

Application by the Town of Ponoka to disregard an access request made by an applicant under the *Freedom of Information and Protection of Privacy Act*

On March 21, 2002, I received a letter on behalf of the Town of Ponoka, requesting authorization to disregard an access request made by a named individual (the “Applicant”) under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”). On April 10, 2002, I issued the following decision, from which I have removed the names of all individuals except the head of the Town of Ponoka.

Commissioner’s authority

Section 55 of the FOIP Act gives me a discretionary (“may”) power to authorize a public body to disregard certain requests under the FOIP Act. Section 55 reads:

55 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.

In considering a public body’s submission under section 55, I will be mindful of the principles of the FOIP Act and the relevant circumstances surrounding such a submission. Before deciding whether to exercise my discretion to authorize a public body to disregard a request, a public body must show that it meets the requirements of either section 55(a) or (b).

Background

On February 19, 2002, the Applicant applied to the Town of Ponoka (the “Town”) for access under the FOIP Act. The Applicant’s title for that access request is “FOIP request No. 5”. The Town confirms that that was the fifth access request the Applicant submitted to the Town (the “Applicant’s fifth access request”).

The Applicant’s fifth access request consists of six parts that the Applicant refers to as A, B, C, D, E and F. The Town highlighted the following excerpts from the Applicant’s fifth access request:

A. My Request Is:

1. Please provide a copy of any documentation, record, report or evidence of any kind that would indicate or show wrongdoing, mismanagement or dishonesty on the part of Senior

Town of Ponoka Officials. Please include documentation or evidence showing that Town Officials did not tell the truth.

2. Please also provide me with documentation or evidence of any kind showing that wrongdoing by Senior Town Officials, was revealed in the Town's response to my FOIP requests #1, 2, 3 and 4.

B. My Request Is:

Please provide me with the complete reports, (regarding these investigations), available for the public to see at the Town Office, referred to by Councillor [name of Councillor].

If these complete reports, referred to by Councillor [name of Councillor], do not exist please clearly confirm this in your reply.

C. My Request Is:

1. Please provide me with documentation or evidence of any kind showing that Town Officials did in fact investigate my allegations of wrongdoing on the part of Senior Town Officials.

2. Please also provide me with documentation or evidence of any kind showing on what these Town Officials based their conclusion that the allegations were unfounded.

D. My Request Is:

1. Please provide me with documentation or evidence of any kind showing that the Town has repeatedly tried to work with me to address my concerns.

2. Please also provide me with documentation or evidence of any kind showing that the Town has tried to refuse and evade addressing my concerns. Please include my written questions that I submitted to the Town which the Town did not answer.

If you feel I already have this information please, in the public interest, provide this information anyway.

E. My Request Is:

Please now provide me with documentation or evidence of any kind that would clearly confirm exactly what the "Development Area" is as contained and defined in the Qualicare Development Agreement.

If you feel you have already provided this information, please provide it again to clarify this matter.

F. My Request Is:

Please provide me with documentation or evidence of any kind showing:

1. What concessions or benefits of any kind, at the Town's expense past, present or future, were given the Qualicare Development, that were properly authorized by Town Council.

2. What concessions or benefits of any kind, at the Town's expense, past, present or future, were given the Qualicare Development that were not properly authorized by Town Council.

3. What concessions or benefits of any kind, at the Town's expense past, present or future, were given the Qualicare Development that contradict or are in contravention of the requirements of the Qualicare Agreement.

4. What concessions or benefits of any kind, at the Town's expense past, present or future involving local improvements that still need to be completed by the Town.

If you feel that I already have this information please provide it anyway in order to have the Town isolate this information so that in the public interest the truth can be established.

The Town summarizes the Applicant's previous four access requests, as follows:

1. October 1, 1999: Request for information from the Town regarding an investigation by Alberta Municipal Affairs with respect to "a development agreement with Qualicare Health Services Corp. and the 42nd Street Projects".

The Town says the following files and records were located and researched, at no cost to the Applicant, in response to the October 1, 1999 access request:

- File No. 102-02 – Complaints – [the Applicant]
- File No. 102-1 – Complaints/Bouquets Town Services
- File No. 87-1001-10 Qualicare Health Services Corp.
- Council agendas and minutes – 1990
- 42nd Street Sewermain, Watermain and Road Capital Expenditures
- File No. 610-6 – 42nd Street Water/Sewer/Storm Sewer

2. November 1, 1999: Request for information from the Town regarding an investigation by the Royal Canadian Mounted Police in respect to the Applicant's allegation of mismanagement and dishonesty on the part of Town administration.

The Town says the following files and records were located and researched, at no cost to the Applicant, in response to the November 1, 1999 access request:

- File No. 102-02 – Complaints – [the Applicant]
- File No. 102-1 – Complaints/Bouquets Town Services
- File No. 87-1001-10 Qualicare Health Services Corp.
- Council agendas and minutes – 1991-1992; 1994-1995
- 42nd Street Sewermain, Watermain and Road Capital Expenditures
- File No. 610-6 – 42nd Street Water/Sewer/Storm Sewer

3. February 1, 2000: In that FOIP access request, the Applicant stated:

A number of Town Officials, past and present, have claimed to have investigated the concerns of mismanagement and dishonesty I have raised.

Would you please provide me with documentation or evidence of any kind showing specifically what these Town Officials did investigate.

In addition to the above requested information, enclosed please find items A, B, C, and D, requesting additional information on very specific items to determine if the Town investigated these items.

The Town says that item A is a request for information regarding acceptance and approval for the 50th Avenue Watermain replacement and road work on 42nd Street between 50th Avenue and 48th Avenue, and on 38th Street from 48th Avenue to 42nd Avenue from February 1998 to February 2000. Item B and Item C were requests for records involving alleged discrepancies regarding sub-grades. Item D involved a request for records involving the "Construction of the Debaji Storm and Sanitary Sewer through the Co-op Oils area in 1998."

I note that the Applicant's February 1, 2000 access request was the subject of an oral inquiry before me that resulted in Order 2001-007. In an additional request of the Applicant that I refer to in Order 2001-007 as item E, the Applicant sought records relating to the "Development Area" of the Qualicare Development Agreement. The Town provided a subdivision plan in response.

4. March 1, 2001: The Town quotes from the Applicant's March 1, 2001 request:

Please provide me with a copy of Council Minutes or any other documentation showing that Council approved the exemption from the road construction and the indemnification clause.

My request: Could you please provide me with documentation showing the following:

1. That the change to the Agreement made by [name of individual] was authorized or ratified by Town Council.
2. Any signed consent to the change by the Developer.
3. That the original "Appendix I Curb & Gutter Contribution" was the one cancelled.
4. Any proof that the change is valid.
5. Any proof that the change is enforceable.
6. Any proof that the change is accurate.

The Town of Ponoka's submissions under section 55(a)

The Town submits that the repeated requests for records that indicate wrongdoing on the part of Council and Administration, and records relating to the Qualicare Development Agreement and local improvements (which have already been disclosed), amount to a "pattern of conduct" as contemplated by Ontario Order M-850 and Order M-1066. The Town quotes Ontario Order M-850, as follows:

[I]n my view, a “pattern of conduct” requires recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way).

...

...[T]here are reasonable grounds for the Town to have concluded that the appellant has demonstrated a pattern of conduct. The recurring incidents of related or similar behaviour on the part of the appellant are the regular submission of sweeping requests for information of an extremely detailed nature, as well as the regular submission of interrelated requests which closely resemble each other.

The Town also quotes a January 29, 1998 decision of the British Columbia Information and Privacy Commissioner in relation to British Columbia’s legislative provision, which is similar to section 55 of the FOIP Act. In finding that an individual’s access requests were repetitious and systematic, the British Columbia Commissioner said:

...

5. The City submits that its long history of dealing with the respondent since May, 1995 suggest that [the respondent’s] concerns, real or imagined, cannot be addressed through disclosures under the Act. The respondent has been provided with records [the respondent] is entitled to under the Act and under the grievance procedures. The City submits that the respondent has failed to show any wrongdoing on the part of the City, and there is no evidence to suggest that responding to any further requests would change that.

6. The City submits that there is no possibility of satisfying this respondent under the Act and the [the respondent’s] requests for access continue to grow in size and complexity...

7. The City submits that the respondent is not using the Act for the purposes for which it was intended and [the respondent] is not acting in good faith...

8. I accept the evidence provided to me by the City that the respondent’s requests are repetitious in nature. I find that the respondent makes requests relating to the same subject matter and has on several occasions asked specifically for the same records [the respondent] had already received from the City.

The Town submits that the circumstances contained in the foregoing decision of the British Columbia Commissioner are similar to its circumstances, as follows:

- As indicated in the Town’s Written Submissions to the Commissioner under File #2229, for a number of years (dating back to 1991), the Applicant has been alleging wrongdoing on the part of the Town Council and Administration relating to the Qualicare Development Agreement and various local improvements;
- As confirmed in Order 2001-007, the Town has already tried to provide all documents that relate to the above issues. As such, the Town submits that there is no possibility of satisfying the Applicant’s requests;
- As the Applicant has repeatedly stated in his fifth access request that he makes these requests “in the public interest in an attempt to establish the truth to bring about a satisfactory resolution to this issue”, the Town of Ponoka submits that no declaration of truth can be made through FOIP proceedings; and

- As all the requests relate to the alleged wrongdoing referred to above, and given that the Applicant's fifth access request even acknowledges that notwithstanding the Town may have already provided him with the records he is requesting, he still makes the same request, the Town submits that the five access requests made by the Applicant are indeed repetitious in nature.

Consequently, the Town requests that I authorize it to disregard the Applicant's fifth access request, on the basis that the Applicant's access requests are repetitious and systematic so as to constitute an abuse of the right to make those requests.

The Town also made submissions under section 55(b) and asks that I find that the Applicant's fifth access request is frivolous and vexatious. For the reasons set out below, I do not find it necessary to consider the Town's submissions under section 55(b).

My decision

I have compared the Applicants five access requests. While the Applicant's five access requests may have different wording, the subject matter of the records/information that the Applicant is seeking is the same. The Applicant wants records concerning alleged wrongdoing on the part of the Town Council and Administration relating to the Qualicare Development Agreement and various local improvements.

In Order 2001-007, which concerned the Applicant's February 1, 2000 access request (the Applicant's third access request), I found that the Town had fulfilled its duty to assist the Applicant under section 10(1) [previously section 9(1)] of the FOIP Act. In Order 2001-007, I said:

Ms. Raugust when asked by me confirmed that a wide net was cast, and all records related to the request were provided. If no records were provided, it is because none existed at the time the search was conducted, even if this was not explicitly stated. While some records were thought to be inaccurate in the sense of being not relevant to the response by the Applicant, the Town tried to provide any documentation, which touched on the issues raised by the Applicant.

...

With respect to Item E of the Applicant's request, which was to provide the Applicant with information that would clearly confirm exactly what is the Development Area for a particular development, I am also satisfied that the Town fulfilled its section 9 obligation. The Town provided a subdivision plan in response. While I agree with the Applicant, that this does not completely answer the Applicant's request, the Town can only provide what records it has...

Therefore, I find that the Town has fulfilled its section 9 duty by making every reasonable effort to search for the requested records and by providing any information it thought might assist the Applicant. Further, I also note that the Town was prompt and timely in responding to the Applicant. Lastly, I also commend the Town on its complete submissions and the procedures it followed.

The subject matter of the Applicant's fifth access request is the same as the Applicant's previous four access requests. It is evident that the scope of the Applicant's fifth access request encompasses the Applicant's previous four access requests, including the Applicant's third access request dealt with in Order 2001-007. Therefore, I conclude that the Applicant's access requests are repetitious in nature, particularly the Applicant's fifth access request.

The Applicant's five access requests span a period of approximately two-and-one-half years. I agree with the Town that the Applicant's access requests amount to a pattern of conduct. Accordingly, I find that the Applicant's access requests are also systematic in nature, that is, regular or deliberate.

Because of the repetitious or systematic nature of the Applicant's access requests, do the Applicant's access requests amount to an abuse of the right to make those requests? I define "abuse" to mean misuse or improper use.

The FOIP Act was intended to foster open and transparent government (see Order 96-002, at page 16). By giving an applicant a right of access to records in the custody or under the control of public bodies (subject to limited and specific exceptions), public bodies can be subjected to public scrutiny.

In British Columbia 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...

I believe that the Legislature enacted section 55 of the FOIP Act to recognize that there will be certain individuals who may try to use the access provisions of the FOIP Act in a way that is contrary to the intention of the FOIP Act to foster open and transparent government. Section 55 provides a public body with recourse in situations in which an applicant improperly makes access requests.

The Town refers to the Applicant's stated purpose in the Applicant's fifth access request:

The purpose of these requests is to establish the truth regarding a very serious issue involving a great deal of public funds and the integrity of the administration of the Town of Ponoka.

I agree with the Town's submission that the Applicant's stated purpose of a declaration of truth or guilt or innocence cannot be accomplished through the FOIP Act. The Applicant's stated purpose reinforces my view that the Applicant is using the FOIP Act for a reason that has nothing to do with the FOIP Act, which is an improper use of the FOIP Act and amounts to an abuse of the right to make access requests.

In Order 2001-007, I said that the Town "tried to provide any documentation which touched on the issues raised by the Applicant". I found that the Town fulfilled its section

10 [previously section 9] duty by making every reasonable effort to search for the records requested and by providing any information it thought might assist the Applicant.

However, the Applicant's fifth access request says that, even if Town has previously provided the information to him, he wants that information again. In my view, that is also evidence that the Applicant's fifth access request amounts to an abuse of the right to make access requests under the FOIP Act. I do not believe that the FOIP Act intended that an applicant could submit and resubmit the same or similar access requests to a public body simply because an applicant does not like the information he obtained or is on a mission to establish the truth of some matter.

Therefore, I find that that, because of the repetitious or systematic nature of the Applicant's access requests, those access requests amount to an abuse of the right to make those access requests.

Consequently, under section 55(a) of the FOIP Act, I exercise my discretion to authorize the Town of Ponoka to disregard the Applicant's fifth access request, dated February 19, 2002.

My decision to authorize the Town of Ponoka to disregard the Applicant's February 19, 2002 access request under section 55(a) of the FOIP Act does not deprive the Applicant of his access rights for the records/information requested. In my view, the Applicant has already exercised his access rights for the records/information in his previous four access requests.

Frank Work, Q.C.
Acting Commissioner