Applying to the Commissioner for Approval to Disregard an Access to Information Request

The *Access to Information and Protection of Privacy Act, 2015* (*ATIPPA, 2015* or *Act*) permits public bodies to seek approval from the Commissioner to disregard access to information requests (requests). Applications must be submitted within five business days of receipt of a request (applications outside of 5 days can only be considered where a public body first establishes extraordinary circumstances exist as set out in section 24 of the *Act*). Where the Commissioner approves a public body's application to disregard a request, the only right of appeal on the part of an applicant is to the Supreme Court Trial Division.

21 (1) The head of a public body may, not later than 5 business days after receiving a request, apply to the commissioner for approval to disregard the request where the head is of the opinion that

(a) the request would unreasonably interfere with the operations of the public body;
(b) the request is for information already provided to the applicant; or
(c) the request would amount to an abuse of the right to make a request because it is
(i) trivial, frivolous or vexatious,
(ii) unduly repetitive or systematic,
(iii) excessively broad or incomprehensible, or
(iv) otherwise made in bad faith.

(2) The commissioner shall, without delay and in any event not later than 3 business days after receiving an application, decide to approve or disapprove the application.

(3) The time to make an application and receive a decision from the commissioner does not suspend the period of time referred to in subsection 16(1).

(4) Where the commissioner does not approve the application, the head of the public body shall respond to the request in the manner required by this Act.

(5) Where the commissioner approves the application, the head of a public body who refuses to give access to a record or correct personal information under this section shall notify the person who made the request.

(6) The notice shall contain the following information:

(a) that the request is refused because the head of the public body is of the opinion that the request falls under subsection (1) and of the reasons for the refusal;
(b) that the commissioner has approved the decision of the head of a public body to disregard the request; and
(c) that the person who made the request may appeal the decision of the head of the public body to the Trial Division under subsection 52(1).

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Unreasonably Interfere with the Operations of the Public Body

A public body's circumstances may be 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 (ie. government department) may not be the same for a small public body (ie. Municipality).

Public bodies must establish that responding to a request will unreasonably interfere with their operations. This could be reflected in the number of requests submitted by an applicant or a group of applicants working together or the sheer size of the access request itself. The unreasonable interference could be exhibited in the human resources burden it imposes on the public body, the expense of providing the response, 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.

Information Already Provided to the Applicant

When deciding whether to seek approval to disregard a request under this section, the issue is whether the public body has provided the information to the same applicant under the current legislation. It is not enough to surmise that the applicant must already be in possession of the information sought, rather a public body must demonstrate that it has provided the information in the current request to the same applicant. If the applicant requested information which was not available under the old *ATIPPA* but may now be available under the *ATIPPA, 2015*, the request is valid. Furthermore, you must consider whether there may be, in exceptional circumstances, a justifiable reason for the applicant to make a request for the same information (i.e. applicant had a fire and records were destroyed).

Abuse of the Right to Make a Request

Pursuant to section 21(1)(c) of the *Act* there are four tests which on their own or in any combination may result in a request amounting to an abuse of the right of access. Some factors may be relevant to more than one of the tests.

Generally, abuse of the right to make a request means excessive or improper use of the access to information legislation. This section is intended to be applied to those circumstances where the right of access is being employed for illegitimate purposes. The following illustrate some of the relevant factors in assessing whether a request is an abuse of the right of access:

1. the number of requests – whether the number is excessive by reasonable standards;
2. the nature and scope of the requests – whether they are excessively broad and varied in scope or unusually detailed, or whether they are identical to or similar to previous requests;
3. the timing of the requests – whether the timing of the requests coincides with some other event, such as an ongoing complaint against the institution or its staff unrelated to the request; and
4. the purpose of the requests – whether they are made for an unreasonable or illegitimate purpose, such as to annoy or harass the public body or to burden the system.

The term "excessively broad" is meant to capture a single ATIPP request that is excessively broad in scope. Prior to seeking approval to disregard on this ground, ATIPP Coordinators must attempt to narrow the scope of a request by discussing with applicants that the volume of records involved in fulfilling a request is more than the public body can handle, and engaging in a good faith discussion to help determine whether a more specifically worded request would capture the information being sought, or whether the request could be limited to certain locations where records may be found, certain employees who may have such records, or certain time periods. This is in keeping with the public body's duty to assist. Bear in mind that a request for a large amount of records is not necessarily excessively broad if it is clear and specific enough to allow the records to be identified and located. A request is more likely to be considered excessively broad if, in addition to being a request for a large amount of records, the wording is overly broad and too general in scope, such that identifying particular responsive records becomes difficult if not impossible.

"Incomprehensible" implies that the request is worded or structured in a way that it is impossible for the ATIPP Coordinator to respond to it. As with excessively broad, it is incumbent on Coordinators to work with applicants, where possible, to identify the records sought and to assist applicants in providing access to the information. When preparing to ask the Commissioner to disregard a request on the basis that it is incomprehensible, the following questions should be considered.

- What difficulty was encountered with the wording of the original request received by the public body?
- What was unclear about the wording of the request?
- What attempts were made to clarify the request with the applicant? If you proceed with a request to disregard to the Commissioner, please include information on the number and dates of attempts to work with the applicant, and copies of any communications with the applicant, with personal information removed.
- Did the applicant agree to amend the original request in any way in an attempt to clarify it? What was the date on which the request was amended? What was the wording of the clarified request?

Given the five day deadline to apply for approval to disregard, the Commissioner acknowledges that failure by applicants to respond to communications from Coordinators in a timely manner will generally frustrate good faith efforts to narrow or make sense of requests.

Trivial, frivolous and vexatious requests are often similar in nature. An ATIPP request can be considered "trivial" or "frivolous" when it is of little weight or importance or is without merit. It is important for a public body to consider, however, that information which may be trivial or frivolous from one person's perspective may be of importance from another.

A frivolous ATIPP request is one made primarily for a purpose other than gaining access to information. It is typically associated with matters that are trivial or without merit.

When making a determination whether a request is trivial or frivolous, the Commissioner will assess whether a public body has established, on reasonable grounds, that the request is part of a pattern of conduct that amounts to abuse of the right to make a request or is made in bad faith. As approving a request to disregard essentially eliminates an applicant's right to access information, doubt will be resolved by the Commissioner in favour of applicants.

While applicants should be reasonable in making access requests, it is essential that Coordinators work with them and recall the duty to assist in providing access to information. Coordinators must perform their duties in the spirit of the *Act* and remember that in Canadian jurisdictions where similar legislative provisions exist, Commissioners are reluctant to support a decision to disregard a request for access unless the evidence is clear and convincing.

The term "vexatious" means "with intent to annoy, harass, embarrass, or cause discomfort." While it is not uncommon for Coordinators to find requests for information bothersome or vexing in some fashion or another, one cannot disregard a request as vexatious simply because of a subjective view that a request has an annoying or vexatious component.

The following factors may support a finding that a request is vexatious:

1. a request that is submitted over and over again by one individual or a group of individuals working in concert with each other;
2. a history or an ongoing pattern of access requests designed to harass or annoy a public body;
3. excessive volume of access requests;
4. the timing of access requests;
5. abusive or aggressive language;
6. burden on the public body;
7. personal grudges;
8. unfounded accusations.

Communications from applicants unrelated to requests may provide evidence of harassment, abuse or other ulterior motive. As an example, in Ontario Order MO-2488, one of the multitude of reasons for finding that a request was made for a purpose other than to obtain access and was therefore frivolous included that the applicant sent more than 300 emails to the institution in a six-month period and telephoned staff almost daily.

A request is repetitive when a request for the same records or information is submitted more than once. "Systematic" involves a pattern of conduct that is regular or deliberate. The number of requests of a similar scope over a period of time or a repeated request for substantially the same information may indicate a repetitive or systematic course of action. Access legislation was not intended to allow an applicant to resubmit the same or similar access requests to a public body simply because of dissatisfaction with a response.

Bad faith is not simply bad judgment or negligence, but requires intent. It contemplates a state of mind which views the access process with contempt and utilizes it as a nuisance, rather than a valid means of obtaining information. When considering invoking "bad faith", the following questions are relevant.

- Is there a "wrong" or "dishonest" purpose in the applicant's request?
- What indications are there that the request might be being made in bad faith?
- Is the applicant using the *Act* for its intended purposes?
- Is the applicant using the *Act* as a weapon against the public body, to overburden, or impair the ability of the public body to function?

As an example, in Ontario Order M-850 a request was assessed as being in bad faith where the applicant stated that he was testing or examining the boundaries of the act or was having fun in filing requests. Additionally, some of the requests were made for the purpose of harassing an employee who was involved in an action brought by the applicant in another forum.

Process - Five Days

The head of a public body must decide within five business days of receiving a request whether to apply to the OIPC for approval to disregard the request. The application to the OIPC must be made no later than the fifth business day. In order to expedite the process, it is recommended that the public body contact the OIPC via e-mail, although it may be advisable to discuss the issue via telephone first with OIPC staff. The specific grounds for the request to disregard are set out in section 21 and the public body must establish on reasonable grounds that one or more of the tests for disregarding an access request are met.

As the *ATIPPA, 2015* grants a right of access to applicants, any doubt by the Commissioner whether to approve a request to disregard will be resolved in favour of the applicant. When applying to the Commissioner for permission to disregard an access request, the following information (including answers to questions where applicable) would be helpful.

- Name of the public body requesting the permission to disregard.
- Name and contact information of the ATIPP Coordinator.
- Public body file number.
- Wording of the access request.
- Date the access request was received by the public body.
- Original due date of request.
- Copy of the advisory response letter sent to the applicant in accordance with section 15 of the *ATIPPA, 2015*, if this letter has been sent (with any personal information redacted).
- What work has been done to date to process the access request?
- What work remains to be done to complete the processing of the access request?
- Any other information that would be helpful to the Commissioner in making the decision whether to grant approval to disregard this request, including the history, nature and number of previous interactions with an applicant.

The following are questions which would be most applicable in circumstances where the public body wishes to disregard a request on the basis that it is excessively broad or that it would unreasonably interfere with the operations of the public body. In preparing to make an application to disregard a request for other reasons, please refer to sections earlier in this guidance document which discuss each of them.

- Has the public body considered applying to the Commissioner for an extension of time rather than applying for permission to disregard the request?
- Was the applicant requested 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?

- When was the search for the records begun?
- Who was responsible for conducting the search?
- What was the approximate time taken to search for the records?
- Was the search discontinued at some point? If so, when and for what reason?
- Were all responsive records provided to the ATIPP Coordinator? If so, when?
- How would completing the response and providing the records unreasonably interfere with the operations of the public body?
- How many active requests is the public body currently processing?
- What other access and privacy activities is the public body currently managing and have these activities been influenced by the time taken to respond to this access request?
- How has this access request affected the public body's staffing resources and the current workloads of staff?
- Were staff members required to work overtime to process the access request?
- Were staff members re-allocated from other activities to respond to the access request?
- Were staff members from other business areas required to assist in responding to the access request?
- Has responding to the access request affected the public body's ability to respond in a timely manner to other access requests or other access and privacy related activities?
- Does the public body have an alternate/back-up ATIPP Coordinator who is able to assist in processing this access request?
- Are there multiple concurrent requests submitted by the applicant?
- If applicable, what are the dates on which the public body received each of the applicant's requests?
- If applicable, on what dates did the public body receive requests from persons with whom the applicant is working in association?
- If applicable, what is the evidence that the applicant is working in association with others who have submitted access requests?
- What is the wording of the multiple concurrent requests in question?
- What consultations were reasonably necessary in relation to the access request?
- Why were the consultations necessary?
- What are the dates of the consultations or intended consultations?
- How long were the consultations or how long are they likely to take?
- Why were the consultations not held at an earlier date?

Three Days

Upon receipt of the application to disregard a request the OIPC has three business days to decide whether to grant approval. In its decision-making process, the OIPC reserves the right to contact the applicant and discuss the request if necessary, and under such circumstances we may need to obtain the name and contact information of the applicant. The OIPC will notify the public body of its decision and the public body will respond to the request if approval is not granted.

The public body will notify the applicant of the refusal to grant access to records if the request to disregard is approved by the OIPC. The contents of the notice to the applicant are set out in section 21(6) of the *Act*, and include information about the applicant's right of appeal to the Trial Division.

If the Commissioner does not approve the public body's application to disregard an access request, the process of responding to the request must continue. Furthermore, the eight business day period which may be absorbed in the process of preparing, submitting and receiving a decision on a request to disregard does not extend the other timelines as set out in the *Act*. The original 20 business day time period to process the request still applies. That being said, if the request is a large one which will unreasonably tax the ability of the public body to respond within 20 business days, or if there are difficulties in doing so that can be supported on other reasonable grounds, the public body may, within 15 business days of receiving the request, apply to the Commissioner for an extension of the time limit to respond to the applicant.

Resources

Report 99-01, Information and Privacy Commissioner of British Columbia

Report F3885, Information and Privacy Commissioner of Alberta

Appeal into Report MA08-171, Information and Privacy Commissioner of Ontario

Toronto Catholic District School Board (Re), 2009 CanLII 15431 (ON IPC)

Order M-618, Information and Privacy Commissioner of Ontario

Order M-850, Information and Privacy Commissioner of Ontario

Order MO-2488, Information and Privacy Commissioner of Ontario

Reports 3558 and 3449, Information and Privacy Commissioner of Alberta

Northwest Territories (Education, Culture and Employment) (Re), 2002 CanLII 53328 (NWT IPC)

BC *Securities Commission* (24 July 2014), F14-24

Ministry of Advanced Education; Employment and Labour; Minister of Executive Council; Ministry of Justice and Attorney General; Saskatchewan Labour Relations Board; Saskatchewan

Workers' Compensation Board (17 May 2010), F-2010-002, at paras 101–102, 103

BC IPC, *Annual Report 2013–14,* p 16

Alberta IPC, *Annual Report 2012-13,* p 26

UK ICO, *Dealing with vexatious requests,* p 3

NZ Ombudsman, *Frivolous and Vexatious Requests*, Part 2A, p 12

Australia OIC*, Vexatious applicant declarations*