

**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*

City of Calgary  
(OIPC File Reference 006490)

April 13, 2018

- [1] The City of Calgary (the “Public Body”), in a letter dated September 7, 2017, requested authorization under section 55(1) of the *Freedom of Information and Protection of Privacy Act* (“FOIP” or the “Act”) to disregard an access request (the “Current Request”) made by an individual (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) reads:

*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**

- [3] On August 10, 2017, the Applicant made an access request to the Public Body under FOIP, as follows:

“All records pertaining to the handling of FOIP request 2015-G-0218.”

- [4] On September 7, 2017, the Public Body applied to me under s. 55(1) of FOIP for authorization to disregard the Applicant’s access request. The Applicant provided a submission regarding the Public Body’s request on September 22, 2017.

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

- [5] A decision under section 55 is a discretionary “may” decision. When making a request for authorization to disregard an access or correction request, a public body bears the burden to

establish that the conditions of either section 55(1)(a) or (b) have been met. Bare assertions or argument are insufficient; a public body must provide evidence. The only requirement for an applicant is to demonstrate the request has merit.<sup>1</sup> If a public body meets its burden, then I must decide whether to exercise my discretion to authorize the public body to disregard the request.

### The Public Body's Position

- [6] The Public Body explained that the access request at issue in this matter (the "Current Request") relates to its handling of a previous access request submitted by the Applicant for a whistleblower investigation report (the "Original Request"). The Public Body's response to the Original Request was being reviewed in an Inquiry before my office at the time it submitted this request for authorization to disregard. The Public Body stated that "[t]he information that would be identified and processed by the Public Body in responding to the Current Request would necessarily include some of the same information, or reveal the substance of this information, that is the subject of the Inquiry."
- [7] The Public Body provided evidence in the form of a sworn affidavit, a portion of which is reproduced below:

I asked the Applicant to clarify the Current Request. Specifically, I asked the Applicant what he meant by the "handling" of FOIP request 2015-G-0218. The Applicant clarified his request on August 11, 2017 to indicate that he wanted the access request to include all information regarding the Public Body's internal handling of FOIP request 2015-G-0218 including: i) the Public Body's initial processing of this request, ii) the Office of the Information and Privacy Commissioner's ("OIPC") initial review (i.e. mediation) of this request, and iii) the OIPC's Inquiry held for this request. The Applicant also clarified that his request did not include the Public Body's correspondence with the OIPC.

FOIP Request 2015-G-0218 references a previous access request submitted by the Applicant to the Public Body for an untitled report dated November 26, 2014, and a whistleblower investigation report, topic: independent investigation dated December 8, 2014 (the "Original Request").

With respect to the Original Request, the Public Body located two responsive reports consisting of 32 total pages ("Records"). The Public Body withheld the Records in their entirety in accordance with exceptions to disclosure set out in the *Freedom of Information and Protection of Privacy Act* (the "Act").

The Original Request is currently subject to Inquiry No. 001676 held by the Commissioner under s. 69 of the Act (the "Inquiry"). The parties to the Inquiry include the Public Body, the Applicant, and several undisclosed affected parties. The parties have made submissions to the OIPC as part of the Inquiry. As part of the Inquiry, the Public Body has also made *in*

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<sup>1</sup> See for example, Service Alberta, Request for Authorization to Disregard an Access Request under section 55(1) of the *Freedom of Information and Protection of Privacy Act*, OIPC File No. F8116, August 24, 2014 at paras 16 - 18, available online at: [https://www.oipc.ab.ca/media/593322/section\\_55\\_service\\_alberta\\_2014.pdf](https://www.oipc.ab.ca/media/593322/section_55_service_alberta_2014.pdf)

*camera* submissions which have been accepted by the OIPC Adjudicator. The Public Body's final submissions for the Inquiry were made on August 1, 2017.

As of the date of this affidavit, the OIPC Adjudicator has not yet issued an Order with respect to the Inquiry.

Processing the Applicant's Current Request involves much of the same information and the same issues that are currently being considered by the OIPC adjudicator as part of the Inquiry.

Many of the Records which would likely be responsive to the Current Request would reveal the contents of the Records that are the subject of the ongoing Inquiry. The information in these records could also reveal the identities of the undisclosed affected parties to the Inquiry and reveal the Public Body's and affected parties representations made to the Commissioner during the Inquiry. This includes allowing the Applicant to ascertain the nature and content of *in camera* submissions made by the Public Body in the course of the Inquiry and submissions made during the review conducted by the OIPC mediator.

- [8] The Public Body takes the position that the Applicant's request is i) systematic in nature and amounts to an abuse of the right to make access requests under the Act and ii) is vexatious.
- [9] I will deal with the Public Body's arguments in more detail in my analysis of s. 55 below.

#### The Applicant's Position

- [10] The Applicant stated that "the City offers no evidence of any kind to support this very serious attempt to refuse a citizen's right to access information". The Applicant further stated:

I shouldn't have to do so but I will put it here in print: in fulfilling this FOIP request, I respectfully ask the Public Body to deliberately NOT include any portions of the original reports sought under FOIP Request 2015-G-2018. I only want all records pertaining to the Public Body's handling of that original request but please not the actual reports themselves. I trust that this is sufficiently clear enough.

My request seeks to determine how the city had processed my earlier request. Journalists and people like researchers for political parties commonly use this type of technique to determine if there has been bias or political interference or the abuse of record retention policies.

[...]

[T]he Public Body asserts incorrectly that in processing this current request, it would have to reveal information that is subject to the inquiry. I neither expect that nor is that my goal in making this request. Obviously if the Public Body refused to release information such as individual's names in my original request, none of that information should be released in this request. My goal is simple; to see how the Public Body processed my request. So, when the Public Body states in this paragraph "The Applicant is essentially trying to obtain information currently subject to the Inquiry before the Inquiry has been decided", this is simply an uneducated and rather suspicious opinion. As the requester, I give evidence here

that the City's conclusion is a false statement without merit and also without proof as that is NOT my intent. I would ask the OIPC to direct the Public Body in fulfilling my current request to not release any information from the original reports which were the subject of FOIP request 2015-G-2018. I only want records regarding the handling of that request.

Related to this, the Public Body makes assertions that I am trying to obtain the Public Body's confidential submissions to the OIPC. Yet again, the assertions are false as clearly those records are NOT related to the internal handling of the request. The Public Body claims that including these records would be an abuse of the my [sic] right to make an access request. I haven't asked for those records and do not expect to receive them. Again, I would submit the Public Body has erred and there is no legitimate claim to allow it to disregard the current request under Section 55.

[...]

The Public Body also declares that my request is 'vexatious'. Actually, I have made a serious request and it seeks to answer a simple question: how did this Public Body handle a FOIP request? This is not trivial as the Act permits citizens to enquire on the operations of public bodies. There is no bad faith on my part, IE malicious or oblique motive, and there is no evidence provided of that. As well, there is no intent on my part to harass or obstruct the Public Body. No evidence is provided. I make a handful of FOIP requests per year to this Public Body.

[...]

Further, I will note that as a professional journalist, I guard my credibility carefully. Besides being an abuse of process (Section 55), the allegations made in the City's submission are a calculated and offensive attempt to besmirch my good name and reputation.

#### Section 55(1)(a)– Repetitious or Systematic in Nature

- [11] The Public Body submits that the Current Request is systematic in nature. "Systematic in nature" includes a pattern of conduct that is regular or deliberate. "Deliberate" has been defined as "intentional", "done on purpose", "fully considered", or not impulsive.<sup>2</sup>
- [12] The Public Body states that the two requests filed by the Applicant (the Original Request and the Current Request) relate to the same information. It states that an applicant does not need to submit a high number of requests in order for them to be considered systematic in nature and relies on *Bonsma v. Alberta (Information and Privacy Commissioner)*, which was a judicial review of a Commissioner's decision under s. 55 of the Act. In *Bonsma*, the Court agreed with the Commissioner's decision that an "access request was not technically repetitious, but the result would be repetitive; this is systematic."<sup>3</sup>
- [13] The Original Request resulted in an Inquiry and an Order issued by my office. The Applicant has explained that the purpose of the Current Request is to see how the Public Body processed the Original Request. The Applicant's two access requests are not identical, but they do relate to similar information. As such, I find that the Applicant's request is systematic in nature.

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<sup>2</sup> *Bonsma v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 209 [*Bonsma*]

<sup>3</sup> *Bonsma* at para 31

### Section 55(1)(a) – Unreasonably Interfere with the Operations of the Public Body

[14] Under section 55(1)(a), the requests must also unreasonably interfere with the operations of the Public Body or amount to an abuse of the right to make those requests. There is no need for me to consider this part of section 55 because the Public Body has not relied on it.

### Section 55(1)(a)– Amount to an Abuse of the Right to Make Those Requests

[15] The Public Body states (in part):

The Applicant's submission of the Current Request is nearly identical to the situation considered by the Court of Queen's Bench in *Bonsma*. In *Bonsma*, an applicant submitted an access request for a public body's file regarding its processing of a previous access request submitted by that same applicant. This previous request was subject to an inquiry where the OIPC had not yet issued an order. As described above, the Commissioner decided that the public body could disregard the applicant's request for the processing file, which was upheld by the Court.

Much of the information that would be identified and processed by the Public Body in responding to the Current Request is currently the subject of, or would reveal information that is the subject of the Inquiry. Moreover, this information would also identify the undisclosed affected parties in the Inquiry. Processing the Current Request would necessarily require the Public Body to consider much of the same information, issues and parties as it did in the Original Request. This would result in a significant duplication of the Original Request. By making the Current Request, the Applicant is essentially trying to obtain information currently subject to the Inquiry before the Inquiry has been decided. The Public Body submits that this is an abuse of the right to submit an access request.

Some of the information responsive to the Current Request would necessarily include the Public Body's representations to the Commissioner in the inquiry, or reveal the substance of such representations. Information responsive to the Current Request could also include representations made by affected parties to the Inquiry. Pursuant to s. 69(3) of the Act, the Applicant is not entitled to have access to any representations made to the Commissioner over the course of the Inquiry [Order F2010-029, para 55]. The Applicant has clarified that the Current Request does not include the Public Body's correspondence with the OIPC. However, the Public Body submits that the Current Request would still encompass information that the Applicant is not entitled to access under s. 69(3) of the Act, for example, draft *in camera* submissions made in the course of the Inquiry and other legal representations.

A purpose of the Act is to provide for an independent review of decisions made by public bodies under the Act [Section 2(e) of the Act]. One of the mechanisms for this review is the inquiry process as established by the Act. Section 69(3) of the Act enables this process by ensuring that the fundamental principle of procedural fairness in an adjudicative process is maintained and that the Commissioner controls the adjudicative process. In the Inquiry the Adjudicator determined that the identities of the affected parties would remain undisclosed and accepted *in camera* some of the Public Body's submissions. In the context of the

Inquiry, it is the Adjudicator, who in accordance with procedural fairness and other considerations under the Act determined the extent to which information would be shared between the parties. The Applicant's Current Request would undermine these decisions. The Applicant cannot through another means obtain information which is the subject of an ongoing Inquiry. The Applicant cannot do indirectly that which he cannot do directly. Seeking to obtain representations to which the Applicant is not entitled to access is a further indication that the Current Request is an abuse of the Applicant's right to make an access request.

- [16] The Public Body also stated that responding to the request would be an inefficient use of public resources because at the time of its submission, the Inquiry had not yet been completed. It further stated that the timing of the Applicant's request, that being nine days after the Public Body made submissions in the Inquiry, and the fact that it was a general request and not a request for personal information, was evidence that the request is abusive.
- [17] The Public Body's arguments focus on the type of information that may be responsive to the Applicant's Current Request; that is, that the undisclosed third parties could be identified and the Applicant could receive draft *in camera* submissions. However, on the facts of this case, speculation about the information that may be responsive to the Current Request does not assist the Public Body in establishing that the conditions of section 55 have been met. The Legislature, in enacting FOIP, designed an access to information regime in which the default is to disclose a public body's information, subject only to the specific and limited exceptions set out in the Act.
- [18] In any event, with respect to the Public Body's concern about potential identification of undisclosed third parties, presumably, as in any other access request, in responding to the Current Request, the Public Body would apply relevant exceptions under FOIP. With respect to the Public Body's concern about draft *in camera* submissions, the Applicant specifically addressed this concern in his submission, stating:

Related to this, the Public Body makes assertions that I am trying to obtain the Public Body's confidential submissions to the OIPC. Yet again, these assertions are false as clearly those records are NOT related to the internal handling of the request. The Public Body claims that including these records would be an abuse of the my [sic] right to make an access request. I haven't asked for those records and do not expect to receive them. Again, I would submit the Public Body has erred and there is no legitimate claim to allow it to disregard the current request under Section 55.

- [19] Previous decisions from this office have defined "abuse" to mean misuse or improper use<sup>4</sup>.
- [20] This definition of abuse was discussed in the *Bonsma* case relied on by the Public Body.<sup>5</sup> On the facts of the *Bonsma* case that were before the reviewing Court, the Commissioner had

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<sup>4</sup> For example, see Request for Authorization to Disregard Access Requests, Grant MacEwan College, IPC File Reference: F3885, March 13, 2007, available online at: [https://www.oipc.ab.ca/media/592928/Section\\_55\\_Grant\\_MacEwan\\_2007.pdf](https://www.oipc.ab.ca/media/592928/Section_55_Grant_MacEwan_2007.pdf)

<sup>5</sup> *Bonsma* at para 25

authorized a public body to disregard an access request. The applicant in that case had made 11 access requests to that public body<sup>6</sup>, and as the Court stated, “The Commissioner noted that these access requests demonstrate that Mr. Bonsma has ongoing issues with Employment Standards and Tesco and that his repeated access requests are “part of a pattern of conduct that is “deliberate”, that is “intentional; done on purpose ... fully considered; not impulsive”.<sup>7</sup> The Court further stated:

However, since that March request is currently before the Commissioner’s office and both requests would deal with Tesco’s objections to production of information and the basis upon which Alberta Employment and Immigration withheld records, he concluded:

In other words, the Applicant is using the access provisions of the FOIP Act to try to obtain information that is the subject of a review already before my office... In my opinion, this is an improper use of the right to make an access request and therefore amounts to an abuse of the right to make the request.<sup>8</sup>

- [21] The Applicant’s Current Request is a ‘FOIP of a FOIP’ request; that is, it is an access request made about the handling or processing of a previous FOIP request. The *Bonsma* case was also about a FOIP of a FOIP request. However, the facts of this case are different than those in *Bonsma*. There is no evidence that the Applicant has made the Current Request for any other purpose than obtaining records regarding the Public Body’s handling of the Original Request. Further, the Applicant has clarified that he does not want any records relating to the Public Body’s submissions before my office.
- [22] A FOIP of a FOIP access request is an access request like any other under the Act and is not *prima facie* abusive. Absent other factors, there is nothing inherently abusive about an access request made about the handling of a previous access request.
- [23] On the evidence before me, I am not satisfied that the Current Request is an abuse of the right to make requests under s. 55(1)(a) of the Act.

#### Section 55(1)(b) – Frivolous or Vexatious

- [24] The Public Body also takes the position that the Current Request is vexatious. 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.<sup>9</sup>
- [25] The Public Body states:

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<sup>6</sup> *Bonsma* at para 23

<sup>7</sup> *Bonsma* at para 24

<sup>8</sup> *Bonsma* at para 25

<sup>9</sup> 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, available online at: [https://www.oipc.ab.ca/media/144959/Section55\\_EdmontonPoliceService\\_2005.pdf](https://www.oipc.ab.ca/media/144959/Section55_EdmontonPoliceService_2005.pdf)

While the Applicant has not continually or repeatedly filed access requests to the same extent as the applicant in *Grant MacEwan College*, the Public Body submits that the Current Request is unnecessary and premature, as the OIPC has not yet issued an Order regarding the Inquiry. Further the Applicant's Current Request relates directly to information which is the subject of an ongoing Inquiry.

[26] The Inquiry referred to by the Public Body has now been completed, but even if it were still ongoing, that alone would not be a sufficient ground to find the request is vexatious. The Applicant has clarified in his submission that he is not seeking confidential submissions made to my office; rather, he seeks "all records pertaining to the Public Body's handling of that original request but please, not the actual reports themselves". The Applicant stated:

My goal is simple; to see how the Public Body processed my request.

[27] On the evidence before me, I am not satisfied that the Public Body has met its burden to establish that the Current Request is vexatious under s. 55(1)(b) of the Act.

#### **Commissioner's Decision**

[28] After careful consideration of the parties' submissions, and for the reasons stated above, I have decided not to authorize the Public Body to disregard the Applicant's Current Request. Therefore the Public Body is required to respond to the Applicant's request for access in accordance with FOIP.

Jill Clayton  
Information and Privacy Commissioner