ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

REQUEST TO DISREGARD F2020-RTD-05

September 23, 2020

ALBERTA HEALTH SERVICES

Case File Number 007564

[1] Alberta Health Services (AHS or the Public Body) requested authorization under section 55(1) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to disregard 53 of 73 access requests received from an individual whom I will refer to as the Applicant.

[2] For the reasons that follow, I have decided to authorize AHS to disregard the 53 access requests in these particular circumstances in which the Court has also made relevant findings, as discussed below.

[3] However, I have decided not to authorize AHS to disregard future access requests from the Applicant for the period of time requested. Instead, I have decided to authorize AHS to limit the Applicant to five access requests per year, with a minimum of sixty calendar days between submissions, for a period of two years.

Commissioner's authority

[4] Section 55(1) of the FOIP Act gives me the power to authorize a public body to disregard certain requests. Section 55(1) reads:

> *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*
> *(b) one or more of the requests are frivolous or vexatious.*

Background

[5] On November 22, 23 and 28, 2017, AHS received a total of 73 access requests from the Applicant under the FOIP Act.

[6] In each of 68 of the access requests, the Applicant asked for all the emails of a named individual that contained variants of the Applicant's name or initials. In five of the access requests, the Applicant asked for AHS's investigation files on complaints he had filed against certain named individuals.

[7] AHS included the five investigation files in its application under section 55(1) of the FOIP Act. It included all but 20 of the access requests for the emails of named individuals. It decided to respond to 20 of the access requests, which are all now the subject of requests for inquiry before me.

[8] Both AHS and the Applicant provided initial written submissions under section 55(1) of the FOIP Act.

[9] AHS's submission included Appendices 1-6. AHS sought to introduce Appendices 3-6 *in camera*, which meant that the Applicant had not been provided with Appendices 3-6 and did not know what was in those appendices. On April 17, 2018, I notified the parties that I would not accept Appendices 3-6 *in camera*.

[10] By letter dated May 1, 2018, AHS asked me to consider two appendices that it provided to me and to the Applicant: Affidavit of Records in the Applicant's civil lawsuit with AHS (identified as Appendix 4); and text messages and Facebook Postings made by the Applicant (no Appendix number identified).

[11] After I had reviewed the parties' initial written submissions, I had some additional questions for AHS. AHS replied to those questions by letter dated May 11, 2018, and provided further considerations to support its application to disregard. By letter dated May 12, 2018, the Applicant responded to AHS's May 1, 2018 and May 11, 2018 letters.

[12] Before I could issue my decision under section 55(1), the Court of Queen's Bench of Alberta issued a Vexatious Litigant and Civil Contempt Order against the Applicant: see 2018 ABQB 976 (the Court decision). On December 20, 2018, AHS notified me about the Court decision and provided me with a copy of the Court order. AHS copied the Applicant on its letter to me.

[13] At paragraph 89(1)(a) of the Court decision, the Court said that the Applicant was enjoined or restricted from the following conduct:

> Commencing, attempting to commence or continuing any complaints, investigations, proceedings and appeals with any non-judicial body, related to matters in [three specified Court dockets] without prior leave of Court and notice to the defendants and other individuals who may be the subject of the complaint, investigations, proceedings and appeals;…

[14] Furthermore, at paragraph 90, the Court stayed all actions ongoing before any "non-judicial body".

[15] At paragraph 82, the Court said that AHS sought relief that would also extend to the Office of the Information and Privacy Commissioner (OIPC), among others. Paragraph 82 specifically listed the OIPC. At paragraph 87, the Court decided that, to prevent abuse of non-court processes, the Court "…should intervene broadly, and impose restrictions both in relation to courts and non-court tribunals." Because the OIPC was specifically mentioned in this context, I concluded that the OIPC was a "non-judicial body" to which the stay in paragraph 90 was directed.

[16] The combination of the restriction on the Applicant in paragraph 89(1)(a) of the Court decision, and the stay on all "actions" ongoing before any "non-judicial body", led me to conclude that the Court intended to stay all actions brought by the Applicant before a non-judicial body, including the OIPC.

[17] On January 23, 2019, the Applicant obtained leave to appeal the Court decision that declared him to be a vexatious litigant and restricted his access to any non-judicial bodies. On January 31, 2019, I wrote to AHS and the Applicant to inform them of my decision not to proceed at that time with any of the Applicant's matters before my office. While I was of the view that the Court decision did not apply to the section 55 request because it was brought by AHS and not the Applicant, I nevertheless said that I would await the decision of the Court of Appeal before deciding the matter.

[18] Subsequently, my office successfully sought leave to intervene in the Applicant's appeal (2019 ABCA 288), on the ground that the Court ought not to have issued an order that affected a non-judicial body such as my office, without any notice to my office.

[19] On May 1, 2020, the Court of Appeal issued its decision related to the Applicant (2020 ABCA 168), which was one of three decisions about vexatious litigants that the Court of Appeal issued on the same day.

[20] In its decision concerning the Applicant, the Court of Appeal said:

> [17] It is quite clear that [the Applicant] has engaged in obsessive conduct which has consumed excessive resources of many institutions. The respondents have been unable to control [the Applicant's] conduct, and there is ample evidence that his conduct will not change…

[21] In its decision concerning non-judicial bodies, the Court of Appeal said:

> [40] In summary, the chambers judge's universal assumption that administrative tribunals are "powerless" to control abuses of their own procedures is unsupported on this record. In any event, any jurisdiction of the court to assist a tribunal should *prima facie* only be exercised on the request or with the concurrence of the tribunal. Finally, no such order should be made without notice to the tribunals affected, as they are entitled to make submissions on their need for judicial assistance. The order should not have been extended to "all non-judicial bodies".

[22] The Court of Appeal set aside part of the Court decision, including that part of the vexatious litigant order pertaining to non-judicial bodies such as my office.

[23] On May 7, 2020, I informed AHS and the Applicant that I now intended to make a decision on AHS's request under section 55(1) of the FOIP Act. I gave AHS and the Applicant until May 29, 2020 to provide a further written submission to me to me and to each other on the issue of whether anything had happened to affect AHS's request under section 55(1). I did not receive any further submissions.

Application of section 55(1)(a) of the FOIP Act to the access requests

[24] A public body bears the burden of proving that section 55(1)(a) applies. See also Practice Note: Authorization to Disregard Requests, available on my office's website at www.oipc.ab.ca.

Section 55(1)(a) – repetitious or systematic in nature

Written submissions of AHS

[25] AHS's initial written submission is that the records the Applicant is requesting significantly overlap with the records provided to the Applicant in the Affidavit of Records through the discovery process under the Rules of Court, in the Applicant's active civil matter against AHS that is before the Court. AHS says that it had provided the Applicant with 16,091 pages of records in the ongoing litigation. The time period of the records provided was May 1, 2013 to March 23, 2017.

[26] AHS says:

> In light of the facts, it is the Public Body's position that the fifty-three requests submitted by the Applicant under the FOIP Act are repetitious and systematic in nature to what the Public Body is already dealing with through the legal matter…

[27] AHS also says that the requests are repetitious as evidenced by the common wording threads within the requests themselves.

Written submissions of the Applicant

[28] In his initial written submission, the Applicant says that the 53 access requests that are the subject of the application under section 55(1) do not overlap with the Affidavit of Records. The Applicant says that AHS conducted document searches for the 20 access requests that are the subject of the litigation but not the subject of AHS's section 55(1) application. The Applicant maintains that AHS did not conduct document searches for the 53 access requests that are the subject of the section 55(1) application, as those individuals are not involved in the lawsuit.

[29] By further letter dated May 12, 2018, in response to AHS's May 1, 2018 and May 11, 2018 letters, the Applicant points to AHS's admission that the information responsive to the 53 access requests is not fully encompassed in what the Applicant has received in the civil litigation process.

[30] The Applicant also disagrees that the requests are repetitious. He says that the common wording threads simply establish that the emails requested contain his personal information, and that every single search keyword is a marker of his personal information.

[31] The Applicant does not say whether he thinks the requests are systematic in nature.

My decision under section 55(1)(a) – repetitious or systematic in nature

[32] In *Request for Authorization to Disregard Access Requests – Grant MacEwan College* (March 13, 2007), the former Commissioner 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.

[33] To begin, the wording of section 55(1)(a) makes it clear that it is the requests under the FOIP Act that are considered when determining whether those requests are repetitious or systematic in nature. Records that have been provided outside of those requests under the FOIP Act are not considered and

are not relevant to a determination of whether the requests under the FOIP Act are repetitious or systematic in nature.

[34] That interpretation is consistent not only with the wording of section 55(1)(a), but also with the former Commissioner's interpretation of section 3(a) of the FOIP Act as providing for a dual process for obtaining records. In Order F2006-028, the former Commissioner said:

> [para 11] I find that the Applicant's decision to use the FOIP process instead of Columbia's information disclosure process does not make the Applicant's access request under the FOIP Act frivolous or vexatious. Section 6 of the FOIP Act gives an applicant a right of access under the FOIP Act. The FOIP Act does not limit this right of access if another access process exists outside of the FOIP Act. Furthermore, section 3(a) clearly provides for a dual process, and states that the FOIP process is in addition to other existing procedures for access to information. Section 3(a) reads:
>
> > *3 This Act*
> >
> > *(a) is in addition to and does not replace existing procedures for access to information or records…*
>
> [para 12] Similarly, I find that the Applicant's decision to obtain information through the litigation process does not make the Applicant's access request under the FOIP Act frivolous and vexatious. In Order 97-009, the former Commissioner addressed an applicant's right to use the litigation process in addition to the FOIP process. The Commissioner referred to section 3(a) of the FOIP Act. The Commissioner held that the Rules of Court do not prevent an applicant from making a request for information under the FOIP Act, nor does the FOIP Act prevent an applicant from making an application for information when an applicant uses the discovery process under the Rules of Court to get the same information.

[35] Therefore, there is no merit to AHS's argument that requesting access to records under the FOIP Act, in addition to the civil litigation process, is repetitious or systematic in nature for the purposes of section 55(1)(a).

[36] While the Applicant's access requests all contain similar wording, the requests are not for the same records or information, and are not for the same time periods. Therefore, I find that the Applicant's access requests are not repetitious.

[37] However, each of the Applicant's access requests is for information in relation to various named individuals within what was his previous employment environment. As such, the Applicant's access requests are part of a pattern of conduct that is regular or deliberate. Therefore, I find that the Applicant's access requests are systematic in nature, as provided by section 55(1)(a) of the FOIP Act.

Section 55(1)(a) – unreasonably interfere with the operations of the public body

Written submissions of AHS

[38] AHS said that to provide a sense of the amount of time and resources that would be needed, approximately 90 days and multiple staff members from AHS's Information and Access department were required to respond to the 20 access requests. The access requests were further complicated by the ongoing civil litigation process and the need to assess legal privilege. Responding to the 53 access requests would unquestionably interfere with the operations of AHS.

[39] AHS estimated that it would be required to expend several hundred hours of staff time, including that of very senior administrative staff, to process the 53 access requests, and spend what would be tens of thousands of dollars of public funds. It says that processing of any more access requests will significantly interfere with the litigation matter and its operations. Of particular concern is that 19 or more of the individuals who are the subjects of the access requests are physicians tasked with ongoing medical treatment of patients. It says that it will have to search through 48 separate email accounts [this would not include the five investigation files] during a span of more than four years when the Applicant was part of the medical staff for a majority of that time. It maintains that responding to the 53 access requests would unquestionably interfere with its operations.

Written submissions of the Applicant

[40] The Applicant says that AHS has failed to provide any evidence that the requests would unreasonably interfere with its operations. He says that AHS is the largest health authority in Canada with an annual budget of $16 billion, and that it is nonsensical for AHS to claim that it can be impaired in any way in its operations as a result of the requests.

[41] In reply to AHS's statement that responding to the access requests would "unquestionably interfere" with its operations, the Applicant says that that is a subjective opinion. The Applicant says that AHS has already spent over 1 million "taxpayer patient care dollars" in the lawsuit against him.

My decision under section 55(1)(a) – unreasonably interfere with the operations of the public body

[42] AHS received 73 access requests from the Applicant within 6 days. It decided to process 20 access requests, but maintained that processing the other 53 would unreasonably interfere with its operations. It provided me with information about the time and resources that were needed to process the 20 access requests, and a rough estimate of the time and resources that would be needed to process the remaining 53 access requests.

[43] While AHS's estimate leaves me to infer somewhat about how processing the 53 access requests will unreasonably interfere with its operations, that inference is bolstered by the evidence that was before the lower Court and by the finding of the Court of Appeal. The entire chronology of events concerning the Applicant and evidence of his complaints involving AHS and others, from June 1, 2016 to August 7, 2018, is set out by the lower Court in its decision and takes up 106 paragraphs of that decision. The Court of Appeal found that the Applicant has consumed excessive resources of many institutions. I note that the Applicant also has many files in my office.

[44] Furthermore, regardless of how many resources a public body may have, it is entirely conceivable that receiving 73 access requests from one person all at once is overwhelming. It is the fact of receiving all these access requests at once from one person that creates the burden.

[45] Considering AHS's estimate, the evidence before the lower Court, and Court of Appeal's finding (which I cannot disregard), I am prepared to find that responding to the 53 access requests will unreasonably interfere with the operations of AHS. Therefore, I authorize AHS to disregard the Applicant's 53 access requests.

Section 55(1)(a) – amount to an abuse of the right to make those requests

[46] As I have already made a decision under the first part of section 55(1)(a), I do not find it necessary to also make a decision under the second part of section 55(1)(a).

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

[47] As I have already made a decision under the first part of section 55(1)(a), I do not find it necessary to also make a decision under section 55(1)(b).

Other matters

Request from the Applicant

[48] Besides asking that I deny AHS's request on the ground that it doesn't meet any of the criteria of section 55(1), the Applicant requests that I "…instruct AHS to immediately provide the documents of the 53 FOIP requests without any further delays, obstructions or violations of the FOIP Act." The Applicant also requests that I "…re-categorize FOIP requests 2017-G-342 to 2017-G-346 from "General" to "Personal" FOIP requests." The Applicant says that these were the five AHS investigations filed by him, which concerned unlawful conduct of AHS Officials committed against him, and which contained his personal information, and were incorrectly categorized as "General" by AHS.

[49] A decision under section 55(1) will result in my allowing or denying a public body's request to disregard. If I allow it, the public body may disregard the access request(s). If I deny it, the public body must respond to the access request(s). In the latter case, the public body gets to decide whether it will provide records, and its decision is reviewable by me. It is only on that review that I may decide whether records must be provided or whether a public body made every reasonable effort to assist an applicant, including understanding the request and seeking further information to process the request.

[50] On an application under section 55(1), I cannot do what the Applicant requests.

Request from AHS to disregard future access requests

[51] AHS also requested two further authorizations:

- to disregard any future requests from the Applicant, for the period in which the outstanding legal matter between the Applicant and the Public Body is resolved, effective the date my office renders its decision; and
- to limit the Applicant to five requests per year, with a minimum of sixty calendar days between submissions, for a period of two years.

[52] I am not prepared to accede to AHS's first request set out above. The time period for that request is uncertain, and there is no evidence before me that any access request(s) from the Applicant during that time will unreasonably interfere with the operations of AHS.

[53] However, I find that AHS's second request is reasonable. Based on the Court of Appeal's finding that the parties have been unable to control the Applicant's conduct and that the Applicant's conduct will not change, I agree that some controls are required on the number of access requests that the

Applicant may submit to AHS at any one time. It is necessary to have the Applicant focus and ask for what he wants, in a controlled manner, so that access rights are maintained but AHS is not overwhelmed.

[54] Therefore, I will authorize AHS to limit the Applicant to five access requests per year, with a minimum of sixty calendar days between submissions, for a period of two years. That will allow the Applicant to still make access requests but also require him to be selective about what records he seeks, such as records that may encompass some of the records in the 53 access requests (for example, the records about the investigations of his complaints) or other records.

Jill Clayton
Information and Privacy Commissioner