ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

REQUEST TO DISREGARD F2023-RTD-01

September 29, 2023

ROCKY VIEW COUNTY

Case File Number 030792

[1] Rocky View County (the "Public Body") requested authorization under section 55(1)(b) of the *Freedom of Information and Protection of Privacy Act* ("FOIP Act" or "Act") to disregard an access request made by an applicant (the "Applicant") as frivolous.

[2] For the reasons outlined in this decision, the Public Body's application for authorization under section 55(1)(b) to disregard the Applicant's access request is dismissed.

[3] The Public Body is required to respond to the Applicant's access request in accordance with the FOIP Act.

Commissioner's Authority

[4] Section 55(1) of the FOIP Act gives me the power to authorize a public body to disregard certain requests. Section 55(1)(a) and (b) state:

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

Background

[5] The access request at issue is for the following:

> I'd like to request any and all copies of emails from [staff of Legislative & Intergovernmental Services]* that include the term "Nut Man" collectively. The old timers will remember the nut man emails. Enough said.
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> I'd also like to request any and all copies of emails from [staff of Legislative & Intergovernmental Services]* that include the term "Yoga". I think we should avoid future records management problems like the old nut man emails.
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> For the time period: As far back as they go
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> * The Applicant's initial access request referenced "any and all staff", but the scope was subsequently narrowed to emails held by the staff of Legislative & Intergovernmental Services.

[6] The applicant is a current employee whose role has involved processing FOIP requests for the Public Body.

Burden of Proof

[7] The FOIP Act is silent on the burden of proof associated with a request to disregard an access request under section 55(1). Former Commissioner Clayton, stated the following about where the onus lies for this provision.[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.
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> 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. I must make a decision based on the arguments and evidence the parties put before me".
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> 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

[1] F2019-RTD-01 (Alberta Justice and Solicitor General); 2019 CanLII 145132 (AB OIPC), at pp. 7 and 8.

> 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.
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> 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.
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> 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 the Public Body to establish, on a balance of probabilities, that the thresholds in section 55 (1)(a) or (b) are met in this case and on doing so I must exercise my discretion about whether to authorize the Public Body to disregard the access request.

[9] This Office's 2011-2012 Annual Report reported an oral decision of the Court of Queen's Bench, a judicial review of a section 55(1) decision issued under the FOIP Act.[2] In that decision, the Court expressed its view that a person defending what amounted to a summary dismissal under the FOIP Act need do no more than show merit. Former Commissioners of this Office have interpreted this 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.

[10] Although a public body has the burden of proof, the British Columbia Information and Privacy Commissioner has previously observed (with respect to British Columbia's equivalent provision), "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]

[11] As such, if an applicant chooses to provide a submission in response to an application to disregard an access request, that submission may be considered along with that made by a public body.

Purpose of Section 55(1)

[12] In this office's first published decision under section 55(1) of the FOIP Act, former Commissioner Frank Work made the following observations on the purpose of this provision.

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[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.
[3] Auth (s. 43) (02-02), [2002] BCIPCD No. 57 at para 4

> The FOIP Act was intended to foster open and transparent government (Order 96-002 [pg. 16]). Section 2(a) and section 6(1) of the FOIP Act grants individuals a right of access to records in the custody or under the control of a public body. The ability to gain access to information can be a means of subjecting public bodies to public scrutiny.
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> However, the right to access information is not absolute. The Legislature recognizes there will be circumstances where information may be legitimately withheld by public bodies and therefore incorporated specific exceptions to disclosure to the FOIP Act. Section 2(a) of the FOIP Act states the right of access is subject to "*limited and specific exceptions*" as set out in the FOIP Act. Section 6(2) of the FOIP Act states that the right of access "*does not extend to information excepted from disclosure"* under the FOIP Act.
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> In my view, the Legislature also recognizes that there will be certain individuals who may use the access provisions of the FOIP Act in a way that is contrary to the principles and objects of the FOIP Act. In Order 110-1996, the British Columbia Information and Privacy Commissioner wrote:
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> *"…The Act must not become a weapon for disgruntled individuals to use against a public body for reasons that have nothing to do with the Act…"*
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> Section 55 of the FOIP Act provides public bodies with a recourse in these types of situations.[4]

[13] In many of her decisions under section 55(1), former Commissioner Clayton observed that access and privacy rights have been deemed "quasi-constitutional" by the Supreme Court of Canada.[5] However, as she also often noted, that does not mean that an individual's ability to exercise their rights is unlimited, and there is no right to make abusive requests.[6] This observation is consistent with the interpretation of access and privacy legislation in other jurisdictions across Canada. For example, in *Crocker v British Columbia (Information and Privacy Commissioner) et al*,[7] the British Columbia Supreme Court provided the following guidance with regard to how section 43 in British Columbia's *Freedom of Information and Protection of Privacy Act* should be interpreted.[8] This provision contains similar wording to the Alberta FOIP Act.

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[4] F2002-RTD-01, at pp. 3 and 4.
[5] See, for example, F2018-RTD-09 at pp. 4.
[6] See, for example, F2017-RTD-02 at para 20, referring to Chief Justice McLachlin's comments in *Trial Lawyers Association of British Columbia* at para 47 and F2020-RTD-03 at para 9.
[7] 1997 CanLII 4406 (BCSC).
[8] Section 43(1) of the British Columbia's FOIP Act reads: If a public body asks, the commissioner may authorize the public body to disregard one or more requests under section 6 or section 32 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.

[14] 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 [BC's] *Interpretation Act…*[9]

[15] BC's former Commissioner, David Loukidelis, added his views on how that provision is to be interpreted. Specifically he said that "any decision to grant a section 43 authorization must be carefully considered, as relief under that section curtails or eliminates the rights of access to information." Another past commissioner has cautioned that, "[g]ranting section 43 requests should be the exception to the rule and not a routine option for public bodies to avoid their obligations under the legislation."[10]

[16] I concur with the above decisions. These interpretations, in my view, accord with the purposes of the FOIP Act and the legislative scheme of the access to information provisions therein.

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

The Parties' Submissions

[17] The Public Body argues only that the request is frivolous under section 55(1)(b). As such, there is no need for me to consider section 55(1)(a) of the FOIP Act, or "vexatious" under section 55(1)(b).

[18] The Public Body argued as follows:

> While the FOIP Act does not specifically define the term "frivolous", it has been identified by the Office of the Information and Privacy Commissioner as referring to something "of little weight or importance" (Order F2003-RTD-01, para 30) as "lacking legal basis or legal merit; not serious; not reasonably purposeful" (OIPC Order P2005-RTD-01, at para 29).
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> The above descriptions of frivolous all speak in some way to the request being extraneous or without merit or importance. In this case, the request seeks to obtain

[9] *Ibid.,* at para 33.
[10] Office of the Auditor General of British Columbia, Order F18-37, 2018 BCIPC 40 (CanLII), at para 11.

information from Rocky View County on two topics – "yoga" and "the Nut Man". Rocky View County generally does not have anything to do with yoga except host it as an occasional self-organized lunchtime activity for staff while the "Nut Man" refers to a private business that sells nuts door-to-door which has not attended the offices of Rocky View County in years but whose presence was sometimes announced through an 'all staff' email. The applicant is believed to be well aware of both those facts. There is no apparent rational connection between the subjects of the request and current County operations. While the applicant has no obligation to tell Rocky View County why they are seeking these records, it does appear there is no purposeful reason why the applicant would require the records, except for the applicant's own amusement. Due to the applicant's employment, the applicant likely had access to many of the same records they are seeking at one time or another.

Further, given the applicant's previous experience with the FOIP Act and its purposes, the applicant is presumed to be aware these records would be considered transitory to the nature of the work of the municipality. Specifically requesting records that are transitory in nature by a knowledgeable applicant further speaks to the lack of purpose of the request and the applicant's nonserious objective in making the request, as it is unlikely many responsive records would be available to be provided.

The public body believes the applicant's behaviour and attitude to the request has in no way indicated they are using the FOIP Act for any legitimate purposes. Rather, in keeping with another Ontario decision, Order M-519, their request could be viewed as an 'abuse' of the right of access, as the purpose of the request "is not legitimate, but is rather designed to harass, or to accomplish some other objective unrelated to the process being used". Similarly, British Columbia's Authorization 02-02 [2002] BCIPCD No. 57, at para 27, identifies some of the factors to weigh when considering if a request may be frivolous or vexatious with particular note taken of the point, "A "frivolous" request is one that is made primarily for a purpose other than gaining access to information." In the present circumstance, the applicant has admitted to trying to use the process to disrupt regular activities of staff for reasons of their amusement rather than because of actual interest in the records themselves.

<u>Public Good</u>

Finally, Rocky View County found the External Adjudication Order No. 5 at paras. 63 – 65 informative, and in particular, the reminder that if a frivolous request is allowed to progress too far, it risks wasting "tens of thousands of dollars of public funds" that should be directed to legitimate public purposes and the idea a public body may need to request authorization to disregard a request in order to protect public resources including staff time.

In the case of this request, the public body has already devoted resources to the request, including the time and involvement of the FOIP Coordinator, Manager of Legal

Services, and the Executive Director of Corporate Services (the head of FOIP for the public body). In a busy municipality with many important and competing projects, timelines and deliverables, utilizing these resources naturally detracts from other pursuits which would benefit Rocky County residents as a whole. Should the request proceed, additional resources would be required as the department subject to the request would also need to be engaged.

In Summary

Based on the subject matter of the request, the applicant's admitted motive for creating the request, and the desire to limit abuses of public body resources and processes, Rocky View County believes authorization from the Information and Privacy Commissioner should be provided to disregard the above-noted request in accordance with s. 55(1)(b) as a "frivolous" request.

[19] The Applicant chose to provide a response explaining their purpose for requesting the information. Some personal information has been redacted from the response, however, portions of the Applicant's response are included below:

> I do not see my request as frivolous nor vexatious and attempted to mitigate the impact on Rocky View County's operations before submitting my access to information request. My initial request was for "Nut Man" and "Yoga" emails from the entire County's staff, which the FOIP Coordinator indicated would be an 8/10 on an impact to operations scale. We then narrowed the request down to only the Legislative and Intergovernmental Services Department […] The FOIP Coordinator indicated that the narrowed request would only be a "2/10" on an impact to operations scale.
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> I do have further personal and anecdotal evidence as to why my access to information request would not be an undue burden on Rocky View County's access to information or general administrative operations. However, I would like to stick to the following arguments. I disagree with Rocky View County's position in regards to my request for the following reasons:
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> - In regards to the request records being transitory in nature, I do not see this as relevant as the *Freedom of Information and Protection of Privacy Act* makes no distinct [sic] between types of records, transitory or otherwise. The *Freedom of Information and Protection of Privacy Act* confirms that all records in the care and custody of the public body fall under the Act.
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> - Rocky View County's submission speaks to the "Nut Man" and "Yoga" emails being of little importance to its municipal operations. However, as the records fall under the *Freedom of Information and Protection of Privacy Act*, I do not see these arguments as relevant. The nature of my access to information request is the matter at hand rather than the nature of the records requested.

- The *Freedom of Information and Protection of Privacy Act* does not have an applicable section regarding the purpose behind an access to information request. Rocky View County argues that my request is frivolous and vexatious for various reasons. Being that the *Act* does not provide clear guidance on requests made under section 55, I would instead like to focus on previous decisions from the Office of the Information and Privacy Commissioner of Alberta.

- Rocky View County's submission cites previous decisions from the Office of the Information and Privacy Commissioner for British Columbia and the Information and Privacy Commissioner of Ontario. I would argue that these decisions are irrelevant as there is sufficient previous precedent set by the Office of the Information and Privacy Commissioner of Alberta.

- Rocky View County's submission cited decisions from the Office of the Information and Privacy Commissioner of Alberta. However, these decisions are from 2003 – 2005 and are not relevant in a municipal context and are not the most recent decisions in this context. Instead I would refer to the Office of the Information and Privacy Commissioner of Alberta's Village of Carbon decision (F2022-RTD-05) which is the most recent and applicable decision in a municipal context.

    - In paragraph 36 of the decision Alberta's Information and Privacy Commissioner Jill Clayton stated that the question of frivolity is a matter of perspective. In regards to my perspective, […] I maintain an interest in records management from my previous experience […] and the purpose of my request is to ensure proper records management, particularly with email management.

    - As Rocky View County noted in its submission, the "Nut Man" and "Yoga" emails are indeed transitory records, but they are still subject to the *Freedom of Information and Protection of Privacy Act.* Due to my employment with the County, I am aware that these records may exist. Being transitory records, they should be routinely deleted. My hope is that I will not receive any records in response to my access to information request.

    - If records are indeed provided in response to my access to information request, I would encourage the emails to be permanently deleted. If my request is deemed frivolous or vexatious, I would also hope that Rocky View County encourages staff to delete transitory records such as "Nut man" and "Yoga" emails.

- The intent with my access to information request is to bring attention to the importance of records management to Rocky View County's staff. After narrowing my request in discussions with the County's FOIP Coordinator, I revised my request to only include [the Legislative & Intergovernmental Services team to ensure they are maintaining their] own email records properly and not to unduly interfere with her operational duties.

- The Information and Privacy Commissioner further states in paragraph 36 of this decision that a vexatious request is one with a motive of harassment or obstruction. As a current employee of the County, I do not believe that my access to information request was made to obstruct nor harass. Quite the opposite – my request was made to draw attention to the importance of records management and its impact on FOIP's operations.

- Rocky View County suggests that frivolous and vexatious access to information requests may waste public funds. Both County's current FOIP Coordinator and I previously dealt with requests that, in my opinion, should have been deemed frivolous and vexatious but were not. These requests unduly wasted public funds. Knowing this, I submitted a narrowed request to ensure that it would not be an operational nor financial burden to the County. I have no intent to pursue further access to information requests beyond confirming whether [the Legislative & Intergovernmental Services team] retains "Nut man" or "Yoga" emails.

- Rocky View County's operations are indeed busy and it has a number of additional corporate projects. […] I believe my access to information request would be simple and routine to complete. Applying to disregard my request is likely more onerous to the County than it would be to complete the request.

The reasons set out above are also the rational connection and the purposeful reasons behind my access to information request that Rocky View County suggested it lacked. I maintain that my access to information request was submitted in good faith under the *Freedom of Information and Protection of Privacy Act*. While I appreciate that the *Act* provides for public bodies to disregard requests as frivolous or vexatious, from my perspective I do not believe that my access to information request falls under section 55 of the *Freedom of Information and Protection of Privacy Act.*

Analysis

[20] Many decisions, both from my office, and other Information and Privacy Commissioners across Canada have previously discussed the meaning of frivolous. These early definitions

have been subsequently followed, and remain as relevant today as ever in determining whether a particular access request may be frivolous:

- "Frivolous" is defined as "being of little weight or importance".[11]
- "Frivolous" is defined as "lacking a legal basis or legal merit; not serious; not reasonably purposeful".[12]
- "Frivolous" is defined as "1. Paltry, trifling, trumpery. 2. lacking seriousness; given to trifling; silly".[13]
- "Frivolous" 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.[14]

[21] As has been previously noted by my office, the fact that responding to an access request may be inconvenient for a public body is not sufficient on its own for a public body to meet its burden under section 55(1). For example, former Commissioner Clayton stated:[15]

> It will usually be the case that a request for information will pose some disruption or inconvenience to a public body; that is not cause to keep information from a citizen exercising his or her democratic and quasi-constitutional rights.

[22] British Columbia has interpreted its equivalent provision similarly, stating:[16]

> 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.

[23] The Public Body's position on the alleged frivolous nature of the Applicant's access request arises, in part, from the nature of the information request – emails relating to "yoga" or the "nut man". The Public Body states there is no rational connection between the subject of the access requests and its operations and suggests the applicant has made

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[11] See, for example, F2003-RTD-01 (Southern Alberta Institute of Technology) at para 29; 2003 CanLII 89043 (AB OIPC)
[12] See, for example, P2005-RTD-01 (Manulife) at para 29; 2005 CanLII 93775 (AB OIPC)
[13] See, for example, F2005-RTD-01 (Edmonton Police Service) at para 20; 2005 CanLII 93776 (AB OIPC)
[14] *Ibid*, citing Ontario Order M-618 [1995]
[15] F2019-RTD-01 (Alberta Justice and Solicitor General) at page 11; 2019 CanLII 145132 (AB OIPC)
[16] See, for example: Order F14-24 (British Columbia Securities Commission (Re), 2014 BCIPC 27 (CanLII) at para 11; Private Career Training Institutions (Re) 2016 BCIPC 26 (CanLII) at para 12; British Columbia (Re), 2019 BCIPC 37 (CanLII) at para 17

the request for their own amusement and for a nonserious objective. Conversely, the applicant, while not obligated to provide any submissions, chose to provide a lengthy explanation of their purpose. Summarized, the Applicant seeks to obtain information about the Public Body's records management through the means of these records.

[24] In my view, the ostensible "silliness" of this access request for "yoga" and "nut man" emails underlies a more serious purpose, as explained by the Applicant. The Applicant is an employee of the Public Body with experience in dealing with matters under the FOIP Act, as well as some knowledge of the Public Body's records management process. The Applicant seeks to obtain information about the Public Body's records management through requesting these particular records. Objectively, proper records management is important to any public body with obligations under FOIP.

[25] As such, on the evidence before me, I am not convinced that the Applicant's access request can be seen as a matter that is trivial or without merit. The Applicant has provided their reasons as to why obtaining this information is important. I accept that the Applicant has a genuine and serious interest in requesting and receiving the "yoga" and "nut man" emails for the reasons provided.

[26] On the basis of the Public Body's evidence, I am not satisfied that the Applicant's access request is frivolous.

[27] I find the Public Body has not met its burden under section 55(1)(b) of the FOIP Act to establish that the access request is frivolous.

Decision

[28] After consideration of the relevant circumstances, and for the reasons stated above, I have decided to dismiss the Public Body's application under section 55(1)(b) of the FOIP Act to disregard the Applicant's access request. The Public Body is required to respond to the Applicant's access request in accordance with the FOIP Act.

Diane McLeod
Information and Privacy Commissioner