Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 053/2015

Ministry of Justice
(Corrections & Policing)

September 18, 2015

Summary: The Applicant requested access an internal privacy breach investigation report from the Ministry of Justice (Justice). Justice provided partial access to the report citing subsection 17(1)(b)(i) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Applicant requested a review by the Commissioner. Justice requested the Commissioner dismiss the review as frivolous and vexatious pursuant to subsection 50(2)(a) of FOIP. The Commissioner found that the circumstances of the case did not meet the threshold to support a finding that the request was frivolous or vexatious. The review continued and the Commissioner found that subsection 17(1)(b)(i) of FOIP applied to the withheld portions of the record. The Commissioner recommended these portions continue to be withheld.

I BACKGROUND

[1] On January 7, 2015, the Ministry of Justice (Justice) received an access to information request from the Applicant for:

> …a copy of the final report that was done in regards to the privacy complaint I had made against the Ministry of Justice…

[2] Justice responded to the Applicant by a letter dated January 28, 2015 indicating that access was partially granted. Justice advised the Applicant that portions of the record

were withheld pursuant to subsection 17(1)(b)(i) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On March 16, 2015, my office received a Request for Review from the Applicant.

[4] My office notified Justice and the Applicant of our intention to undertake a review on March 18, 2015. A submission was received from Justice on June 2, 2015. A submission was received from the Applicant on June 18, 2015.

II RECORDS AT ISSUE

[5] The record at issue is a 21 page privacy breach investigation report.

III DISCUSSION OF THE ISSUES

[6] Justice is a "government institution" pursuant to subsection 2(1)(i) of FOIP.

1. Did the Applicant request this review on grounds that are "frivolous" or "vexatious"?

[7] Following my office's notification letter to Justice, it raised the issue of the Applicant's review being made on grounds that were "frivolous" and "vexatious". It requested that the Commissioner consider subsection 50(2)(a) of FOIP. I requested a submission on subsection 50(2)(a) of FOIP from both Justice and the Applicant. Submissions were received from both parties. As this is a preliminary consideration, I must consider it first prior to any considerations regarding subsection 17(1)(b)(i) of FOIP.

[8] Pursuant to subsection 50(2) of FOIP, the Commissioner has a duty to ensure that the access provisions of FOIP are utilized for purposes which are in keeping with the spirit of the Act. 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 (BC IPC Order 110-1996). Further, the right to request a review should only be denied in limited circumstances,

such as when there is compelling evidence that a particular request is vexatious or is not in good faith.

[9] Pursuant to subsection 50(2) of FOIP, the Commissioner can dismiss or discontinue a review where it appears the access provisions are not being utilized appropriately. Subsection 50(2) of FOIP provides:

> **50**(2) The commissioner may refuse to conduct a review or may discontinue a review if, in the opinion of the commissioner, the application for review:
>
> (a) is frivolous or vexatious;
> (b) is not made in good faith; or
> (c) concerns a trivial matter.

[10] Based on the submission from Justice, I am only considering whether subsection 50(2)(a) of FOIP applies in this case.

[11] *Frivolous* is typically associated with matters that are trivial or without merit, lacking a legal or factual basis or legal or factual merit; not serious; not reasonably purposeful; of little weight or importance.

[12] *Vexatious* means without reasonable or probable cause or excuse. 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 or to obstruct or interfere with the public body's operations. It is usually taken to mean with intent to annoy, harass, embarrass, or cause discomfort. It is a pattern or type of conduct that amounts to an abuse of the right of access.

[13] An abuse of the right of access can have serious consequences for the rights of others and for the public interest. By overburdening a public body, misuse by one person of the right of access can threaten or diminish a legitimate exercise of that same right by others. Such abuse also harms the public interest, since it unnecessarily adds to a public body's costs of complying with the Act.

[14] In *Lang Michener et al v. Fabian et al* (1987) 59 O.R. (2nd) 353, the following criteria were established to guide courts and administrative tribunals in identifying a vexatious court proceeding:

- bringing of one or more actions to determine an issue which has already been determined;
- where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief;
- bringing a proceeding for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
- rolling forward grounds and issues into subsequent actions; and
- persistently taking unsuccessful appeals from judicial decisions.

[15] This case has provided some interesting examples. Based on this case and other decisions, my office considers the following factors in its application of subsection 50(2) of FOIP:

- *Number of requests:* is the number excessive?
- *Scope and Nature of the requests:* are they excessively broad and varied in scope or unusually detailed? Are they identical to or similar to previous requests?
- *Purpose of the requests:* are the requests intended to accomplish some objective other than to gain access? For example, are they made for "nuisance" value, or is the applicant's aim to harass the public body or to break or burden the system?
- *Timing of the requests:* is the timing of the requests connected to the occurrence of some other related event, such as a court or tribunal proceeding?
- *Wording of the requests:* are the requests or subsequent communications in their nature offensive, vulgar, derogatory or contain unfounded allegations?

[16] Depending on the nature of the case, one factor alone or multiple factors in concert with each other can lead to a finding that a request is an abuse of the right of access.

Number of requests

[17] I must now consider whether the number of requests is excessive by reasonable standards. There is no particular number that equates to requests being found to be excessive. It is a measure of what is considered reasonable in the circumstance. Determining whether an Applicant's requests are excessive involves consideration of the volume of requests and the pattern or type of conduct displayed by the Applicant. This must be done on a case-by-case basis, considering all relevant circumstances and not just focusing on a single factor.

[18] Where the volume of requests interferes with the operations of a public body it can be argued the requests are excessive. In order to interfere with operations, the volume of requests must obstruct or hinder the range of effectiveness of the public body's activities.

[19] Other factors to consider include whether the numerous requests are similar, unusually detailed or indicate that the Applicant wishes to revisit an issue over and over again that has already been addressed.

[20] According to the submission received from Justice, it has received eight access to information requests and eight privacy breach complaints from the Applicant since February 2014. Justice indicated that this number is only those interactions involving the Freedom of Information branch (FOI) at Justice. There are numerous other concerns which the Applicant has raised with other branches within Justice. Justice did not address how the volume has impacted its operations.

[21] Historically, since September 2014, my office has had five other requests for review and privacy breach complaints involving the Applicant and Justice. Some of these were informally resolved at the early resolution stage and one concluded with a report.

[22] In his submission, the Applicant asserted that his requests were not excessive. However, he acknowledges that there have been a number of requests over the last two years but asserted that this is the only request he has made for this information.

[23] My office reviewed each of the Applicant's access to information requests, requests for review and privacy breach complaints and found they are not overly similar or repetitive. Further, Justice did not present any arguments to suggest that the volume of requests was obstructing or hindering the range of effectiveness of its activities.

[24] Therefore, I find that the number of requests is not excessive.

Nature and Scope of Requests

[25] When considering whether requests are frivolous, vexatious or not in good faith it is important to consider the nature and scope of the requests. In other words, what the Applicant is requesting. A review of the requests may indicate a theme, pattern or type of conduct that indicates that access to records is not the intent of the Applicant. In many cases, ascertaining the Applicant's purpose requires the drawing of inferences from behavior as Applicants seldom admit to a purpose other than access.

[26] In its submission, Justice asserted that the nature and scope of the requests are wide ranging. They were for a range of policies, information on services and general practices related to correctional services.

[27] In the Applicant's submission, he asserted that he has only made one request for the document at issue in this review. He did not address any previous requests or complaints he has made.

[28] My office reviewed each of the Applicant's access to information requests, requests for review and privacy breach complaints. It appears the Applicant has taken issue with a number of practices, policies and services delivered by Justice. He has also taken issue with specific employees. However, each request appears to be separate and distinct from

the others and involves different records, even if they all relate to matters transpiring out of the Applicant's discontent with services he is receiving.

[29] Therefore, I find that the nature and scope of the requests is not a factor that would support a finding that a pattern or type of conduct exists that amounts to an abuse of the right of access.

Purpose of the Requests

[30] According to its submission, Justice asserted that the number and range of requests and the extent to which the Applicant has pursued them, appears to suggest the purpose is either to create a nuisance for Justice, to get back at it or to harass two specific Justice employees. Further, Justice asserted that in this current review involving the internal privacy breach investigation report, it appears the Applicant's purpose is to harass the individual he has alleged has breached his privacy.

[31] The Applicant asserted in his submission that the purpose of his request is to gain access to the internal investigation report surrounding his complaint of a privacy breach and that the information will be used to prove in detail hardships he has incurred.

[32] A request is made for the purpose other than to gain access if the Applicant is motivated not by a desire to obtain access, but by some other objective. Access to information legislation exists to ensure government accountability and to facilitate democracy. Therefore, where an Applicant's motivation is fact finding or to obtain proof of wrong-doing these purposes cannot be considered unreasonable or illegitimate. Applicants may seek information to assist them in a dispute with a public body, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by public bodies. On the contrary, if the Applicant is rolling forward grounds and issues into subsequent actions for the purpose of harassment, nuisance or to raise an issue already determined than the motivation may not be reasonable or legitimate.

[33] The right of access that is afforded Applicants are accompanied by corresponding responsibilities. One of those responsibilities is that Applicants work in tandem with the public body to further the purposes of the Act. Actions, on the part of an Applicant that frustrate this approach can be said to be an abuse of this process. Examples include being uncooperative with those who are attempting to assist and creating unnecessary confusion around what is being requested via multiple changes to requests.

[34] In this case, the Applicant did resolve a number of issues informally with Justice. Some of the remaining issues went forward to reviews or investigations involving my office. The Applicant has indicated his purpose is to gain access to information that will help him prove that he has experienced certain hardships as an inmate. In my view, in order for the purpose to be one that is other than to obtain access, the Applicant would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

[35] At this stage, I find that the purpose of the requests do not suggest an abuse of the right of access.

Timing of the Requests

[36] In its submission, Justice indicated that the timing of the requests coincides with the Applicant's court date. The Applicant asserted the timing is not connected to any other event.

[37] Based on the submissions received, I do not see a connection between the requests and the Applicant's court date.

Wording of the Requests

[38] Offensive or intimidating conduct or comments by Applicants is unwarranted and harmful. They can also suggest that an Applicant's objectives are not legitimately about access to records. Offensive or intimidating content in an Applicant's communications

should be addressed as a respectful workplace issue. Requiring employees to be subjected to and to respond to offensive, intimidating, threatening, insulting conduct or comments can have a detrimental effect on well-being (Alberta IPC Order F2015-16).

[39] The use of derogatory or vulgar language, or the making of unfounded accusations against a public body's staff, has been held to constitute an abuse of process in many court and tribunal cases across the country. In such cases the persons using such language have been denied the exercise of what would otherwise be their rights, or have been denied remedies. In some cases, the decision-maker has required undertakings that the person conduct themselves appropriately, or has awarded costs against them (Alberta IPC Order F2015-16).

[40] My office has checked with Justice and there is no indication that the wording of the Applicant's requests or any other subsequent communications has been an issue. However, if it were, my office would look at this case differently.

[41] All factors considered, I find that the requests, at this stage, do not meet the criteria established for subsection 50(2)(a) of FOIP. However, this can be revisited in the future should a pattern or type of conduct develop as additional requests are received.

2. Does subsection 17(1)(b)(i) of FOIP apply to the record?

[42] Subsection 17(1)(b)(i) of FOIP is a discretionary exemption and provides:

> **17**(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:
>
> …
>
> (b) consultations or deliberations involving:
>
> (i) officers or employees of a government institution;
>
> …

[43] The provision is meant to permit public bodies to consider options and act without constant public scrutiny.

[44] A *consultation* occurs when the views of one or more officers or employees of the public body are sought as to the appropriateness of a particular proposal or suggested action.

[45] A *deliberation* is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

[46] In order to qualify, the opinions solicited during a "consultation" or "deliberation" must:

i) must be either sought, expected, or be part of the responsibility of the person who prepared the record; and

ii) be prepared for the purpose of doing something, such as taking an action, making a decision or a choice.

[47] Further, the consultations and/or deliberations must involve:

- officers or employees of a government institution;
- a member of Executive Council; or
- the staff of a member of the Executive Council.

[48] The provision is not meant to protect the bare recitation of facts, without anything further. The exemption does not generally apply to records or parts of records that in themselves reveal only any of the following: that a consultation or deliberation took place; that particular persons were involved; that a particular topic was involved or that the consultation or deliberation took place at a particular time. In cases where this is an exception, the public body must demonstrate why.

[49] Justice released a portion of the 21 page privacy breach investigation report to the Applicant and severed information on pages 6, 7, 8, 10, 11, 12, 13, 14, 15, 16 and 19.

[50] In its submission, Justice asserted that the information severed describes discussions that occurred involving Justice staff. From a review of this information, it appears to indicate that a discussion took place, who was involved and what was said in general terms during the discussion. Justice asserted that the information constitutes deliberations and

provided support for its position that deliberations included comments that indicate or reveal reliance on the knowledge or opinions of particular persons, including those of the person making the communication.

[51] From a review of the information severed, I agree with Justice that the information constitutes part of a deliberation process that took place with the objective being to come to findings and recommendations regarding a privacy breach investigation. I also find that some of the information constitutes consultations as Justice consulted a number of staff as part of its investigation process. Therefore, the information on pages 6, 7, 8, 10, 11, 13, 14, 15, 16 and 19 should continue to be withheld.

IV FINDINGS

[52] I find that, at this time, the criteria established for subsection 50(2)(a) of FOIP has not been met.

[53] I find that the information severed in the record qualifies as information subject to subsection 17(1)(b)(i) of FOIP.

V RECOMMENDATIONS

[54] I recommend that Justice continue to withhold the information withheld under subsection 17(1)(b)(i) of *The Freedom of Information and Protection of Privacy Act*.

Dated at Regina, in the Province of Saskatchewan, this 18th day of September, 2015.

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy Commissioner