Order F21-31

DISTRICT OF KENT

Ian C. Davis
Adjudicator

July 23, 2021

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Summary: The District of Kent (District) applied for authorization under s. 43 of the *Freedom of Information and Protection of Privacy Act* to disregard 59 outstanding access requests that the respondent made to the District. The District also sought relief relating to any future access requests made by the respondent. During the inquiry, the respondent withdrew most of her access requests. The adjudicator found that the remaining outstanding access requests were not frivolous or vexatious (s. 43(b)) and would not unreasonably interfere with the District's operations because of the repetitious or systematic nature of the requests (s. 43(a)). The adjudicator concluded that relief under s. 43 was not warranted in this case.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 43(a) and 43(b).

INTRODUCTION

[1] The District of Kent applies for authorization under s. 43 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) to disregard 59 outstanding access requests that the respondent, a former District employee, made to the District from April 27 to May 26, 2021. The District submits that responding to these requests would unreasonably interfere with its operations because of the repetitious or systematic nature of the requests (s. 43(a)). The District also submits that the requests are frivolous and vexatious (s. 43(b)).

[2] In addition, the District seeks prospective relief. Specifically, the District seeks an order authorizing it to disregard "all further access requests made by, or on behalf of, the respondent in excess of one active request at a time, to a limit of no more than two requests in a calendar year, and with the District not being

required to spend more than 5 hours of staff time in responding to each request."[1]

PRELIMINARY MATTER

[3] The respondent says she has limited knowledge of FIPPA and how to make access requests. She says her intent was not to burden the District with her requests and she remains open to reaching a resolution.[2]

[4] In her submissions, the respondent agreed to forego all of her outstanding access requests "at this time", except for the requests for:

- all her timesheets from when she was an employee of the District from 2010 to 2019;
- all records relating to the electrocution of a named individual that occurred in the District in 2015; and
- the 2006-2016 and 2020 statements of financial information that the District is required to prepare annually pursuant to the *Financial Information Act* (the respondent submitted 12 separate requests for these records, one for each year).[3]

[5] Decision F06-03 also dealt with an access applicant who withdrew some outstanding access requests after a public body made a s. 43 application.[4] The adjudicator found that the applicant was free to withdraw the requests, so the adjudicator did not consider them under s. 43. However, the adjudicator considered the withdrawn requests as context for determining whether s. 43 applied to other outstanding requests.

[6] I will take the same approach here. Given what the respondent says in her submissions, I am satisfied she has withdrawn all but 14 of the 59 access requests she initially made.[5] These 14 requests are now the only requests the respondent is making, so they are the only ones left to consider in this s. 43 application. I will not consider whether the withdrawn requests warrant relief under s. 43.

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[1] District's initial submissions at para. 60.
[2] Respondent's submissions at para. 33.
[3] Respondent's submissions at paras. 36-39.
[4] Order F06-03, 2006 CanLII 13535 (BC IPC).
[5] I accept the summary of the 59 access requests in Exhibit "B" to the Affidavit of the District's Director of Corporate Services [Director]. Based on my review of the requests, I find that the requests the respondent has not withdrawn are request numbers 10-21, 25 and 27. Although other requests also relate to the electrocution matter, such as request number 32, I am satisfied that those other requests are already captured by request number 10.

[7] The District notes that the respondent agreed to forego the withdrawn requests "at this time", suggesting she may make them again in the future. The District seeks authorization under FIPPA "clearly stating that it may disregard" the withdrawn requests, "now and in the future."[6]

[8] The District does not need authorization under FIPPA to disregard the withdrawn requests now. There is nothing to disregard. The respondent is no longer making those requests, so the District is not required to respond to them.

[9] As for the future, in my view, there is no basis for me to make an authorization prohibiting the respondent from remaking the withdrawn requests. The withdrawn requests are no longer in dispute under s. 43, so there is no basis under that section for me to grant the authorization the District seeks. That said, the District is free to apply for s. 43 relief in the future if the applicant makes access requests that warrant such relief.

[10] To summarize, I am satisfied by the respondent's submissions that she has withdrawn all but 14 requests, which I will refer to below as the "outstanding requests". The outstanding requests are the only requests left to consider in this application.

ISSUES

[11] The issues in this application are:

1. Would responding to the outstanding requests unreasonably interfere with the District's operations because of the repetitious or systematic nature of the requests (s. 43(a))?

2. Are the outstanding requests frivolous or vexatious (s. 43(b))?

3. If the answer to either of these questions is "yes", what relief, if any, is appropriate?

[12] The burden of proof is on the District to show that s. 43(a) or s. 43(b) applies to the outstanding requests.[7]

[6] District's reply submissions at para. 30.
[7] Order F19-44, 2019 BCIPC 50 (CanLII) at para. 4.

BACKGROUND

[13] The respondent was employed by the District from March 2010 to October 2019. She says she resigned in October 2019 "due to workplace harassment, bullying, intimidation, abuse of power, and poisoned work environment".[8]

[14] On February 25, 2021, the respondent made 12 access requests to the District for various records including her personnel file, payroll records and performance reviews, an employment contract between the District and its Chief Administrative Officer, records setting out job qualifications for certain District positions, and records relating to the District's workplace bullying and harassment policy (February requests). The respondent made all of the February requests within a timespan of just over an hour.

[15] The February requests are not the withdrawn requests or the outstanding requests. The District does not seek authorization under s. 43 to disregard the February requests.

[16] On March 2, 2021, the District notified the respondent that it may assess a fee for processing the February requests and requested that the respondent pay a 50% deposit upon receiving the fee estimate. The respondent requested a fee waiver. The District denied the request for a fee waiver and provided the respondent with a fee estimate of $210. The respondent then complained to the Office of the Information and Privacy Commissioner (OIPC) about the fee and the District's decision to deny her a fee waiver. The OIPC is currently investigating the fee complaint.

[17] The respondent also complained to the OIPC about the timing of the District's responses to the February requests. This complaint appears to have been resolved; the District says the OIPC "confirmed the District's response date as valid".[9]

[18] From April 27 to May 26, 2021, the respondent made 59 access requests to the District in 59 separate emails. These are the 45 withdrawn requests plus the 14 outstanding requests. The withdrawn requests were for various records including copies of invoices, organizational charts, reimbursement payments, correspondence, "cease and desist" letters, a specific email, a reference letter, various financial documents and a list of all numbered companies registered to the District.

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[8] Respondent's submissions at para. 7. The information in this background section is based on the evidence, which I accept, in Affidavit #1 of the Director at paras. 4, 9-14 and Exhibits "A" through "C", and the respondent's submissions at paras. 1-2, 7, 33 and 36-39.
[9] Affidavit #1 of the District's Director at para. 13.

[19] By letter to the OIPC dated May 27, 2021, the District made the s. 43 application at issue in this inquiry. The respondent has not made any further access requests to the District since.

AUTHORIZATION TO DISREGARD REQUESTS – SECTION 43

[20] Section 43 of FIPPA provides:

> If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 [access requests] or 29 [correction requests] that
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> (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.

[21] Rights of access under FIPPA "should only be used in good faith" and "must not be abused".[10] Section 43 is "an important remedial tool in the Commissioner's armory to curb abuse of the right of access."[11] However, a decision to grant a s. 43 authorization must be carefully considered because it curtails or eliminates a person's rights of access to information.[12]

Unreasonable interference because repetitious or systematic – s. 43(a)

[22] Section 43(a) applies if the District establishes that:

- the outstanding requests are repetitious or systematic in nature; and
- if so, responding to them would unreasonably interfere with the District's operations.[13]

[23] In my view, it is not necessary to consider whether the outstanding requests are repetitious or systematic because, even if they are, I find they would not unreasonably interfere with the District's operations.

[24] In the District's initial submissions, it provided evidence which would have satisfied me that responding to the 59 access requests initially at issue (i.e., the 45 withdrawn requests plus the 14 outstanding requests) would have unreasonably interfered with the District's operations. However, as a result of the

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[10] Auth. (s. 43) 99-01 (December 22, 1999) at pp. 7-8. Available on the OIPC website under "Decisions".
[11] *Crocker v. British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BC SC) at para. 33.
[12] Auth. (s. 43) 02-02 (November 8, 2002) at para. 15. Available on the OIPC website under "Decisions".
[13] Auth. (s. 43) 02-01 (September 18, 2002) at paras. 16-17. Available on the OIPC website under "Decisions".

respondent withdrawing most of her requests, the only requests now at issue are the 14 outstanding requests. The District did not specifically address in its reply submissions whether responding only to those 14 outstanding requests would unreasonably interfere with its operations.

[25] On the evidence before me, and without more from the District, I am not satisfied that responding to the outstanding requests would unreasonably interfere with the District's operations. The District did not provide an estimate of how long it would take to process the outstanding requests and I cannot determine this from the District's overall estimate for all 59 requests. The District responded to the February requests and I do not consider the outstanding requests to be any more burdensome than the February requests.

[26] Further, in my view, the requests for the timesheets and *Financial Information Act* statements are not unreasonably burdensome. I find it reasonable to assume that these records already exist and would be easy to locate and prepare for disclosure. The District suggests that some of the older requested records may no longer be in its custody or control.[14] If that is the case, it simplifies the District's responses and I do not see how responding to these requests would unreasonably interfere with the District's operations.

[27] As for the request for all records relating to the electrocution incident, the District did not say how many responsive records there might be or how long it would take to process them, so I cannot asses the magnitude of the burden this request would impose. I am not persuaded that this request would unreasonably interfere with the District's operations.

[28] I conclude that responding to the outstanding requests would not unreasonably interfere with the District's operations, so s. 43(3)(a) does not apply.

Frivolous or vexatious – s. 43(b)

[29] The next issue is whether the outstanding requests are "frivolous" or "vexatious" under s. 43(b). These terms are not defined in FIPPA. However, past orders provide the following non-exhaustive list of factors to consider in deciding whether a request is frivolous or vexatious:

- A frivolous or vexatious request is one that is an abuse of the rights conferred under the Act.
- The determination of whether a request is frivolous or vexatious must, in each case, keep in mind the legislative purposes of the Act, and

[14] District's reply submissions at paras. 31 and 33.

those purposes should not be frustrated by an institution's subjective view of the annoyance quotient of particular requests.

- 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.[15]

[30] These factors have been consistently relied upon to decide s. 43 applications.[16] I will apply them here. If the District establishes a *prima facie* case that the requests are frivolous or vexatious, the respondent bears some practical onus to explain why they are not.[17]

Positions of the parties

[31] The District submits that the outstanding requests are frivolous and vexatious.[18] It says the respondent made the outstanding requests in bad faith because they are part of her own personal investigation into matters that are already being dealt with through more appropriate processes.[19] The District argues that the respondent's requests are vexatious because she appears to have made them with "the sole aim of proving some sort of wrongdoing on the part of the District", even though there is "little to no likelihood of any evidence of wrongdoing appearing in the records."[20] The District says the outstanding requests are part of a "wide-ranging campaign against the District."[21]

[32] The District also argues that the outstanding requests are frivolous and vexatious because:

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[15] Order F19-44, 2019 BCIPC 50 (CanLII) at para. 12, citing Auth. (s. 43) 02-02 (November 8, 2002) at para. 27.
[16] See, e.g., Order F20-15, 2020 BCIPC 17 (CanLII) at para. 23; Order F19-44, 2019 BCIPC 50 (CanLII) at para. 12; Order F19-34, 2019 BCIPC 37 (CanLII) at para. 17.
[17] Auth. (s. 43) 02-02 (November 8, 2002) at para. 4.
[18] District's initial submissions at paras. 42-57.
[19] District's reply submissions at paras. 11-15.
[20] District's reply submissions at para. 20.
[21] District's reply submissions at para. 18.

- the respondent is requesting old records;
- she should already have her timesheets;
- she is encouraging other parties to make requests for the same information;
- she has been disrespectful and hostile to District staff when attending the District's office in person; and
- she does not have a genuine and serious interest in the records.

[33] As I understand the respondent's submissions, she denies that the outstanding requests are frivolous or vexatious. The respondent says the information she is requesting relates to matters of public interest.[22] She says that, due to "deeply disturbing" information she gathered from her former District co-workers, she decided to begin her own "investigation – not only for [her] own personal matters, but to investigate all of the information that was provided to [her] from individuals working in Agassiz."[23] The respondent says she has contacted various citizens and organizations in the course of her investigation.

[34] The respondent also says she believes she needs the requested information to assist her with "a personal claim as well as a group claim through BC Human Rights and/or the Law Courts", and her "submission to claim compensation" under a bullying and harassment class action settlement.[24]

[35] The respondent denies that she was disrespectful and hostile to District staff in her personal interactions with them.[25] The respondent audio-recorded two interactions with District staff (the District objects to this) and provided them to me for review.

[36] The respondent also says she is working together with other concerned organizations and individuals who may submit access requests, but that is beyond her control.[26]

[37] Further, the respondent stated that, due to her lack of knowledge of the FIPPA process, she looks forward to receiving guidance from the OIPC "on what would be considered reasonable when submitting future requests for information."[27] The respondent says she will abide by the OIPC's recommendations.

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[22] Respondent's submissions at para. 33.
[23] Respondent's submissions at para. 16.
[24] Respondent's submissions at paras. 21-22.
[25] Respondent's submissions at para. 28.
[26] Respondent's submissions at para. 33.
[27] Respondent's submissions at para. 41.

Are the outstanding requests frivolous or vexatious?

[38] For the reasons provided below, I am not persuaded that the outstanding requests are frivolous or vexatious.

[39] In Order F20-15, which the District relies upon,[28] the adjudicator found that some of the applicant's requests were vexatious because the applicant was attempting to show that the public bodies' staff engaged in unethical or inappropriate behaviour and the applicant appeared to have made the requests for the sole aim of putting the public bodies' staff in a bad light.[29] The adjudicator ultimately concluded, based on many factors, that the requests were vexatious because the applicant had "chosen to express her frustration, distrust and displeasure" with the public bodies' actions by "harassing them into responding to her requests and associated demands."[30]

[40] I am not persuaded that the respondent's outstanding requests are frivolous or vexatious because she is investigating the District. I do not read Order F20-15 or any other past orders as prohibiting an applicant from investigating a public body and attempting to hold the public body accountable. One of the fundamental purposes of FIPPA is to make public bodies more accountable to the public by giving the public a right of access to records.[31]

[41] What s. 43(b) and decisions like Order F20-15 do prohibit, however, is using access requests as a mere means to harass, obstruct or otherwise harm public bodies, rather than to access information. That is not what I find is going on in this case. The material before me clearly shows there is conflict and distrust between the District and the respondent. However, that is not enough to warrant s. 43 relief. The District must show that the respondent is abusing FIPPA.

[42] Ultimately, I am not persuaded that the respondent is making the outstanding requests simply to harass or obstruct the District rather than to access information. In my view, if the respondent were truly aiming to harass or obstruct the District, she would not have withdrawn the majority of her requests, proposed a resolution, stopped making requests upon receiving the District's s. 43 application, sought guidance from the OIPC on how to make FIPPA requests in the future and agreed to abide by the OIPC's recommendations. In my view, these actions and attitudes are not consistent with someone maliciously determined to use access requests to harass or obstruct the District.

[43] I have also reviewed the evidence regarding the respondent's personal interactions with District staff. It demonstrates some tension between the

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[28] District's initial submissions at paras. 44-48; District's reply submissions at paras. 19-21.
[29] Order F20-15, 2020 BCIPC 17 (CanLII).
[30] Order F20-15, *ibid* at para. 33.
[31] FIPPA, s. 2(1).

respondent and the District. However, objectively, I find the interactions fall short of establishing that the respondent is making access requests simply to harass or obstruct the District. There is a level of tension and conflict, but that does not mean that the respondent is not genuinely interested in the information she is requesting.

[44] Further, I am not persuaded on the evidence before me that the respondent is encouraging others to make access requests in a manner that abuses FIPPA. The respondent admits she is working together with other concerned organizations and individuals who may also request information from the District. However, I do not see that as abusing FIPPA. In my view, the evidence does not establish that the respondent is directing others to repeat her requests in an attempt to subvert the FIPPA process or abuse FIPPA access rights.

[45] As evidence that the respondent is improperly encouraging others to submit access requests, the District submitted a Facebook post that compares the compensation and expenses of the Chief Administrative Officers in Hope, Agassiz, Harrison and Mission.[32] The post does not mention the respondent by name, but the District says the information included in the post "could only have been obtained from materials viewed by the respondent" when she attended the District offices.[33] In my view, this post is legitimate public debate about public information. It does not mention FIPPA or access requests at all, so I do not see how it demonstrates an abuse of FIPPA.

[46] Turning to the outstanding requests individually, I am not persuaded that the request for the respondent's timesheets is frivolous or vexatious. The timesheets are the respondent's personal information. She says she needs them for a legal claim and to claim compensation in a class action settlement. These are not trivial matters and I accept that the respondent has a genuine interest in her timesheets, even if they are dated.

[47] The respondent also says she does not have the timesheets because they were saved on her work computer. I accept that. Accordingly, I am not satisfied that this request is frivolous on the basis that the respondent previously had or now has the records.

[48] I am also not persuaded that the request for all records relating to the electrocution incident that occurred in the District in 2015 is frivolous. The subject matter of this request is clearly serious and not trivial.

[49] However, the District argues that this request is vexatious because the matter is currently being litigated.[34] The District submits that it is "entirely

[32] Affidavit of the Director at Exhibit "G".
[33] District's initial submissions at para. 50.
[34] District's reply submissions at para. 32.

inappropriate for the respondent to be inserting herself into litigation that has nothing to do with her personally."[35] The District relies on Order F18-37 where the adjudicator found it vexatious for an applicant to make access requests aimed at investigating a public body's response to another access request after the applicant had already complained to the OIPC about the adequacy of the public body's response.[36]

[50] The respondent says she has a "close family connection" with the family affected by the electrocution incident and she is "helping the family obtain" the requested records.[37] The respondent attached a letter to her submissions from one of the family members affected. This individual says the respondent is assisting the family to obtain answers about the incident and asked that the information requested from the District be provided to the family through the respondent.

[51] In the circumstances, I am not persuaded that the access request for all records relating to the electrocution incident is vexatious. Based on the material before me, I accept that the respondent's motive for making this request is to assist the affected family. I do not see how that is a bad faith motive or an attempt to harass or obstruct the District. The respondent is not conducting a collateral attack on a regulatory complaint investigation process, as in Order F18-37. I am not persuaded that seeking answers through FIPPA amounts to inappropriate interference in ongoing litigation. FIPPA and litigation are two separate processes and litigation is not a bar to access to information under FIPPA.

[52] Finally, the other outstanding requests are for the District's *Financial Information Act* statements for 2006-2016 and 2020.

[53] In my view, these requests are not frivolous or vexatious. I find it very difficult to accept that it is frivolous or vexatious for an applicant to request records that the law requires a public body to prepare and, in certain circumstances, make available to the public for the purposes of accountability. I am not persuaded that the respondent is making these requests simply to harass or annoy the District. The information in the records may or may not ultimately prove useful to the applicant, but that does not mean the request is trivial or that the respondent is not genuinely interested in the information.

[54] I conclude that the outstanding requests are neither frivolous nor vexatious, so s. 43(b) does not apply.

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[35] District's reply submissions at para. 15.
[36] Order F18-37, 2018 BCIPC 37 (CanLII) at paras. 55-59; District's reply submissions at paras. 12-14.
[37] Respondent's submissions at para. 37.

Request for guidance

[55] Given my conclusions above, no relief under s. 43 is warranted in this case. However, as noted, the respondent seeks guidance from the OIPC "on what would be considered reasonable when submitting future requests for information."

[56] I think it would help the respondent to know, and it is appropriate to say here, that I do not consider it reasonable for her to have submitted 59 access requests in the span of a month to the District, a relatively small public body with limited resources. The respondent says she did not intend to burden the District. However, the effect of her actions was to barrage the District. It is clear to me that, in making the 59 requests, the respondent did not adequately consider the District's operations and responsibilities or the interests of her fellow citizens who also have pressing claims to the District's finite resources. If the respondent had not withdrawn most of her access requests and taken the reasonable position she did in her inquiry submissions, I likely would have granted at least some of the s. 43 relief the District sought.

[57] However, as discussed above, I am satisfied that the respondent appropriately adjusted her position once confronted with the District's s. 43 application and that the specific requests now outstanding do not ultimately run afoul of s. 43. That said, it would have been preferable for the respondent to have taken the position she took in response to the District's s. 43 application prior to making the 59 access requests.

[58] Apart from the above, in my view, the guidance the respondent is seeking is already available in the language of s. 43 itself and past orders interpreting that section. I encourage the respondent to proceed accordingly. As noted above, the District is free to apply for s. 43 relief in the future if the applicant makes access requests that warrant such relief.

CONCLUSION

[59] For the reasons given above, I find that ss. 43(a) and 43(b) do not apply to the outstanding requests and the District is not required to respond to the withdrawn requests.[38] As a result, I conclude it is not appropriate to grant any relief under s. 43 in relation to the outstanding requests or any future requests. The application is dismissed.

July 23, 2021

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.: F21-86224

[38] See *supra* note 6.