



# Strategies for Navigating Repeat & Vexatious Applicants

Or...

# FOI Judo



# Meet the Presenter:



**Adrian Chalifour, FOI & Access Manager**

**PrivacyWorks.**



# Housekeeping

- Speak up! Jump in anytime with questions or comments. If I can't answer a question on the spot, I can follow up via email.
- Please mute your microphone when not speaking to reduce background noise.
- Cameras are optional.
- I'll also do my best to monitor the chat for questions.
- The webinar may be BC-focused, but the principles are applicable across Canada.

# Guiding Principles of Today's Presentation

- Access and Privacy laws are a pillar of Canada's free and open democratic society
- FOI may be a burden, but one that is reasonable and necessary to hold public institutions accountable to the diverse public they serve
- Purpose of this presentation:
  - ✗ Gatekeep, frustrate or deter people from exercising information rights
  - ✓ Equip public bodies with tools and tactics to limit harm from **bad-faith applicants** who seek to abuse or weaponize the FOI process

# Defining “Bad Faith” Applicants

- **Frivolous:** lacking legal basis or merit; not serious or reasonably purposeful; excessively broad or complicated
- **Vexatious:** Without reasonable or probable cause; malicious, retaliatory or harassing/annoying
- **Repetitious:** continual, methodical and/or repeated requests for the same or similar information

# Common Bad Faith Tactics

- **Fishing expedition:** excessively numerous and/or broad requests
- **Obstinance:** Refusing to communicate or cooperate on a basic level e.g. clarifying/narrowing requests, responding to communications, etc.
- **OIPC Complaints:** Excessive complaints on every action and decision taken on a file, however minor e.g. fees, time extensions, redactions, etc.
- **Weaponizing multiple channels:** e.g. litigation and other quasi-judicial channels (Human Rights Tribunal, Ombudsperson, professional associations, HR Investigations, etc.), media and social media activity, etc.
- **Bullying, harassment, intimidation:** targeting specific staff or individuals; verbal and/or physical intimidation, threats, abuse and/or violence

A woman with dark hair in a bun, wearing a grey tank top and black boxing gloves, is shown in a boxing stance. She is punching a black heavy bag with her right arm. The background is a rough, grey concrete wall. The text 'Coach's Advice' and a list of four points are overlaid on the right side of the image.

## Coach's Advice

1. Start strong
2. Work the clock

3. Stand Your Ground
4. Finish Strong



# Meet the Challenger

- **Adrian Chalifour** is a former employee terminated 6 months ago following an extended leave for which insufficient documentation was provided.
- He has since submitted 9 increasingly broad FOI requests, all relating to his leave, a bullying and harassment complaint he made against his manager Adam while on leave (which was found to be unsubstantiated), and/or his termination.
- These prior requests are in various stages of processing. He has become increasingly uncooperative and has started challenging every decision to OIPC review.

*“I formally request the following under FIPPA:*

- *Any and all records relating to bullying and harassment perpetrated against me in the course of my employment.*
- *Any and all records of bullying and harassment perpetrated by Adam against other employees in my department.*
- *The number of employees who have gone on leave directly after a performance meeting with Adam, sorted by leave date, length and type.*
- *Any/all emails or text messages sent or received by management, staff and/or clients containing the following terms: Adam, Adrian, bullying, harassment, Project X, leave.*

# Start Strong: the Power of Intake

- FIPPA balances applicants' information **rights** with **responsibilities** that must be met in order to open a request.
- Prematurely opening or acknowledging requests severely limits a public body's options for managing vexatious applicants.
- Developing a clear, consistent **Intake process** ensures requests are vetted and applicants held accountable before their request is opened or acknowledged.

*“the right of access to information under FIPPA comes with the responsibility to not abuse that right by making repetitious and systematic requests.” (OIPC F21-04)*

# Section 2: Purpose of the Act

- **Section 2:**

1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by:
  - a) giving the **public a right of access to records**
2. This Act **does not replace other procedures** for access to information or limit... access to information... available to the public.”

# Start Strong: Routine Release

- FOI is a channel of last resort.
- If all or portions of the requested records are available through routine release, redirect applicants to the appropriate channel(s).
- Providing routine access gives public bodies more flexibility to:
  - charge fees for services
  - Manage response times
  - Distribute workload according to staff resources
- Applicants can always return to FOI if routine release doesn't satisfy their request.

# Start Strong: Section 5

- 5(1) Applicant **must** make a written request that:
  - a) provides **enough detail** to enable an experienced employee of the public body, with a **reasonable effort**, to identify the record sought,
  - b) provides written **proof of the authority** of the applicant to make the request, if the applicant is acting on behalf of another person, and
  - c) is submitted to the public body that the applicant believes **has custody or control** of the record.

# Start Strong: Section 5

Does the Request Meet 5(1)(a)	
<b>Overly broad or vague</b>	<ul style="list-style-type: none"><li>• Few to no parameters to limit search to a particular topic(s), department(s), record type, timeframe, etc.</li><li>• Requests for overly vague or general information</li></ul>
<b>Overly long or complicated</b>	<ul style="list-style-type: none"><li>• Long, rambling requests filled with exposition, speculation, suspicion, etc.</li><li>• A laundry list or brain dump of several related or unrelated requests</li></ul>
<b>Unclear</b>	<ul style="list-style-type: none"><li>• Internally inconsistent or contradictory</li><li>• Based on incorrect assumptions or misinformation</li><li>• Illegible due to poor grammar, typos, handwriting, etc.</li></ul>

- If clarification or more detail is needed to determine **how and where** to search, may be a section 5 issue
- If the 'ask' is clear, but the scope is unmanageable, may be a **fees** issue.

# Start Strong: Section 5

## **Section 5(1)(b) – Proof of Authority**

- Use if third-party consent or authorization is reasonably required to access all or a portion of the requested records.
- May be immediately applicable (requests for personal records about or involving themselves and other individuals), or an escalation in vexatious behaviour (targeting individuals).

## **Section 5(1)(c) – Public body with Custody and control**

- Ability to disregard ongoing requests once you've clearly established that the records sought are in the custody and control of another.

# Start Strong: Combine / Split Requests

- Public bodies retain the authority to combine or split requests as they deem fit for “more efficient administration” of the Act.
- Not explicitly outlined in the Act, but validated through multiple OIPC orders (see orders [00-19](#) and [00-20](#))
- **Three** common applications:
  1. Combine similar requests submitted separately by the applicant to avoid fees.
  2. Split large, complex requests into multiple reasonable requests that can be better managed individually.
  3. Separate personal and general portions of a single request to ensure the proper application of section 5, fees, etc.



# Start Strong: Duty to Assist

6(2): the head of a public body must **create a record** if:

- a) the record can be created from a machine readable record in the custody or under the control of the public body using its **normal** computer hardware and software and technical expertise, and
  - b) creating the record would not **unreasonably interfere** with the operations of the public body.
- FIPPA's primary purpose is to give access to records not information.
    - Is this information available through another channel or method?
      - If yes, redirect.
    - If no, can a record be created in-house without unreasonably disrupting operations?
      - If no, respond under section 6 and close request.
    - If yes, what resources will be required and is a fee warranted?

***Unreasonably interfere:*** “going beyond the limits of what is reasonable or equitable in time and resources, and the impact which this use of resources would have on the public body’s day-to-day activities.”

# Recap: Start Strong

## Section 2

- Are some or all of the records available through routine release?
- Have these records been provided to the applicant already?

## Section 5(1)(a)

- Can you reasonably determine what the applicant is looking for?
- Can clarification or narrowing be done as a requirement of section 5?

## Section 5(1)(b)

- Is the applicant requesting personal records or information about another person?
- If so, have they provided consent or authorization to do so?

## Section 5(1)(c)

- Does your public body have custody or control of the requested records?

## Section 5

- Can the request(s) be split or combined to allow for more efficient administration of the Act?

# Review

*“I formally request the following under FIPPA:*

- *Any and all records relating to bullying and harassment by Adrian **against me** in the course of my employment.*
- *Any and all records of bullying and harassment perpetrated by Adrian **against other employees** in my department.*
- *The **number of employees** who have gone on leave directly after a performance meeting with Adrian, sorted by leave date, length and type.*
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## Work the Clock: Section 5

- **Saved by the Bell:** the “clock” does not start until section 5 is met.
- **Be proactive and transparent:** communicate the status of the request and what is required, but shift onus to the applicant to fulfill their responsibilities.
- **Be nimble:** once section 5 is met, calculate the due date from that date, acknowledge the request and proceed to the Call For Records.

# Work the Clock: Fees

- Section 75 of FIPPA allows public bodies to charge fees for certain time and resources associated with processing access requests.
- Requests are placed **on hold** once a fee estimate is sent and remain on hold until the fee is paid or otherwise resolved.
- Prompt and judicious use of fees can shift the burden of narrowing back to the applicant *before* any resources are expended on searching and gathering.

# Work the Clock: Fees

- 1. Define Your Process:** a clear and documented **Call for Records** workflow can help ensure fees are identified and considered on all applicable requests.
- 2. Be Nimble:** provide training and tools (templates, etc.) to ensure fee estimates are calculated and issued within the first **3-5 days** of a request.
- 3. The Art of the Estimate:** fee estimates do not need to be 100% accurate, but should be reasonably calculated using available information:

Search and gathering (hrs):	<ul style="list-style-type: none"><li>• Excludes first 3 hours</li><li>• E.g. Number of employees who must search x average time for search</li></ul>
Preparation (hrs):	<ul style="list-style-type: none"><li>• Can include manual conversion of electronic records to PDF</li><li>• E.g 50 files per hour to convert to PDF</li></ul>
Digitizing records (pgs):	<ul style="list-style-type: none"><li>• \$0.10/pg for scanning physical records for release under FIPPA</li></ul>

# Work the Clock: Time extensions

- Section 10 allows public bodies to extend requests by up to 30 days for:
  - Volume: 200 pages or more
  - Consultation with another public body or other third party
- Additional OIPC time extensions:

No. of pages	Range for extension OIPC will consider
<500	0 unless exceptional circumstance
500 > 1000	0 - 30
1000 > 2000	30 - 45
2000 > 3000	45 - 60
3000 > 4000	60 - 75
4000 > 5000	75 - 90
5000 > 10000	90 - 180
10000 > 15000	180 - 270

# Stand Your Ground

- Be the bigger person: calm, courteous, impersonal and professional
- **Duty to Assist** includes “working with applicants in a forthcoming and collaborative spirit: public bodies must not frustrate the public’s right to access through negligence, administrative delays, or excessive severing.”
- **Zero Tolerance** for abuse or harassment: you and your employees have the right to a safe, harassment-free workplace:
  - Know when to “disconnect the call” if applicant can’t be deescalated or refocused to the request.
  - Introduce communication protocols to limit how and with whom applicants may communicate.
  - Keep a record of hostile or abusive behaviour and report to authorities as warranted



# Stand Your Ground: OIPC

- Sometimes OIPC involvement HELPS when dealing with bad-faith applicants:
  - Compel applicants to clearly articulate their issues, remain focused and respectful.
  - Allow for your good-faith actions and applicant's bad-faith actions to be demonstrated and documented.
  - Redirect the applicant's time and focus towards the OIPC review process and allow requests to remain on hold pending the outcome.
  - Generate additional evidence of vexatious behavior should a s.43 application be necessary.

# Finish Strong: Section 43

- “If the head of a public body asks, the commissioner may authorize the public body to disregard a request... because:
  - (a)the request is **frivolous** or **vexatious**,
  - (b)the request is for a record that has been **disclosed to the applicant** or that is accessible by the applicant from another source, or
  - (c)responding to the request would unreasonably interfere with the operations of the public body because the request is **excessively broad** or is **repetitious** or **systematic**.

# Finish Strong: Section 43

- The public body bears the burden of proof to demonstrate section 43 is warranted, and historically the bar has been high.
- OIPC has “considerable latitude and discretion” when deciding the outcome, so “victory” isn’t always sweet.
- An option of last resort:
  - Persistent and escalating pattern of frivolous and vexatious requests
  - Documented and measurable impact on the operations of the public body and/or well-being of staff.
  - Allocate sufficient resources (time and budget) to the section 43 process.
  - Consider hiring a professional

A blue sphere with a slight gradient and a shadow underneath, centered on a white background. The word "Questions?" is written in white, sans-serif font across the middle of the sphere.

Questions?

# Not Sure Where To Start?

We Can Help.

**Free FOI/ATIP Consultations**

Email: [adrian@privacyworks.ca](mailto:adrian@privacyworks.ca)