ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

REQUEST TO DISREGARD F2023-RTD-02

October 27, 2023

VILLAGE OF BEISEKER

Case File Number 031163

[1] The Village of Beiseker (the "Public Body") requested authorization under section 55(1) of the *Freedom of Information and Protection of Privacy Act* ("FOIP Act" or "Act") to disregard two access requests made by an applicant (the "Applicant"). To avoid disclosing the Applicant's identity through gender, while the Applicant is singular, the Applicant is referred throughout as they/them/their. These access requests are referred to herein as "Access Request #5" and "Access Request #6".

[2] For the reasons outlined in this decision, the Public Body's application for authorization under section 55(1) of the FOIP Act to disregard the Applicant's access requests is granted in part. The Public Body is required to respond to Access Request #5, in accordance with the FOIP Act. The Public Body is authorized to disregard Access Request #6.

[3] The Public Body also requested authorization to disregard all future requests that might be submitted by the Applicant. This is denied. Should the Applicant make access requests in the future that the Public Body believes meet the criteria of section 55(1), the Public Body may request authorization to disregard them at that time.

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

(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

[5] As a municipality, the Public Body collects property taxes. The Applicant is a taxpayer within the Public Body and has raised concerns, both privately and publicly, with the Public Body about its expenditures of public funds.

[6] Since May 23, 2023, the Applicant has made six access requests to the Public Body. The Public Body responded under the FOIP Act to the first four, but seeks authorization under section 55(1) to disregard access requests #5 and #6.

[7] The first four access requests, broadly, were for information about a wide range of expenditures made by the Public Body as well other information. The Public Body engaged in discussions with the Applicant about the scope of these access requests, and states that it provided responses to all of them. I am aware that requests for review or complaints have been made about a number of these responses, and they are active before my office. I will not comment further on them in this decision.

[8] Access requests #5 and #6 were made on June 23, 2023 and are for the following:

Access Request #5

"Any Bylaw/Policies/Procedure changes and what they were before.
Any Bylaws/Policies/Procedures not posted on the village website that are active or have been active since 4-28-2023"

Time Frame: 04-28-2023 – today [June 23, 2023]

Access Request #6

"All email correspondence with attachments from 04-28-2023 – today. All emails cc'ed or FWD to employees. All emails they FWD out to Public, all screenshots taken of my emails. Records will be subpeonad [sic] for comparison.

Time Frame: 04-28-2023 – today [June 23, 2023]

[9] On July 21, 2023, the Public Body requested authorization under section 55(1) to disregard Access Request #5 and Access Request #6.

[10] I have not reviewed either party's evidence with respect to fact-finding regarding any allegations of financial or other impropriety. In some respects, the issues between the Applicant and Public Body are similar to those in F2022-RTD-04 and F2022-RTD-05. In those cases, taxpayers were also concerned with public spending. Former Commissioner Clayton held:

> [14] The evidence before me does not indicate one way or another as to whether any of these concerns have any merit. It may very well be the case that, as repeatedly asserted by the Public Body, the concerns of the Applicant and the Ratepayers of Carbon are baseless and unfounded. As Information and Privacy Commissioner, my role is not to make findings regarding the financial administration of the Public Body or other concerns or to resolve the issues between the parties. I make no findings as to the validity of the Applicant's concerns or whether any of the allegations against the Public Body are founded. There are other means by which these concerns may be addressed and the evidence before me indicates that the Applicant and/or the Ratepayers of Carbon are engaged in the process of addressing their concerns through a variety of democratic means available to them.
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> [15] In this case, my role is to determine whether the Public Body has met its burden to establish that the criteria of section 55(1) are met, and if so, whether I will exercise my discretion to authorize it to disregard the access request.

[11] I agree with Commissioner's Clayton's reasoning and have applied the same to my consideration of this matter.

Burden of Proof

[12] 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.

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

> 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 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.

[13] 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.

[14] 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.

[15] 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]

[16] 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.

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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

Purpose of Access to Information Legislation

[17] Section 2 sets out the purposes of the FOIP Act. Included within this provision is section 2(a), which states:

> 2(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to the limited and specific exceptions as set out in this Act.

[18] In an early foundational case, the Supreme Court of Canada spoke to the principles underlying access to information legislation:

> 61 The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps ensure, first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.*479, at p. 480:
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> > Parliament and the public cannot hope to call Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view. See also: Canadian Bar Association, *Freedom of Information in Canada: A Model Bill* (1979), at pp. 178 – 179.
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> *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC)

Purpose of Section 55(1)

[19] 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.

> 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.

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:

"…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…"

Section 55 of the FOIP Act provides public bodies with a recourse in these types of situations.[4]

[20] 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.

[21] 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

[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] "*Crocker",* 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.

> construction and interpretation as best ensures the attainment of its objects", that is required by s. 8 of [BC's] *Interpretation Act…*[9]

[22] 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]

[23] 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)(a) – Are the access requests repetitious or systematic in nature?

[24] As indicated, section 55(1)(a) authorizes me to exercise my discretion to authorize the Public Body to disregard an access request where the Public Body has established, on a balance of probabilities, that "because of their repetitious nature", one or both of the Access Requests "would unreasonably interfere with its operations or amount to an abuse of the right to make those requests".

[25] The Public Body has not argued, and I do not find that there is repetition in the access requests made by the Applicant. "Systematic in nature" includes a pattern of conduct that is regular or deliberate.

[26] The Public Body argues that the Applicant's filing of six access to information requests in a short period of time, since May 23, 2023, is systematic, given that [their] conduct is both regular and deliberate. The Public Body further states that that the Applicant "has, in [their] various communications with the Municipality indicated that [their] intent is to use access requests to find detail of what [they] perceives are wrongdoings and will continue to do so until [they] is satisfied with the findings."

[27] I agree with the Public Body that the access requests are systematic.

Section 55(1)(a) – Would the requests "unreasonably interfere with the operations of the public body or amount to an abuse of the right to make requests"?

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

[28] The Public Body points to the number of access requests and a variety of other complaints made by the Applicant as evidence that they are abusing their rights under the Act. It argues that the Applicant is pursuing a campaign of captious scrutiny and harassment and that their objective is to monitor the most minute details of its operations. The Public Body submits that this is improper and an abuse of their rights under the Act. It states that "[w]hile the Applicant may disagree with the financial decisions of the Municipality, the *FOIP Act* should not be used as a mechanism to "fish" for details of perceived financial impropriety or even spending the Applicant simply disagrees with."

[29] The Applicant disagrees with the Public Body's characterization of her motivation. They provided submissions and voluminous evidence regarding their concerns with the Public Body.

[30] As I noted above, my role is not to make findings as to whether any of the Applicant's concerns are substantiated. However, I am satisfied that the Applicant has a genuine belief that the concerns are valid. Undoubtedly, there is a balance between scrutinizing the actions of a public body to the point where such scrutiny does become abusive and harassing, and the principles outlined in *Dagg,* where access to information serves to provide the information required to participate meaningfully in the democratic process and to ensure that politicians and bureaucrats remain accountable to the citizenry.

[31] On the basis of the evidence before me, I am not satisfied at this time that the Applicant's access requests, generally, rise to the level to make a finding of abuse. However, this does not mean that such a finding could not be made in the future, depending on the actions taken by the Applicant with future requests.

[32] The Public Body provided sworn evidence in the form of an affidavit, stating:

> Further, I do verily believe that the Applicant's continued filing of requests under the FOIP Act are obstructing, taking up limited time and resources, and causing harm to the operations of the Municipality. The Municipality employs three administrative staff, including myself as CAO, does not have in-house IT support, and has devoted substantial efforts to responding to the Applicant's request for information, as well as [their] numerous other complaints.

[33] I accept the Public Body's evidence that it has limited resources and it has already devoted substantial resources to responding to the Applicant's access requests. A response to any access request will, inevitably, require the use of a public body's limited resources and take up the time of administrative staff. A public body must prove that responding to an access request would *unreasonably* interfere with its operations.

[34] The two access requests should be analyzed separately. Access Request #5 is for changes to bylaws, policies and procedures between April 28, 2023 to June 23, 2023, as well any other bylaws, policies and procedures that are not posted on the Public Body's website that have been active since April 28, 2023. There is no evidence before me as to how many responsive records there may be for Request #5 or other evidence as to the impact responding to this specific request would have on the Public Body's operations. In the absence of such evidence, and given the limited time frame, I am unable to find that responding to this request would *unreasonably* interfere with the Public Body's operations. The Public Body submits that Access Request #5 is for a "broad scope of documents and any changes made to those documents without any specific subject matter or topic identified". I do not agree with the Public Body's characterization – this request is limited to a time frame of two months and is limited to bylaws, policies and procedures that have been changed within that time frame or not posted on the website. Certainly, the Public Body may request clarification but it does not appear to be as broad in scope as the Public Body has indicated.

[35] Access Request #6 is another matter. On its face, it appears to be for *all* emails sent by or from the Public Body between April 28, 2023 to June 23, 2023. On the basis of the Applicant's submissions, I understand that the intent may have been only to request access to their personal information, but that is not what the request states. Given the prevalence of email communications and the necessary work involved in processing responsive emails under the FOIP Act, although the only evidence before me is the broad impact of the Applicant's request, I accept the Public Body's submission that responding to Request #6, because it is for *all* email correspondence within a two month time frame, would unreasonably interfere with its operations.

[36] I find that the Public Body has met its burden to establish under section 55(1)(a) that the access requests are systematic in nature, and that responding to Access Request #6 would unreasonably interfere with its operations.

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

[37] As I have found the Public Body met the criteria under section 55(1)(a) for Access Request #6, I need only consider Access Request #5 under section 55(1)(b).

[38] 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. A vexatious request is one in which the Applicant's true motive is other than to gain access to information, which may include the motive of harassing or obstructing the public body to whom the request is made.

[39] The Public Body argues that the request can be characterized as frivolous and vexatious under section 55(1)(b). It states (with footnotes to the supporting evidence omitted):

> The Applicant is not simply seeking access to information, rather [they] is seeking any information that [they] may utilize to be hypercritical of the Municipality so that [they] can "take them down". [Their] purpose or motive in making the Requests is demonstrated by [their] own admissions that [they] views the Municipality as "immorally" abusing or wasting funds and that [they] wants to "pinpoint every discrepancy".
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> Further, the Applicant appears unbothered and considers [their] conduct towards the Municipality justified, even though **[they] admits [their] behaviour is "vexatious".**
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> The Municipality submits that it has demonstrated substantial good faith and met its duty to assist the Applicant before and during the access to information process including:
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> - In providing responses to the Applicant's first iteration of the "Bringing change to Beiseker" document;
> - Continually attempting to clarify the first four access to information requests submitted to the Municipality; and
> - Providing responses to FOIP Requests 1 – 4 without delay.
>
> On the other hand, the Applicant's conduct is rooted in bad faith, particularly given the constant allegations of law breaking, including characterizing the Municipality's efforts to clarify the requests as illegal, and threats of "astronomical consequences" against the Municipality if a response is not provided.
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> In keeping with the prior decisions of the Commissioner, where the purpose of the request is to harass and obstruct a public body, the requests are defined as vexatious. Additionally, the use of the *FOIP Act's* process to request access to information is being used by the Applicant in a manner that amounts to a fishing expedition for information that [they] believes will further [their] baseless objections to how the Municipality is being run. This is a misuse of the *FOIP Act* process. For this reason, the Requests should be considered frivolous and vexatious.
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> In summary, the Municipality submits that the Applicant has made the Requests for purposes of ulterior motives beside access to information, specifically given:
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> a. [Their] harassment of and allegations against the Municipality;
> b. The strain on time and resources of the Municipality;
> c. Use of inflammatory language; and
> d. The advancing unsubstantiated claims of law breaking, unethical conduct and mismanagement.

[40] In further support of its position, the Public Body relies on a May 24, 2023 email where the Applicant 'conceded' their requests were vexatious. However, this comment should not be taken in isolation, but should be reviewed in the context it was made. The Applicant stated to the Public Body:

> As for this being vexatious, I'm sure it is but it wouldn't be this way if things were handled properly with proper systems from the beginning. Hundreds of community members having problems with the office, specific instances that weren't handled properly. Them crying to me on the phone and some even in person because their interactions with office have left them sick to their stomachs. Members angry, so angry, with so many different areas. That have all been pushed to the side with generic answers that never get dealt with. When you have people in the hundreds at once upset, angry, and resentful in a village of only 800ish people there are problems that need fixed [sic]. That is what I am doing.
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> Even the bylaws you are writing don't have proper systems in place to ensure they are being enforced properly. I don't understand how you don't acknowledge that is wrong. So yes, I understand that is vexatious but look at the other side and how vexatious you have made the community feel for so many years straight that this has even had so much attention from the community. Nothing you are feeling is any different than how you have made the community feel for so many years without regard.

[41] Reviewed in the context of the discussion, I am not convinced the Applicant meant their requests were vexatious in the legal sense under the FOIP Act, but rather, they were acknowledging that their requests were vexing to the Public Body. This office has often observed that a request for information will pose some disruption or inconvenience to a public body, but this alone is insufficient to meet the burden under section 55(1) (F2021-RTD-01 at page 11, F2023-RTD-01 at para 21). Further, I note that in their submission, the Applicant submitted that the requests were not vexatious in nature, that is they directly contradicted the Public Body's position.

[42] The Public Body acknowledges that one purpose of the FOIP Act is allow for a level of public scrutiny of public bodies; however, I understand its position to be that in these circumstances, the Applicant's requests have exceeded what is reasonable and have become vexatious. The Applicant has explained their concerns regarding the expenditure of public funds. Regardless of the veracity of these claims, I accept that they are legitimately held. It is clear from both parties' submissions that a great deal of time and energy has been devoted to investigating these concerns.

[43] Upon review, while the Applicant's strong feelings have led to some intemperate use of language, it is not so extreme as to be scandalous or inflammatory. I do not find that

these communications lead to a level of abuse and vexatiousness, such as was found in F2018-RTD-05. Again, I make no findings as to the whether there is any foundation to the Applicant's claims, but I do find that Access Request #5 is not vexatious.

[44] Although the Public Body submitted the requests were frivolous, it did not provide detailed arguments or evidence on this point. In any event, given my finding that the Applicant genuinely seeks the information in Access Request #5, I do not find it is frivolous.

[45] The Public Body has not met its burden under section 55(1)(b) for Access Request #5.

Request to Disregard Future Access Requests

[46] The Public Body requested authorization to disregard future requests made by the Applicant, stating (with footnotes to the supporting evidence omitted):

> The Municipality also seeks authority to disregard any future requests from the Applicant. This is based on the Applicant's behaviour of threatening consequences and vexatious pursuit of finding any issue with the Municipality.
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> The Applicant has admitted that [they] will not stop until [they] takes down the Municipality and that [they] will continue to make further requests for access to information records [they] feels are required to do this.
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> The Applicant disagrees with the administration and Council, as is [their] right; however, [they] has turned to the *FOIP Act* to further [their] objectives of over-scrutinizing and harassing the Municipality. The Municipality has a small number of staff working in the Administration and has devoted considerable amounts of time responding to the requests for access to information over the past 2 months. If the Applicant were allowed to continue making these requests as [they] has claimed [they] will, the daily operations and proper functioning of the Municipality will be impaired.
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> Therefore, the Municipality submits that the use of the Commissioner's authority to disregard the requests and future requests of the Applicant is both reasonable and justified given the systematic, frivolous and vexatious nature of the Requests.

[47] While I am sympathetic to the burden that responding to access requests places on the Public Body, for all of the reasons herein, I am not convinced that the Applicant's history of access requests has yet risen to the level where I would consider granting the Public Body a blanket authorization to disregard any future access requests the Applicant might make. This portion of the Public Body's request is dismissed.

[48] If the Applicant chooses to make any access requests in the future, the parties should continue to communicate and ensure the scope is limited only to the records sought. If

the Public Body believes that any future access requests made by the Applicant meet the criteria under section 55(1) of the FOIP Act, it may apply to me at that time for authorization to disregard those requests.

Decision

[49] After consideration of the relevant circumstances, and for the reasons stated above, the Public Body is required to respond to Access Request #5 in accordance with the FOIP Act, which may include further communications with the Applicant to clarify the scope of the request. I have decided to exercise my discretion to allow the Public Body to disregard Access Request #6.

[50] At this time, the Public Body is not authorized to disregard future access requests that the Applicant may make; however, if it believes that any future access requests meet the criteria under section 55(1) of the FOIP Act, it may request to disregard them at that time.

Diane McLeod
Information and Privacy Commissioner