Order F22-59

CITY OF PRINCE RUPERT

Erika Syrotuck
Adjudicator

November 16, 2022

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Summary: The City of Prince Rupert (City) asked the Commissioner for permission to disregard the respondent's access request under ss. 43(a) (frivolous or vexatious), 43(b) (record already disclosed or accessible from another source) and 43(c) (responding to the access request unreasonably interferes with the public body's operations) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that the City did not meet its burden of proving that ss. 43(a), (b) or (c) applies.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 ch 165 ss. 43(a), (b) and (c).

INTRODUCTION

[1] This inquiry is about the City of Prince Rupert's (City) application for relief under s. 43 of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The access applicant, who is the respondent in this inquiry, is part of a union (Union) and requested the following records:

> "Any and all correspondence including: email, text message, agendas, minutes, mail, letters, memos or notes by or between the City of Prince Rupert management or administration staff and City Council or the Mayors office with reference to or mention of "Construction, Maintenance and Allied Workers", "CMAW", "Local 1735", "Carpenters" or "carpenters".

[3] The initial access request did not include a date range. However, after the City made its s. 43 application, the respondent specified that the request was from January 1, 2004 to June 13, 2022.

[4] The City seeks to disregard the access request under s. 43(a), (b) or (c) of FIPPA.

[5] Section 43 was amended in November 2021.[1] The new version, which is the one under which the City made its s. 43 application, says:

> 43 If the head of a public body asks, the commissioner may authorize the public body to disregard a request under section 5 or 29, including because
>
> (a) the request is frivolous or vexatious,
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> (b) the request is for a record that has been disclosed to the applicant or that is accessible by the applicant from another source, or
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> (c) responding to the request would unreasonably interfere with the operations of the public body because the request
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> (i) is excessively broad, or
>
> (ii) is repetitious or systematic.

[6] The City also asks for permission to disregard any future similar requests.

[7] The City says that it has received at least four additional access requests from the respondent. My understanding is that, should I find that s. 43 applies to the above access request, the City considers these to be future requests and asks for relief from them on this basis.

ISSUES

[8] At this inquiry, I must decide whether to grant the City relief under s. 43(a), (b) or (c). More specifically I must decide:

1. Does s. 43(a) apply because the request is frivolous or vexatious?
2. Does s. 43(b) apply because the request is for a record that has been disclosed to the applicant or that is accessible by the applicant from another source?
3. Does s. 43(c) apply because responding to the request would unreasonably interfere with the operations of the public body because the request is excessively broad?[2]
4. If the answer is yes to any of the above, what relief is appropriate?

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[1] *Freedom of Information and Protection of Privacy Amendment Act, 2021* SBC c 39 s 27.

[2] As I explain below, the City did not argue that the request was systematic or repetitious, and so that is not an issue in this inquiry.

[9] The burden of proof is on the City to show that s. 43 applies.[3]

SECTION 43

[10] Public bodies do not have discretion to disregard access requests on their own; they must obtain permission from the Commissioner under s. 43 of FIPPA.[4]

[11] Given that relief under this section curtails or eliminates the rights to access information, s. 43 applications must be carefully considered.[5] Granting s. 43 applications should be the "exception" and not a mechanism for public bodies to avoid their obligations under FIPPA.[6]

[12] However, s. 43 serves an important purpose. It exists to guard against the abuse of the right of access.[7] 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.[8] In this way, s. 43 is "an important remedial tool in the Commissioner's armory to curb abuse of the right of access."[9]

[13] Sections 43(a), (b) and (c) are all at issue in this inquiry. I will begin with whether the request is frivolous or vexatious under s. 43(a).

Section 43(a) – frivolous or vexatious

[14] Section 43(a) allows the Commissioner to authorize a public body to disregard an access request because a request is frivolous or vexatious.[10]

[15] 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.

[16] Frivolous requests include requests that are trivial or not serious.[11] For example, a past OIPC order found that a request was frivolous because the respondent cancelled a large access request after the public body had spent significant time processing the request.[12]

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[3] Order F21-31, 2021 BCIPC 39 (CanLII) at para 12, for example.
[4] Order F18-25, 2018 BCIPC 28 (CanLII) at para 14.
[5] Auth (s. 43) 99-01 Available at https://www.oipc.bc.ca/decisions/170 at page 3.
[6] Auth (s 43) (19 December 1997), available at https://www.oipc.bc.ca/decisions/168 at page 1.
[7] Auth (s. 43) 99-01. Available at https://www.oipc.bc.ca/decisions/170 at page 7.
[8] Auth (s. 43) 99-01. Available at https://www.oipc.bc.ca/decisions/170 at page 7
[9] *Crocker v British Columbia (Information and Privacy Commissioner*) 1997 CanLII 4406 at para 33.
[10] Before FIPPA was amended in November 2021, s. 43(b) was the equivalent provision.
[11] Auth (s. 43) 02-02 [2002] BCIPCD No. 57 at para 27.
[12] Order F18-09, 2018 BCIPC 11 (CanLII) at para 29.

[17] In addition, past orders have found that a request was frivolous when it was for information that was publicly available,[13] or for information that the access applicant clearly already had access to.[14] However, the November 2021 amendments introduced a discrete provision addressing that situation. So, I will deal with the City's arguments about whether the respondent already has the information in dispute under s. 43(b) rather than s. 43(a).

[18] 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.[15] 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; [16]
- The respondent was motivated by a desire to harass the public body; [17]
- The intent of the requests was to express displeasure with the public body or to criticize the public body's actions;[18] and
- The request was intended to be punitive and to cause hardship to an employee of a public body.[19]

[19] 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.[20]

Parties positions on s. 43(a)

[20] The City says that the request is frivolous and vexatious because it was not made to achieve any sort of legitimate purpose. More specifically, it says that the respondent is using FIPPA as retaliation for a decision of the British Columbia Labour Relations Board (Board). It also says the purpose of the request is to use up the City's resources.

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[13] Order F17-18, 2017 BCIPC 19 (CanLII) at para. 23.
[14] For example, in Order F13-18, 2013 BCIPC 25 (CanLII) at para 34 the adjudicator found that a request was frivolous when it was for records that the access applicant wrote and then sent to the public body.
[15] Auth (s. 43) 02-02 [2002] BCIPCD No. 57 at para 27.
[16] Decision F08-10, 2008 CanLII 57362 (BC IPC) at paras. 38-39; Order F13-16, 2013 BCIPC 20 at para 20.
[17] Order F13-18, 2013 BCIPC 25 (CanLII) at para 36.
[18] Decision F10-11, 2010 BCIPC 51 (CanLII); Order F16-24, 2016 BCIPC 20 (CanLII) at para. 40; F20-15, 2020 BCIPC 17 (CanLII) at para 33
[19] Order F19-44, 2019 BCIPC 50 (CanLII) at para 33.
[20] Auth (s. 43) 02-02 [2002] BCIPCD No. 57, at para 27.

[21] By way of background, the City says that the Union applied to the Board seeking a declaration that a collective bargaining agreement is in force and effect between it and the City with respect to certain employees. The Board dismissed the Union's application. The City provided a copy of this decision (Decision) as evidence in the inquiry.

[22] The City explains that after the Board made the Decision, the respondent requested an audience with the City Council at a June 2022 meeting. The City said it was unable to accommodate the respondent for the June council meeting but offered the respondent an opportunity to present in July.[21] The City explains that, following that exchange, the City received the respondent's access request and a series of similar access requests from others involved in the Union.

[23] It also says that, at a public meeting, members of the Union attempted to start an argument with the Mayor and, after the meeting, attempted to speak with local politicians as they walked to their cars. The City says that the behaviour at the meeting prompted an RCMP commander to stay in the parking lot to observe and take action, if necessary. I gather the City has provided this information to link the respondent's behaviour with its assertion that the respondent has not made the request for a legitimate purpose.

[24] In response to the City's submissions, the respondent says that the timeframe for an appeal of the Board's decision is over and the Union is not seeking to re-open it. The respondent says that the duplicate requests that the City mentions were submitted "in error" and that he and the other access applicants have agreed to combine their access requests and proceed as though the requests are one single request.

[25] In addition, the respondent disagrees with the City's characterization of his behaviour at the public meeting. The respondent says that, while the Mayor "got quite hostile" in response to a question that the respondent asked, he remained respectful considering the Mayor's "tone and false words".[22] He says he did have a conversation in the parking lot with the North Coast MLA, who he has known for 15 years, and another local politician also spoke to them.[23] The respondent says he is unaware of who the RCMP commander is and was never approached by any such person. He says that his actions were "completely normal ways in which members of the public participate in a democratic and transparent society."[24]

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[21] The City provided the relevant emails in its reply submissions.
[22] Respondent's submissions, page 5.
[23] The respondent says that this other politician was the "newly elected Mayor." Because his submissions were made after the municipal elections on October 15, 2022, I gather the respondent is not referring to the same person who was Mayor at the time of the public meeting.
[24] Respondent's submissions, page 1.

[26] The respondent says that the purpose of the access request is to gain an understanding and inform the resident carpenters, construction workers and the public of facts, documents or discussions that the City has not provided through any other source. Specifically, the respondent says the City's response to his access request will provide information about various topics including infrastructure costs, water quality concerns and infrastructure, an agreement with a construction service provider and the City's decision to bring in out-of-town workers during the COVID-19 pandemic. The respondent says he began to look more closely at the City's business dealings after a meeting with the City about upcoming water infrastructure projects. Overall, the respondent says having this information will increase public confidence and engagement in the City.

[27] For all of these reasons, the respondent says that the request is not frivolous or vexatious and that he is using FIPPA as intended.

[28] In reply, the City says that information about the topics identified by the respondent in his submissions are available online. For example, the City says that information about infrastructure costs, potable water delivery and water advisories is available through the City's meeting minutes posted on its website.

[29] The City says the respondent's assertion that the duplicate requests made by other Union members have been rescinded is "not accurate" but did not further explain.[25] However, elsewhere in its submissions, it does say that two of the other requests have been rescinded.[26]

Analysis and findings, s. 43(a)

[30] Overall, I am not satisfied that the request is frivolous or vexatious within the meaning of s. 43(a).

[31] First, I am not persuaded that the request is frivolous. While the connection between the topics that the respondent says he is interested in and the access request is not entirely clear to me, this is not enough to show that the request is trivial or not serious. In addition, I do not think that the fact that there may be additional information in the City's meeting minutes or posted on the City's website on these topics supports a finding that the request is frivolous (or vexatious, for that matter). The City has the burden to show that the request is frivolous, and, in my view, it has not sufficiently explained why the request is trivial, not serious or otherwise frivolous.

[32] I am also not satisfied that the request is vexatious. It does not make sense to me that the respondent (and others) would file access requests to the City in retaliation for the Board's Decision. The City is clearly not responsible for

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[25] The City's reply submissions, para 5.
[26] Covering letter of the City's initial submissions.

the Board's decision-making as it is an entirely separate entity and it is evident to me that the respondent understands this.

[33] In addition, in my opinion, the respondent's behaviours as outlined by the City do not support its assertion that the respondent is making the request for an illegitimate purpose. It is difficult to ascertain the nature of the respondent's interactions with the Mayor and politicians from such differing written accounts. Even if the respondent was overzealous at a meeting, I do not think this is sufficient to demonstrate that the respondent made the access request for the purpose of causing hardship to the City. Again, I find the City has not met its burden.

[34] For these reasons, I am not persuaded by the City's submissions that the request at issue is either frivolous or vexatious under s. 43(a) of FIPPA.

Section 43(b) – record already disclosed or accessible from another source

[35] Under s. 43(b), the Commissioner may authorize a public body to disregard an access request because the request is for a record that has been disclosed to the respondent or that is accessible by the respondent from another source. As I mentioned above, this provision was added to s. 43 in November 2021.

[36] The City says that the information that is the subject of the access request was previously sent to legal counsel for the Union and was attached to its submissions during the Board's hearing that resulted in the Decision. The City says that it has no further records other than what was attached to that submission.

[37] The respondent says that the City has not previously provided the information that is the subject of the access request, nor is it available by any other means. Specifically, the respondent says that he has some documents related to the issues addressed by the Board in the Decision but that those are exclusively information and exchanges between City staff and himself or his "office" (which I assume means the Union). The respondent points out that the access request at issue is for information between City staff, and that information has not been disclosed to him. The respondent says that he would not be requesting records he already has and agrees it would be a waste of time to do so.

[38] I am not satisfied that the request is for records already disclosed to the applicant or accessible from another source. I find that the City's assertion that there are no other responsive records is contradicted by its statement in its reply submissions that, due to the fact that the request is for information about "carpenters", the City's search for records "could lead to a significant amount of

search items" about another union that also includes carpenters.[27] This indicates to me that there are responsive records that have not already been disclosed to the respondent.

[39] In addition, I find the respondent's submissions more compelling because they are more detailed. For example, the respondent explained how the access request is for different records than those that the City already provided to the respondent. Specifically, the access request is for records "by or between the City of Prince Rupert management or administration staff and City Council or the Mayors office." The City's submissions and evidence do not establish that those are the type of records the respondent has already received. The City only says that it has already provided the information that was the subject of the access request but does not provide any details about the types of records it says it already provided.

[40] In summary, I find the City has not met its burden with regards to s. 43(b).

Section 43(c) – unreasonable interference with the operations of the public body

[41] Section 43(c) allows the Commissioner to authorize a public body to disregard an access request because responding to the request would unreasonably interfere with the operations of the public body because the request is (i) excessively broad, or (ii) is repetitious or systematic.[28]

[42] Many past orders relating to this provision before it was amended clarified that this provision has two parts and the public body must prove both.[29] Since the basic structure of the provision has not changed, I find that analysis still instructive. Therefore, I find that the public body must prove that the request is either excessively broad, or repetitious or systematic and that responding to the requests would unreasonably interfere with the public body's operations.

[43] In this case, the City only argued that responding to the request would unreasonably interfere with its operations because the request is excessively broad.

[44] However, it is not necessary for me to decide whether the request is excessively broad, because, as I detail below, I find that responding to the access request would not unreasonably interfere with the City's operations.

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[27] Paragraph 2 of the City's reply submissions.
[28] Before the November 2021 amendments, the equivalent provision was s. 43(a), however that provision did not include "excessively broad" as a basis to provide relief from an access request.
[29] Order F13-18, 2013 BCIPC 25 (CanLII) at para 13; Order F21-02, 2021 BCIPC 2 at para 21, for example.

[45] 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.[30] 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.[31]

[46] In its initial submissions, the City asserted that responding to the request would unreasonably interfere with its operations given the excessively broad nature of the request. The City did not elaborate.

[47] The respondent says that the City can respond in a "short amount of time" and that the records can be easily gathered by way of the search function on any email or similar computer program or paper file cabinet.

[48] In reply, the City says that the length of time needed to search for records cannot be determined by outside persons and that the respondent's access request could lead to a "significant amount of search items."

[49] In light of such scant submissions, I am not persuaded the City has met its burden of showing that responding to the access request would unreasonably interfere with its operations. I can appreciate that the 18-year timespan of the access request is a long timeframe, but that alone does not persuade me to find in favour of the City. The City has not provided any estimate of how long it thinks it would need to search for the records or any other information that is capable of supporting its assertion that responding to the access request would unreasonably interfere with its operations. As a result, I find that the first part of the test is not met. I find s. 43(c) does not apply.

CONCLUSION

[50] For the reasons given above, I deny the City's request to disregard the respondent's access request under s. 43 of FIPPA.

November 16, 2022

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: F22-90496

[30] *Crocker v British Columbia (Information and Privacy Commissioner*) 1997 CanLII 4406 at para. 37.
[31] Order F17-18, 2017 BCIPC 19 at para. 40; Order F13-18, 2013 BCIPC 25 at para. 31.