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Order F14-24

## BC SECURITIES COMMISSION

Elizabeth Barker  
Adjudicator

July 24, 2014

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**Summary:** The British Columbia Securities Commission applied for authorization to disregard the respondent's request for records and any similar requests he may make in the future because they are frivolous or vexatious under s. 43(b) of FIPPA. The adjudicator found that the access request and any similar future requests are not frivolous or vexatious under s. 43(b). The application was dismissed.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 2(2) and 43(b). *Securities Act* R.S.B.C. 1996, c. 418.

**Authorities Considered: B.C.:** Auth. (s. 43) 99-01 (<https://www.oipc.bc.ca/decisions/170>); Auth. (s. 43) 02-02, [2002] B.C.I.P.C.D. No. 57; Order 00-07, 2000 CanLII 7711 (BC IPC); Order F01-27 2001 CanLII 21581 (BC IPC); Order 01-34, 2001 CanLII 21588 (BC IPC); Order F02-07, 2002 CanLII 42432 (BC IPC); Order 02-23, 2002 CanLII 42448 (BC IPC); Order F10-09, 2010 BCIPC 14 (CanLII); Order F11-04, 2011 BCIPC 4 (CanLII).

**Cases Considered:** *R. v. Stinchcombe*, [1991] 3 S.C.R. 326; *Cook v. The Insurance Corporation of British Columbia*, 2014 BCSC 1289.

## INTRODUCTION

[1] This order arises from an application by the British Columbia Securities Commission ("BCSC") for authorization to disregard the respondent's April 16,

2013 request for records under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) (the “outstanding request”) and any similar requests in the future because they are frivolous or vexatious under s. 43(b) of FIPPA

## ISSUES

[2] The issues before me are as follows:

1. Whether the respondent’s outstanding and similar future requests for records are frivolous and/or vexatious under s. 43(b) of FIPPA?
2. If the answer to the first question is yes, then what relief under s. 43 of FIPPA is appropriate?

[3] Previous decisions have established that the applicant public body has the burden of proof under s. 43.<sup>1</sup>

## DISCUSSION

[4] **Background**—BCSC is a provincial government agency that reports to the provincial legislature through the Minister of Finance, who is responsible for the administration of the *Securities Act*.<sup>2</sup> BCSC’s responsibilities include:

- reviewing the disclosure that businesses, which raise capital, must provide to investors;
- reviewing registration applications from those who trade securities, provide advice, or manage portfolios and investment funds to ensure they are qualified, ethical, and solvent;
- taking action against those who contravene securities laws;
- educating investors about how to protect themselves and industry participants about how to comply with securities laws.<sup>3</sup>

[5] In the fall of 2012, the BCSC commenced enforcement action against the respondent under the *Securities Act*. The hearing regarding that matter took place over two days in October 2013 and February 2014.

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<sup>1</sup> See: Auth. (s. 43) 02-02, [2002] B.C.I.P.C.D. No. 57 and Order F10-09, 2010 BCIPC 14 (CanLII).

<sup>2</sup> R.S.B.C. 1996, c. 418.

<sup>3</sup> BCSC provided no description of the agency, so the information in this paragraph comes from its website at [www.bcsc.bc.ca](http://www.bcsc.bc.ca).

[6] On April 16, 2013, the respondent made the outstanding request to BCSC for the following:

All information from Jan 1, 2007 to April 15, 2013 including but not limited to the following: all correspondence by email, telephone, conversation notes, etc., regarding OSE Corp, Great Pacific International Inc, Logan Copper Inc, SNL Enterprises Ltd, and [the respondent] with the CCRA, Investment Industry Regulatory Organization of Canada and any other government and/or private organization my information was discussed or shared with, within Canada and/or internationally.<sup>4</sup>

[7] The BCSC responded by refusing to disclose the requested information under s. 15(1)(a) of FIPPA (harm to a law enforcement matter). The applicant disagreed with the BCSC's response and asked the Office of the Information and Privacy Commissioner ("OIPC") to review BCSC's decision. The matters in dispute were not resolved during mediation, and the applicant requested that they proceed to inquiry under Part 5 of FIPPA.

[8] BCSC requested that the Commissioner exercise her discretion under s. 56 of FIPPA in favour of not holding an inquiry into BCSC's refusal to disclose the requested information under s. 15(1)(a) of FIPPA. The Commissioner's delegate rejected that application and chose to remit the matter to inquiry. A Notice of Written Inquiry for that matter was issued.

[9] BCSC made the s. 43 application, which is the subject of this order, at the same time as it made the above s. 56 application. The inquiry regarding BCSC's decision to withhold the requested records under s. 15(1)(a) of FIPPA has been adjourned pending the outcome of the s. 43 application.

[10] **Applicable Principles**—The relevant portion of s. 43 of FIPPA state:

*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

[11] The principles governing the interpretation and application of s. 43(b) were first articulated by former Commissioner Loukidelis in Auth. (s. 43) 02-02.<sup>5</sup> In that decision, he emphasized that s. 43 is an important remedial tool to curb abuse of the right of access provided under FIPPA and that s. 43 applications require careful consideration, since relief under that section curtails or eliminates

<sup>4</sup> BCSC's initial submission, attachment 1A, p. 4.

<sup>5</sup> [2002] B.C.I.P.C.D. No. 57.

the rights of access to information created by the Legislature through FIPPA.<sup>6</sup> He also provided a non-exhaustive list of factors to assist in determining whether a request is frivolous or vexatious, which may be summarized as follows:

- 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.
- 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.
- The class of "frivolous" requests includes those that are trivial or not serious.
- 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] I agree with the above principles and factors regarding the application of s. 43(b) and will apply them to the facts of this case.

[13] **BCSC's Position**—BCSC submits that the records at issue in the outstanding request are the same records that the respondent received through the BCSC hearing process, namely everything that was of any relevance to that hearing process.<sup>7</sup>

[14] BCSC submits that the outstanding request interferes with the purpose of the *Securities Act* to establish the BCSC as an independent tribunal in control of its own processes, and that it was not the intention of the legislature that FIPPA supplement the procedures of the *Securities Act*.<sup>8</sup>

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<sup>6</sup> He also said the same in the earlier Auth. (s. 43) 99-01, (<https://www.oipc.bc.ca/decisions/170>) dealing with s. 43(a).

<sup>7</sup> BCSC's initial submission, attachment 1(a), p. 14-15.

<sup>8</sup> BCSC's initial submission, para. 63.

[15] BCSC also summarizes what it believes is the reason the respondent turned to FIPPA to request records:

As discussed in detail below, the real motivation behind [the respondent's] FIPPA request is twofold.

- 1) An intentional strategic abuse of the FIPPA process to delay and derail his Commission hearing.
- 2) An attempt to circumvent and frustrate the Commission's internal process for disclosing relevant documents.<sup>9</sup>

[16] BCSC also seeks authorization to disregard the respondent's future access requests and writes:

Since [the respondent's] request is frivolous and vexatious, any future requests the Securities Commission receives from [him] that are in the same vein, for the same purpose and in relation to [his] s. 161 hearing before the Securities Commission will also be frivolous and vexatious. As such, the Securities Commission seeks authorization from the Commissioner to disregard such requests.<sup>10</sup>

[17] **Respondent's Position**—The Respondent disputes that his outstanding request is frivolous or vexatious. He says that it is his first and only FIPPA access request regarding BCSC, and he disputes that it is an abuse of the FIPPA process.

[18] He submits that the document disclosure that was part of the BCSC hearing process pertained to information about only one particular company. The outstanding request, on the other hand, is broader and relates to information about several companies. He submits that his rights of access under FIPPA should not be circumscribed by the BCSC hearing process and whether the requested records are relevant to that process.

[19] He adds that, contrary to BCSC's claims, his outstanding request clearly did not interfere or derail the BCSC hearing process or its normal business. The BCSC hearing against him has concluded and he is awaiting the decision.

## Analysis

### *Outstanding access request*

[20] BCSC alleges that the respondent is "using the fact of the FIPPA process and its requirements as a weapon in his Commission hearing to achieve a delay

<sup>9</sup> BCSC's initial submission, para. 12.

<sup>10</sup> BCSC's initial submission, para. 64.

or adjournment of that hearing.”<sup>11</sup> BCSC also writes, “The way in which [the respondent] has used the FIPPA process in his Commission applications demonstrates an improper ulterior use of FIPPA as a strategic tool to derail the Commission hearing, justifying the relief sought under s. 43.”<sup>12</sup>

[21] I have reviewed the materials that BCSC provides in support of its assertions, including the excerpts of transcripts of the BCSC hearings. There are only two instances in those materials where the respondent refers to his FIPPA request and/or the OIPC process.

[22] The first is a letter from the respondent’s lawyer to BCSC’s senior litigation counsel to clarify if the records withheld under FIPPA have now been included in the BCSC’s disclosure for the purposes of its hearing proceedings.<sup>13</sup> That letter, and BCSC’s reply to it, reveals that BCSC has other records (in addition to those which have been or will be disclosed through the hearing process), but it will not disclose them because it believes they are irrelevant to the issues to be decided at the hearing. Considering the respondent’s lawyer’s letter in context, the letter is an attempt to clarify what has been disclosed in preparation for the BCSC hearing. I disagree that this letter is evidence that the outstanding request, made several months earlier, was made in bad faith or for a purpose other than to gain access to information that the respondent requested.

[23] The second instance where the respondent mentions his FIPPA request and the OIPC process is in a transcript of the second day of the BCSC hearing.<sup>14</sup> In the transcript, the respondent tells the chair of the hearing panel that the respondent does not believe that there has been adequate document disclosure because he has not received all of the records requested in his outstanding FIPPA access request. He also informs the chair that the OIPC will be conducting an inquiry regarding BCSC’s decision to refuse to disclose the records under s. 15(1)(a) of FIPPA. BCSC writes, “His submission to the Commission fabricated and distorted what the OIPC had said in its correspondence in an attempt to lever the FIPPA review process to gain an advantage in his Commission enforcement hearing.”<sup>15</sup> Regardless of how one characterizes what the respondent said at the BCSC hearing, many months after the outstanding FIPPA request was made, it is not evidence that the FIPPA request was made for any purpose other than to gain access to information. I am not persuaded by this transcript that the respondent made his FIPPA access request for the purpose of obstructing BCSC or as a “strategic tool to derail the Commission hearing,” as alleged.

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<sup>11</sup> BCSC’s initial submission, attachment 1A, p. 20.

<sup>12</sup> BCSC’s initial submission, para. 22.

<sup>13</sup> BCSC’s initial submission, attachment 8.

<sup>14</sup> BCSC’s initial submission, attachment 12.

<sup>15</sup> BCSC’s initial submission, para. 19-20.

[24] BCSC also points to the respondent's attempts to adjourn the BCSC hearing as evidence that his outstanding FIPPA request is vexatious and frivolous. I have reviewed the materials regarding these adjournment requests, which include excerpts of hearing transcripts and a BCSC panel decision.<sup>16</sup> There is no reference made by either party to the outstanding FIPPA access request, although the respondent challenges the adequacy of BCSC's disclosure. The adjournment requests were denied and the BCSC hearing proceeded. In my view, this material does not support the conclusion that the outstanding FIPPA access request was made primarily for a purpose other than gaining access to information. Nor does it suggest that the outstanding FIPPA access request was made for oblique or ulterior reasons like delaying or derailing the BCSC hearing, as BCSC suggests.

[25] BCSC also submits that what the respondent wrote when he requested the OIPC review regarding the outstanding request demonstrates that the request is motivated by a desire to circumvent the BCSC enforcement hearing process.<sup>17</sup> Specifically, on the *FIPPA Request for Review* form he wrote that he wants the OIPC to "order BSCS to disclose all requested information as my hearing at BCSC is to be held in October/November 2013."<sup>18</sup> In my view, this merely reveals that the respondent wants to receive the requested information prior to the BCSC hearing, and it is not evidence of an attempt to use FIPPA for the purpose of circumventing the BCSC hearing process.

[26] BCSC submits that the respondent's FIPPA "request on its face relates entirely to a procedure before the Securities Commission and is an attempt to circumvent that tribunal, despite the robust internal processes for ensuring disclosure of documents relevant to enforcement hearings."<sup>19</sup> BCSC explains that it complies with disclosure standards set out in *R. v. Stinchcombe*,<sup>20</sup> in which the Supreme Court of Canada found that the Crown has a legal duty to disclose all relevant information to the defence, subject only to information that is privileged or plainly irrelevant, with no distinction made between inculpatory or exculpatory evidence. BCSC adds that the *Securities Act* and BCSC policy provide a full range of remedies for a defendant who wishes to challenge BCSC disclosure decisions, including applying for leave to the BC Court of Appeal, which the respondent has not done. In the same vein, BCSC submits that the respondent's outstanding FIPPA access request is contrary to the purposes of s. 2(2) of FIPPA, which states, "This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public."

<sup>16</sup> BCSC's initial submission, attachments 10, 11 and 15.

<sup>17</sup> BCSC's initial submission, para. 23.

<sup>18</sup> BCSC's initial submission, attachment 7.

<sup>19</sup> BCSC's initial submission, para. 60.

<sup>20</sup> *R. v. Stinchcombe*, [1991] 3 S.C.R. 326.

[27] In my view, BCSC's submissions on this point equate to an argument that using FIPPA to seek information beyond that which is available through BCSC's hearing disclosure process is an abuse of FIPPA. I cannot agree with this stance. In previous orders, the Commissioner has explicitly rejected the notion that discovery under the *Rules of Court* or some other process displaces the right of access under FIPPA.<sup>21</sup> For example, in Order 01-27, former Commissioner Loukidelis stated:

Section 2(2) of the Act provides that the Act does not replace other procedures for access to information. By the same token, the existence of other procedures for access to information does not oust, or circumscribe, the rights of access afforded under the Act unless the Act is explicitly overridden or ousted...<sup>22</sup>

[28] In other words, FIPPA provides statutory rights of access to information independent of disclosure procedures under the *Securities Act* and BCSC's internal hearing disclosure process. The fact that the respondent seeks access through FIPPA to information that was unavailable to him through BCSC's hearing disclosure process because BCSC found it was irrelevant to its proceedings is not, in the circumstances of this case, an abuse of FIPPA or grounds for relief under s. 43(b).

[29] It is helpful at this point to recall s. 79 of FIPPA, which states:

If a provision of this Act is inconsistent or in conflict with any provision of another Act, the provision of this Act prevails unless the other act expressly provides that it, or a provision of it, applies despite this Act.

[30] Section 79 of FIPPA clearly illustrates that the Legislature intended that FIPPA should prevail over other legislation and legal approaches to the collection, use and disclosure of information unless another act expressly provides otherwise.<sup>23</sup> BCSC does not identify any inconsistencies or conflicts between FIPPA and the *Securities Act*. Nor does it identify any provisions in the *Securities Act* that expressly provide that, in the circumstances of this case, FIPPA does not apply.

[31] BCSC also says that responding to the outstanding request would have "significant negative systemic impacts on the Commission, which must dedicate considerable staff time to review documents irrelevant to the enforcement proceeding."<sup>24</sup> It adds that the respondent is "using the fact of the FIPPA process in submission to the Commission in an attempt to delay the outcome of

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<sup>21</sup> See for example: Order F02-07, 2002 CanLII 42432 (BC IPC), para. 20; Order 02-23, 2002 CanLII 42448 (BC IPC), pp.4-5; and Order 00-07, 2000 CanLII 7711 (BC IPC), pp.14-15.

<sup>22</sup> Order F01-27 2001 CanLII 21581 (BC IPC), at para. 13.

<sup>23</sup> *Cook v. The Insurance Corporation of British Columbia*, 2014 BCSC 1289, at para. 65.

<sup>24</sup> BCSC's initial submission, para. 61.

his enforcement hearing and create undue burden on Commission resources.”<sup>25</sup> However, BCSC provided no evidence that would allow me to ascertain what effort or burden was being placed on BCSC beyond that which FIPPA places on any public body required to respond to requests for records. For example, there was no evidence about the volume of information still in dispute (*i.e.*, not already disclosed through the BCSC hearing process), or the resources and time that may be needed to respond to the outstanding FIPPA request. Clearly, complying with FIPPA necessitates effort on the part of a public body. The purposes of FIPPA should not be frustrated by a public body’s subjective opinion of how onerous it is to respond to a request. The determination of whether a request is frivolous or vexatious must be supported by objective evidence.

[32] BCSC further submits that the respondent is abusing the FIPPA process by attempting to obtain documents he has already received under the Commission’s own process.<sup>26</sup> Despite this assertion, there is nothing in the materials before me that suggests that the respondent wants duplicates of records he has already received. Rather, he appears to be seeking access to the records that have not already been disclosed. While there might be some situations where a public body would be required to provide duplicates of records it had already disclosed, previous orders have found that in most cases FIPPA does not require public bodies to do so, particularly if the individual is not actually requesting duplicates.<sup>27</sup> In the circumstances of this case, BCSC does not need relief under s. 43 to address the part of the outstanding request that may involve records it has already disclosed to the respondent.

[33] In its reply submission, BCSC points to the respondent’s submission that he wants the requested records so that he can “properly defend myself against such egregious abuse of the legal process by the BCSC.” BCSC submits that the tone and content of his response “proves his request’s misguided and vexatious nature and his abuse of FIPPA for ulterior and frivolous purposes.”<sup>28</sup> I do not accept that assessment. The respondent’s stated objective of obtaining information in order to defend himself and challenge BCSC’s case is not an abuse of the rights conferred under FIPPA. Clearly, the respondent is not satisfied with just receiving the information that BCSC tells him is relevant to the issues before the BCSC. It is not unreasonable that the respondent might want to form his own opinion about what information is or is not relevant to his defence.

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<sup>25</sup> BCSC’s initial submission, attachment 1(a), p. 18.

<sup>26</sup> BCSC’s initial submission, para. 57.

<sup>27</sup> For example: Order 01-34, 2001 CanLII 21588 (BC IPC); Order F10-09, 2010 BCIPC 14 (CanLII); Order F11-04, 2011 BCIPC 4 (CanLII).

<sup>28</sup> BCSC’s reply, paras. 1-2.

[34] Considering all the materials, and for the reasons provided above, BCSC has not satisfied me that the respondent's FIPPA request was made for any purpose other than gaining access to information. Further, the respondent's access request cannot be categorized as "trivial" or not serious, given what the parties submitted about the nature of the issues before the BCSC and the consequences for the respondent.

[35] In conclusion, I find that BCSC has not established that the respondent's April 16, 2013 access request is frivolous or vexatious under s. 43(b) of FIPPA, so BCSC is not authorized to disregard it.

*Future access requests*

[36] BCSC also requests authorization to disregard any similar access requests the respondent may make in the future because it believes they will be frivolous and vexatious in the same way as the outstanding request.<sup>29</sup> Given that I have found that the outstanding request is not frivolous or vexatious, this submission is moot. Therefore, I find that BCSC has failed to establish that the respondent's future requests will be frivolous or vexatious under s. 43(b) of FIPPA, so it is not authorized to disregard them.

**CONCLUSION**

[37] For the reasons given above, BCSC's application for authorization under s. 43 of FIPPA is denied.

July 24, 2014

**ORIGINAL SIGNED BY**

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Elizabeth Barker, Adjudicator

OIPC File No.: F14-57734

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<sup>29</sup> BCSC's initial submission, para. 64.