



Order F19-44

BC TRANSIT

Elizabeth Barker
Director of Adjudication

December 10, 2019

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Summary: BC Transit applied for authorization to disregard one outstanding access request and certain future access requests under s. 43(a) and (b) of FIPPA. The adjudicator authorized BC Transit to disregard the outstanding request because it was vexatious under s. 43(b) and to disregard any future request the respondent may make regarding the same topic for a period of two years or the date his law suit concludes, whichever comes first.

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

INTRODUCTION

[1] This inquiry is about BC Transit's application to the Office of the Information and Privacy Commissioner (OIPC) for authorization under s. 43 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) to disregard certain access requests made by the respondent.

[2] Specifically, BC Transit says responding to the respondent's August 27, 2018 access request would unreasonably interfere with its operations because of the repetitious or systematic nature of the request (s. 43(a)). Alternatively, BC Transit says that it should be allowed to disregard that request because it is frivolous or vexatious (s. 43(b)). In addition, BC Transit seeks relief from having to respond to certain future requests the respondent may make.

ISSUES

[3] The issues in this case are as follows:

1. Would responding to the respondent's August 27, 2018 access request unreasonably interfere with BC Transit's operations because the request is repetitious or systematic under s. 43(a) of FIPPA?
2. Is the respondent's August 27, 2018 access request frivolous or vexatious under s. 43(b) of FIPPA?
3. If the answer to either question above is "yes", what relief, if any, is appropriate?

[4] Previous orders and decisions have established that the applicant public body has the burden of proof under s. 43.¹

DISCUSSION

Background

[5] The background to this application involves an incident that occurred on February 23, 2018, when the respondent and his companion were allegedly asked to get off a bus because they were a mixed race couple. The respondent complained to BC Transit and he disputes the adequacy of BC Transit's investigation. The respondent made access requests under s. 5 of FIPPA, posted about the incident on social media and filed a law suit.

[6] On September 26, 2019, BC Transit made this application for authorization to disregard the respondent's outstanding FIPPA access request. It also requested authorization to disregard any future requests by, or on behalf of, the respondent that relate to the February 23 bus incident, BC Transit's investigation and his earlier FIPPA access requests. It seeks this future relief for a period of two years, or until such time as the respondent's law suit is concluded.²

[7] BC Transit did not provide the respondent's access requests or its responses for my review. It did, however, provide a statutory declaration from BC Transit's Information and Privacy Officer (Privacy Officer), as well as two letters its lawyer sent to the respondent, from which I can piece together much of what took place.³ The respondent also provided copies of some of his emails with the Privacy Officer. Based on the parties' submissions and evidence, it is apparent

¹ See: Auth. (s. 43) 02-02, [2002] B.C.I.P.C.D. No. 57 and Order F10-09, 2010 BCIPC 14 (CanLII); Order F17-18, 2017 BCIPC 19 (CanLII).

² BC Transit's October 21, 2019 submission at p. 1.

³ The lawyer's letters are dated April 1, 2019 and September 26, 2019.

that the respondent made four access requests: April 2018, June 18, 2018, August 27, 2018 and July 19, 2019.⁴

[8] BC Transit says that the August 27, 2018 request (August request) is the outstanding request it seeks permission to disregard.⁵ The evidence provided by the parties establishes that BC Transit responded to the other three requests and the respondent made requests for review and complaints to the OIPC about all of BC Transit's responses to his requests.

Applicable Principles

[9] Section 43 of FIPPA states:

Power to authorize a public body to disregard requests

- 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

[10] Any decision to grant a s. 43 authorization must be carefully considered, as relief under that section curtails or eliminates the rights of access to information.⁶

[11] For the reasons that follow, I found it was only necessary to consider s. 43(b) in this case.

[12] The terms "frivolous" and "vexatious" in s. 43(b) are not defined in FIPPA. Former Commissioner Loukidelis deliberated on the meaning of these terms and provided a non-exhaustive list of factors to consider in deciding whether a request is frivolous or vexatious:⁷

- 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

⁴ There was no information about the exact date of the April request.

⁵ BC Transit's October 21, 2019 submission at p. 1.

⁶ Auth. (s. 43) 02-02 (November 8, 2002) at para. 15. Available on the OIPC website.

⁷ Auth. (s. 43) 02-02, (November 8, 2002), at para. 27.

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.

[13] I will consider the above factors in my analysis of the facts of this case.

Parties’ positions on s. 43(b)

[14] BC Transit submits that the respondent’s August request is frivolous and vexatious because his purpose in making it is to harass BC Transit, get the bus driver fired and for monetary gain through his law suit.⁸ It also submits that the purpose of the request is evident from the frequently hostile tone of his requests and what the respondent said on social media and in his court documents. BC Transit says that the August request will not further the respondent’s goal of getting information about the complaint about the bus incident or how BC Transit processed his April and June requests. BC Transit also says:

Instead, his request is now directed to obtaining hundreds of thousands of pages of email messages that do not relate to the actual purpose of his original requests, and will serve no purposes in holding government accountable for its action in relation to the request. Personal information, privileged information and irrelevant information in large volumes will simply add expenses and burden the public purse with an unreasonable task in this circumstance.⁹

[15] In addition, the Privacy Officer says:

It is vexatious to have the same requests, with a rolling date made. It is also frivolous to ask for hundreds of thousands of pages of email and other information to be produced in these circumstances because the substance of what can be produced already has been, or else will have no bearing on the substance of the complaints.¹⁰

⁸ BC Transit’s September 26, 2019 submission at p. 5 and October 21, 2019 submission at p. 2.

⁹ BC Transit’s September 26, 2019 submission at p. 5.

¹⁰ The Privacy Officer’s statutory declaration at para. 39.

[16] The respondent disputes that his August request is vexatious or frivolous. He says that the only reason he made this broad request was because BC Transit was “illegally withholding records that must exist.”¹¹

Analysis and findings

[17] It is apparent that sometime in April 2018 the Complainant made a request for all records related to his complaint about being asked to get off the bus on February 23, 2018.¹² BC Transit says it responded to the request on May 25, 2018 and withheld some information from the records under ss. 13 (policy advice or recommendations) and 22 (disclosure harmful to personal privacy) of FIPPA.¹³ Because no one provided me with a copy of BC Transit’s decision letter, I do not know if it informed the respondent of his right under FIPPA to request the OIPC review BC Transit’s decision.

[18] Based on the emails that the respondent provides, I can see that immediately after he received the response to his April request he contacted the Privacy Officer to question whether she had conducted a thorough search for records. In the months that followed, he and the Privacy Officer communicated several times. Their exchanges were about the respondent’s dissatisfaction with BC Transit’s decision to refuse to give him the bus driver’s name and his belief that BC Transit had not conducted an adequate search for records.

[19] In his June request the respondent asked for several things. He challenged the Privacy Officer about the thoroughness of her search and queried her about who she had asked for records and what type of records she searched for. He asked to see the emails the Privacy Officer sent when she searched for the records. He also said, “I would also like an update on the file. Have more emails been sent since?” The Privacy Officer replied that she would ask everyone she originally asked to double check to ensure that they had sent her all records. She also advised him that, once she got back to him after double checking that all records were disclosed to him, if he were still dissatisfied, he could ask the OIPC to review BC Transit’s decision.

[20] In the days after the June request, the Privacy Officer and the respondent continued to communicate about the respondent’s belief that there must be more records responsive to his requests. The Privacy Officer says that the respondent became hostile when he did not get what he requested.¹⁴ The respondent replies to this part of the Privacy Officer’s evidence by saying that he “was annoyed that the FOI officer was lying and refusing to do her job properly.”¹⁵

¹¹ Respondent’s reply, second to last page.

¹² The Privacy Officer’s statutory declaration at para 12.

¹³ The Privacy Officer’s statutory declaration at paras. 12 and 14.

¹⁴ The Privacy Officer’s statutory declaration at para. 16.

¹⁵ Respondent’s reply at p. 3.

[21] The Privacy Officer says that BC Transit treated the June request as a new request and responded on August 1, 2018, but she does not say what the response was.¹⁶ The respondent provided copies of his and the Privacy Officer's August 1 and 2 emails in which he challenges BC Transit's decision to refuse him access to the bus driver's name.¹⁷

[22] On August 14, 2018, the respondent emailed a complaint to the Privacy Officer about her handling of his requests. I was not provided a copy of this complaint.¹⁸ However, I can see the Privacy Officer's response. She gives him an additional two page email chain containing BC Transit's communication with a news outlet that she says was located the previous day.¹⁹ She also confirms that there are no text messages, no further records related to BC Transit's complaint to the police, and all records had now been provided to him. She concludes by saying that BC Transit is happy to work with the OIPC.

[23] The respondent then sent the Privacy Officer the August request that BC Transit now seeks permission to disregard.²⁰ In it, the respondent said:

No one replied to the editor of the [newspaper]?

You still haven't sent me the emails where records are requested. Please send any records of those requests as well as any replies.

How did you come to be in possession of the emails? They must have been sent to you somehow. Please send any records of those transfers.

[TS and ST] haven't sent you all concerned emails, I know this for a fact, as some emails they sent me and I sent them are missing.

Apparently we have to do this the hard way.

Please send me literally every single email and text message sent between February 23rd 2018 and July 12th 2018, where the sender is [the Privacy Officer, TS, DH, the bus driver, JD, LT or ST] where at least one of the recipient is [the Privacy Officer, TS, DH, the bus driver, ST, BF, JD, SM, GM, AM, RK, LT, NC, SA, LS, KS] or the RCMP.

And;

¹⁶ The Privacy Officer's's statutory declaration at para.18.

¹⁷ Section 7 of FIPPA gives a public body 30 days to respond to a request, so it is not apparent why the respondent thought the response to his June 18 request was late.

¹⁸ It was a PDF attachment to his August 14, 2018 email.

¹⁹ The Privacy Officer's's August 16, 2018 email.

²⁰ The respondent provided a copy of this email.

literally every single email and text message sent between February 23rd 2018 and July 12th 2018, where the sender is [EL, TS, DH, the bus driver, ST, BF, JD, SM, GM, AM, RK, LT, NC, SA, LS, KS] or the RCMP and where at least one of the recipient is [EL, TS, DH, the bus driver, ST, JD or LT].

and:

literally every single email and text message sent between February 23rd 2018 and March 1st 2018 and between May 26th and June 10th by [TS, DH, the bus driver, JD, LT or ST] regardless of the recipient.

Literally. Every. Single. One.

By the way, I saw how you misquoted me in order to make it sound like I threatened the bus driver.

I retract my apology. I really regret giving you the benefit of the doubt.

[24] The Privacy Officer says that she thought the August 27 email was related to the respondent's August 14 complaint.²¹ She responded, "I haven't read this email and won't be reading your emails or communicating with you any further because of your hostility. I'm happy to work with the FOI Commissioner on your concerns."²²

[25] The respondent says that the Privacy Officer's claim that she thought his August request was part of a complaint about his earlier requests "stretches credulity" and her response was "a violation of FOI law."²³

[26] The parties' evidence and submissions establish that from early September 2018 onwards, they were engaged in multiple OIPC processes related to the respondent's requests for review and complaints.²⁴ The Privacy Officer says that in early September 2018, the respondent complained to the OIPC about "the adequacy of BC Transit's searches and the completeness of information produced under the April and June Requests."²⁵ She says that since September 2018 the respondent has made four complaints to the OIPC.

[27] The Privacy Officer says that on March 29, 2019, the OIPC determined that BC Transit had met its duty under s. 6 of FIPPA.²⁶ The respondent does not dispute that this was what occurred.

²¹ The Privacy Officer's statutory declaration at para. 23.

²² The Privacy Officer's August 27, 2018 email attached to respondent's submission.

²³ Respondent's submission at p. 3.

²⁴ The Privacy Officer's statutory declaration at para. 37.

²⁵ The Privacy Officer's statutory declaration at para. 24.

²⁶ The Privacy Officer's statutory declaration at para. 28.

[28] I can see that in the months after the OIPC's decision, in an effort to resolve matters and satisfy the respondent, BC Transit gave the respondent records that were outside the time frame of his requests, as well as emails that were already in his possession, because they were addressed to him in the first place.²⁷

[29] On September 26, 2019, BC Transit brought this s. 43 application. BC Transit says the following about the timing of its s. 43 application:

It is entirely credible that the FOI Officer in reading the letter of August 27, 2018 believed it was demanding documents already provided.

It is noted BC Transit worked with the Complainant and OIPC from September through April 2019 before the Complainant or OIPC suggested he wanted more as a result of that August request (his previous complaints having focused on the initial searches and responses). It was still further in 2019 before the focus of his request came clear and BC Transit came forward with this application.²⁸

[30] The emails exchanged between the parties that were provided for my review show that in several the respondent's tone is sarcastic and rude. For instance, in emails that he sent to the Privacy Officer, he said the following:

- [Regarding the Privacy Officer's difficulty reaching him regarding the April request] "It's funny watching you squirm. Just send the info."²⁹
- [Regarding why BC Transit refused to disclose the bus driver's name] "Love the use of the passive voice here. As if it wasn't you who arbitrarily decided that. Anyway, you're still dodging the question about the text messages. Where are they?"³⁰
- After the Privacy Officer had found and disclosed additional responsive records in November, 2018 the respondent emailed: "You have a lot of nerve, [Privacy Officer]. Are you seriously going to pretend that you just happened to figure out your error exactly then? After double-checking and confirming how many times? After how long? Did you think: '3:00 on the dot is conspicuous, I'm gonna send it one minute earlier?' You are embarrassing yourselves."³¹

²⁷ The Privacy Officer's June Lawyer's letters to the respondent dated April 1, 2019 and September 26, 2019.

²⁸ BC Transit's reply submission at p. 3.

²⁹ Respondent's April 19, 2018 email.

³⁰ Respondent's August 2, 2018 email.

³¹ Respondent's November 6, 2018 email.

- On July 19, 2019, he wrote: “Dearest [Privacy Officer], paragon of hard-working honest and integrity, jewel of the BC public service, pretty please, with sugar on top, you’re going to send me every bill submitted to BC Transit by FH & P Lawyers and Cox Taylor, in 2018 and 2019. Hope that’s not too hostile for you!”³²

[31] The Privacy Officer also provided copies of the respondent’s social media posts. There is one post by BC Transit referencing an earlier conversation with the respondent about how to report his concerns. The respondent’s posts are filled with vitriol and profanity directed at the bus driver and BC Transit. The Privacy Officer says that it is challenging to be forced to deal with a person who is capable of this publicly threatening behaviour.³³ The respondent says the following about the Privacy Officer’s evidence regarding his posts:

She also claims that she has been ‘*dealing with his hostility in communications and social media.*’ She has only been in communication with the Complainant through email, and not through social media. Again, if she has accessed the Complainant’s personal Facebook page through her own will then the Complainant cannot be held responsible for how she ‘feels’.³⁴

[32] It is very clear in this case that the respondent was angry with BC Transit for the bus incident and the fact that he believed it was hiding records that it should have disclosed in response to his April request. On April 16, 2018, the Privacy Officer informed the respondent that if he was not satisfied at any stage of the process, he could contact the OIPC. She also tells him this in her June 18 email. I conclude, therefore, that the respondent knew that there was an OIPC complaint process available to address the dispute about the adequacy of its search for records. Rather than initiate that OIPC process in a genuine effort to resolve the dispute by engaging a neutral third party, he continues to send the Privacy Officer a steady stream of emails aggressively questioning her honesty and how she processed his requests. The tone of the respondent’s emails is confrontational, sarcastic and rude.

[33] The respondent’s intention in his August request, in my view, is to be punitive towards the Privacy Officer for not giving him what he wants. He says, “Apparently we have to do this the hard way.” He then presents a very broad request that is worded in an unnecessarily repetitive, complicated and lengthy fashion. The August request communicates his hostility towards the Privacy Officer and a desire to annoy and cause her hardship. I find that the request does not demonstrate a true desire to actually access the requested information. The

³² July 19, 2019 email.

³³ The Privacy Officer’s statutory declaration at para. 6.

³⁴ Respondent’s submission at para. 32.

purpose for the request is to make the Privacy Officer's job more difficult and to harass BC Transit for what the respondent perceives to be its wrongdoings.

[34] I conclude that the August request is an abuse of the access rights conferred under FIPPA and it is a vexatious request under s. 43(b). Given this finding, it was not necessary to also decide if it was frivolous or if s. 43(a) applies.

Appropriate Remedy

[35] Section 43 gives the Commissioner the discretion to authorize a public body to disregard requests that are frivolous or vexatious. The Commissioner also has the power to make prospective orders and authorize public bodies to disregard future access requests when the facts of the case warrant it.³⁵

[36] In light of my finding that the August request is vexatious, I consider that it is appropriate to authorize BC Transit to disregard it.

[37] BC Transit also requests permission to disregard future access requests the respondent may make related to the bus incident allegation, the subsequent investigation and response by BC Transit and the respondent's previous access requests. BC Transit asks for this future relief for a period of two years, or until such time as the respondent's law suit is concluded.

[38] I have decided that the relief BC Transit requests regarding future requests is appropriate in this case. The evidence establishes that the respondent ought reasonably to know that there is no further purpose to be served making any further requests for records related to the bus incident, the complaint, its investigation and the processing of his earlier access requests. The respondent is well aware that BC Transit has said that there are no other responsive records. The respondent formally challenged this by complaining to the OIPC about the adequacy of BC Transit's search for records. The OIPC determined that BC Transit had complied with its duty under s. 6 of FIPPA. I conclude that any further request for records about the bus incident allegation, the subsequent investigation and response by BC Transit and the respondent's previous access requests would serve no purpose other than to harass BC Transit and for that reason it would be vexatious under s. 43(b).

[39] Therefore, I authorize BC Transit to disregard any future access request by, or on behalf of, the respondent that relates to the bus incident allegation, the subsequent investigation and response by BC Transit or the respondent's previous access requests. This authorization will end two years from the date of this order or the date that the respondent's law suit is concluded, whichever date comes first.

³⁵ *Crocker v. British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BC SC) at paras. 41 and 43.

CONCLUSION

[40] For the reasons given above, I make the following authorization under s. 43(a) of FIPPA:

1. BC Transit is authorized to disregard the respondent's August 27, 2018 request.
2. Subject to paragraph 3 below, BC Transit is authorized to disregard any future request for records which is made by, or on behalf of, the respondent under s. 5 of FIPPA that relates to the bus incident allegation, the subsequent investigation and response by BC Transit and the respondent's previous access requests.
3. The authorization in paragraph 2 immediately above will end two years from the date of this order or the date that the respondent's law suit is concluded, whichever date comes first.

December 10, 2019

ORIGINAL SIGNED BY

Elizabeth Barker
Director of Adjudication

OIPC File No. F19-80605