OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Decision F07-08

PROVINCIAL HEALTH SERVICES AUTHORITY

AND

CHILDREN'S & WOMEN'S HEALTH CENTRE OF BRITISH COLUMBIA

Celia Francis, Senior Adjudicator

September 20, 2007

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Summary: The respondent's request of May 17, 2006 is not frivolous or vexatious. The PHSA is not authorized to disregard this or any future requests from the respondent.

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

Authorities Considered: B.C.: Auth. (s. 43) 02-02, [2002] B.C.I.P.C.D. No. 57; Auth. (s. 43) 04-01, [2004] B.C.I.P.C.D. No. 26; Decision P07-02 [2007] B.C.I.P.C.D. No. 27;Decision F05-01, [2005] B.C.I.P.C.D. No. 4; Decision F06-03, [2006] B.C.I.P.C.D. No. 6; Decision P05-01, [2005] B.C.I.P.C.D. No. 18; Decision F06-02, [2006] B.C.I.P.C.D. No. 3; Decision F05-03, [2005] B.C.I.P.C.D. No. 21; Order 04-23, [2004] B.C.I.P.C.D. No. 23, Order 04-25, [2004] B.C.I.P.C.D. No. 25; Order 04-26, [2004] B.C.I.P.C.D. No. 27; Order 04-36, [2004] B.C.I.P.C.D. No. 37; Order 04-38, [2004] B.C.I.P.C.D. No. 39; Order 04-37, [2004] B.C.I.P.C.D. No 38, Order F05-10, [2005] B.C.I.P.C.D. No. 11; Order F05-11, [2005] B.C.I.P.C.D. No. 12, Order F05-12, [2005] B.C.I.P.C.D. No. 14; Order F06-05, [2006] B.C.I.P.C.D. No. 10, Order F06-07, [2006] B.C.I.P.C.D. No. 12; Order F06-08, [2006] B.C.I.P.C.D. No. 13, Order F06-09, [2006] B.C.I.P.C.D. No. 14; Order F05-34, [2005] B.C.I.P.C.D. No. 46.

Cases Considered: *Crocker v. British Columbia (Information and Privacy Commissioner)* (1997), 155 D.L.R. (4th) 220, [1997] B.C.J. No. 2691 (S.C.); *Cimolai v. Hall,* 2005 BCSC 31; *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2003 BCCA 338; *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2006 BCSC 1473; *Cimolai v. Hall*, 2007 BCCA 225.

1.0 INTRODUCTION

[1] The Provincial Health Services Authority ("PHSA") and the Children's & Women's Health Centre of BC ("CWHC") have asked for authorization to

disregard a request for records of May 17, 2006 that the respondent made under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), on the grounds that it is frivolous or vexatious for the purposes of s. 43(b) of FIPPA. They have also asked for authorization to disregard certain types of future FIPPA requests from the respondent.

2.0 ISSUES

[2] The issue in this matter and the relief the PHSA seeks are set out in para. 3 of the PHSA's application of June 29, 2006 as follows:

> 3. The PHSA submits that the [respondent's] request of May 17, 2006 is "frivolous or vexatious" and asks that the Commissioner authorize the PHSA and the [CWHC]:
>
> (a) to disregard the May 17, 2006 request;
>
> (b) to disregard any further requests from this [respondent] or anyone acting on his behalf for a period of 2 years;
>
> (c) to disregard any further requests from this [respondent] or anyone acting on his behalf for records relating to the investigation conducted by Hanne Jensen & Associates Ltd. and the report of that investigation dated May 31, 2005;
>
> (d) to disregard any further requests from this [respondent] or anyone acting on his behalf for records of communications between the PHSA or the [CWHC] and their lawyers
>
> (e) to disregard any further requests from this [respondent] or anyone acting on his behalf for records related to the retainer of lawyers by the PHSA or the [CWHC]; and
>
> (f) to disregard any further requests from this [respondent] or anyone acting on his behalf for records held by lawyers and law firms acting for or advising the PHSA or the [CWHC].

[3] As previous decisions under this section have noted, the public body is responsible for demonstrating that it is entitled to relief under s. 43.

3.0 DISCUSSION

[4] **3.1 Background**—The PHSA[1] referred to the respondent as "a physician who is currently on unpaid leave" from the CWHC. It said that his history and involvement with the CWHC are described in a number of orders by this Office[2] and in two court decisions.[3] I summarize below the background to this application.[4]

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[1] I will for convenience refer to the two public bodies collectively as the PHSA.
[2] The PHSA lists the relevant orders and decisions later in its initial submission.
[3] The PHSA cited *Cimolai v. Hall et al.*, 2005 BCSC 31, and *Cimolai v. Children's and Women's Health Centre of B.C.*, 2003 BCCA 338.
[4] I have drawn on paras. 4-25, PHSA's initial submission, and para. 18, Chesney affidavit. The court decisions cited just above also provide background on this case.

[5] In January 2001, a Human Rights Advisor conducted an investigation of harassment complaints against the respondent which led to a report finding that the respondent had violated the CWHC's Human Rights policy. After a review and recommendations by the CWHC's Medical Staff Member Review Committee and Medical Advisory Committee, the CWHC's Board of Directors concluded that the respondent had violated the policy, suspended his hospital privileges and stopped paying him. The respondent then launched court proceedings regarding the CWHC's actions.

[6] The British Columbia Supreme Court ("BCSC") dismissed the respondent's application for judicial review but the British Columbia Court of Appeal ("BCCA") allowed his appeal of that decision, saying that the respondent had been denied procedural fairness in the earlier process and that the respondent did not have an adequate alternate remedy in an appeal to the Hospital Appeal Board. The BCCA declined, however, to order the reinstatement of the respondent's hospital privileges. Following this decision, the PHSA retained Hanne Jensen & Associates Ltd. in August 2003 to conduct a new investigation of one of the human rights complaints. This investigation resulted in a report of May 31, 2005. The "internal administrative process" to review the Jensen report had not yet occurred at the time of this application, due to the respondent's "unavailability to participate in that process".[5]

[7] In parallel with these events, the respondent brought defamation actions against a number of physicians and others employed at the CWHC. The BCSC dismissed these suits and the respondent appealed those decisions. Since the date of this s. 43 application, the BCCA has issued a decision dismissing the respondent's appeal.[6]

[8] **3.2 Applicable Principles**—The Information and Privacy Commissioner discussed the interpretation and application of s. 43(b) in Auth. (s. 43) 02-02.[7] I have, in considering the PHSA's request here, applied the approach taken in that and other decisions dealing with s. 43(b), as well as the cases to which they refer.

[9] Section 43(b) 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 …
>
> (b) are frivolous or vexatious.

[5] Para. 18, Chesney affidavit.
[6] *Cimolai v. Hall*, 2007 BCCA 225.
[7] [2002] B.C.I.P.C.D. No. 57.

[10] Relief under s. 43 is available for access requests made under s. 5 of FIPPA that meet certain criteria. Section 43 does not apply to questions seeking answers or to everyday client relations. It also does not apply to requests for information or for routinely-available records.[8]

[11] **3.3 The Request in Issue**—The request of May 17, 2006 for which the PHSA seeks relief is the most recent in a series of 37 access requests that the respondent has submitted to the PHSA since April 2002, some of them involving multiple requests. In response to the first 36 requests, the PHSA said it has disclosed over 4,000 pages of records.[9]

[12] The salient portion of the May 2006 request reads as follows:

> Please consider this as a formal request. I herein ask for:
>
> - all materials relating to me and which relate to the recent harassment investigation so conducted by Ms. Hanne Jensen. This would include all materials, e-mails, notes to file, correspondence, and any other relevant material in her possession. Such material should include that which relates directly to my interactions with her as well as any material in her possession that relates to the investigation process and any other thereafter. This would include material from the time of last request (June 1, 2005) to the final reply from you relating to this request or up to the time of any Inquiry relating to these new matters if that should occur.

[13] The PHSA noted that the respondent had made requests for Hanne Jensen's investigation records a year earlier, in June 2005, both to itself under FIPPA and to Hanne Jensen under the *Personal Information Protection Act* ("PIPA"). In its own case, it had provided some records and withheld others. The PHSA said it was awaiting an order from the inquiry flowing from that matter. In the PIPA case, Ms Jensen requested that the Commissioner exercise his discretion not to hold an inquiry. This matter had yet not been heard at the time of this application.[10] I have since issued Decision P07-02,[11] in which I granted Ms Jensen's request.

[14] In response to the May 2006 request, the PHSA wrote to the respondent requesting clarification, as it appeared that his request included records that had been the subject of his June 2005 request. The respondent replied that there should be no confusion, as his May 2006 request did not overlap with previous dates or requests. The PHSA interpreted this reply—correctly, in my view—to mean that the respondent wanted records that post-dated his June 2005 request.[12]

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[8] See Auth. (s. 43) 04-01, [2004] B.C.I.P.C.D. No. 26, at para. 10.
[9] Paras. 34-35, initial submission.
[10] Paras. 14-18, initial submission; paras. 5-6, Jensen affidavit; Exhibit A, Jensen affidavit.
[11] [2007] B.C.I.P.C.D. No. 27.
[12] Paras. 19-20, initial submission; Exhibits RR and SS, Chesney affidavit.

[15] The respondent also sent a request in May 2006 to Hanne Jensen for her investigation files, including records that post-dated the June 2005 request. Ms Jensen again asked that the Commissioner exercise his discretion not to hold an inquiry on that matter, on the grounds that the request was frivolous or vexatious. The respondent also filed a petition for judicial review of Hanne Jensen's report. As of the date of this s. 43 application, the BCSC had not dealt with this matter,[13] but has since issued a decision in which it dismissed the respondent's petition on the grounds that a judicial review was premature.[14]

[16] **3.4 Description of Previous Requests—**The PHSA provided me with copies of the respondent's 37 PHSA requests[15] to set this matter in context, together with a table listing the requests, their dates, the PHSA's file numbers and, where applicable, this Office's file, decision and order numbers.[16] According to the table, of these 37 requests, approximately 86% have led to files with this Office and a little over half have resulted in orders or decisions.

[17] The requests span the period from April 2002 to May 2006 and include requests for the following types of records: the respondent's personnel files; the respondent's personal information in the hands of various named CWHC employees, departments or investigators; emails, notes and other correspondence related to "interactions" between the respondent and various named CWHC physicians, other employees, investigators or external legal counsel, including records which have a bearing on the respondent's employment; details of contracts, "payment relationships", costs and invoices of various named bodies or individuals, including investigators and external legal counsel; "definition of legal counsel" for individuals involved in the respondent's legal actions; results of various microbiology tests from 1988 to 2003; the respondent's billings to the Medical Services Plan from 1987 to 2003; minutes, tapes and transcripts of certain meetings of specified committees; and records related to a particular grievance.

[18] **3.5 Is Relief Warranted Under Section 43(b)?**—The issue to be decided under s. 43(b) is whether the respondent's request of May 17, 2006 is frivolous or vexatious.

The PHSA's arguments

[19] The PHSA discussed the purpose of s. 43 which, it said, is to curb abuse of the right of access to information. It said that s. 43 must be given "remedial and fair, large and liberal construction and interpretation as best ensures the attainment of its objects", as required by the *Interpretation Act*.[17] It also noted

[13] Paras. 21-23, initial submission; para. 9, Jensen affidavit; Exhibit B, Jensen affidavit; para. 18, Chesney affidavit.
[14] *Cimolai v. Children's and Women's Health Centre of British Columbia*, 2006 BCSC 1473.
[15] Exhibits A, C-LL, Chesney affidavit.
[16] Exhibit B, Chesney affidavit.
[17] The PHSA referred here to *Crocker v British Columbia (Information and Privacy Commissioner) et al.* (1997), 155 D.L.R. (4th) 220, at para. 42.

the Commissioner's comment that the right of access must not be abused as a weapon of information warfare.[18]

[20] In the PHSA's view, it is possible to draw an analogy between the power to prevent abuse of access rights under s. 43 and the Supreme Court's power to declare an individual to be a "vexatious litigant".[19] It pointed out that the Commissioner has found in previous decisions that requests were frivolous or vexatious, for example, where the respondent made repetitive requests but had no live issues or ongoing business with the public body (apart from his access requests) that would likely have resulted in the creation of new records, or where previous requests had exhausted all records.[20] The PHSA noted that Ontario orders have made similar findings and have taken into account a respondent's behaviour or actions, such as failure to co-operate with the institution, a belligerent manner or a practice of pursuing appeals on issues that previous orders have determined. Similarly, the PHSA is of the view that the conduct of the respondent in this case in pursuing access requests and requests for review of PHSA's decisions is relevant to determining whether this request is frivolous or vexatious and in granting the remedy it seeks.[21]

[21] With specific reference to this request, the PHSA said that the respondent's requests have exhausted all the available records "that are conceivably subject to disclosure" under FIPPA that relate to his employment with the CWHC, the human rights investigations and his litigation with CWHC employees. It said that, for reasons set out below, there is no reasonable basis for the respondent to believe that the PHSA or anybody providing services to the PHSA has created any new records "that are subject to disclosure" under FIPPA:

- The respondent has not worked at the CWHC since September 2001 and since then has made 37 requests for records, including his personal information, "from every conceivable source" within the CWHC, the PHSA and outside organizations providing services to the PHSA, including legal services; he has also made requests to the PHSA for records held by individuals or organizations that have no contractual relationship with the PHSA, such as legal counsel for the complainant in the human rights investigation and legal counsel for the defendants in the defamation actions

- Regarding the May 2006 request, the respondent requested Hanne Jensen's files on June 1, 2005 and the only business since that time involving the respondent and Ms Jensen is the respondent's FIPPA and PIPA access requests and legal proceedings the respondent began to challenge the Jensen report. Hanne Jensen deposed in this regard as follows:

[18] Paras. 26-27, initial submission. See para. 26 of Auth. (s. 43) 02-02.
[19] It cited *Re Lang Michener and Fabian et al.,* 37 D.L.R. (4th) 685, and *Public Guardian & Trustee v. Brown,* 2002 BCSC 1152, in this regard.
[20] See Auth. (s. 43) 02-02 and Decision F05-01, [2005] B.C.I.P.C.D. No. 4.
[21] Paras. 28-41, initial submission.

> 10. Since the conclusion of my investigation my involvement with [the respondent] has been limited to dealing with his requests for records under PIPA and FOIPPA and dealing with counsel for the PHSA in relation to the investigation report.

- The respondent is "well aware" from his previous requests and orders by this Office that he is not entitled to disclosure of communications between Ms Jensen and solicitors that the PHSA has retained or paid to provide her and the PHSA with legal advice on the respondent's access requests and other legal proceedings[22]

- As in Decision P05-01,[23] "it is 'not plausible' that the [respondent] is ignorant as to his personal information in the possession of Jensen that was not within the scope of his previous request"[24]

- There is no serious purpose to the respondent's request for records from the Jensen file from June 1, 2005 onwards and the request is frivolous and vexatious[25]

[22] The PHSA also said it was relevant that the respondent has made repetitive requests for records, as follows:

- The respondent has been involved in litigation against individual employees and physicians at the CWHC[26] and, through the discovery process in that litigation, has been provided with many documents originating with the CWHC and, in particular, the files of the individual defendants in the litigation

- The respondent nevertheless requested disclosure of the same documents under FIPPA and insisted on his right to make such a repetitive request when the PHSA asked if he was seeking the same documents that had been disclosed in the litigation

- The respondent made yet another repetitive request for the records of the defendants in the litigation when he made a request under PIPA for records held by the solicitors for the defendants. In Decision P05-01, the

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[22] The PHSA referred here to Decision F06-02, [2006] B.C.I.P.C.D. No. 3. In that case, the respondent requested records related to the costs the PHSA and CWHC had incurred respecting the second human rights investigation. The decision notes that the PHSA disclosed invoices and withheld a "legal account" for legal advice the investigator had received. As part of its application, the PHSA provided me with a copy of the record. I granted the PHSA's request that an inquiry not proceed on the grounds that it was clear and obvious that s. 14 applied to the record.

[23] [2005] B.C.I.P.C.D. No. 18.

[24] In that decision, the same respondent requested records from a law firm retained to represent the defendants in the respondent's defamation actions. The Commissioner accepted the law firm's arguments that disclosure of the some of the requested records would duplicate those the respondent had received through litigation disclosure and the rest were protected by solicitor client privilege, and that the respondent knew these things.

[25] Para. 42, initial submission.

[26] The PHSA referred here to *Cimolai v. Hall et al.,* 2005 BCSC 31.

> Commissioner granted the solicitors' application for authorization to disregard the respondent's request on the grounds that the request was vexatious[27]

[23] The PHSA also asked that I consider the respondent's behaviour and actions in dealing with the CWHC, the PHSA and individuals involved with the respondent currently or in the past, including:

- The respondent's practice of directing his requests to the PHSA's CEO, professing uncertainty about who should receive his requests, despite being aware that the CEO has never responded to his requests and having been told that Ellen Chesney, the PHSA's Chief Communications Officer and Chief Freedom of Information Officer, is responsible for dealing with FIPPA requests. Moreover, in response to Ms Chesney's letters requesting clarification, the respondent writes back to the CEO. The only reasonable explanation for this behaviour, in the PHSA's view, is that it is a "deliberate ploy" by the respondent to harass and inconvenience PHSA employees responsible for dealing with his requests[28]

- A request of October 7, 2004 was on its face frivolous or vexatious as it asked for

  > … details of the names, positions, and reasons for those individuals of the PHSA and C&W <u>who have been tampering with the current human rights investigation</u> conducted by Ms. Hanne Jensen. [PHSA's emphasis]

- The respondent has repeatedly argued issues in inquiries where previous orders have decided against him and where a reasonable person would have concluded there was no chance of success, for example:

  - the respondent has proceeded unsuccessfully to inquiry a number of times regarding the adequacy of the PHSA's search for records[29]
  - the respondent has frequently requested records related to retainers and communications of various lawyers he perceives as acting against his interests and for records related to legal advice that external legal counsel have provided to the PHSA and others[30]
  - the respondent has frequently challenged the PHSA's decisions to deny access to solicitor client privilege communications in circumstances

[27] Para. 43, initial submission.
[28] The respondent said he had done so as FIPPA identifies the head of the organization as "pivotal" and that roles at the PHSA and CWHC have changed many times; para. 24(a), response.
[29] The PHSA cited here Orders 04-23, [2004] B.C.I.P.C.D. No. 23, 04-26, [2004] B.C.I.P.C.D. No. 27, 04-36, [2004] B.C.I.P.C.D. No. 37, and 04-38, [2004] B.C.I.P.C.D. No. 39.
[30] The PHSA cited 8 of its file numbers here.

where a reasonable person would not expect to succeed and where, with one exception, the PHSA's decision has been upheld[31]

- this Office has declined to hold an inquiry in two cases involving financial arrangements respecting solicitor-client relationships and solicitor client privilege[32]
- the respondent has made the same argument regarding waiver of solicitor client privilege in several inquiries, despite the fact that the adjudicator has rejected that argument each time[33]

[24] The PHSA also asked me to take note of the fact that the respondent's submissions in this Office's inquiries, including one involving the Vancouver Coastal Health Authority (as the public body) and the PHSA,[34] "contain numerous repetitions of gratuitous, irrelevant and abusive commentary and allegations often directed at named individuals" which he "rolls" from one submission to the next, regardless of their relevance.[35] The PHSA argued that the respondent's "allegations of misconduct and personal attacks" on individuals are "evidence of his intent and desire to harass and intimidate anyone who he believes has acted against his interests".[36]

[25] The PHSA provided a number of examples of these "personal" and "generalized" attacks, of which I reproduce representative samples below:

> …, I must also now detail issues at hand with the disingenuous behaviour of [...]. He is not only in conflict of interest but has participated in shabby antics in many of these affairs. His testimony, even under oath, must be viewed with a jaundiced eye; even more so now that it has been taken under oath in the presence of […] whose own credibility smells horribly.
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> The public body has gone out of its way to destroy the [respondent's] profession and credibility by spreading falsehoods and rumours. The public body's behaviour is symptomatic of a sick institution with evil at its foundations rather than true care for health, honesty, and patients. Such behaviour is relevant to open to the public eye. The vast majority of the public would be horrified and indeed disgusted with the public body's behaviour.
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> I must raise another issue however that would deny client-solicitor privilege in any regard and that is the likelihood and the need to explore the

[31] The PHSA referred here to Orders 04-37, [2004] B.C.I.P.C.D. No 38, F05-10, [2005] B.C.I.P.C.D. No. 11, F05-11, [2005] B.C.I.P.C.D. No. 12, F05-12, [2005] B.C.I.P.C.D. No. 14, F06-05, [2006] B.C.I.P.C.D. No. 10, F06-07, [2006] B.C.I.P.C.D. No. 12, F06-08, [2006] B.C.I.P.C.D. No. 13, F06-09, [2006] B.C.I.P.C.D. No. 14.

[32] The PHSA cited here Decisions F06-02, [2006] B.C.I.P.C.D. No. 3, and F05-03, [2005] B.C.I.P.C.D. No. 21.

[33] Paras. 44-46, initial submission; paras. 6-13, Chesney affidavit. The PHSA referred for this last point to Orders 04-25, [2004] B.C.I.P.C.D. No. 25, 04-37, F05-10 and F05-12.

[34] Order F05-34, [2005] B.C.I.P.C.D. No. 46.

[35] The PHSA provided copies of the respondent's initial and reply submissions to this Office for inquiries involving the PHSA; Exhibits A-II, Fabbro affidavit.

[36] Paras. 47-51, initial submission.

> furtherance of the fact that each of these lawyers was involved in an extortion and other criminal abuses (breach of privacy, perjury, malicious prosecution, among others). … there is plenty of material already provided to the Commissioner which points to a criminal element involving a multitude of lawyers. … Bear in mind that the breach of privacy relating to my financial accounts is a criminal act. Malicious prosecution is a criminal act. Perjury in the courts is a criminal act.
>
> Their behaviour is in contempt of fairness and is indeed quite sickening. It would appear that such people seem to wallow in the latter. Like the dark side, they derive enjoyment from abusing others and making sinister accomplishments.
>
> …[…] comes out of these affairs smelling putrid and appearing like the monster that he is. The public needs to be protected against criminals such as […].[37]

[26] The PHSA acknowledged that the respondent originally had "a genuine and legitimate interest in obtaining his personal information to assist him in his various legal disputes". It believes, however, that he has since turned to

> … a campaign of harassment, intimidation, character assassination and venting of hostility towards an ever increasing group of individuals who were perceived by [the respondent] to be acting against his interests.[38]

[27] The PHSA concluded by saying that it has been "patient and unfailingly courteous" in its dealings with the respondent but that he has refused to co-operate with PHSA staff and "has taken every opportunity to make groundless allegations of impropriety against PHSA employees".[39]

> 55. The [respondent's] pattern of conduct and his knowledge that Ms. Jensen has no further records containing his personal information result, in the conclusion that this request is an abuse of the access rights under [FIPPA].

Respondent's position

[28] The respondent first mentioned his concern with the way the PHSA had characterized his request of May 2006 as overlapping with his request of June 2005 when, in his view, it was clear that the current request related to material that had not fallen under the previous request. He also explained that he had made a PIPA request in May 2006 to Hanne Jensen, in addition to his request of the same date to the PHSA, because, in the inquiry flowing from his request of June 2005 to the PHSA for Hanne Jensen's investigation records, the third party (the complainant in the harassment process) had argued that the investigator,

[37] Paras. 47-49, initial submission.
[38] Paras. 52-53, initial submission.
[39] Para. 54, initial submission.

and not the PHSA, had control of the investigation files. This, he said, gave rise to a "reasonable cause for doubt".[40]

[29] The respondent continued as follows:

> (2) … I simply wish to have the material expeditiously so that I may use it in my defence.[41] It matters very little if the source is the PHSA or Ms. Jensen, but in any event, it has been denied both ways.
>
> (3) My requests are very simple and relating to material that was easily obtainable. The basic issue was essentially a request for materials from Ms. Hanne Jensen, an investigator in a human rights/harassment process. I was the subject of that process and a decision by her was rendered. I sought to acquire information as detailed in my request. She would in theory be the sole source for such information. It could have been handed over in a day, examined in a few days, and then processed for delivery to me shortly thereafter. Keeping in mind that the Commissioner had previously ruled (F05-34) to have the public body release material from a previous investigator in some similar matters, the PHSA only needed to comply with the existing public record and precedent.

[30] After setting out his perspective of events leading up to the second human rights investigation, the respondent made a number of allegations about the handling of that investigation. For example, according to the respondent: the CWHC "was determined to find a way to maneuver the process to the final result which it desired, while all the time pretending to play the part of a fair process"; the investigator had "altered the complaints to suit her needs"; she interviewed witnesses who had lied in court; and the PHSA paid the investigator to come to a "preformed conclusion". "By the end of the process," he said, the investigator "had consumed hundreds of thousands of tax payer's dollars, only to deliver a malicious report after a malicious and contorted process."[42]

[31] The respondent pointed out that, in Order F05-34, I had ordered the disclosure of material from the previous investigation, similar to that requested in the Jensen case, and that he had not yet received the order on the PHSA's denial of material from the Jensen investigation. He reminded me that past orders have said that confidentiality in workplace investigations does not override FIPPA and suggested that the only reason for "the suppression of information" in this case is "the maintenance of workplace secrecy". The public should know that such processes are not abusive, he continued, as no one would participate in such a process if the outcome were pre-determined and the process itself abusive.[43]

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[40] Paras. 1-2, response.
[41] The respondent did not say what "defence" he means here, but I take him to mean his litigation respecting the Jensen report, which had not yet been heard in May 2006, although he could instead or as well be referring to his appeal of the BCSC defamation decisions, also underway at this time.
[42] Paras. 4 & 6-8, response.
[43] Paras. 9-20, response.

[32] The respondent suggested that the PHSA has not behaved fairly in the second investigation. He closed by saying that he needed the requested material for issues that were very much alive at the time of this application.[44]

Discussion

[33] I acknowledge that the respondent made a sizeable number of requests to the PHSA between 2005 and 2006 and that, in response, the PHSA disclosed a significant number of records. I also recognize that relations between the PHSA and the respondent have been, to say the least, challenging and difficult for some years. Even bearing these things in mind, however, I do not agree with the PHSA that the respondent's request of May 17, 2006 is either frivolous or vexatious, as previous decisions have interpreted these terms.

[34] First, unlike respondents in some previous decisions, who had no live issue with their respective public bodies,[45] this respondent did have active business involving the PHSA and its employees and service providers at the time of this s. 43 application, in the form of his "defence."[46]

[35] Moreover, it is clear from the material before me that the respondent has had ongoing concerns with the conduct of the human rights investigations and other aspects of his dealings, both with the PHSA and those providing services to the PHSA. While I make no comment on the merits of the respondent's concerns, I accept that they are genuine in his eyes.[47]

[36] Thus, despite the PHSA's doubts about the respondent's motives for making the request, and its likely frustration with the respondent's requests and behaviour, in my view, the respondent's May 2006 request was neither trivial nor without merit, nor was it made in bad faith or with an intent to harass or annoy the PHSA. Nor do I consider that it was otherwise an abuse of his right of access. Rather, given his ongoing "defence" activities, I consider that the respondent had a legitimate purpose in making his May 2006 request for records he considered would be useful in his "defence", *i.e.*, either or both of the legal proceedings he was engaged in at the time.[48]

[37] The respondent was also not making a request for records that he knew did not exist or which he had already received, either under FIPPA from the PHSA or through some other avenue.[49] He was requesting records that he had reason to believe would have come into existence since his request of a year earlier. Given that his request of June 2005 came on the heels of the Jensen report, it was reasonable for the respondent to assume that there were records that post-dated June 2005.

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[44] Paras. 22-24, response.
[45] For example, Decision F05-01 and Auth. (s.43) 02-02.
[46] I made similar comments in Auth. (s. 43) 04-01.
[47] See Decision F06-03, [2006] B.C.I.P.C.D. No. 6, at para. 66 for a similar comment.
[48] Again, see Auth. (s. 43) 04-01.
[49] See Auth (s. 43) 02-02 where the respondent made duplicate requests for records he had already received, with no apparent reason for repeating his request.

[38] In this vein, I observe that the PHSA has not explicitly stated that there are no responsive records and that it is not otherwise clear, as it has been in other cases, that there are no new records. Rather, from the PHSA's statement that there are no records "subject to disclosure", Hanne Jensen's evidence and other comments in the PHSA's submission,[50] I infer that responsive records do exist but the PHSA believes that the respondent is not entitled to have access to them. It is of course not possible to say whether or not the respondent is entitled to any responsive records and it is premature for the PHSA to argue the respondent is not entitled to them, when, as it appears, the PHSA has not reviewed them. I also note that in Decision F06-02, the PHSA had already disclosed some records and the issue before me was the one record it had refused to disclose.

[39] I also do not agree with the PHSA that the respondent's supposed "knowledge that Ms. Jensen has no further records containing his personal information" has any bearing. First, it is far from clear what the respondent could be expected to know about the nature of any responsive records. There is no indication that the PHSA has described them to the respondent and nothing in the material before me shows that it has retrieved them or has any idea what exists. Second, and in any event, the respondent's request is not limited to asking for his own personal information. On the contrary, it includes information about the investigation generally.

[40] The Commissioner has given weight to a respondent's stated intention of making many new requests in finding the respondent's requests to be frivolous or vexatious.[51] However, this factor is not present here. While the respondent made numerous detailed requests for records between April 2002 and September 2004, he made no further requests between September 2004 and June 2005 (when he made two requests), and did not make another request until the one in issue here, in May 2006. There is no indication in the material before me that the respondent has made any new requests since May 2006 or that he intends to make further requests in the future.

[41] For the reasons given above, I find that, for the purposes of s. 43(b), the respondent's request of May 17, 2006 is not frivolous or vexatious.

4.0 CONCLUSION

[42] In the circumstances, I decline to grant authorization under s. 43(b).

Requested remedy

[43] Since I have found that the request in issue here does not meet the s. 43(b) test, there is no need for me to consider the remedy the PHSA requested. I will however say that, even if I had found the May 2006 to be

[50] Para. 42(c), for example, as noted above, where the PHSA said that the respondent is aware from his previous requests that he is not entitled to communications between Hanne Jensen and solicitors the PHSA has paid to provide her with legal advice.
[51] See Decision F05-01.

frivolous or vexatious, I would not have been inclined to find it either necessary or appropriate to grant such broad-ranging relief as the PHSA has requested.

[44] As noted above, while the respondent's requests—not to mention the accompanying files and inquiries with this Office—were initially detailed and numerous, and no doubt taxing to deal with, he had not made any new such requests for a year before this application nor has he made any since. There is also no indication that he intends to make new such requests in the future. The PHSA does not seriously suggest otherwise, despite the form of the relief it requests. Rather, it appears to wish me to declare the respondent's past requests to be frivolous or vexatious retroactively. Whether or not they would have met this test is not before me, of course, and it is in any case too late to consider this issue. The respondent should, however, bear in mind that the PHSA is free to make a further s. 43 application if it considers that new circumstances warrant a renewed application.

September 20, 2007

ORIGINAL SIGNED BY

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Celia Francis
Senior Adjudicator

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