Power to authorize a head to disregard access requests

Section 15 of the *Right to Information and Protection of Privacy Act*

Summary and purpose of the provision

Section 15 allows public bodies to seek this Office's approval to disregard one or more access requests in certain limited circumstances:

> **15** On the request of a public body, the Ombud may authorize the head to disregard one or more requests for access if the request for access
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> (a) would unreasonably interfere with the operations of the public body because of the repetitious or systematic nature of the request or previous requests,
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> (b) is incomprehensible, frivolous or vexatious, or
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> (c) is for information already provided to the applicant.

The purpose of s. 15 is to provide public bodies with an independent review mechanism where one or more of the above situations exist with a particular applicant to guard against applicants being able to misuse or abuse their access rights. Public bodies are not the only ones with responsibilities and obligations under the *Act*. Applicants must also exercise their access rights in a reasonable manner and in good faith.

Under s. 84(1) of the *Act*, the burden of proof is on the public body to prove that the applicant has no right of access.

Where this Office finds that a public body's application has merit, this has the effect of removing the applicant's access rights in relation to the access request(s) in question. This is not a decision to be made lightly, particularly as the applicant has no recourse or right of appeal. For this reason, permission will only be granted when the public body has provided detailed and convincing evidence in support of its application to disregard an access request.

If the public body does not satisfy its burden of proof under s. 84(1), this Office will resolve the matter in favour of the applicant and require the public body to complete the processing of the request.

We ask that public bodies submit requests under s. 15 of the *Act* within **7 business days** of receipt of the access request(s) in question. Also, the time to make an application and receive a decision from this Office does not suspend the period of time to respond to the request referred to in s. 11 of the *Act*. As this is the case, our Office will make every reasonable effort to assess a public body's application and issue a decision within **5 business days**.

For this reason, it is imperative that public bodies present as much detail and evidence as possible in support of an application under s. 15. Where an application does not provide sufficient detail, there is a greater chance that the application will not be granted.

15(a): Access request would unreasonably interfere with the operations of the public body because of the repetitive or systematic nature of the request or previous requests

In making an application to disregard an access request under this provision, the public body must demonstrate the two following factors:

- the request(s) in question is/are repetitious or systematic in nature; and
- how processing the request(s) would unreasonably interfere with the public body's operations.

The following explanations set out the criteria that we will take into account in assessing an application to disregard under this section.

Repetitious and systematic

A request is deemed to be repetitive or systematic when an applicant knowingly submits the same request to the same public body, where the public body has previously responded to that request or another request that is seeking substantially the same information for the same period of time.

"Systematic" is not defined in the *Act*; however, we find the following resources provide helpful direction in determining whether an access request (or multiple requests, as the case may be) can be considered as systematic in nature.

In Reader's Digest *Webster's Canadian Dictionary,*[1] "systematic" means "continuing or based on a system; according to a system." In the *Manitoba Freedom of Information and Protection of Privacy Resource Manual*[2], the phrase "systematic in nature" "would include a pattern of conduct that is regular or deliberate". In British Columbia, the Access to Information and Privacy Commissioner's Office has defined a systematic request as being one that is "characterized by a system, which is a method or plan of acting that is organized and carried out according to a set of rules or principles."[3]

A request, or multiple requests, as the case may be, may be considered systematic in nature where an applicant has submitted several access requests to a public body, usually over a period of time, about different aspects of a particular issue or subject matter.

For example, if an applicant makes a request to a public body, and following receipt of the public body's response, submits further related requests, and after receiving the public body's further responses, submits further related requests, and so on, the subsequent requests could be said to be systematic, depending on the scope of the requests and the applicant's intent in making them (i.e., is there a genuine intent on the applicant's part in exercising his or her access rights, or are the requests being made for another purpose?). As another, example, multiple requests from the same applicant over a relatively short period of time that are large in scope may also be systematic, again, depending

[1] By *Geddes & Grosset,* 2010.

[2] *Manitoba Freedom of Information and Protection of Privacy Resource Manual* at page 4-33.

[3] White Rock Order F17-18 issued April 12, 2017 (2017 BCIPC 19 CanLII).

on the scope of the requests and the applicant's intent. Whether a request is systematic in nature will need be determined on a case-by-case basis, as the mere fact that an applicant has submitted multiple requests over a certain time period is not sufficient to establish on its face that they are systematic for the purposes of s. 15 of the *Act*.

Unreasonable interference with operations

A public body's circumstances are often relevant in determining whether a request unreasonably interferes with its operations. All public bodies must ensure that they have devoted reasonable resources to process requests; however, what is reasonable for a large public body, such as a Provincial department, may not be the same for a smaller public body, such as a village or town with a very small staff complement.

Public bodies must establish that responding to a request will unreasonably interfere with their operations. Interference could be exhibited in such forms as the sheer size of the request, the human resources burden it imposes on the public body to respond, the expense of providing the response, or the diversion away from other core duties necessitated by responding to the request, and the effect of the overall burden that the request will impose on the public body to provide the response.

The following questions could be applicable to determine whether a repetitious or systematic request would unreasonably interfere with the operations of a public body:

- How would processing the request and providing a meaningful response unreasonably interfere with the operations of the public body? What is the burden that processing the request would impose on the public body?
- Has the public body considered whether applying for a time extension would be more appropriate than applying for permission to disregard the request?
- Was the applicant asked to break the request down into smaller requests to be submitted over a manageable period of time?
- What is the approximate number of pages in the responsive records?
- What is the approximate number of records that need to be searched?
- In what format are the responsive records stored?
- How many active requests is the public body currently processing?
- Are there multiple concurrent requests submitted by the applicant, or a group of applicants working together?
- When did the public body receive each of the applicant's requests?
- Is there evidence that the applicant is working in association with others who have submitted access requests?

In the event that we do not agree that a public body is permitted to disregard an access request under this section, we may ask the public body to submit a time extension application.

15(b): Access request is incomprehensible, frivolous or vexatious

Incomprehensible requests

"Incomprehensible" implies that the way the request is worded or structured makes it impossible for the public body to respond to it. It is incumbent on the public body's right to information coordinator to work with applicants, wherever possible, to identify the records being sought and to generally assist applicants in exercising their access rights. Before submitting an application to our Office to disregard an access request on this basis, it is helpful to first consider the following:

- What is the difficulty in understanding the access request as submitted by the applicant?
- What is unclear about the wording or structure of the request?
- What attempts has the public body made to clarify the request with the applicant?
- Did the applicant agree to amend the wording of the request or provide clarifications to the public body? If so, what is the wording of the amended/clarified request?

While public bodies have an obligation to assist applicants in exercising their access rights, applicants also have an obligation to be as clear and specific as possible in making access requests and should make good faith efforts to work with public bodies to ensure both parties understand what information is being sought.

If a public body opts to submit an application under this provision, we ask that it also submit copies of its correspondence with the applicant to show the steps taken to attempt to resolve this issue with the applicant.

It is important to note that requests that are clearly worded but very broad in scope are not incomprehensible for the purposes of this section. In such a case, the public body has the right to ask the applicant if he or she is amenable to narrowing the scope (by subject, time frame, etc.); however, the applicant is not obligated to do so. In these cases, an extension of time may be an appropriate way to manage the processing of the request.

Frivolous requests

A frivolous request is one made primarily for a purpose other than gaining access to information and associated with matters that are trivial, without merit, or of limited importance. That being said, information that may seem frivolous from one person's perspective may not be to another person, thus the context surrounding an access request must be taken into account.

Vexatious requests

A vexatious request is one made with an underlying intent to annoy, harass, embarrass, or to cause discomfort, and encompasses situations where a request is made in bad faith. When assessing whether a request is vexatious, public bodies must be mindful that even though they made find a particular request to be bothersome or vexing on some level, a request cannot be disregarded on this basis alone.

The following factors may point to a valid argument that a request is vexatious in nature:

- the same request is submitted repeatedly by an individual (or group of individuals) working together in a concerted effort;
- a history or continuing pattern of access requests designed to harass or annoy a public body;
- excessive volume of access requests;
- the timing of access requests, particularly in relation to another occurrence or event;
- the use of abusive or aggressive language in dealing with public body officials;
- the burden placed on the public body to process and respond to the access request;
- personal grudges and/or unfounded accusations against the public body or one or more of its officials.

An access request can be found to have been made in bad faith where there is evidence to show that an applicant is using his or her access rights with the intent to create a nuisance or burden on a public body, rather than a genuine interest in accessing information. Evidence in support of a claim that a request has been made in bad faith will usually be focused on the applicant's interactions, prior history, and conduct towards the public body in connection with the request(s) at issue. Public bodies must generally demonstrate that an applicant has a dishonest or malicious intent in making an access request or is using an access request (or requests, as the case may be) as a weapon against the public body to burden, impair, or overwhelm its operations.

Access requests that are vexatious in nature and/or made in bad faith will point to a pattern of conduct on the applicant's part that amounts to abuse of his or her access rights under the *Act*.

15(c): Access request is for information already provided to the applicant

This section will apply where the public body has previously provided the same information to the same applicant under the *Act*. To support an application under this section, we ask that the public body submit a copy of the applicant's previous access request and the public body's corresponding response, along with the applicant's current access request. If the information previously provided is merely on the same subject matter or a related matter, but not the same information as currently being sought in the latest access request, this section will not apply.

In considering whether to apply for permission to disregard an access request on this ground, it is helpful for the public body to also take into account whether the applicant has a valid reason for requesting the same information again (i.e., the applicant's previous copy of the records was lost or destroyed due to reasons beyond his or her control).

Resources/Credit:
Office of the Information and Privacy Commissioner for Newfoundland and Labrador, *Applying to the Commissioner for Approval to Disregard an Access to Information Request*.

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