OIPC File F13-54010

IN THE MATTER OF THE APPLICATION

by the

MINISTRY OF TECHNOLOGY, INNOVATION AND CITIZENS' SERVICES
(Public Body)

for authorization under section 43 of the *Freedom of Information and Protection of Privacy Act* to disregard requests from

PAUL RAMSEY

Initial Submissions for the Public Body

March 4, 2014

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1. Description of the Application

1.01 The Ministry of Technology, Innovation, and Citizens' Services (the "Ministry") applied under section 43 of the *Freedom of Information and Protection of Privacy Act* (the "Act") on July 26, 2013, for the Information and Privacy Commissioner's authorization to disregard requests made by Paul Ramsey.

2. Issues under Review in the Inquiry and the Burden of Proof

2.01 The issue is whether the Information and Privacy Commissioner can, under section 43, authorize the Ministry to disregard Mr. Ramsey's request on the basis that it is frivolous or vexatious.

2.02 With respect to the burden of proof, the Ministry generally accepts the burden of proving that a request is frivolous or vexatious. However, the Ministry notes that Mr. Ramsey also bears some practical onus, as explained by the Commissioner in Auth. s.43 (02-02):

> [4] ... As ICBC acknowledges, previous decisions dealing with s. 43 have established that the public body bears the burden of establishing entitlement to relief under s. 43 and this continues to be the case. Having said this, 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.

3. Background to the Request

3.01 On June 18, 2013, Mr. Ramsey made a request to the Ministry for "SMTP server logs for spruce.itsd.gov.bc.ca, pine.itsd.gov.bc.ca, leaf.itsd.gov.bv.ca" for the time period of May 1, 2013 to June 18, 2013.

Affidavit C. Elbahir at para. 12

3.02 On July 4, 2013, Mr. Ramsey made a request to the Ministry for the following records for the time period of January 1, 2013 to July 3, 2013:

> Message tracking log files (files beginning with MSGTRK in %ExchangeInstallPath%TransportRoles\Logs\MessageTracking) from e7hub01.idir.bcgov, e7hub02.idir.bcgov, e7hub03.idir.bcgov, e7hub04.idir.bcgov, e7hub05.idir.bcgov, e7hub06.idir.bcgov, e7hub07.idir.bcgov, e7hub08.idir.bcgov, e7hub09.idir.bcgov
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> Affidavit C. Elbahir at para. 13

3.03 On July 26, 2013, the Ministry applied under section 43 of the Act to disregard Mr. Ramsey's June 18, 2013, and July 4, 2013 requests.

Affidavit C. Elbahir at para. 14

3.04 Subsequently, Mr. Ramsey withdrew his June 18, 2013 request. Mr. Ramsey also modified the July 4, 2013 request to exclude subject lines of emails and to consistently anonymize non-government email addresses in the requested records (the "Request"). However, it continues to include other fields within the logs.

Affidavit C. Elbahir at para. 15

3.05 The matter was not resolved in mediation, and the Ministry proceeds with this application on the basis of the Request as it was modified.

4. Argument of the Public Body

a. Ministry of Technology, Innovation, and Citizens' Services

4.01 The Ministry provides a multifaceted role to the Province of British Columbia through a number of program areas. It provides services to the citizens of British Columbia as well as much of the enabling infrastructure and services that the government of British Columbia needs to perform core business operations.

Affidavit D. Ehle at para. 3

4.02 The Office of the Chief Information Officer (the "OCIO") is one program area within the Ministry. The OCIO is government's chief information management\information technology strategist, and is responsible for the security of government's electronic information and developing policies, standards and programs that protect sensitive and personal information.

Affidavit D. Ehle at paras. 4-6

4.03 Information Access Operations (the "IAO") is another program area within the Ministry. The IAO delivers services on behalf of provincial ministries with respect to fulfilling obligations under the Act, the *Document Disposal Act*, and the Core Policy and Procedures Manual chapter 12 through the management of records within the custody and control of the Province.

Affidavit C. Elbahir at para. 4

4.04 The IAO processes Freedom of Information requests on behalf of all government ministries. This includes reviewing requested records for information that must or may be severed pursuant to the Act.

Affidavit C. Elbahir at para. 5

4.05 The IAO has approximately 100 Freedom of Information related FTE's devoted to the processing of requests for records under the Act. The manager currently dealing with the Request has six Freedom of Information analysts on her team.

Affidavit C. Elbahir at paras. 6-9

4.06 The IAO receives and processes approximately 10,000 Freedom of Information requests a year; however, the average number of general Freedom of Information requests has increased each year from 2009 when Freedom of Information services were consolidated under the IAO.

Affidavit C. Elbahir at para. 10

b. The Nature of the Request

4.07 The Request is for message tracking logs for the time period of January 1, 2013 to July 2013. Though Mr. Ramsey has requested the message tracking logs from 9 hub/transport servers during these times, there are only 5 such email servers with the OCIO.

Affidavit D. Ehle at para. 20

4.08 Generally, two message tracking log files are generated per day per server during business days and one file per day per server during weekends. The size of the first file is approximately 310,000 lines of information per day, while the second file averages 110,000 lines per day.

Affidavit D. Ehle at paras. 18-19

4.09 Based on a conservative estimate of the average number of lines of information per day, multiplied across five servers over a 6 month period, OCIO approximates that the Request equates to approximately 377,200,000 lines of text.

Affidavit D. Ehle at para. 21

4.10 Message tracking log files contain information regarding all email messages coming from and going to government. Each line of these logs contain information under a number of headings, including the date and time of the message, the sender id, and the recipient id. The Ministry understands that only the information under the date and time of the message, sender id, and recipient id fields is requested.

Affidavit D. Ehle at paras. 8-9, 11

4.11 OCIO staff must process every message tracking log file to delete the necessary fields. The OCIO will also consistently anonymize any addresses that are non government addresses and will process the

Request to anonymize any government email addresses where disclosure could reasonably be expected to harm the safety of that individual.

Affidavit D. Ehle at para. 11-15

4.12 After the OCIO completes the above, the records relating to the Request will contain government email addresses in the sender address and recipient address fields, as well as the date and time of the message. The email addresses will include email addresses of Ministry employees as well as seventeen non-ministry organizations.

Affidavit D. Ehle at paras. 15, 16

c. Personal Use of Government Email

4.13 Government employees are permitted to use their email for personal correspondence in certain circumstances both to individuals outside of government and to individuals within government.

Affidavit D. Ehle at paras. 22-23

4.14 The Ministry submits that the information contained in the approximately 377,200,000 lines creates a very large data set. It is a list of all emails across government over a six month period, containing who the emails were sent to and received by, and the date and time of the message.

4.15 While the information in a single line of the records is seemingly innocuous, when combined with many millions of similar lines of information it creates a robust picture of an employee's interactions. The Ministry submits that is possible to analyze this data to determine who an employee interacts with, when these interactions are taking place, and how frequently the interactions are taking place. In doing so, relationship maps can be created to determine relationships between individuals and patterns of their communications.

Affidavit D. Ehle at para. 24

4.16 The Commissioner has held in Order 00-53 that public body employees are third parties for the purposes of section 22 of the Act. As employees may use their work email for personal interactions with other government employees, the Ministry submits that such a relationship map would contain at least some personal information where disclosure of that information would be an unreasonable invasion of a third party's personal privacy by revealing details of their personal relationships.

4.17 As an example, 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. It may, for example, disclose an individual's marital status. Alternatively, disclosure of such email patterns could harm an individual's reputation where it indicates a relationship with someone other than their spouse.

4.18 Further, the Commissioner has noted in a number of Orders and in Investigation Report F11-02 that disclosure under Part 2 is to be treated as disclosure to the world at large. While Mr. Ramsey may not, for example, be able to come to a conclusion that a high proportion of communications between two individuals indicates a romantic relationship, others closer to that individual will.

d. Processing of the Request by the IAO

4.19 As the message tracking logs create a picture of who an individual is interacting with, how frequently they are interacting, and when, the Ministry submits that it is required to review the information in the message tracking log files to determine whether it contains personal information that must not be disclosed pursuant to section 22 of the Act. While some lines will require no severing, others will require investigation and possible severing of information by the IAO.

Affidavit C. Elbahir at paras. 18-19

4.20 Further, if fields other than the date and time of the message, the sender id, and the recipient id are to be included in the Request, the IAO will likely need to liaise with OCIO to determine if there are any risks to security of government systems in order to determine whether the Ministry may withhold this information.

Affidavit C. Elbahir at para. 20

4.21 Finally, the IAO may also need to consult with other ministries and other third parties throughout the processing of the Request. It is unclear how much time this would require or which ministries or third parties would need to be contacted before IAO begins processing the Request.

Affidavit C. Elbahir at para. 20

4.22 Based on the above and an understanding of the nature of the records, the IAO has arrived at a rough approximation of an average of 30 seconds to review each of the 377,200,000 lines.

Affidavit C. Elbahir at para. 19

4.23 A 30 second review of each line equates to 120 lines per hour. At 120 lines per hour, it would take an employee 1,720.5 years to complete this review. If all 100 Freedom of Information related FTE's were to work on just the Request, it would take 17.20 years to complete. This calculation is:

377,200,000 lines/120 lines per hour = 3,143,333 hours to review
3,143,333 hours/1827 hours per employee per year = 1720.5 years
1720.5 years/ 100 staff = 17.20years

4.24 As such, the great majority of the time required by this request will not be with the OCIO in gathering the records. Rather, it is with respect to the time required by IAO to process and sever the records. The time spent by IAO to process and sever the records is not time the Ministry can charge fees for and, as such, the Request will result in an enormous cost to the

Ministry. Further, time extensions under the Act would not alleviate the issues created by the Request.

Affidavit C. Elbahir at paras. 21-23

e. Frivolous or Vexatious

Interpretation of section 43

4.25 Section 43 of the Act reads:

> If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 or 29 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.

4.26 The interpretation of section 43 was considered by the Supreme Court of British Columbia in *Crocker v. Information and Privacy Commissioner for B.C. and BC Transit* ("*Crocker*"). In that case the Court held that section 43 is remedial and designed to alleviate administrative hardship. At para. 33, the Court stated:

> Section 43 is an important remedial tool in the Commissioner's armory 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.*

4.27 In Order 110-1996 the previous Commissioner stated (at p. 5):

> In responding to the applicant's submissions, the Superintendent of Schools for School District No. 39 (Vancouver) made a very considerable understatement when he said that the extent of the submissions on both sides indicates "this has been a very time-consuming and complex series of requests." He estimated that the School Board has spent ninety hours of staff time in preparing its submission and its reply to the applicant's submission

> and over 100 hours responding to the applicant's 21 requests in 1995, plus hours spent on mediation of issues with my Office. [emphasis added]

4.28 Auth. (s. 43) 99-01 is in line with *Crocker,* and also with what the previous Commissioner had said (at p. 6) in Order No. 110-1996 (prior to *Crocker*):

> I agree with the School Board in the present matter that this applicant is not using the Act for the purposes for which it was intended and that he is not, indeed, acting in good faith. (Reply Submission of the Vancouver School Board, pp. 1, 2) The fundamental problem is that the applicant is trying to use the Act to prove that his original report about the Carnegie Adult Learning Centre is correct and that the Vancouver School Board is engaged in at least illicit activities that the applicant wants to expose to the public.
>
> I have several reactions to the nature of this particular inquiry. I am sympathetic to the plight of the School Board in this particular instance. I think that its efforts to help this applicant have been excessive in light of its other responsibilities to students and the taxpayers. A statutory scheme of access to general and personal information is only going to work for innumerable public bodies and applicants if common sense and responsible behaviour prevail on both sides. This is not the first applicant whom I have to come to regard as making excessive, and indeed almost irrational, demands on a public body. The most problematic applicants are those who are using the Act as a weapon against the public body after an unrelated episode that has left them unhappy or contemplating litigation or, as in this case, preparing to arbitrate a claim of unjust dismissal. … [Emphasis added]

4.29 In short, it is well-recognized, both in Commissioners' decisions and in court judgments, that access rights must not be abused, and that section 43 is an important and powerful tool to remedy such abuses.

4.30 In Auth. (s.43) 02-02, the Commissioner said the following with respect to the meaning of section 43(b) (at pp. 4 through 7):

> [14] **3.2 Meaning of Section 43(b)** – As I indicated earlier, this is the first time the meaning of s. 43(b) has been considered. The phrase "frivolous or vexatious" is new to the Act, but is familiar in other settings, including freedom of information legislation elsewhere in Canada. My interpretation of that phrase in s. 43(b) must take into account, not only the legislative purpose underlying s. 43, but the legislative purposes of the Act as a whole. As well, in considering how the words "frivolous or vexatious" have been interpreted in other settings, I must keep in mind differences in statutory language and purpose.
>
> ....
>
> [20] ICBC also cites Commissioner Tom Wright's decision, under Ontario's *Freedom of Information and Protection of Privacy Act*, in Order M-618, [1995] O.I.P.C. No. 385. In that case, Commissioner Wright said (at p. 15) that "the word 'frivolous' is 'typically associated with matters that are trivial or without merit" and that the "word 'vexatious' is usually taken to mean with intent to annoy, harass, embarrass or cause discomfort".

[21] In Order M-618, Commissioner Wright also said, at p. 14, that definitions of the words "frivolous" and "vexatious" must be viewed in context:

> ... Government officials may often find individual requests for information bothersome or vexing in some fashion or another. This is not surprising given that freedom of information legislation is often used as a vehicle for subjecting institutions to public scrutiny. To deny a request because there is an element of vexation attended upon it would mean that freedom of information could be frustrated by an institution's subjective view of the annoyance quotient of particular requests. This, I believe, was clearly not the Legislature's intent.

[22] I agree with this note of caution. By its nature, an access to information request may be vexing or irksome to the public body. The purpose of access to information is, as s. 2(1) of the British Columbia Act explicitly provides, to "make public bodies more accountable to the public". A request may be vexing or irksome to the public body because it will reveal information the public body might prefer not to disclose, but I cannot imagine a case in which a public body's perception that a request is vexatious in this way could, on its own, ever merit relief under s. 43(b).

....

[25] 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:

> ...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.
> ...

[26] As Commissioner Flaherty said in Order No. 110-1996, [1996] B.C.I.P.C.D. No. 36, the right of access under the Act must not be abused as a weapon of information warfare. This still holds true in the wake of this year's s. 43 amendment.

[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.
>
> 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. [emphasis added]

4.31 The Commissioner has thereby held that a vexatious request is one that constitutes an abuse of the right of access conferred by the Act. The Ministry agrees with that statement and submits that the evidence demonstrates that the Applicant has abused his rights under the Act.

4.32 While the Commissioner noted at paragraph 22 of Auth (s.43) 02-02 that vexatious requests include requests made in bad faith, the use of the word "include" by the Commissioner indicates that bad faith is not required in order for a request to be vexatious.

4.33 Finally, the Commissioner has noted with approval the finding of Master Baker in *Borsato* v. *Basra* (2000), 43 C.P.C. (4th) 96, [2002] B.C.J. No. 84 (appeal allowed on another ground), that a pleading is vexatious if it is without *bona fides*, is "hopelessly oppressive" ***or*** causes the other party anxiety, trouble or expense.

The Request is frivolous or vexatious

4.34 The Ministry submits that Mr. Ramsey is not using the Act for the purpose for which it was intended. His rights under the Act are not being exercised responsibly and his Request represents an abuse of these rights.

4.35 The Ministry submits that this request will undoubtedly result in undue trouble and great expense for the Ministry and, as such, the Request is vexatious within the meaning of s.43(b) of the Act.

4.36 The Ministry submits that this request will overburden the Ministry as the Request will take between 17.20 years (if all employees are processing the request full time) and 1720.5 years (if one IAO employee is processing the request fulltime). This time required for the Ministry to respond is much greater than the amount of time at issue mentioned in Order 110-1996 above. Further, this is not time that the Ministry can apply fees to, nor is it an amount of time where time extensions under the Act would sufficiently ease the burden on the Ministry. The Ministry submits that the scheme of access to general and personal information under the Act cannot work where requests are allowed which will take years to process.

4.37 While any request will take time to process, the Ministry submits that it is clear that the Request is exceptional in the amount of time and resources it will demand and it will unduly take away from IAO's ability to properly process other applicant's access requests in a timely fashion. The Request will thereby threaten legitimate exercises of the right of access by others, including the right to access their own information.

4.38 The statutory scheme of access to general and personal information can only work for innumerable public bodies and applicants if common sense and responsible behavior prevails on both sides. The Ministry submits that the statutory scheme cannot work where, as here, the Request will ensure that other duties of IAO staff will be greatly interfered with and

undermined. It will, in effect, allow the right of one to substantially and negatively affect the rights of all other applicants.

4.39 The Ministry submits that such use of the right of access and derogation of other individuals' rights to access is not in keeping with the spirit or purpose of the Act. Further, not only does it affect the Ministry's ability to respond to access requests, it will also harm the public interest because it will greatly add to the Ministry's cost of complying with the Act.

4.40 The Ministry submits that this is exactly the sort of situation which section 43 exists to guard against. Section 43 should protect access rights, guard against unreasonable interference with a public body's operations, and maintain an acceptable level of service to all applicants. To authorize the Ministry to disregard the Request will achieve this purpose.

4.41 Finally, the Ministry submits that the Request is not vexatious in the sense that it causes the Ministry to disclose information that it would rather not, or in any other sense not intended to be covered by s. 43. Rather, the Ministry submits that the Request is vexatious as it is plain and obvious that this request will cause a great amount of administrative hardship for the Ministry and, subsequently, hardship to other applicants exercising their own right to access under the Act.

4.42 In conclusion, the Request is not specific to a subject matter, issue, branch of government or employee and therefore creates approximately 377,200,000 lines of information. This is information that must be reviewed. As such the Request will consume the careers of the Ministry employees tasked with processing it, taking away their ability to process and respond to other requests or requiring the contracting out of work creating great public expense. The Request will overburden the Ministry will threaten or, at very least, diminish a legitimate exercise of that same right of access by others. Therefore, the Ministry submits that the Request

is not in keeping with the purposes of the Act and is of the position that the costs of fully responding to this Request would bring the Act into disrepute.

4.43 The Ministry submits that the Request is therefore frivolous or vexatious.

Relief under section 43

4.44 In *Crocker*, Coultas J. held that the Commissioner's "discretion" under s. 43 is "not completely unfettered". He went on to say the following:

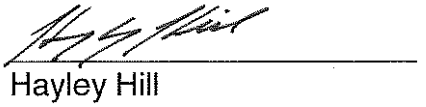
> [45] The remedy must redress the harm to the public body seeking the authorization. If the remedy is wholly disproportionate to the harm inflicted, it may be set aside. In my respectful opinion, the authorization to BC Transit to disregard all requests for information by these Petitioners for one year was wholly disproportionate and clearly wrong. That authorization prevents the Petitioners themselves from accessing personal information. The Act contemplates that individuals will have free and full access to their own personal information, subject only to the express limitation in s. 19 of the Act.

4.45 The relief sought is to disregard the Request. The Ministry submits that this relief balances the legitimate interest of Mr. Ramsey to be able to seek access to records in the future, and the Ministry's interests in avoiding the undue burden that arises from processing frivolous and/or vexatious requests. The Ministry submits that that this remedy will appropriately redress the administrative hardship and operational burden arising from the Request and is proportionate to that harm.

5. Relief Sought

5.01 The Ministry seeks an order that the Ministry is authorized to disregard Mr. Ramsey's Request.

All of which is Respectfully Submitted.
Dated this 4th day of March, 2014
Victoria, British Columbia.



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