ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

Request for Authorization to Disregard an Access Request
under section 55(1) of the
Freedom of Information and Protection of Privacy Act

Regional Municipality of Wood Buffalo
(OIPC File Reference 005258)

November 29, 2017

[1] The Regional Municipality of Wood Buffalo (the "Public Body"), in a letter dated September 29, 2017, requested authorization under s. 55(1)(b) of the *Freedom of Information and Protection of Privacy* ("*FOIP*" or the "Act") to disregard an access request made by a law firm (the "Applicant").

Commissioner's Authority

[2] 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.*

[3] Access and privacy legislation has been deemed "quasi-constitutional" by the Supreme Court of Canada.[1] It allows individuals to access their own personal information, as well as information about public bodies. The fundamental importance of these rights were explained in *Dagg* as follows:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to 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.[2]

[4] Accordingly, the power that has been granted to me under FOIP to authorize a public body to disregard an access request is not one I take lightly. However, the rights granted to individuals under FOIP are not limitless and, in recognition of the potential for various abuses, the Alberta Legislature included section 55 in the Act when it came into force.

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[1] For example, see *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 and *Alberta (Information and Privacy Commissioner) v. United Food and Commercial Workers, Local 401*, 2013 SCC 62

[2] *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403 at para 61 ("*Dagg*")

[5] A decision under section 55 is a discretionary "may" decision. As a starting point, when making a request for authorization to disregard an access or correction request, a public body bears the onus to establish that the conditions of either section 55(1)(a) or (b) have been met. In order for me to authorize a public body to disregard a request, a public body must provide evidence that all of the necessary conditions of section 55 are met. Bare assertions or argument are insufficient. If a public body establishes that the conditions of either section 55(1)(a) or (b) have been met, then I must exercise my discretion to decide whether to grant the public body's request.

Background

[6] On March 21, 2017 I received the Public Body's original request to disregard an access request made by the Applicant on March 7, 2017. The Public Body set out the Applicant's access request as follows:

- "All Correspondence, dated January 1 2008 to December 31 2016; regarding any lands within the area of approximately. 55,000 aces [sic] known as Southlands 1 and 2, including correspondence between the Municipality and the Government of Alberta, [and two named individuals]."

- "All correspondence dated January 1 2008 to December 31 2016; directed to or originating from the Municipality, the Mayor's office or any council members regarding the area of approximately. [sic] 1,000 acres legally described as Plan 1025452, Block 1, Lot 1; also known as Soutlands [sic] 1a and Prairie Creek Business Pak [sic]"

[7] On April 7, 2017, my office notified the Public Body that it was required to provide a copy of its request under section 55 of the Act to the Applicant. After further communications between my office and the Public Body, on September 29, 2017, the Public Body provided a new submission, which it copied to the Applicant, and asked me to disregard its original submission. As requested by the Public Body, I have considered only its September 29, 2017 request under section 55 of FOIP to disregard the Applicant's access request.

[8] The Applicant was given an opportunity to comment on the Public Body's submission, but chose not to do so.

The Public Body's Submissions

[9] The Public Body provided a brief history regarding its issues and ongoing litigation with a client of the Applicant law firm which relates to the land identified in the Applicant's access request. The Public Body explained that as part of the litigation discovery process, in November 2014, it had provided 4,179 pages of records to a client of the Applicant. As the litigation progressed, additional records have been provided to the Applicant's client. The Public Body states,

> Any 'correspondence' as indicated in the FOIP request would have been included in this records discovery but the records included many other records besides "correspondence".

[10] The Public Body further explained that there is an active legal dispute between the Public Body and the Applicant's client as to which additional records should be produced regarding the litigation. The Public Body notes that it is currently appealing a Court's decision requiring it to provide additional records to the Applicant's client.

[11] The Public Body further submits that (as of the date of its September 29, 2017 submission), its legal counsel was in the final stages of providing additional records to the Applicant. It stated:

> However, it is my understanding that the Municipality did agree in the spring/early summer of 2017 to perform an additional records discovery and this commenced well after receipt of the FOIP Act request. The wording of that records discovery was as follows:
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> - Any records between the RWMB and the Government of Alberta relating to the creation, expansion or the boundaries of the Urban Service Area between the Order in Council creating the Urban Service area dated April 1, 1995 and the amendment to the Urban Service Area on July 7, 2016;
> - Any documents related to the Pacific Developments/Prairie Creek lands and the authority for designation of lands into the Urban Service Area;
> - Any documents or records relating to the favorable tax treatment in respect to the Pacific developments/Prairie Creek lands either in the Urban Service Area or Rural Service Area;
> - Any documents relating to Council or RMWB requests to the Government of Alberta to include the Prairie Creek lands into the Urban Service Area; and/or
> - Any documents relating to communications between the Province and the RWMB regarding the passage of any Urban Service Area amendments.
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> While the wording of the above and the wording of the FOIP Act request are not exactly the same; [sic] if you do compare them the conclusion is the FOIP request records would be included in the above (specifically the 2nd point and also note: that Southlands 1, 2 and the land described in the FOIP request refer to the same land mentioned in the above points). It is my understanding that our legal counsel are in the final stages to prepare the results of the latest records discover for disclosure to [the Applicant].

[12] The Public Body then explained its position that the access request was vexatious under s. 55(1)(b) of FOIP, as will be discussed in further detail below

The Applicant's Submissions

[13] The Applicant did not provide a submission.

Application of Section 55(1)(a) of FOIP

[14] The Public Body did not provide a submission under s. 55(1)(a) of the Act; therefore, I will not consider this section.

Application of Section 55(1)(b) of FOIP – Frivolous or Vexatious

[15] The Public Body argues that the Applicant's access request is vexatious, given the fact that document discovery has already occurred through the litigation process (although I note that the document discovery process is not complete, as the Public Body reports that a Court decision on the extent of disclosure of documents in the litigation is itself currently being appealed).

[16] The Public Body states:

> The Municipality is aware that the Commissioner ruled in related previous matters that "litigation discovery" and a "FOIP Request" can co-exist and that the existence of litigation does not remove the right of access under the FOIP Act. However this situation is unique on a number of fronts and the Municipality wishes to provide the following points on why we believe this FOIP request is vexatious and will actually provide LESS information to the applicant than the records discoveries and undertakings did.
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> 1. In Order M-618 [1995], the Ontario Information and Privacy Commissioner made the following comment about "vexatious", *"Vexatious" is usually taken to mean with intent to annoy, harass, embarrass, or cause discomfort."*. In the Request for Authorizations to Disregard Access Requests – Grant MacEwan College (March 13, 2007), the Commissioner noted that in a previous decision under section 55 (Application by the Edmonton Police Service, issued on November 4, 2005), he wrote: [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. [40]*
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>   This latest records discovery (regardless of its end product) and the earlier discovery and undertakings have produced all known records of the Municipality under its custody or control for the subject matter of the FOIP request. There is no logic to the applicant to insist that the Municipality continues to process this FOIP request especially since they will be receiving incoming records very shortly.
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>   Processing of this FOIP request now would be vexatious as it clearly would be an attempt by the applicant to overtax the human and financial resources of the Municipality to repeat the records search for a FOIP request **before** receiving the records that resulted in the latest discovery. The goal of [the Applicant] is to win this lawsuit for their client by either proving their allegations or by their actions and decisions, pressure the Municipality to settle the lawsuit for very large sums. In my opinion, [the Applicant's] attempts to force the Municipality to repeat the records searches involved in the previous records discoveries and undertakings by continuing to pursue this proposed FOIP request; [sic] is to overtax the human and financial resources of the Municipality enough to pressure us to offer a large settlement to make this lawsuit go away. This was NOT the intent or purpose of the FOIP Act.
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> 2. This FOIP request, if not disregarded will result in fewer records than those that were produced and provided to the applicant through the records discoveries and undertakings process. The only "FOIP "exception applied during the discoveries and undertakings was one for legal privilege. All previously released records will have to be reviewed again for FOIP exceptions to disclosure and some of the information may or must be removed if FOIP exceptions to disclosures are relevant. So this FOIP request is pure folly by the applicant as "less" records will be provided, not more. As the applicant is a law firm, they must know this and this is another argument that the applicant's FOIP request is "vexatious".
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> <u>Request To Disregard FOIP Request</u>
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> This FOIP request was only submitted for vexatious purposes in the Municipality's opinion and for the reasons outlined above, we are formally requesting the

> Commissioner's authorization to disregard FOIP Request 2016-42 under section 55(1)(b) of Alberta's Freedom of Information and Protection of Privacy Act.
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> If the Commissioner does not approve the Municipality's request to disregard this FOIP request, the Municipality respectfully requests that the Commissioner contact the applicant and request them to at least postpone their FOIP request until they have received and reviewed the results of the latest records discovery that the Municipality performed. They may be satisfied and withdraw their FOIP request or they may wish to revise it due to the content of the latest records discovery.

[17] As noted by the Public Body in its submission, previous decisions from this office have stated 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[3]. The Public Body also referred to the Ontario Information and Privacy Commissioner's comments in Ontario Order M-618, which has been previously cited with approval by this office. In Order M-618 the Ontario Commissioner stated:

> …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.[4]

[18] The Public Body has asked me to compare the Applicant's request with what its legal counsel are proposing to provide to the Applicant to reach the conclusion that the records are the same (and therefore, presumably, the request is vexatious). I have two comments to make regarding this request: First, the burden to establish that the conditions of s. 55(1) have been met is on the Public Body; it cannot expect me to draw conclusions that it has not clearly established on the evidence before me. Second, based upon my review of the Public Body's submission, it appears that the Public Body relies only on the fact that there is currently litigation between the parties, and particularly, that document production in the litigation is currently at issue, to argue that the Applicant's request is vexatious.

[19] Litigation between parties is, by itself, an insufficient basis upon which to find an access request is vexatious. This has been established in previous decisions. In the *Manulife*[5] decision (where authorization to disregard a request was granted), Commissioner Work stated:

> This decision should not be interpreted as suggesting that, because litigation has taken place, an access request under PIPA would on that basis alone be found to be frivolous or

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[3] 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 ("*Edmonton Police Service"*), available online at: https://www.oipc.ab.ca/media/144959/Section55_EdmontonPoliceService_2005.pdf

[4] Order M-618, London Police Services Board at page 17, available online at: https://www.ipc.on.ca/wp-content/uploads/2016/08/M-618-1.pdf

[5] Request for Authorization to Disregard an Access Request Under section 37 of the *Personal Information Protection Act*, Manulife (OIPC File Reference P0197), November 29, 2005 ("*Manulife*"), available online at: https://www.oipc.ab.ca/media/593294/Section_37_Manulife_2005.pdf

vexatious. In Decision P05-01, the British Columbia Information and Privacy Commissioner said:

> "This decision should not be interpreted as suggesting that an access request will be found vexatious merely because litigation has taken place, is under way, or is possible, and disclosure of the same information or documents has occurred or may occur."[6]

[20] In the *SAIT*[7] decision, a Public Body argued that an arbitration award between the parties precluded an applicant from requesting access to records under FOIP. In rejecting that argument, Commissioner Work explained:

> I do not accept the Public Body's position that the Applicant's decision to exercise its access rights under the FOIP Act, in addition to its rights under the collective bargaining and arbitration processes, are sufficient grounds for finding the access request "vexatious".
>
> The collective bargaining and arbitration processes are separate and independent from the process set out in the FOIP Act. Each process has its own rules and procedures. As a result, the outcomes under one process may differ from the other. There is no evidence presented to me that the collective bargaining and arbitration processes can restrict the Applicant's right to apply for access to the information under the FOIP Act.[8]

[21] Further, in *Edmonton Police Service*[9], an applicant sought records under FOIP in conjunction with records discovery regarding a matter before the Law Enforcement Review Board. The Public Body in that case made similar arguments to the current ones before me, that is, that the requested records would be provided through the usual disclosure process. These arguments were summarized at paragraphs 10 – 14, quoted below:

> 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.
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> 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)*".
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> The Public Body said:
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> > "*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*

[6] *Ibid.* at para 38
[7] Request for Authorization to Disregard an Access Request under Section 55 of the *Freedom of Information and Protection of Privacy Act*, Southern Alberta Institute of Technology (IPC File References #2603), February 3, 2003 ("*SAIT*"), available online at: https://www.oipc.ab.ca/media/592943/Section_55_SAIT_2003.pdf
[8] *Ibid.* at paras 37 and 38
[9] *Supra* note 3

> *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."*

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"*.

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.[10]

[22] In that case, Commissioner Work held that the existence of other means by which an applicant could obtain records did not preclude an applicant from also making an access request under FOIP. He held (at paragraphs 30 – 37):

> Section 3 (a) of the FOIP Act allows individuals to 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,…*
>
> 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.
>
> 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.
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> 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.*
>
> The right of access under the FOIP Act is not absolute. Section 6(2) of the FOIP Act reads:

[10] *Ibid.* at paras 10 - 14

> *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.*
>
> 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.
>
> 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.
>
> 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.[11]

[23] I find the analysis in the *Edmonton Police Service* decision is equally applicable to the matter currently before me. Despite the Public Body's assertion, there is no evidence before me that this is a "unique" situation. That the Applicant has chosen to exercise its access rights under the FOIP Act alongside a contentious document discovery process in the course of civil litigation is not sufficient for me to find the request is vexatious.

Commissioner's Decision

[24] I find that the Public Body has not met its burden of proving that the Respondent's access request is vexatious. Therefore, that part of section 55(1)(b) is not met. Because the Public Body has not met its burden under s. 55(1)(b), I cannot exercise my discretion to authorize the Public Body to disregard the Applicant's access request.

Re Public Body's Request to Contact the Applicant

[25] The Public Body has asked that if I do not provide authorization to allow it to disregard the Applicant's request, that I "contact the applicant and request them to at least postpone their FOIP request until they have received and reviewed the results of the latest records discovery that the Municipality performed". The FOIP Act does not give me jurisdiction to do this, and I do not believe it would be proper for me to insert myself into this private dispute, but it may be entirely reasonable for the parties, that is, the Public Body and the Applicant, to work out for themselves whether the scope of the access request may have changed as a result of the concurrent records discovery process in the ongoing litigation.

Jill Clayton
Information and Privacy Commissioner

[11] *Ibid.* at paras 30 - 37