

**ALBERTA
INFORMATION AND PRIVACY COMMISSIONER**

REQUEST TO DISREGARD F2020-RTD-06

November 23, 2020

TOWN OF DEVON

Case File Number 014044

- [1] The Town of Devon (the “Public Body”) requested authorization under section 55(1) of the *Freedom of Information and Protection of Privacy Act* (“FOIP” or the “Act”) to disregard an access request (with sub-parts) from an individual whom I will refer to as the Applicant.
- [2] For the reasons outlined in this decision, I find the Public Body has not met its burden to establish that the requirements of section 55(1) of FOIP are met. As such, the Public Body’s application for authorization to disregard the Applicant’s access request is dismissed. The Public Body is required to respond to the Applicant in accordance with its obligations under FOIP.

Commissioner’s Authority

- [3] Section 55(1) of the FOIP Act gives me the power to authorize a public body to disregard certain requests. Section 55(1) states:

55(1) If the head of a public body asks, the Commissioner may authorize the public body to disregard one or more requests under section 7(1) or 36(1) if

(a) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make those requests, or

(b) one or more of the requests are frivolous or vexatious.

Background

- [4] The Applicant and the Public Body are involved in a dispute regarding the Public Body’s water rates. The evidence before me is that the Alberta Utilities Commission issued two decisions against the Public Body, one of which remains an active litigation matter before the Alberta Courts. The Public Body argues that because the Applicant’s access request relates to this ongoing matter, it is frivolous or vexatious under section 55(1)(b).

The Access Request

[5] On October 29, 2019, the Public Body received an access request for the following:

- 1) Devon's agreement with [name redacted] as well as rate and amount paid to [name redacted] to represent Devon up to October 28, 2019.
- 2) Total amount of dollars paid by Devon to [a law firm] for legal services regarding all advice and legal representation while acting for the Town of Devon on all matters regarding the AUC (Alberta Utilities Commission) claim and action between Imperial and the Town from January 2018 to settlement date regarding the improper bylaw structure for water rates.
- 3) The total amount of dollars/time paid by Devon to [a law firm] for legal services and advice for the matters regarding the AUC claim between Imperial and Devon for the Issue of "Discriminatory Water Rates" from April 2019 to October 28, 2019.
- 4) The total cost, tender documents (scope of work), change orders and final cost of upgrades to the Devon Bulk water station for all work done in 2019 and 2018 (if applicable). Please include detailed council minutes relating to the decision to upgrade the bulk/key lock station, distribution and associated buildings and structures.
- 5) Council minutes regarding the Imperial-AUC ongoing case.
- 6) Any staff recommendations as to how Imperial's rate of \$4.75 per cu/m was calculated include all discussions.

Analysis

Section 55(1)(b) – Request is frivolous or vexatious

[6] I have reviewed and carefully considered the parties' submissions. As the Public Body has not argued that section 55(1)(a) applies, there is no need to consider it further. The Public Body argues only that the Applicant's request is frivolous or vexatious.

[7] A "frivolous" request is typically associated with matters that are trivial or without merit. Information that may be trivial from one person's perspective, however, may be of importance from another's.

[8] The meaning of "vexatious" has been discussed in a number of recent court decisions¹, as well as previous decisions from my office regarding requests to disregard access requests. Often, a vexatious request is one that involves misuse or abuse of a legal process. Vexatious has been defined in *Black's Law Dictionary* (7th Edition) as without reasonable or probable cause or excuse; harassing; annoying. The class of vexatious requests includes those made in bad faith, such as for a malicious or oblique motive. Such requests may be made for the purpose of harassing or obstructing a public body.

¹ See for example, *Jonsson v Lymer*, 2020 ABCA 167 and *Unrau v National Dental Examining Board*, 2019 ABQB 283.

[9] A request is not vexatious simply because a public body is annoyed or irked, or because the request is for information that the release of which may be uncomfortable for the public body. Further, a request is not vexatious simply because the Applicant may also be involved in litigation with the Public Body.

[10] The Public Body argues that based on the timing of the access request, which was days after the most recent Alberta Utilities Commission decision, as well as the Applicant's position and involvement in the matter, that the Applicant "has an invested interest in the nature of the requested information beyond just access to information". It states that the "timing and nature of the Request is strongly indicative of a motive other than access to information and the Town should be permitted to disregard the Request".

[11] The Public Body further submits:

On the basis of the timing of the Request, the information sought pursuant to the Request, and the history of the dispute between the Town and Imperial and the involvement and background of the Requester, the Town submits that the Requester has made the Request for purposes of an ulterior motive besides access to information, and more specifically for the purposes of:

- a. harassing the Town with respect to expenses paid in relation to the dispute between the Town and Imperial;
- b. attempting to extort a benefit from the Town with respect to water rates that may be established by the Town's council;
- c. attempting to obtain a collateral advantage as against the Town with respect to complaints and litigation arising out of the water rates imposed on Imperial by the Town;
- d. revenge against the Town;
- e. causing harm to the Town;

The request seeks information directly relevant to an ongoing dispute between the Town and Imperial that will be subject to further litigation proceedings (i.e. an application to the Court of Appeal), including the costs incurred by the Town with respect to responding to the complaints. It is frivolous and vexatious to use the *FOIP Act* in an attempt to gain an advantage over the Town respecting an ongoing dispute between the parties. There is no reason for the Requester to want the requested information except for purposes of using this information with respect to the ongoing dispute between the Town and Imperial or to attempt to discredit, harass or embarrass the Town and its administration, Council and consultants.

[12] In further support of its application, the Public Body provided a sworn Affidavit. The Affidavit outlined a brief history of the Applicant's involvement in the water dispute with the Public Body, and included the decisions of the Alberta Utilities Commission. The Affiant further noted his belief that on the basis of the timing of the Request, the information sought pursuant to the Request and the history of the dispute that the

Applicant had made the Request for purposes of an ulterior motive as is quoted above from the Public Body's submission.

- [13] In an application under section 55(1)(b) of FOIP, the Public Body bears the burden to establish that the request is frivolous or vexatious. The Applicant chose to make a submission, which I have carefully considered, although I do not find it necessary to quote at length. Briefly, while the Applicant acknowledges the access request relates to the ongoing water rate dispute, he disagrees with the Public Body's argument that his request is frivolous or vexatious and explains his purpose in requesting the information at issue.
- [14] Essentially, the Public Body argues that because the Applicant is involved in ongoing litigation and his access request appears to relate to this ongoing litigation, his access request is frivolous or vexatious.
- [15] Based on the Alberta Utilities Commission decisions relating to the water dispute, and the ongoing litigation, it is clear that the access request is not frivolous.
- [16] The fact that an access request may relate to litigation between parties is, by itself, insufficient to establish that an access request meets the requirements of section 55(1). For example, in F2020-RTD-04, I stated, "Seeking information for the purpose of an anticipated legal proceeding is not an abuse of the FOIP Act" (emphasis in original).² Although in that case I found the Applicant's access request was vexatious because the broad range of legal and administrative proceedings anticipated by the Applicant appeared to be intended as harassment and revenge against the Public Body, those facts do not apply here. The litigation process between these parties is ongoing. Additionally, I held in F2020-RTD-05 that the Applicant's access requests under FOIP in addition to the civil litigation process were insufficient to establish that the requirement of 'systematic and repetitious' under section 55(1)(a) had been met.³
- [17] In Order F2006-028, the former Commissioner held that an applicant's decision to obtain information through the litigation process did not make an access request under FOIP frivolous or vexatious. Former Commissioner Work stated as follows:

[para 11] I find that the Applicant's decision to use the FOIP process instead of Columbia's information disclosure process does not make the Applicant's access request under the FOIP Act frivolous or vexatious. Section 6 of the FOIP Act gives an applicant a right of access under the FOIP Act. The FOIP Act does not limit this right of access if another access process exists outside of the FOIP Act. Furthermore, section 3(a) clearly provides for a dual process, and states that the FOIP process is in addition to other existing procedures for access to information. Section 3(a) reads:

3 *This Act*

² F2020-RTD-04 at para 29

³ F2020-RTD-05 at paras 33 – 36.

(a) Is in addition to and does not replace existing procedures for access to information or records, ...

[para 12] Similarly, I find that the Applicant's decision to obtain information through the litigation process does not make the Applicant's access request under the FOIP Act frivolous and vexatious. In Order 97-009, the former Commissioner addressed an applicant's right to use the litigation process in addition to the FOIP process. The Commissioner referred to section 3(a) of the FOIP Act. The Commissioner held that the Rules of Court do not prevent an applicant from making a request for information under the FOIP Act, nor does the FOIP Act prevent an applicant from making an application for information when an applicant uses the discovery process under the Rules of Court to get the same information.

[18] Civil litigation is a different process than an access request under FOIP. For example, information that an individual may be wholly entitled to under the Rules of Court, may be subject to redactions under FOIP. Conversely, in an access request under FOIP, an individual may (or may not) be able to obtain more information than under the litigation process. On the basis of the evidence before me, I am not satisfied by the Public Body's submission that the timing of the access request, the information sought in the access request, or the history of the dispute between the Applicant and the Public Body establishes that the access request is vexatious under section 55(1)(b) of FOIP.

Decision

[19] The Public Body has not met its burden to establish that the Applicant's access request is frivolous or vexatious. The Public Body's application under section 55(1)(b) of the FOIP Act is dismissed.

[20] The Public Body is required to respond to the Applicant in accordance with the FOIP Act.

Jill Clayton
Information and Privacy Commissioner

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