Order F24-02

UNIVERSITY OF BRITISH COLUMBIA

Lisa Siew
Adjudicator

January 10, 2024

CanLII Cite: 2024 BCIPC 2
Quicklaw Cite: [2024] B.C.I.P.C.D. No. 2

Summary: The University of British Columbia (University) made an application, under s. 43(c)(ii) of the *Freedom of Information and Protection of Privacy Act* (FIPPA), to the Office of the Information and Privacy Commissioner (OIPC) for authority to disregard a number of outstanding access requests and any future access requests made by, or on behalf, of an access applicant. The access applicant later withdrew all their access requests that the University sought authority to disregard under s. 43(c)(ii). However, the University requested the OIPC proceed with its s. 43 application to determine its request for future relief. The adjudicator determined it would be inappropriate to grant the University's request for future relief under s. 43. The University was not authorized to disregard any future access requests made by, or on behalf of, the applicant.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 43, 43(c)(ii).

INTRODUCTION

[1] This inquiry is related to the University of British Columbia's application to the Office of the Information and Privacy Commissioner (OIPC) for authorization under s. 43(c)(ii) of the *Freedom of Information and Protection of Privacy Act* (FIPPA) to disregard 47 outstanding access requests from an access applicant who is the respondent in this s. 43 application.

[2] The University of British Columbia (University) argued that responding to those access requests would unreasonably interfere with its operations because the requests were repetitious or systematic under s. 43(c)(ii) of FIPPA. Among other things, the University sought immediate relief by requesting authorization under s. 43(c)(ii) to disregard the respondent's open access requests. The University also sought future relief by asking for authorization to disregard any future access requests made by, or on behalf of, the respondent in excess of one open request at a time for a period of two years.

[3] Sometime after the University made its s. 43 application, the respondent informed the OIPC's registrar of inquiries and the University that they wanted to withdraw all their access requests that the University was seeking authority to disregard under s. 43(c)(ii).[1] The respondent, therefore, requested the OIPC dismiss the University's s. 43 application since there were no longer any open access requests that the University needed authority to disregard under s. 43(c)(ii).

[4] However, for a variety of reasons, the University requested the OIPC proceed with its s. 43 application to determine its request for future relief. Therefore, this inquiry is to decide the University's application for future relief under s. 43.

ISSUE AND BURDEN OF PROOF

[5] The issue I must decide in this inquiry is whether the University's request for future relief under s. 43 should be allowed. As the party applying for relief under s. 43, the University has the burden to prove that its application should be granted.[2]

DISCUSSION

Authority to disregard an access request – s. 43

[6] FIPPA gives individuals a "significant statutory right" to access information under the custody or control of a public body, including one's own personal information.[3] However, that right of access should not be misused or abused. When someone abuses their access rights under FIPPA, it can have serious consequences for the access rights of others by overburdening a public body and impacting the public body's ability to respond to those other requests.[4] It can also harm "the public interest" by unnecessarily adding to a public body's costs of complying with FIPPA.[5]

---

[1] Respondent's email to the OIPC dated Nov 11, 2023.
[2] Auth. (s. 43) 99-01 (December 22, 1999) at p. 3, decision available on the OIPC website at <https://www.oipc.bc.ca/decisions/170>. Order F17-18, 2017 BCIPC 19 (CanLII) at para. 4.
[3] Auth. (s. 43) 99-01, *supra* note 2 at p. 3.
[4] Auth. (s. 43) 99-01, *supra* note 2 at p. 8.
[5] Auth. (s. 43) 99-01, *supra* note 2 at p. 8.

[7] Therefore, s. 43 serves as "an important remedial tool in the Commissioner's armoury to curb abuse of the right of access."[6] It allows the Commissioner or their delegate "to grant the extraordinary remedy of limiting an individual's right to access information under FIPPA."[7] For that reason, the Commissioner's authority under s. 43 should be exercised after careful consideration since it can limit or take away a person's statutory right to access information.[8]

Should the University's request for future relief be granted?

[8] As noted, the University sought relief from responding to the respondent's pending access requests under s. 43(c)(ii) because it argued the requests were repetitious or systematic and would unreasonably interfere with its operations. However, after the University made its s. 43 application, the respondent withdrew all their access requests that the University was seeking authority to disregard under s. 43(c)(ii). Therefore, there is no longer any pending access requests for me to consider or authorize the University to disregard under s. 43(c)(ii).

[9] However, the University seeks future relief under s. 43 by asking for authorization to disregard any future access requests made by, or on behalf of, the respondent in excess of one open request at a time for a period of two years. It also requests the authority to "have sole discretion in determining the scope of each request."[9]

[10] The Commissioner or their delegate has the power, under s. 43, to make prospective orders by authorizing public bodies to disregard future access requests when the circumstances warrant such relief.[10] Previous OIPC orders have determined that relief under s. 43 is not warranted when an access applicant withdraws an access request that a public body is seeking authority to disregard under s. 43. For instance, in Decision F06-03, Adjudicator Francis explained that access applicants are free to withdraw their access requests and it is not necessary to consider whether those requests warrant relief under s. 43.[11]

[11] Similarly, in Order F21-31, Adjudicator Davis clarified that relief under s. 43 is not warranted for withdrawn access requests because there is no longer anything to disregard and the public body is not required under FIPPA to respond

---

[6] *Crocker v. British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BC SC) at para. 33.
[7] Order F22-08, 2022 BCIPC 8 (CanLII) at para. 26.
[8] Auth. (s. 43) 99-01, *supra* note 2 at p. 3.
[9] University's submission dated November 20, 2023 at para. 3.
[10] *Crocker v. British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BC SC) at paras. 40-43.
[11] Decision F06-03, 2006 CanLII 13535 (BCIPC) at para. 7. The University was also the public body in that case.

to those requests.[12] The public body in that case also sought future relief because it was concerned the access applicant may make a future request for the same records. Adjudicator Davis determined future relief was not warranted because the withdrawn requests were no longer in dispute under s. 43 which meant he did not have the authority to prohibit the access applicant from remaking the withdrawn requests in the future.[13]

[12] The University recognizes previous OIPC "adjudicators have not proceeded with granting future relief to public bodies under s. 43 after the requests have been withdrawn"; however, it argues that I am not bound by previous OIPC decisions.[14] The University submits that I should depart from longstanding practice and established authority to grant it future relief in this case for a variety of reasons, which I will discuss in detail below.

[13] To start, the University submits granting future relief in this case would be consistent with the "fundamental objective of s. 43" which it describes as alleviating "the undue hardship placed on public bodies by excessive and repetitious access requests."[15] However, it is unclear how the respondent's withdrawn requests would cause the University undue hardship because the University is not required under FIPPA to respond to those withdrawn requests.

[14] To be clear, s. 43 is "remedial, not punitive in nature" and its purpose is to "curb abuse of the right of access."[16] Where there is no harm or abuse to address, then a remedy under s. 43 is not warranted. For example, s. 43(c)(ii) provides relief to public bodies when "responding to the request would unreasonably interfere with the operations of the public body because the request is repetitious or systematic." However, if an access applicant withdraws their requests, the public body is not required to respond to the request under FIPPA and, therefore, does not require immediate or future relief under s. 43(c)(ii) to prevent an unreasonable interference with its operations.

[15] The University also argues that denying it future relief at this time is against "legislative intent, as it leaves public bodies with no practical recourse" if the respondent decides to make another access request for the same or similar records.[17] The University contends it will have go through the time and effort of

[12] Order F21-31, 2021 BCIPC 39 (CanLII) at para. 8.
[13] Order F21-31, 2021 BCIPC 39 (CanLII) at para. 9.
[14] University's submission dated November 20, 2023 at para. 7, citing Order F21-31, 2021 BCIPC 39 (CanLII).
[15] University's submission dated November 20, 2023 at para. 8(a).
[16] *Crocker v British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BCSC) at paras. 32-33.
[17] University's submission dated November 20, 2023 at para. 8(a).

managing those requests and preparing another s. 43 application only to risk the respondent withdrawing their access requests a second time resulting in an endless cycle that is contrary to the legislative intent of s. 43. The University contends the respondent has no intention of stopping "the flow of requests and questions" in the future which it says has been increasing in frequency over time.[18]

[16] However, I note the University is legally required under FIPPA to spend time and resources to respond to access requests. As well, s. 43 authorizations should be the exception to the rule and not a routine option for public bodies to avoid their obligations under FIPPA.[19]

[17] I am also not persuaded the University would be left with no practical recourse if it was denied future relief at this time. The University is free to apply for relief under s. 43 at a later date, if it believes the respondent is making access requests that warrant such relief. If the respondent's requests are similar or the same as their withdrawn requests, then it may be evidence at that time to support the University's claim for relief under s. 43. An access applicant that repeatedly makes the same access requests and later withdraws them after the public body makes a s. 43 application risks having their actions characterized as frivolous or vexatious. Therefore, I find refusing to grant the University's request for future relief now would not defeat the purpose of s. 43 or result in an endless cycle of applications.

[18] The University also argues "previous adjudicators have been mistaken in their interpretation that they no longer have the power to make an order under s. 43 regarding future requests" when an access applicant withdraws their requests.[20] The University contends "the power to limit future requests is not inherently tied to the existence of active requests" and that, even though existing requests are cancelled, "the public body is in the same position, needing proactive relief from future repetitive requests."[21] Therefore, the University submits "it is available for the OIPC to consider whether the withdrawn requests were systematic and repetitious, and to offer future relief to the public body under the Act."[22]

[19] The University did not cite any legal authorities to support its position that the Commissioner's power under s. 43 to limit an access applicant's future requests should be granted after considering an applicant's withdrawn access requests. Instead, contrary to the University's position, I note that previous

---

[18] University's submission dated November 20, 2023 at para. 5.
[19] Section 43 decision made October 31, 1996 by former Commissioner Flaherty at p. 1, available online at <https://www.oipc.bc.ca/decisions/162>.
[20] University's submission dated November 20, 2023 at para. 8(b).
[21] *Ibid*.
[22] *Ibid*.

decision-makers have typically granted future relief only when there are active requests to consider under s. 43 and when the public body first established one of the specified circumstances under s. 43 applied.

[20] For example, in Order F23-61, the adjudicator granted the public body's request for future relief, but only after determining the pending access request at issue was vexatious under s. 43(a) and that responding to the request would also unreasonably interfere with the public body's operations under s. 43(c)(ii).[23] The active requests were a necessary part of the evidentiary foundation required to prove the nature and effect of an applicant's future access requests and behaviour.

[21] Likewise, in *Mazhero v British Columbia (information and Privacy Commissioner*, Justice Tysoe explained that the Commissioner has the discretion to fashion a remedy under s. 43 once the prerequisites under s. 43 have been found to exist.[24] The prerequisites under s. 43(c)(ii) require an existing request under ss. 5 or 29 and that this request would unreasonably interfere with the operations of the public body because it is repetitious or systematic. In this case, the applicant has withdrawn their access requests; therefore, there are no pending requests that could unreasonably interfere with the University's operations.

[22] Furthermore, the BC Supreme Court has found the Commissioner's discretion and authority to grant relief under s. 43 is "not completely unfettered" and that the "remedy must redress the harm to the public body seeking the authorization."[25] Therefore, I conclude any possible remedy under s. 43 is tied to the harms or abuse that the provisions under ss. 43(a) to (c) and s. 43 generally are intended to prevent.[26] As a result, I conclude it would be inappropriate to grant the University's request for future relief because the prerequisites under s. 43 generally and s. 43(c)(ii) in particular have not been met. Since there are no active requests from the respondent to consider, I do not have the necessary evidentiary foundation required to determine the nature and effect of the respondent's future access requests on the public body.

[23] However, the University asks that I consider the respondent's withdrawn requests to predict whether their respondent's future requests would meet the

---

[23] Order F23-61, 2023 BCIPC 71 at paras. 74-75. This order is also cited by the University in its submission dated November 20, 2023 at para. 8(a).
[24] *Mazhero v. British Columbia (Information and Privacy Commissioner)*, 1998 CanLII 6010 (BCSC) at para. 19.
[25] *Crocker v British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BCSC) at para. 45.
[26] I note that s. 43 was amended in November 2021 to give the Commissioner the discretion and the power to authorize a public body to disregard access requests that abuse the right of access for reasons beyond those set out in ss. 43(a) to (c).[26] For a full discussion of those amendments, see Order F23-98, 2023 BCIPC 114 (CanLII) at paras. 53-56.

requirements of s. 43(c)(ii). I am aware of one previous OIPC order which considered granting a public body's request for future relief when there were no active requests to consider. In Order F18-09, Adjudicator Lott considered granting a public body's request for future relief under what is now s. 43(c)(ii) based on an access applicant's completed or withdrawn requests.[27] In that case, Adjudicator Lott considered it appropriate to do so given the circumstances which included four prior successful applications for relief under s. 43 and numerous requests for access made by the respondent after the expiration of each s. 43 authorization.[28]

[24] However, I decline to take the same approach as Order F18-09 because I find the circumstances here are different. This is the first s. 43 application the University has made involving the respondent and there is no evidence the respondent has continued to make numerous access requests after withdrawing their current access requests. I also note that where previous OIPC adjudicators have considered an applicant's previous or completed requests, it was done to assess whether a pending access request was repetitive or systematic under s. 43, which is not the case here since there are no open requests from the respondent to consider or assess.[29]

[25] Furthermore, as previously noted, s. 43 is a remedial tool intended to address or prevent specific harms to a public body under ss. 43(a) to (c) and, in general, the abuse of the right of access under s. 43. I find conducting a s. 43(c)(ii) analysis based on requests for records the respondent is no longer seeking and when there is no longer any harm that needs to be addressed would be contrary to the legislative intent behind s. 43. In my view, it would be turning s. 43 into a punitive tool to punish the respondent for making the access requests in the first place, rather than a remedial one as intended by the legislature.

[26] The University argues that it needs future relief to prevent the respondent from making possible repetitive requests at a later date that would unreasonably interfere with its operations. Therefore, the University is requesting relief under s. 43 for a potential harm that it believes may occur when it has not proven that responding to any of those possible future requests would unreasonably interfere with its operations.

[27] In *Mazhero v. British Columbia (Information* and *Privacy Commissioner)*, Justice Tysoe cautioned against providing remedies for future access requests

[27] Order F18-09, 2018 BCIPC 11 at para. 13.
[28] Order F18-09, 2018 BCIPC 11 at paras. 7-11.
[29] For example, Authorization (s. 43) 02-01, September 18, 2002, at para. 24, available online at <https://www.oipc.bc.ca/decisions/171>.

where it is unclear that a future request will meet the requirements of s. 43. Justice Tysoe said:

> The situation is different, however, when the Commissioner is dealing with future requests. One cannot predict with any certainty that a request which has not yet been made will unreasonably interfere with the operations of the public body. It would not be appropriate to effectively deprive an applicant from the right to make future requests which would not unreasonably interfere with the operations of the public body.[30]

[28] Considering this judicial caution, I find granting the University's request for future relief would be a wholly disproportionate remedy when it is not known whether any of the respondent's future requests will unreasonably interfere with the University's operations. To grant the University's requested relief would effectively deprive the respondent from the right to make future access requests that would not unreasonably interfere with the University's operations.

[29] Although the University does not say this situation applies to the respondent in this case, it further contends that the reason an access applicant may withdraw their access requests is a "recognition on their part that the requests were indeed repetitious or systematic, and moreover, frivolous."[31] The University argues that allowing an access applicant to resubmit the same requests at a later date wastes the public body and the OIPC's resources, undermines the efficiency of the access request process and interferes with the access rights of others. Therefore, the University submits granting it future relief now would be more fair, efficient and in the public interest since "it ensures that the burden of repetitious and systematic requests is not unnecessarily prolonged."[32]

[30] I understand the University is unhappy with its previous interactions with the respondent and, while it does not directly say so, the University implies the respondent withdrew their requests for an improper purpose, specifically to thwart the University's s. 43 application. However, it does not provide evidence to establish the respondent was motivated to withdraw their access requests for that reason. The respondent has the right to withdraw their access requests and doing so is not automatically an admission of guilt or wrongdoing, as alleged by the University. There could be a variety of legitimate reasons why an access applicant decides to withdraw their request after a public body makes a s. 43 application. Ultimately, in this case, there is no persuasive evidence that establishes the respondent withdrew their access requests for an improper purpose.

---

[30] *Mazhero v. British Columbia (Information and Privacy Commissioner)*, 1998 CanLII 6010 (BCSC) at para. 27.
[31] University's submission dated November 20, 2023 at para. 8(c).
[32] University's submission dated November 20, 2023 at para. 8(c).

[31] To conclude, based on the materials before me, I find it would be inappropriate in these circumstances to grant the University's request for future relief under s. 43.

CONCLUSION

[32] For the reasons discussed previously, the University's request for future relief is denied and the University is not authorized under s. 43 to disregard any future requests made by, or on behalf of, the respondent.

January 10, 2024

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F23-93915