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Order F18-09

MINISTRY OF SOCIAL DEVELOPMENT AND POVERTY REDUCTION

Chelsea Lott
Adjudicator

March 6, 2018

CanLII Cite: 2018 BCIPC 11
Quicklaw Cite: [2018] B.C.I.P.C.D. No. 11

Summary: The Ministry applied for authorization under s. 43 to disregard the respondent's future access requests. The adjudicator held that the respondent's past requests were repetitive and that one was frivolous. However, the Ministry did not establish that future requests would be frivolous or that responding to the respondent's access requests would unreasonably interfere with its operations. The Ministry's application was denied.

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

Authorities Considered: Order F17-18, 2017 BCIPC 19; Auth (s. 43) 99-01 (December 22, 1999), online: https://www.oipc.bc.ca/decisions/170; Auth. (s. 43) 02-01 (September 18, 2002), online: https://www.oipc.bc.ca/decisions/171; Decision F09-04 2009 CanLII 42411 (BC IPC); Decision F11-03, 2011 CanLII 82435 (BC IPC); Order F17-18, 2017 BCIPC 19.

Case Considered: *Crocker v British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BC SC).

INTRODUCTION

[1] This inquiry is about an application by the Ministry of Social Development and Poverty Reduction (Ministry or Ministry of Social Development) to the Office of the Information and Privacy Commissioner (OIPC) for authorization under s. 43 of the *Freedom of Information and Protection of Privacy Act* (FIPPA)

to disregard a respondent's outstanding access requests and to impose conditions on future access requests.[1] More specifically, the Ministry seeks:

- Authorization to disregard the respondent's access requests made between November 17, 2016 and the date of this order.
- Authorization to disregard all access requests from the respondent in excess of one open access request at a time for a period of seven years.
- Authorization to not spend more than seven hours responding to any one access request from the respondent.
- Authorization for the Ministry to determine what constitutes a single access request for the purposes of the authorization.
- The respondent is prohibited from contacting the Ministry (verbally or in writing) with respect to the processing of a particular access request except and unless the Ministry contacts her first for clarification.[2]

ISSUES

1. Are the respondent's requests repetitious or systematic and if so, would they unreasonably interfere with the Ministry's operations?

2. Are the respondent's requests frivolous or vexatious?

3. If the answer is yes to either, what is the appropriate remedy?

[2] The Ministry has the burden of proof under s. 43.[3]

DISCUSSION

Background

[3] The Ministry administers and provides a number of assistance programs and services to over 100,000 individuals. Its programs include a bus pass program, child care subsidy, health and dental services and seniors supplement. The respondent is a beneficiary under a number of these programs and the majority of her requests relate to denials of benefits under these programs.[4]

Preliminary matter – procedural fairness

[4] The respondent alleges that the OIPC denied her natural justice by failing to provide her with "the full case against [her]."[5] She states that she cannot tell

[1] The Ministry at the time of the request was called the Ministry of Social Development and Social Innovation but was renamed following the 2017 provincial election.
[2] Ministry submissions at paras. 70–71.
[3] Order F17-18, 2017 BCIPC 19 at para. 4.
[4] Ministry submissions at paras. 4–5.
[5] Aug 12, 2017 email. The respondent advised the registrar of inquiries that she wanted to rely on her submissions to the OIPC investigator/mediator. The registrar consented to her request.

which of her requests the Ministry refers to and so cannot respond.[6] However, since making that submission, the respondent confirmed that she has received the Ministry's submissions.[7] All of the respondent's requests to the Ministry are set out as exhibits to an affidavit submitted by the Ministry. Further, the respondent was granted a two month adjournment to respond to the Ministry's submissions. Despite this, she chose not to provide a response. In my view the respondent has been afforded sufficient procedural fairness.

Section 43

[5] Section 43 of FIPPA provides:

> 43 If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 or 29 that
>
> (a) would unreasonably interfere with the operations of the public body because of the repetitious or systematic nature of the requests, or
>
> (b) are frivolous or vexatious.

[6] The abuse of access to information by an individual interferes with and diminishes the legitimate exercise of the same right by others.[8] Section 43 is, "an important remedial tool in the Commissioner's armory to curb abuse of the right of access."[9]

Previous s. 43 applications

[7] The Ministry has made four prior applications for relief under s. 43 in regard to this respondent.[10] At the time of the first application, the respondent had made 48 access requests consisting of 200 separate sub-requests over an eight year period. Former Commissioner Loukidelis granted relief under s. 43 to the Ministry for a two year period in Auth. (s. 43) 02-01.[11]

[8] After the expiry of the authorization, the respondent once again began making numerous requests to the Ministry, including sub-requests and repetitions of previous requests. This matter was resolved through mediation and the resulting agreement ran from September 2005 to July 2006. The Ministry made

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[6] *Ibid*.
[7] In a phone call with the registrar of inquiries.
[8] Auth. (s. 43) 99-01 (December 22, 1999), online: https://www.oipc.bc.ca/decisions/170 at p. 7.
[9] *Crocker v. British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BC SC) at para. 33.
[10] The previous applications were made by the Ministry of Human Resources, the Ministry of Housing and Social Development and the Ministry of Social Development. I presume that these were the same ministries in that they provided the same services just under different names.
[11] (September 18, 2002), online: https://www.oipc.bc.ca/decisions/171 [Auth. 02-01].

its third application in April 2008. Again, the Ministry was granted a two year period of relief in Decision F09-04.[12]

[9] After the expiry of Decision F09-04, the respondent made numerous requests to the Ministry for access to information. In November 2011, an adjudicator authorized the Ministry in Decision F11-03 to disregard any future requests from the respondent in excess of one open request at a time for five years.[13] The adjudicator also authorized the Ministry to not spend more than seven hours responding to each request. The Ministry was permitted to determine what constituted a single access request.[14]

Requests since Decision F11-03

[10] The Ministry's authorization under Decision F11-03 to disregard access requests expired in November 2016. Five days later, the respondent requested a copy of all "medical letters/notes/notes on prescription pads" over a five year period.[15] The applicant cancelled this request but only after the Ministry had already generated 19,725 pages of records in order to respond.[16]

[11] In the nine months since Decision F11-03 expired, the respondent has made 16 access requests. In response to those requests, the Province's information access operations (IAO) states that 24,220 pages of records have been collected and 7,268 pages reviewed. The Ministry says that the IAO has spent 363 hours processing the requests.[17]

Repetitious or systematic requests

[12] Section 43(a) authorizes a public body to disregard requests that unreasonably interfere with its operations because the requests are repetitious or systematic. A repetitious request is one that is made over again. A systematic request is characterized by a system, which is a method or plan of acting that is organized and carried out according to a set of rules or principles.[18]

[13] This application is unusual in that there are no outstanding requests in evidence for my consideration. The evidence is of completed or withdrawn requests. The Ministry is seeking authorization to disregard possible future requests, which it alleges will be repetitious or systematic and will unreasonably interfere with its operations. It relies on the nature of the past requests to support

[12] 2009 CanLII 42411 (BC IPC).
[13] 2011 CanLII 82435 (BC IPC).
[14] This background is all set out in the affidavit of a manager with information access operations at paras. 8–12 [IAO manager's affidavit] as well as the decisions referred to.
[15] Email dated November 22, 2016 provided after the close of submissions and referred to in the IAO manager's affidavit at para. 12 [Nov 22, 2016 email].
[16] IAO manager's affidavit at paras. 12, 16 and Exhibit J.
[17] *Ibid* at para. 32.
[18] Order F17-18, 2017 BCIPC 19 at para. 7.

its application. Given that context, it is appropriate to consider the character of the respondent's past requests in determining whether the Ministry is entitled to a remedy under s. 43 of FIPPA.[19]

[14] It appears that shortly after the expiry of Decision F11-03 in November 2016, the respondent returned to the same behaviour which resulted in the previous three s. 43 authorizations. The respondent has a habit of making closely related or overlapping access requests.

[15] The majority of the respondent's current requests relate to transportation arrangements and expenses for her medical appointments. The requests are often repetitive in that they have only slightly different wording or the dates overlap with previous requests. As an example, the respondent requested information from the Ministry about reimbursement for medical transportation between July–October 2016. She specifically asked for records showing trips undertaken by two named individuals who drove her to the appointments as well as the date and destination.[20] Three weeks later, she sought similar information, but phrased the request as seeking copies of her requests for drivers to certain medical therapies in 2016 as well as whether the Ministry paid for the transportation.[21] Five days later she again sought similar information by asking for records relating to her request for a driver to be paid in September and October 2016 and records showing the destination, name of the driver and amount paid by the Ministry.[22]

[16] I have also considered the previous s. 43 authorizations involving the respondent. The subject matter of the respondent's requests in the present case were very similar to some of those which led to previous s. 43 authorizations. For example, the respondent has previously made requests for records about:

- her claims for travel expense reimbursement;
- records relating to entitlement to physiotherapy expenses;
- records relating to reconsideration applications the respondent made to the Ministry and the Ministry's responses to those applications;[23]
- tribunal decisions related to applications for benefits;
- physicians' letters;
- her past application for benefits; and
- copies of policies.[24]

[17] The respondent submits that her more recent requests for records are not exactly identical to her previous requests and cover different dates. Although her

[19] Auth. 02-01, *supra* at para. 24.
[20] Nov 22, 2016 email.
[21] IAO manager's affidavit at Exhibit C.
[22] *Ibid* at Exhibit F.
[23] Auth. 02-01, *supra* at para. 25.
[24] Decision F09-04, *supra* at para. 14.

requests may not be identical timeframes, many do overlap and therefore cover the same records.

[18] The respondent further submits that she had legitimate reasons for all of her requests and that every request was for information she needed. The respondent argues that she had to repeat her requests because IAO would send her records in a manner that did not accommodate her disability. There is an email from the respondent which demonstrates that she explained this to the Ministry on one occasion when she repeated two access requests.[25] However, there is no evidence that her other repeat access requests were due to the actions of IAO.

[19] The respondent also indicates that she had a water leak which damaged some records and so she had to request those records again. However, there is no mention in any of her repeat requests to the Ministry that she was making the request because a water leak damaged the previous records. I note the respondent had similar explanations for repetitive requests which nevertheless resulted in relief being granted to the Ministry in previous s. 43 authorizations.[26]

[20] Based on my review of the respondent's recent requests to the Ministry as well as past authorizations I am satisfied that most of the respondent's past requests were repetitious within the meaning of s. 43(a).

Unreasonable interference

[21] The next issue is whether the Ministry of Social Development has established that responding to the respondent's future requests would unreasonably interfere with its operations. The BC Supreme Court said the following in *Crocker* about the issue of unreasonable interference with operations:

> 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.[27]

[22] The evidence about the respondent's access requests since the expiry of Decision F11-03 is contained in the affidavit of an IAO manager. IAO processes access requests on behalf of all provincial government public bodies.[28] IAO is a program within the Ministry of Citizens Services and it is not part of the Ministry

[25] IAO manager's affidavit at Exhibit J.
[26] A series of fires in Auth. 02-01 at para. 22 and water damage in Decision F09-04 at para. 16.
[27] *Crocker, supra* at para. 37.
[28] IAO manager's affidavit at para. 4.

of Social Development. The evidence before me primarily addresses the impact on IAO employees who are part of the Ministry of Citizens Services. Although I appreciate that the Ministry of Citizens Services is providing a service to the Ministry of Social Development, they are separate public bodies under FIPPA.[29] In order for me to attribute the work undertaken by IAO to the Ministry of Social Development I require evidence of that linkage and its effect on the Ministry of Social Development.

[23] I have no direct evidence from the Ministry of Social Development as to how the respondent's recent requests have unreasonably interfered with its own operations. The Ministry's evidence consists of what the IAO manager says she was told takes place in the Ministry of Social Development in response to the respondent's requests. According to the IAO manager:

> … because of the age of the records she is seeking and the large volume of records in the Applicant's file, a Ministry employee (or a small rotation of them) need to locate what she is looking for. Often those searches involved a search for records stored offsite, which takes a couple of days to complete. They must then go by hand go [sic] through all the boxes searching for what the Applicant has requested. Doing so requires that they stop what they are doing at the District Office. This means that record gathering by Ministry staff takes several weeks, if not more, to process the Applicant's requests than it does for other applicants.[30]

[24] This evidence is general and vague. It's not clear to me that the Ministry is referring to requests since the expiry of the last s. 43 authorization.

[25] The IAO manager further says that due to the frequency of the respondent's contact, the Ministry of Social Development has been forced to assign one worker the task of liaising with the respondent. The respondent has also been limited to one 15 minute phone call a week to the Ministry of Social Development.[31] The evidence does not specify whether this is for communications related to the respondent's access requests or for communications about other matters she may have with the Ministry of Social Development.

[26] The Ministry of Social Development's evidence is that in an eight month period it spent 127 days locating and retrieving records and determining the responsiveness of those records.[32] Again, I find this evidence to be vague. This may mean it took 127 days to respond to the request, or alternatively, that employees spent 127 days actually working on the response. The former does not necessarily stem from the nature of the respondent's requests but could

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[29] Schedule 1. The definition of "public body" in FIPPA includes "a ministry of the government of British Columbia."
[30] IAO manager's affidavit at para. 26.
[31] *Ibid* at para. 27.
[32] *Ibid* at para. 32(g).

result from a lack of sufficient resources being allocated to the task. Regardless, I do not have the necessary context or evidence about the operations of the Ministry of Social Development to determine what number of days would be an unreasonable interference.

[27] Finally, I have considered the fact that the OIPC has made previous s. 43 authorizations pertaining to the respondent. That alone is not sufficient, however, to conclude that responding to the respondent's future requests would unreasonably interfere with the Ministry's operations.

Frivolous or vexatious

[28] Section 43(b) applies to requests that are frivolous or vexatious. The following non-exhaustive list of factors should be considered when determining whether a request is frivolous or vexatious:[33]

- A "frivolous" request is one that is made primarily for a purpose other than gaining access to information. It will usually not be enough that a request appears on the surface to be for an ulterior purpose – other facts will usually have to exist before one can conclude that the request is made for some purpose other than gaining access to information.
- The class of "frivolous" requests includes those that are trivial or not serious.
- The class of "vexatious" requests includes those made in "bad faith", i.e., for a malicious or oblique motive. Such requests may be made for the purpose of harassing or obstructing the public body.
- The fact that one or more requests are repetitive may, alongside other factors, support a finding that a specific request is frivolous or vexatious.

[29] The Ministry submits that "making large requests for records and then cancelling after months are spent processing the requests" is frivolous.[34] There is one example of such behaviour. The applicant's request for "all medical letters/notes/notes on prescription pads" generated over 19,000 pages of records was cancelled five months after it was made.[35] I agree that this was a frivolous request and an abuse of the respondent's rights under FIPPA. However, I am not being asked to grant the Ministry a remedy regarding the request. Further, I am not satisfied that based on one frivolous request, that the Ministry should be authorized to disregard all of the respondent's future requests pursuant to s. 43(b).

[33] Order F17-18, *supra* at para. 8.
[34] Ministry submissions at para. 42.
[35] IAO manager's affidavit at paras. 12 and 23.

CONCLUSION

[30] For the reasons provided above, the Ministry's application for authorization to disregard the respondent's future access requests under s. 43 of FIPPA is denied.

March 6, 2018

ORIGINAL SIGNED BY

Chelsea Lott, Adjudicator

OIPC File No.: F17-70424