OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Auth. (s. 43) 02-02

INSURANCE CORPORATION OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
November 8, 2002

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Summary: The applicant, having settled his personal injury claim with ICBC in 1999, has made 18 access requests for information related to the settled claim. Having disclosed to the applicant all information related to the claim, and related matters, ICBC is entitled to the relief it seeks under s. 43(b) respecting the last two requests, which are frivolous and vexatious.

Key Words: frivolous – vexatious – abuse of rights.

Statutes Considered: B.C. *Freedom of Information and Protection of Privacy Act*, ss. 43(a) and (b). **Alberta:** *Freedom of Information and Protection of Privacy Act,* s. 53. **Ontario:** *Freedom of Information and Protection of Privacy Act*, s. 10(2), General Regulations Under the *Freedom of Information and Protection of Privacy Act*, R.R.O. 1990, Reg. 460, s. 5.1.

Authorities Considered: B.C.: Order No. 110-1996, [1996] B.C.I.P.C.D. No. 36; Order 01-16, [2001] B.C.I.P.C.D. No. 17; Auth. (s. 43) 99-01; Auth. (s. 43) 02-01, [2002] B.C.I.P.C.D. No. 47. **Ontario:** Order M-618, [1995] O.I.P.C. No. 385; Order M-850, [1996] O.I.P.C. No. 366; Order MO-1477, [2001] O.I.P.C.D. No. 215.

Cases Considered: *Crocker* v. *British Columbia (Information and Privacy Commissioner) et al.* (1997), 155 D.L.R. (4th) 220, [1997] B.C.J. No. 2691 (S.C.), *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, (2002), 214 D.L.R. (4th) 1, [2002] S.C.J. No. 55, 2002 SCC 53; *Borsato* v. *Basra* (2000), 43 C.P.C. (4th) 96, [2000] B.C.J. No. 84.

1.0 INTRODUCTION

[1] Section 43 of the *Freedom of Information and Protection of Privacy Act* ("Act") gives the commissioner the authority to authorize a public body, in appropriate circumstances, to disregard access to information requests under the Act. An amendment

to s. 43 earlier this year has expanded the grounds for relief. The section now reads as follows:

> 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.

[2] This is the first time the interpretation and application of s. 43(b) have been in issue. The Insurance Corporation of British Columbia ("ICBC") has applied for relief on the basis that two access requests made by an individual – to whom I will refer as the "respondent" – are "frivolous or vexatious". ICBC has asked me to authorize it to disregard those two requests and to grant it further relief respecting requests that may be made by the respondent for one year following this decision.

[3] Because this matter did not settle during mediation, I held a written inquiry under Part 5 of the Act.

2.0 ISSUE

[4] The only issue before me is whether the two current requests to ICBC by the respondent are "frivolous or vexatious" within the meaning of s. 43(b) and, if so, what relief I should give to ICBC. As ICBC acknowledges, previous decisions dealing with s. 43 have established that the public body bears the burden of establishing entitlement to relief under s. 43 and this continues to be the case. Having said this, if a public body establishes a *prima facie* case that a request is frivolous or vexatious, the respondent bears some practical onus, at least, to explain why the request is not frivolous or vexatious.

3.0 DISCUSSION

[5] **3.1 Background** – ICBC's description of the background to this case is supported by an affidavit sworn by Mark Francis, ICBC's Manager of Information and Privacy. He deposed that the respondent was injured four years ago in a motor vehicle accident. ICBC took the position, initially, that the respondent was entirely to blame for the accident, but an internal ICBC Dispute Review Panel later apportioned 75% of the fault to the respondent and 25% to the other individual involved in the accident. ICBC settled the respondent's personal injury claim, paid out on the claim and obtained a signed release from the respondent and the other party. Despite this, the respondent now claims he is entitled to more money and wants to reopen the matter. At some point, the respondent sought a review of his claim file by ICBC's Fairness Commissioner, who decided that ICBC had not treated the respondent unfairly.

[6] Since June of last year, the respondent has made 18 access requests under the Act, each of which relates, directly or indirectly, to ICBC's handling of the respondent's

personal injury claim. ICBC has responded to the access requests, with the exception that it has not responded to the two most recent ones, dated June 2 and July 26, 2002. (I refer to these requests below as the 17th and 18th requests.)

[7] ICBC says that, in addition to the 18 access requests under the Act, the respondent has

> … made numerous requests for information which were not processed as formal FOI requests, but which did result in ICBC retrieving and producing substantial amounts of information.

[8] Several of the respondent's 18 access requests are, ICBC says, repetitive or overlapping. ICBC notes that the respondent has requested all or portions of his claim file on five different occasions and has made access requests for correspondence between ICBC and its Fairness Commissioner on four different occasions. ICBC says some of the applicant's requests under the Act mirror informal requests to which ICBC had already responded. ICBC gives specific examples of this overlap between requests under the Act and informal requests for information.

[9] According to ICBC, the respondent's requests arise in the context of a campaign of letters and e-mails the respondent has directed to a large number of ICBC staff, in which he frequently accuses ICBC staff of lying to him, acting unethically or conspiring against him. ICBC gives specific examples of such communications. To take only one of them, on December 28, 2000 the applicant addressed an e-mail to 72 different ICBC employees, including its president. In it, the respondent accuses an ICBC employee of lying and asks if this is "just another ICBC lie, one more lie in a string of lies?".

[10] ICBC says the respondent's personal injury claim has been settled and all ICBC dispute resolution processes for that claim have been exhausted. It has told the respondent it has no intention of negotiating with him any further about his claim and has encouraged him to commence litigation against ICBC if he wishes to pursue further compensation. The respondent has not done so. ICBC says that, despite this, the respondent continues to write to various ICBC employees and to continue his repetitive and overlapping access requests with respect to his claim, which has been settled for some time.

[11] For his part, the applicant alleges that an ICBC employee misrepresented ICBC policy to him, such that the settlement reached between ICBC and the respondent was, he claims, "fraudulently obtained". He says the amount of compensation that is due to him "needs to be re-argued" and alleges that one of his access requests yielded evidence that supports his allegation about misrepresentation.

[12] The applicant, in describing the two access requests in issue in this proceeding, says the 17th request was for "all my personal information ICBC has in their files." He also says the 18th request was for "copies of the notes Williams [ICBC's Fairness Commissioner] and his staff took of their phone conversations with ICBC employees."

[13] In its reply submission, ICBC says the respondent's 11th request covered the same ground as the 17th and 18th requests. It responded to the 11th request, ICBC says, by providing all responsive records. ICBC says it is not clear what additional information the respondent believes ICBC might have that it has not already disclosed. According to ICBC, the respondent's own submissions in this inquiry establish that there is no reasonable need or motive for him to make the two requests in issue, since they revisit issues that have already been dealt with.

[14] **3.2 Meaning of Section 43(b)** – As I indicated earlier, this is the first time the meaning of s. 43(b) has been considered. The phrase "frivolous or vexatious" is new to the Act, but is familiar in other settings, including freedom of information legislation elsewhere in Canada. My interpretation of that phrase in s. 43(b) must take into account, not only the legislative purpose underlying s. 43, but the legislative purposes of the Act as a whole. As well, in considering how the words "frivolous or vexatious" have been interpreted in other settings, I must keep in mind differences in statutory language and purpose.

[15] Moreover, as I did in Auth. (s. 43) 02-01, I again acknowledge the interpretive approach to s. 43 taken by Coultas J. in *Crocker* v. *British Columbia (Information and Privacy Commissioner) et al.* (1997), 155 D.L.R. (4th) 220, [1997] B.C.J. No. 2691 (S.C.), at para. 42:

> … Section 43 is an important remedial tool in the Commissioner's armoury to curb abuse of the right of access. That section and the rest of the Act are to be construed by examining it in its entire context bearing in mind the purpose of the legislation. The section is an important part of a comprehensive scheme of access and privacy rights and it should not be interpreted into insignificance. The legislative purposes of public accountability and openness contained in s. 2 of the Act are not a warrant to restrict the meaning of s. 43. The section must be given the "remedial and fair, large and liberal construction and interpretation as best ensures the attainment of its objects" that is required by s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238.

[16] This is consistent with the approach that I have taken in interpreting other aspects of the Act, as dictated by Supreme Court of Canada decisions such as *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, (2002), 214 D.L.R. (4th) 1, [2002] S.C.J. No. 55, 2002 SCC 53, a case involving interpretation of the federal *Access to Information Act*.

Interpretive sources

[17] The first point of interpretation is that, by using the word "or" in the phrase "frivolous or vexatious", the Legislature clearly intended those two words to have different meanings. This is consistent with the interpretation the courts have given to the same phrase in Rule 19(24) of the *Rules of Court*. In *Borsato* v. *Basra* (2000), 43 C.P.C. (4th) 96, [2002] B.C.J. No. 84 (appeal allowed on another ground: [2000] B.C.J. No. 2855), for example, Master Baker said the following, at paras. 24 and 25:

> The plaintiff also attacks the statement of defense under rule 1924. A pleading is frivolous if it is without substance is groundless, fanciful, "trifles with the court" or wastes time. This statement of defense does, in my view, waste time and verges on the fanciful. There may, somewhere in the general denial, be grounds, but as pleaded it lacks substance. It is therefore frivolous.
>
> A pleading is vexatious if it is without *bona fides*, is "hopelessly oppressive" or causes the other party anxiety, trouble or expense. This statement of defense cannot be said to be oppressive and possibly without *bona fides*, but is almost certain to cause the plaintiff (and indeed has already caused) anxiety, trouble and expense. It is therefore vexatious.

[18] It also has to be said, however, that the courts have not always found it easy to distinguish between a frivolous or vexatious pleading or proceeding. The courts sometimes tend to treat the two terms as having some overlap. This may also be the case under s. 43(b) without by any means violating the rule that the Legislature is presumed to have intended the two words to have different meanings.

[19] In this case, ICBC relies on *Borsato*, as well as the *Concise Oxford Dictionary* (8th edition) definitions of "frivolous" and "vexatious". That dictionary defines "frivolous" as "lacking seriousness; given to trifling, silly". It defines "vexatious" as "an annoying or distressing thing". In addition to the *Concise Oxford Dictionary* definitions of "frivolous" and "vexatious", which ICBC cites, I note the following definitions from *Black's Law Dictionary* (6th ed.):

> **Frivolous:** Of little weight or importance. A pleading is "frivolous" when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent. A claim or defence is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense. … [case citation omitted]. Frivolous pleadings may be amended to proper form, or ordered stricken, under federal and state Rules of Civil Procedure.
>
> **Vexatious:** Without reasonable or probable cause or excuse. … [case citation omitted]

[20] ICBC also cites Commissioner Tom Wright's decision, under Ontario's *Freedom of Information and Protection of Privacy Act*, in Order M-618, [1995] O.I.P.C. No. 385. In that case, Commissioner Wright said (at p. 15) that "the word 'frivolous' is 'typically associated with matters that are trivial or without merit" and that the "word 'vexatious' is usually taken to mean with intent to annoy, harass, embarrass or cause discomfort".

[21] In Order M-618, Commissioner Wright also said, at p. 14, that definitions of the words "frivolous" and "vexatious" must be viewed in context:

> … Government officials may often find individual requests for information bothersome or vexing in some fashion or another. This is not surprising given that freedom of information legislation is often used as a vehicle for subjecting institutions to public scrutiny. To deny a request because there is an element of

> vexation attended upon it would mean that freedom of information could be frustrated by an institution's subjective view of the annoyance quotient of particular requests. This, I believe, was clearly not the Legislature's intent.

[22] I agree with this note of caution. By its nature, an access to information request may be vexing or irksome to the public body. The purpose of access to information is, as s. 2(1) of the British Columbia Act explicitly provides, to "make public bodies more accountable to the public". A request may be vexing or irksome to the public body because it will reveal information the public body might prefer not to disclose, but I cannot imagine a case in which a public body's perception that a request is vexatious in this way could, on its own, ever merit relief under s. 43(b).

[23] When Order M-618 was issued, Ontario's *Freedom of Information and Protection of Privacy Act* did not expressly allow frivolous or vexatious requests to be disregarded. It was amended in 1996 to allow this. The General Regulations Under the *Freedom of Information and Protection of Privacy Act*, R.R.O. 1990, Reg. 460, stipulate how the determination of what is a frivolous or vexatious request is to be made. Section 5.1 of that regulation provides that a request can be considered to be "frivolous or vexatious" if it is "part of a pattern of conduct that amounts to an abuse of the right of access or if it interferes with the operations of the institution" or if "the request is made in bad faith or for a purpose other than to obtain access." Section 5.1 and the Ontario cases that apply it are of some interest in interpreting the phrase "frivolous or vexatious" in s. 43(b), but I have kept clearly in sight the need to interpret s. 43(b) without simply adopting the meanings expressly provided in the Ontario regulation. See, for example, See Ontario Order M-850, [1996] O.I.P.C.D. No. 366, and Order MO-1477, [2001] O.I.P.C.D. No. 215.

[24] Cases such as *Borsato* are also of some interest in interpreting the phrase "frivolous or vexatious" in s. 43(b), again bearing in mind the different context in which the courts have interpreted that phrase. In such cases, the court is asked to determine if specific aspects of a statement of claim or statement of defence are frivolous or vexatious and should be struck out. If they are, the party whose pleading has been struck is often able to amend the pleading to replace the part struck out as frivolous or vexatious. An entire lawsuit may be struck as being frivolous or vexatious, but more often the court is addressing only specific defects in an otherwise valid pleading. It seems to me that the court's role in policing frivolous or vexatious pleadings is sufficiently different from the remedial authority given to the commissioner under s. 43 as to warrant caution in referring to cases such as *Borsato*.

[25] In interpreting the words "frivolous" and "vexatious", I have kept in mind the accountability goal of the Act. I have also kept it in mind that abuse of the right of access can have serious consequences for the rights of others and for the public interest. As I said in Auth. (s. 43) 99-01, at p. 7:

> … 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 a 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. …

[26] As Commissioner Flaherty said in Order No. 110-1996, [1996] B.C.I.P.C.D. No. 36, the right of access under the Act must not be abused as a weapon of information warfare. This still holds true in the wake of this year's s. 43 amendment.

[27] The following discussion does not exhaust the meaning of the words "frivolous or vexatious", since other factors may be relevant in the circumstances of a given case. For present purposes, one or more of the following factors may be relevant in determining whether a request is frivolous or vexatious:

- Regardless of how it is so, 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 Commissioner Wright's cautionary words in Order M-618 and the legislative purposes of the Act (including s. 43).

- 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 requests that are trivial or not serious, again remembering the words of caution in Order M-618.

- The class of "vexatious" requests includes requests 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 support a finding that a specific request is frivolous or vexatious. Under s. 43(a) of the Act, the commissioner can authorize a public body to disregard repetitive or systematic access requests that would unreasonably interfere with a public body's operations. I do not consider that, because s. 43(a) explicitly refers to repetitious access requests, the commissioner is precluded, in a s. 43(b) case, from considering the repetitive nature of access requests as one factor in deciding whether requests are frivolous or vexatious. To be clear, the fact that access requests are repetitious or systematic in nature cannot, in the face of the explicit test under s. 43(a), be sufficient to warrant relief under s. 43(b). Alongside other factors, however, the fact that repetitious requests have been made may support a finding that a particular request is frivolous or vexatious.

[28] In Order 01-16, [2001] B.C.I.P.C.D. No. 17, I held that a mediated settlement is not a decision to which the doctrine of *res judicata* can apply, but went on to find that an attempt to evade an earlier settlement can be stopped as an abuse of process. Without deciding the question here, it seems to me that s. 43(b) might also apply in such a case, *i.e.*, where request is made in an attempt to defeat a mediated settlement of an earlier request.

[29] **3.3 Is ICBC Entitled to Relief?** – In this case, I am satisfied that the 17th and 18th requests are, as ICBC contends, repetitive of earlier requests made by the applicant. There is also the fact that, as ICBC's evidence confirms, the applicant has received information that responds to these and other requests through informal channels outside the Act. Nor has the applicant, despite the repetitive nature of these two requests, advanced any reason why he has had to make them again. As ICBC's evidence establishes, the respondent has not had any ongoing business with ICBC that would occasion any need on his part to update his earlier access requests in an attempt to get newly-generated records. The only business he has had with ICBC is his access requests under the Act and communications related to those requests. The 17th and 18th requests repeat earlier requests to which ICBC has responded and no serious purpose can be discerned for them. Accordingly, the repetitive nature of the requests is one factor that supports the conclusion that they are vexatious, at least, within the meaning of s. 43(b).

[30] There is other evidence to support the conclusion that these requests are frivolous and vexatious. ICBC contends that some of the respondent's earlier requests – which are not, strictly speaking, directly in issue here – are frivolous. He has, ICBC points out, made requests for his own letters to ICBC without claiming, then or now, that he has not got copies of his own letters, such that he has to get them from ICBC. ICBC says the respondent also has made access requests that he must have known were not legitimate, *e.g.*, a request for ICBC's "unwritten policies".

[31] ICBC argues the respondent's requests are vexatious because, when considered in the overall context of his dealings with ICBC, it is reasonable to draw the conclusion that he is using the most recent requests to "force ICBC to do additional work and, perhaps, to persuade ICBC to reconsider its financial settlement in order to make him 'go away'" (para. 25, initial submission). Among other things, ICBC points to an e-mail the respondent sent to ICBC, after having received records under one of his earlier requests, saying the following:

> I recently received copies of my file in full and ICBC computer notes. Very interesting stuff in there. Enough to plague you for months ;) [emoticon in original]

[32] ICBC alleges that the respondent has, as ICBC puts it, been harassing and annoying ICBC staff by sending multiple e-mails and otherwise pestering ICBC with communications. ICBC says the following at para. 26 of its initial submission:

> 26. Given the regularity of … [the respondent's] requests, it is reasonable to assume that he will continue to make requests as part of his campaign against

> ICBC so long as he is permitted to do so. It is also apparent that … [the respondent] has, through the requests that have already been fulfilled, received any information that might reasonably assist him in gathering information with respect to his claim and the ICBC policies relevant to its handling. Unless … [the respondent] commences litigation there will be no further dealings with respect to the claim (Affidavit of Mark Francis, para. 45), and if litigation is commenced the discovery process will be available to respond to any further disclosure.

[33] The evidence supports the conclusion that the respondent's 17th and 18th requests are frivolous and vexatious in the senses described above. There are ample grounds for concluding that the applicant ought reasonably to know that ICBC has disclosed to him, more than once, all the records it has that relate to his personal injury claim and related Fairness Commissioner matters. Those previously-disclosed records relate to a personal injury claim the respondent settled with ICBC in 1999. There is no reason to believe ICBC will or is likely to create any new records regarding that matter. Nor has the respondent got any other ongoing business with ICBC that might occasion an access request.

[34] The evidence also supports the conclusion that the respondent's requests are part of an ongoing pattern of behaviour that is designed to harass individual ICBC staff and ICBC itself. In this respect, the repetitive nature of the 17th and 18th requests is one factor, though not a major one, that supports a finding that the requests are frivolous and vexatious.

[35] At para. 28 of its initial submission, ICBC says the following about the relief it seeks:

> 28. The remedy sought by ICBC seeks to balance the legitimate interest of … [the respondent] to be able to seek access to information and ICBC's interest in avoiding the "undue burden" that arises from processing frivolous requests. The remedy, if granted, would only block … [the respondent's] current requests, which substantially duplicate previous requests, any future requests that relate to the claim file which has already been disclosed, and future requests with respect to the complaints process which has already run its course.

[36] At para. 2 of its initial submission, ICBC seeks authorization to disregard:

> (a) the requests made by … [the respondent] dated June 2, 2002 and July 26, 2002;
>
> (b) for a period of one year, any further requests related to … [the respondent's] claim for personal injuries suffered in an incident on October 16, 1998;
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> (c) for a period of one year, any further requests related to … [the respondent's] complaint to the ICBC Fairness Commissioner;
>
> (d) for a period of one year, any request that is made at a time when ICBC has received but not as yet responded to a request from … [the respondent] (i.e. … [the respondent] may only make one request at a time); and

(e) for a period of one year, any further requests for ICBC policies and procedures related to claims handling.

[37] I am satisfied that ICBC is entitled to the relief it seeks, which is tailored to specifically address only the frivolous and vexatious aspects of the respondent's dealings with ICBC.

4.0 CONCLUSION

[38] For the reasons given above, I find that the respondent's access requests dated June 2 and July 26, 2002 are frivolous and vexatious within the meaning of s. 43(b) of the Act. In the circumstances, including the fact that the respondent's right of access to his own personal information is to some extent implicated here, I make the following authorization under s. 43 of the Act:

1. ICBC is authorized to disregard the respondent's June 2, 2002 and July 26, 2002 access requests; and

2. ICBC is authorized, up to and including November 7, 2003:

   (a) to disregard any further requests made by the respondent that relate to his claim for compensation for personal injuries suffered in the October 16, 1998 accident referred to above;

   (b) to disregard any further requests related to the respondent's complaint to ICBC's Fairness Commissioner;

   (c) to disregard any access requests for ICBC policies or procedures, or both, that relate to ICBC's processing and disposition of claims for compensation for personal injury; and

   (d) subject to paras. 2(a) through (c), to disregard any access requests in excess of one open access request made by or on behalf of the respondent at any one time.

November 8, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia