Order F23-98

NEW WESTMINSTER POLICE DEPARTMENT

Erika Syrotuck
Adjudicator

November 22, 2023

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Summary: The New Westminster Police Department (Department) requested authorization to disregard a portion of an access request under s. 43(c)(i) of the *Freedom of Information and Protection of Privacy Act.* The adjudicator found that the request was not excessively broad and, therefore, did not authorize the Department to disregard the access request under s. 43(c)(i). The adjudicator also declined to permit the Department to disregard the access request under s. 43 generally.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [RSBC 1996] c. 165, ss. 4(2), 6(2), 43, and 43(c)(i).

INTRODUCTION

[1] This inquiry is about an application by the New Westminster Police Department (Department) to disregard a portion of an access request under s. 43(c)(i) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). Section 43(c)(i) allows the Commissioner to authorize a public body to disregard an access request if responding to the access request would unreasonably interfere with the operations of the public body because the request is excessively broad.

[2] During the inquiry, the Department asked the Office of the Information and Privacy Commissioner (OIPC) for permission to provide some information *in camera*, that is, for the Commissioner only to see. An OIPC adjudicator reviewed the request and accepted some information in one affidavit *in camera.*

[3] The access applicant did not make submissions in this inquiry.

ISSUE

[4] At this inquiry, I must decide the following issues:

1. Would responding to the access request unreasonably interfere with the Department's operations because it is excessively broad within the meaning of s. 43(c)(i) of FIPPA?

2. If the answer to the first question is yes, should I authorize the Department to disregard the access request?

[5] The burden of proof is on the Department to show that s. 43(c)(i) applies.[1]

DISCUSSION

Background

[6] The access applicant used to be a police constable with the Department. Just over a year ago the access applicant made a request for:

> ...all of my personal information including, but not limited to, email messages, Performance Appraisals, PSS Files, Human Resource reports/investigations, notes, text messages and other forms of electronic communication, letters of support, and audio and video recordings.
>
> Additionally, I am requesting a complete copy of my entire up-to-date personnel file.

[7] The Department's Information and Privacy Supervisor (Supervisor) and the access applicant then emailed back and forth about the parameters of the access request.[2]

[8] Specifically, a few days after receiving the initial request, the Supervisor emailed the access applicant for clarification about some parts of the request. In response, the access applicant clarified that the request for text messages was for text messages sent or received by 31 Department employees. In the same email, the access applicant said that the request was for "Everything and anything in terms of correspondence about me."[3]

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[1] Order F21-31, 2021 BCIPC 39 (CanLII) at para 12, for example.
[2] Affidavit of the Department's Information and Privacy Supervisor, paras 14, 15, 17, 18 and Exhibits B and C.
[3] Supervisor's affidavit, Exhibit C, September 13, 2022 email. I have corrected an obvious typographical error.

[9] A few days later, the access applicant sent another email stating that:

> Once again, I'm requesting any and all emails/correspondence/notes/mdt messages involving me…[4]

[10] The Department explains that "MDT" stands for Mobile Data Terminal, which refers to both the laptop computers in police vehicles and to the software on those computers.

[11] Soon after that, the access applicant then sent another, more detailed, version of the request to the Supervisor. The access applicant asked for:

> … communication [including but not limited to emails, faxes, text messages, written notes, documents, recordings and other forms of information, records or communication] concerning [access applicant's name] from November 2018 to present involving all names in the aforementioned email.[5]

[12] Some time later, the Supervisor wrote to the access applicant to "get further clarification regarding your request for MDT messages." Specifically, the Supervisor asked the access applicant if they were able to "provide certain time periods or narrow down the list of names that are a priority?"[6]

[13] In response, the access applicant identified 13 priority individuals in relation to the request for MDT messages.[7]

[14] The Department provided the access applicant with 1,414 pages of records responsive to the access request in several phases. However, it did not provide the access applicant with any MDT messages. The Department seeks the Commissioner's permission to disregard the portion of the access applicant's request that relates to the MDT messages.

What is the request at issue?

[15] As I outlined above, after the access applicant made the initial request, the Supervisor and the access applicant communicated about the access request. This is an expected part of the process of requesting records under FIPPA. However, the Department says that it is still unclear which MDT messages the access applicant wants. Before I can determine whether the access request is excessively broad, I need to first determine the scope of the access request.

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[4] Supervisor's affidavit, Exhibit C, September 22, 2022 email #1.
[5] Supervisor's affidavit, Exhibit C, September 22, 2022 email #2.
[6] Supervisor's affidavit, Exhibit C, November 15, 2022 email.
[7] Supervisor's affidavit, Exhibit C, November 21, 2022 email.

[16] First, the Department says that it is unclear whether the access applicant is seeking MDT messages that "involve" the access applicant or that "concern" the access applicant. It says that, when asked to clarify the scope of the request, the Department says that the access applicant said that the access request was for "Everything and anything in terms of correspondence about me."[8]

[17] The Department also says that there are different types of messages sent using an MDT. For example, it says that MDT software is used for "Transmissions" (i.e., PRIME or CPIC queries, communications with dispatchers) and also for direct messages between users. It says that it is unclear whether the access applicant is seeking Transmissions and direct messages or direct messages only. However, later in its submissions, the Department says that it thinks the request is for all messages sent using an MDT (i.e., Transmissions and direct messages).

[18] Regarding the status of the "priority" individuals, the Department says it understands that the request for the MDT messages to be for all messages sent using an MDT by 13 users, followed by all messages by the remaining 18 users.

Analysis and finding – scope of the request

[19] For the reasons that follow, I find that the portion of the applicant's access request that relates to MDT messages is for any message sent or received on an MDT by the 13 "priority" individuals that are "about" the access applicant.

[20] With respect to the number of individuals, it seems to me that when the Department first applied to the OIPC for relief under s. 43(c)(i), it clearly considered that by prioritizing the 13 individuals, the request had been narrowed to just those 13.[9]

[21] In addition, the Notice of Application explained that the Department had yet to respond to the portion of the access request that was for "Mobile Data Terminal (MDT) messages from 13 specified employees from November 2018 to September 8, 2022" and that this was the portion that it believed was excessively broad.

[22] For these reasons, I find it appropriate for me to decide whether the portion of the access request for the MDT messages, as it relates to the 13 individuals, is excessively broad.

[23] As to which type of MDT messages the access request is for, I find that it is for any type of message sent or received using an MDT (i.e. Transmissions

[8] I have corrected an obvious typographical error.
[9] Page 1 of the Department's s. 43 application dated June 23, 2023.

and direct messages). In my view, nothing in the access applicant's request limits the scope to direct messages only.

[24] Finally, I find that the scope of the access request is for messages where the content is about the access applicant. I can see that the access applicant said that the request for MDT messages was for messages "involving me", however, the access applicant almost immediately followed up with another email clarifying that the communications sought were "concerning" them. The second clarifying email persuades me that the access applicant is only seeking messages about them and is not seeking every message that they sent or received using an MDT. For these reasons, I find that the access applicant is asking for MDT messages where the communication is about them.

[25] In conclusion, I find that the portion of the access request the Department is seeking to disregard is for any type of MDT message sent or received by the 13 "priority" individuals that is about the access applicant.

Section 43

[26] Section 43 gives the commissioner the power to grant the extraordinary remedy of authorizing a public body to disregard an access request. This provision 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
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> (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
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> (ii) is repetitious or systematic.

[27] Public bodies do not have the authority under FIPPA to disregard access requests on their own. Authorizing a public body to disregard an access request is part of the Commissioner's oversight function.[10]

[10] Order F18-25, 2018 BCIPC 28 (CanLII) at para 14.

[28] Given that relief under s. 43 curtails or eliminates the rights to access information, s. 43 applications must be carefully considered.[11] Granting s. 43 applications should be the "exception" and not a mechanism for public bodies to avoid their obligations under FIPPA.[12]

[29] However, s. 43 serves an important purpose. It exists to guard against the abuse of the right of access.[13] 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.[14] In this way, s. 43 is "an important remedial tool in the Commissioner's armory to curb abuse of the right of access."[15]

[30] Relief under s. 43 is at the Commissioner's discretion.[16]

Section 43(c)(i) – excessively broad

[31] Section 43(c)(i) allows the Commissioner to authorize a public body to disregard an access request if responding to the request would unreasonably interfere with the operations of the public body because the request is excessively broad.

[32] As I confirmed in Order F22-59, s. 43(c)(i) has two parts and the Department must prove both.[17] First, it must show that the request is excessively broad. Second, the Department must show that responding to the requests would unreasonably interfere with its operations.

Part 1: Is the request excessively broad?

[33] In November 2021, the legislature amended s. 43. It added "excessively broad" as a basis to disregard an access request that would unreasonably interfere with a public body's operations.[18]

[34] To date, there have been no orders by the commissioner interpreting the term "excessively broad".[19]

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[11] Auth (s. 43) 99-01 Available at https://www.oipc.bc.ca/decisions/170 at page 3.
[12] Auth (s 43) (19 December 1997), available at https://www.oipc.bc.ca/decisions/168 at page 1.
[13] Auth (s. 43) 99-01. Available at https://www.oipc.bc.ca/decisions/170 at page 7.
[14] Auth (s. 43) 99-01. Available at https://www.oipc.bc.ca/decisions/170 at page 7.
[15] *Crocker v British Columbia (Information and Privacy Commissioner*) 1997 CanLII 4406 at para 33.
[16] Order F22-61, 2022 BCIPC 69 (CanLII) at para 56.
[17] Order F22-59, 2022 BCIPC 67 (CanLII) at para 42.
[18] *Freedom of Information and Protection of Privacy Amendment Act,* SBC 2021 ch 39 s 27.
[19] The term excessively broad does not appear anywhere else in FIPPA, nor in the *Personal Information Protection Act*.

[35] The Department points to the Minister of Tourism, Arts and Culture's (Minister) comments during third reading of Bill 22, which set out the proposed amendments to s. 43. When asked to explain the "what the term 'excessively broad' would be," the Minister said:

> This definition is obviously for the commissioner to determine, as he's adjudicating each individual case. An example we were thinking over on this side for the member would be a request, for example, that says: "All emails to government." That's a very broad, sweeping request.[20]

[36] The Department also refers to several decisions of the Ontario Information and Privacy Commissioner in which that Commissioner determined some access requests were excessively broad.[21] I will discuss those orders below.

Analysis – meaning of "excessively broad"

[37] The first part of the test is about whether the request itself is excessively broad. In my mind, the key question is whether the request is likely to result in an excessive volume of responsive records.

[38] Although the term "excessively broad" does not appear in the Ontario legislation, I find support for this approach from the decisions of the Ontario Information and Privacy Commissioner. For example, in Order PO-4193, the adjudicator found that a series of requests were excessively broad due in part to "the sheer number of responsive records that the requests generate."[22]

[39] As to what kind of volume is "excessive," in my view, this needs to be determined with the purpose of s. 43 in mind, which is to curb abuse of the right of access and give all access applicants a fair opportunity to have their request processed. In my mind, a request is excessively broad when it generates a volume of responsive records that can be fairly characterized as "overwhelming" or "inordinate".

[40] It may be obvious on its face that a request will result in an excessive volume of records. For instance, the Minister's example of a request for "all emails to government" would clearly generate an overwhelming and, therefore, excessive volume of responsive records.

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[20] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard*), 42 Parl, 2nd Session, No 140, (25 November 2021) at 4410 (Hon. L. Beare).
[21] *London Health Sciences Centre (Re)* 2021 CanLII 98534 (ON IPC); *Toronto Transit Commission (Re),* 2019 CanLII 144773 (ON IPC); and *Corporation of the City of Brantford (Re),* 2022 CanLII 122346 (ON IPC).
[22] *London Health Sciences Centre (Re)* 2021 CanLII 98534 (ON IPC) at para 66. See also *Carling (Carling) (Re*), 2018 CanLII 15256 (ON IPC) at para 25; *Niagara District Airport Commission (Re),* 2014 CanLII 73018 (ON IPC) at para 23.

[41] Access requests with more clearly defined parameters may still be "excessively broad." In these cases, a public body may have to do a preliminary search in order to provide evidence that the access request would likely result in an excessive volume of responsive records.

[42] To be clear, the term "excessively broad" in s. 43(c)(i) does not refer to the volume of records that may need to be searched to find the subset of records responsive to the access request. This is because the issue under s. 43(c)(i) is whether the *request* is excessively broad. The amount of time and effort required to search for the responsive records goes to whether responding to the request would unreasonably interfere with a public body's operations, which is the second part of the test.[23]

Is the request for MDT messages excessively broad?

[43] The Department makes the following arguments for why the portion of the access request relating to the MDT messages is excessively broad:

- The date range for the request is for four years, November 2018 to September 2022.
- A search for MDT messages by a specific user will result in lines of text data on a page for every single transmission sent by the user, including every single query conducted by the user, every single status update or other communication with dispatchers and all direct messages sent to other MDTs.[24]
- On average, there are 1000 MDT messages per user, per month.[25]
- The text data for MDT messages for one user in a 24-hour period is, on average, 6.5 pages. Four 12-hour shifts per week would result in 1,352 pages per year, per MDT user.[26]

[44] For the following reasons, I find that the access request for the MDT messages is not excessively broad.

[45] First, this is not the type of access request that, on its face, would obviously result in an excessive volume of responsive records. Rather, the request for the MDT messages is limited in time (four years), scope (messages about the access applicant) and to messages sent or received by 13 specific individuals.

[23] See, for example, Order F22-59, 2022 BCIPC 67 (CanLII) at para 49.
[24] Based on affidavit evidence of the Department's PRIME Coordinator, at para 19.
[25] Based on affidavit evidence of the Department's PRIME Coordinator, at para 47.
[26] Based on affidavit evidence of the Department's PRIME Coordinator, at para 47.

[46] While the Department provided evidence about the volume of information it would need to search, its evidence and submissions do not persuade that the request is likely to result in an excessive volume of responsive records. The Department says that one of its employees spent 18 hours searching for MDT messages and did not locate any responsive records.[27] Other than this, the Department's submissions do not give me any sense of how many MDT messages sent by or from the 13 individuals may have anything to do with the access applicant.

[47] I note that, elsewhere in its submissions, the Department says that some of the identified individuals have not used an MDT for years.[28] If an individual had not used an MDT, there would be no MDT messages sent by or to that person, and so there would be no responsive records. The Department did not specify whether or not any of the 13 priority individuals used an MDT.

[48] The Ontario orders do not persuade me the request for the MDT messages is excessively broad. The adjudicators in the Ontario orders looked at the cumulative effect of successive requests. For example, in Order PO-4193, the adjudicator considered that the access applicant had made 23 previous multi-part requests generating over 23,000 pages of records. In the present case, I am not persuaded that the volume of responsive records is comparable.

[49] For these reasons, I am not persuaded that the request for the MDT messages is likely to result in an excessive volume of responsive records. Therefore, I find that the request is not "excessively broad" within the meaning of s. 43(c)(i).

Part 2: Would responding to the request for MDT unreasonably interfere with the Department's operations?

[50] The Department provided extensive submissions about why responding to the request for MDT messages would unreasonably interfere with its operations. Essentially, the Department explains that the search functions are very limited, resulting in the need to manually review all the MDT messages. The Department estimates that it would take 20,800 hours to review all MDT messages.

[51] Given that I found that the request was not excessively broad, I do not need to consider whether responding to the request would unreasonably interfere with the Department's operations.

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[27] Department's initial submissions, para 37 based on affidavit evidence of the PRIME Coordinator at para 50.
[28] Department's initial submissions, para 35 based on affidavit evidence of the PRIME Coordinator at paras 39-41.

Summary – s. 43(c)(i)

[52] I find that the Department has not established that the request was excessively broad. For this reason, I find that the Department is not authorized to disregard the access request under s. 43(c)(i).

Residual discretion under s. 43

[53] In November 2021, the legislature changed the opening words of s. 43.[29] The previous version said:

> 43 If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 of 29 that

[54] The opening words of s. 43 now read:

> 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
>
> [emphasis added by me]

[55] The Department submits the words "including because" give the Commissioner a broad, general discretion to decide if there are reasons other than those set out in subsections (a) through (c) to authorize a public body to disregard an access request. In support of its submission, the Department refers to the Minister's comments during the third reading of Bill 22:

> This amendment expands the grounds under which the commissioner may authorize a public body to disregard a request under section 5 or 29 of FOIPPA. The amendment permits the commissioner to authorize the head of a public body to disregard a request. This includes, but is not limited to, circumstances in which a request is frivolous or vexatious, for a record that has been disclosed to the applicant or that is accessible by the applicant from another source, is excessively broad or repetitious or systematic.
>
> So the commissioner remains the authorizing entity in this independent oversight and will continue to ensure that this provision is not misused.[30]

[56] The word "including" is a word of extension "designed to enlarge the meaning of preceding words."[31] This, in combination with the Minister's comments and the purpose of s. 43, leads me to conclude that the words

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[29] *Freedom of Information and Protection of Privacy Amendment Act,* SBC 2021, ch 39 s 27.
[30] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard*), 42 Parl, 2nd Session, No 140, (25 November 2021) at 4409 (Hon. L. Beare).
[31] *National Bank of Greece (Canada) v Katsikonouris,* 1990 CanLII 92 (SCC) at 1041.

"including because" in the opening clause of s. 43 give the Commissioner the power to authorize a public body to disregard access requests that abuse the right of access for reasons beyond those set out in (a) through (c).

> *Should I authorize the Department to disregard the request for MDT messages under s. 43 generally?*

[57] In addition to its arguments about s. 43(c)(i), the Department asks for relief under s. 43 generally. Whether the Department should be granted relief under s. 43 generally was not an issue listed in the Notice of Application. Typically, parties must request the Commissioner's permission to add new issues into an inquiry. However, I can easily dispense with the Department's arguments, and I will do so below.

[58] The Department asks for relief under s. 43 generally for the following reasons:

> (a) the records at issue cannot be created from a machine-readable record using the Public Body's normal computer hardware and software and technical expertise for the time period requested;
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> (b) creating the records at issue would require extensive manual processing by the Public Body and PRIME Corp;
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> (c) creating the records at issue would unreasonably interfere with the Public Body's operations; and
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> (d) creating the records at issue would serve no useful purpose because information excepted from disclosure could not be reasonably severed from the records within the meaning of s. 4(2) of FIPPA.

[59] The Department submits that creating the records will require extensive manual processing and that doing so will take considerable time and resources away from the responsible employee's other duties. Further, the Department says that "any producible information that remains after severance will be unintelligible and meaningless."[32]

[60] The Department refers to Order F15-02, where the adjudicator found that the public body had a duty to create the records under s. 6(2) but, because the records could not be reasonably severed under s. 4(2), did not order to public body to do so.

[61] In my view, s. 43 is not the appropriate mechanism to address the Departments arguments. This is because the Department's arguments are about its duty to create a record under s. 6(2). Section 6(2) says:

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[32] Department's initial submissions at para 108.

> (2) Moreover, the head of a public body must create for an applicant a record to which section 4 gives a right of access if
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> > (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.

[62] Further, I understand that the Department's position is that, even if it does have the duty to create records under s. 6(2), the Commissioner should not order it to perform that duty because the records cannot be reasonably severed in accordance with s. 4(2).

[63] If a public body asserts that it does not have any responsive records and believes that it is not required to create such a record under s. 6(2), it should respond to an applicant accordingly. If the applicant disagrees, they can seek a review by the Commissioner. I do not think that s. 43 is the proper avenue for addressing the Department's arguments about whether it is required to create any records because s. 6(2) directly addresses this issue.

[64] For these reasons, I decline to give the Department permission to disregard the access request under s. 43 generally.

CONCLUSION

[65] For the reasons above, I do not authorize the Department to disregard the access request at issue under s. 43 of FIPPA.

November 22, 2023

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

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