



Order F22-08

MINISTRY OF ATTORNEY GENERAL

Erika Syrotuck
Adjudicator

February 10, 2022

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Summary: The Ministry of Attorney General applied to disregard one access request and for relief from future access requests under s. 43 of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that s. 43(a) did not apply because although the request at issue was part of a series of systematic requests, the adjudicator was not satisfied that responding to the request would unreasonably interfere with the Attorney General's operations. The adjudicator also found that the request was not frivolous or vexatious under s. 43(b).

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

INTRODUCTION

[1] This inquiry is about the Ministry of Attorney General's (Attorney General) application for relief under s. 43 of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The Attorney General requested to disregard a specific access request made by the respondent and for permission to disregard any future requests the respondent makes for a period of two years, over and above one open access request at a time. The Attorney General further asked for permission to decide what constitutes "one" request.

[2] The Attorney General says that it is entitled to relief under s. 43(a) because responding to the respondent's request would unreasonably interfere with its operations due to the repetitious or systematic nature of the requests. In the alternative, the Attorney General says that s. 43(b) applies because the request at issue is frivolous or vexatious.

Preliminary Issues

[3] In his submissions, the respondent raised several issues about the Attorney General's submissions. The Attorney General says that the respondent did not seek permission to add these as issues to the inquiry and that I should not consider any issues not set out in the notice of inquiry.¹

[4] First, the respondent raised concerns about information accepted *in camera*.

[5] By way of background, the Attorney General sought permission to submit a small amount of information in its initial submissions *in camera*. Information that is accepted *in camera* will only be seen by the Office of the Information and Privacy Commissioner (OIPC) and not be shared with the other parties. When the OIPC accepts information *in camera*, it constrains the other parties' ability to respond and the adjudicator's ability to provide reasons. For this reason, the OIPC exercises discretion to accept information *in camera* sparingly, most often when the submissions and/or evidence would reveal information in dispute or that would itself be subject to an exception under FIPPA.²

[6] An adjudicator from the OIPC granted the Attorney General's request. As is the usual practice, the communications between the Attorney General and the OIPC about the *in camera* request were not shared with the respondent.

[7] In his submissions, the respondent requested to have the entire submission shared in open evidence, or in the alternative, requested to have a copy of the adjudicator's letter approving the Attorney General's *in camera* request.³ The respondent also made the same request in a letter to the Commissioner and the Director of Adjudication responded.⁴ The respondent has already had his concerns about the *in camera* process addressed. As a result, I consider this matter to be resolved.

[8] In addition, the respondent also submits that the Attorney General has waived solicitor-client privilege over the information that is *in camera*.⁵ He asserts that the information has been disclosed elsewhere in the Attorney General's submissions and therefore the Attorney General has waived privilege over the *in camera* information.

[9] While the Attorney General does not directly address the respondent's allegation that it has disclosed the *in camera* information elsewhere in the

¹ Attorney General's reply submissions, page 2.

² See OIPC's guide for written inquiries.

³ Respondent's submissions, page 1.

⁴ By email dated December 3, 2021.

⁵ Respondent's submissions, page 1.

records, the Attorney General says that facts in this case do not meet the legal test for what constitutes a waiver.⁶ It says that no one, aside from employees of the OIPC, has seen the information that is *in camera*. It says that, under s. 44(2.1) of FIPPA, providing information subject to solicitor-client privilege to the OIPC is not a waiver of solicitor-client privilege.

[10] I am not satisfied that the Attorney General has waived privilege over the *in camera* information. There is nothing in the Attorney General's submissions or evidence that would reveal the *in camera* information. I am not satisfied that the information that the OIPC has accepted *in camera* should be disclosed on the basis of waiver.

[11] In addition, the respondent also makes numerous comments on the fact that affiants for the Attorney General have included statements that are hearsay in their evidence. He questions why specific individuals did not provide their own, direct evidence.⁷

[12] The Attorney General acknowledges that it has provided hearsay evidence and says that hearsay is an acceptable form of evidence in administrative proceedings. With regards to one affiant, the Attorney General says that in each instance, the affiant has identified the source of her belief and that it would be appropriate to give the evidence significant weight. Further the Attorney General says that the respondent has made bare and spurious insinuations that this affiant is lying, but provides no evidence or rationale supporting that belief.⁸

[13] The rules of evidence are flexible when it comes to matters before an administrative tribunal. In an administrative proceeding, hearsay evidence is admissible where it is "logically probative and may be fairly regarded as reliable."⁹ If necessary, I will determine the weight to attribute to hearsay evidence in my analysis below.

[14] Finally, the respondent alleges that some information provided in affidavits is false and therefore that I should make a ruling under s. 74 of FIPPA.

[15] The Attorney General says that the courts, not the OIPC, are responsible for deciding matters under s. 74 of FIPPA.¹⁰

[16] At the time of the Attorney General's application, s.74 read:

⁶ Attorney General's reply submissions, pages 2-3.

⁷ Respondent's submissions, pages 1 and 2, for example.

⁸ Attorney General's reply submissions, page 2.

⁹ *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 at para. 34; Order F21-02, 2021 BCIPC 2 at para. 4.

¹⁰ Attorney General's reply submissions, page 2.

74 (1) A person must not wilfully do any of the following:

(a) make a false statement to, or mislead or attempt to mislead, the commissioner or another person in the performance of the duties, powers or functions of the commissioner or other person under this Act;

(b) obstruct the commissioner or another person in the performance of the duties, powers or functions of the commissioner or other person under this Act;

(c) fail to comply with an order made by the commissioner under [section 54.1](#) or [58](#) or by an adjudicator under section 65 (2).

(2) A person who contravenes subsection (1) commits an offence and is liable to a fine of up to \$5 000.

(3) [Section 5](#) of the [Offence Act](#) does not apply to this Act.¹¹

[17] In my opinion, the respondent has not provided any credible evidence that any affiant is wilfully making a false statement or misleading the Commissioner. As a result, I decline to consider this issue any further.

ISSUES

[18] At this inquiry, I must decide whether to grant the Attorney General relief under ss. 43(a) or (b). More specifically, I must decide:

1. Would responding to the respondent's request unreasonably interfere with the Attorney General's operations because of the systematic or repetitious nature of the requests under s. 43(a) of FIPPA?
2. Is the respondent's access request frivolous or vexatious under s. 43(b)?
3. If yes, what relief is appropriate?

[19] The burden of proof is on the Attorney General to show that ss. 43(a) or (b) applies.¹²

BACKGROUND¹³

[20] The respondent is a physician who bills the Medical Services Plan (MSP) for services provided to British Columbia residents. The Medical Services

¹¹ Since the Attorney General made its s. 43 application, s. 74 has been repealed. Part 5.1 of FIPPA contains the new offence provisions.

¹² Order F21-31, 2021 BCIPC 39 at para. 12.

¹³ This background is from the Attorney General's submissions, paras. 2 – 29.

Commission (MSC) is established under the *Medicare Protection Act* and it manages MSP on behalf of the Government of British Columbia.¹⁴

[21] In 2014, the Ministry of Health began an audit of the respondent's billing to MSP through its Audit and Inspection Committee (Committee). In 2018, the Committee completed the audit report, and found that the respondent had made significant billing errors. The Committee recommended to the MSC that action be taken to recover those funds and that the respondent be de-enrolled from MSP, meaning that the respondent would no longer be able to bill MSP for his services. The MSC accepted the Committee's recommendation, and the respondent was provided notice of these actions.

[22] In response to a notice, physicians either enter into a settlement or request an oral hearing before a panel to dispute the report's conclusions. In this case, the Attorney General says that the respondent requested an oral hearing before a panel.¹⁵

[23] The respondent was scheduled to attend the oral hearing in 2019, but it was delayed to 2020.

[24] The Attorney General says that, in preparation for the oral hearing, the respondent received all records related to and relied on to prepare his audit report and that he also received other requested documents, including case files for his patients. In total, the Attorney General says that the respondent received more than 1,400 different records totalling 144,000 pages, although the respondent disputes this number.¹⁶ The Attorney General says that records provided through the oral hearing disclosure process are not redacted, but are subject to an implied undertaking that they will not be provided to the public and are also subject to the patient confidentiality standards set by the College of Physicians and Surgeons.¹⁷

[25] The Attorney General says that the hearing proceeded in September 2020 and that the respondent did not attend. The panel ordered, among other things, that the respondent pay back \$682,744.04, a surcharge, interest, and costs and that the respondent be de-enrolled from MSP and not be allowed to re-enroll for three years.

¹⁴ *Medicare Protection Act*, R.S.B.C. 1996, c. 286, s. 3.

¹⁵ The respondent disputes that he had an opportunity to settle the matter, see the respondent's submissions, page 9.

¹⁶ Respondent's submissions, page 18 for example.

¹⁷ The professional governing body.

SECTION 43

[26] Section 43 allows the Commissioner to grant the extraordinary remedy of limiting an individual's right to access information under FIPPA.

[27] Section 43 allows the Commissioner to authorize a public body to disregard 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.¹⁸

[28] Public bodies do not have discretion to disregard access requests on their own; they must obtain permission from the Commissioner.¹⁹

[29] Given that relief under this section curtails or eliminates the rights to access information, s. 43 applications must be carefully considered.²⁰ According to former Commissioner Flaherty, granting s. 43 applications should be the “exception” and not a mechanism for public bodies “to avoid their obligations under [FIPPA].”²¹

[30] However, s. 43 serves an important purpose. It exists to guard against the abuse of the right of access.²² It recognizes that when an individual overburdens a public body with access requests, it interferes with the ability of others to legitimately exercise their rights under FIPPA.²³ In this way, s. 43 is “an important remedial tool in the Commissioner’s armory to curb abuse of the right of access.”²⁴

[31] The Attorney General seeks relief under s. 43 to disregard the following request that the respondent made on October 15, 2021:

“All material held by the Attorney General’s department and Legal Services Branch which relates to [the respondent]. This should include files, notes, correspondence, e-mail, voice communications records, and any other similar that relate to [the respondent]. This should necessarily be inclusive

¹⁸ Section 43 was amended after this application. The new version also includes these grounds. The public body did not argue that any of the additional grounds in the amended version apply.

¹⁹ Order F18-25, 2018 BCIPC 28 at para. 14.

²⁰ Auth (s. 43) 99-01 Available at <https://www.oipc.bc.ca/decisions/170> at page 3.

²¹ Auth (s 43) (19 December 1997), available at <https://www.oipc.bc.ca/decisions/168> at page 1.

²² Auth (s. 43) 99-01. Available at <https://www.oipc.bc.ca/decisions/170> at page 7.

²³ Auth (s. 43) 99-01. Available at <https://www.oipc.bc.ca/decisions/170> at page 7

²⁴ *Crocker v British Columbia (Information and Privacy Commissioner)* 1997 CanLII 4406 at para. 33.

of notes and e-mails of without prejudice discussions in any regard relating to [the respondent].”

[32] The date range specified by the respondent in relation to the above request is for a period of about 14 months.

[33] I will first determine if the request meets the criteria in s. 43(a).

Section 43(a) – unreasonable interference

[34] Under s. 43(a), the Commissioner may authorize a public body to disregard a request that would unreasonably interfere with the operations of the public body because of the repetitious or systematic nature of the request.

[35] Section 43(a) has two parts and the Attorney General must prove both. First, the request must be systematic or repetitious. Second, responding to the request must unreasonably interfere with the public body’s operations.

[36] The Attorney General says that the respondent’s access request is both systematic and repetitious. I will first determine whether the request at issue is systematic or repetitious and then turn to whether responding to the request would unreasonably interfere with the Attorney General’s operations.

Is the request repetitious?

[37] Requests are repetitious if they are made over again.²⁵ For example, requests which repeat a previous request to which the public body has already responded are obviously repetitious.²⁶

[38] The Attorney General says that there is repetition and overlap between the information that the respondent has sought through FIPPA and the information disclosed to him through the Ministry of Health’s oral hearing process.²⁷ The Attorney General provided evidence from a Ministry of Health employee indicating that “most of [the respondent’s] requests” overlap with documents provided to the respondent during the Ministry of Health’s oral hearing disclosure process.²⁸

[39] In support of its argument, the Attorney General has provided spreadsheets detailing the respondent’s past access requests to public bodies within the provincial government, including the Attorney General and the Ministry

²⁵ Order F17-18, 2017 BCIPC 19 at para. 7.

²⁶ Order F13-18, 2013 BCIPC 25 at para. 15.

²⁷ Attorney General’s initial submissions at para. 48.

²⁸ Affidavit of the acting Senior Director of Audits, Audits and Investigation Branch, Ministry of Health at para. 58.

of Health. The spreadsheets include the wording of each request, date of the request and the outcome of the request.²⁹

[40] The respondent acknowledges that he has made sequential requests to the Attorney General but says that his requests are not overlapping because the requests are for different time periods. The respondent says that his sequential requests are clearly related to ongoing events.³⁰ He says he is not seeking the Ministry of Health's records through this access request,³¹ rather, he is seeking information that he does not have.³²

[41] For the reasons that follow, I am not satisfied that the request at issue is repetitious within the meaning of s. 43.

[42] A review of the respondent's access requests to the Attorney General shows that the request at issue is the fifth request for all records about the respondent in a chronological sequence. The request at issue is clearly about a different time frame than earlier requests.³³

[43] The Attorney General's evidence is too vague to satisfy me that the request at issue overlaps with records that the respondent received during the Ministry of Health's disclosure process. For example, the statement from the Ministry of Health employee that "most of [the respondent's] requests" overlap with disclosure from the Ministry of Health appears to be a general statement about the respondent's past behaviour. Similarly, the Attorney General's submissions do not adequately explain whether the request at issue is for records the respondent has already received from the Ministry of Health or otherwise. I am not satisfied that the current request overlaps with any previous requests.

[44] For these reasons, I am not satisfied that the request at issue is repetitious within the meaning of s. 43(a).

Is the request systematic?

[45] Systematic requests are requests made according to a method or plan of acting that is organized and carried out according to a set of rules or principles.³⁴ Some characteristics of systematic requests may be:

²⁹ Such as how many pages were provided and whether the records were fully or partially disclosed. Affidavit of the acting Manager, Exhibit B.

³⁰ Respondent's submissions, page 4.

³¹ Respondent's submissions, page 6.

³² Respondent's submissions, pages 23, 24.

³³ This is not like in Order F18-09, where the timeframes overlapped. See 2018 BCIPC 11 at para. 17.

³⁴ Order F13-18, 2013 BCIPC 25 at para. 23.

- 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 OIPC; and
- 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.³⁵

[46] The Attorney General submits that due to being constrained by a s. 43 order granted to the Ministry of Health, the respondent has now transferred his focus to the Attorney General. More specifically, the Attorney General says that the respondent has continued his systematic targeting of any person involved in the audit of his MSP billing by making requests to the Attorney General.³⁶ The Attorney General also says that the respondent is using the same detailed wording related to specific events or communications.³⁷

[47] As I mentioned above, the Attorney General has provided spreadsheets detailing the respondent's past access requests to public bodies within the provincial government, including the Attorney General and the Ministry of Health. Since 2017, the respondent has made 102 requests, including 15 to the Attorney General.³⁸ The Attorney General says that the respondent's requests are increasing over time, with 99 of those requests occurring between 2019 and 2021.³⁹

[48] The Attorney General's evidence also includes a spreadsheet about complaints⁴⁰ and reviews⁴¹ sought by the respondent in relation to his access requests.⁴² The spreadsheet does not contain details about the nature of the complaint or review. The Attorney General says that the respondent has sought

³⁵ Order F18-37, 2018 BCIPC 40 at para 26.

³⁶ This statement appears in the affidavit of the acting Senior Director of Audits, Audits and Investigation Branch, Ministry of Health at para. 48. The acting Senior Director deposes that the Attorney General's lawyer in this inquiry told the acting Senior Director this.

³⁷ Attorney General's initial submissions at para. 54.

³⁸ Attorney General's initial submissions at para. 3 and Affidavit of the acting Manager, Information Access Operations at para. 20 and Exhibit B.

³⁹ Attorney General's initial submissions at para. 54 and Affidavit of the acting Manager, Information Access Operations at para. 21.

⁴⁰ A "complaint" is about the public body's actions in the process of responding to an access request, for example whether the public body adequately searched for records or failed to respond to an access request within the timelines set out in part 1 of FIPPA.

⁴¹ A "review" refers to a request that the OIPC determine whether the public body properly applied the exceptions in part 2 of FIPPA to withheld information in responsive records.

⁴² Affidavit of the acting Manager, Information Access Operations, Exhibit C.

53 reviews or complaints on 102 access requests.⁴³ I can see from the spreadsheet that this includes 22 reviews or complaints on 15 requests to the Attorney General. In some cases, the respondent sought complaints and reviews on the same request.⁴⁴

[49] The Attorney General says that the past requests provide important context and illustrate the repetitious and systematic nature of the requests.⁴⁵ It further says that in order to give s. 43 a fair, large and liberal interpretation that best ensures the attainment of its objectives, I should accept evidence about the respondent's requests to other public bodies.⁴⁶

[50] The respondent says that he is not targeting anyone who has ever had anything to do with his matters. He provides a list of approximately 25 lawyers with the Legal Services Branch who have been involved in any of his "affairs" and says that he has not targeted them.⁴⁷ He says that his requests are clearly related to ongoing events.⁴⁸

[51] For the following reasons, I am satisfied that the respondent is making systematic requests to the Attorney General.

[52] The Attorney General's evidence shows that the respondent has made 15 access requests to the Attorney General over the past three years: four in 2021, seven in 2020 and four in 2019.

[53] As previously mentioned, the request at issue is the fifth request to the Attorney General requesting all records about the respondent, each for a sequential but not overlapping time period.

[54] In addition, looking at the past requests to the Attorney General, I can see that the respondent has routinely targeted individuals who appear to be related to the hearing process. For example, the respondent has asked for employment and/or contract details about the lawyer for the Attorney General who provided the Ministry of Health with advice throughout the hearing process; for records related to the appointments of some members of the hearing panel; and for a copy of an affidavit "alleged to have been sworn" by a named individual regarding the "putative hearing Panel unilaterally declared by [named lawyer] with the Legal

⁴³ Attorney General's initial submissions, at para. 54.

⁴⁴ For example, the same request appears twice on the bottom of page 50 in Exhibit C. I can see that in the leftmost column, there is an "R" and a "C" added to the end of the request ID and while the Attorney General has not explained, it makes sense that the "R" refers to a review and the "C" to a complaint.

⁴⁵ Attorney General's initial submissions at paras. 51 and 52.

⁴⁶ Attorney General's initial submissions at para. 43.

⁴⁷ Respondent's submissions, pages 15-16, 20.

⁴⁸ Respondent's submissions, page 4.

Services Branch.”⁴⁹ I can see that the respondent also made similar requests targeting individuals related to the audit and hearing process to the Ministry of Health. The fact that the respondent has not made requests about every lawyer who was ever involved in his matters does not convince me that there is no pattern of requesting records about individuals involved in matters relating to him.

[55] Further, the fact that the respondent has made 22 requests for review or complaints in relation to his 15 access requests to the Attorney General indicates to me that the respondent is routinely raising issues with the responses and pursuing oversight by the OIPC.

[56] I am satisfied that the respondent is systematically requesting records from the Attorney General that relate to the Ministry of Health’s hearing process. Based on these past behaviours I have outlined above, I am satisfied that the respondent has no intention of stopping the flow of requests or complaints or reviews about those requests.

[57] For these reasons, I find that the respondent’s requests to the Attorney General are of a systematic nature.

[58] I turn now to whether responding to the request at issue would unreasonably interfere with the Attorney General’s operations.

Unreasonable interference

[59] What constitutes unreasonable interference with a public body’s operations rests on an objective assessment of the facts; it will vary depending on the size and nature of the operation.⁵⁰ In determining whether a request unreasonably interferes with the operations of the public body, past orders have considered the impact of responding to the relevant requests on the rights of other access applicants.⁵¹

[60] The Attorney General says that responding to the respondent’s present and future access requests would unreasonably interfere with its operations.

[61] The Attorney General says that the respondent’s requests often overlap or duplicate records previously disclosed through FOI or through the hearing process.⁵² The Attorney General says that the respondent repeatedly asks for “all records”, resulting in larger records packages.⁵³ The Attorney General also says

⁴⁹ I note that there are some additional instances where the spreadsheet indicates that a request pertains to a named individual, but the name has been omitted.

⁵⁰ *Crocker v British Columbia (Information and Privacy Commissioner)* 1997 CanLII 4406 at para. 37.

⁵¹ Order F17-18, 2017 BCIPC 19 at para. 40; Order F13-18, 2013 BCIPC 25 at para. 31.

⁵² Attorney General’s initial submissions at para. 63.

⁵³ Attorney General’s initial submissions at para. 63.

that the respondent's access requests often require further communication with him, which is more time consuming than what is typical. For example, the respondent's access requests can be wordy, confusing, repetitive and convoluted, necessitating additional time or follow up to clarify and comprehend.⁵⁴

[62] With regard to the request at issue, a Legal Assistant with the Attorney General says that there was a call for records responsive to the request at issue circulated via email to Legal Services Branch employees.⁵⁵ The Legal Assistant then deposes that “[a] lawyer with significant knowledge of the scope of the request estimated that it would take [Legal Services Branch] employees at least 200 hours to collect the records and consult on the severing of the records.” The Legal Assistant also says that this estimate does not include time spent by the Attorney General's Senior Records Management FOI Assistant or by Information Access Operations (IAO).⁵⁶ IAO is part of the Ministry of Citizens' Services and processes all access requests received by ministries.⁵⁷

[63] With regard to the respondent's past requests, the Attorney General says that its staff have spent approximately 472 hours responding to past access requests: approximately 340 hours by the Attorney General's Senior Records Management FOI Assistant and approximately 132 hours among other employees.⁵⁸ The Legal Assistant explains that the 132-hour estimate came from responses to an email sent to Legal Services Branch and Ministry of Attorney General staff asking how long they had spent working on processing access requests from the respondent.⁵⁹

[64] The Attorney General has also provided some information *in camera* about the amount of time lawyers and paralegals for the Attorney General have spent in relation to the respondent's access requests. The Legal Assistant further explains, in open evidence, that some of this time “likely relates to access requests [made by the respondent] to the Ministry of Health and the MSC.”⁶⁰

[65] In addition, the Attorney General has also provided evidence from the acting Manager on the Justice/Health Team at IAO (Manager). The Manager explains the process of responding to access requests. For example, the Manager's evidence shows that while IAO facilitates the response to the request,

⁵⁴ Attorney General's initial submissions at para. 63; Affidavit of the acting Manager, Information Access Operations, at para. 25.

⁵⁵ Affidavit of the Legal Assistant, para. 8.

⁵⁶ Affidavit of the Legal Assistant, para 10.

⁵⁷ Affidavit of the acting Manager, Information Access Operations, at para. 7.

⁵⁸ Affidavit of the Legal Assistant, paras. 4 and 5.

⁵⁹ The Legal Assistant also says that this email was sent to most but not necessarily all staff who have been involved in processing requests from the respondent. See Affidavit of the Legal Assistant at paras. 3 and 4.

⁶⁰ Affidavit of the Legal Assistant, para. 7.

searching for records and final approval of the records package are the responsibilities of the client ministry.⁶¹

[66] The Manager also gives evidence about the respondent's overall use of resources. For example, the Manager says that only eight of 3,748 applicants have submitted as many or more requests than the respondent.⁶² The Manager also says that the respondent commenced four OIPC proceedings between January 1 and November 2, 2021, which constitutes 4% of all reviews and complaints during that time.⁶³ The Attorney General says that the respondent's complaints require staff to take time away from their duties to assist counsel in preparing affidavits.⁶⁴ In addition, the Attorney General says that where the respondent has already received unredacted copies, his complaints can only be considered a ploy to cripple its operations.⁶⁵

[67] The Manager also references a report from the consulting firm Deloitte, which estimated that the average cost of responding to an access request is \$3,000, therefore the respondent's 102 access requests have cost the province \$306,000. However, the Manager says that the respondent's access requests take more time than average, so this cost estimate is likely conservative.⁶⁶

[68] The Manager says that the respondent has consumed a significant amount of government resources and that responding to his access requests, communicating with him and the OIPC proceedings are impairing their team's ability to respond to other applicants.⁶⁷

[69] The Attorney General says that its evidence details the close connection between IAO and the Attorney General's own access to information operations.⁶⁸ Further, the Attorney General says that given the operational realities, the OIPC should make no distinction between the evidence of IAO and its own evidence.⁶⁹

[70] The respondent says that the Attorney General's 200-hour claim is exaggerated. He says there is a discrepancy between the 200 hours that the Attorney General says it will take to respond to this request and the 132 hours

⁶¹ Affidavit of the acting Manager, Information Access Operations, Exhibit A at slides 21-22.

⁶² The Attorney General says this is during the relevant time period but does not say what the time period is. See the affidavit of the acting Manager, Information Access Operations at para. 24 and Attorney General's initial submissions at para. 63.

⁶³ Paras. 34 and 35.

⁶⁴ Attorney General's submissions at para. 63.

⁶⁵ Attorney General's submissions at para. 63.

⁶⁶ Affidavit of the acting Manager, Information Access Operations, at paras. 26 and 27.

⁶⁷ Affidavit of the acting Manager, Information Access Operations, para. 40.

⁶⁸ Attorney General's initial submissions at para. 39.

⁶⁹ Attorney General's initial submissions at para. 43.

that the Attorney General says it spent on past requests.⁷⁰ The respondent also disputes the estimated \$300,000 cost of responding to his access requests.⁷¹

[71] The respondent also disputes that his requests require more communication than usual. He points to one specific past request where he says there was no communication and that he did not receive a response to his request for six months.⁷² The respondent also says that the Manager's assertion that his requests impair the ability to respond to other applicants is "without evidence."⁷³

[72] The respondent says that, since the request at issue is the only open request, his requests are not a ploy to cripple its operations, as the Attorney General suggests.⁷⁴

[73] After considering all of the above, I am not satisfied that responding to the respondent's request would unreasonably interfere with the Attorney General's operations.

[74] First, some of the evidence provided by the Attorney General does not help me to understand whether responding to the request at issue would unreasonably interfere with its operations because the evidence is not specifically about requests to the Attorney General. For example, the Manager's evidence about the respondent's consumption of resources is about all of the respondent's access requests to all ministries of the provincial government. Further, the Manager's statement that the resources required by the respondent are impairing the ability of IAO to respond to other applicants appears to be about the respondent's requests to various ministries, not specifically those to the Attorney General. Similarly, the estimated time spent by lawyers and paralegals likely includes time spent on the respondent's requests to other public bodies. And, as I detail below, a time estimate without further context does not help to understand the impact on the Attorney General's operations.

[75] FIPPA is clear that each ministry of the provincial government is a separate public body under FIPPA.⁷⁵ A public body's section 43 application should be considered in the context of the particular public body applying for a remedy.⁷⁶ Given that the majority of the respondent's access requests to ministries of the provincial government were to ministries other than the Attorney General, I do not find the above evidence illustrative of the impact of the respondent's past or current requests to the Attorney General. Therefore, I do not

⁷⁰ Respondent's submissions, page 3.

⁷¹ Respondent's submissions, page 24.

⁷² Respondent's submissions, pages 5 and 6.

⁷³ Respondent's submissions, page 6.

⁷⁴ Respondent's submissions, page 25.

⁷⁵ Schedule 1 definition of "public body."

⁷⁶ For a similar comment, see Order F18-25, 2018 BCIPC 28 at para. 15.

find it particularly helpful in determining whether responding to the request at issue would unreasonably interfere with the Attorney General's operations.

[76] The main evidence specifically related to the Attorney General is that it will take its staff 200 hours⁷⁷ to collect the records responsive to the request at issue and to consult on the severing. However, the Attorney General does not explain the impact of spending this time on its operations. For example, it has not explained how this work is distributed amongst employees, the impact that responding to the request will have on processing other freedom of information requests to the Attorney General, or on its employees' other responsibilities. I note that the Attorney General said that swearing affidavits related to the respondent's inquiries takes "time away" from its employees' other duties, but this does not help me to determine whether that time unreasonably interferes with their other duties. As I stated at the outset, whether responding to a request constitutes unreasonable interference depends on the size and nature of the operation. Without more, the Attorney General's estimate about the number of hours it will take its staff does not help me to understand whether responding to the request would unreasonably interfere with its operations.⁷⁸

[77] In addition, the respondent disputes the Attorney General's evidence that it will take 200 hours to respond to his access request. I take the respondent's point that the 200-hour estimate is proportionately far greater than the 132 hours that Legal Services Branch employees⁷⁹ have spent on all of the respondent's past requests to the Attorney General combined.⁸⁰ The Attorney General has not explained why responding to the request at issue will take many more hours relative to what it has spent responding to all of the respondent's past requests combined.⁸¹ Therefore, in addition to my finding above that I do not find the estimate helpful, I also place less weight on the estimate itself.

[78] Finally, the Attorney General has said that the respondent's requests consume more resources because the requests overlap or duplicate and that the respondent requires more communications than is typical. However, I found above that this request does not overlap with previous requests. In addition, the wording of this request, while broad, is straightforward and clear. The Attorney General has said that the respondent requires more communication than is

⁷⁷ Other than the Senior Records Management FOI Assistant.

⁷⁸ For a similar finding, see Order F18-09, 2018 BCIPC 11 at para. 26.

⁷⁹ Other than the Attorney General's Senior Records Management FOI Assistant. The Attorney General provided no estimate of how long it estimates it would take this employee to respond to the current access request.

⁸⁰ The request at issue is for all records for a period of about 14 months. The past three requests for all records from the Attorney General covered a combined period of about 17 months. In addition, the respondent made, and the Attorney General responded to, an additional 11 requests since 2019.

⁸¹ I note that this estimate appears to be at least partially based on responses to an email that was circulated to Attorney General employees about the respondent's request.

normal and the respondent disputes this. The Attorney General has not provided any examples illustrating how this is the case.

[79] Taken together as a whole, I find that the Attorney General's evidence falls short of satisfying me that responding to the request at issue would unreasonably interfere with its operations.

[80] The Attorney General also argued that the respondent's requests were frivolous and vexatious under s. 43(b). I turn now to those arguments.

Section 43(b) – frivolous or vexatious

[81] Similar to s. 43(a), requests that are frivolous or vexatious are an abuse of the right to access information under FIPPA. Both frivolous and vexatious requests are made for a purpose other than a genuine desire to access information.

[82] Frivolous requests include requests that are trivial or not serious.⁸² Past OIPC orders have found that a request was frivolous when the requested information was publicly available,⁸³ the request was for documents that the respondent authored and sent to the public body,⁸⁴ and because the respondent cancelled a large access request after the public body had spent significant time processing the request.⁸⁵

[83] Vexatious requests include requests made in bad faith, such as for a malicious purpose or requests made for the purpose of harassing or obstructing the public body.⁸⁶ Past orders have found requests to be vexatious because:

- The purpose of the requests was to pressure the public body into changing a decision or taking an action;⁸⁷
- The respondent was motivated by a desire to harass the public body;⁸⁸
- The intent of the requests was to express displeasure with the public body or to criticize the public body's actions;⁸⁹ and
- The request was intended to be punitive and to cause hardship to an employee of a public body.⁹⁰

⁸² Auth (s. 43) 02-02 [2002] BCIPCD No. 57 at para. 27.

⁸³ Order F17-18, 2017 BCIPC 19 at para. 23.

⁸⁴ Order F13-18, 2013 BCIPC 25 at para. 34.

⁸⁵ Order F18-09, 2018 BCIPC 11 at para. 29.

⁸⁶ Auth (s. 43) 02-02 [2002] BCIPCD No. 57 at para. 27.

⁸⁷ Decision F08-10, 2008 CanLII 57362 (BC IPC) at paras. 38-39; Order F13-16, 2013 BCIPC 20 at para. 20.

⁸⁸ Order F13-18, 2013 BCIPC 25 at para. 36.

⁸⁹ Decision F10-11, 2010 BCIPC 51; Order F16-24, 2016 BCIPC 20 at para. 40; Order F20-15, 2020 BCIPC 17 at para. 33

⁹⁰ Order F19-44, 2019 BCIPC 50 at para. 33.

[84] In Auth (s. 43) 02-02, Commissioner Loukidelis said that the fact that one or more requests are repetitive may support a finding that a specific request is frivolous or vexatious.⁹¹

[85] The Attorney General submits that the respondent's pattern of access requests and the frequency with which he pursues review by the OIPC indicate that he is making the access requests to annoy and burden the targets of his requests and to express his displeasure about being subject to oversight by the MSC.⁹² The Attorney General says that the respondent's requests return to the same subject matters repeatedly. Further, the Attorney General submits that the respondent's requests dissect its actions through incremental requests on the same issues.⁹³

[86] The Attorney General also says that the respondent appears to be pursuing OIPC proceedings as a matter of course, regardless of the Attorney General's response, which demonstrates that he is not pursuing the proceedings out of a genuine desire to access information.⁹⁴

[87] The Attorney General says that in making the request at issue, the respondent is essentially seeking lawyers' files, which are presumptively privileged.⁹⁵ It says that solicitor-client privilege captures more than just communications that give or receive legal advice.⁹⁶ The Attorney General says that, as a sophisticated OIPC applicant and litigant, the respondent should know that communications held by the Legal Services Branch are largely subject to solicitor-client privilege and therefore very few records will be released to the respondent.⁹⁷ It says that the records that could be released to the respondent would most likely to be correspondence between the Attorney General and the respondent, which the respondent already has in his possession. For this reason, the Attorney General says that the request is frivolous.

[88] The respondent says that his request is part of a sequential progression, relating to ongoing events about which the Attorney General has information.⁹⁸ He disputes the Attorney General's argument that the requested records are subject to solicitor-client privilege.⁹⁹ Among other things, he says that not all communications between a client and lawyer are privileged.

⁹¹ Auth (s. 43) 02-02 [2002] BCIPCD No. 57, at para. 27.

⁹² Attorney General's initial submissions, para. 82.

⁹³ Attorney General's initial submissions, para. 70.

⁹⁴ Attorney General's initial submissions, para. 80.

⁹⁵ Attorney General's initial submissions, para. 77.

⁹⁶ Attorney General's initial submissions, para. 76 citing *British Columbia (Attorney General) v Lee*, 2017 BCCA 219, at paras. 32-33.

⁹⁷ Attorney General's initial submissions, para. 73.

⁹⁸ Respondent's submissions, page 5.

⁹⁹ Respondent's submissions, page 30.

[89] Overall, I am not satisfied that the request at issue is frivolous or vexatious in the way that past orders have interpreted these terms.

[90] First, I do not accept the Attorney General's argument that the request is frivolous because the respondent ought to know that the request will likely be subject to solicitor-client privilege under s. 14. The law about how privilege applies to documents in a lawyer's file is nuanced.¹⁰⁰ I am not satisfied that it is a foregone conclusion that the information requested by the respondent is subject to solicitor-client privilege, save for his own communications. As a result, I am not satisfied that the request at issue is frivolous on this basis.

[91] In addition, I found above that the respondent's request was not for records already received and I am not satisfied that the request at issue is frivolous on this basis.

[92] I am also not satisfied that the request is vexatious.

[93] Above, I summarized past orders where past adjudicators had found that requests were vexatious. The above orders share a commonality, which is that the respondent's motive was a central factor in finding that the request(s) were vexatious.

[94] The respondent's own submissions make clear that he is displeased with being subject to oversight by the Ministry of Health's audit program. In addition, some language in past requests expresses displeasure. For example, a request to the Attorney General referred to the "bogus" audit program. I can also see that the respondent has displayed some difficult behaviours, including the frequency with which he pursues review by the OIPC.

[95] However, on balance, the arguments and evidence from Attorney General do not satisfy me that the respondent made the request at issue for the purpose of harassing or burdening the public body.

[96] For example, I am not satisfied that the pattern of access requests to the Attorney General indicates that the requests were made for the purpose of annoying and burdening the public body or expressing his displeasure. As previously mentioned, the respondent made four requests to the Attorney General in 2019, seven in 2020 and four in 2021. At the time of this s. 43 application, the request at issue was the only open request. I am not satisfied that this pattern of requests supports a finding that the request at issue is vexatious because it was intended to burden the public body.

[97] Similarly, I am not persuaded that the pattern of the respondent's access requests indicate that he transferred his focus to the Attorney General as a result

¹⁰⁰ See Order F19-21, 2019 BCIPC 23 at paras. 110-114 for a discussion on some of this law.

of the s. 43 order limiting his requests to the Ministry of Health. The respondent made four access requests after being limited, which was not an increase in volume compared to his past requests to the Attorney General.

[98] In addition, nothing in the request itself indicates it is vexatious. The request at issue is a straightforward request for the respondent's own information.

[99] Overall, the behaviours outlined by the Attorney General do not demonstrate enough of a link between the respondent's displeasure and his motive for making access requests to the Attorney General. An access applicant may be both displeased and make an access request, but this does not make a request vexatious.

[100] Nothing in this order precludes the Attorney General from applying for relief under s. 43 in the future, should the circumstances change.

CONCLUSION

[101] For the reasons above, I do not give the Attorney General permission to disregard the request at issue under s. 43(a) or (b) of FIPPA. I also decline to give the Attorney General relief from future requests or to decide what constitutes "one" request.

February 10, 2022

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: F21-87965¹⁰¹

¹⁰¹ In his submissions, the respondent sought clarity on the proper file number. I confirm this is the correct number.