

**ALBERTA**  
**INFORMATION AND PRIVACY COMMISSIONER**

Request for Authorization To Disregard an Access Request  
under Section 55 of the  
*Freedom of Information and Protection of Privacy Act*

**Southern Alberta Institute of Technology**  
(IPC File Reference: #2603)

February 5, 2003

[para 1] On December 19, 2002, I received a letter on behalf of the Southern Alberta Institute of Technology (the "Public Body") requesting authorization to disregard an access request made by the SAIT Academic Faculty Association (the "Applicant").

**Commissioner's Authority**

[para 2] Section 55 of the *Freedom of Information and Protection of Privacy Act* ("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*

[para 3] 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**

[para 4] On October 15, 2002, the Applicant applied to the Public Body under the FOIP Act for access to:

*...information contained in the Fee-for-Service contracts for all instructor contracts for the time periods ... academic years 1997/98, 1998/99, 2001/02 and fall 2002/03 (to current).*

*The information required is the following:*

<i>Name</i>	<i>Times of Course</i>
<i>Department</i>	<i>Total Hours</i>
<i>Course Name</i>	<i>Hourly Rate</i>
<i>Course Code</i>	<i>Total Commitment</i>
<i>Location/Department</i>	<i>Hours/Month</i>
<i>Day of the Week</i>	<i>Other Academic Duties</i>

[para 5] The Public Body wrote to the Applicant on November 4, 2002 to advise that it would be seeking authorization pursuant to section 55 of the FOIP Act to disregard the Applicant's access request.

[para 6] On November 20, 2002, I received a letter on behalf of the Applicant asking that I require the Public Body to release the requested information.

[para 7] My Office notified the Public Body and the Applicant on December 16, 2002 that no request for authorization to disregard the Applicant's access request have been received to date.

[para 8] On December 19, 2002, I received a submission from the Public Body requesting:

1. Authorization under section 55(a) and (b) of the FOIP Act to disregard the Applicant's October 15, 2002 access request; and
2. A time extension, in the event that its request for authorization to disregard the Applicant's access request is denied.

[para 9] The Public Body provided the Applicant with a copy of its submission.

[para 10] On January 8, 2003, my Office received a letter from the Applicant rebutting the Public Body's submission. The Applicant sent a copy of its letter to the Public Body as well. I decided to accept the Applicant's rebuttal.

[para 11] In response to the Public Body's request, I allowed the Public Body to provide a response to the Applicant's rebuttal. I advised both the Applicant and the Public Body that, upon receipt of the Public Body's response, there would be no further opportunity to supply additional information unless I had specific issues that I wished answered.

[para 12] The Public Body's response was received in my Office on January 15, 2003. In accordance with my request, the Public Body sent a copy of its response to the Applicant.

### **Public Body's Submission Under Section 55 of the FOIP Act**

[para 13] The Public Body said the Applicant's access request is "*part of an ongoing campaign pursued by the union for a number of years and on a variety of fronts to challenge the hiring of fee-for-service instructors*". The Public Body claimed that the Applicant is attempting to use the FOIP Act to obtain access to information that it could not obtain through the collective bargaining and arbitration processes. The Public Body argued that the Applicant is seeking to "*expand its limited collective rights by applying as a "person" under the Act for release of personal information*".

[para 14] The Public Body said:

*"...both branches of s. 55 were met on the facts, i.e. that the repetitious or systematic nature of the request would unreasonably interfere with SAIT's operations or amount to an abuse of process and that the request was frivolous or vexatious given SAFA's limited entitlement to the information sought under its collective agreement with SAIT and the fact that the limited scope of that entitlement had been defined by an arbitrator's award issued on October 9, 2002, days before the initial access request was made on October 15, 2002..."*

### **Application of Section 55(a) of the FOIP Act**

[para 15] Section 55(a) sets out two conditions:

1. The request is of a repetitious or systematic nature; and
2. Responding to the request would unreasonably interfere with the public body's operations or amount to an abuse of the right to make the request.

### ***Is the Applicant's access request "repetitious"?***

[para 16] In Authorization (s. 43) 99-01 [page 3], the British Columbia Information and Privacy Commissioner defines "repetitious" as:

*"...something that is characterized by repetition. Repetition is the act of repeating an act or things. To 'repeat' an act or thing, in turn, is to do the act or other thing over again one or more times..."*

[para 17] I agree with this definition of "repetitious".

[para 18] Based on the evidence presented to me, I find that the Applicant's October 15, 2002 access application is the first instance that the Applicant had applied for this kind of information under the FOIP Act.

[para 19] I understand the Applicant attempted to obtain access to the information through other means, prior to its October 15, 2002 formal application under the FOIP Act. However, access requests made outside the FOIP Act are not relevant to section 55.

[para 20] Section 55 refers to requests made under section 7(1) or section 36(1) of the FOIP Act. In other words, when an applicant is invoking the access rights set out in section 7(1) or the right to request correction set out in section 36(1), is that request “repetitious”?

[para 21] In this case, I cannot accept the Public Body’s submission that the one access request made by the Applicant under the FOIP Act for this information is of a repetitious nature as provided by section 55(a).

***Is the Applicant’s access application of a “systematic” nature?***

[para 22] In a previous decision under section 55, I authorized the Town of Ponoka to disregard an applicant’s fifth access request [Application by the Town of Ponoka, issued on April 23, 2002]. I said the subject matter of the applicant’s fifth access request was the same as the previous four access requests, of which one went to inquiry and resulted in Order 2001-007. I said the applicant’s access requests were “systematic” in nature as they were “regular or deliberate”.

[para 23] However, in this case, there is one access request as opposed to a series of access requests submitted over a period of time. As such, I have to consider whether one access request would constitute a request of a systematic nature.

[para 24] An access request made pursuant to the FOIP Act after exhausting other informal avenues for access does not make the FOIP access request systematic in nature. If so, this would be contrary to the intent of the FOIP Act, which is to grant individuals a legislated right to access information that is otherwise not available to them.

[para 25] As stated earlier, section 55 refers to requests made under section 7(1) or section 36(1) of the FOIP Act. It is the FOIP access request that must be systematic in nature.

[para 26] On the basis of the evidence before me, I do not accept the Public Body’s submission that the Applicant’s October 15, 2002 access request is systematic in nature as provided by section 55(a) of the FOIP Act.

[para 27] This is not to say that a single access request could never be systematic.

***Does the Applicant's access request unreasonably interfere with the Public Body's operations or amount to an "abuse"?***

[para 28] As I did not find the Applicant's access request is repetitious or systematic in nature, I do not have to consider whether the second condition set out in section 55(a) applies.

**Application of section 55(b) of the FOIP Act**

[para 29] Section 55(b) allows me to authorize a public body to disregard an access request if the request is "frivolous" or "vexatious".

[para 30] *Black's Law Dictionary* (5<sup>th</sup> Edition) defines "frivolous" as "of little weight or importance" and "vexatious" as "without reasonable or probable cause or excuse".

[para 31] In Order M-618 [1995], the Ontario Information and Privacy Commissioner made the following comments about "frivolous" and "vexatious", which I found helpful in my consideration of this matter:

*"...Frivolous" 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...*

*"...Vexatious" is usually taken to mean with intent to annoy, harass, embarrass, or cause discomfort. Government officials may often find individual requests for information bothersome or vexing in some fashion or another. This is not surprising given that freedom of information legislation is often used as a vehicle for subjecting institutions to public scrutiny. To deny a request because there is an element of vexation attendant upon it would mean that freedom of information could be frustrated by an institution's subjective view of the annoyance quotient of a particular request. This, I believe, was clearly not the Legislatures intent....."*

[para 32] The Public Body argues that the Applicant's access request is frivolous and vexatious given the magnitude of the request and circumstances surrounding it. The Public Body said:

*"...SAFA [the Applicant] now seeks to expand its limited collective rights by applying as a "person" under the Act for release of personal information...*

*It has been said that the purpose of the Act is to foster open and transparent government and to serve as a means of subjecting public bodies to public scrutiny.*

*It has not been suggested that the Act is intended to supplement a union's labor relations negotiating strategies or allow a union to pursue an agenda which has less to do with public accountability than it does to circumventing limitations placed on it by the collective agreement by which it is bound."*

[para 33] The Public Body provided copies of the Applicant's August 30, 2001 and February 28, 2002 letters requesting information relating to fee-for-service contractors. The February 28, 2002 letter and the Public Body's response to that letter subsequently lead to a policy grievance filed by the Applicant. A hearing on the matter was held on April 12, 2002 and a grievance arbitration award was issued on October 9, 2002.

[para 34] I find that this evidence indicates that the Applicant perceives the information sought as a matter of importance. The focus of the Applicant's actions is on obtaining the information itself. Objectively, I do not find that the Applicant's October 15, 2002 access request is "frivolous" as provided by section 55(b) of the FOIP Act.

[para 35] In considering whether the Applicant's access request is "vexatious", I am mindful of Commissioner Wright's comments in Order M-618. These comments are reinforced by the British Columbia Information and Privacy Commissioner in his Authorization (s.43) 02-02:

*[22] ...By its nature, an access to information request may be vexing or irksome to the public body...A request may be vexing or irksome to the public body because it will reveal information the public body might prefer not to disclose, but I cannot imagine a case in which a public body's perception that a request is vexatious in this way could, on its own, ever merit relief under s. 43(b).*

[para 36] The Public Body argues that the October 9, 2002 arbitration award sets out the Applicant's entitlement with respect to the information requested. As such, the Applicant's decision to apply for access to information that it could not obtain otherwise "*is a purpose not contemplated by the statute. To the extent that it has a valid purpose in seeking information requested, that purpose is met by the procedure agreed to in the collective agreement between SAIT and the union*".

[para 37] I do not accept the Public Body's position that the Applicant's decision to exercise its access rights under the FOIP Act, in addition to its rights under the collective bargaining and arbitration processes, are sufficient grounds for finding the access request "vexatious".

[para 38] The collective bargaining and arbitration processes are separate and independent from the process set out in the FOIP Act. Each process has its own rules and procedures. As a result, the outcomes under one process

may differ from the other. There is no evidence presented to me that the collective bargaining and arbitration processes can restrict the Applicant's right to apply for access to the information under the FOIP Act.

[para 39] In Order 97-009, Commissioner Clark said:

[90] *The third parties raised a preliminary issue which, in effect, questioned my jurisdiction to decide the issue of litigation privilege relating to documents when that issue was now before the court, and also questioned whether the Applicant had the right to proceed under the Act when the Applicant had already chosen the court to decide the issue...*

[93] *... A also says that I should not allow the Applicant to circumvent the proper procedures prescribed by the Rules of Court, that the Applicant is, in effect, attempting to do indirectly what the Applicant is unwilling to do directly, and that the Act should not be used as a tool to allow the Applicant to achieve this objective...*

[97] *...The Act provides in section 3(a) that "This Act is in addition to [my emphasis] and does not replace existing procedures for access to information or records." I was not referred to any authority, either in the Rules of Court or elsewhere, that would restrict an applicant to obtaining information only in the discovery process under the Rules of Court when the applicant has commenced that process in court.*

[98] *In my view, the Freedom of Information and Protection of Privacy Act, which is a substantive body of legislation, operates independently of the Rules of Court, which is a regulation. The Rules of Court do not prevent an applicant from making an application for information under the Act, nor does the Act prevent an applicant from making an application for information when the applicant has used the discovery process under the Rules of Court to get that same information...*

[para 40] Therefore, I do not find that the Applicant's October 15, 2002 access request is "vexatious" as provided by section 55(b) of the FOIP Act.

### **Decision**

[para 41] After careful consideration of the relevant circumstances, I have decided not to authorize the Public Body to disregard the Applicant's October 15, 2002 access request pursuant to section 55 of the FOIP Act. Therefore, the Public Body must proceed with processing the Applicant's access request in accordance with the FOIP Act.

[para 42] I will respond to the Public Body's request for a time extension in separate correspondence.

[para 43] I will remind both parties that the Public Body may have to expend significant resources to complete whatever final access request emerges. The money will have to come from somewhere. It seems to me that both parties have an interest in economy and efficiency in this matter.

Frank Work, Q.C.  
Information and Privacy Commissioner