



Order F19-34

**ALL MINISTRIES OF THE GOVERNMENT OF BRITISH COLUMBIA AND THE
OFFICE OF THE PREMIER**

Lisa Siew
Adjudicator

September 24, 2019

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Summary: All ministries of the Government of British Columbia and the Office of the Premier (Government) applied for authority under s. 43(b) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) to disregard a number of access requests from the Official Opposition caucus (the Opposition). The BC Government claims it should be given authority to disregard the access requests because they are frivolous or vexatious. The BC Government also argues that it should be allowed to disregard the access requests because it is concerned the Opposition contravened the *Personal Information Protection Act* (PIPA) in making the requests. The adjudicator determined that the access requests were not frivolous or vexatious under s. 43(b); therefore, the BC Government was not authorized to disregard the access requests. The adjudicator also declined to consider whether there was a PIPA violation under a s. 43(b) FIPPA application. She concluded that it was not appropriate for a public body to bypass the PIPA complaint process through a s. 43 FIPPA application.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 10(2)(b) and 43(b).

INTRODUCTION

[1] The Official Opposition caucus (Opposition) consists of 42 members of the Legislative Assembly acting together as Her Majesty's Loyal Opposition.¹ The Opposition says it employs a contractor to make access requests on its behalf under the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] As a result of certain events, the Opposition was concerned about government officials and staff using their personal email accounts for work. The Opposition explains that it instructed the contractor to make a number of access

¹ BC Government's response submission at para. 7. Opposition's submission at para. 3.

requests across the provincial government. The requests were made to various provincial government ministries, the Office of the Premier and Government Communications and Public Engagement (a central government agency). I will refer to the applicants collectively as the BC Government.

[3] The contractor requested the BC Government provide him with copies of emails involving the personal email addresses of specific government employees and ministers, including any emails these individuals had with certain named government employees or officials. In total, the contractor made 615 separate requests for records encompassing specific time periods.

[4] The BC Government applied to the Office of the Information and Privacy Commissioner (OIPC) for authorization under s. 43(b) of FIPPA to disregard the 615 access requests on the basis they are frivolous or vexatious.²

PRELIMINARY MATTER

[5] I have carefully considered the BC Government's submissions. The crux of the BC Government's position is that the Opposition has breached the *Personal Information Protection Act* (PIPA) in collecting and using the third parties' personal email addresses to make the FIPPA access requests. It argues that "in order to bring harmony and consistency to the application and interpretation of [FIPPA] and PIPA, the 615 Open Requests must be found to be an abuse of process, frivolous and vexatious."³ The BC Government claims that to find otherwise would result in a potential contravention of PIPA.

[6] Apart from its allegations, the BC Government provides no conclusive finding of a PIPA violation. I am not aware of any OIPC decision that finds the Opposition contravened PIPA and I decline to make such a finding under a s. 43 FIPPA application. In my opinion, a s. 43 FIPPA application is not the appropriate mechanism to address the BC Government's complaints about a PIPA contravention. The proper OIPC process to deal with the BC Government's concerns is under PIPA's complaint process, which includes investigation and mediation in order to reach a resolution or settlement of the issues.⁴

[7] If I were to consider the BC Government's PIPA allegations under a s. 43(b) FIPPA application, it would circumvent the OIPC mediation and investigation process. In my view, it is not appropriate for a public body to bypass the PIPA complaint process through a s. 43 FIPPA application. Engaging in the PIPA complaint process would allow the parties to be heard and to make fuller submissions on the specific information at issue, including a more detailed

² The BC Government did not apply for relief under s. 43(a) of FIPPA.

³ BC Government's initial submission at para. 31.

⁴ The PIPA complaint process is set out under the OIPC's guidance document titled, *Guide to OIPC Processes (PIPA)*.

consideration of the relevant PIPA provisions. For example, it is questionable whether the Opposition is subject to PIPA⁵ and, based on the materials before me, it is not obvious that there was a contravention of PIPA.⁶

[8] I also note that the provisions of FIPPA are already harmonized with PIPA to address these circumstances. Section 10(2)(b) of FIPPA gives the commissioner the discretion to extend the time for responding to an access request “if the commissioner otherwise considers that it is fair and reasonable to do so, as the commissioner considers appropriate.” A public body may apply for a time extension under s. 10(2)(b) of FIPPA if it believes a PIPA complaint must be addressed before it can process or respond to a FIPPA access request. Therefore, the BC Government may apply for a time extension under s. 10(2)(b) in order to make a PIPA complaint and obtain a decision related to that complaint.

[9] If the time extension is granted, the PIPA complaint process will provide a remedy for any improperly collected, used or disclosed third party personal information. Nothing in the evidence before me indicates that the BC Government considered or pursued this option before making its s. 43(b) application. It is also not clear from the parties’ submissions that the third parties know the BC Government has raised these concerns on their behalf or that they would object to the collection, use and disclosure of their personal information in these circumstances.

[10] For all these reasons, I will not consider in this s. 43(b) FIPPA application whether the access requests contravene PIPA.

ISSUES

[11] The issues I must decide in this inquiry are as follows:

1. Are the access requests frivolous or vexatious under s. 43(b)?
2. If the answer to the first question is yes, then what relief, if any, is appropriate?

[12] The BC Government has the burden of proving that the access requests are frivolous or vexatious for the purposes of s. 43(b).

⁵ At para. 7 of its response submission, the BC Government says it accepts that the Opposition “itself is not subject to PIPA on the basis that the caucus consists of many Members of the Legislative Assembly acting together (see s. 3(2)(g) of PIPA).”

⁶ For example, sections 12(1)(e), 15(1)(e) and 18(1)(e) of PIPA allow an organization to collect, use and disclose personal information that is “available to the public from a source prescribed for the purposes of this paragraph.” The parties do not address these provisions in their submissions.

DISCUSSION

Who is the respondent in this s. 43(b) application?

[13] The parties disagree about whether the individual contractor or the Opposition was the access applicant and, therefore, the respondent for the purposes of this inquiry. The Opposition provided affidavit evidence to establish that the contractor acted on its behalf. I accept this evidence and find, therefore, the Opposition is the respondent in this application.

Section 43(b)

[14] Section 43(b) of FIPPA gives the Commissioner the discretionary power to authorize a public body to disregard access requests that are frivolous or vexatious. In *Crocker v British Columbia (Information and Privacy Commissioner)*, Coultas, J. identified the nature and purpose of s. 43 as follows:

Section 43 of the *Act* is remedial, not punitive in nature...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....⁷

[15] The BC Government applies for relief under s. 43(b) on the basis the Opposition's access requests are frivolous or vexatious and amount to an abuse of process.

[16] In Auth. (s. 43) 02-02, former Commissioner Loukidelis considered the terms "frivolous" and "vexatious" by keeping in mind the purposes of FIPPA and said the following about the abuse that s. 43 aims to prevent:

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'

⁷ 1997 CanLII 4406 (BC SC) at paras. 32-33.

costs of complying with the Act. Section 43 exists, of course, to guard against abuse of the right of access.⁸

[17] Previous OIPC decisions adopt the following non-exhaustive factors in determining whether an access 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 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 support a finding that a specific request is frivolous or vexatious.⁹

[18] I will apply the above-noted considerations and principles to this inquiry.

The parties' submissions

BC Government

[19] The BC Government submits that it should be allowed to disregard the access requests because it is concerned the Opposition contravened PIPA in making the requests. It alleges the Opposition improperly collected and used the third parties' personal email addresses without consent or statutory authorization.

[20] The BC Government also says it would be a further violation of PIPA to require public bodies "to use the fruits of such a privacy breach to conduct a search for records responsive to an access request which will include the sharing

⁸ [2002] BCIPCD No. 57 at para. 25.

⁹ Order F14-24, 2014 BCIPC 27 at para. 11, citing Auth. (s. 43) 02-02, [2002] BCIPCD No. 57.

of such information to public body employees for search purposes.”¹⁰ It says the Opposition should prove it did not violate PIPA before the BC Government responds to any of the requests.

[21] The BC Government argues that s. 43 is a remedial tool which should be used in these circumstances. It argues that s. 43 is “broad enough to control the abuse of process that would take place by allowing an organization to contravene PIPA in order to make access requests under [FIPPA].”¹¹ The BC Government takes the position that the access requests are frivolous or vexatious under s. 43(b) because allowing the Opposition to use improperly obtained personal information to make the access requests is an abuse of the right of access under FIPPA.

The Opposition

[22] The Opposition denies any contravention of PIPA. It provided an affidavit from its Director of Outreach & Community Relations who explains that the third parties’ personal email addresses were publically available and collected via the internet by research staff. The Director’s affidavit includes a collection of screen shots that show the online sources for the third parties’ email addresses. He says this personal information was found using common, internet search engines.

[23] The Opposition also submits that its requests are not frivolous or vexatious for the purposes of s. 43. It says that s. 43 may be engaged where the access request is made in bad faith or for a purpose other than gaining access to information. The Opposition says none of those circumstances apply in this case.

[24] The Opposition explains that its access requests arise “from the fact that a senior member of government publicly admitted to using her personal email account for government business.”¹² It claims the access requests are important to determine “the extent to which other Government officials, in particular Cabinet Ministers, the Premier, and their political staff, are doing government business using personal email accounts in an attempt to circumvent their obligations under [FIPPA].”¹³ The Opposition also says its request for records is fundamental to its role as the official opposition in holding government to account.

BC Government’s response

[25] The BC Government responds, in part, by alleging the Opposition made the access requests to embarrass the people associated with the personal email addresses at issue. It says, by including specific email addresses in the access

¹⁰ BC Government’s initial submission at para. 16.

¹¹ *Ibid* at para. 32.

¹² Opposition’s submission at para. 9.

¹³ *Ibid* at para. 6.

requests, the Opposition appears to be inferring that the government officials named in the requests may have acted inappropriately, without providing any evidence to support such an inference. The BC Government submits that this practice is not a good faith exercise of FIPPA's access rights.

Analysis and findings

[26] Based on the parties' submissions, I understand that the BC Government seeks relief under s. 43(b) on the following two grounds:

- (1) The access requests are frivolous and vexatious because the Opposition made them for an improper purpose; and
- (2) The access requests are frivolous and vexatious because the Opposition contravened PIPA in making the requests; therefore, the requests are an abuse of the right of access under FIPPA.

I will deal with each position below.

Are the access requests frivolous or vexatious under s. 43(b)?

[27] The BC Government alleges the Opposition made the access requests to embarrass the people associated with the personal email addresses at issue; however, I am not convinced by the Government's submissions that this was a motive for the Opposition's request. The Opposition identified a legitimate reason for making the access requests. It says that it made the access requests to determine whether public officials and employees have inappropriately used private emails for public business, specifically referencing a provincial minister's public acknowledgement that she had used her personal email account to communicate with other government employees.¹⁴

[28] One of the purposes of FIPPA is to make public bodies more accountable to the public by giving the public a right of access to records.¹⁵ The use of personal email accounts for government business has the potential to undermine the public's ability to hold a public body to account since it makes it harder for public bodies to search for and identify responsive records. Public body employees may be unwilling to produce records from their personal account or allow access to their accounts for that purpose.¹⁶

[29] The Opposition explains that its access requests are to determine whether the BC Government is avoiding its responsibilities under FIPPA. It also acknowledges that there will be no records to produce if the named individuals

¹⁴ Opposition's submission at para. 5.

¹⁵ Subsection 2(1)(a) of FIPPA.

¹⁶ OIPC guidance document titled, *Use of Personal Email Accounts for Public Business*.

are not using their private email addresses for public business.¹⁷ The Opposition says its request for records is fundamental to its role as the official opposition in holding government to account.

[30] I accept that the Opposition has a genuine and serious interest in requesting and receiving these records. I am satisfied the Opposition's access requests were not made in bad faith or made primarily for a purpose other than gaining access to information. I am, therefore, not convinced that the Opposition's access requests are frivolous or vexatious for the purposes of s. 43(b).

Should s. 43(b) be used as a remedial tool in these circumstances?

[31] The BC Government argues that s. 43(b) should be used as a remedial tool in these circumstances to curb an abuse of process. The BC Government claims the Opposition's access requests are frivolous and vexatious under s. 43(b) because the processing of the requests would require it to use, collect, and disclose personal information that was collected contrary to PIPA.

[32] However, as previously noted, the BC Government provides no conclusive evidence or finding of a PIPA violation.¹⁸ As a result, I am not persuaded that the Opposition's access requests amount to an abuse of process requiring relief under s. 43(b). The BC Government's allegations are too speculative for me to reach such a conclusion. Considering the circumstances, I decline to apply s. 43(b) as a remedial tool to authorize the BC Government to disregard the Opposition's access requests based on unproven allegations of a PIPA contravention.

[33] To summarize, I find the BC Government has not met its burden of proving that the Opposition's access requests are frivolous or vexatious under s. 43(b). I am not convinced that the Opposition's requests are an abuse of the right of access under FIPPA.

¹⁷ Opposition's submission at para. 20.

¹⁸ For the reasons previously given, I also decline to consider under a s. 43 FIPPA application whether there was a contravention of PIPA.

CONCLUSION

[34] For the reasons given, the BC Government's application under s. 43(b) of FIPPA for authorization to disregard the Opposition's access requests is denied.

September 24, 2019

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

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