ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

REQUEST TO DISREGARD F2024-RTD-01

February 7, 2024

UNIVERSITY OF CALGARY

Case File Number 031411

[1] The University of Calgary (the "Public Body") requested authorization under section 55(1) of the *Freedom of Information and Protection of Privacy Act* (the "*FOIP Act*") to disregard three 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.

[2] For the reasons outlined in this decision, the Public Body is required to respond to access requests A23-029, A23-030 and A23-033 in accordance with the *FOIP Act*.

Commissioner's Authority

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

> 55(1) If the head of a public body asks, the Commissioner may authorize the public body to disregard one or more requests under section 7(1) or 36(1) if
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> (a) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make those requests, or
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> (b) one or more of the requests are frivolous or vexatious.

Background

[4] The three access requests at issue relate to communications of an employee of the university, an associate professor. Previous access requests made by the Applicant have also sought information about the professor's research activities. The access requests at issue before me in this matter are for the following:

> **A23-029** – copies of all e-mails sent or received (including CC:s and BCC:s) by [the professor], since June 1, 2022.
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> **A23-030** – copies of any correspondence, both sent and received, including email, Twitter, text, Signal, WhatsApp, Slack etc., referencing [a named journalist] and/or [news organization] since June 1, 2022.
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> **A23-033** – copies of any documents, including e-mails, texts, or Instant messages, slack messages, WhatsApp messages, reports memos, briefing notes, correspondence etc., referencing any communications between [the professor] and the Security Service of Ukraine (SBU) regarding social media posting/accounts or misinformation/disinformation, since January 1, 2021.

[5] The Public Body also provided a copy of a Statement of Claim, noting that it is a party to litigation involving the journalist and news organization named in A23-030, stating, "Although it is not clear whether or how the Applicant is involved in that matter, the nature of the various requests indicates that there is a connection between the request and that litigation." In the absence of any evidence or further argument on this point, I decline to infer a connection between these access requests and the litigation, and have not considered it further in this matter.

Preliminary Issue – Jurisdiction

[6] A preliminary issue arose regarding my jurisdiction to consider this matter. The Public Body received access requests A23-029 and A23-030 on or about June 20, 2023. It received A23-033 on July 26, 2023. The Public Body submitted its application to disregard these three access requests on August 18, 2023. This means that almost two months had passed from the Public Body's receipt of A23-029 and A23-030.

[7] As it was not clear that I had jurisdiction to consider A23-029 and A23-030 under section 55(1) of the *FOIP Act*, I wrote the parties to explain this concern and requested submissions from them on this preliminary issue of jurisdiction.

[8] Section 55 of the *FOIP Act* does not establish a public body's timeline for bringing an application under this provision. Section 55(2) states:

> *55(2) The processing of a request under section 7(1) or 36(1) ceases when the head of a public body has made a request under subsection (1) and*
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> > *(a) if the Commissioner authorizes the head of the public body to disregard the request, does not resume;*
> >
> > *(b) if the Commissioner does not authorize the head of the public body to disregard the request, does not resume until the Commissioner advises the head of the public body of the Commissioner's decision.*

[9] The effect of subsection 55(2) is to cease the processing of a request once an application is made under subsection (1). This means that the usual timeline under the *FOIP Act* is no longer running; however, this only occurs *after* the application under section 55(1) has been made. As such, in my view, the statutory timelines for processing the three access requests ceased on August 18, 2023 when the Public Body made its application under section 55(1). Prior to this application though, in my view, the usual timelines under the *FOIP Act* for processing these access requests applied.

[10] Section 11 of the *FOIP Act* sets out the timeline for a public body to respond to an access request as follows:

> *11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless*
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> > *(a) that time limit is extended under section 14, or*
> >
> > *(b) the request has been transferred under section 15 to another public body.*
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> *(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.*

[11] Section 11(1) requires a public body to make every reasonable effort to respond to a request, and if it is not responded to within 30 days, or within the timelines contemplated by subsections (a) and (b), section 11(2) states that it is to be treated as a decision to refuse access to the record. That is, although a public body has not responded, its failure to respond is to be treated as a response: a decision to refuse access to the record. Where a public body has refused to provide access to a record, this triggers an applicant's right of review under section 65(1) of the *FOIP Act*.

[12] Upon receipt of my request for additional information regarding the timeline in this case, the Public Body provided confirmation that it had decided to extend its timeline to respond for access requests A23-029 and A23-030 under section 14(1) of the *FOIP Act*. The Public Body provided a copy of the letters it sent to the Applicant on July 17, 2023

which had extended its timeline for responding by 30 days, to August 19, 2023. As such, the Public Body was within its statutory timeline under the *FOIP Act* when it requested authorization to disregard the three access requests on August 18, 2023.

[13] I find I have jurisdiction to consider these three access requests under section 55(1) of the *FOIP Act*.

Burden of Proof

[14] The *FOIP Act* is silent on the burden of proof associated with a request to disregard an access request under section 55(1). Former Commissioner Clayton, stated the following about where the onus lies for this provision.[1]

> The proposition that "he who asserts must prove" applies across all areas of law, unless there is a specific reverse onus: for example, see Garry v Canada, 2007 ABCA 234, para 8; and Rudichuk v Genesis Land Development Corp, 2017 ABQB 285, para 27. The proponent of a motion needs evidence.
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> As the moving party requesting my authorization, the onus is on the Public Body to prove, with evidence, the requirements of section 55(1)(a) or (b), on a balance of probabilities. As I stated in the MacEwan University Decision under section 55(1) Decision (September 7, 2018), "I cannot make arguments for any party before my office. I must make a decision based on the arguments and evidence the parties put before me".
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> Under section 55(1)(a), I am permitted to authorize the Public Body to disregard one or more of the Applicant's requests if they are repetitious or systematic in nature, and would unreasonably interfere with the operations of the Public Body or amount to an 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.

[15] 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

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

case and on doing so I must exercise my discretion about whether to authorize the Public Body to disregard the access request.

[16] 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 quashing that section 55(1) decision of former Commissioner Work, the Court expressed its view that an application to disregard an access request amounts to a summary dismissal (or disposition) application. Given the similarity of a request for authorization to disregard an access request and a summary disposition application, Alberta's case law provides some guidance as to the evidentiary requirements of a public body in a section 55(1) matter. The law in Alberta is clear that parties to a summary disposition application must 'put their best foot forward'.[3] However, in the *Bonsma* decision, the Court further expressed its view that a person defending what amounted to a summary dismissal under the *FOIP Act* need do no more than show merit. In other words, that person did not have a burden to show that the request was for a legitimate purpose.

[17] 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.

[18] 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."[4] As such, if an applicant chooses to provide a submission in response to an application to disregard an access request, that submission may be considered along with that made by a public body.

Purpose of Access to Information Legislation

[19] 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.

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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] See, for example, *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.,* 2019 ABCA 49 at para 37

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

[20] In an early foundational case, the Supreme Court of Canada spoke to the principles underlying access to information legislation:[5]

> 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.

Purpose of Section 55(1)

[21] 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.
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> In my view, the Legislature also recognizes that there will be certain individuals who may use the access provisions of the FOIP Act in a way that is contrary to the principles and

[5] *Dagg v Canada (Minister of Finance)*, 1997 CanLII 358: Although LaForest J. was writing for a dissenting minority on another point, the majority agreed with this comment. Numerous subsequent decisions have confirmed this opinion (for example: *Lavigne v Canada (Office of the Commissioner of Official Languages),* 2002 SCC 53; *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3; *Ontario (Attorney General) v Ontario (Information and Privacy Commissioner)*, 2024 SCC 4).

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.[6]

[22] 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.[7] 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.[8] 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*,[9] 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.[10] This provision contains similar wording to the Alberta *FOIP Act*. The Court stated:

> Section 43 is an important remedial tool in the Commissioner's armory to curb abuse of the right of access. That section and the rest of the Act are to be construed by examining it in its entire context bearing in mind the purpose of the Legislation. The section is an important part of a comprehensive scheme of access and privacy rights and it should not be interpreted into insignificance. The legislative purposes of public accountability and openness contained in s. 2 of the Act are not a warrant to restrict the meaning of s. 43. The section must be given the "remedial and fair, large and liberal construction and interpretation as best ensures the attainment of its objects", that is required by s. 8 of [BC's] *Interpretation Act…*[11]

[23] 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

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[6] F2002-RTD-01, at pp. 3 and 4

[7] See, for example, F2018-RTD-09 at pp. 4

[8] 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

[9] "*Crocker",* 1997 CanLII 4406 (BCSC)

[10] 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.

[11] *Crocker.,* at para 33

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."[12]

[24] 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?

[25] 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 or systematic nature", one or more of the Access Requests "would unreasonably interfere with its operations or amount to an abuse of the right to make those requests". A request is repetitious when a request for the same records or information is made more than once. "Systematic in nature" includes a pattern of conduct that is regular or deliberate.

[26] The Public Body asserts that the access requests are systematic, but did not provide any further argument on that point, so I will not consider that portion of 55(1)(a).

[27] The Public Body argues that the access requests are repetitious and states:

> The 2023 Requests are repetitive because they seek similar or the same records to those that the Applicant already sought, and was denied, in [the Applicant's] previous requests. The 2023 Requests seek records already covered by the Applicant's June 2022 Request. It is reasonable to assume that the 2023 Requests are simply an attempt to access the same information already requested in a different manner. This repetition can be abusive in and of itself: F2023-RTD-04 at para. 25. The Applicant's most recent request of July 26, 2023, is another example. Many of the records it would include would already be covered by the 2023 Requests or the 2022 Requests [the Applicant] chose to stop pursuing. The Applicant is submitting repeated requests targeting the same or substantially the same information.

[28] The Applicant takes the position the requests are not repetitious, stating:

> Nor are the requests repetitive. In 2022, I asked for funding information (which the University refused to provide) and for information on a specific study – which [the professor] was touting on social media and in numerous media interviews. It would not be surprising that, given the media attention, there would be interest in the study itself

[12] Office of the Auditor General of British Columbia, Order F18-37, 2018 BCIPC 40 (CanLII), at para 11

> and the background of it. I was certainly not interested in any of [the professor's] personal information or [the professor's] proprietary research.

[29] The Public Body states that the Applicant previously made similar requests. It decided an exemption applied to those requests and withheld the responsive records. A review was requested and performed by my office, and as an Inquiry was not requested, the file was closed in May, 2023. The Applicant confirmed the file had been closed, stating:

> I decided not to proceed with the complaints because the information that I had requested, which the University claimed was secret, had been publicly disclosed previously by the University. It seemed silly, despite their intransigence, to continue the complaint and tie up precious Commission resources.

Based on the submissions before me, I understand the Applicant's previous two requests to the Public Body were for copies of documents showing the sources of funding for a study about Canadian social media disinformation relating to the Russia-Ukraine war and for copies of documents regarding the proposal, planning and drafting of the study, including documents relating to the section of Twitter accounts to track and review for the study.

[30] The Public Body asserts that these current requests seek the same or similar records as the previous requests (regarding the study and the sources of funding for the study), and states it "is reasonable to assume that the 2023 Requests are simply an attempt to access the same information already requested in a different manner". The current requests include a very broad request for all emails sent or received by the professor within a specific time period, any correspondence referencing a specific journalist or news organization, and documents referencing communications between the professor and the Security Service of Ukraine regarding social media accounts or misinformation/disinformation. It is not clear on the evidence before me that the access requests are repetitious, and I cannot assume, as requested by the Public Body, that these access requests are simply an attempt to access the same information.

[31] I find that the Public Body has not met its burden to establish under section 55(1)(a) that the access requests are repetitious. As the Public Body has not established that the access requests are repetitious or systematic, there is no need for me to consider the second part of section 55(1)(a), that is, whether the requests would unreasonably interfere with the operations of the public body or amount to an abuse of the right to make requests.

[32] I will consider the records under section 55(1)(b).

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

[33] 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. The Public Body argues the access requests are frivolous:

> The 2023 Requests are trivial or without merit because they do not disclose any access to information rationale. There is no reasonable justification for the Applicant's request to obtain every email sent to or by [the professor] since June 1, 2022. In the language of *Hyrniak v Mauldin*, the costs of the University's complying with the request are not justified because there is no discernable, reasonable, justification for them.

[34] An applicant is not required to disclose their purpose for requesting information. I understand the Public Body's position is that A23-029 (for all of the professor's emails) is overly broad. This factor alone does not make the request frivolous. Rather, when faced with an access request that may be overly broad, public bodies and applicants are encouraged, where possible, to communicate with each other to possibly narrow the scope of the request. The Public Body has provided no evidence as to whether it attempted to clarify or narrow A23-029 and the Applicant confirms this:

> The University also made no attempt to communicate with me about their concerns about the potential search size of any of the current requests. I would have been happy to work with them on modifying or focusing the requests to make them more manageable, as I have done with many institutions across the country if they had bothered to reach out to me.
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> […]
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> Regardless of the adversarial way the University has chosen to treat these requests, I remain open to working with them to address their concerns about the size/scope or the requests and find ways to make them more manageable for them to proceed with. I look forward to working with them on these if they so wish.

[35] The Public Body's argument regarding the frivolous nature of the Applicant's requests focuses only on A23-029, that being the requests for all of the professor's sent and received emails within a certain time frame. I have found that the broadness of this access request is not, on its own, sufficient to find that it is frivolous. The Public Body did not provide any argument that A23-030 and A23-033 are frivolous. As such, I will not consider whether they are frivolous.

[36] I find that A23-029 is not frivolous.

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

[38] A vexatious request may also involve misuse or abuse of a legal process. While I agree with these comments and others made by former Commissioners, the common law also provides guidance in capturing the meaning of "vexatious". For example, in *Canada v Olumide*, 2017 FCA 42 the Federal Court of Appeal provided the following comments:

> [32] In defining "vexatious" it is best not to be precise. Vexatiousness comes in all shapes and sizes. Sometimes it is the number of meritless proceedings and motions or the reassertion of proceedings and motions that have already been determined. Sometimes it is the litigant's purpose, often revealed by the parties sued, the nature of the allegations against them and the language used. Sometimes it is the manner in which proceedings and motions are prosecuted, such as multiple, needless filings, prolix, incomprehensible or intemperate affidavits and submissions, and the harassment or victimization of opposing parties.
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> [33] Many vexatious litigants pursue unacceptable purposes and litigate to cause harm. But some are different: some have good intentions and mean no harm. Nevertheless, they too can be declared vexatious if they litigate in a way that implicates section 40's purposes: see, *e.g. Olympia Interiors* (F.C. and F.C.A.) above.
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> [34] Some cases identify certain "hallmarks" of vexatious litigants or certain badges of vexatiousness: see, for example, *Olumide v Canada*, 2016 FC 1106 at paras. 9-10 where the Federal Court granted relief under section 40 against the respondent; and see paragraph 32 above. As long as the purposes of section 40 are kept front of mind and the hallmarks or badges are taken only as non-binding *indicia* of vexatiousness, they can be quite useful.

[39] The Federal Court of Appeal's comments were made specifically in relation to section 40 of the *Federal Courts Act*, but in my view, a broad interpretation of "vexatious" is applicable to applications to disregard an access or correction request. Similarly, the Alberta Court of Appeal (in speaking to the jurisdiction granted to the Court under the *Judicature Act,* not the *FOIP Act*) cautioned that too strict an adherence to indicia of vexatious may invite a formalistic analysis which does not focus on the individual litigant.[13] While these judicial comments are not directly applicable to the *FOIP Act*, they provide support for the interpretation that there are many ways in which an access or

[13] *Jonsson v Lymer*, 2020 ABCA 167 at para 40

correction request may be considered vexatious. Such a finding will always depend on the specific facts of the case.

[40] The Public Body argues the Applicant's requests are vexatious as follows:

> The Applicant's 2023 requests are vexatious because their true motive is other than to gain access to information. It appears, especially in light of third request received July 26, 2023, that the Applicant's motivation is to target [the professor] and [the professor's] research activities.

[41] The Public Body has provided no additional evidence or argument in support of this position. The Applicant denies that the access requests specifically target the professor and argues that the Public Body has not referred to other access requests the Applicant has previously made to it "on a variety of subject matters".

[42] While a "vexatious" request may "come in all shapes and sizes",[14] the Public Body has provided only speculation that the Applicant's motive is to target the professor. This is specifically denied by the Applicant, who has pointed to the fact that they have made numerous access to information requests across the country on a variety of topics. On the basis of the evidence before me, I am unable to conclude that these access requests are vexatious.

[43] The Public Body has not met its burden under section 55(1)(b).

Decision

[44] After consideration of the relevant circumstances, and for the reasons stated above, the Public Body is required to respond to access requests A23-029, A23-030 and A23-033 in accordance with the *FOIP Act*.

[45] As the Applicant has indicated willingness to work with the Public Body, the parties may benefit from communicating with each other to narrow the scope of the access requests.

Diane McLeod
Information and Privacy Commissioner

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[14] *Canada v Olumide*, 2017 FCA 42 at para 32