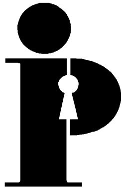

ORDER MO-2406

Appeal MA08-171

Toronto Catholic District School Board

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NATURE OF THE APPEAL:

The Toronto Catholic District School Board (the Board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a complete copy of the requester's personnel file. The Board responded to the request by asking the requester to submit the $5 application fee, and noted that the Board would not consider any request for information provided previously, but would accept a request for information in her file placed there subsequent to her last request of August 21, 2006.

The requester wrote to the Board and provided the $5 application fee. The Board then issued a decision in which they reiterated their position that it considered the request to be frivolous and vexatious and, therefore, would not contemplate a request for information already provided previously. The Board provided the requester with a copy of all information contained in her file subsequent to August 21, 2006.

The requester then sent a revised request to the Board in which she re-stated her request for a complete copy of her personnel file. She also sought that all documents which she did not agree with be corrected. The Board did not formally respond to this revision.

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

During mediation it was clarified with the appellant that she is appealing only the position of the Board that her request for records dated prior to August 21, 2006 is frivolous and vexatious. The appellant is not appealing the disclosure provided for records dated after August 21, 2006.

The mediator clarified with the appellant that it will be necessary for her to submit a formal request for correction to the Board, indicating clearly what information she believes is inaccurate, and providing the accurate information. The appellant was advised of her right to appeal any decision made by the Board in response to her correction request. The mediator also informed the appellant of her right to have a statement of disagreement attached to the records if the Board does not make the requested corrections. The appellant is not appealing this issue.

The issue of the Board's refusal to process the part of her request that deals with records predating August 21, 2006 was transferred to adjudication. I sent a Notice of Inquiry to the Board, initially, seeking its representations on the issue as to whether the appellant's request was frivolous or vexatious under section 4(1)(b) of the *Act*. The Board provided representations in response to the Notice of Inquiry. In their representations, the Board also submitted that the responsive records may be excluded from the *Act* by reason of section 52(3). Therefore, I sought further representations from the Board on that issue. I received representations from the Board on section 52(3)1. I then sent the Board's representations, along with a Notice of Inquiry setting out the issues of whether the appellant's request was frivolous and vexatious and whether the responsive records are excluded from the application of the *Act* by reason of section 52(3)1, to the appellant, seeking her representations. I received representations from the appellant in response. The appellant did not want any of her representations shared with the Board. Nevertheless, I have considered the appellant's representations in their entirety in making my decision in this appeal.

RECORDS:

Records in the appellant's personnel file which predate August 21, 2006.

DISCUSSION:

Is the request for access frivolous or vexatious?

General principles

Section 4(1)(b) 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 of Regulation 823 under the *Act* elaborates on the meaning of the terms "frivolous" and "vexatious":

> 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.

Section 4(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be exercised lightly [Order M-850].

An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious [Order M-850].

By way of background, the Board states that the appellant, as an employee of the Board and a member of the Ontario English Catholic Teachers' Association, Toronto Occasional Teachers' Local, is entitled to exercise rights under that bargaining unit's collective agreement with the

Board. By means of Article 11 of this collective agreement, the appellant is entitled to peruse and receive a copy of any Principal's Report on Occasional Teachers and other documents in her file except information that is precluded from disclosure under the *Act*.

The Board states that the appellant has exercised her rights under the *Act* and the collective agreement for access to her file multiple times over the past ten years. It submits that it provided disclosure to the appellant of the requested material. It provided the following chronology of the appellant's access to her personnel file, prior to the request at issue in this appeal:

> May 1997 - the appellant exercised her rights under her collective agreement to view her file, request copies of any or all documents, and request that documents be removed.
>
> June 1999 - the appellant again exercised her rights under the collective agreement to view her file, request certain copies of documents, and the removal of others.
>
> October 1999 - the appellant filed a request under the *Act* for a copy of all documents in her personnel file.
>
> December 2003 - the appellant filed a request under the *Act* for her entire personnel file. The Board granted access, in its entirety, to a copy of the appellant's file. It did, however, also note in its decision letter that this was the second such request under the *Act* for, in the most part, the same documents and advised the appellant that in the future it would not accommodate requests for this same material.
>
> August 2006 - the appellant again filed a request under the *Act*. This time, the appellant only requested a copy of those documents that were placed in her file subsequent to her last request.

The Board submits that the appellant has been provided ample access to, and copies of, her personnel file and that her continued requests for such are an abuse of her access rights under [the *Act*] as well as her collective agreement. It states:

> By any standard, four …access requests [under the *Act*] for the same documents as well as … similar access requests under her collective agreement for those same documents is vexatious …constituting a "pattern of conduct amounting to an abuse of the right of access"...
>
> With respect to the issue of "purpose other than to obtain access", we will not attempt to read the mind of the appellant, but simply use her own words from her request:

> "I need this for a mediation hearing at the Ontario Human Rights Commision (OHRC) offices on May 5 at 9:00am."…

> Clearly, she has had access numerous times prior to this request/appeal and her purpose was not to gain access but to use against the Board at an OHRC hearing. The Board had provided her, at various times, under two separate access processes, a full copy of her file. In addition, on April 21, 2008, a mere two days after receiving her request and fee, and a full two weeks before her hearing date, the Board provided her copies of all records she had not previously received under access request [of August 2006] above.

> It is also important to note that the appellant, subsequent to this request and during the mediation process, withdrew her OHRC complaint against the Board. Thus, by her own actions, the appellant has even removed the rationale she stated as her reason for needing a full copy of her file under [the *Act*]. Her continuance of this …Inquiry thus can only be seen as petty and vindictive.

> It should also be noted that the above noted OHRC complaint was the third such complaint the appellant has filed against the Board. In the penultimate ruling, dated August 2007, the OHRC rejected a reconsideration of the appellant's complaints against the Board. In its own words, provided in its decision; the OHRC found:

>> Accordingly, in the particular circumstances of this case, these aspects of the complaint can he characterized as vexatious and made in bad faith.

> This constitutes evidence from an independent, third party institution of the appellant's abusive use of legal rights in an inappropriate manner.

The appellant did not address the Board's representations directly, nor did she expressly provide any indication of what documents from what particular time period she has not obtained already from the Board.

Findings and Analysis

The request at issue in this appeal was initially filed on April 14, 2008. At that time, the appellant sought a complete copy of her personnel file. In this request, she indicated that she required the file for a "mediation hearing at the OHRC offices on May 5, 2008". The Board notified her by letter dated April 16, 2008, that her request was deficient in that the application fee was not included and informed her that the request was frivolous and vexatious and, therefore, it would not contemplate such a request for information already provided previously. It stated in its letter that it would, however, accept the appellant's request as being a request for

information in her file placed there subsequent to August 21, 2006 and that it would only contemplate a request for records filed subsequent to her last request of August 2006.

The Board also advised the appellant in its letter of April 16, 2008, that it was under no obligation to meet her stated deadline. The appellant was advised that if her deadline must be met, she could exercise her rights under the collective agreement to view and receive copies of her file. On April 19, 2008, the appellant wrote the Board indicating that she interpreted the Board's response to be a deemed refusal of her request and that she would be appealing that refusal. On April 21, 2008, the appellant paid the fee for the request to the Board. On the same date, the Board wrote the appellant and provided copies of all documents filed subsequent to the August 2006 request date. In its decision letter, it stated that:

> As you rightly noted in your request, we have previously advised you that we consider your periodic requests for a "complete copy of your personnel file" to be frivolous and vexatious and, therefore, we will not contemplate such a request for information already provided previously. We will, however, accept your request as being for any information in your file placed there subsequent to August 21, 2006. Since you were given prior warning [in December 2003], we expect that you have retained in your possession a copy of all information previous[ly] provided…

On April 23, 2008, the appellant submitted a new request to the Board, which she indicated replaced her April 14, 2008 request. She again sought "a complete copy of her personnel file" and required that file before May 5, 2008.

On May 14, 2008, the appellant filed an appeal of the Board's April 21, 2008 decision with this office. During the mediation process, the appellant exercised her rights under the collective agreement, viewed her complete file, and requested copies of some thirty-nine documents which were subsequently copied and provided to her. The Board states that:

> Despite this additional accommodation of the appellant, during the mediation process, she still has insisted on forcing this matter to the formal inquiry stage, thus further wasting the Board's limited resources…

Section 5.1(a) of Regulation 823 under the Act

Pattern of Conduct that Amounts to an Abuse of the Right of Access

Previous orders of this office have found that in order to meet this criterion, the institution must demonstrate that the appellant has made recurring requests of a related or similar nature or that requests have been made of this nature that the requester is connected with in some material way [Order M-850]. In determining whether or not the "pattern of conduct" exists, the focus should be on the cumulative nature and effect of a requester's behaviour.

The determination of what constitutes "an abuse of the right of access" has been informed by the jurisprudence of this office and the case law dealing with that term. In the context of the *Act*, it has been associated with a high volume of requests, taken together with other factors. Generally, the following factors have been considered as relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

> • *the number of requests* – whether the number is excessive by reasonable standards;
>
> • *the nature and scope of the requests* – whether they are excessively broad and varied in scope or unusually detailed, or, whether they are identical to or similar to previous requests;
>
> • *the timing of the requests* – whether the timing of the requests is connected to the occurrence of some other related event, such as court proceedings; and
>
> • *the purpose of the requests* – whether the requests are intended to accomplish some objective other than to gain access without reasonable or legitimate grounds.

For example, are they made for "nuisance" value, or is the requester's aim to harass the government or to break or burden the system [Orders M-618, M-850, MO-1782 and MO-1810].

It has also been recognized that other factors, particular to the case under consideration, can also be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access [Order MO-1782].

The focus should be on the cumulative nature and effect of a requester's behaviour. In many cases, ascertaining a requester's purpose requires the drawing of inferences from his or her behaviour because a requester seldom admits to a purpose other than access [Order MO-1782].

I will first consider whether the facts relevant to this appeal support a conclusion that the appellant has engaged in a pattern of conduct that amounts to an abuse of the right of access.

<u>Pattern of Conduct</u>

Previous orders cited above have made it clear that the "pattern of conduct" that is required to support a finding that this part of the test has been met relates to recurring incidents of related or similar requests. In my view, the evidence before me supports such a conclusion. It is self-evident from the evidence before me that the appellant has made similar requests in the past for the same information and has received access to it.

In the present appeal, I find that the appellant has clearly made use of the access provisions of the *Act* more than once for the purpose of obtaining access to information which has been previously provided by the Board through its decisions on her earlier requests for the identical

information. This activity is one of the examples from the abuse of process cases in a legal context which are cited in Order M-850. I find that the appellant's use of the access provisions in the *Act* represents a pattern of conduct that amounts to an abuse of the right of access as contemplated by section 4(1)(b) of the *Act* and section 5.1(a) of Regulation 823.

Other factors can also be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access [Order MO-1782]. In my view, the tone and substance of the appellant's representations supports my finding that there are reasonable grounds to conclude that the request is part of a pattern of conduct that amounts to an abuse of the right of access. The appellant's representations contain repeated allegations of misconduct directed toward the Board, and have little to do with her access request at issue. The appellant does not address the Board's representations that she has been given access to her personnel file on a number of occasions, as set out above. The appellant does not provide any information in her representations to allow me to conclude that she has not already had access to the requested records. The appellant's submissions focus on her need to have the personal information in her personnel file corrected and that she is aware of the process for so doing under section 36(2), but has not yet done so.

Section 36(2) of the *Act* allows requesters to seek the correction of personal information held by an institution. This section reads, in part that:

> Every individual who is given access under subsection (1) to personal information is entitled to,
>
> (a) request correction of the personal information if the individual believes there is an error or omission;
>
> (b) require that a statement of disagreement be attached to the information reflecting any correction that was requested but not made;

Based on the parties' representations, I find that the Board has established that the appellant has engaged in a "pattern of conduct" as required by section 5.1(a) of the regulations. In the circumstances of this appeal, therefore, I find that the Board has demonstrated that the appellant's pattern of conduct, which includes the request at issue in this appeal, is an abuse of the right of access. For this reason, I find that the request which gave rise to this appeal is frivolous or vexatious within the meaning of section 4(1)(b). As I have found that the appellant's request is frivolous or vexatious based on a pattern of conduct, there is no need for me to consider whether the request is also frivolous or vexatious in that it is based on a "purpose other than to obtain access".

Furthermore, as I have found that the appellant's request is frivolous or vexatious, it is not necessary for me to also consider whether the responsive records are excluded from the application of the *Act* by reason of section 52(3)1, as claimed by the Board.

Conclusion and Remedy

Where a request is found to be frivolous or vexatious, this office will uphold the institution's decision. In addition, this office may impose conditions such as limiting the number of active requests and appeals the appellant may have in relation to the particular institution [Order MO-1782 and MO-1921].

In the present appeal, it is my view that this is an appropriate situation to limit the appellant's active access to information within her personnel file to those matters arising after the date of the appellant's request of April 14, 2008. Nothing in this order shall prevent the appellant from seeking a correction of any of her personal information in her personnel file in accordance with the provisions of section 36(2) of the *Act*.

ORDER:

1. I uphold the Board's decision under section 4(1)(b) of the *Act* that the appellant does not have a right of access to the records she has requested because her request is frivolous or vexatious, and I dismiss this appeal.

2. The appellant is limited to requesting access to information from her personnel file with the Board to those matters arising after the date of the appellant's request of April 14, 2008.

Original signed by: March 30, 2009
Diane Smith
Adjudicator