



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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Order F18-34

LAW SOCIETY OF BRITISH COLUMBIA

Lisa Siew
Adjudicator

August 13, 2018

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Summary: The Law Society of British Columbia applied for authority under s. 43(b) of the *Freedom of Information and Protection of Privacy Act* to disregard an access request from a former lawyer on the basis the access request was vexatious. It also requested authority to disregard all future access requests of similar breadth from the former lawyer. The adjudicator determined that the current access request was not vexatious and she declined to grant the Law Society of British Columbia relief under s. 43(b) for this request or any future access requests that it may receive from the former lawyer.

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

INTRODUCTION

[1] The Law Society of British Columbia (Law Society) applied to the Office of the Information and Privacy Commissioner (OIPC) for authorization under s. 43 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) to disregard an access request from a former lawyer (the respondent in this application). The respondent requested access to all records related to the Law Society's investigation of him. The Law Society submits this request is vexatious under s. 43(b) of FIPPA and seeks relief from responding to this access request and all future access requests of similar breadth that the respondent may make under FIPPA.

ISSUES

[2] The issues I must decide in this inquiry are the following:

1. Is the access request from the respondent vexatious under s. 43(b)?
2. What relief, if any, is appropriate?

DISCUSSION

Background

[3] The Law Society is the regulatory body responsible for setting and enforcing standards of professional conduct for lawyers in British Columbia. The respondent is a former lawyer who was disbarred by the Law Society.¹ In the years before his disbarment, the Law Society investigated a number of complaints made against the respondent.²

[4] There is also a long history of court proceedings between the parties. Over a three year period, the respondent brought a total of six civil proceedings against the Law Society and various Law Society staff and officers.³ Some of those actions were discontinued by the respondent or stayed by court order and a number of applications were made by both parties in relation to those proceedings.⁴

[5] In June 2017, the Law Society received an email from a third party on behalf of the respondent with a letter attached. The letter requested access under FIPPA to records related to the Law Society's investigation of the respondent, including investigations conducted by several specific Law Society employees or investigators. In response, the Law Society asked the respondent to confirm by mail and original signature that the request was from him and to narrow his request, which it considered to be overly broad and duplicated records already disclosed during litigation.⁵ In using the term "broad", I understand the Law Society to mean the respondent requested a large number of records. The Law Society says the respondent did not reply.

[6] In July 2017, the respondent requested the same records from the Law Society, but provided the request by hardcopy as instructed. This access request

¹ Law Society submission dated May 30, 2018 at para. 3.

² Affidavit of the Law Society's former staff lawyer in the Professional Regulation Department at paras. 16-30, in Law Society submission dated May 30, 2018 at Tab 7.

³ Law Society submission dated May 30, 2018 at para. 19.

⁴ *Ibid* at para. 21 and Tab 5.

⁵ Affidavit of Law Society paralegal/Information and Privacy Officer at para. 4 and Exhibit "B" in Law Society's submission dated May 30, 2018 at Tab 9.

is the one the Law Society is seeking authority under s. 43 to disregard. The respondent then emailed the Law Society a number of times including on the day of his request, asking for an update.⁶ Over a month later, in August 2017, the Law Society informed the respondent that it would provide a response to his request within the legislated timeframes in FIPPA.⁷ The next day, the Law Society applied to the OIPC for authority under s. 43 of FIPPA to disregard the respondent's access request on the basis it was vexatious.⁸

[7] Mediation did not resolve the issues between the parties and the matter proceeded to inquiry. During the inquiry process, the respondent clarified that he was only seeking access to records that involve the investigation of him by one specific Law Society investigator for a one year period. The Law Society replied that it did not object to responding to that narrowed request.

[8] Given its reply, I wrote to the Law Society to clarify whether it wanted to withdraw its section 43 application. The Law Society responded that it wished to proceed with its application since the relief sought was not only for the current request, but also for future requests from the respondent. The Law Society says it seeks relief under s. 43 since it is likely, given his past conduct during court proceedings, that the respondent will continue to make broad access requests and only after considerable time and effort on its part will he narrow his request at the last minute.⁹ This inquiry results from the Law Society's request to proceed with its s. 43 application.

Section 43

[9] Section 43 of FIPPA gives the Commissioner the discretionary power to authorize a public body to disregard access requests 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.

[10] The nature and purpose of s. 43 was identified by Coultas J. in *Crocker v. British Columbia (Information and Privacy Commissioner)* as follows:

Section 43 of the *Act* is remedial, not punitive in nature...Section 43 is an important remedial tool in the Commissioner's armoury to curb abuse of the right of access. That section and the rest of the *Act* are to be construed by

⁶ Law Society submission dated May 30, 2018 at Tab 61.

⁷ Email dated August 30, 2017 in Law Society submission dated May 30, 2018 at Tab 61.

⁸ Letter from Law Society's lawyer to OIPC dated August 31, 2017.

⁹ Law Society letter dated June 26, 2018.

examining it in its entire context bearing in mind the purpose of the Legislation....¹⁰

[11] In Auth. (s. 43) 99-01, former Commissioner Loukidelis explained that when someone abuses the right of access under FIPPA, it can have serious consequences for the access rights of others and for the public interest:

... Access to information legislation confers on individuals such as the respondent a significant statutory right, *i.e.*, the right of access to information (including one's own personal information). All rights come with responsibilities. The right of access should only be used in good faith. It must not be abused. By overburdening a public body, misuse by one person of the right of access can threaten or diminish a legitimate exercise of that same right by others, including as regards their own personal information. Such abuse also harms the public interest, since it unnecessarily adds to public bodies' costs of complying with the Act. Section 43 exists, of course, to guard against abuse of the right of access.¹¹

[12] The Law Society applies for relief under s. 43(b) on the basis the respondent's current access request is vexatious. Previous OIPC decisions and orders adopt the following non-exhaustive factors in determining whether an access request is vexatious:

- 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 the legislative purposes of the Act, and those purposes should not be frustrated by an institution's subjective view of the annoyance quotient of particular requests.
- The class of "vexatious" requests includes those 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.¹²

[13] In Order F13-18, the adjudicator also noted that "access to information requests may be vexing or irksome due to the nature of the request, and vexatious is meant to signify something more than that which is annoying or distressing."¹³

¹⁰ 1997 CanLII 4406 (BC SC) at paras. 32-33.

¹¹ Auth. (s. 43) 99-01 at pp. 7-8. See also Auth. (s. 43) 02-02, [2002] BCIPCD No. 57 at para. 25.

¹² Order F14-24, 2014 BCIPC No. 27 at para. 11, citing Auth. (s. 43) 02-02, [2002] BCIPCD No. 57.

¹³ Order F13-18, 1998 CanLII 6010 (BC SC) at para. 35.

[14] I will apply the above-noted considerations and principles to the facts of this inquiry.

The parties' submissions

Law Society's position

[15] The Law Society submits that the respondent's access request is not a genuine request for information. It says the respondent's access request is vexatious because it was made in bad faith for a malicious or oblique motive with a view to harassing or obstructing the Law Society.¹⁴ It says this vexatiousness is demonstrated by the respondent's behaviour, specifically that the respondent:

- requested access to records he already received through its discipline process and the court disclosure process.¹⁵
- engaged in "vexatious conduct" during litigation which required court intervention to control.¹⁶
- harassed the Law Society, its employees and its lawyers by threatening to report individuals to their professional regulators or by bombarding them with emails and faxes.¹⁷ For example, it says he filed a baseless complaint against a Law Society investigator to the Association of Certified Fraud Examiners and after the investigator responded to the complaint, the respondent took no further steps in the matter.¹⁸
- repeatedly invited the Law Society to make him settlement offers by claiming that otherwise, the damages would be "astronomical."¹⁹
- made a broad access request because he knows, based on information previously provided to him, it will require a lot of staff time to respond.²⁰

[16] The Law Society submits these factors indicate that the respondent's access request is not a legitimate request for personal information, but "the next step in a pattern of harassment and vexatious conduct" intended to further the respondent's "personal vendetta against his former regulator."²¹

¹⁴ Law Society submission dated May 30, 2018 at para. 5.

¹⁵ *Ibid* at paras. 6, 10-18.

¹⁶ *Ibid* at paras. 6, 19-28.

¹⁷ *Ibid* at paras. 6, 29-35.

¹⁸ *Ibid*.

¹⁹ *Ibid* at para. 36.

²⁰ *Ibid* at paras. 6, 37-41.

²¹ *Ibid* at para. 42.

[17] The Law Society also submits the evidence in this case is similar to the evidence before former Commissioner Loukidelis in Auth. (s.43) 02-02. It says “in that case, a pattern of harassing emails, as well as the suggestion that perhaps all of the efforts were aimed at encouraging the public body to make a settlement offer in order to avoid further trouble, were both factors that led to the conclusion that the requests were vexatious.”²²

Respondent’s position

[18] The respondent submits that his access request is a bona fide request for information. He says that his narrowed request demonstrates that he does not seek duplicate information or records already provided to him by the Law Society. In his submission, the respondent identifies what records can be excluded from his access request.²³ He also says he is asking for records “in relation to one investigator at the LSBC over a specified period of time when [the respondent] was not a practicing lawyer that does not involve a citation and related disclosure.”²⁴ The respondent notes that he was not able to question this investigator during litigation and submits that the Law Society may not have found, or already provided him, with all the related records.

[19] The respondent questions the Law Society’s claim that a large amount of time and resources will be required to process this request and he offers cost-saving alternatives such as receiving the information by email. As part of his submission, the respondent also provided documents related to the court proceedings between the parties, including his 243 page brief that challenges, among other things, the constitutionality of a section in the *Legal Profession Act*. He does not explain how this information supports his position regarding the s. 43 application. I have reviewed this material and will only refer to it when the information is relevant for the issues being considered in this inquiry.

[20] In response, the Law Society says the respondent did not communicate the narrowing of his request in writing, prior to the inquiry, even though it had asked him to do so. The Law Society submits this is further proof that his request was not made in good faith, but a tactic to force the Law Society to go through an expensive and time consuming OIPC process “without any potential benefit to [the respondent] in receiving the records that he seeks.”²⁵ The Law Society says its s. 43 application would not have been necessary had the respondent proposed this narrowing at the initial stages of the FIPPA process.

²² Law Society submission dated May 30, 2018 at para. 9.

²³ Respondent’s email submission dated June 7, 2018.

²⁴ *Ibid.*

²⁵ Law Society submission dated June 12, 2018 at para. 4.

Analysis and findings

[21] The parties' submissions demonstrate that they have a long and contentious history and both feel aggrieved by their interactions with one another. However, I am not persuaded that the respondent's current access request is vexatious for the purposes of s. 43(b). As part of his inquiry submissions, the respondent clarified and reasonably narrowed the scope of his request, which reduces the chances of duplication and decreases the time and cost to the Law Society.

[22] Further, despite the Law Society's suspicions about the respondent's motives and its frustration with his behaviour, I am satisfied the respondent had a legitimate reason for making his access request. The respondent explained that he is seeking these records because he could not obtain this information by questioning the Law Society investigator and he wants to know what investigative records, if any, were created during a specific period of time when he was not a practicing lawyer.²⁶ I conclude the respondent was not making a request for records that he knows do not exist or which he already received under FIPPA or through another avenue of access. I also note that the respondent explains in his emails to the Law Society that he plans to forward this information to the Association of Certified Fraud Examiners in relation to its investigation of a Law Society investigator.²⁷ I accept that the respondent has a genuine interest in requesting and receiving these records.

[23] The Law Society alleges the respondent's request is vexatious because he failed to clearly articulate his narrowed request in writing and he provided details only after the Law Society was put to the expense of preparing formal submissions for its section 43 application.²⁸ The Law Society says, in the past, the respondent would adjourn or abandon court applications only after the Law Society went through the time and expense of responding and his current conduct reflects this same pattern of behaviour.²⁹ The Law Society also says the respondent followed up his current access request with 32 emails in approx. one month, which it sees as a sign of harassment.³⁰ However, for the reasons to follow, I am not persuaded by the Law Society's submission that the respondent's current access request is a means of harassment and retribution against the Law Society and its employees.

[24] I have reviewed the 32 emails referred to by the Law Society. In some of the emails, a third party asks on behalf of the respondent for an update on the

²⁶ Respondent's email submission dated June 7, 2018.

²⁷ Emails dated August 27, 28 & 29, 2017, located at Tab 61 of Law Society submission dated May 30, 2018.

²⁸ Law Society letter dated June 26, 2018.

²⁹ Law Society submission dated May 30, 2018 at paras. 6, 19-28 and Law Society letter dated June 26, 2018.

³⁰ Law Society submission dated May 30, 2018 at para. 35, the 32 emails are located at Tab 61.

respondent's access request.³¹ I acknowledge the frequency with which the respondent contacted the Law Society for an update may be considered annoying, but it does not appear that the Law Society responded to the respondent's initial follow up email until weeks later.³² Therefore, I can understand why the respondent may have been motivated to repeatedly ask for an update. I also note that some of the emails are not even related to the access request, but address other matters between the parties.³³

[25] More importantly, some of the 32 emails identify what records are of interest to the respondent. While the respondent does not explicitly narrow his access request in these emails, they indicate he is interested in records related to a specific Law Society investigator.³⁴ These emails occurred prior to the Law Society's application to the OIPC for relief under s. 43 and were a missed opportunity for a discussion between the parties to address some of the Law Society's concerns with the broad scope of the respondent's access request. Considering the circumstances, I find neither party made their best efforts to resolve the matters between them; however, the fact that the respondent made an effort to follow up on his access request indicates he had a legitimate interest in obtaining the requested records.

[26] In my view, it is also significant that shortly after receiving the respondent's July 2017 access request and his follow up emails, the Law Society chose to make a section 43 application instead of following up with the respondent to address its concerns. Therefore, I am unable to conclude, as the Law Society suggests, that the respondent forced the Law Society to make a section 43 application only to wait until the last minute to narrow his request. Considering all the evidence, I am not satisfied that the respondent, as part of a campaign of harassment against his former regulator, waited in bad faith until the Law Society went through the time and effort of making formal submissions for its section 43 application before clarifying his access request.

[27] Contrary to what the Law Society submits, the facts and evidence in this case are not similar to what was before former Commissioner Loukidelis in Auth. (s.43) 02-02. In that decision, former Commissioner Loukidelis found the two outstanding access requests were vexatious because they repeated or overlapped a multitude of earlier concluded requests, and he could find no purpose for them since they revisited issues already dealt with between the

³¹ The emails are supposedly from the respondent's assistant.

³² The only email in evidence that indicates a response from the Law Society to the respondent's emails is dated August 30, 2017, well after his first request for an update on July 21, 2017.

³³ For example, an email dated August 28, 2017 and another dated August 29, 2017 contains correspondence about litigation matters referred to as "requests from discovery" and "application response to [the respondent's] application."

³⁴ Email dated August 27, 2017, located at Tab 61 of the Law Society's submission dated May 30, 2018 and see *supra* note 27 for other relevant emails.

parties.³⁵ He also found that the requests were part of an ongoing pattern of harassing behaviour based, in part, on an email in which the respondent said he planned to use the information obtained from an earlier access request to “plague” the public body for months.³⁶

[28] In this case, this is not a situation where the respondent’s access request repeats other prior or pending requests or the respondent has made multiple requests for access over a short span of time.³⁷ I have also reviewed the evidence provided by the parties, and the emails sent by the respondent, and there is no evidence or statement from the respondent in these materials which suggests he is abusing his access rights under FIPPA, as was the case in Auth. (s.43) 02-02 and other previous OIPC orders.³⁸

[29] Considering all the evidence, I am not persuaded the respondent made his current access request for an improper motive or for a malicious purpose such as to harass the Law Society or to force a settlement offer. Therefore, I find the respondent’s current access request is not vexatious for the purposes of s. 43(b). As a result, the Law Society is not authorized under s. 43 to disregard the respondent’s current access request. To be clear, the access request is for any records that involve the investigation of the respondent by one specific Law Society investigator for a particular one year period.³⁹

Future relief

[30] The Law Society also seeks authorization under section 43(b) to disregard all of the respondent’s future requests which are broad in scope. Given my finding the current access request is not vexatious for the purposes of section 43(b), the Law Society is not entitled to relief under that section, including any request for future relief. However, I will address the Law Society’s submissions on this matter.

[31] The Law Society says it seeks future relief under s. 43(b) since it is likely, given his past conduct, that the respondent will continue to make broad access requests and only after considerable time and effort on its part will he narrow his

³⁵ Auth. (s. 43) 02-02, [2002] BCIPCD No. 57 at para. 29.

³⁶ *Ibid* at para. 31.

³⁷ I am aware that there may be other outstanding access requests between the parties; however, those requests are not before me and the Law Society does not discuss or rely on those requests as part of its submissions for this application.

³⁸ See Decision F08-09, 2008 CanLII 57361 (BC IPC) at paras. 27-45 where the adjudicator considered email evidence, and the similarity of other requests, to find the access requests were vexatious because the applicant was using the requests to harass the public body into taking certain actions against a fish farm. Also see Order F13-16, [2013] BCIPCD No. 20 at para. 20 where the adjudicator considered email evidence to find the access requests were vexatious because they were being made to pressure the public body to back down on a particular decision.

³⁹ This access request is identified in bold at page 2 of the respondent’s email submission dated June 7, 2018.

request at the last minute. It submits the respondent made a broad access request in order to put the Law Society through the time and expense of responding. The Law Society provided submissions and evidence on how much time and effort would have been required to address the respondent's access request if it had not been narrowed in response to its section 43 application.

[32] Any remedy under s. 43 must be proportional to the harm inflicted and must bear in mind the objectives of section 43.⁴⁰ In *Mazhero v. British Columbia (Information and Privacy Commissioner)*, Tysoe, J. cautioned against providing remedies for future access requests where it is unclear that a future request will meet the requirements of section 43:

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

[28] However, in my view, there will be situations where it would be appropriate for the Commissioner to authorize a public body to disregard all future requests for general information where the applicant has so abused his or her right of access to records that the Commissioner is able to 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. Coultas J. gave potential examples of such situations in *Crocker* when he referred to applicants making repeated requests in bad faith or making frivolous and vexatious requests. But only in very exceptional circumstances would it be appropriate, in my view, for the Commissioner to authorize a public body to disregard all future requests for personal information (or a type of personal information).⁴¹

[33] Although Tysoe, J.'s comments in *Mazhero* were in relation to s. 43(a), I agree with other OIPC decisions which found they apply equally to s. 43(b).⁴²

[34] In my view, it would not have been appropriate in these circumstances to authorize the Law Society to indefinitely disregard the respondent's future access requests whenever the Law Society deems them to be too broad. I conclude that type of authorization would be a wholly disproportionate remedy. The fact that an access request, present or future, may be broad in scope does not mean that it is by default also vexatious under s. 43(b).

⁴⁰ *Crocker v British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BC SC) at paras. 40-51.

⁴¹ 1998 CanLII 6010 (BC SC).

⁴² See for example, Order F13-16, 2013 BCIPC No. 20 at paras. 30-31 and Decision F08-10, 2008 CanLII 57362 (BC IPC) at paras. 41-45.

[35] The Law Society also said in its application that the respondent already obtained some of the requested records during litigation disclosure. However, a public body does not need a section 43 authorization to address such circumstances. Previous OIPC decisions have explained that “FIPPA does not normally require public bodies to disclose copies of records that they have already provided to the same applicant, either through a previous request or another avenue of access.”⁴³ I expect the Law Society will be able to respond to this type of future request by identifying when such records were previously provided or if no responsive records exist, the Law Society will only need to inform the respondent of that fact.⁴⁴

CONCLUSION

[36] For the reasons given above, the Law Society’s application under s. 43(b) of FIPPA is denied. It is not authorized to disregard the respondent’s request for any records that involve the investigation of him by one specific Law Society investigator for the requested one year period. The Law Society is also not authorized to disregard any future access requests it may receive from the respondent.

August 13, 2018

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F17-71261

⁴³ Decision F11-04, 2011 BCIPC 40 at para. 15; Decision F10-09, 2010 BCIPC 47 at para. 26.

⁴⁴ For similar comments, see Order F13-16, 2013 BCIPC No. 20 at para. 33.