

Office of the
INTEGRITY
COMMISSIONER
New Brunswick



Bureau du
COMMISSAIRE
À L'INTÉGRITÉ
Nouveau-Brunswick

REPORT OF FINDINGS

Right to Information and Protection of Privacy Act

Matter No: 19/20-AP-096
September 26, 2019

I BACKGROUND

1. On July 19, 2019, the Applicant submitted an access request under the *Right to Information and Protection of Privacy Act*¹ (“the Act”) to the Southwest New Brunswick Service Commission (“the Commission”) for information over the past three years as follows:
 1. Copies of all decisions by the PRAC [the Planning Review and Adjustment Committee] related to decisions in the Town of Saint Andrews;
 2. Copies of all correspondence to and from PRAC members related to decisions in the Town of Saint Andrews including but not limited to any emails, letters, briefing materials, recommendations;
 3. Copies of all correspondence from all NB Southwest Service Commission staff related to any activities in the Town of Saint Andrews.
2. The Applicant also submitted a second access request to the Commission on July 22, 2019.
3. On September 3, 2019, the Commission issued a notice to the Applicant advising that it was extending the 30-business day time limit to respond to the Applicant’s requests of July 19, 2019 and July 22, 2019 for an additional 30 business days under s. 11(3)(c) of the Act, as the Commission had determined that searching and preparing the requested records would unreasonably interfere with the Commission’s operations.
4. On September 5, 2019, the Commission made a submission to this Office seeking authorization to disregard the third part of the Applicant’s July 19, 2019 request as set out above under ss. 15(a), (b), and (c) of the Act. In making this application, the Commission indicated that it was only seeking this Office’s permission to disregard this one portion of the Applicant’s active access requests. The Commission also indicated that it had originally hoped to meet the initial 30-business day time limit to respond fully to this request but later realized that it was unable to do so.
5. Upon initial review of the Commission’s application, as it appeared that the facts presented by the Commission in this case had merit, we notified the Applicant to advise of the situation and to invite the Applicant’s representations before arriving at a final decision on this matter. In doing so, we provided the Applicant with a copy of s. 15 of the Act and the guidance document that this Office developed on the interpretation and application of this provision.²

¹ S.N.B., c. R-10.6.

² Power to authorize a head to disregard access requests, Office of the Integrity Commissioner of New Brunswick, August 2018: <https://oic-bci.ca/wp-content/uploads/2019/07/15-Request-to-disregard-FINAL-2.pdf>

6. After reviewing the Commission's application and the Applicant's representations, I have determined that the facts and representations presented in this case support a finding that the application be granted under s. 15(a) of the *Act* as the portion of the access request in question is systematic in nature and would unreasonably interfere with the Commission's operation. Given the work that would be required on the Commission's part to process this part of the request, I am exercising my discretion in favour of granting the Commission's application. The reasons for this decision are set out below.

II PROCEDURAL ISSUE: TIMING OF THE COMMISSION'S APPLICATION

7. In making representations to this Office, the Applicant raised the question of the timing of the Commission's application, noting that it had been made nearly a month and a half after the Commission received the Applicant's July 19, 2019 request. The Applicant noted that our guidance document asks that public bodies make s. 15 applications to this Office within seven business days of receipt of the access request at issue and that, for this reason, the Commission's application should be denied.
8. On this point, it is important to note that while s. 15 of the *Act* establishes the right of a public body to request authorization from this Office to disregard an access request, the *Act* is silent on the procedure that our Office is to follow in assessing and issuing decisions under this provision. An application under s. 15 does not trigger the applicant's complaint rights or the timelines for this Office to investigate complaints under Part 5 of the *Act*.
9. As this is the case, this Office is free to set its own process for addressing s. 15 applications, in keeping with the purpose of s. 15 of the *Act*, the overall spirit and intent of the statute as a whole, as well as principles of administrative fairness.
10. As there is no legal authority under the *Act* for this Office to place an access request on hold pending a decision under s. 15, we ask public bodies to submit s. 15 applications as soon as practicable after receiving an access request so that they can be treated by this Office within the public body's statutory time limits to respond to the request. Also, if the circumstances of a particular situation merit the relief afforded to the public body under s. 15 of the *Act*, it is in the best interests of both the public body and the applicant that applications under this provision be submitted to this Office and assessed as soon as practicable so as to minimize the amount of resources expended by the public body to process the request(s) at issue in the interim and to ensure that the applicant is informed as soon as possible if their access rights have been limited or curtailed.

11. The seven-business day timeframe indicated in our guidance document is a suggestion to encourage the timely handling of s. 15 applications but is not a statutory requirement and a failure of a public body to meet the suggested timeframe does not mean that the public body's application will be refused by this Office on this ground.
12. That being said, it is somewhat unusual that the Commission submitted the s. 15 application after exercising its ability to extend the time limit to respond of its own accord under s. 11(3)(c) of the *Act*, notice of which was given to the Applicant on September 3, 2019. Section 11(3)(c) allows a public body to extend the statutory time limit to respond to an access request where "a large number of records is requested or must be searched or responding within the time period set out in subsection (1) [30 business days] would interfere unreasonably with the operations of the public body".
13. Upon reviewing the Commission's application, it did not appear to this Office that the Commission's decision to extend the time limit to respond to the request of its own accord under s. 11(3)(c) of the *Act* was unfounded, given the broad wording and three-year time frame of this request. I also note that the Applicant responded to the Commission's notice of this extension by indicating that the extended time limit was acceptable, although the Applicant stated that a timelier update would have been appreciated under the circumstances.
14. Had this Office had concerns about the legitimacy of the Commission's decision to self-extend the time limit under s. 11(3) of the *Act*, we certainly would have taken this into account in determining whether the s. 15 application should proceed.
15. As the Commission brought this application within its statutory time limit to respond to this request, and in addition, as the Applicant also did not question the Commission's decision to extend the time limit, this was not deemed to be a factor that affected the Commission's ability to bring the present application.
16. For these reasons, I do not find that the Commission's s. 15 application in this case should be rejected or denied on the basis of the length of time between receipt of the request in question and when its s. 15 application was submitted to this Office.

III SECTION 15: POWER TO AUTHORIZE A HEAD TO DISREGARD REQUESTS

17. Section 15 of the *Act* 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 the public body, the Commissioner may authorize the head [of a public body] to disregard one more requests for access if the request for access

- (a) would unreasonably interfere with the operations of the public body because of the repetitious or systematic nature of the request or previous requests;
- (b) is incomprehensible, frivolous or vexatious, or
- (c) is for information already provided to the applicant.

18. The purpose of section 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 under the *Act*. 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.

19. The impact of this Office granting permission to disregard an access request not only removes an applicant's right to make the request, but also the right to receive the public body's response as well as to seek an independent review either by this Office or through the courts. This means that the access rights afforded under the *Act* should be limited only to circumstances that are egregious and amount to a clear abuse of access rights.

20. 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 and that permission to disregard the access request in question should be granted in keeping with the requirements of s. 15. This is often a difficult onus for public bodies to meet and the circumstances in which this Office will grant permission to disregard an access request are rare.

21. I will now consider the first ground of the Commission's application, s. 15(a) of the *Act*.

Section 15(a): Unreasonable interference with operations due the systematic or repetitive nature of the request(s)

22. In making an application to disregard an access request under this provision, a public body must demonstrate the 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.

23. I will address both parts of this test in turn below.

Is the request systematic?

24. In this case, the Commission submits that the third point of the Applicant's July 19, 2019 request is systematic in nature, given its wide scope and that processing it would require the Commission to search through a significant portion of its records before it would be able to begin processing the request. The Commission estimates that its communications involving the Town of Saint Andrews accounts for approximately 40% of the Commission's Planning office activities over the past three years. The Commission indicated that its staff typically communicate on various matters involving the Town of Saint Andrews on a daily basis.
25. The Commission also submits that the wording of the request is large and unspecific in scope.
26. On this point, the Applicant disagrees that the portion of the request in question can be considered as systematic in nature for two primary reasons. First, this is the first time the Applicant has submitted an access request to the Commission for this type of information, which the Applicant states is related to the delivery of planning services to the Town of Saint Andrews. Second, the Applicant submits that the intent behind this request is also a key factor that must be taken into account.
27. As for the reasons behind making this particular request, the Applicant stated that it was "precipitated entirely by the actions of the ... Commission". The planning functions for the Town of Saint Andrews were transferred to the Commission in December 2017 and since that time, the Applicant is of the view that several of the decisions issued by the Commission with respect to planning matters relating to the Town of Saint Andrews are not in keeping with the Town's zoning by-laws. The Applicant also has concerns about how the planning services for the Town of Saint Andrews came to fall under the responsibility of the Commission in 2017, as well as how the Commission's planning office presents information on matters that are appealed to the Planning Review and Adjustment Committee (the PRAC), which the Applicant believes is making it more difficult for individuals to challenge decisions at the appeal level.
28. The Applicant has a particular concern about a recent decision made by the Commission's planning office in relation to a property located in the Town of Saint Andrews, which the Applicant believes

violated a number of Town zoning by-law provisions and also believes there are numerous other instances “where multiple major variances have been granted on the recommendation of the Planning Department that completely contradict the zoning bylaw.”

29. For these reasons, the Applicant submits that these circumstances are not in keeping with the *Community Planning Act* and that to “get at the root of these issues requires in-depth review of the documentation and records that strike at the heart of the matters at hand.” In the Applicant’s opinion, this gives rise to concerns about “the entire planning services provided to the Town of Saint Andrews hence the wider request for information”. The Applicant submits that the public is entitled to know the truth and have transparency from public bodies, which is the basis for the request at issue.
30. Having considered both the Commission’s and the Applicant’s submissions, I find that the portion of the request at issue can be considered systematic in nature for the reasons that follow.
31. To assist in this Office’s interpretation of the term “systematic,” which is not defined in the legislation, as noted in the case law cited in our s. 15 guidance document, the British Columbia Information and Privacy Commissioner 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
32. While the Applicant is correct in noting that this is the first request for this information that has been made to the Commission, this alone is not sufficient to establish that the request is not systematic in nature. Similarly, where an applicant has submitted multiple access requests to a public body within a certain period of time is also not a clear indicator that one or more of those requests can be deemed as systematic in nature for the purposes of s. 15(a) of the *Act*. Each case must be assessed on a case-by-case basis, taking into account the request(s) at issue and the applicant’s intent in making the request(s).
33. There is no evidence before me that suggests that the Applicant has engaged in a pattern of submitting multiple requests to the Commission, which is the usual fact pattern that gives rise to an argument that a particular request (or requests, as the case may be) should be considered systematic for the purposes of s. 15(a) of the *Act*.
34. The question in this case is whether a single request can be said to be systematic for the purpose of s. 15(a) of the *Act*.

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

35. In looking at the wording and scope of the portion of the request at issue, I note that it is broad in the sense that it seeks all correspondence from Commission staff related to any activities in the Town of Saint Andrews over the previous three-year period. In submissions to this Office on this matter, the Applicant indicated that the intended scope of this request is correspondence relating to the delivery of planning services to the Town of Saint Andrews.
36. As there is no particular issue or cases referenced by the Applicant, it appears to me that the wording of the request is systematic of its own accord.
37. The Applicant's stated reasons for making this request to the Commission in a nutshell are the Applicant's concerns about the overall approach and decisions being made by the Commission's planning staff in relation to the Town of Saint Andrews over the last three years and, in the Applicant's view, the resulting need for an in-depth review of the entire planning services provided to the Town of Saint Andrews by the Commission.
38. The Applicant is generally aware of the volume that has been conducted by the Commission's planning staff during the requested timeframe and the work that would be involved in processing this portion of the July 19, 2019 request, but believes that this is justified given the Applicant's overarching concerns.
39. In taking into account the Applicant's stated intention behind this request, the Applicant is seeking to subject all of the activities undertaken by the Commission's planning staff in relation to the Town of Saint Andrews over the past three years to public scrutiny. The Applicant has concerns that the Commission's planning-related activities involving the Town of Saint Andrews is not being done in conformity with the Town's by-laws and the *Community Planning Act*.
40. Given that the work conducted by the Commission's planning staff with respect to this Town accounts for a substantive amount of the work conducted over the past three years, I find that the request is systematic in nature. Had the planning staff only handled a small number of issues in relation to the Town during the specified timeframe, my finding may well be different, but that is not the case here.
41. While it may well be that a member of the public has concerns about the operations of an entire branch of a public body over a certain time period, I do not agree that the access rights afforded under the *Act* are the proper mechanism to address a concern of this magnitude.

42. For the above reasons, I find that the third portion of the July 19, 2019 request is systematic, based on its broad wording and scope and the Applicant's stated intentions in making the request to the Commission.

Would the request unreasonably interfere with the Commission's operations?

43. In this case, the Commission submits that processing the third point of the Applicant's July 19, 2019 request would unreasonably interfere with its operations, solely based on the volume of records involved and the work that would be required by Commission staff to conduct a reasonable search, fully process the relevant information, and to provide a meaningful response.
44. As indicated above in the previous section, the Commission states that its staff communicate on various issues relating to the Town of Saint Andrews on a daily basis, and often multiple times a day. The Commission estimates that communications involving the Town of Saint Andrews accounts for approximately 40% of its Planning office activities over the past three years and thus would require the Commission to initially conduct a search of a substantive amount of its communications generated over the past three years. Following the completion of this exercise, the Commission would then have to begin sorting and processing the records and, given the nature of the work conducted by the Commission, it anticipates that a significant portion of the relevant records would require the third party notification process under ss. 34 to 36 of the Act be undertaken before the Commission could make a final decision on access rights.
45. As for the resources the Commission has allocated to meet its obligations to applicants under the Act, the Commission indicated that it is not one of the larger public bodies, such as a Provincial government department, and thus does not have a full-time position dedicated to processing access requests. The Commission stated that this means that the searching and processing that would be required to address the third portion of the Applicant's July 19, 2019 request would fall on Commission staff, largely its entire Planning office (which currently has seven employees), all of whom are primarily tasked with performing their assigned responsibilities and duties as part of the Commission's day-to-day operations. The Commission submits that processing the third portion of the July 19, 2019 request, given its broad scope and the volume of records that are implicated, would place significant strain on its resources and would distract it from providing the southwest region of the Province with services.
46. On this point, the Applicant does not question or challenge the amount of work that this portion of the July 19, 2019 request places on the Commission and believes that it is justified, given the Applicant's overall concerns about the planning services and decisions made by the Commission with respect to

the Town of Saint Andrews. While not directly stated, it appears that the Applicant's position is that the interference with the Commission's operations in being required to process the portion of the request in question is reasonable, given the Applicant's overarching concerns with the Commission's recent handling of planning decisions.

47. The *Act* requires public bodies to be transparent in the conduct of their business and to uphold the public's access rights, up to the point that doing so would interfere with their operations; however, the *Act* permits access rights to be limited in specific circumstances where this burden becomes unreasonable and would negatively impact a public body's ability to conduct its day-to-day operations.
48. In this case, I find that processing the portion of the access request in question would not only interfere with the Commission's operations, but that this interference would be unreasonable, given its broad scope and timeframe and the amount of work that would be required on the part of the Commission to fully address it.

Sections 15(b) and (c)

49. As I have found that the Commission's application under s. 15(a) has merit and have decided to exercise my discretion in favour of granting authorization to disregard the third portion of the July 19, 2019 access request, there is no need for me to consider the other grounds raised under s. 15.
50. That being said, I did review the Commission's submissions on these points but am not convinced that sufficient evidence was presented to give these grounds further consideration.

IV DECISION

51. For the reasons set out above, I find that the Commission's application for authorization to disregard the third portion of the Applicant's July 19, 2019 request under s. 15(a) of the *Act* has merit and I am exercising my discretion to grant the Commission's application in light of the circumstances at play in this case.
52. Before arriving at this decision, I also considered whether it would be appropriate in the circumstances to manage this portion of the Applicant's request through further time extensions granted by this Office under s. 11(4) of the *Act*. Given the broad scope and three-year timeframe and the work that would be required by the Commission to fully address this, it appeared that this approach would

reduce, but not alleviate, the unreasonable interference with the Commission's operations in these circumstances.

53. Should the Applicant wish to pursue this matter further through the access rights afforded under the Act, the Applicant may want to consider focusing any future requests on specific cases or decisions rendered by the Commission and/or to reduce the timeframe of the requested information, which I trust would result in the Applicant receiving information from the Commission in a timely manner.

This decision is issued in Fredericton, New Brunswick this 26th day of September 2019.



Charles Murray

Integrity Commissioner and Ombud of New Brunswick