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Order F14-13

MINISTRY OF TECHNOLOGY, INNOVATION AND CITIZENS' SERVICES

Ross Alexander
Adjudicator

May 15, 2014

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Summary: The Ministry of Technology, Innovation and Citizens' Services applied under s. 43 of FIPPA to disregard the respondent's request for message tracking log files from government email servers for a six month period. The responsive information is millions of lines of text. The Ministry argued the respondent's request is frivolous or vexatious because the respondent is not responsibly exercising his rights under FIPPA and the request is an abuse of the right to access. The adjudicator determined that the request is not frivolous or vexatious, and found s. 43 does not apply.

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

Authorities Considered: B.C.: Auth (s. 43) (02-02), [2002] B.C.I.P.C.D. No. 57; Order 03-16, [2003] B.C.I.P.C.D. No. 16 (CanLII); Order F13-16, 2013 BCIPC 20 (CanLII); Decision F10-09, 2010 BCIPC 47 (CanLII).

Cases Considered: *Crocker v. British Columbia (Information and Privacy Commissioner) et al*, 155 D.L.R. (4th) 220, [1997] B.C.J. No. 2691 (S.C.)*; Borsato v. Basra* (2000), 43 C.P.C. (4th) 96, [2000] B.C.J. No. 84.

INTRODUCTION

[1] This is an application by the Ministry of Technology, Innovation and Citizens' Services ("Ministry") for authorization under s. 43 of the *Freedom of*

Information and Protection of Privacy Act ("FIPPA") to disregard the respondent's request for information related to email messages coming from and going to government.

[2] Government servers record over 20 fields of email related information, such as the date and time of emails, sender email addresses, recipient email addresses, client IP addresses, message subjects, etc. These files that contain this information are called "message tracking logs". The respondent requested message tracking log files from government email servers between January 1, 2013 and July 3, 2013.

[3] The Ministry estimates approximately 377.2 million lines of text is responsive to the respondent's request. The Ministry states it must review this information to determine whether some of the information must be severed because disclosure of it would be an unreasonable invasion of the personal privacy of third parties (s. 22 of FIPPA). It estimates that it will take over 3 million hours of time – with the associated costs – to complete this review.[1] The Ministry submits that the request is frivolous or vexatious within the meaning of s. 43(b) of FIPPA because it is an abuse of the right of access conferred under FIPPA.

[4] The respondent denies that his request is either frivolous or vexatious. He takes issue with the Ministry's assertion that it would have to spend millions of hours on his request because computers can automatically filter out or sever private data, or anonymize certain information.

ISSUE

[5] The issue before me is whether the Ministry is authorized to disregard the respondent's access request under s. 43 of FIPPA.

[6] Previous orders have established that the public body making an application under s. 43 has the burden of proof, so the Ministry has the burden of proof for this application. However, as stated in Auth (s. 43) (02-02), "if a public body establishes a *prima facie* case that a request is frivolous or vexatious, the respondent bears some practical onus, at least, to explain why the request is not frivolous or vexatious."[2]

[1] The Ministry estimates that it would take an average of approximately 30 seconds to review each line. It bases this estimate on the fact that some lines would require no severing, but others would require investigation and severing.

[2] Auth (s. 43) (02-02), [2002] B.C.I.P.C.D. No. 57, at para. 4.

DISCUSSION

Background

[7] The respondent requested message tracking log files from government email servers for the period between January 1, 2013 and July 3, 2013. The amount of information responsive to this request is considerable, with the Ministry estimating that it is approximately 377.2 million lines of text.[3] The respondent wants the requested information to create a relationship map of interactions between individuals whose email addresses are contained in the message tracking logs.[4]

[8] To both parties' credit, it is apparent from the materials before me that they have tried to work out many of the challenges associated with this request. The Ministry has identified issues related to potential personal privacy, safety and government systems security, and considered how it can use technology to respond to the request. The respondent has amended his request and shown a willingness to attempt to work with the Ministry to facilitate disclosure of the requested information, as well as stated that he is prepared to amend his request to avoid any reasonable concerns about security. An example of the efforts both parties have made is that the Ministry identified that it is able to consistently anonymize non-government email addresses, and the respondent agreed to amend his request to have these email addresses consistently anonymized.

[9] The parties' views diverge on the issue of whether it is necessary for the Ministry to manually review all of the requested information to determine whether some of the information may unreasonably invade third party privacy (s. 22).

[10] The Ministry states that it will have to review the information to determine whether disclosure would be an unreasonable invasion of the personal privacy of third parties (s. 22), since the tracking log may reveal details of government employees' personal relationships. The Ministry submits, for example, that where there are a high proportion of emails between two employees at ministries that do not regularly interact and these emails are in the late hours, this may disclose a personal or romantic relationship.

[11] The Ministry estimates that it would take 35 hours to delete the unnecessary fields and anonymize the non-government email addresses, and then over 3 million hours to review and sever the information to determine what

[3] The respondent initially requested three specified SMTP server logs for the time period from May 1, 2013 to June 18, 2013. He then requested email message tracking logs from 9 hub/transport servers from January 1, 2013 to July 3, 2013. The respondent withdrew his first request when the Ministry informed him that the information in his first request is contained in his second request.

[4] This is the Ministry's understanding about why the respondent wants the information. The respondent does not dispute this statement or provide alternative reasons.

information can be disclosed to the respondent.[5] The Ministry estimates it would take 100 employees 17.2 years to complete the request, at a cost of over $125 million.[6]

[12] In the respondent's view, the Ministry's argument that s. 22 may apply to some information depends on whether government employees may use their email for personal correspondence. He submits that if they do not, or if they have no expectation of privacy in doing so, then the data can be *automatically* processed in a relatively short period of time. In his view, certain fields of personal data can be removed from the email message tracking log files on the computer and it is unnecessary to manually review the information.

[13] In support of his position that government employees have no expectation of privacy when using their work email accounts, the respondent points to the government's *Core Policy and Procedures* Manual, which restricts personal use of government technology resources. The policy also states that there is no expectation of personal privacy related to the use of government information technology resources except for specific privileged communications, and that emails on government networks will be managed as government records.

Section 43

[14] Section 43 entitles the commissioner to authorize public bodies to disregard requests for records if either ss. 43(a) or (b) apply. The Ministry only alleges that s. 43(b) applies.[7] Section 43(b) states:

> If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 or 29 that
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> …
>
> (b) are frivolous or vexatious.

[5] The Ministry provided calculations of its estimates, which the respondent does not challenge. The respondent did, however, offer to provide computer script that would decrease the amount of time required to delete the unnecessary fields and anonymize the non-government email addresses, which the Ministry declined because it will not run unknown or untrusted programs or scripts on government systems due to security concerns.

[6] The Ministry provided two different cost estimates, both of which were over $125 million. While FIPPA enables public bodies to charge fees for many aspects of the access to information process, s. 75(2)(b) disentitles public bodies from charging fees for severing information from a record. The Ministry states that nearly all of the work to process the request relates to severing, so it would be forced to absorb nearly the full cost of responding to the request.

[7] Section 43(a) applies to requests that "would unreasonably interfere with the operations of the public body because of the repetitious or systematic nature of the requests". Section 43(a) does not apply since the respondent's requests are not of a repetitious or systematic nature.

[15] If s. 43 applies, the public body is not required to respond to the request. Coultas J. explained the purpose of s. 43 in *Crocker v. British Columbia (Information and Privacy Commissioner) et. al.* as follows:

> ... 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 examining it in its entire context bearing in mind the purpose of the legislation. The section is an important part of a comprehensive scheme of access and privacy rights and it should not be interpreted into insignificance. The legislative purposes of public accountability and openness contained in s. 2 of the Act are not a warrant to restrict the meaning of s. 43. The section must be given the "remedial and fair, large and liberal construction and interpretation as best ensures the attainment of its objects" that is required by s. 8 of the Interpretation Act, R.S.B.C. 1996, c. 238.[8]

[16] Former Commissioner Loukidelis subsequently considered the application of s. 43(b) in depth in Auth (s. 43) 02-02.[9] He confirmed the need to keep in mind the purposes of FIPPA when considering the terms frivolous and vexatious, stating that:

> In interpreting the words "frivolous" and "vexatious", I have kept in mind the accountability goal of the Act. I have also kept it in mind that abuse of the right of access can have serious consequences for the rights of others and for the public interest. As I said in Auth. (s. 43) 99-01, at p. 7:
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> > … 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.
> >
> > …

[17] Former Commissioner Loukidelis then provided a list of factors that may be relevant in determining whether the request is frivolous or vexatious, which I paraphrase below:

- Regardless of how it is so, a frivolous or vexatious request is one that is an abuse of the rights conferred under the Act.

[8] [1997] B.C.J. No. 2691.
[9] [2002] B.C.I.P.C.D. No. 57.

- The determination of whether a request is frivolous or vexatious must, in each case, keep in mind both the legislative purposes of FIPPA and that a public body's subjective view that the request is vexatious does not, on its own, merit relief under s. 43(b), since a request may be vexing or irksome to the public body because it will reveal information the public body might prefer not to disclose.

- 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 term frivolous includes requests that are trivial or not serious.

- A "vexatious" request 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.[10]

[18] I adopt the approach set out in Auth (s. 43) 02-02 and apply it here.

[19] The Ministry submits that a vexatious request is one that constitutes an abuse of the right of access conferred by FIPPA, and that bad faith is not required in order for a request to be vexatious. The Ministry also relies on *Borsato v. Basra*,[11] which states that a "pleading is vexatious if it is without bona fides, is "hopelessly oppressive" or causes the other party anxiety, trouble or expense". *Borsato* was cited with approval in Auth (s. 43) 02-02, but with caution because the court's consideration of frivolous or vexatious pleadings is a different context than for s. 43 of FIPPA.

[20] The Ministry submits the request is not within the spirit of FIPPA and is vexatious because it is plain and obvious that this request will cause a great amount of hardship for the Ministry and, subsequently, hardship to other applicants exercising their rights to access under FIPPA.

[21] In my view, it would be unreasonable to require the Ministry to spend millions of hours responding to this request. However, assuming for the sake of argument only that this is true, this fact in isolation does not mean that the respondent's request is frivolous or vexatious under s. 43 of FIPPA.[12]

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[10] [2002] B.C.I.P.C.D. No. 57 at para. 27.
[11] 43 C.P.C. (4th) 96, [2000] B.C.J. No. 84.
[12] For clarity, I note that requiring a public body to respond to a request does not necessarily mean that it must create, sever and/or disclose the requested records. FIPPA has a number of provisions regarding how and to what extent public bodies must respond to requests. For example, there is s. 4(2) (records exempt from disclosure), s. 6(1) (duty to assist applicants), s. 6(2) (creating records), ss. 7 and 75 (fees and deposits), and s. 8 (contents of response). For example, see Order 03-16, [2003] B.C.I.P.C.D. No. 16.

[22] Section 43 is a blunt tool that authorizes public bodies to disregard requests for records. The effect of s. 43 is that the person requesting records is denied the rights conferred by FIPPA for that request.[13] As such, s. 43(b) has been applied in circumstances where the purpose of the request is to attempt to pressure the public body rather than make a genuine request for records[14] or the respondent is attempting to re-litigate an issue,[15] not when a respondent is making a request for the first time and genuinely wants access to the information.

[23] In this case, there is no suggestion that the respondent was making the request in bad faith or that he does not genuinely want access to the information he is requesting. Further, the respondent does not suggest the Ministry be forced to spend millions of hours to respond. His position is that the Ministry can respond to his request using technology, and in a manner that does not require the Ministry to spend a significant amount of time to respond. It is not necessary, and I expressly decline, to make a finding on this issue here.

[24] While I expressly decline to express my view as to the merits of whether the Ministry must ultimately create and disclose the requested records, I am not satisfied that it is appropriate to deny the respondent of his general statutory rights under Part 2 of FIPPA by authorizing the Ministry to disregard his request. In my view, considering the circumstances of this case, the respondent's request is not an abuse of the right of access conferred by FIPPA and the request is neither frivolous nor vexatious under s. 43.

[25] I find that the Ministry is not permitted to disregard the respondent's request under s. 43. Again, I reiterate that nothing I have said here should be taken to express any view on the merits of how the Ministry must respond to the respondent's request, including whether the Ministry is required to create a record of the requested information pursuant to s. 6(2), whether any exemptions under Part 2 of FIPPA apply to exempt the information from disclosure, or whether the Ministry can reasonably sever the record pursuant to s. 4(2) if some of the record is exempt from disclosure under Part 2 of FIPPA.[16]

CONCLUSION

[26] For the reasons given above, I find that the Ministry is not authorized under s. 43 of FIPPA to disregard the request for government email message

[13] Limits may also be ordered with respect to the person's subsequent requests under FIPPA. For example, see Order F13-16, 2013 BCIPC 20 (CanLII).
[14] Order F13-16, 2013 BCIPC 20 (CanLII)
[15] Decision F10-09, 2010 BCIPC 47 (CanLII).
[16] Section 22, which is the issue where the parties diverge, is one of the exemptions under Part 2 of FIPPA.

tracking log files from government email servers between January 1, 2013 and July 3, 2013.

May 15, 2014

ORIGINAL SIGNED BY

Ross Alexander
Adjudicator

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