ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

REQUEST TO DISREGARD F2021-RTD-01

March 10, 2021

ALBERTA HEALTH SERVICES

Case File Number 016554

[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*" or the "Act") to disregard an access request from an entity that I will refer to as the Applicant.

Background

[2] On November 6, 2019, the Applicant made an access request to AHS. On December 24, 2019, AHS responded to the access request.

[3] On February 21, 2020, my office received the Applicant's request for a review of AHS' response. On October 23, 2020, I notified the parties that, under section 68 of the *FOIP Act*, I was authorizing a member of my staff to mediate and try to settle the matter that was the subject of the request for review (Case File 016554).

[4] On November 26, 2020, as the review before my office was proceeding, AHS requested authorization under section 55(1)(a) to disregard the Applicant's access request. An application under section 55 is usually brought before a public body provides a response to an applicant. The timing of AHS' application in this matter raises a preliminary issue of whether the *FOIP Act* allows a public body to bring an application under section 55(1) to disregard an access request after the public body has already provided a response to the access request.

[5] On February 1, 2021, I asked the parties to provide me with submissions regarding the statutory interpretation of the *FOIP Act* on this preliminary issue. I noted that, although applications under section 55(1) have been previously addressed in the course of an Inquiry (Orders F2006-048 and F2014-011), my office had not yet expressly considered the issue of whether the *FOIP Act* contemplates that a public body may bring an application under section 55(1) after a public body has already provided a response to the request.

AHS provided its response on February 12, 2021 and the Applicant provided its response on March 1, 2021.

Preliminary Issue: Does the *FOIP Act* allow a public body to bring an application under section 55(1) after it has already provided a response to an access (s. 7(1)) or correction (s. 36(1)) request?

[6] Section 55 of the *FOIP Act* gives me the power to authorize a public body to disregard certain requests. Section 55 states:

> *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.*
>
> *(2) The processing of a request under section 7(1) or 36(1) ceases when the head of a public body has made a request under subsection (1) and*
>
> *(a) if the Commissioner authorizes the head of the public body to disregard the request, does not resume;*
>
> *(b) if the Commissioner does not authorize the head of the public body to disregard the request, does not resume until the Commissioner advises the head of the public body of the Commissioner's decision.*

[7] AHS takes the position that the *FOIP Act* does not limit when a request to disregard may be made. It states (in part):

> **The Commissioner has Jurisdiction to Control the Procedure and Prevent Abusive Requests**
>
> By its application for authorization to disregard the Current FOIP Request, AHS asks the Commissioner to bring an abusive request to an end. The Commissioner's jurisdiction to control systematic, frivolous, or vexatious proceedings is shown by the plain language of the *FOIP Act.* Section 55 of the *FOIP Act*, which the Alberta Court of Appeal noted is a 'gatekeeping' provision [*Makis v Alberta Health Services*, 2020 ABCA 168 ("*Makis*")] clearly enables the Commissioner, at any time, to authorize a public body to disregard a request which is abusive, repetitive, frivolous, or vexatious. The Commissioner has found that section 55 of the *FOIP Act* is the *locus* for her jurisdiction to control abuses of her process. [*Re Alberta Justice and Solicitor General*, Order F2015-16 (*"Alberta Justice*") at para 41] Further, the Commissioner has the authority under section 70 of the *FOIP Act* to refuse to conduct an inquiry "if the circumstances warrant," and, following an inquiry, the Commissioner has the jurisdiction to make an order on "any terms or conditions." The Commissioner's jurisdiction under the *FOIP Act* is clearly broad enough to include exercising control over and limiting abusive proceedings.

As the Alberta Court of Queen's Bench has held, the Commissioner has broad authority to regulate her own proceedings, [*Carter v Alberta (Ministry of Justice and Solicitor General)*, 2019 ABQB 491 ("*Carter*") at paras. 17 and 18] which necessarily include the power to prevent abuse of her processes as they arise. Further, there is no "legislative gap", which might prevent the Commissioner from dealing with abusive procedures [*Makis* at para 9], which necessarily includes proceedings which are frivolous or vexatious. [*Unrau v National Dental Examining Board,* 2019 ABQB 283 at paras. 64 - 81] The Commissioner has asserted an inherent power to control her own procedures in proceedings before the Alberta Court of Appeal, and has invoked that power to prevent abuses. [*Makis* at para. 39]

It is abundantly clear that the Commissioner has the jurisdiction under section 55 of the *FOIP Act* to limit requests for information which are frivolous, vexatious, or abusive.

The *FOIP Act* Does Not Limit When a Request to Disregard may be Made

It is well established that, in interpreting a statute, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [*Rizzo v Rizzo Shoes (Re),* [1998] 1SCR 27 at para. 21, 154 DLR (4th) 193; cited with approval in *Normtek Radiation Services Ltd. v Alberta Environmental Appeal,* 2020 ABCA 456 at para. 75] On the plain language of the *FOIP Act,* it is apparent that there is no limit on when a request to disregard an access request may be made or granted by the Commissioner. Section 55 provides that, "if the head of a public body asks, the Commissioner may authorize the public body to disregard one or more requests […]". The only limit on the Commissioner's jurisdiction to authorize a public body to disregard a request is that the public body must show that the request:

(a) would unreasonably interfere with the public body's operations;
(b) amounts to an abuse of the right to make a request; or
(c) is frivolous or vexatious.

An open-ended ability for the public body to apply for (and the Commissioner to grant) authorization to disregard a request is consistent with the scheme of the *FOIP Act* as a whole. In particular, the *FOIP Act*, specifically contemplates requests which, if granted, continue to have effect for a period of up to two years. [*FOIP Act,* at s. 9(1)] Although the public body may provide an initial response to such a request, circumstances could evolve after that response is provided such that the initial request, though not initially abusive, frivolous or vexatious, became so after the initial response was provided. As the Courts have noted, the ways in which a proceeding may be frivolous, vexatious or abusive vary widely. [*Canada v Olumide,* 2017 FCA 42 at para. 32, 277 ACWS (3d) 50.] Reading section 55 as only permitting a public body to apply for authorization to disregard a request before providing a response of any sort would, in effect, deprive the Commissioner of the jurisdiction to control abusive requests.

It is also important to note that, under the scheme of the *FOIP Act*, simply responding to a request does not bring proceedings to an end. A response may include a statement

that access is granted, accompanied by the requested record [*FOIP Act*, at ss. 12(1)(a) and (b), 13(2)], a statement that access is granted, with access to be provided at a future time and place specified in the response [*FOIP Act*, at ss. 12(1)(a) and (b), 13(3)], or a refusal to grant access to the records requested [*FOIP Act*, at ss. 12(1)(a) and (c)]. In all cases, it remains open to the person making the request to ask the Commissioner for a review of the public body's decision. [*FOIP Act* at s.65(1)] Simply providing a response to a request does not end the Commissioner's involvement in the matter. The Commissioner retains supervisory jurisdiction over a request until she issues an order either refusing to conduct an inquiry under section 70 or under section 72 following the completion of an inquiry. The Commissioner's supervisory jurisdiction must necessarily include the jurisdiction to authorize a public body to disregard a request which is frivolous, vexatious, or otherwise abusive, whenever that occurs.

Further, nothing in section 68 of the *FOIP Act* could reasonably be interpreted as limiting the Commissioner's jurisdiction to authorize a public body to disregard a request for information. The existence of a review or mediation pursuant to section 68 does not preclude an application under section 55. Section 68 simply authorizes the Commissioner to authorize a mediator to investigate and try to settle a matter upon which a request for review has been made. Mediation under section 68 is a 'without prejudice' process, the results of which have no bearing on the outcome of any subsequent inquiry. [*Alberta Teachers' Association v Alberta (Information and Privacy Commissioner)*, 2011 ABQB 19 ("*ATA*") at paras. 125 and 127; *Re Service Alberta,* Order 2015-012 at para. 25] Further, it is "extremely unusual" for the Commissioner to be privy to the events that take place during a mediation. [*Re Alberta Childrens' Services,* Order 2000-015 at para. 13] There is no basis on which a without prejudice process, the results of which are not binding upon the Commissioner, could oust the Commissioner's jurisdiction to protect its process against frivolous, vexatious, or otherwise abusive request for information.

In *Alberta Justice*, the public body declined to answer a request on the basis that the language in the request was inappropriate or offensive. [*Alberta Justice* at paras. 6 and 7] Even though the public body had not asked for authorization to disregard the request under section 55 of the *FOIP Act*, the Commissioner found that she had the jurisdiction to consider whether the request was abusive of her process. [*Alberta Justice* at para 43] The Commissioner further found that even where:

> […] the Public Body has not made such an application, nor is it pursuing a remedy that such an application could afford. I believe it is open for me, despite the existence of section 55 and the absence of a section 55 application, to consider whether a request or some aspect of it is an abuse of process […] [*Alberta Justice,* at para 46]

In *Alberta Justice*, the Commissioner had the jurisdiction to consider whether a request was abusive, even in the absence of a request from the public body, and after the public body provided a response to the request. As such, there can be no question of the Commissioner's broad jurisdiction to prevent an abuse of process. Simply providing a response to an information request (even, as in this case, a response which decline to

provide the information requested), does not deprive the Commissioner of the necessary jurisdiction to control her process.

The Commissioner specifically requested comment on the decision of *Re Workers Compensation Board,* Order F2006-028 ("*WCB*") and its impact on the Preliminary Issue. As in *Alberta Justice*, in *WCB*, the Commissioner considered a request under section 55 as a preliminary issue. The section 55 request was made for the first time in the Public Body's written submissions in advance of an Inquiry, after the Public Body first responded to the access request, and after mediation had failed to resolve the resulting review. [*WCB* at paras. 3, 6, and 8] that [sic] the Commission ruled that, although it was not the norm for a public body to make a request under section 55 in the course of an inquiry, he would make a ruling as the public body had requested it. The public body's prior response to the request did not factor in the Commissioner's decision. [*WCB* at para. 10]

The Commissioner has also requested comment on *Re Town of Ponoka,* Order F2014-011 ("*Ponoka*"). The adjudicator's statement in *Ponoka* that the public body could ask the Commissioner for permission to disregard a future request can only be properly understood in the context of the adjudicator's finding on her own jurisdiction. The adjudicator correctly noted that the *FOIP Act* requires the Commissioner's authorization, which had not been delegated to her. [*Ponoka* at para. 6] Thus, only if a request were made to the Commissioner, with the full jurisdiction to decide the issue, could the request for authorization be disregarded.

In keeping with the Commissioner's broad jurisdiction to control her own process, where a request to disregard an access request is made under section 55 of the *FOIP Act,* the Commissioner considered and decides the request on its own merits, regardless of the stage in the process at which the request is made. As set out above, the Commissioner's jurisdiction to control her own process, in particular through section 55, is broad and not restricted to requests made prior to a response.

[8] The Applicant takes the position that AHS cannot bring its application to disregard the access request under section 55(1) as it has already responded to the access request. It states:

1. The Plain Language of Section 55 Restricts the Public Body's Right to Apply to Disregard a Request

By its plain language, section 55(1) is restricted to the period after a person has submitted a request under ss. 7(1) or 36(1), but before the public body has provided a response. Section 55(1) specifically states that a public body may "*disregard* one or more requests" upon the Commissioner's authorization. To "disregard" something is "to pay no attention to it" [Merriam Webster online, *sub verbo* "disregard" https://www.merriam-webster.com/dictionary/disregard]. Where a public body (i.e. AHS) has specifically turned its mind to a request under section 7(1) and provided a response, there is nothing left to disregard.

Section 55(2) of the *FOIP Act* which AHS does not reference in its submissions, reinforces this interpretation. Section 55(2) states:

> **(2) The processing of a request under section 7(1) or 36(1) ceases when the head of a public body has made a request under subsection (1)** and
>
> (a) if the Commissioner authorizes the head of the public body to disregard the request, does not resume;
>
> (b) if the Commissioner does not authorize the head of the public body to disregard the request, does not resume until the Commissioner advises the head of the public body of the Commissioner's decision.

In other words, a public body can only invoke s. 55 while there remains a potential to process a s. 7(1) or 36(1) request. If the public body makes a s. 55 request, then the public body's timeframe for providing a response is tolled by s. 55(2) of the *FOIP Act*. However, once a public body processes the request and provides a response, there is neither anything to disregard, nor is there any deadline to toll.

Rather, once AHS responded, the statutory framework shifted the burden to [the Applicant] to file a request for review under s. 65 of the *FOIP Act.* The process started under s. 65 of the *FOIP Act* is not subject to s. 55; rather, only ss. 7 and 36 processes are subject to s. 55. This legislative omission must be intended to have meaning.

If a request under s. 55 could be made at any time, including after a response is provided, not only would this render the use of the word "disregard" meaningless, but it would be inconsistent with the procedural provisions of subsection (2).

AHS is correct to note that s. 55 is part of the Commissioner's suite of "gatekeeping" powers. But where a public body has responded to a s. 7(1) request for information, without objection or recourse to a s. 55 request, the public body has already opened the gate to allow the request to be processed and then subject to review.

2. This Interpretation is Consistent with the Purpose and Scheme of Part 5 of the Act

[The Applicant's] interpretation is consistent with the scheme of the Act as whole, and in particular with Part 5 of the *Act*, dealing with reviews and complaints. In very general terms, the *Act* contemplates a two-stage process for applicants seeking disclosure under s. 7:

> i. the request, the processing of that request, and the public body's response to that request (Part 1, Division 1); and
>
> ii. the Commissioner's review of that response (Part 5, Division 1)

Those are two separate processes, addressing two distinct requests. The first is a request for access, and the second is a request for a review of the public body's decision.

In particular, s. 65(1) provides that a person may ask the Commissioner "to review any decision, act or failure to act of the head [of a public body] that relates to the request." The Commissioner's review under Part 5, Division 1 is of the public body's decision or act: was the public body's response appropriate or not? That is the focus of the inquiry. Had AHS believed the request was abusive, it ought to have applied under s. 55 *before* processing the request.

In an effort to avoid the obvious consequences of the statute's plain wording, AHS submits that [the Applicant's] s. 7 request *became* abusive only after [the Applicant] challenged the sufficiency of AHS' Record of Proceedings in the judicial review proceeding. That submission has no merit. The *FOIP Act* itself, and past orders of the Commissioner, are abundantly clear that a *FOIP* request is not abusive merely because there is another means of obtaining the same information:

> 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. [Order F2006-028 at para. 11]

Moreover, in the judicial review, the Court will either: (a) direct AHS to disclose the same records, and hence the FOIP request is just another means to access the same records and is not abusive; or (b) direct that the requested records are irrelevant to the judicial review, in which case there is not even any overlap.

AHS suggests that [the Applicant's] exercise of its lawful rights as a litigant in the Court of Queen's Bench and its lawful exercise of its right under the *FOIP Act* is somehow an "abuse" of the FOIP process. This position is inconsistent with s. 3 of the *Act*, contrary to past orders of the Commissioner, and troubling in its policy implications.

3. The Commissioner Clearly Retains Jurisdiction to Control Her Processes, but This Must Be Read in the Context of the *Act* as a Whole

Section 55 is a specific statutory power granted to the Commissioner. If, as AHS suggests, the Commissioner retains an unrestricted right to authorize a public body to disregard a s. 7(1) request at any time, then there would be no need for the Commissioner's express powers under s. 55. Further, s. 55(2) would be meaningless.

The fact that the legislature saw fit to bestow the Commissioner with a specific power in specific circumstances confirms the Commissioner's jurisdiction to control her process using s. 55(1) of the *FOIP Act* must be exercised within a specific framework, and one that is commenced by the public body noting the request is abusive and seeking relief from processing it.

Notwithstanding the above, [the Applicant] notes that the Commissioner retains some jurisdiction to control her process on review. [Section 70 of the *FOIP Act*] In this regard, the *Alberta Justice* decision [*Re Alberta Justice and Solicitor General,* Order F2015-16] provides guidance on the tools at the Commissioner's disposal where a public body has

not requested a s. 55 order prior to responding to a request. Importantly, in *Alberta Justice*, the Commissioner expressly did not decide the issue on s. 55 of the *FOIP Act*. Rather the Commissioner noted that the review involved a request containing derogatory commentary, and she then tailored an order that permitted the public body to take no account of the applicant's abusive language while maintaining the public body's obligation to respond to the genuine requests for information. In other words, the Commissioner's control of her process addressed the derogatory language, not the right to disregard and stay processing a request as a whole – which is the intention of the *FOIP Act.*

Absent a s. 55 application, [the Applicant] submits, the Commissioner's jurisdiction over her processes must be exercised with a view to the level of mischief (e.g. derogatory comments) on the fact of the request. In this regard, there is no such mischief in the requests.

4. Order F2014-011 is Instructive in the Proper Interpretation of s. 55

Order F2014-011 [*Re Ponoka*] was in respect of an inquiry overseen by an adjudicator. In that case, the adjudicator declined to consider a s. 55 application because she lacked the statutory delegated authority to do so. However, she went on to hold, consistent with [the Applicant's] submissions above, "the Public Body appears not to have done this [brought the s. 55 application] when it received the Applicant's request and the Public Body has clearly already responded to the request at issue. [*Re Ponoka* at para. 6] The adjudicator concluded, "[i]f the Applicant's representative makes an access request to the Public Body **in the future** that the Public Body believes is repetitious or systematic… or frivolous or vexatious… the Public Body may ask the Commissioner **at that time** for authority to disregard that request." This reasoning is entirely consistent with a proper interpretation of s. 55 of the *FOIP Act,* and confirms [the Applicant's] submissions above.

5. Order F2006-008 is Inapplicable and Not Helpful to AHS in Any Event

Order F2006-008 [*WCB*] provides no guidance on the applicability of, or jurisdiction to consider, a s. 55 application because the jurisdictional question was not considered. In any event, the Commissioner ultimately (and easily) concluded that the request did not meet the threshold for an abusive, frivolous or vexatious request, and accordingly, the s. 55 application was rejected.

For all of the reasons submitted above, [the Applicant] submits that AHS s. 55 application is untimely and the Commissioner should not countenance the application. The review should be considered on its merits.

[9] I have carefully considered the parties' submissions. In this case, the issue is not whether the requirements of section 55(1) can be met by the Public Body, but a preliminary issue of whether the *FOIP Act* allows me to make a decision under section 55(1) after a public body has already responded to an access request. In my view, the issue can be determined solely on the basis of statutory interpretation, which requires that the words

of a statute be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the legislation, the object of the legislation and the intention of the Legislature.

[10] Section 55(1) allows me to authorize a public body to "disregard" a request. "Disregard" is not defined in the *FOIP Act*. Therefore, as is noted by the Applicant, I should consider its ordinary meaning. Webster's Dictionary defines "disregard" as 'to pay no heed to' or 'to ignore'. This means that section 55(1) gives me the power to allow a public body to not respond to a request when certain conditions are met.

[11] Since section 55(1) is all about authorizing a public body to "disregard" a request such as an access request, I do not see how it is possible to authorize a public body to disregard an access request when it has already responded to that access request. If a public body has already responded, there is nothing remaining that I can authorize it to disregard.

[12] Next, section 65(1) states:

> *65(1) A person who makes a request to the head of a public body for access to a record or for correction of personal information may ask the Commissioner to review any decision, act or failure to act of the head that relates to the request.*

[13] Based on the wording of sections 55(1) and 65(1), and the sequence in which those provisions appear, my opinion is that there is an inherent timeline contemplated by sections 55(1) and 65(1). Section 55(1) precedes section 65(1), such that a request under section 55(1) must happen before a public body has provided a response to an access request and before that response is under review by my office. This is a further reason why a public body's request under section 55(1) of the *FOIP Act* must come before a public body responds to an access request.

[14] In this case, the Applicant has already exercised the right under section 65(1) of the *FOIP Act* to request a review, and my office is already conducting that review. If I were to authorize AHS to now disregard the access request, that decision would summarily deprive the Applicant of the substantive right under section 2(e) of the *FOIP Act*, the purpose of which is to provide for independent reviews of decisions made by public bodies. Consequently, I believe that the Legislature did not intend that I make a decision under section 55(1) after an applicant had already exercised the right to request a review of a public body's response to the applicant's access request, as here.

[15] As a final point, I concur with the submissions of both parties that I retain jurisdiction to control proceedings before my office. There is a distinction between the rights and obligations of those subject to the *FOIP Act*, and my ability to control matters that come before my office. The preliminary issue before me in this matter is not whether I have the jurisdiction to control abuse before my office, but whether the Public Body may bring an application to disregard a request under section 55 after it has already provided a

response. Regardless of whether an application has been made under section 55 of the *FOIP Act* (or s. 37 of the *Personal Information Protection Act*, or s. 87 of the *Health Information Act*), I have broad authority to control matters before my office.[1] Once a public body receives (and has responded to) an access or correction request under the *FOIP Act*, it is subject to the requirements of the Act, and if a review is requested, the procedures of my office.

[16] My finding that a public body may no longer rely on section 55 of the *FOIP Act* after responding to an access or correction request under sections 7(1) or 36(1) does not limit my powers to control proceedings before my office.

Decision

[17] For the reasons stated above, I decline to make a decision under section 55(1). My office's review of AHS' response to the Applicant's access request will continue. I thank the parties for their helpful submissions on this issue.

Jill Clayton
Information and Privacy Commissioner

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[1] See, for example: Order F2015-16 at paras 41 – 59; *Carter v Alberta (Ministry of Justice and Solicitor General)*, 2019 ABQB 491 at paras 13, 16, 18; and *Makis v Alberta Health Services,* 2020 ABCA 168 at para 39.