ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

Request for Authorization to Disregard an Access Request
under section 37 of the
Personal Information Protection Act

Gowling WLG (Canada) LLP
(OIPC File Reference 003172)

December 12, 2016

[1] On June 21, 2016, I received an application from Gowling WLG (Canada) LLP (the Organization) under section 37 of the *Personal Information Protection Act* (PIPA) for authorization to disregard an access request received May 11, 2016 from an individual to whom I will refer as the Respondent in this application.

Commissioner's Authority

[2] Section 37 of PIPA gives me the power to authorize an organization to disregard certain requests. Section 37 reads:

> *37 If an organization asks, the Commissioner may authorize the organization to disregard one or more requests made under section 24 or 25 if*
>
> *(a) because of their repetitious or systematic nature, the requests would unreasonably interfere with the operations of the organization 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

[3] On May 11, 2016, the Respondent made an access request under PIPA to the Organization, as follows:

> Pursuant to the *Personal Information Protection Act* (PIPA), which you are governed by, please provide me with all records you have containing my personal information. This includes, but is not limited to, all records containing my name, address, email address, and credit and financial information.

[4] On June 21, 2016, the Organization applied to me under section 37 of PIPA. I then gave the Respondent an opportunity to provide comments on that application. The Respondent provided comments, the last of which I accepted on August 4, 2016.

The Organization's submission

[5] The Organization says that the Respondent has been an unsuccessful litigant and complainant in various matters against the Organization, its clients and its lawyers. The Organization sets out a detailed

history of the Respondent's litigation and complaints, spanning some twelve years prior to the access request. I note that the Respondent's litigation and complaints have escalated significantly since 2013.

[6] The Organization takes the view that the circumstances make the Respondent's access request a part of a pattern of conduct that is repetitious or systematic in nature because it is a repeated attempt to obtain records through PIPA which were either previously provided to the Respondent through the various actions and complaints, or which are not available because of privilege.

[7] Alternatively, the Organization submits that the Respondent's access request is frivolous or vexatious. In the Organization's view, the Respondent is inappropriately using the access request as a weapon against the Organization for reasons that are not consistent with the purpose of PIPA.

The Respondent's submission

[8] The Respondent says that her May 11, 2016 request to the Organization followed from a conversation with Service Alberta about the Organization's having obtained the Respondent's credit report. The Respondent says that she became aware that the Organization obtained her credit report when she saw that a "hard" credit check by the Organization appeared in a credit report she obtained in the fall of 2015. She says that a "hard" credit inquiry negatively impacts a credit score. The Respondent further says that Service Alberta informed her that the Organization did not have the authority to obtain the credit report in the circumstances, and informed her of the PIPA process for requesting her personal information.

[9] The Respondent then says that, on June 6, 2016, she sent correspondence to the Organization with a request for a narrowed subset of records relating to her personal credit and financial information. The Respondent explains that she requested this narrowed subset of records sooner than the original request for all personal information, with a view to first obtaining the records related to the alleged improper credit check and then to assess whether further personal information records would be required. The Respondent maintains that the credit report is not part of her lawsuit against the Organization at this point. The evidence provided by the Respondent is that the Organization pulled the credit report for a security for costs application.

[10] In her submission, the Respondent also cites two reports from the Privacy Commissioner of Canada in which two law firms were found to have contravened PIPEDA when they obtained credit reports of the complainants, without their knowledge and consent. The Respondent further cites a Federal Court case that makes a similar finding.

Application of section 37(a) of PIPA

1. **Section 37(a) – repetitious or systematic in nature**

[11] Section 37 of PIPA contains wording that is similar to section 55 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). The former Commissioner has followed definitions set out in decisions under section 55 of the FOIP Act in making decisions under section 37 of PIPA: see, for example, *Request for Authorization to Disregard an Access Request – Alberta Motor Association* (March 8, 2010) (available on my Office's website at www.oipc.ab.ca).

[12] However, the former Commissioner has also said that, when interpreting section 37 of PIPA, he will be guided by the purpose of PIPA in that PIPA seeks to balance an individual's right to have his or her personal information protected and the need of organizations to collect, use and disclose personal information for purposes that are reasonable: see *Authorization to Disregard an Access Request – Manulife* (November 29, 2005), at paragraph 25. The FOIP Act, on the other hand, was intended to foster open and transparent government, and to provide access to records in the custody or control of a public body as a means of subjecting public bodies to public scrutiny.

[13] In *Request for Authorization to Disregard Access Requests – Grant MacEwan College* (March 13, 2007, available on my Office's website at www.oipc.ab.ca), 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.

[14] In *Authorization to Disregard an Access Request – Manulife* (November 29, 2005), at paragraph 26, the former Commissioner said:

> [26] In this case, the Applicant has made only one request under section 24 of PIPA. Granted, she has sought information previously through litigation, and through an access request to the Office of the Privacy Commissioner of Canada, but she has only applied for access to information under PIPA one time. Subsection 37(a) refers to requests for access under section 24 of PIPA. I do not agree that her one access request is repetitious or systematic in nature as required by PIPA subsection 37(a).

[15] I adopt that same reasoning. The Respondent has made an access request under PIPA only once. There is no evidence before me that the Respondent has made this same access request more than once. Therefore, I find that the access request is not repetitious. The access request is also not systematic in nature.

[16] I find that the Organization has not met its burden of proving that the Respondent's access request is repetitious or systematic in nature. Therefore, that part of section 37(a) is not met.

2. Section 37(a) – unreasonably interfere with the operations of the organization

[17] Under section 37(a), the requests must be repetitious or systematic in nature and also unreasonably interfere with the operations of the organization or amount to an abuse of the right to make those requests.

[18] As I have found that the request is not repetitious or systematic in nature, it is not necessary to decide whether the request would unreasonably interfere with the Organization's operations. However, if I were to decide this, I would find that it did not apply because the Organization did not argue it or provide any evidence.

[19] I find that the Organization has not met its burden of proving that the Respondent's access request would unreasonably interfere with the operations of the Organization. Therefore, that part of section 37(a) is not met.

3. Section 37(a) – amount to an abuse of the right to make those requests

[20] In *Request for Authorization to Disregard Access Requests – Grant MacEwan College* (March 13, 2007), the former Commissioner defined "abuse" to mean misuse or improper use. In that case, the Commissioner found that the applicant was not using the FOIP Act for the purpose for which it was intended, but as a weapon to harass and grind the College. He found that the applicant's requests were part of a long-standing history and pattern of behavior designed to harass, obstruct or wear the College down, which amounted to an abuse of the right to make those requests.

[21] My Office's 2011-2012 Annual Report summarized the Court's judicial review of a section 55 decision of the former Commissioner in *Clarence J. Bonsma v. The Office of the Information and Privacy Commissioner and Alberta Employment and Immigration Information and Privacy Office* (*Bonsma*, an oral decision of Clackson J. in Action Number 1103-05598), as follows:

> Alberta Employment and Immigration (the Public Body) applied to the Commissioner under section 55 of the *FOIP Act* to disregard the Applicant's access request. The Commissioner decided to authorize the Public Body to disregard the request.
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> On judicial review of the Commissioner's decision, the Court of Queen's Bench quashed the decision. The Court said that if requests are not the same, then the fact that there are numerous requests made regularly cannot run afoul of section 55 in the absence of compelling evidence of ulterior improper motive. That is where the second part of section 55 becomes important. The ulterior motive is what establishes the abuse.
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> Since the request here was not repetitious, summary dismissal was dependent upon regular and deliberate requests and motivation. On the record, there was no basis to conclude that the Applicant was improperly motivated. Therefore, the Commissioner's conclusion that the Applicant's request was abusive was not reasonable.

[22] Furthermore, the Court expressed its view that a person defending what amounted to a summary dismissal application under section 55 need do no more than show merit. In other words, that person did not have a burden to show that the request was for a legitimate purpose.

[23] Based on the Court's decision in *Bonsma*, I find that the Organization has the burden to prove that the Respondent's request amounts to an abuse.

[24] There is nothing on the record in the Organization's application to establish that the Respondent had an ulterior improper motive for making the access request. The Respondent does not have to prove that the request was for a legitimate purpose. However, if the Respondent did have that burden, I would find that the Respondent has adequately explained why she is seeking the information: she intends to bring a PIPA complaint.

[25] I find that the Organization has not met its burden of proving that the Respondent's access request amounts to an abuse. Therefore, that part of section 37(a) is not met.

4. Section 37(b) – frivolous or vexatious

[26] In *Request for Authorization to Disregard Access Requests – Edmonton Police Service* (November 4, 2005, available on my Office's website at www.oipc.ab.ca), the former Commissioner reviewed the meaning of "frivolous", which the *Concise Oxford Dictionary* (9th Edition) defined as paltry, trifling, trumpery; lacking seriousness, given to trifling, silly.

[27] The Commissioner considered Ontario Order M-618 [1995], in which the Ontario Information and Privacy Commissioner stated:

> "…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…

[28] The Commissioner also reviewed the meaning of "vexatious", which *Black's Law Dictionary* (7th Edition) defined as without reasonable or probable cause or excuse; harassing; annoying.

[29] The Commissioner was further mindful of the following comments from Ontario's Information and Privacy Commissioner in Ontario Order M-618:

> …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 Legislature's intent.

[30] The Commissioner then stated in the *Edmonton Police Service* decision:

> [25] A request is not "vexatious" simply because a public body is annoyed or irked because the request is for information the release of which may be uncomfortable for the public body.
>
> [26] A request is "vexatious" when the primary purpose of the request is not to gain access to information but to continually or repeatedly harass a public body in order to obstruct or grind a public body to a standstill.

[31] There is nothing on the record in the Organization's application to establish that the Respondent's access request is vexatious. Based on the Court's decision in *Bonsma*, there is no evidence of an ulterior improper motive for making the access request.

[32] I find that the Organization has not met its burden of proving that the Respondent's access request is vexatious. Therefore, that part of section 37(b) is not met.

[33] I will consider next whether the Respondent's access request is frivolous. In this regard, I intend to first consider the Respondent's general access request for personal information and then her narrowed access request for her credit and financial information.

[34] In Order P2011-006, the former Commissioner considered the issue of an individual's access request to a law firm for that individual's personal information in circumstances that are similar to the

Respondent's. The Commissioner's analysis and findings as to what is and is not "personal information" in those circumstances are instructive.

> [para 18] …Section 1(k) of the Act defines personal information as information about an identifiable individual.
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> [para 19] As I pointed out in in Decision P2011-D-003, information in the file of a law firm that is representing a client opposed in interest to the Applicant in a legal matter may not be personal information of the Applicant in the sense of being "about" him within the terms of PIPA, even though it relates to the Applicant in some way. As I said in that order:
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> > 29 … under PIPA, an access request can only be for a person's own personal information, and in this and similar cases, what is properly regarded as the requestor's personal information does not by any means extend to what are likely to be the greatest parts of the file. I addressed a similar point in an earlier order, P2006-004. In that case, an individual had requested his own personal information from the Law Society. Much of the information in the Law Society's files consisted of its dealings with complaints the applicant had made against Law Society members. I said:
> >
> > > 11 My jurisdiction over information requests under the Personal Information Protection Act is limited to access requests for personal information. Sections 24 and 46(1) of the Act combine to confer my jurisdiction. They provide:
> > >
> > > > 24(1) Subject to subsections (2) to (4), on the request of an individual for access to personal information about the individual and taking into consideration what is reasonable, an organization must provide the individual with access to the following:
> > > >
> > > > (a) the individual's personal information where that information is contained in a record that is in the custody or under the control of the organization; … .
> > > >
> > > > 46(1) An individual who makes a request to an organization respecting personal information about that individual may ask the Commissioner to review any decision, act or failure to act of the organization. [emphasis added]
> > >
> > > 12 The Act defines "personal information" as "information about an identifiable individual". In my view, "about" in the context of this phrase is a highly significant restrictive modifier. "About an applicant" is a much narrower idea than "related to an Applicant". Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant - and that is therefore connected to them in some way - is not necessarily "about" that person. In this case, only a part of the information that the A/C asked for was information "about" him. Had he relied on PIPA to obtain information, he would not have received much of the information that was made available to him under the Legal Profession Act and the Rules created thereunder, or thereunder, or pursuant to the requirements of fairness.
> > > …
> > > 18 I do not need to decide for the purpose of this inquiry precisely which parts of the information in the documents collected or created for the purpose of the complaint proceedings were "personal information" of the A/C, as that term is to be understood in PIPA. It is sufficient to say that there is a great deal of information in the documents that is not the A/C's personal information even though it was generated in consequence of his complaints. The latter includes information about the persons about whom he complained and their dealings with the A/C, information about other third parties and their dealings with the A/C, descriptions of various events and transactions, and correspondence and memos related to the handling of the complaints and other aspects of the complaint process. As well, the fact the A/C was the author of documents does not necessarily mean that the documents so authored were his personal information.
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> 30 In my view, there is likely to be a close parallel between the type of information that is in the "client file" held by the law firm, and the type of information described in the paragraphs just

> quoted. The fact the file contains information related to one of the Applicants because he was the opposing party in the legal matters does not of itself make the information "about him". What is "about him" is information such as what he has said or expressed as an opinion, the fact he has done certain things or taken certain steps, details of his personal history, and personal details about him such as his name and other associated information such as where he lives or his telephone number. This is not meant to be an exhaustive list, but is provided to illustrate the type of information that is personal information, in contrast to information other than this type of information, that was generated or gathered by the law firm or its client for the purpose of pursuing the litigation. The point is that much or most of the latter may well not be the first Applicant's personal information even though it relates to a legal matter that involved him. An obvious example would be legal opinions given to the law firm's client as to how to deal with the litigation with the Applicant or associated legal matters. The way in which the law firm was advising its client and dealing with the legal matters may have affected the Applicants, but it was not "about" them in the sense meant by the definition of personal information in the Act. (This information would also be privileged, but the point here is that much or most of it would likely not be the Applicant's personal information within the definition of the term contained in the Act.)
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> [para 20] Thus, it appears highly likely to me that much of the information in the file over which privilege is being claimed in this case is not the Applicant's personal information within the terms of PIPA, and the Applicant is not entitled to it on that basis, regardless of whether it is subject to privilege.

[35] To begin this analysis, nothing prevents an individual from making a general access request to a law firm for the individual's own personal information. Such an access request is not automatically without merit and therefore frivolous.

[36] However, Order P2011-006 has decided that when there is litigation between a law firm and an individual, much of what is in a lawyer's file will not be "about" the individual and therefore will not be the individual's "personal information" as that definition is understood in PIPA. It is reasonable to draw the same conclusion in this case in which the Respondent, who is a self-represented litigant, will already have many of the records as the litigating party. The information in these records, while relating to legal matters involving the Respondent, is not "about" her. In these circumstances, I conclude that Respondent's general access request for personal information lacks merit and is therefore frivolous.

[37] As to the Respondent's contact information such as name, address and email address, the Respondent as a self-represented litigant has likely filed that personal information in court, in which case that personal information will fall outside of PIPA, as provided by section 4(3)(k).

[38] I find that the Organization has met its burden of proving that the Respondent's general access request for personal information is frivolous. Section 37(b) is met for that general access request.

[39] However, the Respondent's narrowed access request for her credit and financial information is another matter. That request clearly meets the definition of personal information because it is for information "about" the Respondent. Therefore, the Respondent's narrowed access cannot be said to lack merit and is not frivolous. In coming to this conclusion, I am also mindful that the purpose of PIPA is to protect personal information.

[40] I find that the Organization has not met its burden of proving that the Respondent's narrowed access request for her credit and financial information is frivolous. Section 37(b) is not met for that access request.

My decision

[41] For the reasons stated above, the Organization's application to disregard the Respondent's general access request for personal information is allowed.

[42] However, the Organization's application to disregard the Respondent's narrowed access request for her credit and financial information is denied. The Organization must now respond to that narrowed access request according to PIPA.

Jill Clayton
Information and Privacy Commissioner