ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

REQUEST TO DISREGARD F2024-RTD-06

August 27, 2024

City of Medicine Hat

Case File Number 034257

[1] The City of Medicine Hat (the "Public Body") requested authorization under section 55(1) of the *Freedom of Information and Protection of Privacy Act* (the "*FOIP 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.

[2] For the reasons outlined in this decision, the Public Body is required to respond to access requests 30-2024 and 31-2024 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
>
> (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 Applicant is an independent journalist. The Public Body has requested authorization to disregard two access requests, as summarized below:

30-2024

- Information about "living expenses" paid or reimbursed to employees of the Public Body;
- Information about severance agreements, including the date, amount paid, and the job title or position;
- A detailed accounting of funds reallocated by the City Manager in 2023;
- Monthly staff turnover statistics; and
- Itemized expenses and P-card statements for the City Manager and Managing Directors.

Time Frame: 2020 - 2023

31-2024

- All communications between Public Body employees, internal and external, including City Council and members, and the Mayor, with all or part of the Applicant's name or business name, and any variations or misspellings of the specified terms.

Time Frame: 2020 – April 15, 2024

[5] The Public Body states:

> These requests are intentionally extensive in their scope and nature and are part of an online social media campaign by the applicant, encouraging people to harass the city administration with FOIP requests as part of an operation they call "Go FOIP Yourself". [The Applicant's business] and the applicant are crowdsourcing funds to pay for the requests.

[6] The Public Body provided additional evidence in the form of screenshots of some of the Applicant's social media posts discussing the 'Go FOIP Yourself' campaign and crowdfunding. Both parties also included links to online videos in their submissions. The Public Body's links appear to be to the Applicant's social media (Facebook) and were provided as additional evidence of the crowdfunding and 'Go FOIP yourself' campaign, as well as an assertion that the Applicant claimed they would do "all kinds of FOIPP requests". The Applicant's video links appear to be for Council meetings of the Public

Body. I have not reviewed any of the online videos linked by the parties, and have based my decision only on the written evidence and submissions before me.

Burden of Proof

[7] The *FOIP Act* is silent on the burden of proof associated with a request to disregard an access request under section 55(1). In prior decisions, I have held that:[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.

[8] Therefore, 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.

[9] 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

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

[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

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.

[10] My office has 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.

[11] 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 Section 55(1)

[12] Section 2 sets out the purposes of the *FOIP Act,* which includes allowing 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 set out in the *FOIP Act*.

[13] 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

[3] See, for example, *Weir-Jones Technical Services Incorporated v Purolator Courier Ltd.,* 2019 ABCA 49 at para 37; *Alberta Energy v Alberta (Information and Privacy Commissioner*), 2024, ABKB 198 at para 21 (appeal pending on other grounds)

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

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.

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.[5]

[14] 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.[6] 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.[7] 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*,[8] 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.[9] This provision contains similar wording to the Alberta *FOIP Act*. The Court stated:

[5] F2002-RTD-01 (Alberta Municipal Affairs), 2002 CanLII 7872 (AB OIPC), at pp. 3 and 4

[6] See, for example, F2018-RTD-09 (MacEwan University), 2018 CanLII 15765 (AB OIPC) at pp. 4

[7] See, for example, F2017-RTD-02 (Calgary Police Service), 2020 CanLII 97987 (AB OIPC) at para 20, referring to Chief Justice McLachlin's comments in *Trial Lawyers Association of British Columbia* at para 47 and F2020-RTD-03 (Alberta Justice and Solicitor General) at para 9

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

[9] 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.

> 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…*[10]

[15] 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."[11]

[16] 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?

[17] 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.

[18] The Public Body submits as follows:

> The pattern of conduct in this case, as revealed in the social media campaign, is regular and deliberate. The resources required to respond to these requests, both within the FOIP unit and across the city administration, is overwhelming. The FOIP right of access has been weaponized for a political interest but in such a way that has very little direct connection with the cause itself "amounting to an abuse of the right to make requests".

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

[19] The evidence before me does not indicate that the Applicant has made more than these two access requests, and these requests are for different records and information. These access requests are not repetitious.

[20] The Public Body argues that the pattern of conduct demonstrated by the Applicant's social media campaign makes these requests systematic. However, section 55(1)(a) of the *FOIP Act* does not speak to the general circumstances of an access request; rather, it requires that because of the repetitious or systematic nature of *the access requests*, they would unreasonably interfere with the operations of the public body or amount to abuse of the right to make those requests. There is no argument or evidence before me that the access requests themselves are systematic.

[21] The Public Body has not met its burden under section 55(1)(a) to establish that the access requests are repetitious or systematic, therefore there is no need for me to consider the second part of the test under section 55(1)(a).

[22] I will consider the Public Body's arguments under section 55(1)(b).

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

[23] 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. In defining "vexatious", as courts have noted, it is best not to be precise.[12] Generally, vexatious access requests can include those where the applicant's true motive is other than to gain access to information. A vexatious request may be one where the intent is to harass the public body to whom the request is made or to misuse or abuse a legal process. Vexatiousness comes in all shapes and sizes, and is highly dependent on the facts of each case.

[24] The Public Body argues the Access Requests are frivolous and vexatious:

> Because the requests campaign by the applicant has little bearing in content to any declared public interest or cause, the substance of the requests and information produced is necessarily of "little weight and importance". (Commissioner decision – February 5, 2003)
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> The requests are vexatious because the stated purpose is not to gain access to information but to harass the city continually and repeatedly with an attempt to bring it to a standstill (Commissioner decision – November 4, 2005)

[12] Canada v Olumide, 2017 FCA 42 at paras 32 - 34

[25] The Applicant opposes the Public Body's request for authorization to disregard their access requests under section 55(1) and disputes the Public Body's characterization of the access requests, stating in part (video links omitted):

> I am writing to urgently express my strong opposition to the City of Medicine Hat's request to Disregard our Freedom of Information Request. As an independent journalist, I am deeply concerned with the principles of transparency and accountability in our municipal government. Public interest started with [a specified individual] being refused information. My FOIP request is for the exact information [that individual] was seeking.
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> Feb 20 2024 [a specified individual] asked that [their] information request be put on the Mar 4 2024 Council Agenda. It was not, nor was it placed on the Mar 18 agenda. It only came to the public's attention Apr 5 when the Apr 8 Agenda Packet was published. (pg. 271)
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> The normal number of views for City Council meetings number in the hundreds […], far less than 1000. In comparison, the April 8 Council meeting had over 1000 views. […]
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> The [individual's] request was not addressed at the Apr 9 Council meeting as time ran out. [The individual] said this information was available to the public via a FOIP request.
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> Apr 15 2025 I filed a FOIP request for the exact information [the individual] was seeking. I also filed a FOIP request for my personal information. I cannot remember filing a FOIP request with the City of Medicine Hat before so it is certainly not repetitious. I am willing to consider altering the scope of my personal request but have not been offered any opportunity to do so.
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> The Go FOIP Yourself campaign was a clever play on words to attract public attention to the FOIP process. The City has cited no numbers and has not proved any increase in FOIP requests due to our "campaign".
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> As for the "crowdfunding", I was told that I would be billed at $27/hour to fulfill the FOIP request. This is not something that I can afford. (I was also told via email that I would be provided with an estimate but the Request to Disregard came first.)
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> The information is of great public interest to the Residents of Medicine Hat as evidenced by the unprecedented levels of public engagement in recent council meetings. Attendances that were in the single digits have now swelled to nearly 100 concerned citizens with hundreds more watching live online with thousands of views, seeking answers and accountability from their elected officials. This underscores the significance of the requested information and the urgent need for transparency in our local governance. This information is certainly not "of little weight and importance" and it is not available any other way.

> The City's attempt to characterize our request as frivolous and vexatious is not only baseless but also indicative of a concerted effort to undermine our legitimate pursuit of information and obstruct our efforts to serve the public interest. Our request is not trivial but rather a matter of importance to the public. Our request is not intended to harass or annoy the public body but rather to fulfill our duty as journalists to inform the public and hold our government accountable.

[26] Although both parties provided submissions on the public interest (or lack thereof) in the requested information, there is no requirement under the *FOIP Act* for an access request to be made in the public interest. That being said, access request 30-2024 is for a variety of records relating to the Public Body's expenditure of public funds and other information related to the management of the Public Body, and arguably, could be said to be in the public interest. In these circumstances, it is difficult to see how such information could be considered trivial or without merit, and I do not find this request is frivolous.

[27] Similarly, the sole fact that the Applicant has requested access to Public Body communications with their name or business name in 31-2024 is insufficient to determine that request is frivolous.

[28] In an early foundational case, the Supreme Court of Canada spoke to the principles underlying access to information legislation:[13]

> 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.

[13] *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).

[29] Access to information is essential for meaningful participation in a functional democracy. The Public Body asserts that the "stated purpose is not to gain access to information but to harass the city continually and repeatedly with an attempt to bring it to a standstill". The Public Body has not provided any evidence that supports this claim. While a vexatious request may "come in all shapes and sizes",[14] the Public Body's submission is insufficient to convince me that the access requests are vexatious. I accept that the Applicant has made the access requests for a legitimate purpose, to participate in the democratic process. That is, particularly with 30-2024, the Applicant seeks information about decisions the Public Body has made in order to hold the Public Body to account.

[30] The Public Body has not met its burden under section 55(1)(b) of the *FOIP Act*.

Decision

[31] After consideration of the relevant circumstances, and for the reasons stated above, the Public Body is required to respond to access requests 30-2024 and 31-2024 in accordance with the *FOIP Act*.

[32] In their submission, the Applicant indicates willingness to consider modifying the scope of the access requests. I note that 31-2024 is a very broad request for communications including variations of all or part of the Applicant's name or business, including misspellings. I encourage the parties to communicate with each other to confirm and, where possible, to narrow the scope of the access requests.

[33] As a final note, this is the fourth application the Public Body has brought to me this year requesting authorization to disregard access requests (resulting in three decisions: F2024-RTD-03, F2024-RTD-05, and this decision). I have dismissed all of these applications on the basis that the Public Body did not provide sufficient evidence to meet its burden. These decisions should provide guidance to the Public Body as to the evidence required for these types of cases and I encourage the Public Body to ensure it has evidence to support its application before it considers bringing another one in the future.

Diane McLeod
Information and Privacy Commissioner

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