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

ORDER MO-1377

Appeal MA-990222-2

Township of Edwardsburgh

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NATURE OF THE APPEAL:

The appellant wrote to the Township of Edwardsburgh (the Township) seeking access under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to a copy of the "Township of Edwardsburgh Waste Disposal Site 1998 Monitoring Report", dated May 1999, prepared by a named environmental consultant.

The Township identified a June 1999 version of the report, which it agreed to provide to the requester upon payment of a fee. The requester made it clear that she was interested in receiving access to the May 1999 version of the report, and appealed the Township's decision on the basis that the May 1999 version was in the Township's custody or under its control. As a result, this office opened Appeal Number MA-990222-1.

During mediation, it was clarified that the May 1999 version of the report exists, but it is in the possession of the consultant and not the Township. The Township took the position that the report is not under its control.

In Order MO-1289 dated March 31, 2000, Assistant Commissioner Tom Mitchinson determined that the record is "under the control" of the Township for the purpose of section 4(1) of the *Act*. As a result, the Assistant Commissioner made the following order:

> 1. I order the Township to send a written direction to the consultant to provide the Township with the May, 1999 version of the report. The Township's written direction should be issued no later than **April 26, 2000**, and should require delivery of the record no later than **May 5, 2000**.
>
> 2. Upon receipt of the record from the consultant, I order the Township to issue an access decision to the appellant in accordance with Part I of the *Act*, treating the date of receipt of the record as the date of the request.
>
> 3. I order the Township to provide me with a copy of the written direction referred to in provision 1 above, and a copy of the Township's access decision referred to in provision 2 above.
>
> 4. I remain seized of this appeal with respect to any compliance issues arising from this order.

On June 8, 2000, the Township issued a decision to the appellant denying access to the record at issue. The Township stated that access was denied on the basis of section 4(1)(b) (frivolous or vexatious request) of the *Act*, and further stated that:

> The 1998 report dated May 1999 contained errors and was superceded by a 1998 report dated June 1999. The 1998 report has subsequently been superceded by a 1999 environmental monitoring updated dated June 2000.

The appellant appealed the Township's access decision to this office, and Appeal Number PA-990222-2 was opened. In her letter of appeal, the appellant stated (among other things):

> It is important for me to see what information was in the original record versus the altered version of the record. This record contains groundwater monitoring data and conclusions regarding possible groundwater contamination *which may be contaminating my drinking well water*. In addition, the Ministry of the Environment decisions made based on the May 1999 record were subsequently changed upon receipt of the altered record dated June 1999. Therefore, I feel that this information is important to my understanding of the Ministry of the Environment's position in this matter and it is important to my family's long term health [appellant's emphasis].

During the mediation stage of the appeal, the Township wrote to this office stating:

> . . . We wish to reiterate our position, as expressed in our letter to the Commissioner January 24, 2000:
>
> > The report in question was received by the Township, but on careful review, was found to contain errors. The report was deemed unacceptable, we declined to accept it, and all copies were returned to [the consultant]. A new report bearing the same title but dated June 1999 was received and accepted by the Township. This latter report was submitted to the Ministry of the Environment for the Province of Ontario in compliance with Provisional Certificate of Approval No. A440404 dated September 24, 1997. This report has been accepted and vetted by the Ministry of the Environment.
>
> The 1998 Environmental Monitoring Updated dated June 1999 is available to the public at the municipal offices of the [Township]. The appellant was offered in writing July 6 and September 15 the opportunity to obtain a copy of this report, which she declined.

SECTION 4, VEXATIOUS OR FRIVOLOUS

The Township considers the request by the appellant to be both frivolous and vexatious.

The request to obtain a report, which contains errors and has been replaced by a subsequent report that has been provided to, accepted by and vetted by the Ministry of the Environment, can only be deemed frivolous. In addition, the 1999 Environmental Monitoring Update and Surface Water Drainage Plan, has been prepared and filed with the Ministry of the Environment in May of 2000. This report is a progressive document that contains all factual test data from the inception of monitoring at the Waste Disposal Site, including that which was reported in the 1998 report. It also contains data resulting from an

> additional year of operation of the site and is currently under review by the Ministry of the Environment Eastern Region
> Office in Kingston. The appellant has made no attempt to review this latter report, nor has she requested a copy of it. Surely one would be interested in obtaining the most recent information available.
>
> Secondly, an Application for Review of the Provisional Certificate of Approval A441404 was filed with the Environmental Bill of Rights Office to "consider the immediate and temporary closure of the Site". Based upon the information disclosed in the application, we have reasonable grounds to believe that the appellant initiated the application. The Ministry of the Environment "decided that a review will not be conducted". We consider that the attempt to obtain a rejected copy of the 1998 Environmental Monitoring Update, May, 1999, which has been acknowledged to contain errors, to be vexatious. The only purpose for this attempt is to embarrass the consultant . . . and the [Township]; there can be no legal ramifications since the Ministry of the Environment has accepted the revised report and the matter is closed.
>
> We enclose for your information a copy of a report by our consultant regarding the testing of the appellant's water supply, as required by the Ministry of the Environment.
>
> Thirdly, we enclose a copy of a facsimile from [named lawyer] which outlines a proposal with regard to the appellant's property in spite of the evidence referred to above. We reiterate that this appeal can only be deemed vexatious.

Later during the mediation stage of the appeal, the Township indicated that it was relying on section 5.1(b) of Regulation 823 made under the *Act* (the Regulation) to support its position that the appellant's request is frivolous and vexatious.

I sent a Notice of Inquiry setting out the issues in the appeal to the Township, and received representations in response. In the circumstances, I determined that it was not necessary for me to seek representations from the appellant.

RECORD:

The record at issue in this appeal is a report prepared by the consultant dated May 1999 entitled "1998 Environmental Monitoring Update Township of Edwardsburgh Waste Disposal Site".

DISCUSSION:

FRIVOLOUS OR VEXATIOUS

Introduction

Section 4(1)(b) of the *Act* reads:

> 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,
>
> . . . . .
>
> the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 5.1(b) of the Regulation states:

> 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,
>
> 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, Assistant Commissioner Tom Mitchinson stated:

> In January 1996, the Legislature amended section 4 of the *Act*, thereby providing institutions with a summary mechanism to deal with requests which the institution views as frivolous or vexatious. 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.
>
> It is important to ensure, in these circumstances, that an institution adequately substantiates its decision to declare a request to be frivolous or vexatious. In addition, because such a determination will often turn on an evaluation of the requester's activities or conduct, the requester must have the opportunity to understand and to address the case which an institution is advancing.
>
> . . . . .
>
> Section 42 of the *Act* places a burden on institutions to demonstrate the application of exemptions. It does not offer specific guidance on the burden of proof regarding decisions that a request is frivolous or vexatious. However, the general law is that the burden of proving an assertion falls on the party making the assertion. On this basis, I find that an institution invoking section 4(1)(b) of the *Act* has the burden of proof.

Bad faith

Section 5.1(b) of the Regulation 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]

The Township relies on its statements made in its letter to this office during the mediation stage of the appeal, as set out above. In addition, the Township provided representations as follows:

> . . ..We refer you to the attached documentation which indicates that there has been no impact on the applicant's water supply from the operation of the [Township] Waste Disposal Site.

The Township accordingly attached several documents in support of this statement.

In my view, the Township has failed to establish that the appellant's request was made in bad faith under section 5.1(b) of the Regulation. The fact that the appellant is seeking a copy of a report which is known to contain errors, and which has been replaced, is not itself sufficient to establish bad faith on the part of the appellant. In the context of general records, the right of access in section 4(1) of the *Act* is not limited to records which are current or accurate. In fact, this office has ordered the release of records known to contain inaccurate information [see, for example, Order PO-1690].

The Township also submits that the appellant's failure to request a copy of the revised report is an indication of bad faith. I am not satisfied that this additional factor would be sufficient to establish bad faith. In any event, the material before me indicates that the appellant is, in fact, interested in the revised report. In her appeal letter, the appellant states that she intends to compare the record to the "altered version of the record."

The Township further submits that it believes the appellant's purpose in seeking access is "to embarrass the consultant . . . and the Township . . ." The Township states:

> . . . [A]n Application for Review of the Provisional Certificate of Approval A441404 was filed with the Environmental Bill of Rights Office to" the immediate and temporary closure of the Site". Based upon the information disclosed in the application, we have reasonable grounds to believe that the appellant initiated the application. The Ministry of the Environment "decided that a review will not be conducted". We consider that the attempt to obtain a rejected copy of the 1998 Environmental Monitoring Update, May, 1999, which has been acknowledged to contain errors, to be vexatious . . . there can be no legal ramifications since the Ministry of the Environment has accepted the revised report and the matter is closed.

Again, I am not satisfied that seeking access to the record at issue, whether or not the appellant initiated the application to the Environmental Bill of Rights Office, is sufficient evidence to establish that the appellant's purpose is to embarrass the consultant and the Township, or that the request is made in bad faith.

In my view, the appellant has an inherent interest in the subject matter of the record, since it potentially impacts on her family's health and safety, regardless of the accuracy of the report. Indeed, although the appellant need not establish this in order to rebut the "frivolous or vexatious" claim under section 4(1) of the *Act*, the appellant has a legitimate interest in comparing the original version of the report to subsequent versions.

Finally, the Township submits that "there has been no impact on the applicant's water supply from the operation of the [Township] Waste Disposal Site". While this may be the case, as I indicated above, the appellant is entitled to request access to relevant records in order to reach her own conclusions and determine what actions she may take, if any, to protect the environment and her family's health and safety.

Purpose other than to obtain access

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, sucha pattern could be a relevant factor in a determination of whether the request was "for a purpose other than to obtain access".

The words "for a purpose other than to obtain access" apply if the requester is motivated not by a desire to obtain access pursuant to a request, but by some other objective [Order M-850].

For essentially the same reasons outlined above, the Township has not persuaded me that the appellant is seeking access to the record for any purpose other than to obtain access.

Conclusion

The Township has not provided reasonable grounds to establish that the appellant's request for access is either frivolous or vexatious under section 4(1) of the *Act* or under section 5.1(b) of the Regulation.

ORDER

1. I do not uphold the Township's decision that the appellant's request for access is either frivolous or vexatious.

2. I order the Township to issue an access decision to the appellant in accordance with Part I of the *Act*, treating the date of this order as the date of the request.

Original Signed By: December 8, 2000
David Goodis
Senior Adjudicator