Information and Privacy
Commissioner/Ontario

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

INTERIM ORDER P-1534

Appeal P-9700134

Ontario Municipal Board

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:

This appeal results from a longstanding dispute between the Ontario Municipal Board (the OMB) and the appellant. The appellant has been seeking access to "explanations and documents" dating back to April 1993 in respect of matters he brought before the OMB. The OMB previously advised the appellant, on a number of occasions, that he has been granted access to all records in what it classified as its "public files" relating to his involvement with the OMB. The appellant continues to believe that the OMB has not provided him with all responsive records.

On February 24, 1997, in the absence of a formal request from the appellant, the OMB provided him with a number of records it had previously considered were not responsive (the "yellow sheets"). Yellow sheets are staff memoranda and related documentation that contain procedural communications about appeals before the OMB or other matters between members and/or staff, such as scheduling of hearing dates. They also include conversations with municipal officials, lawyers for the parties and the parties themselves. The OMB offered the explanation that these yellow sheets had up to that point not been considered part of its "public files", but due to a recent change in OMB policy they were now being made available. The appellant believed these records were incomplete and that this was indicative of the OMB's failure to provide all responsive records and evidence that further responsive records exist.

As a result, the appellant submitted a formal request to the OMB under the Freedom of Information and Protection of Privacy Act (the Act) for "all typed, handwritten, word processed or otherwise electronically made files, logs, memos, minutes, etc., whether in the public files or not, which make reference to [the appellant] and/or the matter(s) referred to in [his] files." He specified in his request that the OMB search "all files in the offices and storerooms, cupboards, closets, etc., of all members and staff of the [OMB] who have had business with these files", that they provide him with all records of meetings relating to the appellant between the various Chairs and members of the OMB and the files which have been kept by the OMB about him.

The OMB denied the appellant's request pursuant to section 10(1)(b) of the Act. The OMB's decision letter stated, in part:

> The [OMB] has frequently, adequately and accurately replied to each of your requests for information, even for those not recorded in its files. It has explained the discrepancy in the status of the [OMB]'s files prior to 1995 and after that date when the "yellow sheets" and attached memoranda were placed on the [OMB]'s files.
>
> The [OMB] is of the opinion that your application for access to records which are already in your possession and which ... constitute the records in the custody and control of the [OMB] is both frivolous and vexatious.

The appellant appealed this decision. After receiving the appeal, this office sent a Confirmation of Appeal/Notice of Inquiry (the COA/NOI) to the OMB. This notice indicated that the OMB has the preliminary onus of establishing that the request in question is 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. In particular, the COA/NOI set out this office's policy for processing these types of appeals which states, in part:

> To ensure procedural fairness, the decision maker assigned to the appeal will determine whether the appellant should have access to the points raised in the institution's representations in order to formulate his or her case. Should the decision maker decide that such access is required, he or she will determine the extent to which the institution's representations will be provided to the appellant and the format in which this communication will take place.

In this case, once the representations of the OMB were received, it was determined that the appellant should have access to them in order to respond and a copy was provided to him by this office. The appellant submitted representations in reply.

An individual contacted this office indicating that he was aware of this inquiry and requested the opportunity to provide representations. This request was granted and representations were received from him. I have reviewed these representations and determined that they are not relevant to the determination of whether the appellant's request is frivolous or vexatious, and I will not consider them further.

After reviewing the appellant's representations, I decided that the OMB should be provided with a copy of the appellant's representations for the purposes of replying. The OMB submitted a detailed reply.

I have considered all materials submitted by the parties in reaching my decision in this appeal.

PRELIMINARY MATTERS:

The appellant has raised several issues in his letter of appeal and his representations. They can be summarized as follows:

1. His current request relates to an original request dating back to 1993, which pre-dates the amendments to the Act requiring the payment of a request fee and an appeal fee. Therefore, he feels that the $5.00 request and $10.00 appeal fees he paid for the current request and appeal should be ordered refunded.

2. He asks me to obtain certain records from the OMB which he claims have not been made available to him (e.g OMB meeting minutes), and make a determination regarding access.

3. He indicates that he wants access to certain records referred to in the OMB's representations (e.g. legal opinions).

4. He asks this office to refer his allegations regarding the OMB's conduct to the office of the Solicitor General and/or the Ontario Provincial Police.

5. He wants me to order an award of costs.

Items 1, 2 and 3 would require determinations as to whether the current request is a new request or forms part of an earlier request (Item 1); whether the appellant should be ordered access to records (Item 2); and whether certain records form part of the current request or would require a new request (Item 3). None of these issues are within the scope of this particular inquiry, and I will not consider them further in this order.

With respect to Item 4, the appellant contends that the OMB has committed offences that fall within the provisions of sections 61(1)(d), (e) and/or (f) of the Act. All of these require a wilful act by the offending party, and need the consent of the Attorney General before a prosecution can be commenced. The Provincial Offences Act permits any member of the public to lay a charge under section 61(1) of the Act, and the appellant is free to pursue this avenue before a justice of the peace if he so chooses.

Finally, with respect to Item 5, the Commissioner's office does not have statutory authority to make an award of costs in the course of issuing an order under the Act (Order P-604).

The sole issue to be determined in this inquiry is whether the appellant's request is frivolous or vexatious.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS REQUESTS

Several provisions of the Act and Regulation 460 are relevant to the issue of whether the request is frivolous or vexatious.

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) state that a head who refuses to provide access to a record because the request is frivolous or vexatious, must state this position in a decision letter to the requester and provide reasons to support the opinion.

Sections 5.1(a) and (b) of Regulation 460 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.

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

The appellant's submissions include lengthy arguments in support of his reasons for believing that further records exist, which is his principal reason for making his request under the Act. He also points out that he is not seeking access to any records already received from the OMB, and only wants records which relate to him. He argues that he has maintained his position since 1993 that the OMB was in possession of additional records. When he received the yellow sheets from the OMB, which had not previously been made available, he believed this supported his contention. He also noticed several discrepancies in these yellow sheets which reinforced his view. On this basis, the appellant contends that he has a legitimate interest in the requested records, and formulated his request to include all records relating to him, not just so-called "public records".

The legitimacy or otherwise of the appellant's request is a significant factor in this inquiry, as is the appellant's contention that some specific aspects of the current request arose from information disclosed to him for the first time on the yellow sheets. In my view, these are both relevant factors which I will consider in my subsequent discussion of sections 5.1(a) and (b).

The OMB's representations acknowledge that the yellow sheets were not previously disclosed to the appellant, and explain that until recently these type of records had not been considered responsive. However, the OMB feels it rectified this situation by making these records available to the appellant. The OMB's representations also acknowledge, for the first time, that two legal opinions should have been included among the records responsive to the appellant's request, and state that they are subject to exemption on the basis of solicitor-client privilege.

The OMB's representations also explain in detail the extensive interaction between the appellant and various staff, and the steps taken to respond to his various requests for information and documentation. The OMB claims that all records have now either been provided to the appellant or do not exist. In my view, these arguments are most relevant to the issue of whether additional records exist. However, the OMB submits that the current request is part of a repetitious pattern, which also makes the OMB's submissions relevant to the considerations present in section 5.1(a).

The OMB also submits that the motivation for the appellant's request is his belief that the OMB has maintained a "secret file" about him. The OMB has continually denied this allegation but the appellant refuses to accept this. The OMB further submits that the requests become more frequent as his appeals before the OMB progress. In my view, these submissions are relevant to the issue of whether the request is part of a pattern of conduct which constitutes an abuse of the right of access under section 5.1(a), and to section 5.1(b).

Finally, the OMB submits that the appellant has been acting in concert with another individual, and that the activities of both individuals should be taken into account in assessing whether the appellant's request is part of a pattern of conduct which constitutes an abuse of process. The OMB states:

> "[The appellant] is correct that there are few formal indicia that [the other individual's] conduct and words can be ascribed equally to [the appellant], other than a direction that [the other individual] was to inspect the Board's files as [the appellant's] agent, and the reference in [the appellant's] most recent request under the Act to [the other individual] as his agent. Nevertheless, it is clear from study of the letters in the file that they were joint appellants, rarely signed separate documents, and in addition continually refer to having been informed of matters by the other.

The OMB provided me with a series of files containing correspondence and other documentation for by-law appeals involving both the appellant and the other individual. It is clear that the two individuals share a common position on many aspects of these appeals, frequently writing in support of each other's position. However, having reviewed these files, I find that there is insufficient evidence of an ongoing agency relationship between the two individuals as it relates to the appellant's requests for information under the Act or otherwise. On one occasion the appellant appointed the other individual as an agent, but it was for the particular purpose of inspecting Board files. He makes a general reference in his request letter to the other individual as his agent, but it is clear that the appellant is acting on his own behalf in making the request. These are the only two references to agency identified by the OMB. In my view, the relationship between the OMB, the appellant, and the other individual is not a relevant consideration in determining whether the appellant's request is frivolous or vexatious, in the circumstances of this appeal.

Section 5.1(a)

The requirements of section 5.1(a) would be met if the OMB establishes reasonable grounds for concluding 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.

In Order M-850, I defined the term "pattern of conduct". I 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)".

I also interpreted the term "abuse of the right of access" in the same order. Building on comments made by former Commissioner Tom Wright in Order M-618 (issued before the "frivolous or vexatious" amendments were added to the Act and Regulation 460), I found that case law on the issue of the abuse of process provided 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.

I went on to state that, 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 Order M-864, former Assistant Commissioner Irwin Glasberg summarized the interpretations of "abuse of the right of process" in Orders M-618 and M-850 as follows:

> Following my review of these two orders, and taking into account the wording of section 5.1(a) of the regulations, I believe that there are a number of factors that are relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access. Some of these considerations are listed below:
>
> (1) The actual number of requests filed
>
> (Are they considered excessive by reasonable standards?)
>
> (2) The nature and scope of the requests
>
> (For example, are they excessively broad and varied in scope or unusually detailed? Alternatively, are the requests repetitive in character or are they used to revisit an issue which has previously been addressed?)
>
> (3) The purpose of the requests
>
> (For example (a) have they been submitted for their "nuisance" value, (b) are they made without reasonable or legitimate grounds, and/or (c) are they intended to accomplish some objective unrelated to the access process?)
>
> (4) The sequencing of requests
>
> (Do the volume of requests or appeals increase following the initiation of court proceedings by the institution or the occurrence of some other related event?)
>
> (5) The intent of the requester
>
> (Is the requester's aim is to harass government or to break or burden the system?)
>
> While this list is not intended to be exhaustive, these factors represent the type of considerations which could define "an abuse of the right of access" for the purposes of section 5.1(a). I would also reiterate the view, originally expressed by Commissioner Wright in Order M-618, that a high volume of requests alone would not necessarily amount to an abuse of process.

The OMB submits that informal contacts by the appellant to ask questions and seek information on various file-related activities, and formal requests made by him under the Act, are both relevant to this issue of whether the request is part of a pattern of conduct that amounts to an abuse of the right of access. The OMB does not identify the number of formal requests made by the appellant, but acknowledges that "initially it would appear that if an individual has made few formal requests, as [the appellant] admittedly has done, there would be no scope for the argument that his conduct could fit the fairly serious test of frivolous and vexatious." In the OMB's view, the test was met in this case "because there were so many informal inquiries of the Board for information, no matter how often explained and responded to, that there was no need for the appellant to make a formal request, except for the purpose of interference with the operation of the Board's normal business."

The OMB argues, therefore, that there has been a pattern of conduct on the part of the appellant that amounts to an abuse of the right of access, if not through formal requests under the Act, then clearly in combination with informal requests for information. The OMB adds that the impact on the operations of the institution are equally disruptive whether requests are made formally or informally.

Previous orders of this office have found that 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 (Orders M-906, M-1066 and M-1071). I find that a similar distinction can be made in certain circumstances between formal requests for access **under the Act**, and informal contact between a member of the public and an institution, outside the formal context of the Act.

In the circumstances of this appeal, I find that the limited number of requests made by the appellant under the Act is insufficient in itself to establish a pattern of conduct that amounts to an abuse of the right of access. The OMB appears to suggest that, because it has told the appellant on a number of occasions that no further records exist, he has no right to a determination of this issue under the Act. This is clearly not the case. Although institutions are encouraged to deal with requests for information without requiring a formal request under the Act, this practice is in no way intended to diminish statutory rights should the informal process not be satisfactory to the requester. This is particularly true in the present appeal, when the appellant has never had an adjudication by this office on the issue of the reasonableness of the search for responsive records, which appears to be his main concern. I have a great deal of difficulty in accepting the OMB's position that the appellant is abusing the access process when he has not yet had the benefit of a determination through all phases of the statutory access scheme. Also, in my view, even if at the completion of the entire request and appeal process it is determined that no additional responsive records exist, it does not necessarily follow that this request is frivolous or vexatious within the meaning of the Act and Regulation 460.

The OMB further submits that to comply with the latest request, it would require an additional search of approximately 5,000 to 10,000 files which would interfere significantly with the operations of the OMB. In my view, 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 57 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 27(1) may also provide relief. In my view, this factor alone is not sufficient to establish that the request would interfere with the operations of the OMB under section 5.1(a).

Finally, it is important to point out that the appellant has provided evidence of a legitimate reason to submit his request under the Act. He points out that his request arose out of information which came to his attention for the first time when the yellow sheets were provided to him by the OMB. He has made it clear on a number of occasions, including in his request letter, that he is seeking all responsive records, and not only those from the OMB's so-called "public file". Although the distinction between "public" and "non-public" files may be relevant to the business activity of the OMB, this distinction is not appropriate when responding to a request for access under the Act. Significantly, it was not until the OMB responded to the appellant's representations in this appeal, a very late stage in the appeals process, that it identified two legal opinions responsive to the appellant's request, and maintained that they were exempt under solicitor-client privilege (section 19). I find it impossible to reconcile the OMB's principle argument that the appellant's request is frivolous and vexatious because the OMB has "frequently, adequately and accurately replied to each of [the appellant's] requests for information", with the fact that it identified two additional responsive records during the course of this inquiry, which are clearly within the scope of the request, and would not have been identified but for the fact that this matter proceeded to appeal.

Therefore, having applied the various interpretations contained in Orders P-860 and P-864, and for all of the reasons outlined above, I find that the appellant's current request under the Act is not part of any pattern of conduct, and clearly not part of a pattern of conduct which amounts to an abuse of the right of access or would interfere with the operations of the OMB. Therefore, the OMB has failed to establish the requirements of section 5.1(a) of Regulation 460.

Section 5.1(b)

The requirements of this section would be met if the OMB establishes reasonable grounds for concluding that the request is made in bad faith or for a purpose other than to obtain access.

In Order M-850, I commented on the meaning of the term "bad faith", which is a prominent component of section 5.1(b). I indicated that "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral underhandedness. I went on to conclude that it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with secret design or ill will.

Since the concept of bad faith in section 5.1(b) and that of "an abuse of the right of access" under section 5.1(a) overlap to some extent, the same evidence can, on occasion, be used to prove or disprove that each of these provisions apply in a particular case.

The OMB submits that it would not characterize the request as being in bad faith based on the definition established in Order M-850. The OMB goes on to submit, however, that based on the examples of "intemperate and unnecessary" communications from the appellant, it has provided in its representations that there is evidence of some degree of bad faith.

In my view, the analysis set out above in my discussion under section 5.1(a) would apply here. Having considered the evidence presented, and the arguments of the parties, I am satisfied that the appellant had legitimate reasons for submitting this request, which would outweigh any possible appearance of bad faith. In addition, in my view, the evidence does not support a finding that the appellant was consciously acting in any dishonest manner.

Similarly, I am not satisfied that the appellant's request was submitted "for a purpose other than to obtain access". As I noted in Order M-860:

> ... it is possible for a piece of correspondence to have more than one legitimate purpose: i.e. to request access to certain records **and** at the same time register a complaint. Moreover, 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.

In this case, although the request letter contains allegations about the conduct of the OMB and some of its employees, I am nevertheless satisfied that the request was made for the purpose of obtaining access.

Based on the foregoing analysis, I find that the OMB has not satisfied the requirements of section 5.1(b) of Regulation 460.

Accordingly, as I have found that the OMB has not established the requirements of section 5.1 of Regulation 460, I find that the request is not frivolous or vexatious within the meaning of the Act.

ORDER:

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

2. I order the OMB to make an access decision in response to the appellant's request, in accordance with the requirements of sections 26, 28 and 29 of the Act, as applicable, treating the date of this order as the date of the request, and to send me a copy of the decision letter (c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1) when it is sent to the appellant.

Original signed by: February 25, 1998
Tom Mitchinson
Assistant Commissioner