OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Auth. (s. 43) 03-01

MINISTRY OF MANAGEMENT SERVICES

David Loukidelis, Information and Privacy Commissioner
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Summary: The respondent's requests are not systematic, but even if they were systematic (or repetitious), responding to them does not unreasonably interfere with the Ministry's operations. Nor is relief warranted on the basis that the respondent's requests are frivolous or vexatious.

Key Words: repetitious – systematic – unreasonably interfere with operations – frivolous – vexatious.

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

Authorities Considered: B.C.: Order No. 110-1996, [1996] B.C.I.P.C.D. No. 36; Auth. (s. 43) 02-02, [2002] B.C.I.P.C.D. No. 57; Auth. (s. 43) 02-01, [2002] B.C.I.P.C.D. No. 47.

1.0 INTRODUCTION

[1] This decision stems from the request by the Archives and Records Service, which is part of the Ministry of Management Services ("Ministry"), under s. 43 of the *Freedom of Information and Protection of Privacy Act* ("Act"), for authorization to disregard an access to information request the respondent has made to it. Specifically, the Ministry seeks authorization to disregard the respondent's June 7, 2002 access request, which it says covers approximately 9,700 pages of records. (I will refer to this request as the "current request".) The Ministry also seeks authorization to limit the number of pages of records that the respondent can request under the Act in any given calendar month, as described below.

[2] Because the Ministry's application was not resolved during mediation by this office, an inquiry under Part 5 of the Act was held.

2.0 ISSUE

[3] The issue here is whether, under s. 43(a) or s. 43(b), I should authorize the Ministry to, as it has asked, ignore the respondent's current request and any other request where the number of pages that the respondent has requested in a given month, when added to the number of pages he has already requested in the same calendar month, exceeds 600 pages.

3.0 DISCUSSION

[4] **3.1 Background** – The respondent and the Ministry have some history. According to the Ministry's evidence, the respondent and the Ministry entered into a research agreement under s. 35 of the Act on June 3, 1998. The Ministry uses such research agreements as a means of facilitating access to its archival records by researchers who generally require access to large quantities of records. Under a research agreement, a qualified researcher is given complete access to original archived records. Since these records can contain third-party personal information, the Ministry requires prospective researchers to establish the legitimacy of their proposed research. Researchers must complete, as part of their application for a research agreement, a document that describes their proposed research project. They must also provide a resume and three references.

[5] The researcher must agree, in the research agreement, not to disclose any third-party personal information in individually-identifiable form. If a researcher breaches this obligation, the Ministry may terminate the agreement, it may take legal action to prevent any further unauthorized disclosure of personal information or it may do both of these things.

[6] The Ministry says that the high degree of trust it considers necessary to make s. 35 research agreements work did not, in the end, survive its experience with the respondent. It says most of the records the respondent requested under his research agreement were from the last half of the 20th Century, with many coming from the 1970s and 1980s. Some of them contained, it says, information about identifiable individuals' medical history, their finances, their employment history, their educational history and other personal information the disclosure of which is presumed to be an unreasonable invasion of personal privacy under s. 22(3) of the Act.

[7] In the summer of 1998, the respondent asked for copies of hundreds of pages of records under his research agreement. The Ministry says that, on many occasions, the respondent listed "for litigation" as the purpose for his photocopying requests. The Ministry was concerned that this statement was not consistent with the respondent's earlier representation that his research was "purely academic".

[8] Because it was concerned about the legitimacy and good faith of the respondent's research, on October 29, 1998, the Ministry asked the respondent to confirm, in writing, that the purpose of his research was personal or academic, or both, and that copies of records he obtained would not be used for litigation or for any commercial purposes. The

Ministry says it considered the respondent's November 8, 1998 response to its request not to be credible and, when the research agreement expired on January 1, 1999, the Ministry did not renew it. The respondent applied again for a research agreement on March 4, 1999, and the Ministry denied that application.

[9] As a result, the respondent started making access requests under the Act for archived records. The first of these requests was made on September 22, 2000, and, according to the Ministry's submissions, the respondent has since made another ten access requests to it. The first request involved approximately 1,500 pages of records, while the numbers of records involved in the later requests varied from 1,000 pages to, in the case of the respondent's most recent access request, roughly 9,700 pages. According to the Ministry's submissions, the respondent has requested approximately 26,900 pages of records, up to and including the most recent access request of June 7, 2002. (It should be noted here that, on July 27, 2001, the respondent also sought photocopies of the file lists for 29 archival accessions, which the Ministry severed, but the Ministry has not given me a total number of pages involved in that request.)

[10] This means that, over the 22 months from the respondent's first access request and including the current request, the respondent requested an average of roughly 1,225 pages of records each month. The Ministry says it has, to date, processed roughly 17,200 pages of records in response to the respondent's requests, excluding the current request. It estimates that the manager of its Information and Privacy Section has devoted some 516 hours to processing the responses to the requests to date, again excluding the current request, and that dealing with the most recent request will require another 291 hours or so.

[11] According to the Ministry, the respondent's requests "comprised 6.2 percent of the total number of formal requests" that it received during the same period as the respondent's requests (para. 2.10, initial submission). It says the manager of its Information and Privacy Section has "devoted approximately 17 percent of his time to processing requests" from the respondent during that same period (para. 2.10). It also says the respondent's access requests "are at least ten times larger than the average request" the Ministry receives (para. 2.10, initial submission).

[12] The Ministry argues that the demands the respondent places on it "are both excessive and irrational", to the extent that the respondent is guilty of misusing his right of access by "overburdening the Ministry with his systematic requests" (para. 2.12, initial submission). The Ministry goes so far as to contend that the respondent's "misuse" of his access rights "threatens and diminishes the exercise of that same right by other respondents". Allowing this to continue would, the Ministry says, "harm the public interest on the basis that it would unduly add to the Ministry's costs of complying with the Act" (para. 2.12, initial submission).

[13] The Ministry elaborates on this by describing the records typically covered by the respondent's access requests as "sensitive records that have been created relatively recently" and which deal with individuals who are "likely to be still alive" (para. 2.17, initial submission). Accordingly, the Ministry says, "any line by line review of such

records must be diligent in ensuring that the privacy interests of third parties are protected" (para. 2.17, initial submission).

[14] The Ministry places some weight on the fact that the respondent's access requests entail the retrieval of boxes containing relevant records from an offsite storage facility the Ministry maintains. This requires an employee to co-ordinate the process of recalling boxes from offsite storage and returning them when the request has been processed. The Ministry also places some weight on the fact that it has limited space available to store boxes onsite while a particular request is being processed, which means it can only retrieve a few boxes at a time for a particular access request, thus adding (it says) to the burden of responding to the respondent's access requests.

[15] The Ministry says, without being specific, that there have been "many" occasions when its manager has "spent 80 to 90 percent of his time during the course of a week dealing only with requests" from the respondent. This, the Ministry contends, means that access requests made by other respondents have to be set aside for three or four days at a time, since the volume and complexity of the response requests make it impractical and inefficient to work on them for only an hour or two at a time (para. 2.22, initial submission). It says, again without elaboration, that the "frequency and volume" of the respondent's requests "has impaired the ability of BC Archives to respond to other respondents for archival records within the time period specified in the Act" (para. 2.25, initial submission). This means, the Ministry says, that other respondents have had to wait longer [how long is not said] to receive access to their records" (para. 2.25). It also says that other of the manager's pro-active functions, which are described at para. 2.25, have been impeded because of the need to devote time to the respondent's access requests.

[16] **3.2 Applicable Principles** – Auth. (s. 43) 02-01, [2002] B.C.I.P.C.D. No. 47, discusses the interpretation and application of s. 43(a), while Auth. (s. 43) 02-02, [2002] B.C.I.P.C.D. No. 57, addresses s. 43(b). I have, in considering the Ministry's request, applied the approach taken in those decisions and the cases to which they refer.

Section 43 reads as follows:

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

[17] **3.3 Is Relief Warranted Under Section 43(a)?** – The Ministry argues that the respondent's requests are "systematic" within the meaning of s. 43(a) and cites my interpretation of that term in Auth. (s. 43) 99-01, at p. 3:

> The plain meaning of the word "systematic" in s. 43 is something that is characterized by a 'system'. In turn, a 'system' is a method or plan of acting that is organized and carried out according to a set of rules or principles.

[18] At para. 2.06 of its initial submission, the Ministry says the following:

> BC Archives submits that the Respondent's previous requests are systematic for the purpose of section 43(a). The Respondent submits a request to BC Archives, on average, every 6 to 7 weeks. Because the Respondent has been denied a section 35 research agreement to access the records in question (for the reasons mentioned in paragraphs 1.23 to 1.25, inclusive, of these submissions), he has clearly made the decision to systematically request, bit by bit, access under the Act to those same records. The Respondent clearly has an overall plan to get access to all records held by BC Archives that relate to a specific issue, though BC Archives has not yet determined what that overall plan is. The Respondent methodically requests access under the Act to large volumes of records on a regular basis, and has done so for a long period of time (i.e. since September 22, 2000). BC Archives submits that the Respondent's requests can properly be categorized as "systematic" for the purposes of section 43(a) of the Act.

[19] The Ministry has also provided evidence that it says speaks to the lack of trust on its part in the respondent's motives and actions. I think it is fair to say that neither side in this case particularly trusts the other. I will address this aspect of the case further, in relation to s. 43(b), but for present purposes note only that any such evidence does not advance the Ministry's case that there is "mischief" of a kind that warrants relief under s. 43(a).

[20] The periodicity or regularity of access requests is a factor that can support the finding that one or more access requests are "systematic" within the meaning of s. 43(a). The Ministry says this is the case here. Its submissions refer to the respondent having "an overall plan", but also say it has "not yet determined what that plan is." I have trouble accepting the contention that there is "clearly" a plan of some sort when that plan remains unknown.

[21] Moreover, the Ministry says the respondent has made requests "on average" every six or seven weeks, but this is not the same as saying that the requests have some system to them, including because they may be regular and have a periodicity to them. It does not suffice to say that requests are made, "on average", every two, six, seven or ten weeks if the public body is merely dividing the number of requests into the number of weeks the requests cover. Nor is it enough to say that a respondent "methodically" requests access to records under the Act.

[22] I am not persuaded that, on the material at hand, the respondent's requests can be characterized as systematic. The Ministry does not argue that one or more of the respondent's requests is repetitious and nothing in the material before me suggests this.

[23] In any case, even if one were to assume, for the purpose of discussion, that the respondent's requests are systematic (or repetitious), I am not persuaded that responding to the requests unreasonably interferes with the Ministry's operations.

[24] Citing its evidence about the resources devoted to answering the respondent's requests, the Ministry argues that the requests unreasonably interfere with its operations. At para. 2.26 of its initial submission, it says the following:

> BC Archives submits that having to devote the time that it has had to devote to processing the requests received from the Respondent is not in keeping with the spirit and purposes of the Act. BC Archives submits that to require it to continue to incur the costs and burden of responding to the Respondent's requests for archival records, without any limit to the size and frequency of those requests, would offend public policy, particularly in these times of fiscal restraint, and would bring the Act into disrepute. Apart from the fact that the Respondent's requests unreasonably interfere with the operations of BC Archives, those requests also unfairly impact on other respondents and on the taxpayers of the province. The Respondent's irresponsible exercise of his access rights under the Act has impaired the ability of BC Archives to respond to other respondents seeking access to archival records within the time periods specified in the Act. BC Archives submits that this is precisely the sort of mischief that section 43 of the Act was intended to remedy.

[25] In contending that relief is warranted under s. 43(a), the Ministry relies on a s. 43 authorization that my predecessor gave to the Law Society of British Columbia on December 19, 1997. Having considered the factors Commissioner Flaherty relied on in granting that authorization, I am not persuaded that, even applying those factors, the case has been made here for relief under what is now s. 43(a) of the Act. Further, at para. 2.12 of its initial submission, the Ministry cites comments that my predecessor made in Order No. 110-1996, [1996] B.C.I.P.C.D. No. 36, and submits that the demands the respondent's access requests place on it "are both excessive and irrational".

[26] Whether, as the Ministry contends, the Ministry's "having to devote time" to responding to requests is "in keeping with the spirit and purposes of the Act" is not relevant, including in what the Ministry describes as "times of fiscal restraint". Nor is it relevant, for the purposes of s. 43, that responding to requests may somehow "unfairly impact on other respondents" or "the taxpayers of this province". The sole question under s. 43(a) is whether one or more requests "would unreasonably interfere with the operations of the public body". Is this the case here?

[27] I accept that the respondent's access requests have, taken all together, required the Ministry to process a large quantity of records. The current request, of course, would on its own, bump up the aggregate number of records quite considerably. But, while it may well be a factor, a large number of records is not enough to cross the threshold of what is an unreasonable interference with a public body's operations.

[28] As to the resources required to deal with the respondent's requests, the Ministry says that, although the respondent's requests account for only some 6.2% of the requests it received during the relevant period, the respondent's requests have consumed something like 17% of the access and privacy manager's time (not to mention the time of other staff). It is also apparent from the Ministry's evidence that, because of the way it organizes its records storage and because of working-space constraints, the processing of the respondent's requests does place a strain on the resources at present available to the Ministry for its access activities. Even accepting, however, that processing the respondent's access requests adds materially to the Ministry's burden, I am not persuaded that the material before me crosses into unreasonable interference with the Ministry's operations as required by s. 43(a) of the Act.

[29] **3.4 Is Relief Warranted Under Section 43(b)?** – The Ministry relies on Auth. (s. 43) 02-02 in contending that the respondent's access requests are vexatious. Citing the non-exhaustive list of factors that I set out in that case, the Ministry submits that the respondent's requests constitute an abuse of the right of access conferred by the Act and are therefore vexatious (para. 2.30, initial submission). It also contends that the systematic nature of the respondent's requests reinforces the conclusion that his requests are vexatious for the purpose of s. 43(b). It again notes that the respondent's formal access requests under the Act represent some 6.2% of the total number of formal requests that the Ministry has received since the respondent's first access request. It also points to what it contends are the broad nature and scope of the response requests. If one considers both formal requests under the Act and informal requests for information, the respondent's access requests represent roughly 1.1% of the total number of requests, but have "monopolized" approximately 17% of the access and privacy manager's time during the relevant period. The Ministry argues (para. 2.31, initial submission) that "the misuse of the Act" that this allegedly represents

> … threatens and diminishes the legitimate exercise of that same right by others, that such abuse harms the public interest, on the basis that it unnecessarily adds to the costs of complying with the Act, and is thereby vexatious for the purposes of section 43.

[30] The Ministry also refers to what it alleges is the respondent's occasional "belligerent and hostile behaviour" towards its access and privacy manager. The evidence offered in support of this allegation is found at para. 53 of the affidavit of Mac Culham, where he deposed that he has found the respondent's "behaviour to me to be belligerent and hostile." At para. 54, Mac Culham deposed that on one occasion he received a voicemail message from the respondent, which concluded with a profanity. The respondent may have been – on at least one occasion – rude, profane and, in the manager's eyes, belligerent and hostile. But this does not, on its own, make one or more of the respondent's access requests frivolous or vexatious within the meaning of s. 43(b) of the Act.

4.0 CONCLUSION

[31] For the reasons given above, I decline at this time to grant authorization under either s. 43(a) or s. 43(b). The respondent should bear in mind that the Ministry is free to make a further s. 43 application if it considers new circumstances warrant a renewed application. I will also add that, although fees should not be a barrier to access, the Act allows the Ministry to charge the respondent fees for access. There is no evidence that the Ministry has availed itself of its ability to charge the respondent fees for the services it provides in responding to his requests.

December 10, 2003

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia