Decision P05-01

DIVES GRAUER & HARPER

David Loukidelis, Information and Privacy Commissioner
May 27, 2005

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Summary: The respondent requested all information relating to him in the custody or control of the applicant organization, a law firm. The applicant organization sought, and is given, authority under s. 37(b) to disregard the request. As the respondent knew when he made the request, a response to the request would duplicate disclosure of documents the respondent had already obtained in litigation involving the respondent and clients of the applicant organization. Some of the documents had not been disclosed in the litigation because privilege was claimed for them, as the respondent knew when he made the request. The respondent's access request is vexatious as it relates to those documents.

Statutes Considered: *Personal Information Protection Act,* ss. 23(1) & (3), 29(2), 37(b); *Freedom of Information and Protection of Privacy Act*, s. 43(b).

Authorities Considered: Auth. (s. 43) 02-02, [2002] B.C.I.P.C.D. No. 57; Order P05-02, [2005] B.C.I.P.C.D. No. 19; Order P05-03, [2005] B.C.I.P.C.D. No. 20.

1.0 INTRODUCTION

[1] This decision stems from an application by Dives Grauer and Harper ("DGH"), a firm of lawyers practising in Vancouver and an organization covered by the *Personal Information Protection Act* ("PIPA"), for authority under s. 37(b) of PIPA to disregard an access request made to DGH by the respondent. The respondent wrote to one of DGH's lawyers on August 15, 2004 and, referring to PIPA, said he was making a "formal request" for

> …all materials in possession of yourself, Mr. Stanger [a DGH lawyer], Dives Grauer & Harper and its affiliates or employees, and which relate to myself, and which should be permissible to obtain as indicated under the rules of the Act.

[2] Essentially identical requests were made to two other Vancouver law firms, dealt with in Order P05-02[1] and Order P05-03,[2] both of which are released concurrently with this decision.

[3] Section 23(1) of PIPA reads as follows:

> **Access to personal information**
>
> 23(1) Subject to subsections (2) to (5), on request of an individual, an organization must provide the individual with the following:
>
> (a) the individual's personal information under the control of the organization;
>
> (b) information about the ways in which the personal information referred to in paragraph (a) has been and is being used by the organization;
>
> (c) the names of the individuals and organizations to whom the personal information referred to in paragraph (a) has been disclosed by the organization.

[4] DGH responded to the respondent's request under s. 23(1)(a) by writing to this office on August 19, 2004, seeking authority under s. 37(b) of PIPA to disregard the request on the ground that it is frivolous and vexatious. Section 29(2) suspends the time for responding to a request where the organization involved has sought relief under s. 37.

[5] The backdrop to the respondent's request is that DGH was retained to defend several individuals in two lawsuits that the respondent brought against them in the British Columbia Supreme Court. DGH says that, in defending the third parties, it collected documents in the possession or control of the third parties, prepared lists of documents required by the *Rules of Court* and sent the lists of documents to the respondent's lawyer. As a result of proceedings in the second lawsuit, DGH sought and obtained further documents and produced a supplementary list of documents. These documents have, DGH says, been disclosed to the respondent through his lawyer. It says this at p. 2 of its submission:

> As a result of the trial process we are in possession of a great number of documents. In virtually every case, save those where there is a privilege possessed either by defendants or an independent witness, the documents that we possess were also produced to … [the respondent]. These documents are derived from our clients, the defendants, and also from other witnesses. In the absence of the trial process, we would have no right to obtain these documents, and the individuals would have no obligation to produce them to us.

[1] [2005] B.C.I.P.C.D. No. 19.
[2] [2005] B.C.I.P.C.D. No. 20.

[6] At p. 2 of its application for s. 37(b) relief, DGH says the following, making similar points in its submission:

> We have conducted reasonable steps to prepare for the defence of the case in this matter. Personal information that we do have regarding … [the respondent], if any, would have all been obtained in the process of our position as legal counsel to the defendants and related only to the issues raised in the litigation. Throughout the litigation we have been under a duty to disclose any relevant documents that were not protected by solicitor-client privilege. We have complied with that duty. We also have transcripts of evidence that … [the respondent] has received copies of, as well as all of the documents disclosed by … [the respondent] himself in this litigation, including those that he obtained from access to information requests made to … [a named public body].
>
> It is our respectful submission that to require us to respond to the request for access would be frivolous, in that it could only directly mirror disclosure previously made in the context of the disclosure requirements of the litigation process. It is vexatious in that it could take significant time and effort to comply while providing no useful information to … [the respondent] for the reasons outlined. The purpose of the Act, we submit, would not be advanced by allowing litigants to use it in this way to cause duplication of effort by counsel representing opposing parties.

[7] DGH says the respondent has "made numerous" requests for access to records, under the *Freedom of Information & Protection of Privacy Act* ("FIPPA"), to the public bodies involved in matters that gave rise to the two lawsuits in which DGH has represented the third parties. According to DGH, there is "a pattern of requests aimed at obtaining the same information repeatedly from different sources" (p. 3, application).

[8] Although his request to DGH was broad, the respondent now says, on p. 5 of his submission on this application, that he does not

> …seek material that has been released in discovery or shown through the Court. I seek material that has not been admitted and copy of true originals that have subsequently been altered.

[9] He also says on p. 5 that he seeks "documents that have not been produced in the litigation process". The respondent seems to believe there is a conspiracy on the part of "a closely knitted group of lawyers" who have allegedly co-operated in what he claims are intentional efforts to suppress documents in the litigation. He gives particulars that he says support this serious allegation, but DGH offers particulars that rebut the respondent's claims. On this point generally, DGH says the respondent "has not produced a shred of evidence or any rational justification" for his claims about the behaviour of various lawyers in this case (p. 6, reply).

2.0 ISSUE

[10] The issue here is whether it is appropriate to authorize DGH, under s. 37(b) of PIPA, to disregard the respondent's request for access to his own personal information. Although PIPA does not assign a burden of proof in s. 37 matters, an organization

seeking relief under that section would be wise to provide evidence of a basis for the relief it seeks.

3.0 DISCUSSION

[11] **3.1 Applicable Principles**—Section 37, which is identical in all material respects to s. 43 of FIPPA, reads as follows:

> **Power to authorize organization to disregard requests**
>
> 37 If asked by an organization, the commissioner may authorize the organization to disregard requests under section 23 or 24 that
>
> (a) would unreasonably interfere with the operations of the organization because of the repetitious or systematic nature of the requests, or
>
> (b) are frivolous or vexatious.

[12] This is the first time s. 37(b) of PIPA has been considered, while s. 43(b) of FIPPA, which is comparable to s. 37(b), has been considered in a number of decisions. Section 43(b) was first considered in Auth. (s. 43) 02-02[3]. In that case, a public body had applied for authority to disregard an access to information request under FIPPA on the basis that it was frivolous and vexatious. In considering the matter, I looked at court decisions addressing the meaning of "frivolous" and "vexatious" in the context of civil litigation and at discussions of those words under Ontario's *Freedom of Information & Protection of Privacy Act*. I observed that in interpreting the words "frivolous" and "vexatious" it was necessary to keep in mind the accountability goals of FIPPA, as set out in s. 2(1) of FIPPA, and the fact that abuse of the right of access to information under FIPPA can have serious consequences for the rights of others and for the public interest (para. 25). At para. 27, I said the following:

> [27] The following discussion does not exhaust the meaning of the words "frivolous or vexatious", since other factors may be relevant in the circumstances of a given case. For present purposes, one or more of the following factors may be relevant in determining whether a request is frivolous or vexatious:
>
> - Regardless of how it is so, a frivolous or vexatious request is one that is an abuse of the rights conferred under the Act.
>
> - The determination of whether a request is frivolous or vexatious must, in each case, keep in mind Commissioner Wright's cautionary words in Order M-618 and the legislative purposes of the Act (including s. 43).
>
> - A "frivolous" request is one that is made primarily for a purpose other than gaining access to information. It will usually not be enough that a request appears on the surface to be for an ulterior purpose – other facts will usually have to exist before one can conclude that the request is made for some purpose other than gaining access to information.

[3] [2002] B.C.I.P.C.D. No. 57.

- The class of "frivolous" requests includes requests that are trivial or not serious, again remembering the words of caution in Order M-618.

- The class of "vexatious" requests includes requests made in "bad faith", *i.e.*, for a malicious or oblique motive. Such requests may be made for the purpose of harassing or obstructing the public body.

- The fact that one or more requests are repetitive may support a finding that a specific request is frivolous or vexatious. Under s. 43(a) of the Act, the commissioner can authorize a public body to disregard repetitive or systematic access requests that would unreasonably interfere with a public body's operations. I do not consider that, because s. 43(a) explicitly refers to repetitious access requests, the commissioner is precluded, in a s. 43(b) case, from considering the repetitive nature of access requests as one factor in deciding whether requests are frivolous or vexatious. To be clear, the fact that access requests are repetitious or systematic in nature cannot, in the face of the explicit test under s. 43(a), be sufficient to warrant relief under s. 43(b). Alongside other factors, however, the fact that repetitious requests have been made may support a finding that a particular request is frivolous or vexatious.

[13] Some, but not necessarily all, of the considerations mentioned in the preceding passage and in other decisions involving s. 43(b) of FIPPA will be helpful in considering s. 37(b) of PIPA.

[14] Further, when interpreting and applying s. 37(b), one must keep it in mind that PIPA's legislative purposes are not identical to FIPPA's. As s. 2(1) of FIPPA makes clear, the twin purposes of that statute are to "make public bodies more accountable to the public and to protect personal privacy". The former goal is advanced, as s. 2(1)(a) indicates, by "giving the public a right of access to records" and the latter is advanced, s. 2(1)(b) acknowledges, by giving individuals a right of access to their own personal information. Certainly, where FIPPA's goal of ensuring public body accountability to the public is engaged, different considerations may apply in interpreting the words "frivolous" and "vexatious" in s. 43(b) of FIPPA as distinguished from cases where, as here, an individual has requested her or his own personal information under s. 23(1)(a) of PIPA. The right of access under s. 23(1)(a) of PIPA allows individuals to know what personal information of theirs an organization has and to ensure that it is accurate and complete.

[15] Here, it is not plausible that the respondent was ignorant as to what personal information DGH possessed. In his submission, the respondent says he does not want what he already received and claims his goal is to reveal documents that were supposedly suppressed in the litigation disclosure process and to identify discrepancies in what was disclosed in that process. At the time of his request, I am satisfied, the respondent knew, because of the litigation disclosure process, what personal information DGH had about him and also knew that DGH had this information for the purposes of the respondent's lawsuits against DGH's clients.

[16] The respondent now says he does not want duplicates of documents he has already received, but that is not how he framed his request. The respondent has made a request for disclosure of personal information he has, as he surely knew when he made the request, already received through the litigation process.

[17] As regards the respondent's allegations of incomplete disclosure through the litigation process, or inconsistencies in disclosure, I am persuaded by DGH's rebuttal of those claims. I accept DGH's position that disclosure in response to the respondent's request would duplicate the disclosure already made to the respondent through the two court actions.

[18] This is not the end of the matter. DGH acknowledges that it has documents that were not disclosed to the respondent in the litigation process because, DGH says, they are privileged to the benefit of individual defendants or others. DGH says the undisclosed documents, which are found in its files for the court cases and which relate to its conduct of the court actions, either consist of privileged solicitor-client communications or are materials protected by litigation privilege.

[19] Section 23(3)(a) of PIPA provides that an organization is not required to disclose "personal information and other information" in response to an access request by an individual where the information "is protected by solicitor-client privilege". DGH has not responded to the respondent's access request, including by denying disclosure under s. 23(3)(a). There would be no point in its doing so pending disposition of its s. 37(b) application. (This is recognized by s. 29(2) of PIPA, which stops the clock, pending resolution of DGH's s. 37(b) application, on the 30 days DGH has to respond to the respondent's request.)

[20] The respondent should be well aware of the claim of privilege. As DGH has said in its submissions, it claimed privilege for the contents of its files in the lists of documents that it created under the *Rules of Court* and delivered to the respondent's lawyer. Those records are in issue here. The situation here, therefore, is that the respondent has been involved in litigation, has gone to the law firm representing his opponents and, knowing that he has received documents through that law firm in the litigation, has made an access request that covers documents for which—as he knew at the time of his request—solicitor-client privilege has been asserted. If the respondent wished to challenge the claim of privilege, the court processes for doing so were available to him in the litigation. The respondent's request under PIPA is vexatious as it applies to the material for which privilege was claimed in the litigation, a claim the respondent had the right to challenge in the courts.

[21] Similarly, the respondent has had disclosure of his personal information through the litigation discovery process. He now claims documents were suppressed and there were inconsistencies in the disclosure. I have already accepted DGH's rebuttal of those claims, but add that, had the respondent wanted to do so, he could have challenged the accuracy and completeness of the disclosure in the litigation.

[22] I note again that the purpose of the s. 23(1)(a) right of access to one's own personal information in the custody or control of an organization is to allow an individual

to know what personal information of his or hers an organization has and to ensure that it is accurate and complete. Again, the respondent knows, through the litigation disclosure, what personal information DGH has. The respondent also had the opportunity and means to challenge the adequacy of that disclosure through the litigation process. His present access request, despite what he has said in this proceeding, duplicates that disclosure and is also a collateral challenge to the adequacy of the disclosure in the litigation.

[23] In these particular circumstances, including in light of the respondent's stated motives and DGH's related rebuttal, I am persuaded that the respondent's access request is vexatious for the purposes of s. 37(b). Without suggesting the respondent bears any burden of proof, I see no factors in the material before me that would justify a conclusion different from the one I have reached.

[24] This decision should not be interpreted as suggesting that an access request will be found vexatious merely because litigation has taken place, is under way, or is possible, and disclosure of the same information or documents has occurred or may occur. My findings in this case relate to the particular circumstances at hand surrounding the respondent's access request.

4.0 CONCLUSION

[25] For the reasons given above, under s. 37(b) of PIPA, I authorize DGH to disregard the respondent's request in its entirety.

May 27, 2005

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia