ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

Request for Authorization to Disregard Access Requests
Under section 55 of the
Freedom of Information and Protection of Privacy Act

Edmonton Police Service
(IPC File References: #3448 and #3449)

November 4, 2005

[1] On October 14, 2005, I received written requests from the Edmonton Police Service ("the Public Body") for authorization to disregard two access requests made by an applicant ("the Applicant").

Commissioner's Authority

[2] Section 55 of the *Freedom of Information and Protection of Privacy Act* ("the FOIP Act") gives me a discretionary ("may") power to authorize a public body to disregard certain requests under the FOIP Act. Section 55 reads:

> *55 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

[3] On August 11, 2005, the Applicant submitted two requests for access to information in relation to appeals filed by the Criminal Trial Lawyers' Association ("CTLA") to the Law Enforcement Review Board ("LERB"):

- The first access request was for the "*entire Internal Affairs file*" on the CTLA complaint against an employee of the Public Body.

- The second access request was for the "*entire Internal Affairs file*" on the CTLA complaints "*against various police officers arising out of the "Overtime" matter*".

[4] In both requests for access to information, the Applicant writes:

> "*This request is made pursuant to the Freedom of Information and Protection of Privacy Act and your disclosure obligations in relation to the Law Enforcement Review Board Appeal.*"

[5] On October 13, 2005, the Public Body sent two letters to me: one requesting authorization to disregard the Applicant's first access request and a second requesting authorization to disregard the Applicant's second access request. The Public Body copied both letters to the Applicant.

[6] I opened two files:

- File #3448 is in relation to the Public Body's request to disregard the Applicant's first access request; and

- File #3449 is in relation to the Public Body's request to disregard the Applicant's second access request.

[7] I granted the Applicant the opportunity to provide comments to me regarding the Public Body's request to disregard the two access requests.

[8] On October 26, 2005, I received the Applicant's written comments. The Applicant sent a copy of the comments to the Public Body and to other parties.

The Public Body's Submissions

[9] In requesting authorization to disregard the Applicant's access requests, the Public Body wrote:

> *"The EPS, pursuant to s. 55 of the FOIPP Act, requests that the Commissioner authorize the EPS to disregard this FOIPP request on the grounds that the request is frivolous and vexatious".*

[10] The Public Body says the Applicant is "*fully aware*" the records requested under the FOIP Act are the "*exact records*" that would be released to the Applicant through the LERB disclosure process.

[11] The Public Body also says the Applicant is aware the LERB disclosure will be more "*fulsome*" as the records are generally disclosed in their entirety with the exception of privileged information. The Public Body said records requested pursuant to the FOIP Act "*must be reviewed and severed in accordance with the Act (third party personal information will be removed)*".

[12] The Public Body said:

> "*In the past, the EPS has worked with applicants… in situations such as this where records requested pursuant to the FOIPP Act will be received through the LERB disclosure process. In the past, agreement has been reached wherein the applicant would review the records as received through LERB disclosure, and then determine whether they still wished to pursue their request. In this instance, as the attached correspondence demonstrates,* [the Applicant] *is not amenable to a similar resolution.*"

[13] The Public Body says the Applicant's two access requests pursuant to the FOIP Act are "*duplicitous… and an abuse of the spirit and intent of access to information legislation*".

[14] If I may paraphrase, the Public Body is saying the Applicant will get the information the Applicant is seeking from the LERB disclosure and the information from the LERB disclosure would be more complete since third party information would not be withheld as required under the FOIP Act. The Public Body is saying there is an established process (i.e. the LERB disclosure process) to provide the Applicant with the information requested; therefore, the Applicant's access requests under the FOIP Act for the same information are frivolous and vexatious.

The Applicant's Submission

[15] The Applicant says:

> "*The Edmonton Police Service knows very well that it will be many months, before the LERB orders disclosure. The first appeal to the LERB was filed in February 2005, 8 months ago. The EPS will not provide disclosure until ordered to do so by the LERB. The LERB will not even schedule pre-hearing applications before all Overtime-related proceedings are completed…*"

[16] The Applicant also says "*Based on precedent, it is expected that the EPS will, on LERB disclosure, take the position that we cannot, in turn, make public disclosure. It will seek to place trust conditions on this disclosure.*"

[17] The Applicant states that even if the Public Body does not impose any conditions on the LERB disclosure, the "*expected long delay alone is a clear reason to order the EPS to immediately comply*" with the access requests.

Application of Section 55(b) of the FOIP Act

[18] Section 55(b) allows me to authorize a public body to disregard an access request if the request is "frivolous" or "vexatious".

Are the Applicant's access requests "frivolous"?

[19] The *Concise Oxford Dictionary* (Ninth Edition) defines "frivolous" as "*1. paltry, trifling, trumpery. 2. lacking seriousness; given to trifling; silly*".

[20] In Order M-618 [1995], the Ontario Information and Privacy Commissioner wrote:

> *"…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…".*

[21] The CTLA has filed a number of complaints against the Public Body related to the Overtime matter. The Applicant is counsel for the CTLA. The access requests submitted by the Applicant are for records relating to appeals to the LERB filed by the CTLA on complaints against the Public Body. The fact that these appeals are currently outstanding before the LERB is evidence that the information sought is a matter of importance to the Applicant.

[22] Therefore, I do not find that the Applicant's two access requests are "frivolous" as provided by section 55(b) of the FOIP Act.

Are the Applicant's access requests "vexatious"?

[23] *Black's Law Dictionary* (7th Edition) defines "vexatious" as "*without reasonable or probable cause or excuse; harassing; annoying*".

[24] In considering whether the Applicant's access requests are "vexatious", I am mindful of the following comments from the Ontario Information and Privacy Commissioner:

> *"… 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 attendant upon it would mean that freedom of information could be frustrated by an institution's subjective view of the annoyance quotient of a particular request. This, I believe, was clearly not the Legislature's intent."*
> [Order M-618]

[25] A request is not "vexatious" simply because a public body is annoyed or irked because the request is for information the release of which may be uncomfortable for the public body.

[26] A request is "vexatious" when the primary purpose of the request is not to gain access to information but to continually or repeatedly harass a public body in order to obstruct or grind a public body to a standstill.

[27] In Order 110-1996, the British Columbia Information and Privacy Commissioner said:

> *"…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…"*

[28] Factors that may support a finding that a request is vexatious include:

- a request that is submitted over and over again by one individual or a group of individuals working in concert with each other;
- a history or an ongoing pattern of access requests designed to harass or annoy a public body;
- excessive volume of access requests; and
- the timing of access requests.

[29] Depending on the circumstances of a given case, other factors may also be relevant in determining whether a request is vexatious or not.

[30] Section 3 (a) of the FOIP Act allows individuals access information either through the procedures established by public bodies or through application under the FOIP Act, or both. Section 3 (a) of the FOIP Act states:

> *3 This Act*
>
> *(a) is in addition to and does not replace existing procedures for access to information or records,…*

[31] The words "in addition to and does not replace existing procedures for access" mean that the FOIP Act and access procedures established by public bodies are to coexist and are equally available to individuals. The FOIP Act does not

preclude public bodies from continuing to disclose records or information through other established procedures.

[32] The FOIP Act grants individuals a right of access to records in the custody or under control of any public body, subject to limited and specific exceptions (section 2 (a)). Section 2 (a) does not say that the FOIP Act only applies in situations where there are no existing procedures for access established by the public body. If it were otherwise, public bodies could deprive a person of all of their rights under the FOIP Act, including the right to request a review, simply by substituting their own access procedures.

[33] Section 6 (1) of the FOIP Act states:

> *6 (1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*

[34] The right of access under the FOIP Act is not absolute. Section 6(2) of the FOIP Act reads:

> *6(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.*

[35] An applicant has a right of access "to any record", subject to the exceptions available under the FOIP Act. Section 6 (1) does not restrict applicants to access only those records that are not available through procedures established by public bodies.

[36] That the Applicant decides to exercise the access rights under the FOIP Act alongside the LERB disclosure process and that the Applicant refuses to wait first for the LERB disclosure before pursuing an access request under the FOIP Act are not sufficient grounds to support a finding that the access requests are vexatious. I am not convinced that the Applicant's two access requests are part of a history or pattern of behaviour designed to harass, obstruct or wear the Public Body down.

[37] At the same time, I want to make it clear that I will not hesitate to allow public bodies to disregard requests where I am satisfied they are frivolous or vexatious. I have done so several times in the past. This legislation is meant to give access to information, not to exact punishment or harass public bodies.

Decision

[38] After careful consideration of the relevant circumstances in this matter, I have decided not to authorize the Public Body to disregard the Applicant's two access requests. Therefore, the Public Body must proceed with processing the Applicant's two access requests in accordance with the FOIP Act.

Frank J. Work, Q.C.
Commissioner