



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

ORDER MO-1724

Appeal MA-020095-3

The Regional Municipality of Niagara



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NATURE OF THE APPEAL:

The Regional Municipality of Niagara (the Region) initially received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

For the years 2001, 2000, 1999, 1998, and 1997

- copies of all Purchase Orders issued to [an identified vendor] and any related or associate[d] corporations, companies or entities in each of the years.
- print-out from the Region's accounting records of each year-end detailed vendor report for [the identified vendor] and any related or associate[d] corporations or entities in each of the years.

Please breakdown the response on a year-by-year basis.

The First and Second Appeals

The Region initially responded to the request by stating that the request was frivolous and vexatious within the meaning of section 4(1)(b) of the *Act*. The requester (now the appellant) appealed the Region's decision (Appeal MA-020095-1), and that appeal resulted in Order MO-1575, in which the Region's position that the request was frivolous and vexatious was not upheld. The Region was required to provide the appellant with a decision in accordance with the *Act*.

The Region then issued an interim fee estimate decision in response to the appellant's request. The fee estimate was for \$18,511.00 and the Region indicated that it required a deposit representing one-half of the total estimated cost, prior to searching for the records to which the appellant sought access.

In response, the appellant wrote to the Region. The letter stated:

- 1) Please advise if copies of Purchase Orders are archived or recorded in digital form. Please provide details on how this is done. Please advise how are Purchase Orders generally distributed and maintained for the years in question? ie., Number of copies? Which departments or offices maintain copies, for how long? etc. Please provide as much information as reasonably possible to assist in narrowing my request.
- 2) Please also ask the following question of the identified individuals to assist in narrowing my request: "To each of [three identified individuals] – Please identify the names used by Niagara vendors that are related or associated with [the identified vendor] to the best of your knowledge. Please provide each of their answers. [The appellant then stipulated how these questions should be asked].

- 3) Please also ask the Accounting Department if they are able to identify [the identified vendor] and any other vendors that are related or associated with [the identified vendor] and to identify these vendors from their accounting vendor list.
- 4) Please break-out the portion of fee for bullet point two (i.e.: the “print-outs”).

The Region responded to the appellant’s questions by letter which read, in part, as follows:

Purchase Orders are archived in hard copy only, in chronological order. Our search methodology will consist of a manual examination of all purchase orders issued within the time frame from which you want information.

Master copies are retained in our Corporate Services Department. These are the “official” records and would be the ones accessed. Records less than two (2) years old are retained in our main office building. Others are retained offsite until destruction is permitted under our retention by-law.

The [Act] does not make provision for the reporting of responses to written questions. It ensures the public’s right of access to records or part of records. Consequently, [the Region] will not pose your questions to the three (3) staff members you named on your behalf.

...your original request refers to “... the [identified vendor] and any related or associated corporations, companies or entities...”. To access computer records for year-end detailed vendor reports only for [the identified vendor] would require approximately 0.5 hours each for 2001 and 2000, and 0.75 hours for each of 1999, 1998 and 1997. You would need to identify by name any vendor besides [the identified vendor] in order for us to access it.

The appellant then appealed the Region’s fee estimate decision (Appeal MA-020095-2). At the time of opening that appeal, this office confirmed with the parties that the issue in that appeal was the fee estimate decision. That appeal was streamed directly to the inquiry stage of the process.

A Notice of Inquiry was initially sent to the Region, inviting representations on the fee estimate decision. The Region provided representations on the issues. After confirming that the request was for hard copies of the purchase orders, the representations stated:

The records in question are created in hard copy and filed in chronological order. They can be identified by vendor name. In order to locate the requested records, a person familiar with their organization must physically examine each document and read the vendor name. For those requested records that are not identified as [the identified vendor] extensive research must be undertaken to identify all of [the identified vendor’s] “related or associated corporations, companies or entities.” **The Region does not keep records identifying the relationships between its vendors.** [emphasis added]

In preparing this fee estimate, the institution consulted with employees familiar with the type and contents of the requested records. In a letter dated December 5, 2002, the institution indicated to the requester that, "to access computer records for year-end detailed vendor reports only for [the identified vendor] would require approximately 0.5 hours each for 2001 and 2000, and 0.75 hours for each of 1999, 1998 and 1997. You would need to identify by name any vendor besides [the identified vendor] in order for us to access it." The fee estimate is based on combing the manual records for relationships between all other vendors and [the identified vendor].

The estimated time required to do this manual search for any number of vendors not named specifically by the requester is as follows:

The Region's representations then summarized the amount of estimated fees, and then stated:

The institution acknowledges that in the original interim fee estimate, GST was incorrectly applied. The total fee estimate, therefore is \$17,300.00 instead of \$18,511.00

The adjudicator dealing with that appeal then sent the Notice of Inquiry, along with a copy of the Region's representations, to the appellant. The adjudicator also advised the Region that, as the Region had revised its decision, a revised decision letter should be sent to the appellant.

The Region then issued a revised fee estimate decision letter to the appellant.

In response, the appellant notified this office that, as a consequence of and based on the revised decision letter he received, he had revised his request and sent the revised request to the Region. He then asked the adjudicator to close the inquiry based on the revised request. As a result, Appeal MA-020095-2 was closed.

The Current Appeal

The current appeal has been opened as a result of the revised request provided by the appellant to the Region, and the Region's response.

The appellant's revised request reads as follows:

I am amending this request for information as follows:

- 1) To obtain from each of [three identified individuals] the names of Niagara vendors, related to or affiliated with [the identified vendor]. This information is to be limited to these individual's personal knowledge or from their own records at hand. I do not require that they perform any exhaustive search to determine this information.

- 2) To provide in digital file form from the accounting records the detailed vendor reports for each of the identified vendors, including [the identified vendor], for the years 1997, 1998, 1999, 2000 and 2001.
- 3) To provide in a digital file form the Region's year end Vendor Summary for each of the years 1997, 1998, 1999, 2000 and 2001. This should show, the vendor ID, vendor name, and total for each year.

The Region responded to the revised request as follows:

Please be advised that it is the practice of the [Region] not to provide records in digital form. ...

As ... indicated to you in the past, [the Region] cannot provide you with information that is not in the form of a record. Therefore, [the Region] cannot provide you with "information limited to these individual's personal knowledge".

The appellant appealed the Region's decision.

Upon receipt of the appeal letter, this file was streamed directly to the adjudication stage of the process. I sent a Notice of Inquiry to the appellant initially, asking for representations on a number of the issues. The appellant provided representations to me, and I then sent a Notice of Inquiry, together with a copy of the appellant's representations, to the Region. I invited the Region to address two specific issues raised by the appellant. The Region provided representations in response.

DISCUSSION

Abuse of Process

The appellant stated in his appeal letter that he considers the Region's decision letter to be an "abuse of process".

In his representations, the appellant takes the position that the Region is abusing the process in these circumstances. He refers to the large fee estimate he received in the earlier appeal, and his concern that certain records of the nature requested are not kept by the Region. The appellant's representations also refer to his concerns regarding the "abuse of process" by the Region on other occasions.

In its representations, the Region claims that the appellant is "abusing the process" by displaying a pattern of behavior that reveals that he is not interested in accessing the records in a timely fashion, but rather that he is manipulating the process in order to manufacture the circumstances to launch appeals with this office.

It is clear that both parties are unhappy with the actions of the other in regards to their dealings in this series of appeals. Both parties accuse each other of “abusing the process” and both express concerns relating to the responses the other party has provided, and refer to existing or potential litigation between them.

In the circumstances of this appeal, I am not prepared to find that either party is “abusing the process” or violating the spirit of the *Act*. The issues concerning the fee estimates referred to by the appellant are not before me in this appeal, and I am not prepared to address the Region’s claims in light of the findings made in Order MO-1575, referred to above.

Accordingly, I will address only the specific issues raised as a result of the appellant’s revised request and the Region’s response at issue in this appeal.

Requests for Information “Within an Individual’s Knowledge”

As identified above, the appellant’s revised request reads as follows:

To obtain from each of [three identified individuals] the names of Niagara vendors, related to or affiliated with [the identified vendor]. This information is to be limited to these individuals’ personal knowledge or from their own records at hand. I do not require that they perform any exhaustive search to determine this information.

The Region’s response stated:

As ... indicated to you in the past, [the Region] cannot provide you with information that is not in the form of a record. Therefore, [the Region] cannot provide you with “information limited to these individual’s personal knowledge”.

In the Notice of Inquiry I sent to the appellant, I invited the appellant to address this issue. The appellant’s representations focus on the history of the dealings between the appellant and the Region, and the reasons why he believes that certain information exists. The appellant then identifies that he believes the information he is interested in obtaining would likely be known by the identified individuals. He states:

The individuals noted would know some, if not all, and right “off hand” the names used for companies being recorded as vendors in Niagara’s accounting department related to [the identified vendor], since they would be the ones involved in approving payments, issuing purchase orders and executing contracts with [the identified vendor] and its related companies over the years.

I am not looking for an exhaustive nor absolute list, nor do I wish records to be created on this point, but simply to identify the names these individuals know of “off-hand”, since I am certain the ones they know “off-hand” are the only ones I am really interested in.

The appellant then identifies how much easier it would be to electronically search for specific records relating to those specific companies if they were identified.

Previous orders of this office have addressed the issue of whether or not an institution is obliged to respond to requests for access to information within "an individual's knowledge or memory". In Order M-33, former Commissioner Tom Wright stated:

I have previously examined the issue of the extent to which the *Act* covers information not recorded in any tangible form. In Order 196, I indicated that, in my view, the *Act* does not impose a specific duty on an institution to transcribe oral views, comments or discussions. Similarly, it is my view that the *Act* does not require an institution to produce information from an individual's memory or knowledge.

With respect to the question of the extent to which an institution should respond to questions directed to it by a requester, former Commissioner Sidney B. Linden made the following statement in Order 99:

While it is generally correct that institutions are not obliged to "create" a record in response to a request, and a requester's right under the *Act* is to information contained in a record existing at the time of his request, in my view the creation of a record in some circumstances is not only consistent with the spirit of the *Act*, it also enhances one of the major purposes of the *Act* i.e., to provide a right of access to information under the control of institutions.

I agree with the former Commissioner's comments ...

It is my view that there is no statutory obligation on the institution to respond to the request in any way different from the way it did. Although the response to the initial request could have specifically identified the willingness on the part of the institution to assist the appellant, I find that the actions of the institution in responding to the appellant's request were reasonable and satisfactory in the circumstances.

I agree with the approach taken by former Commissioner Wright.

I find that there is no statutory obligation on the Region to respond to the request for information "limited to these individual's personal knowledge". Although ordinarily it would be preferable for an institution to assist a requester in identifying information to the extent possible, in the circumstances of this appeal, I find that the position taken by the Region in responding to the appellant's request was reasonable and satisfactory in the circumstances.

Adequacy of Decision Letter

An additional issue raised in this appeal is whether or not the Region's response letter to the appellant is an adequate decision letter for the purposes of the *Act*. I invited the parties to address this issue, with particular reference to the information provided to the appellant by the Region in the course of dealing with both this appeal and the earlier appeals.

The appellant did not specifically address this issue in his representations.

The Region's representations address this issue as follows:

[In the response letter], the Corporate Records Manager wrote to the appellant on behalf of the Region to advise him that [his revised request] contained an inadequate request. This letter was not understood by the Region to be a decision letter. It was meant to clarify [the Region's] understanding of the request as stated. In no way did the letter purport to prohibit the requester from submitting another revised request that actually did ask for records of the municipal corporation.

The Region appears to be taking the position that its response letter was not an actual decision, but rather, that it was a request for clarification.

I do not accept the Region's position. The Region was aware of the fact that the appellant was submitting a revised request to the Region. Indeed, the "second appeal" referred to above was closed on the basis that the appellant would be submitting a revised request. In response to the revised request, the Region should have issued a proper decision letter in accordance with the provisions of sections 19 and 22 of the *Act*. If, as the Region now asserts, the response letter it provided was a request for clarification, it should have made that clear, particularly in light of the history of the dealings between the Region and the appellant.

Furthermore, the Region's response to the request seems to address specific issues concerning access to the requested records. In that regard, the letter appears to be a decision regarding access; however, I find that the Region has not provided an adequate decision letter in response to the appellant's request.

Later in its representations the Region also appears to take the position that, because a portion of the request is not valid (in that it is a request for information within an individual's knowledge), there is no need to address the other parts of the request. I do not accept the Region's position. In my view, whether or not a portion of the request is valid does not affect the Region's statutory obligations to respond to the other portions of the request.

Having said that, I also recognize that the appellant's revised request is in some ways a restatement of portions of his earlier requests. The Region has already given the appellant an

access decision concerning some of the requested information, or has advised the appellant of its preliminary position on access to those records through the parties' ongoing communications.

Notwithstanding the fact that the appellant may be aware of the Region's position concerning access to some of the requested records, or whether or not responsive records exist, I will order the Region to issue a proper decision letter in response to the appellant's revised request. Given the nature of and background to this appeal, in my view it is important that both parties adhere to the requirements of the legislation concerning access requests and decisions. Accordingly, I will order the Region to issue a proper decision letter to the appellant, in accordance with sections 19 and 22 of the *Act*. The decision should respond to the appellant's request for information contained in any records which may be held by the three identified individuals, as well as the request for records in digital file format.

In requiring the Region to issue a new decision, I am essentially requiring the parties to start over. In my view, this is the only solution that would allow, not only the parties, but this office as well, to deal with the access issues in any meaningful way.

Format of Records

The appellant's revised request included a request for responsive records "in digital file format".

The Region's response letter states that it would not provide the records in digital form.

The appellant's representations on this issue state:

I cannot see any reason for the institution not being able to provide digital records and the *Act* clearly provides for digital records to be made accessible.

The Region's position on its response letter - that the letter was not understood by the Region to be a decision letter - is set out above. In its representations regarding the format of the records, the Region now acknowledges that this office has held that records should be made available in multiple formats.

As I am requiring the Region to issue a proper decision letter in accordance with the *Act*, the decision letter should also include a decision concerning access to the records in digital format, which reflects the revised position taken by the Region as identified in its representations.

ORDER:

1. I uphold the Region's decision concerning the appellant's request for information "within an individual's knowledge".

2. I order the Region to issue a proper decision letter to the appellant in response to the appellant's request for records, in accordance with the requirements of the *Act*, treating the date of this order as the date of the request.
3. I order the Region to provide me with a copy of its decision letter.

Original signed by: _____
Frank DeVries
Adjudicator

December 9, 2003 _____