

ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

REQUEST TO DISREGARD P2023-RTD-01

January 11, 2023

CARON & PARTNERS LLP

Case File Number 027713

- [1] Caron & Partners LLP (the “Organization”) requested authorization under section 37 of the *Personal Information Protection Act* (“PIPA” or the “Act”) to disregard an access request made by an applicant (the “Applicant”).
- [2] For the reasons outlined in this decision, the Organization is not authorized to disregard the Applicant’s access request under section 37 of PIPA. The Organization must process the Applicant’s access request in accordance with PIPA.

Commissioner’s Authority

- [3] Section 37 of PIPA gives me the power to authorize an organization to disregard certain requests. Sections 37(a) and (b) state:

37 If an organization asks, the Commissioner may authorize the organization to disregard one or more requests under section 24 or 25 if

- (a) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the organization 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 Organization states it received an access request from a former employee on September 4, 2022. The access request provides some background information about the Applicant's relationship with the Organization and requests the following:

I want every document from my resume to all matters after I was hired. I want every document related to my termination and the complaints I made about [name redacted]. I want my full employment file without redactions.

- [5] The Organization provided the following submission:

A copy of this individual's access request is attached to this letter. We note that [the Applicant] purports to make this request under the FOIP Act, but since our firm is not a public body, we would be governed under PIPA instead.

This is not the first time this individual has made such a request. A thorough history was laid out by our firm in a letter to your office on March 6, 2013, which is attached for your reference. On April 12, 2022, our firm was authorized to disregard a request by this individual (case file 009257). Nothing has changed for our firm with respect to this matter since that decision.

- [6] The Applicant was invited to provide a submission, but did not respond.

Analysis

Burden of Proof

- [7] PIPA is silent on the burden of proof associated with a request to disregard an access request under section 37. However, former Commissioner Clayton, in speaking of where the onus lies in the nearly identical provision of section 55(1) of the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act") stated the following:¹

The proposition that "he who asserts must prove" applies across all areas of law, unless there is a specific reverse onus: for example, see *Garry v Canada*, 2007 ABCA 234, para 8; and *Rudichuk v Genesis Land Development Corp*, 2017 ABQB 285, para 27. The proponent of a motion needs evidence.

As the moving party requesting my authorization, the onus is on the Public Body to prove, with evidence, the requirements of section 55(1)(a) or (b), on a balance of probabilities. As I stated in the *MacEwan University Decision* under section 55(1) Decision (September 7, 2018), "I cannot make arguments for any party before my office.

¹ F2019-RTD-01, at pp. 8 and 19.

I must make a decision based on the arguments and evidence the parties put before me”.

Under section 55(1)(a), I am permitted to authorize the Public Body to disregard one or more of the Applicant’s requests if they are repetitious or systematic in nature, and would unreasonably interfere with the operations of the Public Body or amount to an abuse of the right to make those requests. Under section 55(1)(b), I may authorize the Public Body to disregard one or more of the requests if they are frivolous or vexatious.

Because section 55 provides that I “may” give authorization, if the Public Body meets its burden I must then decide whether to exercise my discretion to authorize the Public Body to disregard the requests.

Applying this reasoning to section 55, if a public body meets its burden, I will then go on to consider whether there is any compelling reason not to grant my authorization to disregard a request.

- [8] I agree with former Commissioner Clayton that it is up to a public body to establish, on a balance of probabilities, that the thresholds in section 55 (1)(a) or (b) are met under the FOIP Act. Similarly, this analysis is equally applicable to an organization under section 37 of PIPA.
- [9] In this case, the Organization must establish on a balance of probabilities that the thresholds in section 37(a) or (b) are met under PIPA, and on doing so I must exercise my discretion about whether to authorize the Organization to disregard the access request at issue.
- [10] In my review of the information provided by the Organization, I noted a discrepancy in its submission. The OIPC Case File to which it referred, 009257, resulted in P2022-RTD-01, a section 37 decision issued earlier this year on April 12, 2022 by former Commissioner Clayton. In P2022-RTD-01, the Organization was granted authorization under section 37; however, the applicant in that case had a different name than the Applicant in this matter. Further, the Applicant in P2022-RTD-01 was not, according to the information before Commissioner Clayton, a former employee of the Organization. The Applicant in this case is a former employee of the Organization. The Organization has not provided any additional information to explain these discrepancies.
- [11] The information before me indicates that the Applicant in this case and the applicant in P2022-RTD-01 are different individuals. Therefore, it appears that the Organization’s submission that they are the same individual appears to have been made in error. As such, the findings in P2022-RTD-01 do not assist it in this matter.

- [12] Based on the limited information provided by the Organization for this matter, it may be that the Organization erroneously conflated the outcome in 009257 (P2022-RTD-01) with its 2013 submission for OIPC Case File P2294. However, my role in this application is not to speculate on the information that may have been offered by an organization, but to evaluate the case on the basis of the information before me.
- [13] In addition to providing a copy of the Applicant's September 4, 2022 access request, the Organization provided a copy of its section 37 submission, dated February 25, 2013 with respect to a prior access request made by the Applicant. The Organization's previous application to disregard the Applicant's previous 2013 access request was opened as OIPC Case File P2294. The Organization did not provide a copy of the resulting unpublished decision in P2294. I have reviewed my office's copy of the decision in P2294. Former Commissioner Clayton did not grant the Organization authorization to disregard the Applicant's 2013 access request under section 37 of PIPA.
- [14] This Office's 2011-2012 Annual Report discussed a judicial review of a section 55(1) decision issued under the FOIP Act.² In quashing that section 55(1) decision of former Commissioner Work, the Court expressed its view that an application to disregard an access request amounts to a summary dismissal (or disposition) application. Given the similarity of a request for authorization to disregard to a summary disposition application, Alberta's case law provides some guidance as to the evidentiary requirements of an organization in a section 37 matter. The law in Alberta is clear that parties to a summary disposition application must 'put their best foot forward'.³ Similarly, an organization making a request under section 37 of PIPA should put its best foot forward in making a submission. That is, in order to meet its burden of proof, in its initial submission, an organization is required to provide evidence and submissions explaining how it believes the requirements of section 37(a) and/or 37(b) are met as regards to the specific access request received.
- [15] According to the Alberta Court of Queen's Bench (as it then was), where my review of a request to disregard must depart from the case law relating to summary disposition is with respect to the burden for an individual making an access (or correction) request. Alberta's case law has established that *both* parties to a summary disposition matter must put their best foot forward. However, in the *Bonsma* decision, the Court further expressed its view that a person defending what amounted to a summary dismissal under

² *Clarence J Bonsma v The Office of the Information and Privacy Commissioner and Alberta Employment and Immigration Information and Privacy Office*, an oral decision of Clackson J. in Court File No. 1103-05598 ("*Bonsma*").

³ See, for example, *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.*, 2019 ABCA 49 at para 37.

section 55 of the FOIP Act need do no more than show merit. In other words, that person did not have a burden to show that the request was for a legitimate purpose.

[16] Former Commissioners of this Office have interpreted the *Bonsma* decision as meaning that an applicant is not obligated to make a submission in response to an organization's request for authorization to disregard their access request. I agree with this approach. However, if an applicant chooses to provide a submission, it may be considered along with the submission of an organization.

[17] In F2018-RTD-09, former Commissioner Clayton observed that access and privacy rights have been deemed "quasi-constitutional" by the Supreme Court of Canada. In that case, the public body had provided evidence in the form of a website created by the applicant, but had not made any argument as to how these records met the criteria of section 55(1) of the FOIP Act. Commissioner Clayton stated, in part:⁴

... It may be, perhaps, that the Public Body felt the background information and records it provided were self-evident in establishing the conditions of section 55(1) were met. This is not so. A public body must still 'connect the dots' and link its evidence to its application. That is, a public body must provide some argument regarding its evidence.

[...]

The onus is on a public body to make the link between its evidence and its application under FOIP. I cannot make arguments for any party before my office. I must make a decision based on the arguments and evidence that parties put before me. The burden lies on the public body making an application under section 55(1) to explain why it believes the criteria have been met. Although the Public Body provided extensive background information and documentation, it cannot simply provide evidence without explaining how that evidence relates to the legislative provision under which it is bringing an application. [Emphasis in original]

[18] This analysis under section 55(1) of the FOIP Act is equally applicable to an organization under section 37 of PIPA. The Organization provided a copy of the submission it made in 2013 for an access request made by the Applicant. However, the Organization has not made any submissions as to how its prior 2013 submissions relating to a previous access request made by the Applicant should now be sufficient to authorize it to disregard the Applicant's current access request.

[19] Further, as I noted above, in that case (OIPC Case File P2294), the Organization was not authorized to disregard the Applicant's access request made at that time. Former

⁴ F2018-RTD-09 at pages 4 - 6

Commissioner Clayton provided written reasons at that time as to why the Organization had not met its burden under section 37 of PIPA.

[20] On the basis of the information before me, the Organization has not provided any evidence or submissions on which I can make a finding under section 37 of PIPA. It has not made any argument that this access request meets the criteria of section 37(a) or 37(b). There is no evidence or argument for me to consider with respect to the Applicant's September 4, 2022 access request.

[21] I find the Organization has not met its burden of proof under section 37 of PIPA. Therefore, I cannot authorize the Organization to disregard this access request under section 37 of PIPA.

Decision

[22] After consideration of the relevant circumstances, and for the reasons stated above, I have decided not to authorize the Public Body under section 37 of PIPA to disregard the Applicant's Access Request, dated September 4, 2022. Therefore, the Public Body must proceed with processing the Applicant's access request in accordance with PIPA.

Diane McLeod

Information and Privacy Commissioner

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