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

ORDER M-1071

Appeal M-9700280

City of Hamilton

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

NATURE OF THE APPEAL:

The requester made a 19 part request to the City of Hamilton (the City) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for information with respect to a specific property, a named company and a named individual.

The City responded to parts 1-11 of the request. However, it advised the requester that parts 12-19 of the request were denied because they were frivolous and vexatious, as contemplated by section 4(1)(b) of the Act. The requester (now the appellant) appealed 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. The City submitted representations in response to the notice. I have considered these representations in reaching my decision.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS

Several provisions of the Act and Regulations 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 823, made under the Act, was amended shortly thereafter to add the provision reproduced below. These provisions 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, ...
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 20.1(1) of the Act:

> A head who refuses to give access to a record or a part of a record because the head is of the opinion that the request for access is frivolous or vexatious, shall state in the notice given under section 19,
>
> (a) that the request is refused because the head is of the opinion that the request is frivolous or vexatious;
>
> (b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; and

(c) that the person who made the request may appeal to the Commissioner under subsection 39(1) for a review of the decision.

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.

In its submissions, the City seems to rely on section 5.1(b) of the Regulation in that it states that parts 12-19 of the appellant's request was made in bad faith. However, the evidence and argument submitted by the City touches on all aspects of section 5.1. Therefore, I have considered both sections 5.1 (a) and (b) in reaching my decision.

Section 5.1(a)

The City submits that parts 12-19 of the appellant's request are an abuse of the right of access and that the request was made in bad faith and for a purpose other than to obtain access. It argues that the request is part of a pattern of conduct designed to burden the City's system of operation.

The City states that it suspects that it received the request because the appellant lost title to the property named in his request through the application of the municipal tax sales statute by the City.

The City takes the position that the present request, together with the correspondence to the City from the appellant generally and what it believes to be the litigious nature of the appellant, demonstrates a course of conduct on the part of the appellant that amounts to an abuse of the right of access or would interfere with the operations of the institution. It argues that the appellant has undertaken this course of conduct for the purpose of harassing the City at a time that he knew the City, in general, and the Freedom of Information Unit, in particular, were very busy.

In Order M-850, Assistant Commissioner Tom Mitchinson commented on the meaning of "pattern of conduct" 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" was also discussed by 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).

I agree with this analysis and adopt it for the purposes of the present appeal.

In my view, the abuse of the right of access described by section 5.1(a) refers only to the access process under the Act, and is not intended to include proceedings in other forums. I find, therefore, that in order for the City to meet the requirements of section 5.1(a), it is required to demonstrate a reasonable basis for concluding that this **request** is part of a pattern of conduct that amounts to an abuse of the right of access **under the Act**, but not considering the appellant's parallel activities in other forums (Orders M-906 and M-1066).

The City states that the appellant has made one other request which was included in a letter that consisted primarily of complaints about the City and its staff. It states that as this was the only request from the appellant at that time and compliance with the request was not difficult, the City responded despite the tone of the letter. The request that is the subject of this appeal is the second request the appellant has made to the City.

I find the fact that the appellant submitted one other request, which appears to have been made in 1995, is not sufficient to permit me to conclude that the appellant has engaged in a pattern of conduct which may be characterized as an abuse of the right of access for the purposes of section 5.1(a). I have not been provided with any evidence that the first request was improper.

The City has submitted evidence to demonstrate an intent to abuse the process on the part of the appellant. However, the evidence does not relate to actions involving the City. The evidence which does relate to the City does not relate to Freedom of Information matters. Some parts of the evidence might be described as "hearsay" because it is not information that appears to be in the direct knowledge of the City. Therefore, based on the evidence before me, I cannot conclude that the appellant's request forms the basis of a pattern of conduct that amounts to an abuse of the right of access. I find, that the request is not frivolous and vexatious under the criteria set out in the first part of section 5.1(a).

Section 5.1(a) also refers to a pattern of conduct that would interfere with the operations of the institution. As I said above, the City has not clearly stated that it is relying on this part of section 5.1(a). However, I have considered its application to the situation which brought about this appeal.

There are a number of alternative measures available to relieve an institution faced with a request which may, on the surface, appear likely to interfere with its operations (Order M-906).
They 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.

The fee provisions are intended to support a "user pay" principle, and could be used to greatly lessen any possible interference. The Regulation provides a rate of $30 per hour for search time. Therefore, the City would be able to achieve significant cost recovery if an extensive search is required to respond to the request.

The City may also wish to determine if it might 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). This would allow 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;

However, I draw the City's attention to the fact that previous orders (Orders 27, 93 and P-1287) state that numerous requests, even in the same letter, cannot be "pooled" for this purpose of a time extension. In Order P-1287, which dealt with the question of request fees, 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.

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.

Denying a requester his right of access under the Act is a serious matter. In my view, the interference complained of must not be of a nature for which the Act or the jurisprudence (Order 81) provides relief.

In the circumstances of this appeal, I have not been provided with sufficient evidence that this is the case, and therefore, I cannot find that the appellant has engaged in a pattern of conduct that would interfere with the operations of the City.

Section 5.1(b)

This section is comprised of two components and where either applies, a finding that a request is frivolous and vexatious may follow. The first mandates a finding that the request was made in "bad faith" while the second requires that the request be made "for a purpose other than to obtain access".

The City states that the fact that the appellant is still seeking information when the matter of the tax sale of his property is over is evidence of bad faith, as is the detailed nature of parts 12-19 of his request.

Bad Faith

Again, in Order M-850 Assistant Commissioner Mitchinson addressed the question of what constitutes "bad faith" for the purpose of section 5.1(b) as follows:

> 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]

While the relationship between the City and the appellant is not an amicable one and it is evident that the appellant disagrees with the actions taken by the City, I cannot conclude that the appellant is acting in

bad faith. Accordingly, I find that the request is not frivolous and vexatious under the bad faith component of section 5.1(b).

For a purpose other than to obtain access

In Order M-850, Assistant Commissioner Mitchinson made the following remarks with respect to this component of section 5.1(b):

> 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".

In my view, the City's characterization of the appellant's motives for filing the request are speculative at best and cannot reasonably be construed as having been made for some purpose other than to obtain access.

The City has argued that the tax sale matter is over and done with and that the records, if obtained, cannot be put to any useful purpose. According to the City, there have been no legal steps taken to recover title, nor could there be any taken, because the relevant legislation contains a complete bar to civil action "subject to proof of fraud".

In my view, all of the appellant's actions which the City has described to me indicate that the appellant has an interest in obtaining information about the tax sale process which was followed by the City. The appellant appears to have some questions about the process. The appellant's next step after obtaining access may be to attempt to use the information in some way "against" the City in some other forum. This may or may not be a realistic option. However, that factor is not relevant to a determination of whether the request in the present appeal is frivolous and vexatious under section 5.1(b).

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 (Order M-906).

Therefore, I find that the request is not frivolous or vexatious on the ground that it is for a purpose other than to obtain access pursuant to section 5.1(b).

Conclusion

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 to parts 12-19 of the request 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: February 3, 1998
Marianne Miller
Inquiry Officer