



Order F21-33

## VANCOUVER COASTAL HEALTH AUTHORITY

Elizabeth Barker  
Director of Adjudication

July 29, 2021

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**Summary:** Vancouver Coastal Health Authority (VCH) failed to respond to an applicant’s access requests within the timelines required by the *Freedom of Information and Protection of Privacy Act*. The director found that VCH had not fulfilled its duties under ss. 6(1) and 7 of the Act and ordered it to respond to the access request by a specified deadline.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 7(1), 7(2), 7(3), 8(1) 10(1)(c), 10(2) and Schedule 1 (definition of “day”).

### INTRODUCTION

[1] This inquiry is about whether Vancouver Coastal Health Authority (VCH) complied with its duty to respond to the applicant’s access requests within the required timelines in the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] On March 10, 2021, the applicant, who is a journalist, requested “All of chair Penny Ballem's sent and received email, from 6:30 a.m. to 7:30 p.m. on March 8, 2021.” VCH confirmed receipt of the request, acknowledged it had 30 working days to respond under FIPPA, and said it would provide its response by April 23, 2021.

[3] On April 29, 2021, the applicant complained to the Office of the Information and Privacy Commissioner (OIPC) that VCH had failed to respond to his request in accordance with the timelines set out in FIPPA. Mediation did not resolve the matter and it proceeded to inquiry.

[4] The applicant and VCH both provided brief inquiry submissions. There was no affidavit evidence or supporting documentation from either party.

[5] VCH's initial submission was received in this Office on July 8, 2021. As of that date, VCH had not provided its decision in response to the March 10, 2021, access request.

## **ISSUES**

[6] The issues to be decided in this inquiry are as follows:

1. Did VCH make every reasonable effort to respond without delay to the requests as required by s. 6(1) of FIPPA?
2. Did VCH fail to respond to the requests in accordance with the requirements of s. 7 of FIPPA?
3. If the answer is "yes" to either of the above questions, what is the appropriate remedy?

[7] Section 53(3) of FIPPA says that the failure of the head of a public body to respond in time to a request for access to a record is to be treated as a decision to refuse access to the record.

[8] Section 57(1) of FIPPA says that at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the records or part.

## **DISCUSSION**

### ***Background***

[9] VCH is a regional health authority serving 1.25 million people within its jurisdiction, which includes Vancouver, Richmond, North Shore, Coast Garibaldi, Sea-to-Sky, Sunshine Coast, Powell River, Bella Bella, and Bella Coola. Dr. Penny Ballem has served as the Chair of VCH's Board of Directors since January 2019.<sup>1</sup>

### ***Duty to Respond Without Delay***

[10] FIPPA imposes obligations on public bodies to respond to access requests within certain timelines. The sections of FIPPA that are relevant in this inquiry are as follows:

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<sup>1</sup> VCH's initial submission at para. 10.

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**Duty to assist applicants**

- 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

**Time limit for responding**

- 7(1) Subject to this section and sections 23 and 24 (1), the head of a public body must respond not later than 30 days after receiving a request described in section 5 (1).
- (2) The head of the public body is not required to comply with subsection (1) if
- (a) the time limit is extended under section 10, ...
- (3) If the head of a public body asks the commissioner under section 43 for authorization to disregard a request, the 30 days referred to in subsection (1) do not include the period from the start of the day the application is made under section 43 to the end of the day a decision is made by the commissioner with respect to that application.
- ...

**Contents of response**

- 8(1) In a response under section 7, the head of the public body must tell the applicant
- (a) whether or not the applicant is entitled to access to the record or to part of the record,
  - (b) if the applicant is entitled to access, where, when and how access will be given, and
  - (c) if access to the record or to part of the record is refused,
    - (i) the reasons for the refusal and the provision of this Act on which the refusal is based,
    - (ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and
    - (iii) that the applicant may ask for a review under section 53 or 63.
- ...

### Extending the time limit for responding

10(1) The head of a public body may extend the time for responding to a request for up to 30 days if one or more of the following apply:

(a) the applicant does not give enough detail to enable the public body to identify a requested record;

(b) a large number of records are requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body;

(c) more time is needed to consult with a third party or other public body before the head can decide whether or not to give the applicant access to a requested record;

(d) the applicant has consented, in the prescribed manner, to the extension.

(2) In addition to the authority under subsection (1), with the permission of the commissioner, the head of a public body may extend the time for responding to a request as follows:

(a) if one or more of the circumstances described in subsection (1)(a) to (d) apply, for a period of longer than the 30 days permitted under that subsection;

(b) if the commissioner otherwise considers that it is fair and reasonable to do so, as the commissioner considers appropriate.

...

[11] Schedule 1 of FIPPA says that "day" does not include a holiday or a Saturday.

#### *VCH's submission*

[12] VCH says that it was unable to respond to the access request by the legislated response date because it has been managing an extraordinary volume of access requests as a result of the ongoing COVID-19 pandemic and it was backlogged and unable to process this particular access request by the legislated date.<sup>2</sup> VCH says it received 42% more access requests in January 1-July 7, 2021 than it did in January 1- June 7, 2019. In addition, VCH says that it received 22 requests from the applicant between January 1 and July 7, 2021.

[13] VCH also says that Dr. Ballem has been managing an extraordinary volume of responsibilities as a result of the ongoing COVID-19 pandemic. VCH says that in addition to her usual professional roles and responsibilities,<sup>3</sup> she was

<sup>2</sup> VCH's initial submission at para. 10.

<sup>3</sup> She is the Chair of BCH's Board of Directors, a UBC clinical professor and a fellow of the Canadian Academy of Health Sciences.

appointed by the Ministry of Health as the executive lead of British Columbia's COVID-19 vaccine program on January 14, 2021. VCH says:

Its scale-up, especially as more COVID-19 vaccines became available during the March-July 2021 time period, coincided with the timing of this access request. Due to these added responsibilities, Dr. Ballem has been extremely busy and it has been difficult to coordinate time with her to review the Records prior to release.<sup>4</sup>

[14] VCH says that its FOI Office “is actively working with Dr. Ballem to review the Records and to release them as soon as is practically possible, given the other responsibilities that she is currently managing. VCH’s FOI Office anticipates that it will be able to release the Records in the next two to three weeks.”<sup>5</sup>

[15] VCH concludes its submission by saying:

For the reasons outlined above, VCH is seeking an extension of time in order to release the Records. This is not to diminish the importance of VCH’s FOI obligations under *FIPPA* as it pertains to the Applicant’s access request. Rather, it is to reflect the reality of the impact of the COVID-19 pandemic response activities on VCH’s ability to meet those obligations at these critical junctures of the COVID-19 vaccine program. VCH remains committed to working transparently and diligently to meet its FOI obligations to the best of its ability, recognizing the very real constraints being imposed on its FOI processes by forces beyond its control.<sup>6</sup>

[16] As the applicant acknowledges, VCH says that, on April 30, 2021, it notified the applicant that the responsive records contain information that VCH says affect the interests of a third party, requiring third party consultation under s. 23 of *FIPPA*.

#### *Applicant’s submission*

[17] The applicant submits that VCH failed to uphold its obligations under s. 6. He says that VCH did not communicate with him about its alleged hardships and ask him to consent to a delay, nor did it ask the OIPC for an extension.<sup>7</sup>

[18] He says, “VCH would have been better to fulfil the applicant’s request, than to advance a litany of excuses. VCH, from its Chair on down, is simply unwilling to provide access to records.”<sup>8</sup> In support, he cites the OIPC’s 2016 audit of the City of Vancouver’s handling of *FIPPA* access requests during the

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<sup>4</sup> VCH’s initial submission at para. 11.

<sup>5</sup> VCH’s initial submission at para. 14. See also VCH’s reply submission dated July 20, 2021.

<sup>6</sup> VCH’s initial submission at para. 15.

<sup>7</sup> Applicant’s submission at para. 12.

<sup>8</sup> Applicant’s submission at para. 4.

time frame that Dr. Ballem was the City Manager.<sup>9</sup> He also cites news articles about how municipal officials are reluctant to respond to journalists' FIPPA access requests. The applicant says that access to information is a quasi-constitutional right and the media have a right to timely, free and broad access to the records of public bodies. He adds that the public body's duty to provide access to records should not be defined by the willingness of the public body and its staff.<sup>10</sup>

[19] The applicant says, "The 'chair-has-no-time' excuse is presented without any evidence, except elements copied from her bio. There is no evidence about her actual workload or schedule. The submission is, therefore, meaningless."<sup>11</sup>

[20] The applicant adds:

VCH has an annual budget of \$3.8 billion and 17,000 staff. The applicant and the public should not be penalized because of poor allocation of resources or an unwillingness to adhere to the public records law. VCH has enough resources to devote to fulfilling its access and privacy duties, but chose not to.

Any claimed hardship by volume of requests received can and should be solved by adopting a proactive disclosure regime, as per section 71 of FIPPA.

It is fallacious at least, comedic at best, to imply that the applicant's 22 requests over more than six months of this year caused a backlog.<sup>12</sup>

### *Analysis and Decision*

[21] The applicant's access request was dated March 10, 2021. VCH's was obliged under s. 7(1) to provide a response by no later than 30 days after receiving the request. Schedule 1 to FIPPA defines the term "day" as excluding "a holiday or a Saturday". In turn, the *Interpretation Act* defines "holiday" as including a Sunday and the statutory holidays listed in that definition.<sup>13</sup> Taken together, these definitions mean that the "30 days" that VCH had as the default response time under s. 7(1) of FIPPA amounted to some six calendar weeks, give or take, and not roughly one month. The initial time for VCH to respond was, in fact, April 23, 2021.

[22] There is no indication in its submission that VCH sought to extend this initial 30-day time limit in the way that is permitted under FIPPA. VCH said that a

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<sup>9</sup> *Audit and Compliance Report F16-01, City of Vancouver Duty to Assist*, at <https://www.oipc.bc.ca/audit-and-compliance-reports/2112>.

<sup>10</sup> Applicant's submission at paras. 1-3.

<sup>11</sup> Applicant's submission at para. 6.

<sup>12</sup> Applicant's submission at paras. 9-11.

<sup>13</sup> *Interpretation Act*, RSBC 1996, c. 238.

third party consultation was required under s. 23, so it could have extended the time for responding for up to 30 “days” on its own motion under s. 10(1)(c) of FIPPA. If more time than that were later needed, VCH could have applied under s. 10(2) for this Office’s permission for a further extension.

[23] Far from extending the response time under s. 10(1)(c) to allow for what VCH said was a necessary third party consultation, there is no indication before me that VCH has in fact initiated that consultation.

[24] Nor has VCH sought to explain its conduct by providing any information about the volume of records it must review in order to process the request, keeping in mind that the request is for one person’s emails over a 13-hour period on a single day.

[25] I accept that Dr. Ballem, whose emails are the subject of the request, is extremely busy during these extraordinary times, especially given her role in relation to vaccines. It is extraordinary, however, for VCH to claim that it is “actively working with” her to “review the Records and to release them as soon as is practically possible,” giving a two to three week estimate for its response. It is VCH’s - not Dr. Ballem’s - legal responsibility to review the records and consider if any information can or must be withheld, and then release the remainder.

[26] It may be that VCH intends its reference to “actively working with” Dr. Ballem to “review the Records” to refer to formal third party consultation with Dr. Ballem under s. 23. If so, there is no reason VCH could not prepare a proposed disclosure package that highlights the passages it considers might be protected under ss. 21 or 22 of FIPPA, which are the only sections that are appropriate for a third party consultation under s. 23. Dr. Ballem could then provide her representations to VCH on those passages, or other information she believes appropriate for severing.

[27] There is no information before me to indicate that VCH has responded at all to the request for Dr. Ballem’s emails. Therefore, I find that VCH failed to respond to the applicant’s access request within the period required by s. 7.

[28] It is well established that a public body’s duty under s. 6(1) to make every reasonable effort to respond without delay to the request is a duty to make every reasonable effort to respond within the times set out in s. 7. In other words, if a public body can reasonably respond sooner than the 30-day default response period, it must do so or risk violating the s. 6(1) duty. It is abundantly clear that VCH has not only violated its duty to respond within the time required under s. 7, it has also breached its duty under s. 6(1).

***What is the appropriate remedy?***

[29] The usual remedy in such cases is to make an order pursuant to s. 58 requiring the public body to respond to the request by a particular date.<sup>14</sup> In its July 8, 2021 submission, VCH says that it anticipates it will be able to respond to the request in the next two to three weeks.

[30] I find that requiring VCH to respond to the access request by August 4, 2021 is the appropriate remedy in this case.

[31] I also think it is appropriate here to express my dismay at VCH's attitude in this case. I readily acknowledge that the COVID-19 pandemic has imposed considerable pressure on the resources and programs of all public bodies, and accept that VCH has experienced an increase in access requests during the January-July 2021 period.

[32] The fact of the matter, however, is that VCH's obligations under FIPPA are legal duties and they must be respected, not honoured in the breach. VCH is responsible for properly funding compliance with its FIPPA duties, including by assigning new resources, perhaps by contracting with outside service providers, to meet increased (and very possibly temporarily increased) demand. It is certainly not up to VCH to instead ignore its legal duties under FIPPA and sit back to see whether this Office will hold it to account for its failure to respect the law.

**CONCLUSION**

[33] For the reasons given above, I make the following order under s. 58 of FIPPA:

- 1) I find that VCH has failed to meet its duties to respond to the request without delay under s. 6(1) and has violated its duty to respond within the period required under s. 7 of FIPPA.

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<sup>14</sup> For example, see: Order F16-29, 2016 BCIPC 31 (CanLII); Order F06-04, 2006 CanLII 13533 (BC IPC); Order 04-30, [2004 CanLII 43762 (BC IPC); Order F11-18, 2011 BCIPC 24 (CanLII); Order F21-24, 2021 BCIPC 29; Order F21-26, 2021 BCIPC 33.

- 2) I require VCH to respond to the applicant's request by no later than August 4, 2021.

July 29, 2021

**ORIGINAL SIGNED BY**

Elizabeth Barker, Director of Adjudication

OIPC File: F21-85957