



Order P24-04

FINESTRA DESIGNS LTD.

David S. Adams
Adjudicator

February 22, 2024

CanLII Cite: 2024 BCIPC 18
Quicklaw Cite: [2024] B.C.I.P.C.D. No. 18

Summary: Finestra Designs Ltd. (Finestra) applied under s. 37(b) of the *Personal Information Protection Act* to disregard the respondent's request for personal information, saying that the request was frivolous and/or vexatious. The adjudicator declined to consider the application because the access request was already overdue when the application was made.

Statutes Considered: *Personal Information Protection Act*, SBC 2003, c 63, ss. 29(1), 29(2), 31, 37(b)

INTRODUCTION

[1] Section 23 of the *Personal Information Protection Act* (PIPA) gives individuals the right to access their personal information under the control of an organization, as well as the right to know how the organization has used and disclosed that information.

[2] Section 37(b) of PIPA allows an organization to apply to the Office of the Information and Privacy Commissioner (OIPC) for permission to disregard an access request made under s. 23 that is frivolous or vexatious. This inquiry concerns an application under s. 37(b).

[3] An individual (the respondent) requested his personal information from an organization, Finestra Designs Ltd. (Finestra), his former employer. He also requested information about how Finestra had used his personal information. Finestra did not respond to the request and the respondent complained to the OIPC. The OIPC issued a notice of complaint to inform the parties that it would investigate the issue of whether Finestra had failed to respond to a request for personal information and began to investigate. Several months after the notice of

complaint was issued, Finestra applied to the OIPC for permission to disregard the respondent's request.

PRELIMINARY MATTER

Without prejudice communication

[4] The respondent says that Finestra's application relies, in part, on information his lawyer emailed to Finestra's lawyer on a without prejudice basis. The respondent says that it would be inappropriate for me to rely on it in my assessment of the application. He says that this without prejudice communication was part of a settlement negotiation and was made for the purpose of advancing settlement discussions.¹

[5] Finestra does not dispute this characterization of events or otherwise explain why it would be proper for me to consider the without prejudice communication. In my view, it would not, and so I have not considered it. As the adjudicator in Order P14-01 put it:

In my view, it would be improper to consider information which was previously shared by the parties on a "without prejudice" basis, in order to resolve or settle their disputes, and which they previously understood would not be used in any subsequent proceeding. Therefore, I have not considered this "without prejudice" information.²

ISSUE AND BURDEN OF PROOF

[6] The only issue in this inquiry is whether Finestra may disregard the respondent's access request under s. 37(b) of PIPA. Although PIPA does not expressly set out who has the burden on a s. 37 application, previous orders have established that the organization making the application should provide evidence to demonstrate that it is entitled to relief under s. 37.³

DISCUSSION

Background

[7] Finestra is a provider of residential doors and windows. The respondent is a former employee of Finestra. The parties' employment relationship ended.

¹ Respondent's submission at 1-3.

² Order P14-01, 2014 BCIPC 5 (CanLII) at para 11.

³ Order P22-01, 2022 BCIPC 12 (CanLII) at para 3, citing Order P14-01, *ibid* at para 2; and Order P10-01, 2010 BCIPC 21 (CanLII) at para 9.

While the parties mention that they are engaged in litigation, they have not explained its nature to me.

[8] On May 24, 2023, the respondent made an access request under s. 23(1) of PIPA for “any documents or records under control of Finestra...containing personal information about” him. The respondent also requested information about how Finestra had used his personal information.

[9] On May 31, 2023, Finestra responded that it was reviewing the request and would provide a “more substantive response” by July 29. On June 2, 2023, the respondent’s lawyer wrote to Finestra to say that his client expected Finestra to comply with its PIPA obligations and reply within the time limit set out in PIPA.

[10] On July 10, 2023, Finestra told the respondent that it would not comply with his access request on the basis that it was frivolous and vexatious. Finestra said that if the respondent complained to the OIPC about this non-compliance, Finestra would apply under s. 37 to disregard the request. Finestra advised the respondent that it would produce relevant documents pursuant to the *Supreme Court Civil Rules*.

[11] On July 17, 2023, the respondent complained to the OIPC that Finestra had failed to respond to his access request. In August 2023, the OIPC issued a notice of complaint informing the parties that the OIPC would investigate whether Finestra had failed to comply with PIPA by not responding to a request for personal information. The OIPC investigation commenced at the end of November 2023 and is on hold pending the outcome of this application.⁴

[12] On January 2, 2024, Finestra applied to the OIPC for permission to disregard the respondent’s access request.

Commissioner may authorize organization to disregard requests – s. 37

[13] Section 37 of PIPA provides:

If asked by an organization, the commissioner may authorize the organization to disregard requests under section 23 or 24 that

...

(b) are frivolous or vexatious.

⁴ The OIPC’s investigation of the complaint is file P23-93924.

Parties' positions

[14] Finestra asks that I authorize it to disregard the respondent's access request under s. 37. It says the access request was not a legitimate request for personal information, but rather an attempt to "force Finestra to incur unnecessary legal expenses", and that the access request was made in bad faith and/or for malicious or oblique motives – namely, to gain a tactical advantage in the parties' litigation. It says that it provided the respondent with "the necessary disclosure in the ongoing litigation", and that the respondent did not raise any concerns about the scope of that disclosure. It says that because in its view, the respondent was not genuinely seeking information, it advised the respondent it "would not be complying with" the request.⁵

[15] The respondent says his access request is neither frivolous nor vexatious. He says he has made only a single request under PIPA for his personal information, in good faith and for no improper purpose.⁶

Threshold issue – should I consider an overdue request?

[16] For the following reasons, I find that it is not appropriate for me to consider Finestra's application to disregard the access request.

[17] Part 8 of PIPA contains provisions about how an organization must respond to an access request and the time it may take to do so.

[18] Section 29(1) provides that an organization must respond to an access applicant not later than 30 days after receiving the applicant's request.⁷

[19] There are some exceptions to this general rule. Section 29(2) suspends the time for responding to an access request where the organization has made an application under s. 37.⁸ Section 31 allows an organization to extend the time limit for its response in several specified circumstances.

[20] Finestra received the access request on May 24, 2023. Finestra does not point to any provision or other circumstance that would have extended the time available for a response. By my calculation, the deadline imposed by s. 29(1) would therefore have been July 5, 2023.

[21] Finestra did not apply to disregard the request until January 2, 2024. Finestra therefore far exceeded the time available to an organization to respond.

⁵ Finestra's January 2, 2024 application at 1-2.

⁶ Respondent's submission at 5-7.

⁷ PIPA defines "day" to exclude holidays and Saturdays.

⁸ That suspension, however, operates only from the day the relief is sought, and ends when the commissioner makes a decision on the application.

Based on the communications between the parties in July 2023, I am satisfied that Finestra knew there were response timelines under PIPA and that requesting relief under s. 37 was an option. However, Finestra does not explain why it took several additional months to make its application to disregard the request.

[22] The wording of s. 37 of PIPA is very similar to the wording of s. 43 of the *Freedom of Information and Protection of Privacy Act* (FIPPA).⁹ Both sections allow an organization to ask the OIPC to disregard an access request that is frivolous or vexatious. Previous orders and decisions have considered the interpretation of s. 43 of FIPPA to be helpful in interpreting s. 37 of PIPA.¹⁰

[23] Previous OIPC orders dealing with s. 43 of FIPPA have considered whether it is appropriate to consider an application to disregard an access request that is already overdue. For example, in Order F23-90, the adjudicator noted that each case will turn on its own facts and said:

Adjudicators have decided to consider overdue requests when the respondent was responsible for contributing to the public body's inability to respond in time to the access request, for instance by overwhelming the public body with other access requests and with follow-up issues and questions, and when there was no evidence that the public body had deliberately neglected the overdue request.¹¹

[24] In Order F23-90, the adjudicator held that since the applicant public body had failed to justify why it did not respond to an access request within the legislated timeline, it would have been inappropriate to consider the application for relief regarding that request.¹² However, in Decisions F06-03 and F06-12 and Order F20-15, the adjudicators decided they would consider overdue requests as part of the s. 43 applications because the volume of the access applicants' requests had overwhelmed and overburdened the public bodies and there was no evidence the public bodies had deliberately neglected the requests.¹³

[25] In this case, as far as I can tell from the materials before me, the respondent has made only one access request. Finestra has not claimed to have been overburdened by the request. Moreover, Finestra's own submission shows

⁹ RSBC 1996 c 165.

¹⁰ Order P10-01, 2010 BCIPC 21 (CanLII) at para 18; Order P14-01, *supra* note 2 at para 15; Decision P05-01, 2005 CanLII 18157 (BC IPC) at paras 12-14.

¹¹ Order F23-90, 2023 BCIPC 106 (CanLII) at para 19, citing Decision F06-12, 2006 CanLII 42644 (BCIPC) at paras 25-26; Order F20-15, 2020 BCIPC 17 at para 10; and Decision F06-03, 2006 CanLII 13535 (BCIPC) at para 30.

¹² Order F23-90, *ibid* at para 27.

¹³ Decision F06-03, 2006 CanLII 13535 (BC IPC) at para 30; Decision F06-12, *supra* note 11 at paras 25-26; Order F20-15, *supra* note 11 at paras 9-11.

that it deliberately chose not to respond to the access request within the legislated timeline. It says:

On July 10, 2023...my office notified [the respondent and his lawyer] that because they were not genuinely seeking information from Finestra via the disclosure request [under PIPA], but rather utilizing the OIPC's regime to in effect retaliate against Finestra for the position it was taking on the matters in dispute to thereby force Finestra to incur unnecessary legal expenses, the disclosure request was patently frivolous and vexatious – and Finestra therefore would not be complying with the request.¹⁴

[26] I therefore find that none of the factors that have persuaded previous adjudicators to consider applications to disregard an overdue access request assist Finestra here.

[27] Finestra also says it later provided the respondent with “necessary disclosure in the ongoing litigation”.¹⁵ However, disclosure in the course of litigation pursuant to the rules of court, and disclosure of an individual's personal information pursuant to PIPA, are very different things. Disclosure in litigation gives a party access documents relevant to the litigation, but there is no such condition imposed on access rights under PIPA. PIPA gives an individual a right to access their personal information with no requirement that the information be relevant to any proceeding. Moreover, documents disclosed in litigation are subject to an implied undertaking of confidentiality,¹⁶ while no such restrictions are placed on the information an access applicant receives under PIPA. In Order P21-03, the Director of Adjudication found that the existence of another avenue, such as disclosure in the course of litigation, for obtaining some of the requested records does not disentitle an access applicant from exercising the rights set out in PIPA.¹⁷ I agree with and adopt this reasoning.

[28] A party's declaration to another party that it does not intend to comply with PIPA does not have the same effect as an application to the OIPC. Compliance with PIPA's provisions is not optional. An organization cannot avoid its obligations under PIPA on the basis that it finds them unpleasant or has suspicions about an access applicant's motives.

[29] To summarize, I find that Finestra's response to the respondent's access request is overdue. In the absence of sufficient factors that would persuade me to consider Finestra's application to disregard the access request despite the access request being overdue, I decline to consider it.

¹⁴ Finestra's January 2, 2024, application at 1.

¹⁵ *Ibid* at 2.

¹⁶ See, e.g., *Duncan v. Lessing*, 2018 BCCA 9 at paras 4-7.

¹⁷ Order P21-03, 2021 BCIPC 11 (CanLII) at paras 14-15.

CONCLUSION

[30] For the reasons given above, I decline to consider Finestra's application to disregard the access request. Since the respondent's access request was already the subject of a deemed refusal file at the time of Finestra's application (OIPC File P23-93924), work on that file should resume.

February 22, 2024

ORIGINAL SIGNED BY

David S. Adams, Adjudicator

OIPC File No.: P24-95381