Yukon Information & Privacy Commissioner

Request for Authorization to Disregard Access Requests

Pursuant to section 43 of the
Access to Information and Protection of Privacy Act

File # 12-031
Applicant #1

Tim Koepke
Information and Privacy Commissioner (IPC)

Public Body: **Department of Justice**

Date: **October 18, 2012**

Summary: The Information and Privacy Commissioner (IPC) received a request from the Public Body pursuant to section 43 of the *Access to Information and Protection of Privacy Act* (ATIPP Act) for authorization to disregard the Applicant #1's two pending requests for access to information as well as any future access requests made under the ATIPP Act. The Public Body was also seeking a blanket authorization to disregard any access requests for similar information made by any inmate indefinitely into the future.

Decision: The IPC declined to grant the Public Body authorization to disregard Applicant #1's pending and future access requests as the Public Body had not demonstrated it met the requirements of either section 43(1)(a) or (b).

The IPC also concluded that section 43 did not allow consideration of a request for blanket authorization to disregard future requests from inmates for similar information in the absence of an access request under section 6 of the ATIPP Act.

Statute Considered: *Access to Information and Protection of Privacy Ac*t, R.S.Y. 2002, c.1, s.43

Authorities Considered: Alberta Request for Authorization to Disregard Access Requests Edmonton Police Service (IPC File References: #3448 & #3449)

Yukon Information and Privacy Commissioner Decision Section 43 request #00-106A October 5, 2000

BCIPC Authorization (s.43) 02-02 Insurance Corporation of British Columbia

BCIPC Authorization (s.43) 02-01 Ministry of Human Resources

Mazhero v. British Columbia (Information and Privacy Commissioner) (1998). CanLII 6010 (BC SC)

Crocker v. British Columbia (Information and Privacy Commissioner) et al (1997) CanLII 4406 (BC SC) - 1997-12-02

Introduction

[1] On September 6, 2012 I received a letter from the Department of Justice (the Public Body) requesting authorization under section 43 of the *Access to Information and Protection of Privacy Act* (ATIPP Act) to disregard current access requests and any future access requests made by two inmates (Applicant #1 and Applicant #2) at Whitehorse Correctional Centre (WCC).

[2] In addition, the Public Body requested a blanket authorization to disregard further requests for similar information from any other inmates indefinitely into the future.

[3] As the circumstances surrounding the access requests made by each of the Applicants are different, I will deal with the request in relation to each Applicant in separate decisions.

[4] This decision deals with the section 43 request for authorization in relation to Applicant #1 to disregard two pending access requests #A-4068 and #A-4082 and any future access requests. In addition, I will deal with the request for a blanket authorization to disregard access requests for similar information from any other inmates indefinitely into the future.

[5] A decision to take away an individual's access right is a serious one and therefore an individual must be given notice where a section 43 request is being made by a public body. Consequently my office notified Applicant #1 of the request for

authorization. The Applicant was provided a copy of the Public Body's request letter and given an opportunity to respond to it. The Applicant did not make a submission.

Powers to authorize a public body to disregard requests

[6] Section 43(1) reads as follows:

> *If a public body asks, the commissioner may authorize the public body to disregard one or more requests under section 6 or 32 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.*

Burden of Proof

[7] The Burden of proof rests with the Public Body.

Operation of section 43

[8] Section 43 allows me to authorize a public body to disregard one or more access requests if (a) that 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.

[9] Before deciding whether to exercise my discretion to authorize a public body to disregard a request, a public body must establish through the evidence it submits

and applying the ordinary civil standard of proof - that it has met the requirements found in either section 43(1)(a) or (b).

[10] If the Public Body is relying on section 43(1)(a) it first must establish that an applicant has made requests of a "repetitious or systematic nature". If the public body has established the access requests are of a "repetitious or systematic nature", it must then establish that the repetitious or systematic nature of the access requests "would unreasonably interfere with the operations of the public body".

[11] If the Public Body is relying on section 43(1)(b) it must establish that the requests are frivolous or vexatious.

Issues

[12] The issues to be decided are:

1. Whether the Public Body should be authorized under section 43(1)(a) or (b) to disregard Applicant #1 's pending two access requests and any future requests?

2. Whether the Public Body should be authorized to disregard any requests for similar information from any other inmates indefinitely into the future?

[13] I will first describe the Applicant #1's pending two requests and then consider whether they meet the test under section 43.

Applicant #1 Access Requests

[14] On July 16, 2012 Applicant #1 submitted a request for access #A-4068 under section 6 of the ATIPP Act for the following information:

> *All internal charges laid against me, sentencing, dates, times of all hearing in relation to myself since Sept. 26 2011 (Guilty, Not Guilty, throw out, everything*
>
> *All separate confinement form and dispositions, All segregation time whether Admin, Punitive, Disiplinary or Short term, long term etc. and reasoning.*
>
> *All negative reports on me (Plus progress log) positive reports*
>
> *Human Right Act Correctional Act and Regulations and all other law, rule, Regulation that W.C.C. has to abide by I would like to know all the roles this justice system/jail have to abide by [sic]*

[15] On July 26, 2012 Applicant #1 made a second access request #A-4082 under section 6 of the ATIPP Act for access to the following information:

> *The Dates and times of all my internal charges, hearings, and dispositions. Dates and times of exactly which units I'm being placed on and Why. Dates and times of all segregation placements, Disciplinary, short and long term (why), Punitive, and Administrative seg and SSP,*
> *Corrections Act and Regulations*
> *Human Rights Act*
> *Yukon First Nations Agreements and treaty's. [sic]*

[16] Applicant #1's requests cover records that fall into two broad categories. The requests are for personal information related to disciplinary and separate confinement matters and for general information about various laws and Treaties.

[17] The Records Manager response with respect to the general information requested by Applicant #1 was as follows:

> *.. published legislation is not normally available through the ATIPP process as it is available in public libraries, some government offices, and online. In an attempt to help you acquire this information I contacted WCC to determine what materials they have in their library. [WCC] will make copies of all the following available in the library for your reference… We will process your request for our personal information today and pass it on to the Department of Justice for their response.*

[18] I agree with the Records Manager that the purpose of ATIPP, as stated in section 5 of the Act, is to provide the public a right of access to records that are not otherwise available. This means if records are routinely available public bodies are expected to provide them without a request under the Act. The purpose of a section 43 is to provide relief for requests made under section 6 of the Act. Section 43 relief is not available in relation to requests for information that is routinely available.

Public Body's Submission

[19] Although the Public Body is making this request under section 43 it did not specifically indicate whether it is relying on 43(1)(a) or (b) for authorization to disregard Applicant #1's pending and future access requests at issue.

[20] The Public Body's argument appears to be that I should authorize it to disregard the requests because Applicant #1 gets the requested personal information related to disciplinary and separate confinement matters through a number of other established processes that exist outside of the ATIPP Act.[1]

[21] The Public Body's submission describes in considerable detail these other established processes through which the Applicant would receive similar information to that requested in the two access requests.

[22] The Public Body indicates, for example, that it

> *…has developed specific policies and procedures for making information available to the inmate regarding matters such as separate confinement and discipline. These procedures are included in the policies and inmates sign a form indicating that they receive the information. These policies are entitled B "B4.1 Inmate Disciplinary Process", "B4.2 Segregation/Observation Unit", "B4.3 Separate Confinement" and "D.4.4 Secure Supervision Placement".* [2]

Copies of the policies were attached to the submission.

[23] Another example provided by the Public Body of an external process that includes a requirement to provide information to an inmate is the

> *…complaint process established in the Corrections Act with its own robust information process that an inmate can use if for some reason*

[1] Public Body submission at page 1 para 3

[2] Public Body Submission at page 1 para 1

the information supplied through the various policies of the department is not seen as sufficient by the inmate.[3]

[24] Finally reference is made to the process provided for an inmate to make a complaint to the Investigations and Standards Office as provided for in the *Corrections Act*, the complaint process provided for in the *Ombudsman Act* and the review process under the ATIPP Act. The Public Body submits that these processes

> *…are sufficient to ensure that inmates have access to information relevant to their files*. [4]

[25] In support of this argument the Public Body refers to section 1(2) of the ATIPP Act. Section 1(2) provides as follows:

> *1(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public independently of the Act.*

[26] The Public Body also argues that the ability of inmates to access personal information affects the safe operation of WCC. However it does not elaborate on how it interferes other than to say that inmates held in segregation for serious infractions may have personal effects removed from their immediate access which are inventoried and returned upon release from segregation.[5]

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[3] Public Body Submission at page 2 para 2

[4] Public Body Submission at page 2 para 2

[5] Public Body Submission at page 2 para 1

[27] The Public Body summarizes its argument saying:

> *The Department is of the opinion that the ATIPP Act was not intended to interfere with the safe operation of the WCC. Also given the fact that we have established robust policies and procedures we are noting that ATIPP requests for the same information that is already supplied through another source and signed for by the inmate should not be covered by the ATIPP Act as per section 1(2).* [6]

Discussion

Whether the Public Body should be authorized to disregard Applicant #1's Access Requests #A-4068 and #A-4082?

[28] Section 1(2) of the ATIPP Act does not, as the Public Body suggests, mean that the ATIPP Act is displaced where there are other procedures established outside of the ATIPP Act for accessing personal information. Section 1(2) provides

> *This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public independently of the Act.*

[29] Section 1(2) provides for a dual process. The words in section 1(2) "*does not replace other procedures for access to information"* means that the ATIPP Act and access procedures established by public bodies are to coexist and are equally available to individuals making a request for access under section 6 of the Act. It allows individuals to access personal information either through the procedures established by public bodies or through application under the ATIPP Act or both.

[6] Public Body Submission at page 2 para 2

[30] To understand section 1(2) it must be read in conjunction with section 5 of the ATIPP Act. Section 5 gives an applicant a right of access to "any record" subject to the exceptions in the ATIPP Act. Section 5 does not restrict an applicant's access to only those records that are not available through procedures established by public bodies.

[31] This very principle was discussed in Edmonton Police Service (IPC File References: #3448 and #3449) by the Alberta Information and Privacy Commissioner. In that in case the Public Body requested an authorization to disregard a request on the basis the Applicant had requested through the Alberta *Freedom of Information and Protection of Privacy Act* (FOIP Act), the exact same information that he would receive through a Law Enforcement Review Board disclosure process. The Commissioner concluded that that access legislation and access procedures established by public bodies are to coexist and are equally available to individuals.[7]

[32] The rationale for this conclusion as stated by the Commissioner is:

> *…If it were otherwise, public bodies could deprive a person of all of their rights under the FOIP Act, including the right to request a review, simply by substituting their own access procedures.*[8]

[33] Yukon Information and Privacy Commissioner (IPC) Hank Moorlag came to the same conclusion when considering a section 43 request in File No. # 00-106A October 5, 2000. In that case the Public Body asked for authorization to disregard

[7] Alberta Request for Authorization to Disregard Access Requests Edmonton Police Service (IPC File References: #3448 & 3449) at para 31

[8] Ibid at para 32

a request on the basis of section 43(1)(a). In the evidence submitted to the IPC the Public Body referred to

> *... other proceedings the Applicant initiated by which he is able, or might be able to obtain the same information that he is seeking by his requests under the ATIPP Act.* [9]

[34] The IPC concluded

> *Similarly I do not believe the Public Body can rely on what other proceedings the Applicant initiated to obtain the same or similar information.*[10]

[35] The simple fact that other "robust policies and procedures" exist giving the Applicant access to information similar to that requested through the ATIPP Act is not, as submitted by the Public Body, a basis under section 43 for authorizing a Public Body to disregard a request for access under ATIPP.

[36] I have reviewed the two access requests in question. I note that they were made 10 days apart and appear on the face of it to request some of the same information. However even if I concluded, based on my review of the two access requests, that the requests were repetitious, that alone is not enough to meet the evidentiary requirements of section 43(1)(a).There must also be evidence of how responding to those requests would unreasonably interfere with the Public Body's operations.

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[9] Yukon Information and Privacy Commissioner Decision Section 43 request #00-106A October 5, 2000 at page 3 para 1

[10] Ibid at page 3 para 2

[37] Section 43 gives no explicit guidance as to what is meant by the "operations" of a public body. I agree with the BC Information and Privacy Commissioner's interpretation provided in Authorization (s.43) 02-01 where he indicated the meaning of this section is to be interpreted bearing in mind the scheme of the Act. This means the impact on a public body's "operations" is to be gauged in relation to the access and privacy operations of the public body.[11]

[38] This approach was approved by the BC Supreme Court in *Crocker v. British Columbia (Information and Privacy Commissioner)*. In that case Coultas J. was reviewing the decision of the Information and Privacy Commissioner authorizing the Public Body to disregard the access requests as repetitious and unreasonably interfering with the operations of the Public Body. He was satisfied that there was sufficient evidence before the Commissioner about the nature and number of requests and the effect on its access and privacy operations to support the conclusion in that case. Coultas J. commented on the nature and adequacy of the evidence saying:

> *BC Transit submitted a considerable body of evidence about the nature and number of requests submitted by the Petitioners and the effect of those requests on its operations. The evidence demonstrated that a significant portion of the company's Information and Privacy resources were being expended responding to the petitioner's requests and that the demands were also affecting the Customer Service departments ability to perform its other duties and responsibilities.*[12]

[11] BCIPC Authorization (s.43) 02-01 at para 27

[12] Crocker v. British Columbia (Information and Privacy Commissioner) et al (1997) at para 45

[39] The BC Supreme Court decision in M*azhero v. British Columbia (Information and Privacy Commissioner),* provides further guidance as to the kind of evidence that must be submitted to ground a section 43(a) request.

> *The City's submission to the Commissioner in support of its application was accompanied by an affidavit sworn by the City's Manager of Information and Privacy. The affidavit detailed Dr. Mazhero's requests made in 1997 and the effort required to be expended by City employees in dealing with the requests. The Manager of Information and Privacy estimated that he had spent 100 hours dealing with the requests up to that time and that he would have to spend another 100 hours responding to Dr. Mazhero's remaining requests. Other City employees spent time locating and retrieving records, but they did not keep a record of their time. In the submission itself, the City asserted that Dr. Mazhero was not acting in good faith and that his actions were bringing the Act into disrepute. Dr. Mazhero was notified of the City's application and he made extensive written submissions to the Commissioner.*[13]

[40] In this case before me the Public Body has not provided any evidence of the burden on its access and privacy operations resulting from the Applicant's access requests which would satisfy the requirement in section 43(1)(a). The Public Body's comment that the access requests affect the "safe operation" of WCC is not relevant under section 43.

[41] Nor has the Public Body provided any evidence that the request is frivolous or vexatious within the meaning of section 43(1)(b). Neither frivolous nor vexatious is defined in the Act. However the phrase "frivolous and vexatious" is used in access

[13] Mazhero v. British Columbia (Information and Privacy Commissioner), 1998 CanLII 6010 (BC SC) at para 7

legislation in other jurisdictions in their respective section 43 equivalents.[14] Consequently those decisions offer guidance as to the meaning of "frivolous and vexatious".

[42] In the Edmonton Police Service decision the Alberta Information and Privacy Commissioner considered whether the Applicant's decision to exercise rights under the FOIP Act alongside other disclosure procedures alone was sufficient grounds to support a finding that the access requests were vexatious. Based on a consideration of the purpose and scheme of the Act the Commissioner concluded using other disclosure processes alone was not sufficient grounds to support a finding access requests are vexatious. He suggested that there must be something more that indicates the access requests are part of a history or pattern of behaviour designed to harass, obstruct or wear the Public Body down.[15]

[43] The BC Information and Privacy Commissioner considering a request from the British Columbia Insurance Corporation for authorization to disregard a request suggested that the fact that one or more requests are repetitive may support a finding that a specific request is frivolous or vexatious.[16] In his opinion the fact that section 43(a) refers to repetitious requests did not preclude him from considering in a 43(b) case the repetitive nature of access requests as being one factor in deciding whether requests are frivolous or vexatious. However, he concludes that given the explicit test in 43(a) that a request be repetitious, that fact alone will not be sufficient to warrant authorizing a Public Body to disregard a request for authorization to disregard a request. There must be other factors alongside the fact

[14] Alberta Freedom of Information and Protection of Privacy Act s.55; and British Columbia Freedom of Information and Protection of Privacy Act, ss. 43(a) and (b)

[15] Supra Footnote 7 at para 36

[16] BCIPC Authorization (s.43) 02-02 Insurance Corporation of British Columbia

a request is repetitious to support a conclusion a request is frivolous and vexatious. [17]

[44] The only information provided by the Public Body in support of its section 43 request relates to the Applicant #1's ability to access personal information through other disclosure processes. It did not provide any additional evidence that would support a conclusion that the access requests are frivolous or vexatious.

Conclusion

[45] The Public Body has not met its burden to demonstrate that for the purposes of section 43(1)(a) or (b), the two pending access requests would unreasonably interfere with the operations of the public body because of the repetitious or systematic nature of the requests or that they are frivolous or vexatious. I have decided not to authorize the Public Body to disregard the Applicant #1's two pending access requests. Therefore the Public Body must proceed with processing the Applicant #1's two access requests according in accordance with the ATIPP Act.

Whether the Public Body should be authorized to disregard Applicant #1's future requests for access under ATIPP Act?

[46] The Public Body has also requested that I authorize it to disregard any future requests from the Applicant for information related to disciplinary matters and separate confinement matters. It is settled law that a section 43 authorization may deal with possible future requests by an Applicant to a public body within certain limits. Tysoe J. in *Mazhero v. British Columbia (Information and Privacy*

[17] Ibid at para 27

Commissioner) confirmed the ability to deal with future requests and described the limits this way:[18] He said

> *…One cannot predict with any certainty that a request which has not yet been made will unreasonably interfere with the operations of a 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.*
>
> *...As a general rule, even though the Commissioner has determined that the repetitive or systematic nature of past and pending requests represent an unreasonable interference with the operations of the public body, he should not generally authorize a public body to disregard all future requests for records (or a type of records) without regard to whether any such requests will unreasonably interfere with the operations of the public body. As stated by Coultas J. in Crocker v. British Columbia (Information & Privacy Commissioner), the remedy fashioned by the Commissioner must redress the harm to the public body seeking the authorization. In attempting to minimize such harm, it is too drastic to authorize the public body to disregard all future requests for records (or a type of records) when it is not known whether any such requests will cause unreasonable interference with the operations of the public body. This is especially so when the requests relate to personal information for two reasons. First, personal information is more restricted by its nature and it is less likely that a request for personal information will unreasonably interfere with the operations of the public body. Second, the*

[18] Supra at footnote 13

applicant has a stronger claim to have access to records of a personal nature than to general records.[19]

Conclusion

[47] The Public Body has not provided any evidence as to how any future requests from Applicant #1 will unreasonably interfere with the operations of the Public Body. In the result I do not authorize the Public Body to disregard Applicant #1's future requests.

Whether the Public Body should be authorized to disregard any other inmates' future requests for access under ATIPP Act for a certain type of information?

[48] Section 43 refers to a request to disregard one or more requests made under "section 6 or section 32" of the ATIPP Act. This means a section 43 authorization including one dealing with future requests can only be granted where an access request or requests have been made at some point in time under the ATIPP Act.

[49] When deciding to authorize a public body to disregard a future request the question is whether the Applicant has so abused his or her right of access to records that I could conclude with reasonable certainty from the nature of the previous requests that any future request by the applicant would unreasonably interfere with the operations of the public body.

[19] Supra footnote 13 at paras 27 and 29

[50] Therefore before I can authorize a Public Body to disregard a future request there must have been in the past or present an access request or requests made under section 6.

Conclusion

[51] Section 43 does not allow me to consider a request for a blanket authorization to disregard future requests from any inmate in the absence of an access request made under section 6 of the ATIPP Act.

October 18, 2012

ORIGINAL SIGNED BY

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Tim Koepke
Yukon Information and Privacy Commissioner

Distribution List:

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