Order F21-07

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

Ian C. Davis
Adjudicator

February 17, 2021

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Summary: The complainant made access requests to all ministries of the government of British Columbia and the Office of the Premier. The requests were for lists of certain file and folder names on the electronic devices used by the Premier, Minister or Minister of State for each public body. In response, the public bodies stated that the requested records do not exist and they were not required to create them. The public bodies argued that they had fulfilled their duties to the applicant under s. 6(2) (duty to assist applicants) of the *Freedom of Information and Protection of Privacy Act*. The complainant complained to the Office of the Information and Privacy Commissioner about the public bodies' response. The adjudicator determined that the public bodies were required under s. 6(2) to create the requested records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 6(2).

INTRODUCTION

[1] The complainant made access requests to all ministries of the government of British Columbia and the Office of the Premier (public bodies). The requests were for lists of certain file and folder names on the electronic devices used by the Premier, Minister or Minister of State for each public body. In response, the public bodies stated that the requested records do not exist, the public bodies are not required to create them, and the public bodies have fulfilled their duties to the applicant under s. 6(2) (duty to assist applicants) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The complainant complained to the Office of the Information and Privacy Commissioner (OIPC) about the public bodies' response. Mediation did not

resolve the complaint and the matter proceeded to inquiry. The public bodies provided one joint inquiry submission.

PRELIMINARY MATTERS

[3] The parties' submissions raise certain preliminary matters that require setting out some background to resolve.

[4] The complainant made the initial access requests on December 15, 2017. They requested the following: "A list of all file names and folder names located on the desktop, my downloads, my documents, and my favourites folders from all electronic devices used by the Premier/Minister/Minister of State".[1] The date range specified in the request was from "12/15/2017" to "12/15/2017".

[5] By letters dated January 31, 2018, the public bodies responded that they were not required to create the requested records under s. 6(2). Section 6(2) states that a public body must create a record for an applicant if: (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise; and (b) creating the record would not unreasonably interfere with the operations of the public body.

[6] On March 5, 2018, the OIPC received the complainant's complaint about the public bodies' response. During mediation, the complainant clarified their access request. The OIPC Investigator's Fact Report, which the parties accept as accurate,[2] states that the complainant's request is for:

> … a screen print (or the like) of each of the named folders (desktop, downloads, documents and favourites) from the Premier/Minister/Minister of State's device of primary use. For example, operating the device of primary use, click on or bring up each of the named folders and generate a screen print (or the like) of any items/folders/files listed in each of the named folders.[3]

[7] The public bodies argue that, during mediation, the complainant narrowed and clarified their request to screenshots (or the like) "*rather than*" a list of file and folder names as described in the original access request.[4]

[8] Although the clarified request refers to a "screen print", the parties refer to "screenshots" in their submissions and I will do the same. I accept the public bodies' evidence that a screenshot is a "digital picture of the content currently

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[1] Email dated December 15, 2017 at 7:29 AM.
[2] Complainant's submissions at para. 39; public bodies' initial submissions at para. 10.
[3] Investigator's Fact Report at para. 4.
[4] Public bodies' reply submissions dated May 14, 2020 at p. 2 (italics added).

displayed" on a user's electronic device, including a desktop or laptop computer, tablet or cellphone.[5]

Should I disregard portions of the complainant's submissions because they are beyond the scope of this inquiry?

[9] The public bodies note that the complainant made inquiry submissions about methods of creating the records that go beyond taking screenshots. The public bodies submit that these submissions are beyond the scope of this inquiry, and I should disregard them, because the complainant limited their request to screenshots during mediation.[6]

[10] In response, the complainant says they "did not narrow or restrict [their] request to screenshots".[7] Rather, the complainant says that, when they mentioned screenshots in mediation,[8] "this was simply one option that [they] raised to demonstrate that there were various avenues open to the Public Bodies in producing the requested records by using their normal computer hardware, software and technical expertise."[9] The complainant says they are "open to receiving [the requested] information in any form that is easily producible by the Public Bodies."[10]

[11] In my view, the complainant's access request is not limited to screenshots. The clarified request explicitly referred to screenshots "(or the like)" and mentioned screenshots as an "example" of how the requested lists could be created. The only reasonable interpretation of this language is that the complainant requested the lists of file and folder names as screenshots *or in any other similar form*, not that they intended to narrow their request only to screenshots.

[12] Given that the access request is not limited to screenshots, I conclude that the complainant's submissions about creating the requested records through methods other than screenshots are within the scope of this inquiry. The public bodies made reply submissions, albeit in the alternative, about these methods,[11] so I see no prejudice to their position in allowing this material.

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[5] Affidavit #1 of the Director, Technical Stewardship, Hosting Services in the Office of the Information Officer (Director) at paras. 5 and 18.
[6] Public bodies' reply submissions dated May 14, 2020 at p. 2; public bodies' further reply submissions dated November 10, 2020 at p. 2.
[7] Complainant's submissions at para. 36.
[8] By disclosing this aspect of the mediation process in their submissions, I take the parties to have waived any settlement privilege or confidentiality that might have attached to it.
[9] Complainant's submissions at para. 36.
[10] Complainant's submissions at para. 20.
[11] Public bodies' further reply submissions dated November 10, 2020 at pp. 2-5.

Is the complainant's access request for current or historic records?

[13] The complainant clarified, in their inquiry submissions, that they are only seeking the file and folder names as they currently exist, not as they existed on December 15, 2017, when the initial access requests were made.[12] The complainant says they accept "that a delay has resulted from this process – as outlined in the timeline provided in the Investigator's Fact Report."[13]

[14] The public bodies object to the complainant clarifying their request to seek current records.[14] They submit:

> … it would be unusual to permit a Complainant's access request to continually evolve over time and to adjudicate the matter based on the evolved request with no further decisions of the Public Bodies having been made. To do so creates uncertainty with respect to what records – both in terms of type and scope – are at issue and the case that the Public Bodies must meet with respect to this inquiry. To the extent that the Complainant is seeking creation of records from a machine readable record that will be in existence at the time an Order is made by the Adjudicator, the Complainant is effectively seeking creation of records from a machine readable record that is not yet in existence, but will be at a point in the future. The Public Bodies submit that this is not contemplated by the access provisions of FIPPA.[15]

[15] In my view, the date range "12/15/2017" to "12/15/2017" in the initial access request can reasonably be interpreted as a request for the records as they would have existed on that date or as soon as they could be created. In other words, I accept that the access request is for the lists of file and folder names on the primary devices used by whoever occupies the roles of Premier, Minister or Minister of State on the date the public bodies create the records, if they are required to do so. If the complainant wanted the lists of file and folder names on the primary devices used by the particular public officials in office on December 15, 2017, they could have named these individuals in their access request.

[16] Contrary to the public bodies' position, I am also satisfied that the request for current records is sufficiently certain to allow the public bodies to identify the records sought and know the case to meet. The request itself has not evolved; it has always been for lists of the file and folder names on the devices used by the Premier, Minister or Minister of State for each public body. I accept that the specific records responsive to the request have changed over time because the ministers and their electronic devices have changed. However, this occurred

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[12] Complainant's submissions at para. 18.
[13] Complainant's submissions at para. 18.
[14] Public bodies' initial submissions at para. 67.
[15] Public bodies' further reply submissions dated November 10, 2020 at p. 2.

because the public bodies denied the request based on s. 6(2), which meant the December 15, 2017 date passed by, and more time elapsed when the complainant initiated the FIPPA complaint process. I do not see why the complainant should be tied to a historical request in these circumstances.

[17] In my view, this conclusion accords with the language and intent of s. 5(1)(a) of FIPPA. That section requires an applicant to make a request that "provides sufficient detail to enable an experienced employee of the public body, with a reasonable effort, to identify the records sought". Here, the public bodies' relevant employees would know that the records sought are, on the date they are created in response to the request, as stated in the complainant's access request. The request provides sufficient detail for the public bodies to respond even though the date mentioned in the request has, at this point, necessarily passed.

[18] I also note that the logical implication of the public bodies' position is that the complainant would have to continually re-submit their access request as factual circumstances evolve throughout the FIPPA process, including the processes in this Office. I see no basis in FIPPA for such a requirement. In Order 03-19, former Commissioner Loukidelis resolved an inquiry on the basis of a flexible approach to the requested time period and I will do the same here.[16]

[19] I conclude that the access requests at issue in this inquiry are for records containing a "list of all file names and folder names located on the desktop, my downloads, my documents, and my favourites folders" on the devices of primary use for the Premier, Minister or Minister of State for each public body, as of the date the records are created in response to the access request, if the public bodies are required to do so under s. 6(2). Again, the public bodies made submissions, albeit in the alternative, about creating records responsive to the complainant's access request as I have described it,[17] so I see no prejudice to their position on the s. 6(2) issue in this inquiry.

ISSUE

[20] The issue is whether s. 6(2) of FIPPA requires the public bodies to create the requested records. The burden is on the public bodies to prove that they have complied with their duties under s. 6(2).[18]

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[16] Order 03-19, 2003 CanLII 49192 (BC IPC) at paras. 8, 28 and 69.
[17] Public bodies' initial submissions at paras. 61-68; public bodies' further reply submissions dated November 10, 2020 at pp. 2-5.
[18] Order 01-31, 2001 CanLII 21585 (BC IPC) at para. 5.

SECTION 6(2) – DUTY TO ASSIST APPLICANTS

[21] Section 6 of FIPPA provides as follows:

> (1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.
>
> (2) Moreover, the head of a public body must create a record for an applicant if
>
> (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
>
> (b) creating the record would not unreasonably interfere with the operations of the public body.

[22] I accept that the requested records do not currently exist.[19] The complainant does not dispute this. Therefore, the question is whether s. 6(2) requires the public bodies to create the requested records. The public bodies must create them if both ss. 6(2)(a) and 6(2)(b) are satisfied. In other words, if the public bodies establish that the records cannot be created as described in s. 6(2)(a) or that creating the records would unreasonably interfere with their operations under s. 6(2)(b), then the public bodies are not required to create the records.

[23] The complainant submits that the public bodies are required to and capable of creating the requested records either by screenshots or by the other methods they suggest in their submissions.

[24] The public bodies submit that they are not required to create the requested records by any method. With respect to screenshots in particular, they submit that s. 6(2) does not require a public body to create them. The public bodies provided evidence that the BC government received eight access requests between April 12, 2018 and January 18, 2019 for various screenshots.[20] In response to seven of these requests, the government responded that no records existed and the public bodies took the position that they were not required to create them under s. 6(2).[21] The public bodies acknowledge that, in response to the other request, the public body provided a screenshot of the apps

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[19] Public bodies' initial submissions at paras. 36 and 39-43.
[20] Affidavit #1 of a Senior Director, Access and Open Information with Information Access Operations, Ministry of Citizens' Services at para. 10. A ninth access request was withdrawn by the applicant.
[21] There is no indication in the evidence before me that these requests proceeded to review before the OIPC or that the OIPC in any way agreed with the public bodies' position.

on a minister's phone. However, they argue that response went beyond the public body's obligations under FIPPA.[22]

Can the records be created as described in s. 6(2)(a)?

[25] Section 6(2)(a) states that the head of a public body must create a record for an applicant if the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise.

[26] The public bodies acknowledge that the requested records can be created by taking screenshots.[23] The public bodies provided affidavit evidence from the Director, Technical Stewardship, Hosting Services in the Office of the Chief Information Officer (OCIO). The Director deposes that to create the requested records through screenshots on a government-issued computer, such as a desktop or laptop, one would have to take the following steps:

a. Identify the folder for which the screenshot is requested, and set up the view to "List View" to view the whole file name;
b. Open the "Snip & Sketch" tool, and select the option to create a new snip;
c. Select the image of the folder;
d. Copy and paste the image into a Word document;
e. If there are more files than can be captured in one snip, the user will need to scroll down to show more files, ensuring that there is no repetition or any missing files;
f. Select the option to create another new snip, select the image, and copy and paste the image into the Word document;
g. Repeat with further views of the folder and with other requested folders.[24]

[27] The Director also states that "similar steps" are required to create the requested records through screenshots on mobile devices, such as tablets or cell phones.[25]

[28] In addition to screenshots, the public bodies acknowledge that the records can be created through a computer program that the OCIO would have to write, because it does not currently exist.[26] The OCIO could then run the program

[22] Public bodies' initial submissions at paras. 30-33.
[23] Public bodies' initial submissions at paras. 16-23 and 62; public bodies' reply submissions dated May 14, 2020 at pp. 2-3; Affidavit #1 of the Director at paras. 5-8.
[24] Affidavit #1 of the Director at para. 7.
[25] Affidavit #1 of the Director at para. 18.
[26] Public bodies' initial submissions at paras. 63-65; Affidavit #1 of the Director at paras. 11-16.

without the user's involvement. However, the Director states that the program could not capture files that are not synced to the network, such as files in the Downloads folder, which is one of the folders the complainant requested.[27] The Director also says that "file and file structure stored on mobile devices (i.e. cell phones and tablets) cannot be retrieved from the same methods as are used on laptop or desktop devices, as this data is not synchronized to the user's network drive."[28]

[29] The complainant raises two additional methods of creating the requested records. One method "is to automatically create a text file … from the command line program (i.e. Command Prompt and PowerShell for Windows, and Terminal for Macs) that is built-in to Public Bodies' desktops or laptops".[29] I will refer to this as the "command method". The other method raised by the complainant is called "screen recording".

[30] The complainant provided affidavit evidence about these two methods from the founder of Motiontide Digital Agency Vancouver (Founder). The Founder is a digital marketing expert with "intermediate internet programming background and skills."[30] The Founder explains that command line programs "can automatically create a text file listing file names in any folders and subfolders on a device."[31] The Founder provided two examples of commands that could produce the requested lists—the "directory" command and the "tree" command—and explained how to use them to create the requested records.[32]

[31] Taking the directory command as an example, the Founder deposes:

> 20. In order to create a directory listing all files in a folder and its subfolders on Command Prompt or PowerShell, the user needs to take the following steps:
>
> i. Open the command line at the folder of interest by holding Shift + right click and selecting "open Command window here"; and
>
> ii. To list the files in all the subfolders as well as the main folder, enter: dir –s>listmyfolder.txt
>
> 21. If the user is on a MacOS device, he/she can create a directory list on Terminal by doing the following steps:

[27] Affidavit #1 of the Director at para. 13.
[28] Affidavit #1 of the Director at para. 16.
[29] Complainant's submissions at para. 12.
[30] Affidavit #1 of the Founder of Motiontide Digital Agency Vancouver (Founder) at para. 2.
[31] Affidavit #1 of the Founder at para. 17.
[32] Affidavit #1 of the Founder at paras. 6-28.

i. Open System Preferences and select Keyboard > Shortcuts > Services. Find "New Terminal Folder" in the settings and check the box;

ii. Open Finder, right-click the folder of interest, and select "open to Terminal"; and

iii. To list the files in all the subfolders as well as the main folder, enter: ls -R > listmyfolders.txt

22. While these are examples of commands that can be used to create a directory listing all the files in a folder of interest, as well as the files in any of its subfolders, there are other commands that can also perform this task.[33]

[32] The Founder also explained how to create the requested records through screen recording.[34] I understand from the Founder's evidence that this would essentially involve making a video of the user scrolling through the requested folders.

[33] I also understand from the complainant's evidence and submissions that it is not possible, or at least not practical, to use the command method or screen recording to create the records on mobile devices, such as tablets or cell phones.[35]

[34] The public bodies do not deny that the records can be created through screen recording or the command method where the device of primary use is a desktop or laptop computer. However, the public bodies note that it would not be possible to create the requested records using the command method where the device of primary use is a cell phone or tablet.[36] As noted, the complainant acknowledges this.

[35] Based on the evidence set out above, I find that the requested records can be created as follows:

- Where the device of primary use is a desktop or laptop computer, a record containing a list of the requested file and folder names can be created through screenshots, screen recording, the command method or a computer program written by the OCIO. The exception is that the computer program cannot capture files not synced to the network, such as files in the Downloads folder.

[33] Affidavit #1 of the Founder at paras. 20-22. The steps for applying the "tree" command are similar.
[34] Affidavit #1 of the Founder at paras. 29-36.
[35] Complainant's submissions at paras. 15 and 22.
[36] Public bodies' further reply submissions dated November 10, 2020 at p. 4.

- Where the device of primary use is a mobile device such as a tablet or cell phone, the requested record can be created through screenshots.

[36] I am satisfied that creating the requested records according to these methods means creating the records "from a machine readable record in the custody or under the control of the public body".[37] The requested file and folder names are recorded and stored graphically and electronically on the public bodies' devices and can be "read", or "made intelligible",[38] through the devices themselves. Also, neither party disputes that the public bodies have physical custody and control over the requested information.

[37] The final question under s. 6(2)(a) is whether creating the records in accordance with my findings above would involve the public bodies using their "normal computer hardware and software and technical expertise". If not, then the public bodies are not required to create the records.

[38] The complainant submits that the methods described above are within the public bodies' normal computer hardware and software and technical expertise.[39]

[39] The public bodies submit that creating the records by any of the identified methods is not required under s. 6(2)(a) because they involve manual effort that goes beyond using computer hardware and software and technical expertise.[40] With respect to screenshots specifically, the public bodies say they require "manual input as well as manual review and reconciliation that … is more than merely incidental."[41]

[40] Order F10-30, referred to by the public bodies, is relevant here.[42] The applicant requested a record showing the government ministries responsible for paying the companies and individuals listed in the Public Accounts as having supplied at least $25,000 worth of products and services to the government in two specific years. The names of the suppliers were disclosed in the Public Accounts, but not the particular ministries responsible for paying them. The adjudicator found that to create the requested record the public body would have had to manually adjust raw data to reconcile it with the supplier totals in the Public Accounts. The adjudicator held that s. 6(2) did not require the public body to do this.

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[37] Compare, e.g., Order 04-18, 2004 CanLII 7060 (BC IPC) at para. 27.
[38] Order MO-2130, 2006 CanLII 50782 (ON IPC) at p. 8.
[39] Complainant's submissions at paras. 45-58.
[40] Public bodies' initial submissions at paras. 61-68; public bodies' further reply submissions dated November 10, 2020 at pp. 2-3.
[41] Public bodies' initial submissions at para. 62.
[42] Order F10-30, 2010 BCIPC 43 (CanLII). See also F10-16, 2010 BCIPC 25 (CanLII). The public bodies refer to this case at para. 53 of their initial submissions.

[41] The present case is different. In Order F10-30, the machine readable records that contained the relevant source data had to be manually adjusted to create the requested record. Here, however, the requested information already exists on the devices in question; it does not need to be adjusted or reconciled. It needs to be converted into a record that can be provided to the complainant. As I found above, the requested information can be turned into a record through electronic methods. While some human effort is required to make these methods work—for example, pushing buttons, entering commands, etc.—that kind of effort is an ordinary part of using computer software and hardware and technical expertise. That is the point of s. 6(2) and it would not be reasonable to suggest that s. 6(2) only applies where computers work by themselves.

[42] For these reasons, I am satisfied that creating the records through screenshots, screen recording, the command method or the OCIO computer program involves the public bodies using computer hardware and software and technical expertise.

[43] Further, as I understand the public bodies, they argue that the proposed methods of creating the records go beyond using "normal" computer hardware and software and technical expertise.[43] They say the Premier, Ministers and Ministers of State may or may not have, and are not required to have, the technical expertise needed to create the requested records. The public bodies also say that an assistant, for example, cannot use the devices in question to create the records because this would contravene the OCIO's computer use policy (Policy) and expose the user "to possible privacy and security concerns".[44] Specifically, the public bodies note s. C. 18 of the Policy, which states:

> Employees must not divulge, share or compromise their own or another Employee's government authentication credentials (e.g., passwords, access cards, etc.). This includes not divulging passwords to technical support.[45]

[44] A user could allow their assistant to create the records on the user's device, which would not require the user to share their password, so I do not see how this would contravene s. C. 18 of the Policy. I also do not see how this process creates "possible privacy and security concerns." Any government staff member tasked with creating the records on the user's device would be bound by s. B. 12 of the Policy (as they are with information on their own devices) to ensure that confidential information they are working with is protected. Further, the public bodies do not say that it would contravene the Policy or create security concerns for OCIO staff to access the requested information through a computer

[43] Public bodies' further reply submissions dated November 10, 2020 at p. 3.
[44] Public bodies' further reply submissions dated November 10, 2020 at pp. 2-3; Affidavit #1 of the Director at paras. 9-10.
[45] Affidavit #1 of the Director at Exhibit "A", p. 10.

program. I do not understand why it would contravene the Policy or create security concerns for an assistant, for example, to create the records, but not for OCIO staff. The public bodies do not explain this.

[45] For these reasons, I am not persuaded that the Policy requires the Premier, Ministers or Ministers of State to create the records themselves through screenshots, screen recording or the command method. In my view, there are ways for others to create the records while safeguarding the information and respecting the Policy.

[46] In light of this finding, I am also not persuaded that creating the records through screenshots, screen recording or the command method is so complex that it is beyond the public bodies' normal technical expertise. The public bodies question whether creating the records is within the normal technical expertise of the Premier, Ministers or Ministers of State. However, I do not understand them to be suggesting that creating the records is beyond the normal technical expertise of each public body, taking into consideration the expertise of all its available employees. Further, if needed, the public bodies could seek the assistance of the OCIO, as the complainant suggests.[46] Since the public bodies raised the possibility of the OCIO writing a computer program to create the records, I find that at least some of the OCIO's information technology resources are available to the public bodies and constitute part of their normal technical expertise.

[47] To be clear, although I do not understand the public bodies to be disputing this, I am also satisfied that screenshots, screen recording and the command method are within the public bodies' normal computer software and hardware. The computer software and hardware required to use these methods are built into the devices themselves, so I do not see how they require any technology that is not "normal".

[48] Finally, I must consider whether the OCIO computer program method of creating the records is within the public bodies' "normal" computer hardware and software and technical expertise.[47]

[49] In *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, the Ontario Court of Appeal upheld an adjudicator's decision requiring the public body to extract information from a database "by developing an algorithm through the use of technical expertise and software that is normally

[46] Complainant's submissions at paras. 56 and 67-71.
[47] The public bodies' raised this method, so I do not think they are suggesting that it goes beyond their "normal" computer hardware and software and technical expertise. However, this issue is clearly part of the s. 6(2) analysis, so I will address it for the sake of clarity and completeness.

used by the institution."[48] The Court rejected a contrary approach whereby "access would be determined based upon the coincidence of whether the software was already in use, regardless of how easy or inexpensive it would be to develop."[49] The Court held that the adjudicator's approach best promoted the purposes of freedom of information legislation, including facilitating democracy through public accountability and transparency.[50] Moldaver J.A. (as he then was) stated that:

> [48] A contextual and purposive analysis of s. 2(1)(b) [the Ontario equivalent to s. 6(2)] must also take into account the prevalence of computers in our society and their use by government institutions as the primary means by which records are kept and information is stored. This technological reality tells against an interpretation of s. 2(1)(b) that would minimize rather than maximize the public's right of access to electronically recorded information.[51]

[50] I agree with Moldaver J.A.'s comments in *Toronto Police Services Board.* In my view, a similar approach to that taken in *Toronto Police Services Board* is appropriate under s. 6(2) of FIPPA, given the similarities in the statutory language between the provinces and the shared purposes of freedom of information legislation.[52] Following *Toronto Police Services Board*, I find that a public body's "normal" computer hardware and software and technical expertise under s. 6(2)(a) includes programs that are reasonably within the public body's technical ability to create with its existing computer hardware and software.

[51] Applying this approach to the facts of this case, the public bodies acknowledge, by raising the OCIO computer program method, that their normal computer software and hardware and technical expertise includes at least part of the OCIO's technological capabilities. Although the program would have to be created, this alone does not mean that the method is beyond the public bodies' normal technological capabilities. The public bodies say the OCIO could develop

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[48] *Toronto Police Services Board v. Ontario (Information and Privacy Commissioner)*, 2009 ONCA 20 at para. 42 [*Toronto Police*]. Neither party cited this case, but I am entitled to rely on it: *R. v. Badhesa*, 2019 BCCA 70 at para. 18; *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 at para. 172.

[49] *Toronto Police*, *ibid* at para. 57.

[50] *Toronto Police*, *ibid* at paras. 43-50.

[51] *Toronto Police*, *ibid* at para. 48. The Court also cited with approval, at para. 55, the observation in BC Order 03-16, 2003 CanLII 49186 (BC IPC) at para. 64, that "[p]ublic bodies must ensure that their electronic information systems are designed and operated in a way that enables them to provide access to information under the Act. The public has a right to expect that new information technology will enhance, not undermine, information rights under the Act and that public bodies are actively and effectively striving to meet this objective."

[52] The language in the Ontario legislation is not exactly the same as in s. 6(2), but the provisions are substantially similar. In my view, the similarities are sufficient to take guidance from the Ontario legislation here.

and run the program and they do not say this would require buying new hardware or software or hiring anyone with special technical expertise.

[52] Accordingly, I am satisfied that creating the requested records through the OCIO computer program would involve the public bodies using their normal computer hardware and software and technical expertise.[53] Whether creating the records according to this method would unreasonably interfere with the public bodies' operations is a separate question.

[53] For the reasons provided above, I conclude that the requested records can be created from a machine readable record in the custody or under the control of the public bodies using their normal computer hardware and software and technical expertise.

Would creating the records unreasonably interfere with the public bodies' operations under s. 6(2)(b)?

[54] Section 6(2)(b) states that a public body must create a record for an applicant if s. 6(2)(a) is satisfied and creating the record would not unreasonably interfere with the operations of the public body.

[55] FIPPA contemplates that creating records will require some effort and institutional resources and that some interference with a public body's operations is acceptable.[54]

[56] However, a public body is not required to create a record if creating it would unreasonably interfere with the public body's operations. What constitutes an unreasonable interference "rests on an objective assessment of the facts" and "will vary depending on the size and nature of the operation."[55] Other factors to consider include the nature of the machine readable records in issue, the public body's technical expertise and technological resources, the size and complexity of the task and "the burden that creating the record will place on a public body's information systems resources measured in relation to its total resources of that nature."[56]

[57] The complainant submits that creating the records through screenshots, screen recording or the command method would not unreasonably interfere with the public bodies' operations.[57] They say the public bodies could use the

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[53] See also Order F15-02; 2015 BCIPC 2 (CanLII) at paras. 50 and 56-59.
[54] Order 03-19, 2003 CanLII 49192 (BC IPC) at para. 25.
[55] *Crocker v. British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BC SC) at para. 37; Order 03-19, 2003 CanLII 49192 (BC IPC) at para. 20.
[56] Order 03-19, 2003 CanLII 49192 (BC IPC) at para. 21; Order 03-16, 2003 CanLII 49186 (BC IPC).
[57] Complainant's submissions at paras. 59-73.

command method on laptop or desktop computers to create the records "with little to no difficulty".[58]

[58] The complainant acknowledges that the public bodies would have to create the records through screenshots where the device of primary use is a cell phone or tablet. However, the complainant says it is unlikely these devices would contain a large volume of requested information "due to limited storage space and memory capacity on such devices".[59]

[59] The complainant also says there should not be a significant amount of requested information on folders that are not synced to the government's network, such as the Downloads folder, because the Policy requires government employees to store information on their network drives.[60]

[60] The public bodies submit that using any of the methods in question to create the requested records would unreasonably interfere with the public bodies' operations. They say that screenshots, screen recording and the command method all require direct manual processing, review and reconciliation that is time-consuming and would unreasonably interfere with the public bodies' other work.[61] They say creating screenshots is "an administratively burdensome task."[62]

[61] With respect to the OCIO computer program, the public bodies submit:

> This program would need to be developed by the OCIO, as it does not currently exist, and, as set out above, to do so would be costly. This is estimated at 20-40 hours of technical development for a simple tool which exports the requested data from the requested set of folders. The program would require additional technical resources to utilize, and would only be suitable for occasional use. Development of a program which is suitable for repeated, ongoing use, or which would accommodate requests against different folders or drives, would require additional effort.
>
> Further, such a program could not capture all the requested files. Files that are not synced to the network cannot be captured by the program. The program would not capture requested files that are found on a mobile device or a tablet.
>
> For the information such a program could capture, which would be an incomplete response to the Complainant's request, the amount of time and expertise required to create such a program exceeds that which is

[58] Complainant's submissions at para. 14.
[59] Complainant's submissions at para. 15.
[60] Complainant's submissions at para. 55; Affidavit #1 of the Director at Exhibit "A", pp. 5 and 8-9.
[61] Public bodies' initial submissions at paras. 22, 61-62 and 67-68; public bodies' further reply submissions dated November 10, 2020 at pp. 3-4.
[62] Affidavit #1 of the Director at para. 8.

> reasonable. Therefore, the Public Bodies submit that there is no requirement to create the requested records in this way.[63]

[62] Past orders provide some helpful guidance here. In Order 03-19, former Commissioner Loukidelis found that it was not unreasonable to require a public body to spend 48 hours of programmer time to respond to an access request when the public body devoted 900 to 1,000 hours of programmer time to respond to research requests for similar information.[64]

[63] In Order F15-02, the adjudicator found that one method of creating the requested record would unreasonably interfere with the public body's operations because it would take 245 hours of employee time or roughly $50,000 in contracting costs, which was at least three times the public body's annual budget for this kind of contract work.[65] However, the adjudicator found that a second method of creating the requested record was not unreasonable because it would only require two days of employee time.[66]

[64] In this case, the public bodies do not provide even rough estimates of how "costly" the computer program would be in dollar figures, what budgetary considerations are involved, or how many "additional technical resources" would be required to utilize the program. More importantly, the public bodies' evidence does not indicate the total available resources they have in combination with the OCIO. As a result, there is insufficient evidence as to the magnitude of the burden that creating the records through the OCIO computer program would impose.

[65] The public bodies estimate that creating the computer program will take about 20-40 hours. However, without more evidence about the public bodies' resources and the effect that creating the records would have on them, I am unable to find that this interference would be unreasonable. Without more from the public bodies, and considering past cases such as Order 03-19 and Order 15-02, I find the OCIO computer program method would not unreasonably interfere with the public bodies' operations.

[66] I am also not persuaded that the public bodies are not required to create the records because the OCIO computer program cannot capture every requested folder or file name (e.g., the Downloads folder). The computer program can create records from desktop or laptop computers, and it is reasonable to conclude that records created from such devices would represent a sizeable portion of what the complainant's request seeks. Further, as

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[63] Public bodies' initial submissions at paras. 64-66 (paragraph numbers omitted); Affidavit #1 of the Director at paras. 11-13.
[64] Order 03-19, 2003 CanLII 49192 (BC IPC) at para. 28.
[65] Order F15-02, 2015 BCIPC 2 (CanLII) at paras. 65 and 67.
[66] Order F15-02, *ibid* at paras. 66-67.

discussed below, there are other methods to consider for capturing the rest of what the complainant has requested, such as the names of the files in the Downloads folder.

[67] For these reasons, I find that creating the records through the OCIO computer program would not unreasonably interfere with the public bodies' operations.

[68] Turning to screenshots, screen recording and the command method, the public bodies say, as noted above, that the Premier, Minister or Minister of State would have to perform these methods themselves. The public bodies argue that the manual input required to create the records would unreasonably interfere with the public bodies' operations because the public officials in question have "heavy responsibilities", limited time and "large workloads".[67] According to the public bodies, requiring the Premier, Minister or Minister of State to create the requested records "would unreasonably detract from the individual's ability to conduct work they are appointed to do in order to lead their Ministries and the Province."[68]

[69] I do not question the significance of the roles and responsibilities of the Premier, Ministers and Ministers of State. However, I am not persuaded by the public bodies' argument because I do not agree that the only option is for these public officials to create the records themselves. For the reasons provided above, in my view, it is reasonable to conclude that, as with many other tasks, a government assistant or employee could perform the necessary task through one of the methods in question without compromising privacy or security or contravening the OCIO's computer use policy.

[70] The public bodies roughly estimate that there is anything from "any number" to "hundreds to thousands" of total files in any one of the requested folders in question.[69] However, the public bodies do not provide even rough estimates of how long it would take to create the requested records using the methods in question. Further, the evidence does not indicate the extent of the resources the public bodies have available to create the records. Given the evidence, I am not satisfied that the interference with the public bodies' operations would be unreasonable.

[71] I acknowledge that the lack of evidence here is due to the public bodies' position that the Premier, Ministers and Ministers of State are the only resources available to create the records. However, the public bodies could have, but did not, provide persuasive evidence in the alternative about the possibility of other government employees creating the records.

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[67] Public bodies' further reply submissions dated November 10, 2020 at p. 3.
[68] Public bodies' further reply submissions dated November 10, 2020 at p. 4.
[69] Affidavit #1 of the Director at para. 6; public bodies' initial submissions at para. 19.

[72] For the reasons given, I am not satisfied that the public bodies have discharged their burden under s. 6(2)(b) in relation to the methods in question. Based on the evidence discussed above, I accept that these methods require varying levels of effort and that this, to varying degrees, creates a burden. However, in my view, the public bodies' evidence is too limited and general for me to conclude that creating the records through these methods is unreasonably burdensome for the purposes of s. 6(2)(b).

[73] To summarize, I conclude that the requested records can be created from a machine readable record in the custody or under the control of the public bodies using their normal computer hardware and software and technical expertise. Depending on the device of primary use, this can be done through at least one of the proposed methods. Further, I am not satisfied that creating the records according to these methods would unreasonably interfere with the public bodies' operations. I accept that creating the records causes some interference with the public bodies' operations, but I am not satisfied that the interference would be unreasonable in the circumstances.

CONCLUSION

[74] For the reasons given above, under s. 58(3)(a) of FIPPA, I require the public bodies to perform their duty under s. 6(2) to create the records requested by the complainant.

February 17, 2021

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

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