



INTERPRETATION BULLETIN

Section 15 – Permission to disregard access request

Right to Information and Protection of Privacy Act

May 2014

The purpose of this Interpretation Bulletin is to provide the basis upon which the Commissioner receives, consider and rules on an application for permission to disregard an access to information request. It also serves to answer questions regarding the interpretation of this provision of the Act and guide those who have to apply it. Applications under section 15 are made by public bodies.

PUBLIC BODY SEEKING PERMISSION TO DISREGARD AN ACCESS REQUEST

Both versions of paragraph 15(a) are reproduced below:

15 On the request of a public body, the Commissioner may authorize the head to disregard one or 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.

15 Sur demande d'un responsable d'un organisme public, le commissaire peut l'autoriser de ne pas tenir compte d'une ou de plusieurs demandes de renseignements dans l'un des cas suivants:

*(a) la demande nuirait considérablement aux activités de l'organisme public ou **serait abusive** en raison de leur caractère répétitif ou systématique;*

(b) la demande est incompréhensible, frivole ou vexatoire; ou,

(c) la demande fait trait à des renseignements qui ont déjà été fournis à leurs auteurs.

(Emphasis added)

A public body may apply for the Commissioner's permission to disregard an individual's access request in certain circumstances as provided by section 15 of the *Act*. Those circumstances are usually brought about when the public body is of the belief that an applicant is using the access provisions of the *Act* in a way that is contrary to its principles and objects. Section 15 can offer recourse to the public body by having an independent review of the situation and allowing our Office to provide useful guidance in how best to proceed.

A request to disregard is a serious matter as it could have the effect of removing an applicant's express right to seek access to information in a particular case. It is important for a public body to remember that a request to disregard must present a sound basis for consideration and should be prepared with this in mind. For this reason, our Office has developed a process which is designed to explore instances where a public body chooses to adopt such an extraordinary measure rather than asking an applicant for clarification or applying to the Commissioner for a time extension within which to process an access request. We will require that the public body submit the request to disregard in writing and provide any supporting facts, evidence, and arguments in advancing its case. The process will also provide the applicant with the opportunity to state his or her intentions in relation to the access request and to the public body's request to disregard. This step in the process gives the applicant a chance to rebut the public body's assertion that the access request should be disregarded.

In this Interpretation Bulletin, we explain the steps that are followed when an application is made under section 15, with a particular examination of the interpretation of paragraph 15(a) in light of its inconsistency. In addition, given the fact that the few applications our Office has received under section 15 entail the difficulties encountered when having to process an access to information requests for a large volume of records, we provide the factors we examine in an application filed under paragraph 15(a) and the burden of proof that the public body must meet in such a case.

REVIEW PROCESS FOR APPLICATION UNDER SECTION 15

Step one – cursory review

The first step in the review process involves a cursory examination of the submission to ascertain whether it has merit warranting further review. If we deem the submission has merit, the processing of the request is put on hold while we continue our review of the request to disregard.

Putting the applicant's request on hold until a decision is made:

- gives the public body time to respond to the subject request as per the requirements of the *Act* in the event the request to disregard is not granted;

- advises the applicant of the matter before us and that the response to the subject request has been remitted until a determination has been made; and,
- prevents an unnecessary processing of the request in the event the public body is granted permission to disregard the subject request.

Step two – in-depth review

The second step in our process involves a serious examination of the public body's submission. We examine all supporting facts, evidence, and arguments to get a sense as to why the public body has resorted to this approach rather than asking for an extension of time within which to process the request. We also examine whether the public body provided assistance to the applicant, sought clarification from the applicant, and/or whether there are issues between the two parties. Depending on the outcome of the second step, our review process will lead us to one of two findings:

- a) the request to disregard has not established a sufficient case for us to grant permission; or,
- b) the request to disregard has established a valid case for granting permission to disregard the applicant's request.

Where the submission has no merit, we assist the public body in establishing a workable schedule of time within which the request can be processed depending on the circumstances of the case. This ensures that the applicant receives a response, while allowing the public body to expend its resources reasonably. The matter ends there, and the public body returns to its obligations to process the applicant's request within a specified time line.

Despite the fact that the request to disregard has been refused, the Commissioner can nevertheless look to possible remedies to assist the public body in the processing of the applicant's request. Possible remedies include granting a generous time extension within which the public body can respond in order to remove any potential interference with its operations, or limit of the number of requests to be processed for any one applicant at a time, and so on. In the event we find the public body has established a valid case on its request to disregard, we move on to the third step.

Step three – applicant's input

At this stage, we seek input from the applicant by way of comments and/or submissions as to his or her stated intentions regarding access to the subject information. This step may be determinative in establishing whether the individual is genuinely interested in accessing public information or whether the applicant is using the provisions of the Act for another motive. We consider the applicant's comments and input with regard to the overall case before arriving at a final decision on whether to grant permission to disregard the request. This is a crucial aspect in the overall determination of the matter.

Specifics: Interpretation of paragraph 15(a)

The matter of an application to disregard a request for access to information is provided under section 15 of the *Act*, under the heading entitled *Power to authorize a head [of a public body] to disregard requests – Pouvoir autorisant le responsable d'un organisme public de ne pas tenir compte des demandes*.

We can see there is a discrepancy between these two versions of paragraph 15(a). The French version of paragraph 15(a) has additional words not found in its English counterpart, those of “*ou serait abusive*” and it appears these words are written to create a higher standard of proof for a public body to be granted permission to disregard a request, i.e., in addition to proving that the applicant’s requests interfere unreasonably with the operations of the public body due to their repetitious and systematic nature, the public body would have to establish that the repetitious and systematic nature of these requests suggest that the applicant is abusing the process.

According to the French version, in order for a public body to prove under paragraph 15(a) that repeated requests are interfering with its operations, the public body must prove either one of the two following scenarios:

- a) that the request or requests are of such a repetitious or systematic nature that they can be said to abuse one’s right to submit requests;
- b) that the request or requests are such a repetitious or systematic nature that they can be said to interfere with the operations of a public body.

There is no reference to the abusive nature of repeated requests as a separate element of proof to establish a case under paragraph 15(a) in its English version; however, it is a well-known principle of law in New Brunswick that both the English and French versions of a legislative provision have the same force and effect and are considered to be equal. Therefore, it is imperative that both be read together with a view to interpret their true meaning in accordance with the intent and spirit of the *Act*.

Consequently, and in applying this principle, the Commissioner interprets paragraph 15(a) to be that which is found in its English version, which means that in order to seek permission from the Commissioner to disregard an applicant’s request or requests, a public body must prove that the applicant’s request or requests are of such a repetitious or systematic nature that they can be said to interfere with its operations. There is the element of the possible misuse of one’s rights under the *Act* such that it may threaten the legitimate exercise of that right when making repeated requests, and this may have been the basis for which the French version of paragraph 15(a) was drafted to include the words “*serait abusive*”. Although that fact may be for consideration, it cannot stand as an additional element in the determination of an application to disregard a request.

This signifies that the public body will not be entitled to present an applicant's abuse of process on these applications; only submissions regarding the interference with the public body's operations will be allowed.

The interpretation of paragraph 15(a) does not end there. The English version of paragraph 15(a) also has additional words: those of "*or previous requests*". These words appear to correspond to the "repetitious or systematic nature of the requests" elements of the provision. In other words, it appears to be written to be argued in this manner: that the applicant's request or previous requests - viewed collectively - are repetitious and thereby interfere with the operations of the public body. The French version is not structured exactly in the same manner. That version indicates: "leur caractère répétitif", a plural qualifier to the word "requests", although the French word subject of that qualifier is the singular "la demande" instead of "la demande ou les demandes antérieures" such as found in the English version.

Upon a full reading of both versions of paragraph 15(a), the Commissioner is satisfied that the legislator intended to refer to more than one request in order to raise the issue of the "repetitious" nature of requests, such as that which is found in the English version. This is in keeping with jurisprudence in other jurisdictions which calls for the review of a series of requests, including previous requests, made by an applicant when a public body seeks permission to disregard that applicant's request or requests.

Consequently, the Commissioner interprets paragraph 15(a) to be that found in its English version, which means that in order to ask for the Commissioner's permission to disregard an applicant's requests, a public body must prove that the applicant's requests, which can include previous requests, are of such repetitious or systematic nature that these requests can be said to interfere with its operations.

FACTORS AND BURDEN OF PROOF REQUIRED BY PARAGRAPH 15(A)

Having established the interpretation of paragraph 15(a) of the *Act*, it is appropriate to lay down the test to be met when making an application to disregard an applicant's request or requests based on the proposition that such requests interfere with a public body's operations.

Firstly, the public body has the burden to meet the test found in paragraph 15(a). Placing the burden upon the public body is appropriate given that the public body seeks to remove an express legal right of access to public information granted to the applicant under the *Act*.

Secondly, we examine various considerations we believe relevant to a request to disregard. These have been used in other jurisdictions in Canada for similar applications and are grouped into three distinct elements. To arrive at a decision for a public body's request to disregard made under

paragraph 15(a) of the *Act*, we have devised a test, based on paragraph 15(a), consisting of these three elements:

- 1) that the requests are repetitious or systematic;
- 2) that the requests unreasonably interfere with the operations of the public body; and;
- 3) the accompanying role of the applicant in making the requests.

For each element, this test provides a series of considerations in the form of questions to ascertain the true issues surrounding the applicant's request or requests.

First element

Repetitious or systematic requests (previous requests):

- Are the requests repetitious (does the applicant ask more than once for the same records or information)?
- Are the requests similar in nature or do they stand alone as being different?
- Do previous requests overlap to some extent?
- Are the requests close in their filing time?
- Does the applicant continue to engage in a determined effort to request the same information (an important factor in finding whether requests are systematic, is to determine whether they are repetitious)?
- Is there a pattern of conduct on the part of the applicant in making the repeated requests that is regular or deliberate?
- Does the applicant methodically request records or information in many areas of interest over extended time periods, rather than focusing on accessing specific records or information of identified events or matters?
- Has the applicant requested records or information of various aspects of the same issue?
- Has the applicant made a number of requests related to matters referred to in records already received?
- Does the applicant follow up on responses received by making further requests?
- Does the applicant question the content of records received by making further requests?
- Does the applicant question whether records or information existed when told they do not?
- Can the requests be seen as a continuum of previous requests rather than in isolation?

Second element

Request or requests unreasonably interfere with the public body's operations:

- Are the requests large and complex, rather than confusing, vague, broadly worded, or wide-ranging (ex. "all records" on a topic), without parameters such as date ranges?
- Did the public body seek clarification and was it obtained?
- Did the clarification of the applicant's requests, if obtained, provide useful details to enable the effective processing of the requests?
- Do the applicant's requests impair the public body's ability to respond to other request in a timely fashion?
- What is the amount of time to be committed for the processing of the request, such as:
 - number of employees to be involved in processing the request;
 - number of employees and hours expended to identify, retrieve, review, redact if necessary, and copy records;
 - number of total employees in the same office; and,
 - whether there is an employee assigned solely to process access requests.

Third element

Applicant's accompanying role in making the requests:

- Does the applicant work with the public body when asked to clarify the request (a view to assist in the processing of the request) or does the applicant complicate the process?
- Does the applicant cooperate by communicating with the public body when asked to do so to enable the public body to better process his or her request?
- Is the applicant helpful in assisting the public body in dealing with the request expeditiously?
- What is the applicant's stated intention in accessing the public information?
- Does the applicant demonstrate a genuine interest in the request and to access the records or information?
- Are there issues between the applicant and the public body?
- Is there evidence of the applicant's unwillingness to cooperate which can be viewed as an attempt to interfere with the public body's operations by sending its staff to conduct unnecessary searches?
- Is the applicant misusing his or her rights under the Act such that it threatens the legitimate exercise of that right by other applicants?

The public body must first ensure that it meets the requirements found in the first element, that of proving the applicant's requests are repetitious or of a systematic nature, before moving on to establish the second element. The latter requires the public body to prove that processing these requests will cause an unreasonable interference with its operations.

The Commissioner will only consider granting a request to disregard when the public body has established a valid case under these first two elements; otherwise, the request to disregard is denied. In such a case, the Commissioner finds alternatives to assist the public body in processing the request or requests in the circumstances surrounding the matter. For instance, the Commissioner can extend the time to process the request so that the public body's operations are not affected to a great extent, or the Commissioner can limit the number of hours spent on a single request. Additionally, the Commissioner can determine the period of time during which the applicant cannot file more than one request or is limited to filing requests for access generally. To support the public body, the Commissioner may also limit the process to only one request per applicant at any one time.

Where the public body has established a valid case under these first two elements, the Commissioner considers the third element, that of the role of the applicant vis-à-vis the request or requests with a view to garner the applicant's intentions on the exercise of the right to access public information. Both the submissions of the public body and of the applicant are considered together before arriving at a final decision.

Should you have any additional questions regarding what has been described above, please communication with us at the following contact information:

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