



Order F24-04

NELSON POLICE DEPARTMENT

Alexander R. Lonergan
Adjudicator

January 11, 2024

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Summary: The complainant is a former police officer who requested records from the Nelson Police Department (NPD). After receiving the request, NPD produced a fee estimate under s. 75(1) of the *Freedom of Information and Protection of Privacy Act* (FIPPA), which the complainant asked the OIPC to review. The adjudicator found that the complainant's request was for his own personal information and therefore, under s. 75(3) of FIPPA, NPD was not authorized to charge a fee. Given this, the adjudicator found it unnecessary to also consider whether the fee was properly calculated under s. 75(1) of FIPPA and Schedule 1 of the *Freedom of Information and Protection of Privacy Regulation*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 6(2)(b), 43, 43(c)(i), 75(1), 75(1)(b), and 75(3); *Freedom of Information and Protection of Privacy Regulation*, BC Reg 155/2012, s. 13, and Schedule 1.

INTRODUCTION

[1] The complainant¹ requested, under the *Freedom of Information and Protection of Privacy Act* (FIPPA),² that the Nelson Police Department (NPD) provide him with access to all records containing information about him.³

[2] In response, NPD produced a fee estimate. The complainant requested a fee waiver, which NPD declined.⁴ The complainant then asked the Office of the Information and Privacy Commissioner (OIPC) to review NPD's fee estimate. Mediation by the OIPC did not resolve the matter and it proceeded to inquiry.

¹ Given that this inquiry is a review of a fee estimate following a complaint, I will refer to the complainant as a "complainant". However, the complainant is considered an applicant for the purposes of s. 75.

² All sectional references in this order refer to FIPPA unless otherwise indicated.

³ Complainant's access request, at p. 1.

⁴ Email from NPD to the complainant, dated 14 November 2022.

Preliminary Matters

Mediation Material

[3] NPD's submissions and affidavit evidence include references to, and excerpts from, communications with an OIPC investigator during mediation.⁵

[4] The OIPC's Instructions for Written Inquiries⁶ states the following:

“Mediation material” refers generally to communications that relate to offers or attempts to resolve the matter during mediation. The Commissioner will not consider mediation materials in reaching a decision and issuing an order. To preserve the integrity of the “without prejudice” nature of the mediation process, a party may not, without the written consent of the other parties, refer to or include in its submissions any mediation materials, including any opinions or recommendations an investigator expressed during mediation.

[5] Nothing in the material before me establishes that the complainant consents to including mediation material in NPD's submissions.

[6] The OIPC registrar of inquiries wrote to NPD requesting that all mediation material be removed from its submissions. Additionally, the registrar advised NPD that the adjudicator of the inquiry would not consider any mediation material in reaching their decision.⁷ NPD did not respond to this request or provide amended submissions.

[7] Given the importance of preserving the without-prejudice nature of the OIPC's mediation process, I will not consider any mediation material or references to such material in the parties' submissions while deciding the issues before me.⁸

Request to Continue Mediation

[8] In their submissions, NPD asks that I assist the parties in resolving this matter by providing guidance or directions for reformulating the complainant's access request.⁹ I interpret this to be a request that I mediate the issues between the parties.

⁵ NPD's initial submission at paras. 32 and 33; and Affidavit #1 of Nelson Police Board Secretary at para. 25 and Exhibit C.

⁶ Available online at: <https://www.oipc.bc.ca/guidance-documents/1744>.

⁷ Email from OIPC to counsel for NPD dated 18 August 2023.

⁸ Specifically, I will not consider NPD's initial submission at paras. 32 and 33, nor Affidavit #1 of the Nelson Police Board Secretary at para. 25 and Exhibit C.

⁹ NPD's initial submission at para. 54.

[9] The parties have already had the benefit of the OIPC’s investigation and mediation processes, which are designed to clarify and attempt to resolve the issues in dispute between the parties. NPD has not explained why it is asking for additional mediation at this point or explained why it did not seek this guidance or direction during the OIPC’s investigation and mediation processes. In my view, the ongoing disagreement between the parties indicates the need for a binding decision on these issues. Therefore, I decline NPD’s request that I assist the parties in continuing to mediate their dispute.

Breadth of Complainant’s Request, ss. 6(2)(b), 43(c)(i)

[10] NPD argues that the complainant’s access request is so broad that if NPD is required to fulfill the access request as currently written, then the act of retrieving, reviewing, and redacting the responsive records would “unreasonably interfere with the operations of NPD within the meaning of s. 6(2)”.¹⁰

[11] Section 6(2) says that where an applicant has a right of access to information in the custody or under the control of a public body under s. 4, but a record containing that information does not already exist, the public body must create that record for the applicant. Section 6(2)(b) limits this requirement to circumstances where creating the record would not unreasonably interfere with the public body’s operations.

[12] NPD did not refuse to create a record for the complainant, nor is it apparent that a record must be created to respond to the complainant’s request.¹¹ Therefore, s. 6(2)(b) is not relevant to the issues I must decide and I will not consider it further.¹²

[13] NPD’s argument that the “retrieval, review, and redaction” of existing records would be “extraordinarily burdensome”¹³ is, in substance, a request for relief under s. 43(c)(i). Section 43(c)(i) allows the head of a public body to request authorization from the OIPC to disregard an applicant’s request if the request is so excessively broad that responding to the request would unreasonably interfere with the public body’s operations.

[14] NPD has not applied for authorization to disregard the complainant’s request under s. 43, nor is such an application listed in this matter’s Fact Report or Notice of Inquiry. Therefore, s. 43(c)(i) has no bearing on this review of NPD’s fee estimate and I will not consider it further.

¹⁰ NPD’s initial submission at paras. 46, and 50-53.

¹¹ See Order F21-07, 2021 BCIPC 8 at para. 22 where the adjudicator implies that a finding that the requested records do not exist is the first step in determining whether s. 6(2) applies.

¹² Further, s. 6(2) was not listed as an issue in the OIPC’s Fact Report or Notice of Inquiry and neither party requested the OIPC’s permission to add it into the inquiry.

¹³ NPD’s initial submission at para. 46.

ISSUES

[15] The issues to be decided in this inquiry are:

1. Is the complainant's access request a request for his own personal information under s. 75(3)?
2. If not, was NPD's fee estimate calculated in accordance with s. 75(1)(b) and the *Schedule of Maximum Fees*?¹⁴

[16] FIPPA is silent on the burden of proof in an inquiry regarding s. 75(3) and whether a public body's fee estimate accords with s. 75(1)(b). Where FIPPA does not identify which party bears the burden of proof on a particular issue, past orders have considered who raised the issue, who is in the best position to meet the burden of proof, and what is fair in the circumstances, when deciding which party ought to bear the burden of proof.¹⁵

[17] The complainant wrote the access request and therefore is best placed to explain the meaning of, and intention behind, his request. For this reason, I find that the complainant is in the best position to establish whether his access request is for his own personal information under s. 75(3). Consequently, the complainant bears the burden of establishing s. 75(3) in this matter.¹⁶

[18] If s. 75(3) does not apply to the access request, then NPD may require the complainant to pay a fee provided that NPD adheres to the requirements of s. 75(1) and the prescribed *Schedule of Maximum Fees*. Past OIPC orders have placed the burden on a public body to prove that it fulfilled its duties and obligations under FIPPA because it is in the best position to prove that it has done so.¹⁷

[19] NPD is the party that raises s. 75(1) and the prescribed *Schedule of Maximum Fees* as its authority to charge the disputed fees. Furthermore, NPD is in the best position to explain how its own fee estimate was calculated. For these reasons, I find that NPD has the burden of establishing that its fee estimate complies with s. 75(1) and the prescribed *Schedule of Maximum Fees*.

¹⁴ The *Schedule of Maximum Fees* is set out at s. 13 and Schedule 1 of the *Freedom of Information and Protection of Privacy Regulation*, BC Reg 155/2012.

¹⁵ For example, see Order F21-35, 2021 BCIPC 43 (CanLII), at para. 20; and Order F23-15, 2023 BCIPC 18 (CanLII), at para. 7; See also *British Columbia Teachers' Federation v. British Columbia*, 2012 BCCA 326 at paras. 70-72.

¹⁶ The OIPC allocated this burden in the same way in Order F18-11, 2018 BCIPC 14 (CanLII), at para. 22.

¹⁷ Order F23-59, 2023 BCIPC 69 (CanLII), at para. 7; Order F20-34, 2020 BCIPC 40 (CanLII), at para. 6; and Order 01-47, 2001 CanLII 21601 (BC IPC), at para. 9.

DISCUSSION

Background¹⁸

[20] The complainant is a former police officer who spent many years working for NPD. The circumstances surrounding the end of the complainant's employment with NPD have led to other proceedings which have not concluded at the time of this inquiry.

[21] The complainant requested that NPD provide him with access to all records in which he is "named, referenced, or discussed". He provided various versions of his name, titles, aliases, and identifiers such as badge and employee ID numbers, as well as an extensive list of the types of records that may contain that information.

[22] The complainant specified that the requested information included any record of information or communications in which NPD members or employees of the City participated, between April 1, 2007, and the date of his request. He asked that the requested information be provided by email.

[23] In response, NPD issued a fee estimate of \$5,400 - \$7,650, plus unspecified photocopy and courier costs. The complainant requested a fee waiver, which NPD declined. The complainant requested the OIPC review NPD's fee estimate for compliance with s. 75.

Section 75

[24] Section 75 permits public bodies to charge fees as follows:

- 75 (1)** The head of a public body may require an applicant who makes a request under section 5 to pay to the public body the following:
- (a) a prescribed application fee;
 - (b) prescribed fees for the following services:
 - (i) locating and retrieving the record;
 - (ii) producing the record;
 - (iii) preparing the record for disclosure, except for time spent severing information from the record;
 - (iv) shipping and handling the record;
 - (v) providing a copy of the record.
- (2) Subsection (1) (b) (i) does not apply to the first 3 hours spent on a request.

¹⁸ The background information is based on the parties' submissions and is not information that is in dispute.

- (3) Subsection (1) does not apply to a request for the applicant's own personal information.
- (4) If an applicant is required to pay fees for services under subsection (1) (b), the head of the public body
 - (a) must give the applicant a written estimate of the total fees before providing the services, and
 - (b) may require the applicant to pay a deposit in an amount set by the head of the public body.

Is the request for the complainant's own personal information? – s. 75(3)

[25] Section 75(3) prevents a public body from requiring an applicant to pay any fees assessed under s. 75(1) if the request is for an applicant's own personal information. Therefore, NPD cannot require the complainant to pay any of the fees it assessed under s. 75(1) if the complainant's request is for his own personal information.

The Parties' Positions

[26] It is clear from the materials before me that the complainant's position is that his access request is for his own personal information.¹⁹

[27] NPD says that, while there is no doubt that NPD possesses some records which constitute the complainant's personal information, the request goes "far beyond a search for records pertaining only to his own personal information related to his employment with NPD."²⁰

[28] NPD says that the request is not limited to the Complainant's personal information because it is for any and all records upon which the complainant's name or initials appear. NPD argues that the request includes records where he is only incidentally involved, such as department-wide emails about discounted ski passes, routine training opportunities, and work-related documents that contain the complainant's name but are not about him.²¹

Analysis

[29] The issue under s. 75(3) is whether the complainant's *request* is for his own personal information, not whether the request is excessively broad. As discussed above, whether the request is excessively broad under s. 43 is not an issue in this inquiry.

¹⁹ Complainant's submission at p. 1.

²⁰ NPD's initial submission at paras. 9 and 25.

²¹ *Ibid.*, at paras. 7, 8 and 38.

[30] “Personal information” is defined in Schedule 1 of FIPPA as “recorded information about an identifiable individual other than contact information.” Past orders have said that information is about an identifiable individual if it is reasonably capable of identifying a particular individual, either alone or when combined with other sources of information.²² On the other hand, “Contact information” means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business address, business email, or business fax number of an individual.²³

[31] Previous orders addressing s. 75(3) have considered whether the access request is “in substance” a request for an applicant’s personal information, having regard to the wording of the request and any additional explanation of it.²⁴

[32] To determine whether the access request is a request for the complainant’s personal information, I must carefully consider the language of the access request and the correspondence between the parties because that correspondence gives additional context to the request.

The Access Request

[33] The complainant’s access request states as follows:

Please find below my request for personal information relating to me, [*complainant’s name and employee identifying numbers*]. Please provide my requested information in an electronic format to my email address. If you require any further information, please contact me.

Please include a record of information in any form, in which [*complainant’s name*], also referred to as: [*aliases and other names of complainant*] is named, referenced, or discussed, including but not limited to: [*list of types of records*]

In specific, a record of information in any form, in which [*complainant’s name*], also referred to as: [*complainant’s name and employee identifying numbers*], any record of information or communication, related, received, sent, courtesy copied, blind courtesy copied, read, or authored by:

→ Any and all sworn and non sworn members of the Nelson Police Department and any and all employees of the Corporation of the City [*sic*] of Nelson between the time period of April of 2007 and today’s date.

²² See for example, F18-11, 2018 BCIPC 14 (CanLII), at para. 32; and Order F19-13, 2019 BCIPC 15 (CanLII), at para. 16.

²³ Schedule 1 of FIPPA defines “Personal information” and “Contact information”.

²⁴ Order 00-19, 2000 CanLII 10662 (BCIPC) at p. 11; and Order F18-11, 2018 BCIPC 4 (CanLII) at para. 40.

[34] I find that this request is clearly for information about the complainant that is reasonably capable of identifying him, so it is a request for his personal information. For example, the first paragraph states that the complainant's request is "for personal information relating to me". The second paragraph of the complainant's request asks for records of information in which he "is named, referenced, or discussed". This clearly shows that the request is for information about himself.

[35] NPD relies on Order 00-19²⁵ in support of its argument that many responsive records would not contain the complainant's personal information, even if they contain his name or signature, because they are "work product[s]" or "work-related communications".²⁶

[36] Order 00-19 dealt with multiple access requests, complaints, and a context which are not present in the current matter. Each case must be decided on its own unique circumstances and facts, and contrary to what NPD argues,²⁷ Order 00-19 does not create a general rule that work-related communications are not an individual employee's personal information. For these reasons, I consider Order 00-19 distinguishable from the present matter.

Correspondence

[37] The complainant and NPD exchanged email correspondence following the access request which clarifies what information is being requested.²⁸ In these emails, NPD asked the complainant:

- Whether he required emails sent to him through department email distribution lists, which would include matters such as training opportunities, ski passes, policy reviews and more; and
- Whether his request required a keyword search of the complainant's initials, given that NPD also uses his initials as a common acronym for policing matters.²⁹

[38] The complainant's response was that:

- Emails pertaining to ski passes and training could perhaps be omitted if those emails were sent to all NPD members;
- Searching his initials could reveal relevant material because NPD used individuals' initials; and

²⁵ Order 00-19, 2000 CanLII 10662 (BC IPC).

²⁶ NPD's initial submission at paras. 38-40.

²⁷ *Ibid.*, at para. 42.

²⁸ Affidavit #1 of Nelson Police Board Secretary, at Exhibit A.

²⁹ *Ibid.*, at pp. 7-8 of Exhibit A.

- He required NPD to provide all documents with his initials that are “related to [him].”³⁰

[39] This response clearly shows that the complainant is only requesting information that identifies him. The complainant is not requesting records that only contain his contact information such as department-wide emails that incidentally include his workplace email address. Similarly, he is not requesting records that contain his initials if those initials are used as an acronym for something else.

[40] I find that the parties’ correspondence further clarifies that the complainant’s request is only for his own personal information.

Conclusion, s. 75(3)

[41] After considering all of the relevant circumstances and for the reasons set out above, I find that the complainant’s request is only for his own personal information. The language of the complainant’s request and the correspondence that followed it satisfy me that he has met his burden of establishing that s. 75(3) applies.

[42] As the complainant’s request is for his own personal information, under s. 75(3) NPD may not require the complainant to pay a fee for the services listed at s. 75(1) that arise from his access request.

Was the fee properly estimated under s. 75(1)(b) and the Schedule?

[43] I have found that the access request was solely for the complainant’s own personal information and that s. 75(3) precludes NPD from charging a fee on that basis. Therefore, it is unnecessary for me to also consider whether NPD properly calculated its estimated fee under s. 75(1)(b) and the *Schedule of Maximum Fees*.

³⁰ *Ibid.*, at pp. 6-7 of Exhibit A.

CONCLUSION

[44] NPD is not authorized to require the complainant to pay a fee for the services outlined in s. 75(1) of FIPPA because the complainant's request is for his own personal information within the meaning of s. 75(3).

January 11, 2024

ORIGINAL SIGNED BY

Alexander R. Lonergan, Adjudicator

OIPC File No.: F22-91886