



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

ORDER MO-1187

Appeal MA-980325-1

Regional Municipality of Waterloo



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NATURE OF THE APPEAL:

The Regional Municipality of Waterloo (the Region) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The requester is a construction firm which held a contract in 1996 for work at a Regional facility. The request was for access to information related to a named employee of the Region, who holds the position of Senior Project Manager in the Environmental Engineering Unit, Design and Construction Division. Specifically, the request was for access to:

- the details of salary of the employee including how much he is paid, whether he is paid by the hour or by a fixed yearly salary and, if paid by the hour, a copy of yearly records of hours per week for each week worked for the last two years;
- the employee's starting salary and details of all changes to his salary since hiring, complete with dates and duration;
- the date the employee was hired by the Region and his original job function, including all changes to his job function since the date of his hiring;
- all documents arising at and prior to hiring the employee to fill his initial position, such as
 - requisitions from the department for a position needing to be filled by the employee including budget for salary
 - advertisements and calls for resumes used in selecting the employee
 - the names of each competitor requesting consideration for the job
 - the results, such as point scores, or other evaluations performed on each proponent and their standings for the position including the employee.

The Region confirmed the salary range for the employee's position, and provided the requester with a copy of the employee's current job description. The Region refused to respond to the remainder of the request because the request is vexatious, as contemplated by section 4(1)(b) of the Act. The Region indicated that it considered this request to have been made in bad faith, as it was very personally directed at the employee and not related to the work or other issues surrounding the construction contract.

In reply, the requester informed the Region that the information was being requested because the Region had charged the requester \$68.40 per hour plus \$.34 per kilometre for travel for the employee attending at the construction site. The requester also claimed that the qualifications, capabilities and experience of the employee were a major issue in many of the outstanding disputes between the requester and the Region.

The Region replied that the information provided directly addressed the two points raised by the requester.

The requester, now the appellant, appealed the Region's decision.

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

In this case, once the representations of the Region were received, it was determined that it was not necessary to provide the Region's representations to the appellant.

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.

The Region submits that Webster's Ninth New Collegiate Dictionary defines the term "vexatious", in part, as, "... intended to harass." The Region argues that because the requested information did not support a reasonable purpose, and was personally directed at one staff member, the Region felt that it was reasonable to believe that the request fit this definition. The Region submits that the appellant's request was made in bad faith.

In the materials provided to me by the Region and by the appellant, I am able to determine that the appellant and the Region are embroiled in a number of legal proceedings involving the parties who participated in the construction work at a Water Treatment Plant. In addition, the appellant has made a number of requests under the Act for information which he thinks will be of assistance to him in his legal proceedings.

As indicated above, the appellant indicated to the Region that the information was being requested because the Region had charged the requester \$68.40 per hour plus \$.34 per kilometre for travel for the employee attending at the construction site. The requester also claimed that the qualifications, capabilities and experience of the employee were a major issue in many of the outstanding disputes between the requester and the Region.

Essentially, the Region takes the position that the present request, in sharp contrast to the other requests submitted by the appellant, does not relate to the contract or work performed by the appellant and is not relevant to any possible legal action. The Region indicates that it is unreasonable that the appellant would assert that the requested information would be relevant to assessing the adequacy of the Region's project management.

Section 5.1(b) 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”.

In Order M-850 Assistant Commissioner Tom 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 judgment 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]

I cannot impute such motives to the appellant in the present circumstances. While perhaps his actions are inappropriate, I find that the appellant cannot reasonably be described as dishonest in making this request under the Act. The animosity between the parties appears to have tainted all of the appellant’s activities, however legitimate, in the eyes of the Region. Accordingly, I find that the request is not frivolous and vexatious under the bad faith component of section 5.1(b).

Therefore, I do not uphold the Region’s decision that the appellant’s request is frivolous and/or vexatious. As such, pursuant to section 19 of the Act, the Region is required to process the appellant’s request.

ORDER:

1. I order the Region to provide the appellant with a decision letter in accordance with the time frames set forth in section 19 of the Act, using the date of this order as the date of the request, and without recourse to a time extension under section 20 of the Act.

2. I further order the Region to provide me with a copy of the letter referred to in Provision 1 by forwarding a copy to my attention c/o the Office of the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario M5S 2V1.

Original signed by: _____

Holly Big Canoe
Adjudicator

_____ February 3, 1999