OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-22-004

Re: Department of Justice and Public Safety

Prince Edward Island Information and Privacy Commissioner
Denise N. Doiron

April 27, 2022

Summary: The Public Body asked for the Commissioner's authorization to disregard two access requests for video records, pursuant to section 52 of the *Freedom of Information and Protection of Privacy Act*. The Commissioner authorized the Public Body to disregard these two access requests, pursuant to clause 52(1)(b) of the *Freedom of Information and Protection of Privacy Act*, finding that the requests were frivolous and vexatious.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, Cap. F-15.01, sections 2, 7, 52, 65, and 67.

Cases Cited: Order F21-14, *Re: Board of Education of School District 52 (Prince Rupert),* 2021 BCIPC 18 (CanLII)
Order P10-01, *Re: Occupational Health and Safety Agency for Healthcare in BC*, 2010 BCIPC 21 (CanLII)
Order F2020-RTD-06, *Re: Town of Devon* (Re), 2020 CanLII 97985 (AB OIPC)

Order F21-31, *Re: District of Kent*, 2021 BCIPC 39 (CanLII)
PEI Order AU-10-003 (March 17, 2010)
Saskatchewan Workers' Compensation Board (Re), 2019 CanLII 111883 (SK IPC)

I. BACKGROUND

[1] An individual had been incarcerated at the Provincial Correctional Centre. While they were still in custody, and within a one-month period, the individual (the "Applicant") made five access requests to the Department of Justice and Public Safety (the "Public Body"), pursuant to section 7 of the *Freedom of Information and Protection of Privacy Act* (the "*FOIPP Act*"). Their requests were for audio and video recordings of the Applicant from multiple dates when the Applicant was incarcerated.

[2] The Public Body located and retrieved records on one access request, there were no responsive records for the second access request, and the Applicant withdrew the third access request. The Public Body asked for my authorization to disregard the remaining two access requests, under subsection 52(1) of the *FOIPP Act*.

[3] We provided a copy of the Public Body's request, supporting affidavit, and enclosures to the Applicant and invited them to provide submissions. The Applicant did not respond to our invitation.

II. ACCESS REQUESTS AT ISSUE

[4] The access requests in question are set out below. I will refer to these access requests as the access requests at issue, or by the Public Body's reference number. I have removed the dates referenced in the access requests, as such dates may identify the Applicant:

> JPS 2021-214: "Requesting video surveillance of all camera views in A/D holding cells and lockup cells that I was placed in. Dates: [*Applicant lists 7 consecutive days*]-24 hours; [*date*] from 9 pm; 11:30 pm [*date*]; 9:00 pm until 11 :30 pm; [*date*] SLU unit; A/D 7:30 am until 7:30 pm; 3 camera in A/D, 1 camera in SLU, 3 cameras in lock-ups cells, 5 cameras in holding cell, 2 cameras in lock-up area. Holding cell 182, 3 cameras in A/D area cells 191, 192, 194, lock-up, 2 cameras in lock-up area/camera SLU."
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> JPS 2021-263: "Recorded camera video in A/D area 3 camera views/holding cell #184 and lockup area 2 main camera views holding cell #191, holding #192, holding cell 194, [*date*] both times I was in cell #184. Then from [*date*] in SLU/Segunit 1 camera view until [*date*] was the only inmate in that area. Might be needed for legal proceedings in the Court of Law giving Notice so video wouldn't be lost. Time period: [*date*] 8:00 am A/D area all cameras, [*2 dates*] lock-up cell, 191 and other cells 192, 194, until [*date*], then [*date*] until [*date*] 24 hours a day."

[5] As might be expected, the correctional facility operated by the Public Body utilizes many video recording cameras throughout the facility for safety and security purposes, which record 24 hours a day. The access requests at issue appear to cover all footage from just about every, if not every, camera in the correctional facility the Applicant believed they could have been recorded on while incarcerated during the relevant time periods. Although it is difficult to determine from reading the wording of the access requests exactly how many cameras or camera views are involved, one request involves video footage for 10 days from at least 19 cameras, and the other involves video footage for 40 days from at least 6 cameras.

[6] The Public Body commenced locating and retrieving the responsive records, but quickly realised that the volume of responsive records is significant, and the work involved in searching, locating and retrieving the video footage from all of the cameras requested was extensive. Further, the video footage requested is part of the correctional facility's security system and is only accessible to a small number of employees, and is not easily downloaded. Attempts to preserve the amount of video footage required in order to be able to search, locate and retrieve the requested video footage resulted in the correctional facility's computer system crashing.

[7] The Public Body estimates that access request JPS 2021-214 involved in excess of 200 hours of footage, and access request JPS 2021-263 involved in excess of 800 hours of footage. The Public Body did a test and were able to locate and retrieve 8 hours of video footage in one hour. By extrapolation, we calculate that it would take at least 125 hours of dedicated work for the Public Body to locate and retrieve the approximately 1,000+ hours of video footage which would comprise the records responsive to the two access requests at issue. This would not include the work necessary to review and, if necessary, sever the personal information of other individuals who would also have been recorded by the same cameras at the same times as the Applicant.

III. JURISDICTION

[8] Subsection 52(1) of the *FOIPP Act* states, in part:

> 52. (1) If the head of a public body asks, the Commissioner may authorize the public body to disregard any request made under subsection 7(1), …

[9] The jurisdiction for me to consider authorizing a public body to disregard an access request is triggered when an applicant has made an access request under subsection 7(1) of the *FOIPP Act*, and the public body asks me to authorize them to disregard the access request. Both conditions have been met, therefore I am satisfied that I have jurisdiction in this matter.

IV. ISSUES

[10] The issues in this application are:

Issue 1: Are the access requests at issue repetitious or systematic? And, if so, would responding to the access requests at issue unreasonably interfere with the Public Body's operations, or amount to an abuse of the right to access (clause 52(1)(a) of the *FOIPP Act*)?

Issue 2: Are the access requests at issue frivolous or vexatious (clause 52(1)(b) of the *FOIPP Act*)?

Issue 3: If the Public Body has established that the conditions of either clause 52(1)(a) or 52(1)(b) of the *FOIPP Act* have been met, should I exercise my discretion and authorize the Public Body to disregard the access requests at issue?

V. BURDEN OF PROOF

[11] The *FOIPP Act* is silent on which party bears the burden of proof on an application under section 52. When no burden of proof is expressly set out, the burden of proof typically rests with the party that is bringing the matter forward. As this is a request from the Public Body for authorization to disregard an access request or requests, the party bringing the matter forward is the Public Body. Therefore, the burden of proof in this matter rests with the Public Body. I would have also considered any submissions of the Applicant, but the Applicant in this matter elected not to participate.

VI. ANALYSIS

[12] The right of access to information is a significant statutory right. However, it is not an absolute right. In setting out the purposes of the *FOIPP Act*, subsection 2 specifies that the right of access is "…subject to limited and specific exceptions as set out in this Act…". Further, there are some circumstances where a request for access may be outside the intent and function of the legislation, or may be misused, or be of such a nature as to be regarded as an abuse of the right to access.

[13] The misuse or abuse of the right of access by an applicant is a serious matter. It can effectively obstruct the exercise of this same right by other applicants, can overburden a public body, and harm the public interest by both diminishing the ability of other citizens to exercise their own statutory rights of access and unnecessarily adding to the

cost and time burdens of the public bodies in complying with their statutory duties under the *FOIPP Act*.

[14] For these reasons, the *FOIPP Act* also recognizes that not all access requests are appropriate. Section 52 of the *FOIPP Act* exists for the purpose of preserving the proper intent and functioning of the legislation, and protects against the misuse or abuse of the right of access to information by an applicant.

[15] The *FOIPP Act* does not permit public bodies to decide on their own to disregard an access request. However, subsection 52(1) of the *FOIPP Act* gives the Commissioner the power, in some circumstances, to authorize a public body to disregard access requests. More specifically, subsection 52(1) states:

> 52. (1) If the head of a public body asks, the Commissioner may authorize the public body to disregard any request made under subsection 7(1), if the request
> (a) would unreasonably interfere with the operations of the public body or amount to an abuse of the right to access, because of the repetitious or systematic nature of the request; or
> (b) is frivolous or vexatious.

[16] The Public Body has requested that I authorize them to disregard the two access requests at issue under both clause 52(1)(a) [repetitious or systematic], and 52(1)(b) [frivolous or vexatious]. I will consider each in turn.

Issue 1: Are the access requests at issue repetitious or systematic? And, if so, would responding to the access requests at issue unreasonably interfere with the Public Body's operations, or amount to an abuse of the right to access (Clause 52(1)(a) of the *FOIPP Act*)?

[17] Clause 52(1)(a) of the *FOIPP Act* refers to access requests that are repetitious or systematic. The expressions "repetitious" and "systematic" are not defined in the *FOIPP Act.* The Public Body refers us to Alberta's Office of the Information and Privacy Commissioner's interpretation of these expressions:

> Alberta's Information and Privacy Commissioner has said that *"repetitious" is when a request for the same records or information is submitted more than once, and "systematic in nature" includes a pattern of conduct that is regular or deliberate.*" [FN 1]
>
> [FN 1] *Alberta Health Services*, 2020 CanLII 97984 at para. 32 (AB OIPC). In this case Alberta's Information and Privacy Commissioner held that requests for information in relation to the same named individuals did reveal a pattern of conduct that was regular or deliberate and therefore systematic in nature. Also see *Alberta Health Services*, 2019 CanLII 145071 at paras. 43-45 (AB OIPC). In this case an applicant had made 11 requests within a 16 month period for personal information related to him and his children with every employee they had had contact with. This was held to be regular and deliberate conduct that was systematic in nature.

[18] In a recent decision from the Information and Privacy Commissioner of British Columbia, Order F21-14, *Re: Board of Education of School District 52 (Prince Rupert),* 2021 BCIPC 18 (CanLII), the adjudicator added some further potential considerations in assessing whether requests are "systematic" as follows:

> [11] . . . The key characteristics of a systematic request include:
>
> - a pattern of requesting more records, based on what the respondent sees in records already received;
> - combing over records deliberately in order to identify further issues;
> - revisiting earlier freedom of information requests;
> - systematically raising issues with the public body about their responses to freedom of information requests and then often taking those issues to review by the OIPC;
> - behaviour suggesting that a respondent has no intention of stopping the flow of requests and questions, all of which relate to essentially the same records, communications, people and events; and
> - an increase in frequency of requests over time.

[19] I will apply these principles in analyzing the Public Body's submissions.

Repetitious

[20] Past access requests may be relevant in assessing whether the access requests at issue are repetitive. The Applicant had made three other access requests during a five-week period: JPS 2021-264 had no responsive records, the Public Body provided responsive records for request JPS 2021-191, which related to audio recordings, and the Applicant withdrew access request JPS 2021-192. I reviewed the text of these requests, and the

information the Applicant was requesting was not the same information as requested in the access requests at issue. The access requests at issue therefore do not duplicate any information the Applicant had previously requested.

[21] With respect to the two access requests at issue, there may be overlapping responsive video footage between the two access requests. In relation to request JPS 2021-214, the Public Body remarks that:

> "In making this request, the Applicant essentially asks the Public Body to preserve and process every minute of footage from every single camera they believed recorded them during the time period of the request. . ."

[22] In relation to request JPS 2021-263, the Public Body remarks that:

> "This request includes a repeated ask for records requested in JPS 2021-214. Again, the Applicant asks for every minute of footage from every camera they believed recorded them during times they were in custody. . ."

[23] While there is some overlap in the records requested between the two access requests at issue, they are not entirely the same. In my view, it is not appropriate to characterize an individual making only two requests with some overlapping responsive records, as "repetitious". This mirrors the sentiment of the Adjudicator from British Columbia's Office of the Information and Privacy Commissioner expressed in Order P10-01, *Re: Occupational Health and Safety Agency for Healthcare in BC*, 2010 BCIPC 21 (CanLII), at paragraph 20.

[24] The Public Body has failed to demonstrate that the Applicant's access requests at issue are repetitious. I will next consider whether the access requests are systematic.

Systematic

[25] To be considered systematic in nature, I must be persuaded that the Applicant has exhibited a pattern of behaviour that is regular or deliberate, or that other key characteristics and relevant factors, such as those set out by the Information and Privacy

Commissioner of British Columbia in Order F21-14 (cited in para. 18 above) are exhibited.

[26] I considered whether the characteristics of a systemic request, as out by the Information and Privacy Commissioner of British Columbia in BC Order F21-14, *supra*, are applicable to the Applicant's situation. It does not appear that any of these relevant factors apply.

[27] Past access requests may be relevant in assessing whether the access requests at issue are systematic. In looking at past access requests of the Applicant, I considered the following:

- the Applicant had made other access requests, which involve many employees with which they had contact;
- the two access requests at issue are broad with a large volume of responsive records;
- the requests were made within a few weeks of each other; and
- the responsive records of the two access requests at issue may have some overlapping records.

[28] I am not persuaded that these circumstances are sufficient to establish that the Applicant has a pattern of conduct that is regular or deliberate in relation to the access requests made by the Applicant to the Public Body. The Public Body has not established that the access requests at issue, and in the context of the Applicant's other access requests, are systematic in nature.

[29] As I have found that the access requests at issue are not repetitious or systematic, clause 52(1)(a) of the *FOIPP Act* does not apply, and I do not need to consider whether the two access requests at issue would unreasonably interfere with the operations of the Public Body or amount to an abuse of the right to access.

Issue 2: Are the access requests at issue frivolous or vexatious (clause 52(1)(b) of the *FOIPP Act*)?

[30] The expressions “frivolous” and “vexatious” are not defined in the *FOIPP Act*. The Public Body referred us to Alberta’s Office of the Information and Privacy Commissioner’s interpretation of these expressions, which is:

> . . . Vexatious has been defined as something "*without reasonable or probable cause or excuse; harassing; annoying*." [FN 3]
>
> The question to answer is whether the primary purpose of the request is access to information. If the goal is to continually or repeatedly harass as a way of obstructing a public body then the behaviour is vexatious. [FN 4] The combination of an ongoing pattern of access requests, the excessive volume of requests, the timing of requests, other history or disputes with an applicant, and the inappropriate behaviour of an applicant can all contribute to a determination that an applicant is vexatious. [FN 5]
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> [FN 3] *Alberta Health Services*, 2019 CanLII 145071 at para. 53 (AB OIPC).
> [FN 4] *Alberta Health Services*, 2019 CanLII 145071 at para. 55 (AB OIPC).
> [FN 5] *Alberta Health Services*, 2019 CanLII 145071 at paras. 52-59 (AB OIPC).

[31] In subsequent orders from Alberta’s Information and Privacy Commissioner, such as Order F2020-RTD-06, *Re: Town of Devon* (Re), 2020 CanLII 97985 (AB OIPC), at paragraphs 7 and 9, they have also remarked that:

> [7] . . . Information that may be trivial from one person’s perspective, however, may be of importance from another’s.
>
> and
>
> [9] A request is not vexatious simply because a public body is annoyed or irked, or because the request is for information that the release of which may be uncomfortable for the public body. . . .

[32] In a recent decision from British Columbia’s Information and Privacy Commissioner, Order F21-31, *Re: District of Kent*, 2021 BCIPC 39 (CanLII), the adjudicator set out a non-exhaustive list of considerations in assessing whether access requests are frivolous or vexatious as follows:

> [29] The next issue is whether the outstanding requests are “frivolous” or “vexatious” under s. 43(b). These terms are not defined in FIPPA. However, past orders provide the following non-exhaustive list of factors to consider in deciding whether a request is frivolous or vexatious:

- A frivolous or vexatious request is one that is an abuse of the rights conferred under the Act.
- The determination of whether a request is frivolous or vexatious must, in each case, keep in mind the legislative purposes of the Act, and those purposes should not be frustrated by an institution's subjective view of the annoyance quotient of particular requests.
- A "frivolous" request is one that is made primarily for a purpose other than gaining access to information. It will usually not be enough that a request appears on the surface to be for an ulterior purpose – other facts will usually have to exist before one can conclude that the request is made for some purpose other than gaining access to information.
- The class of "frivolous" requests includes those that are trivial or not serious.
- The class of "vexatious" requests includes those made in "bad faith", i.e., for a malicious or oblique motive. Such requests may be made for the purpose of harassing or obstructing the public body.
- The fact that one or more requests are repetitive may, alongside other factors, support a finding that a specific request is frivolous or vexatious.

[33] I am aware that one of the above-noted potential relevant circumstances involves considering the purpose of the request, and that this contradicts an earlier message from former Commissioner Judith Haldemann in 2010[1], who did not agree that it was appropriate to delve into the reasons an applicant makes an access request. However, I believe that the purpose of an Applicant's request is relevant if it relates to assessing whether an Applicant's request is frivolous or vexatious. This reflects the approach in other jurisdictions with similar provisions relating to frivolous or vexatious access requests.

[34] I will apply these principles in analyzing the Public Body's submissions.

Frivolous

[35] In the text of the access request JPS 2021-263, the Applicant states that the purpose of their request is that it: "Might be needed for legal proceedings in the Court of Law giving Notice so video wouldn't be lost". The Public Body advises that they are unaware of any claims or legal proceedings in which these videos

[1] PEI Order AU-10-003, available on our website at www.oipc.pe.ca under "Rulings and Orders"

would be relevant. In consideration of former Commissioner Haldemann's remarks, the Public Body did not ask the Applicant for further information about the purpose of the access requests. The Applicant did not respond to our invitation to provide submissions, so I have no information beyond the Applicant's general speculation in JPS 2021-263 about possible legal proceedings.

[36] As I do not have any information about the strength of the statement, that the records might be needed for legal proceedings, I must consider the context. As described by the Public Body, the Applicant is seeking "essentially every moment they believe they were recorded by a camera" in various locations where the Applicant was present in the correctional facility for the duration of the Applicant's incarceration in the facility. The Public Body invited the Applicant to refine their requests, but the Applicant declined. I am not persuaded that video recordings of every minute of the Applicant's incarcerations would be relevant to any legal proceeding, or for any other purpose.

[37] The access requests at issue are unreasonably broad. I am persuaded that access request(s) for in excess of 1,000 hours of video in and of itself, is a trivial, non-serious request. I am persuaded that the access requests at issue are frivolous.

[38] As I am satisfied that the access requests at issue are frivolous, this enables me to authorize the Public Body to disregard these access requests, subject to a reasonable exercise of my discretion, which I discuss below.

[39] The Public Body also believes the access requests at issue are vexatious. As I have found that the access requests are frivolous it is not necessary for me to assess whether they are also vexatious. However, in the interests of completeness, I will also consider whether the access requests at issue are vexatious.

Vexatious

[40] Other actions of an Applicant outside of the access to information realm may be relevant to assessing whether a request is vexatious if the access request(s) fits into a pattern of excessively unreasonable conduct. The Public Body submits that the access requests for every minute the Applicant was recorded by a camera while incarcerated fits within the overall conduct of the Applicant to harass, obstruct or wear the Public Body.

[41] The Public Body provided affidavit evidence, including exhibits of multiple incident reports relating to various incidents over a period of almost six weeks the Applicant was in custody in the Provincial Correctional Centre ("PCC"), including: yelling, use of profanity, refusal to follow directions, aggressive behavior, damage to a toilet, two incidents of threatening an employee, and an incident of threatening an employee's life and family. The affidavit, sworn by an employee of the Public Body with knowledge of the facts, indicated this was a pattern of behaviour also exhibited by the Applicant in prior incarcerations at the PCC. Specifically, the affidavit evidence described the Applicant's behaviour as follows:

> *When at the PCC, it has been difficult for employees to manage the Individual who has conducted themselves in ways that demonstrate their unwillingness to cooperate, their unwillingness to follow directions and their aggression.*

[42] The affidavit also indicated the Applicant had been charged with assaulting an employee of the Public Body in late 2020, for which they were later convicted, and involved similar behaviours as described above. The affidavit further indicated that, just prior to the Applicant being transferred to a federal custodial institution, the Applicant had been the only individual housed on a particular unit of the PCC and, upon the Applicant being transferred, the Public Body discovered that the Applicant had caused damage to a television and left feces in a fridge on the unit.

[43] The two access requests are unreasonably broad, and appear to be part of a pattern of unreasonable behavior. I am satisfied that the access requests at issue are an abuse of the Applicant's right to access their own personal information. I am not persuaded that the Applicant is seeking this information for the purpose of gaining access to the information. I am persuaded that the requests for in excess of 1,000 hours of video were made in bad faith and are vexatious in nature.

Issue 3: If the Public Body has established that the conditions of either section 52(1)(a) or (b) of the *FOIPP Act* have been met, should I exercise my discretion and authorize the Public Body to disregard the requests?

[44] The Public Body requests that I authorize them to disregard the access requests at issue. This is not a decision I take lightly. Authorizing a public body to disregard an access request is a serious matter, as it is removing an individual's right.

[45] If a public body has established to my satisfaction that one or more of the requirements of subsection 52(1) of the *FOIPP Act* apply, I must still determine whether the circumstances warrant an exercise of my discretionary power to authorize the Public Body to disregard the access requests at issue.

[46] In *Saskatchewan Workers' Compensation Board (Re)*, 2019 CanLII 111883 (SK IPC), the Saskatchewan Information and Privacy Commissioner commented on the seriousness of authorizing a public body to disregard an access request, and cited the following relevant comments of the former British Columbia Information and Privacy Commissioner, David Loukidelis, on the purpose and importance of a provision similar to subsection 52(1) of the *FOIPP Act:*

> ...Access to information legislation confers on individuals such as the respondent a significant statutory right, i.e., the right of access to information (including one's own personal information). All rights come with responsibilities. The right of access should only be used in good faith. It must not be abused. By overburdening a public body, misuse by one person of the right of access can threaten or diminish the legitimate

> exercise of that same right by others, including as regards their own personal information. Such abuse also harms the public interest, since it unnecessarily adds to public bodies' costs of complying with the Act. Section 43 exists, of course, to guard against abuse of the right of access…
>
> (BC IPC Order 99-01 at p. 7)

[47] In deciding whether to exercise my discretion to authorize the Public Body to disregard the request, I believe that the effort required from the Public Body is a relevant factor to consider. As noted earlier, our extrapolation of the estimated time to locate and retrieve the responsive records is at least 125 hours. We do not have an estimate of how long it would take the Public Body to process the records for disclosure after they are located and retrieved. I am persuaded that this is an overburden that warrants the relief contemplated in section 52 of the *FOIPP Act.*

[48] In the circumstances, I grant the Public Body's request, and authorize the Public Body to disregard the access requests which the Public Body refers to as JPS 2021-214, and JPS 2021-263, in accordance with clause 52(1)(b) of the *FOIPP Act* on the grounds that the access requests are frivolous and vexatious.

VII. FINDINGS

[49] Based on the above, I find that the Public Body has not established that the Applicant's access requests JPS 2021-214 and JPS 2021-263 are repetitious or systematic. I find that the Public Body has established that the Applicant's access requests JPS 2021-214 and JPS 2021-263 are both frivolous and vexatious, and that the circumstances warrant exercising my discretion in favour of authorizing the Public Body to disregard these access requests.

VIII. ORDER

[50] I hereby authorize the Public Body to disregard the Applicant's access to information requests in JPS 2021-214, and JPS 2021-263, pursuant to clause 52(1)(b) of the *FOIPP Act*.

[51] Under clause 52(2)(a) of the *FOIPP Act*, the Public Body's processing of access requests JPS 2021-214 and JPS 2021-263, which ceased when the Public Body made the request to disregard, shall not resume.

[52] In accordance with section 67 of the *FOIPP Act*, the Commissioner's order is final. However, an application for judicial review of the Order may be made pursuant to section 3 of the *Judicial Review Act*, R.S.P.E.I. 1988, Cap. J-3.

Signed: Denise N. Doiron

Denise N. Doiron
Information and Privacy Commissioner