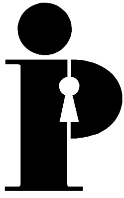

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

INTERIM ORDER MO-1168-I

Appeal MA-980178-1

Kawartha Pine Ridge District School Board

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NATURE OF THE APPEAL:

The appellant made a request to the English-Language Public District School Board No. 14 (now the Kawartha Pine Ridge District School Board) (the Board) under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for a copy of the complete report dealing with consulting services regarding Employee Benefit Programs which was submitted to the Board at a meeting on April 16, 1998, as well as any supporting reports.

The Board initially denied access to the requested records on the basis of section 52(3) and, in the alternative, sections 6(1)(b), 10(1) and 11(c), (d), (e) and (f). The appellant appealed this decision. Upon receipt of the Confirmation of Appeal, the Board notified this office that the head is of the opinion that the request is frivolous or vexatious pursuant to section 17(1.1) of the Act. The Board later contacted this office to indicate that it incorrectly cited section 17(1.1) and that it intended to refer to section 4(1)(b). The Board did not appear to comply with the requirements of section 20.1(1). However, the appellant was advised of the Board's position in the Mediator's Report which was sent out to the parties on September 2, 1998.

I have decided to deal with this matter as a preliminary issue in the appeal. I sent a Notice of Inquiry to the Board. This notice indicated that the Board has the preliminary onus of establishing that the request in question is either frivolous 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. Therefore, the Board must establish a *prima facie* case, otherwise the claim fails. If it does, the appellant must be given an opportunity to make representations.

The Board submitted representations. I have reviewed the Board's submissions to determine whether procedural fairness would require that the appellant be given an opportunity to provide representations. In view of my assessment of the Board'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.

PRELIMINARY MATTERS:

MEETING INVOLVING THE PARTIES AND THE COMMISSIONER'S OFFICE

Prior to the issuance of the Notice of Inquiry, the Board asked for an opportunity to have all of the parties meet with the Commissioner's office to explore the issues of concern to the Board. I advised the Board that the Act provides that the parties involved in an inquiry are entitled to make representations to the Commissioner's office. I indicated further that it is the usual practice of this office to invite the parties to submit their representations in writing. I considered the Board's request for a meeting of the parties in order to determine whether the circumstances warranted variance with the usual procedures of this office. However, I determined that the usual written process was adequate in the circumstances. Therefore, I denied the Board's request.

The Board has again raised this issue in its representations in response to the Notice of Inquiry. In this regard, the Board states:

> By virtue of the background of this matter, and due to the issues involving the intent as well as access to confidential information, we suggested that the parties should have an opportunity to meet with the Adjudication Review Officer to explore these issues. In other words, credibility may well be a significant issue in this matter. The issues noted above may not be determinable without the opportunity of exploring with [the appellant] the extent to which these issues apply.
>
> Representatives of the Board and the writer would be pleased to meet with you to explore these issues more fully. We would also be pleased to answer any questions you might have with respect to these particular submissions on the issue of vexatious.

I have again considered the Board's request. I have also read the representations submitted by the Board on the issue under section 4(1)(b). I find the representations to be very detailed and pointed. The Board's reasons for advancing the application of section 4(1)(b) are clearly articulated. However, based on the arguments presented by the Board, and the manner in which I have interpreted the requirements for establishing that a request is frivolous and/or vexatious, I have concluded that it is not necessary to go any further and examine the appellant's motivation or actions in making this access request. Therefore, the Board's request for an in-person meeting involving the Commissioner's office and the parties is denied.

INADEQUATE DECISION LETTER

Sections 20.1(1)(a) and (b) of the Act provide 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. As I indicated above, the Board did not advise the appellant that it intended to deny access to the records because it considered the request to be frivolous or vexatious. This information was only communicated to the Mediator assigned to the file after the appellant had filed an appeal of the Board's original access decision.

In acknowledging its failure to notify the appellant, the Board submits that:

> We would also note that these particular reasons were not included in the letter of June 10, 1998 from the Board to [the appellant]. However, at that time, the Board was not fully aware of the circumstances and, particularly, was not aware of the access to confidential information and the recent dealings with the media. As a result, we would submit that this should not be an impediment to the consideration of whether the request is vexatious.

Fortunately for the Board, in the circumstances of this appeal, the issue was raised early enough in the process to allow the Mediator to include it in the Mediator's Report which was then sent to the parties. The Mediator's Report is designed to provide the parties with a summary of the status of an appeal following mediation. It outlines the issues which were raised by the parties, the manner in which any issues have been

resolved and those which remain at issue. After this document is provided to the parties, they are given ten days to respond to the Mediator if they have any disagreement or concerns regarding its contents. In this case, the appellant did not contact the Mediator to question the inclusion of this issue.

In Order M-850, Assistant Commissioner Tom Mitchinson observed that the legislative provisions relating to whether a request is frivolous or vexatious confer a significant discretionary power on institutions which can have serious implications on the ability of a requester to obtain information under the Act. He went on to express the view that this power should not be exercised lightly. I agree with this position. I would suggest that, by extension, it is imperative that a requester be fully informed as early as possible regarding the institution's position and its reasons for advancing such a claim.

As a result of the Commissioner's process, the appellant was made aware of the issue prior to the matter being set down for inquiry. Therefore, any deficiency in notification was rectified, albeit at a relatively late stage. However, I would forewarn the Board that, had they raised this issue later in the process, in particular, after the Notice of Inquiry was issued, I would be inclined to disallow the Board from advancing the claim. In my view, the disadvantage to the appellant and generally, the delay such an approach would cause, would weigh heavily against allowing the Board to pursue its claim. Therefore, an institution must be diligent in exercising its discretion in this regard.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS

The provisions which I must consider to determine whether the appellant's request is frivolous or vexatious are in sections 4(1)(b) and 20.1(1) of the Act and section 5.1 of Regulation 823 made under the Act.

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. The onus of establishing that an access request falls within these categories rests with the institution (Order M-850).

As I noted above, sections 20.1(1)(a) and (b) of the Act go on to 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 Regulation 823 provide some guidelines for determining whether a request is frivolous or 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.

I will now consider whether the facts of this case fit into one or both of these definitions.

Background to the request

In its representations, the Board outlines the background to the request. In this regard, it indicates that the request relates to a proposal for the provision and administration of benefits. The Board informs me that, at the time that the Northumberland-Clarington Board of Education and Peterborough County Board of Education were merged by the Fewer School Boards Act, there were two providers for these services, one for each Board. The Board states that the appellant provided these services for Peterborough. The Board indicates that both providers were asked to make a submission for the provision of these services to the newly amalgamated Board. As a result of an analysis and the usual process, the Board of Trustees decided to continue with the other service provider. At a debriefing session, the reasons for this decision were explained to the appellant.

The Board's submissions

Section 5.1(a)

Pattern of Conduct that Amounts to an Abuse of the Right of Access or would interfere with the operations of the institution

The Board initially argues that section 52 of the Act was enacted to address "abuse" of the Act by employees. The Board submits that section 4(1)(b) should be interpreted in the same manner to prevent persons other than employees from "abusing" the Act for purposes other than as set out in section 1(a).

In another vein, the Board indicates that it recently came to its attention that the appellant has obtained confidential information with respect to this matter from an employee of the Board. The Board submits that this is a wrongful act on the part of the employee and that the appellant has participated in breach of confidentiality by an employee. The Board takes the position that the appellant does not come to this matter with "clean hands", and argues that the exercise of any equitable principles would thus mitigate against the right of the appellant to access information and would substantiate the argument that the application is vexatious.

The Board also takes the position that the appeal and request are vexatious because the appellant has already obtained all information necessary for it to understand the basis of the Board's reasoning and decision. The Board submits that the request for information is for purposes other than those set out in section 1(a) of the Act. In particular, the Board submits that the request was made for the following purposes:

1. to attempt to discredit the Board either with the Administration, Trustees, or public or media;

2. to possibly make a claim against the Board.

With respect to the first possible use of the documentation and information, the Board attached a copy of an article which appeared in the Peterborough Examiner. The Board believes that the appellant had access to a confidential document referred to in the article, which, it argues, constitutes a breach of confidentiality. Moreover, the Board argues that the appellant has access to information pertaining to the overall savings to the Board.

The Board submits that the appellant has already started its attempt to discredit the Board through the media and will continue to do so, utilizing any information or documentation received through the request.

With respect to the possibility of a claim against the Board, the Board indicates that it has encountered other situations where unsuccessful bidders have attempted to use the Act, either successfully or unsuccessfully, and thereafter have commenced a claim against the Board. The Board suggests that this process circumvents the usual disclosure and discovery processes which are available to parties in a civil litigation claim.

The Board submits that the actions of the appellant in making the request, attempting to discredit the Board through the media, accessing confidential information, and otherwise as set out above, constitute a pattern of conduct which amount to an abuse of the rights of access under the Act and which also interfere with the operations of the Board. The Board refers to Order M-864 in support of its position.

To determine whether the Board's submissions meet the criteria outlined in section 5.1(a), I must first determine whether the appellant's filing of this request forms part of a "pattern of conduct". If I find that it does, then I must determine (1) whether this pattern amounts to an abuse of the right of access, or (2) whether this pattern would interfere with the operations of the Board.

In Order M-850, the Assistant Commissioner 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)". He also pointed out that, in determining whether a pattern of conduct has been established, the time over which the behaviour occurs is a relevant consideration. I agree with this approach and adopt it for the purposes of this appeal.

In Order M-864, which the Board relies on in support of its decision, former Assistant Commissioner Irwin Glasberg considered whether the filing of 15 requests over an 18-month period constituted a "pattern of conduct". He concluded that they were not. In the present case, the Board does not argue that the appellant has submitted a number of requests. In fact, it appears that the appellant has only filed one request relating to this matter. In my view, the reasoning in Order M-864 is not helpful in determining this issue.

The Board has taken the position that the totality of the appellant's actions in its dealings with it amounts to a "pattern of conduct". In Order M-906, former Inquiry Officer John Higgins dealt with a similar situation. In that case, the City of Elliot Lake argued that various actions taken by the appellant, including "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 ..." amounted to a pattern of conduct as contemplated by section 5.1(a).

In Order M-906, the former Inquiry Officer stated:

> 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.

I agree entirely with these comments. I find that the reasons provided by the Board regarding this issue relate to activities of the appellant which are completely unrelated to his attempt to gain access to records under the Act. In addition, the appellant has only submitted one request to the Board that I am aware of, and it clearly describes the information requested. Therefore, I find that the appellant's actions in filing the access request at issue in this appeal do not amount to a "pattern of conduct" as contemplated by section 5.1(b) of Regulation 823. Therefore, I find that the Board cannot rely on either component of section 5.1(a) of the regulation to decline to process the appellant's access request.

Section 5.1(b)

The Board also submits that the matter falls within section 5.1(b) as it is of the opinion that the request is made in bad faith as well as for a purpose other than to obtain access. The Board bases this position on the submissions referred to above.

Under section 5.1(b), a request will be defined as "frivolous" or "vexatious" where the head of an institution is of the opinion on reasonable grounds that the request is made in bad faith or that it was made for a

purpose other than to obtain access. There are no further requirements to be met. In particular, no "pattern of conduct" is required. I will examine each component of section 5.1(b) separately.

Bad Faith

In Order M-850, Assistant Commissioner Mitchinson commented on the meaning of the term "bad faith". He 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. He 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.

I adopt this approach for the purposes of the present appeal.

In Order M-864, former Assistant Commissioner Glasberg found that, in the situation where the appellant used information to assist his wife with her legal proceeding against the institution, the access request was filed for legitimate reasons. Having found that the objects of the appellant's requests were genuine and that they were not designed to harass the Board, he concluded:

> I find that the appellant filed his access requests for a legitimate, as opposed to a dishonest, purpose and that he was not operating with an obvious secret design or ill will.

With these comments in mind, I have considered the Board's representations. I will begin by saying that I am not persuaded that the Board has demonstrated that the appellant's request was made in "bad faith". The Act provides a legislated scheme for the public to seek access to government held information. In doing so, the Act establishes the procedures by which a party may submit a request for access and the manner in which a party may seek review of a decision of the head. It is the responsibility of the head and then the Commissioner's office to apply the provisions of the Act in responding to issues relating to an access request. In my view, the fact that there is some history between the Board and the appellant, or that records may, after examination, be found to fall outside the ambit of the Act, or that the appellant may have obtained access to some confidential information outside of the access process, in and of itself is an insufficient basis for a finding that the appellant's request was made in bad faith. The question to ask is whether the appellant had some illegitimate objective in seeking access under the Act. I am not persuaded that because the appellant may not have "clean hands" in its dealings with the Board, that its reasons for requesting access to the records are not genuine.

In a similar vein, there is nothing in the Act which delineates what a requester can and cannot do with information once access has been granted to it (see: Order M-1154). In fact, there are a number of exemptions (such as section 10(1), for example) which recognize that disclosure to the public could reasonably be expected to result in some kind of harm. In orders dealing with section 14(1) of the Act, this office has acknowledged that disclosure of personal information to individuals other than the individual to

whom the information relates under the Act is, effectively, disclosure to the world, and this is a consideration to be taken into account in determining whether the exemption applies. In my view, the fact that the appellant may decide to use the information obtained in a manner which is disadvantageous to the Board does not mean that its reasons in using the access scheme were not legitimate.

It appears from the nature of the request and the history between the Board and the appellant, that the appellant was not satisfied with the explanation for non-renewal of its contract with the newly amalgamated Board, and that it is seeking access to records relating to the Board's decision. I am satisfied that the appellant is seeking the information for genuine reasons, even though those reasons may be against the Board's interests. Therefore, I find that the Board has not provided me with sufficient evidence to establish that it had reasonable ground for believing that the appellant's access request was made in bad faith. Therefore, the Board cannot rely on this part of section 5.1(b) of the regulation to decline to process the appellant's access request.

Request for a Purpose other than to Obtain Access

The Board relies on the arguments presented above as the basis for claiming that the request was "for a purpose other than to obtain access".

In my view, the fact that once access is obtained, the appellant intends to use the document for a particular purpose, for example to take issue with the Board's decision-making or to bring action against the Board, 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.

In Order M-860, former Inquiry Officer John Higgins noted:

> ... 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 Order M-906, former Inquiry Officer Higgins observed that:

> ... 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.

I agree completely with these comments. I am satisfied that the request was made for the purpose of obtaining access. Moreover, I find that this purpose is not contradicted by the possibility that the appellant

may also intend to use the documents against the Board once access is granted. Therefore, I find that the Board cannot rely on this part of section 5.1(b) of the regulation to decline to process the appellant's access request.

Conclusion

In conclusion, I find that the criteria in sections 5.1(a) and (b) of Regulation 823 have not been satisfied and, therefore, a reasonable basis for concluding that the request was "frivolous or vexatious" has not been established.

ORDER:

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

2. I remain seized of this matter in order to deal with the exemptions originally claimed by the Board.

Original signed by: November 26, 1998
Laurel Cropley
Adjudicator