OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

DECISION ON A Section 43 APPLICATION BY THE VANCOUVER POLICE BOARD

David Loukidelis, Information and Privacy Commissioner
December 22, 1999

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Summary: Applicant public body had received 3,874 requests, over approximately five years, of which 24 were made by respondent individual. No evidence presented by public body of unreasonable interference with its operations caused by the respondent's access requests. Guidance given by Commissioner as to kinds of evidence needed on such issues.

Key Words: repetitious - systematic - unreasonable interference - operations.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 5 and 43.

Cases Considered: B.C.: *Crocker v. British Columbia (Information and Privacy Commissioner)* (1998), 155 D.L.R. (4th) 220 (B.C.S.C.); *Mazhero v. British Columbia (Information and Privacy Commissioner)* (1998), 56 B.C.L.R. (2d) 333 (B.C.S.C.).

1.0 NATURE OF THIS PROCEEDING

This is an application by the Vancouver Police Board ("Board"), under s. 43 of the *Freedom of Information and Protection of Privacy Act* ("Act"), for authority to disregard access to information requests, under s. 5 of the Act, from a particular individual ("respondent"). Section 43 of the Act reads as follows:

> If the head of a public body asks, the commissioner may authorize the public body to disregard requests under Section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body.

Here is paragraph 10 of the Board's written submission in this proceeding:

> It is the submission of the Vancouver Police Board that an order should be issued by the Information and Privacy Commissioner pursuant to s. 43 preventing the Applicant [sic] from making further access requests to both Vancouver Police Department and Vancouver Police Board.

2.0 BACKGROUND

The Board's request for a s. 43 authorization originally formed part of the Board's submissions in the inquiry that led to Order No. 331-1999, which was released December 21, 1999. By a letter dated August 26, 1999, this office directed that the s. 43 aspect of the Board's submissions in that inquiry be separated from that inquiry and proceed independently. This is in accordance with this office's policies and procedures respecting s. 43 applications.

The Board's written submission in this matter was received on October 29, 1999. The respondent's written reply was received on November 5, 1999.

3.0 ISSUE

Simply put, the issue to be considered here is whether the Board, based on the evidence it has submitted, should be authorized to disregard "further access requests" by the respondent. The Board bears the burden of establishing that the remedial authority under s. 43 can be exercised in its favour.

4.0 DISCUSSION

4.1 Respondent's Point Regarding Jurisdiction - After he addressed the merits of the Board's s. 43 application, the respondent raised a jurisdictional issue. At paragraph 16 of his reply, the respondent said "the Commissioner may have lost jurisdiction to entertain this matter because of the shoddy manner in which his staff has handled the Board's s. 43 application." The respondent then went on to explain the reasons for this contention.

First, and most important, the contention that my staff have handled this matter in a "shoddy manner" is baseless. Second, there is no doubt that I have the jurisdiction to deal with this matter. The respondent's objection to the manner in which the Board's application originated or to the procedure that was followed here is not valid.

4.2 Who Is Seeking the Section 43 Authorization? - The title of the Board's submission names only the Board as the applicant public body. However, throughout its submission, the Board distinguished between itself and the Vancouver Police Department ("VPD"), as if they are separate entities for the purposes of the Act. As was noted above, the specific remedy sought in this proceeding is an order preventing the respondent "from making further access requests to both the Vancouver Police Department and the Vancouver Police Board."

I have approached this matter on the basis that the Board is the only applicant public body. The Board is a "public body" under the Act because it is a "local government body", and therefore a "local public body", as those terms are defined in Schedule 1 to the Act. The VPD is not, however, recognized as a separate public body under the Act. Because it has no separate existence for the purposes of the Act, the VPD has no standing to apply for relief under s. 43 of the Act. I have authority to grant relief under s. 43 only to public bodies, including local public bodies such as the Board.

As an aside, this approach does not affect any decision where an access request has been directed to a named police department and has been dealt with under that name. Nor does this approach affect any order by my predecessor regarding police departments. It is clear from the Act that, regardless of which name is used, a police department is, for the purposes of the Act, one and the same as the relevant Police Act police board.

4.3 Merits of the Board's Application - In *Crocker v. British Columbia (Information and Privacy Commissioner)* (1998), 155 D.L.R. (4th) 220 (B.C.S.C.), Coultas J. recognized, at p. 237, that s. 43 is "an important remedial tool in the Commissioner's armoury to curb abuse of the right of access." Section 43 applications require careful consideration, since relief under that section curtails or eliminates the rights of access to information created by the Legislature through the Act.

Before a s. 43 authorization can be granted, an applicant public body must establish - through the evidence it submits and applying the ordinary civil standard of proof - that two conditions found in s. 43 have been met. See *Mazhero v. British Columbia (Information and Privacy Commissioner)* (1998), 56 B.C.L.R. (2d) 333 (B.C.S.C.), at p. 339.

The public body first must establish that an applicant has made requests of a "repetitious" or "systematic" nature. The plain meaning of the word "repetitious" in s. 43 is something that is characterized by repetition. Repetition is the act of repeating an act or things. To 'repeat' an act or thing, in turn, is to do the act or other thing over again one or more times. The plain meaning of the word "systematic" in s. 43 is something that is characterized by a 'system'. In turn, a 'system' is a method or plan of acting that is organized and carried out according to a set of rules or principles.

If the public body has established the existence of access requests of a "repetitious or systematic nature", it must then establish, on evidence it supplies, that the repetitious or systematic nature of the access requests "would unreasonably interfere with the operations of the public body".

I am able to exercise my discretion to grant an appropriate remedy under s. 43 only if these conditions have been met. I have decided, for the following reasons, that I cannot exercise my discretion to grant relief under s. 43 to the Board.

Before discussing the Board's case, I should note, as an aside, that the courts have

accepted that a s. 43 authorization may deal with pending access requests or with possible future requests to a public body. See *Crocker*, above, at p. 239 and *Mazhero*, above, at p. 338. It is clear from both of those cases, however, that my power to authorize a public body to disregard future requests is somewhat restricted.

The Board gave me some sense of the significance of the respondent's access requests in relation to the total burden of requests under the Act. It said that, between November 4, 1994 and March 19, 1999, "the Vancouver Police Department" had received the impressive total of 3,868 access requests under the Act. Fifteen of these - 0.39% of the total - were made by the respondent. The Board indicated that, between March 19, 1999, and the date of its submission in this matter, the VPD had received one more access request from the respondent.

The Board also said that, between November 4, 1994, and March 19, 1999, it had received six access requests. Three of these - 50% of the total - were made by the respondent. The Board indicated that, between March 19, 1999 and the date of its submission in this matter, it had received two more access requests from the respondent.

Again, for the purposes of this proceeding, I have treated the VPD and the Board as one entity under the Act. In this light, the respondent has been responsible for 24 of the 3,874 requests received by the Board during the periods described above. This means the respondent generated 0.62% of the total number of requests received by the Board during the relevant period.

Copies of all the respondent's access requests, and of the responses to those requests, were submitted in evidence as exhibits to the Affidavit of Randall G. Smith, sworn March 19, 1999 ("Smith Affidavit"), and submitted to me by the Board.

Having established the above facts about the respondent's access requests, the Board made the following submissions:

> 6. The Applicant's [respondent's] FOI requests to the Vancouver Police Department and the Vancouver Police Board are repetitious or systematic in nature. The Applicant's FOI requests to the Vancouver Police Department and the Vancouver Police Board unreasonably interfere with the operations of both public bodies.
>
> 7. The Vancouver Police Board respectfully requests an order pursuant to s. 43 allowing the Vancouver Police Board and the Vancouver Police Department to disregard requests under s. 5 of the *Freedom of Information and Protection of Privacy Act* against the Applicant.
>
> 8. The Vancouver Police Department and the Vancouver Police Board have for many years not pursued remedies under s. 43. However, the Applicant's frivolous and vexations [*sic*] submissions in this Inquiry [sic] now demonstrate that the Applicant does not take the FOI process

> seriously nor does he recognize the cost (in both time and money) of his repeated requests of both the Vancouver Police Department and Vancouver Police Board.
>
> 9. It is the submission of the Vancouver Police Board that it acted in good faith in responding to the Applicants [*sic*] repeated FOI requests to the Vancouver Police Board.

The Board did not elaborate on its assertion that the respondent's 24 access requests, made over a span of almost four years, are of either a "repetitious" or "systematic" nature. The Board did not say whether those requests are repetitious or systematic. It offered both possibilities. Nor did the Board provide any evidence to support its contention that the requests have unreasonably interfered with operations.

The respondent noted, at paragraph 13 of his reply, that "my access requests relate to investigations of my complaints against 16 police officers." I have analyzed the respondent's access requests. They do appear to be connected, to one degree or another, with various complaints made by the respondent about members of the VPD.

There seems to be some overlap among a few of the respondent's access requests. The overlap may be due to the respondent's desire to explore all information sources in order to further his grievances about the behaviour of certain VPD members. The overlap may or may not mean the requests are of a repetitious nature for the purposes of s. 43. But in the absence of any analysis by the Board of the 24 requests over almost five years, I cannot determine - based on my review of the request letters and the responses alone - whether they are of a repetitious nature.

Nor can I conclude, based on the material put before me by the Board, that the respondent's requests are of a systematic nature for the purposes of s. 43. Again, the respondent seems to have assiduously pursued his access rights in relation to the Board and the activities of the VPD. It is also clear, again, that there is a common theme to the respondent's various access requests. But in the absence of supporting evidence and analysis, I cannot conclude - based on my review of the request letters and the responses alone - that the respondent's requests are systematic in nature.

In any case, even if the Board had established that the respondent's access requests are of a repetitious or systematic nature, it has not established that, because of their repetitious or systematic nature, those requests would unreasonably interfere with operations. The Board did not provide any evidence on this issue at all. Only paragraphs 3 and 44 of the Smith Affidavit directly address the Board's s. 43 application. Paragraph 3 says the respondent "has made numerous FOI requests to both the Vancouver Police Department and the Vancouver Police Board since August 23, 1995." Paragraph 44 is as follows:

> 44. Further, I make this Affidavit in support of the application of the Vancouver Police Department and the Vancouver Police Board for an order allowing these public bodies to disregard s. 5 requests from the

> Applicant [respondent], pursuant to s. 43 of the *Freedom of Information and Protection of Privacy Act*.

There is no evidence before me as to the operational burden imposed by the respondent's access requests. This is to be contrasted with the situation in *Crocker*, above. At p. 238, Coultas J. made the following observations about the evidence considered by my predecessor in making his decision in that case:

> With respect to his findings of fact, there was evidence before him to support those findings. BC Transit submitted a considerable body of evidence about the nature and number of requests submitted by the Petitioners and the effect of those requests on its operation. The evidence demonstrated that a significant portion of the company's Information and Privacy resources were being expended responding to the Petitioner's requests and that their demands were also affecting the Customer Service department's ability to perform its other duties and responsibilities. The determination of what constitutes an unreasonable interference in the operation of a public body rests on an objective assessment of the facts. What constitutes an unreasonable interference will vary depending on the size and nature of the operation. A public body should not be able to defeat the public access objectives of the Act by providing insufficient resources to its freedom of information officers. However, it is the Commissioner, with his specialized knowledge, who is best able to make an objective assessment of what is an unreasonable interference. In this instance, the Commissioner had sufficient evidence to make an informed assessment of the negative impact of the Petitioners' requests on BC Transit.

The following discussion, from pp. 335 and 336 of *Mazhero*, above, is also a useful indication of the kind of evidence that has been submitted in cases such as this:

> The City's submission to the Commissioner in support of its application was accompanied by an affidavit sworn by the City's Manager of Information and Privacy. The affidavit detailed Dr. Mazhero's requests made in 1997 and the effort required to be expended by City employees in dealing with the requests. The Manager of Information and Privacy estimated that he had spent 100 hours dealing with the requests up to that time and that he would have to spend another 100 hours responding to Dr. Mazhero's remaining requests. Other City employees spent time locating and retrieving records, but they did not keep a record of their time. In the submission itself, the City asserted that Dr. Mazhero was not acting in good faith and that his actions were bringing the Act into disrepute. Dr. Mazhero was notified of the City's application and he made extensive written submissions to the Commissioner.

There is no evidence before me, in this case, about any of the following things:

- the extent of the Board's access to information resources;
- the amount of time expended by the Board's access to information staff or VPD staff in responding to the respondent's access requests;
- any interference by the respondent's access requests with the processing of other access requests;
- any interference by the respondent's access requests with the Board's operations of those of the VPD.

My assessment of the respondent's access requests - which, again, account for roughly 0.62% of all of the access requests received by the Board - suggests that many of them were responded to readily easily. Exhibits C, E, G, I, K, M, O, Q, S, U, V, Y, AA, CC, EE, GG, HH, JJ, KK and MM to the Smith Affidavit are copies of various responses to the access requests made by the respondent. The responses at Exhibits C, G, I, M, Q, EE, GG, HH, JJ, KK and MM to the Smith Affidavit either entirely, or in part, rejected the respondent's request on one or more closely-related grounds.

In some of these cases, the request was rejected on the ground that disclosure would harm a law enforcement matter, within the meaning of s. 15(1)(a) of the Act. In other cases, the Board relied on what is now s. 3(1)(h) of the Act, on the basis that various *Police Act* complaint proceedings initiated by the respondent were under way and that the responsive records were therefore excluded from the Act. In yet other cases, no sections of the Act were cited in rejecting the access request. The response letters simply noted that the request was being rejected because the respondent was, at that time, involved in an ongoing public inquiry under the *Police Act*.

These 11 response letters - which cover almost half of the respondent's total number of access requests - on their face, at least, do not appear to have entailed an excessive amount of effort in responding. Absent any evidence from the Board on the point, I cannot conclude at this time that responding to these access requests, or to the respondent's other requests, can be said to have interfered unreasonably with the operations of the Board or of the VPD. Evidence may be available to support a contrary conclusion, but it has not been submitted to me in this application.

Accordingly, the Board has failed to establish that the respondent's access requests have in the past unreasonably interfered with, or in the future would unreasonably interfere with, either its operations or those of the VPD. I cannot consider exercising my discretionary remedial power under s. 43 unless and until unreasonable interference with operations has been established.

The result in this application should not be interpreted as giving the respondent, or anyone else, free rein in dealings with the Board, or with other public bodies, under the Act. Access to information legislation confers on individuals such as the respondent a significant statutory right, *i.e.*, the right of access to information (including one's own personal information). All rights come with responsibilities. The right of access should

only be used in good faith. It must not be abused. By overburdening a public body, misuse by one person of the right of access can threaten or diminish the legitimate exercise of that same right by others, including as regards their own personal information. Such abuse also harms the public interest, since it unnecessarily adds to public bodies' costs of complying with the Act. Section 43 exists, of course, to guard against abuse of the right of access. The result in this application does not preclude the Board from applying again, at some time in the future and based on new evidence, for relief under s. 43 respecting the respondent.

As one last comment, at paragraph 14 of his submission in this case, the respondent said that "most of my access requests pertain to records which contain my personal information." My review of the access requests indicates that this is not necessarily true. In any case, the respondent is simply not correct to say, as he does at paragraph 14 of his reply, that *Mazhero* gives him "an almost unfettered right of access" to his own personal information. The case does not, in my view, go that far.

5.0 CONCLUSION

For the reasons given above, I find that the Board has not established that relief can be granted under s. 43 of the Act. I therefore decline to make any order under s. 43 of the Act based on the evidence before me.

December 22, 1999

David Loukidelis
Information and Privacy Commissioner
for British Columbia