ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

Request for Authorization to Disregard an Access Request
under section 55(1) of the
Freedom of Information and Protection of Privacy Act

Alberta Energy Regulator
(OIPC File Reference 005876)

July 27, 2018

[1] The Alberta Energy Regulator (the "Public Body") requested authorization under section 55(1) of the *Freedom of Information and Protection of Privacy Act* ("FOIP") to disregard an access request made by a husband and wife (the "Applicants"). In particular, the Public Body requests authorization to:

a) Disregard the access request in its entirety as it relates to lands other than the Applicants' lands; and

b) In relation to the Applicants' lands, to disregard the access request unless the Applicants state in writing to the Public Body in certain and unequivocal terms, that they want access to the information as identified in the Public Body's letter of May 23, 2017, these being the records for which the Public Body stated no additional fees would be payable.

[2] For the reasons that follow, I am granting the Public Body's request.

Commissioner's Authority

[3] 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.*

[4] A decision under section 55 is a discretionary "may" decision. A public body making a request under section 55 has the burden to establish that the conditions of either section 55(1)(a) or (b) have been met. If a public body meets its burden, then I will decide whether to exercise my discretion to authorize the public body to disregard the request at issue.

Background

[5] The Public Body stated it had a history of interactions with the Applicants. This included a previous access request, which had been processed by its predecessor public body, the Energy Resources Conservation Board, and which was reviewed by my office.

[6] In 2014, the Public Body stated it had sent a letter to the Applicants, "advising that due to the increasingly hostile and abusive nature of the Applicants' communications (written and verbal) with AER personnel, all communications with the AER that did not relate to emergency situations would be channeled through a single point of contact" within the Public Body. The Public Body provided a copy of this letter.

[7] The Applicants made an access request under FOIP, dated April 12, 2017, as follows:

> "[Land description redacted] and ALL Battle and Pigeon Lake Watershed
>
> All information regarding both utility and petroleum development on [Applicants'] Farms
>
> In particular we require ALL relevant information pertaining to but NOT limited to at least one dozen (12 spills). that we have been notified of. And many that we have NOT been notified of. One of those is incident report [redacted] dated August 1999 with the licensee as [redacted]. [Redacted] had a pipeline breach on the SAME lease [redacted] that was spilled prior to [date redacted]. NO product was recovered and yet the file was CLOSED by the regulator in Jan of 2000. [Name redacted], we have pastured livestock for 17 years in that carcinogenic mess and we need to know PLEASE…
>
> "Where is our land CLEAN and where must we and or [redacted] Corp FENCE OFF the land so the cows don't eat and are not exposed to carcinogenic produced water, drilling fluids, methanol and a host of "other" proprietory [sic] poisons of our Licensee, [redacted] Corp please?
>
> We request ALL relevant information pertaining to all petroleum and utility development on our family's land as described on page 1."

[8] On April 21, 2017, the Public Body requested clarification from the Applicants regarding the land that was included within the scope of their request.

[9] The Applicants responded to the Public Body in a series of emails which I have reviewed. The Public Body summarized the Applicants' responses as follows:

> "The emailed responses from the [Applicants] did not provide the clarification requested. Instead of clarifying what lands comprised the Pigeon Lake watershed, the [Applicants] ridiculed the AER's preliminary assessment of the size of the watershed lands and directed the AER to research the question with the assistance of a specific independent person or

> organization. These email responses were co-addressed to other persons or organizations that have no connection with the access request or the information requested."

[10] On May 1, 2017, the Public Body responded to the Applicants stating it would respond to the access request as it related to the Applicants' lands, and would await clarification regarding the watershed portion of the access request before processing that part of the access request.

[11] On May 17, 2017, the Public Body provided a fee estimate for processing the part of the access request that related to the Applicants' lands. The Applicants emailed the Public Body the next day, May 18, 2017; however the email did not respond to the Public Body's fee estimate. That is, the Applicants did not state whether they accepted the fee estimate, wanted to review or abandon their request, or request a review by my office. The Public Body did identify from the email message that the Applicants were interested in information about an incident that occurred in August, 2016, and that they required "lab results".

[12] In a letter dated May 23, 2017 to the Applicants, the Public Body described the information it had regarding the August, 2016 incident referred to by the Applicants, as well as an earlier incident for which the Public Body had environmental assessment and remedial program reports. The Public Body stated it could process the Applicants' access request for those records without any additional fees and asked the Applicants how they wished to proceed.

[13] The Public Body's letter of May 23, 2017 clarifies the scope of the Applicants' access request.

[14] The Public Body described the Applicants' response as follows:

> "The [Applicants] responded in an email message dated May 24, 2017, the contents of which were simply profane and abusive, and in no way indicated how the [Applicants] wished to have the AER process their access request. This email was directed to dozens of other email addresses, including landowner advocates, government leaders, lawyers not representing the [Applicants], government departments or agencies, and energy company representatives."

[15] I have reviewed the Applicants' May 24, 2017 email to the Public Body, and agree with the Public Body's assessment. The disrespectful and demeaning insults, and profanity directed towards the Public Body are abusive and vitriolic, and the email is not suitable for publication.

[16] The Public Body subsequently requested authorization to disregard the Applicants' request under section 55(1) of FOIP.

The Public Body's Submission

[17] The Public Body states:

> "The AER believes that although the [Applicants'] original purpose for making the access request may have been to obtain information about their lands, or about the watershed lands within which they believe their lands are situated, their purpose became and now is to

> use the request as a communication platform for harassing and degrading the AER and its personnel in a vulgar and public way, and to continue to have that platform by refusing to respond to the AER's reasonable requests for clarifications and instructions, thereby obstructing the AER's processing of the request in a way that makes the request vexatious."

[18] The Public Body referred to Order F2015-16, at paragraphs 51 – 53, which addressed the matter of an access applicant's use of language that is intended to offend. I have addressed this Order in more detail in my analysis. The Public Body continued:

> "The [Applicants] have a history with the AER that is characterized by them using derogatory and vulgar language in email messages whose apparent purpose is simply to rant against the AER and the oil and gas industry. The messages they provided in the course of this access request are further examples of that.
> […]
> The AER believe the [Applicants'] email messages demonstrate that the [Applicants] primary purpose and motivation in making or continuing their access request, and in fact prolonging it by failing to provide reasonably requested clarification, is to have a platform to publicly offend and intimidate individuals and organizations, using profane and even vulgar language and leveling unsubstantiated accusations. This belief is supported by the fact that the [Applicants] are sending their messages to dozens of email recipients with no interest in the access request or the information sought by them. Such conduct is an abuse of the right to make an access request.

The Applicants' Submissions

[19] My office received a number of emails from the Applicants. The Applicants' emails are replete with insults and demeaning comments as well as an unusual formatting style including a variety of fonts, font sizes, coloured letters, and highlighting. The Applicants appear to have mistaken my office as the entity responsible for responding to their access request, and their emails contain numerous demands for me to disclose the requested information, as well as what may be interpreted as the Applicants' reasons for requesting the information.

[20] Although some of the emails appear to be in response to the Public Body's section 55(1) application, their contents are not relevant to the section 55(1) application before me. The Applicants do not actually address the Public Body's application under section 55(1), other than to deny that they are frivolous or vexatious.

[21] Upon review of the Applicants' emails, it appears that the information identified by the Public Body in its letter of May 23, 2017, is likely within the scope of the information requested by the Applicants.

[22] I do not find any part of the Applicants' submissions to be both relevant to this matter and suitable for publication.

Application of Section 55(1) of FOIP

[23] The Public Body does not rely on section 55(1)(a) for their request for authorization to disregard the Applicants' access request.

Section 55(1)(b) – Frivolous or Vexatious

[24] A vexatious request includes one in which the applicant's true motive is other than to gain access to information, which can include the motive of harassing the public body to whom the request is made.

[25] The Public Body submits that the Applicants' access request is vexatious, and relies on Order F2015-16.

[26] In Order F2015-16, a public body refused to process an access request unless the applicant resubmitted it without language it considered insulting and offensive to government employees. The applicant refused to do so. I found that the offensive parts of the applicant's request were an abuse of the FOIP office's process and directed the public body to disregard these parts of the communication, but to process the parts that were a genuine request for information. I imposed a further condition that any additional communications from the Applicant to the Public Body containing similar material could be disregarded in their entirety.

[27] That analysis is applicable to the matter before me. I stated in Order F2015-16:

> [para 39] I accept that a respectful workplace is an extremely important principle. Requiring government workers to be subjected to and to respond to offensive, intimidating, threatening, insulting conduct or comments is not only unwarranted, but I agree with the Public Body's argument […] that it could potentially "cause harm" by having a detrimental effect on their well-being.
> […]
> [para 51] There are many court and tribunal cases, particularly in the realm of human rights, in which the use of derogatory or vulgar language, or the making of unfounded accusations against government employees, has been held to constitute an abuse of process. (See, for example, *Bakhtiyari v. British Columbia Institute of Technology* [2007] BCHRT 320.) 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 of these cases, the decision-maker has required undertakings that the person conduct themselves appropriately, or has awarded costs against them. (See, for example, *Nourhaghighi v. Toronto Catholic School Board* [2009] HRTO 1519; *Heilman v. First Canada (No. 3)* [2011] BCHRT 260.)
>
> [para 52] My conclusion in the present case is that despite the Applicant's explanations that the information he provided was necessary to help the FOIP Coordinator and others to understand his fear and anger, and to understand the seriousness of his request, the degree of offensiveness of some of the language was not necessary for this purpose.

> [para 53] I find, therefore, that the motive for the inclusion of this particular language was other than to obtain information or to provide necessary background for obtaining it. The parts of the Applicant's request in which he makes belittling or severely insulting statements about individuals, appear to be motivated not by a desire to obtain information but by a desire to intimidate and deliberately offend. His ideas that he was not treated fairly or appropriately by government employees, even if this was important to inform what he was asking for, could have been stated without severe insult. Further the Applicant's refusal to remove the language when requested suggests that his motive is, in part, to assert some dominance or control over the process and other participants, and to resist others' exercise of authority, rather than simply to obtain information.

[28] I further note that "scandalous or inflammatory language in pleadings before the court" has been identified as an indicia of abusive litigation by the Alberta Court of Queen's Bench (*Chutskoff v. Bonora,* 2014 ABQB 389 at para. 92, aff'd 2014 ABCA 444). This principle is also applicable in proceedings before my office.

[29] I accept the Public Body's position that although the Applicants' original purpose in making the request may have been to obtain information about their lands, their subsequent responses to reasonable requests for clarification from the Public Body demonstrate a purpose other than obtaining access to information. The Applicants' purpose, as is amply demonstrated in their vulgar May 24, 2017 email which was copied to dozens of unrelated email addresses, is to have a public platform to insult and degrade the Public Body and its staff.

[30] It is clear that the Applicants have concerns with the Public Body, but that does not allow them to direct abusive and vitriolic language towards public servants who are trying only to clarify the scope of an access request.

[31] As a result of their subsequent responses to the Public Body's attempts to clarify the scope of their request, I find the Applicants' access request is vexatious under section 55(1)(b) of FOIP.

Commissioner's Decision

[32] I have decided to grant the Public Body's request as follows:

1) The Public Body is authorized to disregard the Applicants' access request in its entirety as it relates to lands other than the Applicants' lands; and

2) In relation to the Applicants' lands, the Public Body is authorized to disregard the Applicants' access request unless the Applicants state in writing to the Public Body, in certain and unequivocal terms, that they want access to the information identified in the Public Body's letter of May 23, 2017.

   In the alternative, if the Applicants believe the Public Body's letter of May 23, 2017 does not capture the scope of their access request, the Applicants may state in writing to the

Public Body, in certain and unequivocal terms, the scope of the information to which they are requesting access.

To be clear, in communicating the scope of their access request, whether they agree with the scope identified by the Public Body on May 23, 2017 or not, the Applicants must not use abusive and vitriolic language in communicating the scope of their access request under FOIP to the Public Body.

Jill Clayton
Information and Privacy Commissioner