



OFFICE OF THE  
INFORMATION &  
PRIVACY COMMISSIONER  
FOR BRITISH COLUMBIA

Order F21-02

## CITY OF NANAIMO

Ian C. Davis  
Adjudicator

January 13, 2021

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**Summary:** The City of Nanaimo (City) applied for authorization under s. 43 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) to disregard several outstanding access requests made by the respondent as well as certain future access requests. The adjudicator found that the City had not established that responding to the requests would unreasonably interfere with its operations because of the repetitious or systematic nature of the requests (s. 43(a)) or that the requests were frivolous or vexatious (s. 43(b)). Accordingly, the adjudicator concluded that the City was not entitled to relief under s. 43.

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

## INTRODUCTION

[1] The City of Nanaimo (City) applies for authorization under s. 43 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) to disregard certain outstanding access requests made by the respondent. The City says responding to these requests would unreasonably interfere with its operations because of the repetitious or systematic nature of the requests (s. 43(a)). The City also says the requests are frivolous or vexatious (s. 43(b)). In addition, the City seeks authorization to disregard “all further access requests by the respondent in excess of one active request at a time, to a limit of no more than two requests in any calendar year, and with the City not being required to spend more than 5 hours of staff time in responding to each request.”<sup>1</sup>

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<sup>1</sup> City's initial submissions at para. 45.

## PRELIMINARY MATTER

[2] The respondent submits that much of the City's affidavit evidence in this inquiry is "inadmissible argument, opinion, mere belief, speculation, hearsay or double hearsay and/or untenable assertions (express or implied) of personal knowledge."<sup>2</sup>

[3] In reply, the City submits that strict rules of evidence do not apply to an inquiry under FIPPA and that it is up to me to determine how much weight to place on the evidence submitted.<sup>3</sup> The City also says the respondent's evidentiary objections apply equally to her own affidavit.

[4] In general, the strict rules of evidence that apply to court proceedings do not apply to administrative proceedings, including this application.<sup>4</sup> For example, hearsay is admissible if it is "logically probative and may fairly be regarded as reliable".<sup>5</sup> Given the flexible approach to evidence in administrative proceedings, I am satisfied that it is not necessary in this case to make preliminary rulings on the admissibility of evidence. I will consider all of the evidence submitted, assess its credibility and reliability, and determine what weight it should be given.

## ISSUES

[5] The issues in this application are:

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

[6] The burden of proof is on the City to show that s. 43(a) or s. 43(b) applies.<sup>6</sup>

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<sup>2</sup> Respondent's submissions at para. 60.

<sup>3</sup> City's reply submissions at para. 19.

<sup>4</sup> *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39 at paras. 67-68; Order F08-22, 2008 CanLII 70316 (CanLII) at para. 28.

<sup>5</sup> *Cambie Hotel (Nanaimo) Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2006 BCCA 119 at para. 36; Order F20-48, 2020 BCIPC 57 (CanLII) at para. 34.

<sup>6</sup> Order F19-44, 2019 BCIPC 50 (CanLII) at para. 4.

## BACKGROUND

[7] In late 2015 or early 2016, the City's Mayor and Council hired the respondent to work for the City.<sup>7</sup> The respondent worked for the City until sometime in 2018.

[8] In late 2018, the respondent filed a complaint with the British Columbia Human Rights Tribunal (BCHRT) against the City and two individuals. The hearing in that case was adjourned on April 15, 2020 after disputes arose about the scope of document production by the City.<sup>8</sup>

[9] The respondent made three access requests to the City on May 13, 2020 and one on June 28,<sup>9</sup> 2020 (collectively, the "earlier requests"). One of the May 13 requests and the June 28 request were multi-part requests. The City has responded to the earlier requests and does not seek authorization to disregard them under s. 43.

[10] In this application, the City seeks authorization under s. 43 to disregard a multi-part request dated August 31, 2020 and two multi-part requests dated September 9, 2020 (collectively, the "outstanding requests").

[11] On August 31, 2020, the respondent requested that the City provide her access to records relating to a forensic audit report prepared by KPMG. Specifically, the respondent requested:

1. copies of each draft of the KPMG forensic investigative assistance report prepared by KPMG for Valkyrie LLP dated January 15, 2018, January 17, 2018 (track changes), January 17, 2018 (clean), January 22, 2018 (track changes), January 22, 2018 (clean), February 21, 2018 (track changes), February 21, 2018 (clean).
2. email exchanges among, in any combination, [the respondent], [two named individuals], KPMG forensic audit team between December 1, 2017 and January 31, 2018.

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<sup>7</sup> The information in this background section is based on the evidence, which I accept, unless otherwise stated, in the Affidavit #1 of the City's Director of Legislative Services and Corporate Officer (Director) at paras. 6-7 and 17 and Exhibits "A" and "B"; Affidavit #1 of the respondent at paras. 4-5, 8-12 and 17-20 and Exhibits "B"- "I"; and the City's reply submissions at para. 10. This section is also informed by the respondent's BCHRT complaint. I recognize that the information in the complaint is not proven fact, but it still provides helpful context on uncontested matters.

<sup>8</sup> The parties' submissions do not indicate the current status of the BCHRT case.

<sup>9</sup> Exhibit "A" to Affidavit #1 of the Director states that the respondent made requests on June 29, 2020. However, exhibit "E" to Affidavit #1 of the respondent shows that the City received these requests on June 28, 2020.

3. copies of email from any employee or Council members to KPMG auditor or KPMG forensic auditors in respect of the above noted forensic audit reports from February 1, 2018 to May 30, 2018.
4. copies of email between Valkyrie LLP and KPMG auditors and/or KPMG forensic auditors regarding the above noted reports from November 1, 2018 to May 30, 2018.<sup>10</sup>

[12] Subsequently, on September 9, 2020, the respondent requested that the City provide her access to records relating to “privacy breaches” by CUPE union members regarding a named individual. Specifically, the applicant requested:

1. Email and letters from [the respondent] to [named individual], President CUPE 401 between September 1, 2017 to January 31, 2018.
2. Email and letters from [named individual], President CUPE 401 to [the respondent] same time period.
3. Email from [the respondent] to City staff about privacy breaches between October 6, 2017 and December 31, 2017.
4. Email and letter from [named individual], President CUPE 401 to City staff about privacy breaches circulated and posted within the workplace.
5. Email from [named individual], President CUPE 401 to [the respondent] about FOI department.<sup>11</sup>

[13] Later on September 9, 2020, the respondent requested that the City provide her access to the following:

All email from [the respondent] to Senior Management group email from September 18, 2017 to January 31, 2018 regarding (1) Goldner Report, (2) Censure Hearings for [two named individuals], (3) Mandated January 30, 2018 apologies by [two named individuals] to [the respondent], and (4) KPMG Forensic Audit.<sup>12</sup>

[14] As noted above, in this application, the City seeks authorization under s. 43 to disregard the outstanding multi-part access requests made on August 31 and September 9, 2020.

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<sup>10</sup> Exhibit “F” to Affidavit #1 of the respondent (formatting adjusted slightly).

<sup>11</sup> Exhibit “G” to Affidavit #1 of the respondent (formatting adjusted slightly).

<sup>12</sup> Exhibit “H” to Affidavit #1 of the respondent.

**AUTHORIZATION TO DISREGARD REQUESTS – s. 43**

[15] 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 [access requests] or 29 [correction requests] 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.

[16] Rights of access under FIPPA “should only be used in good faith” and “must not be abused”.<sup>13</sup> Section 43 is “an important remedial tool in the Commissioner’s armory to curb abuse of the right of access.”<sup>14</sup> However, a decision to grant a s. 43 authorization must be carefully considered because it curtails or eliminates a person’s rights of access to information.<sup>15</sup>

[17] Before turning to s. 43(a), I note that the parties disagree about how many access requests the respondent made to the City.

[18] The City submits, for instance, that the applicant’s August 31 request is not a single request but is actually four separate requests. The City says the earlier requests and the outstanding requests total 23 individual access requests.<sup>16</sup> The City relies on Authorization (s. 43) 02-01, where former Commissioner Loukidelis found that multiple requests made in a single document were actually separate access requests under FIPPA.<sup>17</sup>

[19] The respondent says that in total she only made seven different access requests using the City’s online request system.<sup>18</sup>

[20] In my view, it is not necessary to decide exactly how many access requests the respondent made in order to decide this application. I find it more useful to focus on the substance of what the respondent requested and how that relates to the other requests. This is the approach I have taken in the analysis below.<sup>19</sup>

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<sup>13</sup> Auth. (s. 43) 99-01 (December 22, 1999) at pp. 7-8. Available on the OIPC website under “Decisions”.

<sup>14</sup> *Crocker v. British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BC SC) at para. 33.

<sup>15</sup> Auth. (s. 43) 02-02 (November 8, 2002) at para. 15. Available on the OIPC website under “Decisions”.

<sup>16</sup> City’s initial submissions at para. 4.

<sup>17</sup> Auth. (s. 43) 02-01 (September 18, 2002) at paras. 12-15. Available on the OIPC website under “Decisions”.

<sup>18</sup> Affidavit #1 of the respondent at para. 12; respondent’s submissions at para. 13.

<sup>19</sup> For a similar approach, see e.g. Order F16-24, 2016 BCIPC 26 (CanLII).

***Are the requests repetitious or systematic in nature (s. 43(a))?***

[21] Section 43(a) applies if the City establishes, first, that the requests are repetitious or systematic in nature and, second, that responding to the requests would unreasonably interfere with the City's operations.<sup>20</sup>

[22] Repetitious requests are requests made more than once.<sup>21</sup>

[23] The City argues that the outstanding requests are repetitious because they "relate to the same topics as each other or to the respondent's other requests."<sup>22</sup> For example, the City submits that each of the four requests made on August 31 repeats the other August 31 requests because all of these requests relate to the KPMG audit report. The City also argues that some of the outstanding requests made on September 9 repeat certain earlier requests because they all relate to "privacy breaches".<sup>23</sup>

[24] The City also argues that the outstanding requests are repetitious because the respondent already has the records she requests.<sup>24</sup> However, the City does not say that the respondent currently possesses the requested records as a result of prior access requests that she is now repeating. Accordingly, I do not see how the City's argument relates to whether the outstanding requests repeat prior requests. As I see it, the City's argument relates to whether the outstanding requests are frivolous or made in bad faith.<sup>25</sup> These concepts relate to s. 43(b), so I will consider this argument under my analysis of that subsection.

[25] The respondent submits that the outstanding requests are not repetitious. She says some of the outstanding requests "ask for the same type of information, but it is in relation to different records, events, or time frames."<sup>26</sup> The respondent says the outstanding requests are "for different documents".<sup>27</sup> The respondent also submits that there is "no overlap" between the earlier requests and the outstanding requests.<sup>28</sup>

[26] I am not persuaded by the City's argument that the outstanding requests are repetitious simply because they relate to the same topics or to topics covered by the earlier requests. In my view, past s. 43 orders do not stand for such a broad interpretation of the word "repetitious". Rather, past orders have found that

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<sup>20</sup> Auth. (s. 43) 02-01 (September 18, 2002) at paras. 16-17. Available on the OIPC website under "Decisions".

<sup>21</sup> Decision F12-01, 2012 CanLII 22871 (BC IPC) at para. 5.

<sup>22</sup> City's initial submissions at para. 13.

<sup>23</sup> City's initial submissions at para. 13.

<sup>24</sup> City's initial submissions at paras. 13-14.

<sup>25</sup> Compare, e.g., Order F16-24, 2016 BCIPC 26 (CanLII) at para. 41.

<sup>26</sup> Respondent's submissions at paras. 56-57.

<sup>27</sup> Respondent's submissions at para. 58.

<sup>28</sup> Respondent's submissions at para. 19.

requests are repetitious if they are for information previously requested or for information that is very similar to what was previously requested.<sup>29</sup> The mere fact that a request is connected to another in terms of topic or subject matter is not sufficient to establish that the request is repetitious unless the connection is such that the records requested actually overlap to some extent.

[27] With this in mind, having reviewed all of the requests, I find none of the outstanding requests repetitious. Each group of records requested on August 31 is generally related to the KPMG audit report, but they are clearly different from each other in terms of content and/or timeframe. I am also not persuaded that the outstanding requests repeat any of the earlier requests. Although some of the outstanding requests relate to the same general topics as some earlier requests, the outstanding requests differ in the specific content of the request, such as the timeframe or the individuals involved in correspondence. With respect to the outstanding requests relating to “privacy breaches” that the City specifically mentions, I find they seek correspondence between different individuals than the earlier requests relating to the same topic and are, therefore, not repetitious.

[28] 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.”<sup>30</sup> 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.<sup>31</sup>

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<sup>29</sup> See e.g. Order F16-24, 2016 BCIPC 26 (CanLII) at paras. 37-38; Order F18-09, 2018 BCIPC 11 (CanLII) at paras. 15 and 17; Order F18-37, 2018 BCIPC 40 (CanLII) at para. 20; Decision F05-01, 2005 CanLII 11955 (BC IPC) at para. 18; Order F13-18, 2013 BCIPC 25 (CanLII) at para. 22.

<sup>30</sup> Auth. (s. 43) 02-01 (September 18, 2002) at para. 17, citing Auth. (s. 43) 99-01, (December 22, 1999).

<sup>31</sup> 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.

[29] The City submits that the outstanding requests are systematic because they share several of these key characteristics.<sup>32</sup> The City says the timing of the outstanding requests indicates that the respondent is requesting further records based on what she sees in the records she has already received. The City also notes that the applicant has filed a complaint regarding the adequacy of the City's search for the records requested on June 28. Further, the City argues that the respondent is revisiting earlier requests and, based on the number and pace of her requests, has no intention of stopping the flow of requests and questions.

[30] The respondent denies that the outstanding requests are systematic. She explains why she made them. The respondent says it is "important to access records held by the City in order to refresh [her] recollection and to develop the best possible evidentiary foundation for the eventual hearing" in her BCHRT case.<sup>33</sup> The respondent says that, in the summer of 2020, she appeared as a witness in a different BCHRT hearing also relating to the City. She says this experience reinforced her earlier conclusion that she needs the requested records to assist her in her own BCHRT case.<sup>34</sup>

[31] On October 14, 2020, the City's Director of Legislative Services and Corporate Officer (Director) swore an affidavit in support of this s. 43 application. As of that date, the Director's evidence is that the City had responded to roughly half of the earlier requests.<sup>35</sup> The Director provided a table which indicates that the City responded to the respondent's two-part June 28 request on August 12, 2020, but does not indicate when the other responses were provided.<sup>36</sup> The Director does not say how the City responded to the requests, including whether any records were provided with the responses. The City did not provide me with any of its responses to the respondent's access requests.

[32] Given the evidence presented, it is not clear to me what information the respondent had received in response to the earlier requests when she made the outstanding requests. The City did not provide evidence that explains what information it disclosed to the respondent or how that information relates to the outstanding requests. Without more, I am unable to see how the respondent is systematically requesting further records based on what she saw in the records she already had when she made the outstanding requests.

[33] I also note that the respondent's sworn evidence is that she testified as a witness in a BCHRT case in the summer of 2020 and this prompted her to seek more information for her own case. She made the outstanding requests within a month of appearing as a witness. Given the evidence before me, I find it more

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<sup>32</sup> City's initial submissions at paras. 15-21.

<sup>33</sup> Affidavit #1 of the respondent at para. 16.

<sup>34</sup> Affidavit #1 of the respondent at para. 6-8 and 16.

<sup>35</sup> Affidavit #1 of the Director at para. 7.

<sup>36</sup> Exhibit "A" to Affidavit #1 of the Director.



likely that the respondent made the outstanding requests because of her experience appearing as a witness, rather than because of records she had already received.

[34] The City also says the respondent is systematically raising issues with the City about its responses because the respondent complained to the OIPC about the adequacy of the City's search for the records requested on June 28. In my view, one complaint is not sufficient to establish that the respondent is systematically raising issues with the City about its responses.

[35] Further, the City argues that the respondent has exhibited behaviour suggesting she has no intention of stopping the flow of requests and questions, which is another factor that past orders have found characterizes a systematic request. The Director says the respondent's "communications" are "repetitive", but does not elaborate.<sup>37</sup> The City did not provide me with any of the communications between it and the respondent (apart from the outstanding requests themselves). In my view, the City's evidence is too general and vague for me to conclude from it that the respondent has no intention of stopping the flow of questions and communications.

[36] I am also not persuaded that the respondent has no intention of stopping the flow of access requests. It is true that the applicant made numerous requests from May 13 to September 9, 2020. However, the public body made submissions on October 14 and December 7, 2020, but did not provide any evidence that the respondent has made any further requests since September 9. Thus, the evidence before me is that the flow of requests has not continued beyond the outstanding requests.

[37] Finally, the City submits that the outstanding requests are also systematic because the respondent is revisiting earlier requests. For the reasons provided above, I do not accept that the outstanding requests are repetitious. I accept that some of the outstanding requests generally relate to the same or similar issues and individuals, but this does not mean the respondent is systematically revisiting earlier requests.

[38] 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 of s. 43(a). The outstanding requests do not rise to the level of the frequent, methodical, deliberate, all-encompassing and seemingly endless patterns of requests found to be systematic in other orders.<sup>38</sup> Given my conclusions that the outstanding requests are neither repetitious nor systematic, it is not necessary to

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<sup>37</sup> Affidavit #1 of the Director at para. 29.

<sup>38</sup> Compare, e.g., Order F20-39, 2020 BCIPC 46 (CanLII); Decision F06-03, 2006 CanLII 13535 (BC IPC); Decision F05-01, 2005 CanLII 11955 (BC IPC).

consider whether the requests would unreasonably interfere with the City's operations. Section 43(a) does not apply.

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

[39] The next issue is whether the outstanding requests are “frivolous” and “vexatious” under s. 43(b). These terms 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.
- 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.<sup>39</sup>

[40] These factors have been consistently relied upon to decide s. 43 applications.<sup>40</sup> I will apply them here. If the City establishes a *prima facie* case that the requests are frivolous or vexatious, the respondent bears some practical onus to explain why they are not.<sup>41</sup>

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<sup>39</sup> Order F19-44, 2019 BCIPC 50 (CanLII) at para. 12, citing Auth. (s. 43) 02-02 (November 8, 2002) at para. 27.

<sup>40</sup> See, e.g., Order F20-15, 2020 BCIPC 17 (CanLII) at para. 23; Order F19-44, 2019 BCIPC 50 (CanLII) at para. 12; Order F19-34, 2019 BCIPC 37 (CanLII) at para. 17.

<sup>41</sup> Auth. (s. 43) 02-02 (November 8, 2002) at para. 4.

[41] The City submits that the outstanding requests are frivolous or vexatious because the City “has reason to believe” that the respondent already possesses some of the requested records.<sup>42</sup> The Director deposes that:

- on June 25, 2020, the respondent submitted a professional misconduct complaint against several City staff members to the Chartered Professional Accountants of British Columbia (CPABC complaint);
- the respondent included in the CPABC complaint several City records that she “has no legal right to”, such as the KPMG audit report;
- in addition, the respondent’s CPABC complaint included photos that show she possesses at least portions, if not the entirety, of many of the records requested in the outstanding requests; and
- the City has requested that the respondent return or destroy certain records, the respondent has not done so, and the City has requested under s. 73.2 of FIPPA that the Attorney General of British Columbia petition the court for an order requiring the respondent to return the records.<sup>43</sup>

[42] The City also submits that the respondent made the outstanding requests in bad faith, for a malicious motive, and in an effort to harass City staff and obstruct them from carrying out their other work duties.<sup>44</sup> The Director says the respondent knows that a number of the records she requested contain confidential and sensitive personal information of third parties.<sup>45</sup> The Director provided examples *in camera* of the respondent’s past conduct that the Director says illustrate the respondent’s “disregard for the Act and a willingness to abuse it.”<sup>46</sup> The Director also says the respondent’s time at the City was “tumultuous” and marked by “frequently abusive and vindictive behaviour”, including a death threat for which she was arrested.<sup>47</sup>

[43] The Director provided further evidence, much of which is *in camera*. I can say that, according to the Director, the respondent continues to be “aggressive, dismissive, and demeaning” toward City staff.<sup>48</sup> The Director says City staff fear the respondent, “dread receiving emails from [her] and dread having to deal with” her, which causes them to “suffer significant stress and anxiety” despite their experience in dealing with difficult individuals.<sup>49</sup> The Director says the

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<sup>42</sup> City’s initial submissions at paras. 34 and 36-37.

<sup>43</sup> Affidavit #1 of the Director at paras. 10, 12 and 21.

<sup>44</sup> City’s initial submissions at paras. 37-41.

<sup>45</sup> Affidavit #1 of the Director at para. 9.

<sup>46</sup> Affidavit #1 of the Director at para. 22 (also paras. 18-20).

<sup>47</sup> Affidavit #1 of the Director at paras. 24-25.

<sup>48</sup> Affidavit #1 of the Director at para. 27.

<sup>49</sup> Affidavit #1 of the Director at para. 29.

outstanding requests are perceived by her and her staff “as vexatious, harassing, and obstructive, not as a legitimate exercise of the right of access under the Act.”<sup>50</sup>

[44] In response, the respondent submits that the outstanding requests are not frivolous or vexatious.<sup>51</sup> She says she wants the records for the genuine and legitimate purpose of assisting her with her BCHRT case. She says there is no bar to her seeking the requests through the FIPPA process if she cannot get them through the BCHRT process or otherwise. The respondent submits that her requests are not frivolous because her BCHRT case is “plainly about significant matters.”<sup>52</sup>

[45] Further, the respondent says the City should not be allowed to disregard the respondent’s access requests “based on unproven allegations of a FIPPA contravention or, *a fortiori*, accusations of other alleged misconduct within the jurisdiction of the criminal and civil courts.”<sup>53</sup> In specific response to the City’s allegations, the respondent deposes:

I unequivocally deny possessing copies of any of the records sought in my request; engaging in toxic behavior toward City employees; improperly possessing documents; abusing FOIPPA; abusive and vindictive behavior towards City employees; making a death threat; being aggressive, dismissive and demeaning towards City staff; or seeking to harass and obstruct the City’s ordinary operation by making abusive access requests.<sup>54</sup>

[46] Regarding the KPMG audit report in particular, the respondent says she “does not have a copy of any version”.<sup>55</sup> She says she is “primarily interested in obtaining a copy of the January 15, 2018 version of the KPMG Report” because she believes it will assist her in demonstrating, “with particularity, that [she] did not interfere with the work of KPMG.”<sup>56</sup>

[47] I accept that, in general, the respondent’s employment with the City did not go well for her or the City, and this continues to have residual negative effects. The Director’s evidence supports this, and so does the respondent’s evidence relating to her BCHRT complaint.

[48] The City provided evidence about past negative dealings between the parties. For example, the Director deposes that the respondent “involved herself in how the City responded to two specific access requests” without any authority

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<sup>50</sup> Affidavit #1 of the Director at para. 31.

<sup>51</sup> Respondent’s submissions at paras. 31, 34-47 and 53-54.

<sup>52</sup> Respondent’s submissions at para. 42.

<sup>53</sup> Respondent’s submissions at para. 44.

<sup>54</sup> Affidavit #1 of the respondent at para. 21.

<sup>55</sup> Affidavit #1 of the respondent at para. 17(a).

<sup>56</sup> Affidavit #1 of the respondent at para. 17(a).

under FIPPA to do so.<sup>57</sup> The details of the two incidents are *in camera*. The Director says she mentioned these incidents because she believes they illustrate “the respondent’s disregard for [FIPPA] and a willingness to abuse it.”<sup>58</sup> However, the respondent unequivocally denies “abusing FOIPPA”. The parties’ affidavit evidence is in direct conflict on this point.

[49] A conflict in affidavit evidence can be resolved where there is “documentary evidence, evidence of independent witnesses or undisputed evidence that undermines the affidavit of one of the parties on critical issues or some other basis for preferring one affidavit over another.”<sup>59</sup> A conflict may also be resolved if “one of the affiants has made several inconsistent statements concerning important outstanding facts (although not concerning the essential fact in question); and that there are no (or no adequate) explanations for making the inconsistent statements.”<sup>60</sup>

[50] I am not satisfied that the conflict in the affidavit evidence about whether the respondent abused FIPPA in the past can be resolved in the City’s favour. In my view, the factors set out above do not support the City’s claim or the respondent’s denial. More importantly, the specifics of the City’s allegations are *in camera*. The respondent does not know exactly what they are. As a result, she has not had a full opportunity to respond to them. In these circumstances, I cannot accept the City’s allegations because it would be unfair to the respondent.<sup>61</sup>

[51] Some of the City’s other evidence invites me to infer from the respondent’s character and past conduct that the access requests currently in dispute are frivolous or vexatious.<sup>62</sup> This evidence is helpful context. However, I place limited weight on it, especially where it is *in camera* and the respondent has not had an opportunity to fully respond. Although “people generally act consistently with their known character” and past conduct, that is not always or necessarily true.<sup>63</sup> Even if all of the City’s allegations about the respondent’s character and past conduct are true, it is still possible that the respondent may not have made the outstanding requests in bad faith.

[52] Turning to the evidence that directly relates to the outstanding requests, the City says the respondent already has some of the records she seeks. The City also says the respondent has communicated with City staff in a manner that shows she made the outstanding requests to harass them or obstruct their work.

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<sup>57</sup> Affidavit #1 of the Director at para. 18.

<sup>58</sup> Affidavit #1 of the Director at para. 22.

<sup>59</sup> *Brisette v. Cactus Club Cabaret Ltd.*, 2017 BCCA 200 at para. 27.

<sup>60</sup> *Derouin v. The Owners, Strata Plan VIS 2923*, 2011 BCSC 207 at para. 38.

<sup>61</sup> See, e.g., *Dereva v. Canada (Citizenship and Immigration)*, 2015 FC 417 at para. 12; *Kane v. Bd. of Governors of U.B.C.*, [1980] 1 S.C.R. 1105 at p. 1113.

<sup>62</sup> For example, Affidavit #1 of the Director at paras. 18-19 and 24-27.

<sup>63</sup> *R. v. Handy*, 2002 SCC 56 at para. 39. See also paras. 35-37 and 82.

However, as noted above, the respondent unequivocally denies these allegations. She denies possessing copies of any of the records sought; being aggressive, dismissive and demeaning towards City staff; or seeking to harass and obstruct the City's ordinary operation by making abusive access requests. The parties' affidavit evidence is again in direct conflict on material points.

[53] I am not persuaded that these conflicts in the affidavit evidence can be resolved in the City's favour. It did not provide me with any documentary evidence of the respondent's communications with City staff, such as emails or letters. Accordingly, this is not a case like Order F19-44 or Auth. (s. 43) 02-02, for example, where adjudicators found access requests vexatious based on indisputable documentary evidence of the content of correspondence between the public body and the access applicant.<sup>64</sup> The City also did not provide me with the CPABC complaint that the City says supports its position that the respondent already has some of the requested records. The City does not explain why it did not provide supporting documentary evidence.

[54] The City also does not point to any other basis on which I could resolve the conflict in the affidavit evidence in the City's favour. The City only provided affidavit evidence from the Director. The City does not identify any inconsistencies in the respondent's evidence and I do not see any. Regarding the KPMG audit report in particular, the respondent's evidence is, in fact, consistent: in three different places, she says, in slightly different ways, that she does not have this record.<sup>65</sup>

[55] Ultimately, I accept the respondent's sworn evidence that she is currently involved in a BCHRT case with the City and she wants the requested records to assist her with that case. This is not an improper motive and it does not suggest bad faith. For the reasons provided above, the City's evidence falls short of establishing otherwise. Further, past s. 43 orders have found that where the respondent has a live issue or grievance with the public body and the respondent has a genuine need for, or interest in, the requested records, the requests are not frivolous or vexatious.<sup>66</sup> I accept that the respondent's ongoing BCHRT case amounts to a live issue between the parties and she has a genuine need or interest in the records, so I make a similar finding here. I conclude that the City has failed to meet its burden to prove that the outstanding requests are vexatious.

[56] In my view, the outstanding requests are also not frivolous. The respondent wants the records to assist her with her BCHRT case. That is clearly

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<sup>64</sup> Order F19-44, 2019 BCIPC 50 (CanLII) at paras. 30-34; Auth. (s. 43) 02-02 (November 8, 2002) at para. 31.

<sup>65</sup> Affidavit #1 of the respondent at paras. 17(a), 21 and 24.

<sup>66</sup> See, e.g., Decision F07-08, 2007 CanLII 42406 (BC IPC); Order F18-32, 2018 BCIPC 35 (CanLII); Order F19-08, 2019 BCIPC 10 (CanLII).

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not a trivial matter. The City says it is trivial for the applicant to request various versions of the KPMG audit report.<sup>67</sup> However, the respondent explained that she believes these specific records will assist her in defending against an allegation. I do not consider that to be a trivial matter.

## **CONCLUSION**

[57] 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 outstanding requests or any future requests. The application is dismissed.

January 13, 2021

## **ORIGINAL SIGNED BY**

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Ian C. Davis, Adjudicator

OIPC File No.: F20-83925

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<sup>67</sup> City's initial submissions at para. 35.