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

ORDER MO-1505

Appeal MA-010234-1

Conseil scolaire public de district du Centre-Sud-Ouest

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 appellant submitted the following request to Le Conseil scolaire public de district du Centre-Sud-Ouest (Le Conseil) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> Portions of accounting reports for each fiscal year end date, since inception of [Le Conseil]. Specifically Vendor Detail Reports showing all accounts paid or payable in each fiscal year, shown in ledger type report forms with all invoices received and payments made to every vendor during the year. If vendors are coded, the corresponding list of vendors names and the accounting code used as required to be able to analyze the data.
>
> A separate computer report should be produced for each fiscal year end date covering the entire year. The reports are requested on magnetic media, such as CD, ZIP Disk or floppy disk, and not printed on paper.

Le Conseil refused to give access to the requested records in accordance with sections 4(1)(b) and 20.1 stating that the request is frivolous and vexatious. In particular, Le Conseil stated that:

- The request is part of a pattern of conduct that amounts to an abuse of the right of access;
- The request is part of a pattern or conduct that would interfere with the operations of the institution;
- The request is made in bad faith; and
- The request is made for a purpose other than to obtain access.

The appellant appealed this decision.

During mediation of the appeal, Le Conseil advised the mediator that it believes that the appellant is flooding the institution with large access requests for reasons other than to obtain access. Le Conseil notes that there is on-going litigation between it and the appellant, and that it believes that the purpose behind the appellant's request (and several others that he has made which are currently on appeal) is to cause Le Conseil to expend resources to address the requests and subsequent appeals in order to harass it.

Also during mediation, the appellant took the position that Le Conseil should have issued a decision in the alternative in the event that the frivolous and vexatious claim was not upheld at inquiry. In essence, the appellant is suggesting that Le Conseil has not issued a proper decision under the *Act*. This issue was not resolved during mediation and I will address it at inquiry.

I decided to seek representations from Le Conseil, initially and sent it a Notice of Inquiry setting out the facts and issues at inquiry. Le Conseil submitted representations in response. After reviewing them, I decided that it was not necessary to hear from the appellant.

PRELIMINARY MATTER:

DOES LE CONSEIL'S JULY 30, 2001 DECISION CONSTITUTE A PROPER DECISION UNDER THE *ACT*?

As I noted above, the appellant takes the position that Le Conseil should have issued an access decision in the alternative to its claim that his request was frivolous and vexatious. Essentially, the appellant has questioned whether Le Conseil issued a decision in accordance with the access provisions of the *Act*.

Sections 19 through 22 of the *Act* are relevant to this issue. These sections set out the procedure for institutions to follow in responding to an access request.

Section 19 provides:

> Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, **subject to sections 20,** 21 and 45, within thirty days after the request is received,
>
> (a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and
>
> (b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced. [my emphasis]

Sections 21 and 22 set out the specific procedures the institution is to follow in notifying affected parties and the particulars to be included in a notice of refusal to give access to a record.

Section 20.1 of the *Act* states, however:

> (1) 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.

> (2) Sections 21 and 22 do not apply to a head who gives a notice for the purpose of subsection (1).

In my view, in enacting section 20.1, the Legislature very clearly intended that a claim that a request is frivolous or vexatious be available to an institution prior to it being required to perform any additional tasks with respect to the request. That does not mean that an institution is precluded from providing an alternative basis for refusing access to a requested record (if it believes there is a basis under the *Act*), and often institutions do, in fact, provide a notice of refusal in accordance with section 22 of the *Act*.

Based on the wording of the legislation, I find that, in issuing its decision pursuant to section 20.1, Le Conseil was not required to make an alternative decision on access at that time.

DISCUSSION:

FRIVOLOUS OR VEXATIOUS

Introduction

Several provisions of the *Act* and Regulations are relevant to the issue of whether the request is frivolous or vexatious. These provisions read as follows:

Section 4(1)(b) 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, ...
>
> > 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 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.
>
> …
>
> 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.

Order MO-1477

Order MO-1477 disposed of the claim by Le Conseil that another request submitted by the appellant was frivolous and vexatious. This order was issued by Assistant Commissioner Mitchinson on October 17, 2001, the same day that Le Conseil's representations were received in the current appeal. I note that the submissions made in this appeal are virtually identical to those submitted to the Assistant Commissioner in the appeal which resulted in Order MO-1477. After reading both Le Conseil's submissions and the decision in Order MO-1477, I find myself in complete agreement with the conclusions reached by Assistant Commissioner Mitchinson and will, therefore, refer to them extensively below.

Section 5(1)(a) - Pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of an institution

Pattern of Conduct

The Conseil submits that the request is part of a pattern of conduct by the appellant to use the *Act* and the processes of this Office to harass, bother and batter a party adverse in interest in civil litigation, to widen the discovery process available to it under the court process, and is not in keeping with the spirit and purpose of the legislation. The Conseil also submits that the appellant has engaged in similar conduct with other institutions. The Conseil asserts that:

> As soon as [the requester] becomes involved in a dispute under a contract with a public institution covered by [the *Act*], that institution starts to receive several access requests, of a varied nature for the purpose of harassing the [institution], expending the institution's resources to respond to the requests and deal with appeals from the requests, and widen the discovery process in litigation.

In Order M-850, Assistant Commissioner Mitchinson commented on the meaning of "pattern of conduct" in section 5.1(a) of the Regulation, 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).

In Order MO-1477, Le Conseil argued that the appellant's request for the records relating to three named individuals, though contained in one paragraph, is actually seven separate "batched" requests. Le Conseil referred to the wording of the request, which identified that the appellant is seeking access to "all records dealing with the hiring or appointment of [the three named individuals]. Including without limitation…". The request then listed the information that would be included in these records, specifically such items as the job descriptions, the advertisements for positions, the list of those considered for the jobs, evaluation criteria and results, the members of the selection panel, and any declared conflict of interest made by those members.

In the current appeal, Le Conseil makes similar arguments claiming that the above request "is in fact, more than 16 requests (4 separate requests for extensive financial records of [Le Conseil] for 4 separate years … It is massive …"

Similarly, Le Conseil also refers to a number of other "batched" requests received from the appellant. Although acknowledging that it has received only a total of six request letters from the appellant, in le Conseil's view, these six letters constitute, at a minimum, 27 separate requests (and even more if the information for each year requested is taken as a separate request). With respect to this argument, Assistant Commissioner Mitchinson concluded:

> I do not accept the Conseil's characterization of the request in this appeal. The appellant's letter represents a single request for records concerning the hiring and appointment of three identified individuals. The appellant goes on to specify the type of information that would be covered by this request which, although helpful in bringing a level of specificity to the request, simply consists of examples of the

types of records that would otherwise be covered by the general wording of the request.

In Order P-1267, Adjudicator Holly Big Canoe reviewed this issue in the context of a request that specified 51 separate items. She found that, with the exception of four items which were distinct from the nature of the general information requested, all the other items were covered in the main request. The relevant portion of that Order reads as follows:

> Finally, in the circumstances of this appeal, I am satisfied that the requester could have submitted a broadly worded request which would have encompassed everything responsive to his request, with the exception of the last four items. Such a broadly worded request would have been, in my opinion, much more onerous for the Ministry to process, and would have resulted in the appellant being provided access to more records than he was interested in. In my view, the appellant has actually aided the Ministry's processing of his request by being specific about particular records he is interested in and the location of the information he is seeking. While the Ministry has indicated that the information will have to be collected from a number of different locations, these locations are, with one exception, all offices within the appellant's former work location (the only exception is noted as an alternate location to one within the appellant's former work location) or its storage facility.

Similarly, as far as the request in this appeal is concerned, I am satisfied that the types of specific information identified by the requester are directly related to the general request made by the appellant, and that it is properly considered a single request for information.

In my view, these conclusions are equally applicable to the circumstances of the current appeal.

As Le Conseil notes, it has received a total of six request letters from the appellant over a seven-month period of time (and Le Conseil has not indicated that he has made any further requests since October, 2001). One of the six is a duplicate request, submitted by the appellant in order to exercise a right of appeal that had expired in the first instance. I am currently in the process of adjudicating the issues in that appeal and will not comment on it further. However, Assistant Commissioner Mitchinson also addressed this argument in Order MO-1477, and again, I fully agree with his conclusions as they pertain to the current appeal:

> Without making a specific finding on the nature of these other requests (all of which were included with the Conseil's representations), as a general observation, each of them appears to follow the same approach as the request that led to the present appeal - a single request for a category of records, together with specific types of information that would fit the category.

> In determining whether a requester has established a "pattern of conduct", the number of requests submitted to a particular institution is a relevant consideration. In my view, six requests over a 12-month period is not, in itself, sufficient to establish a pattern of conduct as the term is used in section 5.1(a) of the regulation. Another relevant consideration is whether the requests are similar in nature or related to each other. Having reviewed the six request letters submitted by the appellant, I find that they are not. Each of them deals with what appears to be different subject matters with little or no overlap.
>
> Having reviewed the various requests and considered the Conseil's representations, I find that that the Conseil has not established that the appellant has engaged in a "pattern of conduct" for the purpose of section 5.1(a) of the *Act*. Had the Conseil been faced with 27 requests over this same time period my conclusion might have been different, but, as outlined earlier, the characterization of the six letters from the appellant as representing 27 separate requests under the *Act* is not supportable.

Abuse of the right of access

The meaning of "abuse of the right of access" in section 5.1(a) was also discussed in Order M-850. Assistant Commissioner Mitchinson stated:

> 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).

Le Conseil notes that it is engaged in commercial litigation with the appellant arising from disputes over a building contract. One of the arguments put forward by Le Conseil is that this request is made by the appellant to "widen the discovery process available to it under the court process, for reasons unconnected to the spirit and purpose of [the *Act*]". This argument was also made and addressed in Order MO-1477.

Le Conseil submits:

> As stated in the Notice of Inquiry, these requests do not spring from an exercise of a legitimate right of access, but are designed to harass the opponent in litigation, target and occupy the resources the institution may use in responding to litigation (including its lawyers to review its records) to accomplish an objective unrelated to the [*Act*'s] process: to advance claims in litigation (particularly spurious claims against individual senior staff of the institution) and/or to pressure and harass an opponent in a dispute into settlement.
>
> There are more than reasonable grounds to conclude that this is a pattern of conduct that amounts to an abuse of process.

In Order MO-1472-F, I addressed the issue of whether the use to which requested records might be put had an impact on the issue of whether a request is frivolous or vexatious. I found that it did not, stating:

> … the use to which a requester wishes to put records once access is granted does not, nor should it, factor into the question of whether the use of the *Act* is frivolous or vexatious. This factor is more appropriately dealt with under the "harms" provisions of various exemptions set out in the *Act*. In my view, it is the

> activities or conduct on the part of a requester in using the "process" of the *Act* that engages the application of these provisions.

These conclusions were a continuation of my reasoning in Order MO-1168-I, wherein I had previously stated:

> 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.

Commenting on these previous decisions, Assistant Commissioner Mitchinson stated:

> I agree with these findings. In my view, the arguments submitted by the Conseil that deal with the possible use to which the records, if accessed, might be put has no bearing on the issue before me.

After considering all of Le Conseil's arguments in the previous appeal (which were reiterated in the current appeal), Assistant Commissioner Mitchinson summed up his conclusions as follows:

> It should also be noted that the Conseil has provided no evidence to support its allegations concerning harassment by the appellant. The request in this appeal appears on its face to be a legitimate request on the part of a member of the public to access records under the custody and control of the Conseil and, absent evidence to the contrary, which has not been provided, I find that the actions by the appellant in submitting the request do not amount to an abuse of the right of access in the circumstances.
>
> Accordingly, I find that the request by the appellant is not part of a pattern of conduct that amounts to an abuse of the right of access, and therefore does not fall within the scope of section 5.1(a) of Regulation 823. Because of this finding, it is not necessary for me to consider whether the request is a "pattern of conduct that would interfere with the operations of the institution".

In the current appeal, Le Conseil refers to four letters submitted to this office on October 11, 2001 (which refer individually to the four appeals he had with this office) in which he requests that the Commissioner apply to the Attorney General for Ontario for consent to prosecute Le Conseil under section 48 of the *Act*. Le Conseil interprets these letters as further evidence of a pattern of conduct which amounts to an abuse of the right of access:

> [T]he prosecution letters conclusively make plain that the ultimate purpose of the requests is not "access" as contemplated under [the *Act*], but rather to do damage to parties adverse in interest.

Often, in situations where an institution claims that a request is frivolous or vexatious, there is a considerable "history" between it and the requester (see, for example, Orders M-947 and MO-1488), and it is predictable that this issue will arise where relations between the parties are

strained or otherwise problematic. A dispute may be triggered by one event or may be a result of the cumulative interactions between the parties. In my view, the appellant's letters to this office are clearly a reflection of the level of animosity that has developed between the parties, but they do not detract in any way from the legitimacy of his requests (at least at this point in time).

Interfere with the operations of an institution

Le Conseil takes the position that it exists and operates to serve the needs of French-language children. Noting that it has limited staff and resources allocated to deal with matters pertaining to the *Act*, that it serves "a jurisdiction twice the size of Belgium", and that the appellant's requests do not relate to its primary mandate, Le Conseil submits that to respond to the appellant's requests would unreasonably interfere with its operation.

In Order M-850, Assistant Commissioner Mitchinson stated:

> ... in my view, a pattern of conduct that would interfere with the operations of an institution is one that would obstruct or hinder the range of effectiveness of the institution's activities.
>
> It is not possible to establish a finite set of criteria that will demonstrate "interference with the operations" as used in section 5.1(a). It is important to bear in mind that interference is a relative concept which must be judged on the basis of the circumstances a particular institution faces. For example, it may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government Ministry, and the evidentiary onus on the institution would vary accordingly.

Recently, Adjudicator Liang had occasion to comment on an institution's assertions that responding to the appellant's request would interfere with its operations (Order MO-1427):

> The District states that this request is a "major interference" with its operations. It states that it is a relatively small municipality engaged in the provision of a variety of services, and that its resources are stretched to the limit. It is concerned about the resources which will be required to deal with this request.
>
> …
>
> [I]t should be noted that the *Act* provides for certain measures which relieve the burden on an institution faced with an apparently onerous request. These are found in section 45 of the *Act* (fees) and the related provisions in the Regulations, and the interim access decision and fee estimate scheme described in Order 81 (which permit, in certain cases, the postponement of the majority of the work required to respond to a request until a deposit has been received). In some circumstances, a time extension under section 20(1) may also provide relief, although where the process described in Order 81 is adopted, such a time

> extension may only be claimed once the appellant pays any deposit which may be required: see Order M-906.
>
> In this case, I conclude that the District cannot rely on "interference with operations" as a ground for finding the request "frivolous or vexatious". The request is in reality much narrower than the District asserts and, in any event, I am satisfied that the *Act* would provide meaningful relief from the burden of responding to the request.

In Order M-1071, former Adjudicator Marianne Miller, also referring to comments made by former Adjudicator Higgins in Order M-906 relating to alternative measures that are available under the *Act* to relieve an institution faced with a request which may, on the surface, appear likely to interfere with its operations noted that:

> 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.

With respect to the "massive" nature of the appellant's request, Le Conseil states that "the requester, seeks, in effect, records of every financial and payment record of [Le Conseil] since its start-up".

In my view, the comments from previous orders referred to above are equally applicable in the circumstances of this appeal. I am not persuaded that the relief provided by the *Act* would not be sufficient to address Le Conseil's concerns in this regard, and I conclude that Le Conseil has not established that this request constitutes a pattern of conduct that would interfere with its operations.

Section 5.1(b) - Request is made in bad faith or for a purpose other than to obtain access

In Order MO-1377, Senior Adjudicator David Goodis made the following statements with respect to the term "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]

I accept this position and adopt it for the purpose of determining whether the request at issue in this appeal was made in "bad faith".

In Order MO-1477, Assistant Commissioner Mitchinson addressed Le Conseil's submissions (which are virtually identical to those submitted in the current appeal) as follows:

> The Conseil's submissions on the issue of whether the appellant's request amounts to bad faith on the part of the appellant are based on its position that the purpose of the request is wholly collateral to access to the records. The Conseil submits:
>
> > … [The appellant] seeks, through the instrumentality of [the *Act*], to gain what it thinks is ammunition for a lawsuit, but more particularly in an attempt to raise personal details about the effected senior staff to gain what it perceives, to be an upper hand on the individuals and the institution. What is ironic is that a statute put in place ostensibly to encourage better functioning for institutions by allowing access to the institution by those served by it, is available as a tool to a non-user of its services as a means of derogating from, and distracting from, the central programs it offers: education to minority language students in South, Central and Southwestern Ontario.
>
> I do not accept the Conseil's position. It provides no evidence to support its allegations regarding the appellant's intended use of the information received in response to the access request and, more importantly, the Conseil is mistaken in its description of the operation of the *Act* and the purposes for which a request can be made. Section 1 of the *Act* provides a general right of access to records under the control of institutions, including the Conseil. It does not limit that right to a specific purpose, nor does it require a requester to justify or even identify the reason for making a request. The Conseil, like all public institutions, must respond to requests for access to records that relate to its operational or administrative dealings with contractors and others; there is nothing unusual or inappropriate about this, and it clearly does not constitute "bad faith" on the part of a requester to exercise its statutory access rights in this regard.

I agree with these comments and find them equally applicable in the circumstances of this appeal.

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 be "frivolous or vexatious". Again, no "pattern of conduct" is required although such a 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 regarding the "bad faith" component of section 5.1(b), Le Conseil has not persuaded me that the appellant is seeking access to the record for any purpose other than to obtain access. In fact, Le Conseil's own representations focus on the purpose for which the request for access is made, and the specific uses the appellant may make of the records in the event that access is granted.

Le Conseil reiterates its view under this component of section 5.1(b), that the prosecution letters provide evidence regarding the purposes of the appellant in making the requests and pursuing the appeals. For the same reasons outlined above, I do not accept that his actions in this regard should be interpreted as anything other than an indicator of the animosity between the parties.

Accordingly, I find that the request by the appellant was not made in bad faith or for a purpose other than to obtain access, and therefore does not fall within the scope of section 5.1(b) of Regulation 823.

ORDER:

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

2. I order Le Conseil 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: January 31, 2002
Laurel Cropley
Adjudicator