



Order F20-35

BC EGG MARKETING BOARD

Ian C. Davis
Adjudicator

August 5, 2020

CanLII Cite: 2020 BCIPC 41

Quicklaw Cite: [2020] B.C.I.P.C.D. No. 41

Summary: The BC Egg Marketing Board (Board) applied for authorization under s. 43 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) to disregard four access requests made by the respondent, as well as any future related request. The Board argued that the four requests would unreasonably interfere with its operations because of the repetitious or systematic nature of the requests (s. 43(a)). The Board also argued that the requests were frivolous or vexatious (s. 43(b)). The adjudicator determined that the Board was not authorized to disregard the four requests, or any future related request, under s. 43(a) or s. 43(b).

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

INTRODUCTION

[1] The BC Egg Marketing Board (Board) applies for authorization under s. 43 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) to disregard four access requests made by the respondent. The Board says responding to the respondent's requests would unreasonably interfere with its operations because of the repetitious or systematic nature of the requests (s. 43(a)). The Board also says the requests are frivolous or vexatious (s. 43(b)). In addition, the Board seeks authorization to disregard any future request made by the respondent regarding the same subject matter as the four requests.

ISSUES

[2] The issues I will decide in this application are as follows:

1. Would responding to the respondent's four access requests unreasonably interfere with the Board's operations because the requests are repetitious or systematic under s. 43(a)?
2. Are the respondent's requests frivolous or vexatious under s. 43(b)?
3. If the answer to either of these questions is "yes", what relief, if any, is appropriate?

[3] The burden of proof is on the Board to show that s. 43(a) or s. 43(b) applies.¹

BACKGROUND

[4] The applicant sent the following letter dated March 31, 2020 to the Board:

The 2005 publication by the Farm Industry Review Board concerning New Entrants in the Specialty and Organic categories mentions an aspect of Egg Marketing Board policy is: someone may be exempted from the requirement that a producer must hold a permit, i.e. 'quota' to produce eggs for sale. What I'm after is: the paperwork for obtaining that kind of exemption for myself.

As well, I am interested in policy and regulations to do with an enterprise in which I'd go 'round to rural areas, purchase eggs offered for sale at roadside stands, then re-sell those eggs to restaurants, specialty food stores, butcher shops, private homes et cetera. Please send to me, in hardcopy by regular surface mail, printouts of Egg Marketing Board policy and regulations pertaining to that subject.

Pursuant to the *Freedom of Information and Protection of Privacy Act* ... I require and hereby demand a copy of any / all records falling in these categories:

- first: a copy of the form for applying to the Egg Marketing Board for an exemption from the quota supply scheme for eggs produced strictly for personal consumption by individuals who own their own flock of chickens;
- second: a copy of each and every application for such personal exemption from the quota supply scheme made within the decade from April 1st 2010 to March 31st 2020;
- third: a copy of all correspondence with each and every applicant for such personal exemption from the quota supply scheme made within the decade from April 1st 2010 to March 31st 2020;

¹ Order F19-44, 2019 BCIPC 50 (CanLII) at para. 4.

- fourth: a copy of each and every personal exemption from the quota supply scheme actually issued by the Egg Marketing Board, within the decade from April 1st 2010 to March 31st 2020;
- fifth: a copy of all communications with the federal counterparts of the BC Egg Marketing Board to do with such personal exemption from the quota supply scheme made within the decade from April 1st 2010 to March 31st 2020;
- sixth: a copy of each and every application for a “small lot exemption” from the quota supply scheme made within the decade from April 1st 2010 to March 31st 2020;
- seventh: a copy of all correspondence with each and every applicant for a “small lot exemption” from the quota supply scheme made within the decade from April 1st 2010 to March 31st 2020;
- eighth: a copy of each and every “small lot exemption” from the quota supply scheme actually issued by the Egg Marketing Board, within the decade from April 1st 2010 to March 31st 2020;
- ninth: a copy of all communications with the federal counterparts of the BC Egg Marketing Board to do with such “small lot exemption” from the quota supply scheme made within the decade April 1st 2010 to March 31st 2020.²

[5] By letter dated April 30, 2020, the Board advised the respondent that his proposed enterprise to purchase and re-sell eggs would be in violation of the *Food and Agricultural Products Classification Act* and the *Egg Grading and Standards Regulation*.³ The Board said the respondent’s request for policies and regulations was not a proper access request under *FIPPA*. Nevertheless, the Board explained the law to the respondent, provided him with the applicable regulations and directed him to relevant websites.

[6] Regarding the nine access requests set out in the bullet-point list in the respondent’s letter, the Board said it was concerned that the respondent was not acting in good faith and was “not using *FIPPA* for the purposes for which it was intended”.⁴ The Board asked the respondent to “kindly advise and explain your legitimate purposes for requesting this extensive information.”⁵

[7] Notwithstanding these concerns, the Board responded to the first five access requests in the list. The Board provided the respondent with the form requested in his first request. The Board also explained that persons having what the respondent referred to as a “personal exemption from the quota supply

² Letter from the respondent to the Board dated March 31, 2020. I have edited the letter slightly for grammar, clarity and punctuation. The underlining is in the original.

³ Letter from the Board to the respondent dated April 30, 2020.

⁴ Letter from the Board to the respondent dated April 30, 2020 at p. 2.

⁵ Letter from the Board to the respondent dated April 30, 2020 at p. 2.

scheme” are “Backyard Flock Producers” who have no more than 99 hens, do not have a quota for producing eggs and do not require registration or a permit.⁶ The Board advised that it had no records responsive to the second to fifth requests because no “personal exemptions” are required or issued for Backyard Flock Producers.

[8] Regarding the final four access requests, which are the ones at issue on this application, the Board explained that the persons having what the respondent referred to as a “small lot exemption” are “Small Lot Producers” who have 100 to 399 laying hens and a permit. The Board advised that, unless a Small Lot Producer has his or her eggs graded at a grading station, the eggs may only be sold to “end users”, i.e. the persons who will actually be consuming the eggs. The Board then told the applicant that it would be making this s. 43 application, which it did on April 30, 2020.

[9] On May 7, 2020, the respondent sent two emails to the Board.⁷ In the first, he requested to be directed to a webpage where he could find information about how to apply to register as a Small Lot Producer. He also requested the contact information for a Small Lot Producer in his area so that he could “see how they do it / talk to them”. In the second email, the respondent requested the contact information for an egg grading facility in his area.

SECTION 43 – AUTHORIZATION TO DISREGARD REQUESTS

[10] Section 43 of FIPPA provides:

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.

[11] Rights of access under FIPPA “should only be used in good faith” and “must not be abused”.⁸ Section 43 is “an important remedial tool in the Commissioner’s armory to curb abuse of the right of access.”⁹ However, a

⁶ Letter from the Board to the respondent dated April 30, 2020 at p. 3; Board’s initial submissions at para. 8.

⁷ Schedule D to the Board’s reply submissions. The Board did not explicitly state in its submissions whether it seeks to disregard these May 7, 2020 emails.

⁸ Auth. (s. 43) 99-01 (December 22, 1999) at pp. 7-8. Available on the OIPC website under “Decisions”.

⁹ *Crocker v. British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BC SC) at para. 33.

decision to grant a s. 43 authorization must be carefully considered because it curtails or eliminates a person's rights of access to information.¹⁰

Are the requests repetitious or systematic in nature?

[12] Section 43(a) applies if the Board establishes, first, that the requests are repetitious or systematic in nature and, second, that responding to the requests would unreasonably interfere with the Board's operations.¹¹

[13] Repetitious requests are made two or more times.¹² Based on the evidence before me, I find that the requests at issue on this application were not made more than once. I conclude that these requests are not repetitious.¹³

[14] The next question is whether the requests are systematic in nature. Systematic requests involve "a method or plan of acting that is organized and carried out according to a set of rules or principles."¹⁴ The key characteristics of a systematic request include:

- a pattern of requesting more records, based on what the respondent sees in records already received;
- combing over records deliberately in order to identify further issues;
- revisiting earlier freedom of information requests;
- systematically raising issues with the public body about their responses to freedom of information requests, and then often taking those issues to review by the OIPC;
- behaviour suggesting that a respondent has no intention of stopping the flow of requests and questions, all of which relate to essentially the same records, communications, people and events; and
- an increase in frequency of requests over time.¹⁵

[15] The Board submits that the scope of the respondent's requests, and the purposes for which he intends to use the requested information, show that the

¹⁰ Auth. (s. 43) 02-02 (November 8, 2002) at para. 15. Available on the OIPC website under "Decisions".

¹¹ Auth. (s. 43) 02-01 (September 18, 2002) at para. 16. Available on the OIPC website under "Decisions".

¹² Decision F12-01, 2012 CanLII 22871 (BC IPC) at para. 5.

¹³ The Board referred to the respondent's request as being repetitious in the introduction to its initial submissions at paras. 4 and 15, but did not elaborate. Although I do not understand the Board to be seriously arguing that the requests are repetitious, I have addressed the issue for the sake of completeness.

¹⁴ Auth. (s. 43) 02-01, *supra* note 11 at para. 17, citing Auth. (s. 43) 99-01, *supra* note 8.

¹⁵ Order F18-37, 2018 BCIPC 40 (CanLII) at paras. 26-27; Order F13-18, 2013 BCIPC 25 (CanLII) at para. 25; Decision F06-03, 2006 CanLII 13535 (BC IPC) at paras. 51 and 53.

requests are systematic in nature.¹⁶ The Board says the respondent seeks to use the requested information either to pursue an illegal enterprise of buying and re-selling ungraded eggs or to further his longstanding effort to challenge regulations prohibiting the sale of raw unpasteurized milk. Further, the Board submits that the respondent “has no intention of stopping his pursuits and will simply make further inquiries and requests”.¹⁷

[16] The respondent submits that his requests are “systematic” only in the sense that he is using the FIPPA process to engage in political activism.¹⁸ The respondent acknowledges that he wants the requested information to assist him in proving in court proceedings “that production of milk or eggs is allowed outside the quota system for ‘personal use’ or as a ‘small lot producer’.”¹⁹ The respondent says that regulations imposing grading on eggs and “outlawing people milking a cow to feed ourselves are classic examples of how communism interferes with the free market.”²⁰

[17] In my view, the respondent’s four outstanding March 31, 2020 requests are not systematic in the sense required under s. 43(a). I accept the Board’s evidence that the respondent has been engaged in a long-standing effort to challenge regulations prohibiting the sale of raw unpasteurized milk.²¹ That is apparent from the court judgments the Board provided to me. However, I find that, to this point, the respondent’s efforts have not involved a pattern of access requests to the Board increasing in frequency over time. I also find that the evidence does not show that the respondent is systematically raising issues with the Board about their responses and involving the OIPC.

[18] Further, I find the evidence does not establish that the respondent’s behaviour is systematic because he intends to continue a flow of requests and questions to the Board about eggs and/or raw milk. The respondent’s submissions clearly show that he has strong beliefs and concerns. However, I find it speculative that he will continue to pursue these issues through repeated inappropriate FIPPA requests and questions to the Board. I recognize that he sent the May 7, 2020 emails and included a further access request in his submissions.²² However, I am not satisfied that this is sufficient to establish a systematic pattern.

[19] Having regard to the relevant factors, the context and the purposes of FIPPA and s. 43, I conclude the requests are not systematic within the meaning

¹⁶ Board’s initial submissions at para. 22 (underlining in original); Board’s reply submissions at paras. 2-6 and 12.

¹⁷ Board’s reply submissions at para. 7.

¹⁸ Respondent’s submissions at para. 3.

¹⁹ Respondent’s submissions at paras. 5, 13 and 18.

²⁰ Respondent’s submissions at para. 8.

²¹ Board’s reply submissions at para. 5.

²² Respondent’s submissions at para. 14.

of s. 43(a). Given my conclusion, it is not strictly necessary for me to consider whether the requests would unreasonably interfere with the Board's operations. However, I will consider that issue below for the sake of completeness.

Would responding to the requests unreasonably interfere with the Board's operations?

[20] In *Crocker v. British Columbia (Information and Privacy Commissioner)*, the BC Supreme Court said the following about unreasonable interference with a public body's operations under s. 43(a):

The determination of what constitutes an unreasonable interference in the operation of a public body rests on an objective assessment of the facts. What constitutes an unreasonable interference will vary depending on the size and nature of the operation. A public body should not be able to defeat the public access objectives of the *Act* by providing insufficient resources to its freedom of information officers.²³

[21] In *Crocker*, the Commissioner granted a s. 43 authorization and the Court upheld that decision.²⁴ The public body submitted a "considerable body of evidence" about the access requests and how they affected the public body's operations, including its ability to perform its other duties and responsibilities.²⁵

[22] In this case, the Board submits that responding to the requests would unreasonably interfere with its operations.²⁶ The Board says the requests are onerous because it would be required to gather 10 years of records for approximately 600 permits when its resources are limited due to the global COVID-19 pandemic. The Board's submissions imply that processing the requests would unreasonably interfere with its ability to fulfill its duties "to oversee the province's egg farming industry and ensure that British Columbians continue to have a safe egg supply in the midst of the global pandemic."²⁷ The Board notes that responding to the requests would likely require it to notify all of the third-party permit holders, which requires significant additional work.

[23] The respondent submits that the Board is simply using the global pandemic as an excuse not to process his requests.²⁸ Further, the respondent says that, rather than seeking to disregard his requests, the Board is obliged to give him a written estimate of the total fee for processing his requests. He says

²³ *Crocker*, *supra* note 9 at para. 37.

²⁴ However, the Court disagreed with one of the two remedies that the Commissioner granted. See *Crocker*, *ibid* at paras. 45 and 50.

²⁵ *Crocker*, *ibid* at para. 37.

²⁶ Board's initial submissions at paras. 23-25.

²⁷ Board's initial submissions at para. 23.

²⁸ Respondent's submissions at para. 16.

he can then choose whether to pay the fee, contest it, or seek to have it waived.²⁹

[24] In my view, the Board has not established that responding to the respondent's requests would unreasonably interfere with its operations. I accept that, as a matter of common sense, the global pandemic must place some constraints on the Board's ability to respond to access requests. However, the Board provided no detailed evidence or argument about its size and resources, what staff resources are used to respond to FIPPA access requests, the distribution of labour within the Board, how long it expects it would take to process the requests and roughly how much that might cost, or how processing the requests would affect its other priorities.³⁰ I find the Board has not provided the evidence required by *Crocker*. In my view, the evidence adduced by the Board is not sufficient to establish that processing the respondent's requests would unreasonably interfere with its operations.

[25] To summarize, I find that s. 43(a) does not apply because the respondent's four outstanding March 31, 2020 requests are neither repetitious nor systematic and responding to the requests would not unreasonably interfere with the Board's operations. I turn now to s. 43(b).

Are the requests frivolous or vexatious?

[26] The terms "frivolous" and "vexatious" in s. 43(b) are not defined in FIPPA. However, past orders provide the following non-exhaustive list of factors to consider in deciding whether a 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.

²⁹ Respondent's submissions at para. 19. See also s. 75 of FIPPA.

³⁰ I say this recognizing that the Board is not required to issue a fee estimate under s. 75 of FIPPA before seeking a s. 43 authorization. See *Crocker*, *supra* note 9 at para. 44.

- 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.³¹

[27] These factors have been consistently relied upon to decide s. 43 applications.³² I will apply them here. If the Board establishes a *prima facie* case that the requests are frivolous or vexatious, the respondent bears some practical onus to explain why they are not.³³

[28] The Board submits that it is “evident” from the respondent’s access requests that they are frivolous or vexatious.³⁴ The Board submits that it would be “prudent” to consider the respondent’s “extensive history with the Courts”, including cases where he has been found in contempt of court.³⁵

[29] The Board also argues that the respondent’s requests are being made for improper purposes, namely to further an illegal enterprise of buying and re-selling ungraded eggs or to, “in a vexatious manner, challenge and defy” the regulations prohibiting the sale and distribution of raw milk.³⁶ The Board says the respondent does not need the requested information to make his argument about raw milk because the Board explained the egg regulation laws to him.³⁷ The Board says it is “unclear, and with respect nonsensical” as to how the requested information is relevant to the respondent’s “ongoing vexatious legal challenges.”³⁸ The Board also notes that the respondent has not applied to the Board for a permit.

[30] Finally, the Board says the respondent made “egregious unfounded attacks” on certain persons in his written submissions.³⁹ The Board claims that, if the respondent receives the requested information, he may harass and question permit holders, which would harm “the good will, respect and trust that Small Lot Producers of eggs have in the BC Egg Marketing Board”.⁴⁰

³¹ Order F19-44, 2019 BCIPC 50 (CanLII) at para. 12, citing Auth. (s. 43) 02-02, *supra* note 10 at para. 27.

³² See e.g. Order F20-15, 2020 BCIPC 17 (CanLII) at para. 23; Order F19-44, *ibid*; Order F19-34, 2019 BCIPC 37 (CanLII) at para. 17.

³³ Auth. (s. 43) 02-02, *supra* note 10 at para. 4.

³⁴ Board’s initial submissions at para. 29.

³⁵ Board’s initial submissions at para. 30.

³⁶ Board’s reply submissions at para. 5.

³⁷ Board’s reply submissions at para. 12.

³⁸ Board’s reply submissions at para. 6.

³⁹ Board’s reply submissions at para. 9.

⁴⁰ Board’s reply submissions at para. 11.

[31] The respondent concedes that he wants the records so that he can “use them as evidence substantiating an argument” in his court proceedings.⁴¹ He says the records “will compel the provincial government to answer why [he] and [his] associates in raw milk dairies, don’t qualify for similar ‘personal exemption’ ‘small lot producer’.”⁴² The respondent also explains that his proposed enterprise to buy and re-sell eggs is not illegal. He says he will “arrange with a Grading Station to co-operate with [him] so the proposed endeavor may operate within the Regulations.”⁴³ As I understand the respondent, he submits that his intentions are not improper and do not abuse FIPPA. As for the respondent’s litigation history, he says it is irrelevant to the FIPPA process.⁴⁴

[32] For the following reasons, I do not find the respondent’s four outstanding March 31, 2020 requests frivolous or vexatious.

[33] The respondent explained in his submissions how he proposes to pursue his egg-selling business legally. He also says he wants the requested information to assist him in his long-standing effort to challenge regulations prohibiting the sale of raw unpasteurized milk. The respondent’s submissions suggest that he intends to argue that the regulatory scheme for eggs should similarly apply to raw milk. He wants evidence of the permits granted under that scheme. The Board’s argument invites me to decide whether the respondent needs the requested information to make his case. However, in my view, it is not my role to decide how the respondent should pursue his cause. I find there is a logical and legitimate basis for the respondent to seek the requested information and that this supports the conclusion that his requests are not frivolous or vexatious.

[34] Further, I am not persuaded that the respondent’s past litigation history supports the Board’s position that the requests are frivolous or vexatious. The Board says it would be “prudent” to consider this history, but cites no legal authority for doing so. I fail to see how past litigation about the respondent’s taxes, for example, is relevant to whether his FIPPA requests should be disregarded in this case.

[35] I agree with the Board that the respondent made “egregious unfounded attacks” in his written submissions. I find parts of the respondent’s submissions clearly inappropriate and irrelevant because they include, for example, offensive comments about counsel for the Board.⁴⁵ I have disregarded that material. Nothing in this order, including the result, should be taken as condoning or endorsing these parts of the respondent’s submissions.

⁴¹ Respondent’s submissions at para. 5.

⁴² Respondent’s submissions at para. 7.

⁴³ Respondent’s submissions at para. 9.

⁴⁴ Respondent’s submissions at para. 22.

⁴⁵ For example, respondent’s submissions at paras. 1, 4-6 and 21.

[36] That said, I am not persuaded by the Board's argument that the requests are frivolous or vexatious because the respondent will use the requested information to harass and question Small Lot Producers resulting in harm to them, the Board, and/or their relationship. I find the allegation that the respondent will harass Small Lot Producers speculative. Further, I find that whether disclosure of the requested information would result in harm is of limited relevance to this application. That issue is for the Board to consider when responding to the access requests and deciding whether to refuse access under the FIPPA exceptions to disclosure.

[37] In the result, I do not find the respondent's four outstanding March 31, 2020 requests frivolous or vexatious. I am not satisfied by the evidence that the respondent's requests are trivial or that he is abusing FIPPA or seeking the information for an improper motive, such as to harass or obstruct the Board.

CONCLUSION

[38] For the reasons given above, I find that ss. 43(a) and 43(b) do not apply. As a result, I conclude it is not appropriate to grant any relief under s. 43 in relation to the March 31, 2020 requests or any future related request.

August 5, 2020

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.: F20-82735