Honourable Serge Joyal, P.C.
Chair of the Standing Senate Committee on Legal and
Constitutional Affairs
Senate of Canada
Ottawa, Ontario
K1A 0A4

Dear Honourable Senator Joyal:

As you know, my predecessor appeared before the Standing Senate Committee on Legal and Constitutional Affairs to discuss Bill C-58 on October 3, 2018. To follow up on his appearance, and in response to the questions posed by members of the Committee, I would like to offer the following comments and additional information.

Let me first reiterate that Bill C-58 proposes important steps forward to strengthen access to government information in Canada. It would bring Canada’s access to information regime into the 21st century, by introducing requirements for the proactive publication of a broad range of information by approximately 265 federal government institutions, as well as by the Prime Minister’s Office, Ministers’ offices and administrative bodies that support Parliament and the courts. This would put into practice the concept of “open by default”.

Bill C-58 would also establish a requirement to review the Act every five years, with the first review beginning no later than one year after the bill receives Royal Assent. Parliament would be engaged in these reviews because a report must be tabled in Parliament and referred to the relevant Committees. The House of Commons and Senate Committees could then undertake their own studies and make recommendations to the Government. These reviews will provide an important opportunity for Canadians and Parliamentarians to have their say on access rights, so that we can continue to build on this first round of changes.
Most significantly, for the first time, this bill gives the Information Commissioner the power to make binding orders to government institutions, including for the release of records. I would like to emphasize that the Commissioner’s orders will be binding on the Crown. This is explicitly confirmed by existing section 76 of the Access to Information Act, which states that the Act is binding on Her Majesty in right of Canada (Bill C-58 would renumber this as section 100). The burden would no longer be on the Commissioner or a complainant to go to court to obtain the release of records in accordance with the Commissioner’s recommendations. The dynamic will be reversed: an institution would be bound to act in accordance with the Commissioner’s order, unless the institution, within 30 business days of receipt of an order, applies to the Federal Court for review of the matter. I am attaching an annex with a more detailed description of the process proposed in the bill for your information.

The proposed order-making power would transform the Commissioner’s role from an ombudsperson, who makes recommendations, to an authority with the legislated ability to make binding orders regarding the processing of requests, including the release of records. The Information Commissioner will also be able to publish orders, establishing a body of precedents to guide institutions as well as users of the system. These are major steps forward.

As my predecessor said during his appearance at Committee, to facilitate the transition to a new regime, the Information Commissioner has asked that the order-making power come into force at Royal Assent rather than on the first anniversary of Royal Assent. I value her perspective on this, so I hope the Committee will consider bringing forward such an amendment.

As well, as the Committee is aware, the Information and Privacy Commissioners are jointly seeking changes to some aspects of the order-making power so that the values of privacy and openness are properly balanced. I hope the Committee will consider bringing forward amendments to address the points the Commissioners raise in their joint letter.

With regards to other issues that were raised during the meeting, I would like to offer the following comments and additional reference material:

**Fees**

As noted by officials at the October 3, 2018 meeting, Bill C-58 proposes to remove outdated references to search and preparation fees, but to retain the provisions of the Access to Information Act which allow the Government to set an application fee of up to $25, and to set other types of fees by regulation. Retaining an authority to set fees by regulation is intended to provide flexibility for the future, should a review of the Access to Information Act determine this is merited. The authority for the head of an institution to waive fees is also retained. The Government will continue to fulfil its commitment to charge no fees other than the $5 application fee.
Proposed new requirements to indicate specific subject matter, type of record, and date or date range in a request (section 6)

These amendments were intended to ensure that requests provide enough information to be quickly responded to. However, we have heard the concerns of First Nations groups and the Information Commissioner about the potential for this clause to be misused, and I hope the Committee would consider proposing an amendment to eliminate these proposed requirements.

Seeking the Information Commissioner's approval to decline to act on a request (section 6.1)

Committee members asked for examples of vexatious and bad faith requests from other jurisdictions.

As you may know, the provinces have long experience with applying these kinds of provisions: the legislation of British Columbia, Alberta, New Brunswick, Prince Edward Island, and Newfoundland and Labrador allow government institutions to decline to process "frivolous and vexatious" requests, subject to the prior approval of their provincial Information Commissioner. In Manitoba and Ontario, institutions can directly decline to process such requests, with a right of appeal to their Commissioners.

To assist the Committee, I am attaching the following material:

- The Information and Privacy Commissioner of Ontario’s Fact Sheet on frivolous and vexatious requests, which offers guidance about the factors the Commissioner considers to determine whether a request is an abuse of the right of access, and examples of the kinds of requests the Ontario Commissioner has found meet that definition
- The New Brunswick Office of the Information and Privacy Commissioner’s Interpretation Bulletin respecting permission to disregard a request, setting out the elements that the Office considers in reviewing such a request
- Guidance published by the Office of the Information and Privacy Commissioner of Newfoundland and Labrador, providing criteria that will be considered before giving approval to disregard a request, including because it unreasonably interferes with the operations of a public body
- The Office of the Information and Privacy Commissioner of Alberta’s Practice Note, outlining the Office’s general practices when it considers requests from provincial institutions seeking authority to disregard a request
- A list of examples that my officials have compiled of requests found by provincial Commissioners to be frivolous and vexatious
I would note as well that in a brief submitted in May 2016 to the House of Commons Standing Committee on Access to Information, Privacy and Ethics, the British Columbia Freedom of Information and Privacy Association described the concept of frivolous and vexatious requests as requests that “are designed to impede the functioning of the public body rather than to elicit information.”

As these materials demonstrate, there is a large body of provincial experience that can guide the application of these provisions at the federal level. In developing our proposals, we drew from the legislation and practices in the provinces. As my predecessor mentioned when he appeared before the Committee, the requirement for the Information Commissioner’s prior approval provides additional assurance to Canadians that institutions would not decline to act on legitimate requests.

I would add as well that we will be amending our Treasury Board policies to provide guidance to institutions about the use of these provisions. We will make it clear to institutions that they must work with requesters to focus a request before seeking the Information Commissioner’s approval to decline to act; and importantly, institutions would be given clear direction that the provisions could not be used to impede requests that are consistent with the spirit of the Act – for example, requests from First Nations researchers seeking access to historical records to substantiate Indigenous claims. Indigenous representatives and researchers, including national organizations representing First Nations, Métis and Inuit people, will be consulted in the development of policy guidance so that their needs and concerns are reflected.

Improving the overall administration of the Access to Information Act

Beyond the measures proposed by Bill C-58, the Government has taken steps to strengthen access to information. The Treasury Board of Canada Secretariat recently launched the ATIP Online Request Service to make it easier for Canadians to make access to information requests. We will continue to enhance the Service and add institutions through to March 2021.

The Treasury Board of Canada Secretariat has also launched work to improve the request processing tools available to institutions to support their work.

Immigration, Refugees and Citizenship Canada receives the greatest number of access to information requests, most of which are requests for information relating to client records. Immigration, Refugees and Citizenship Canada has a multi-year initiative underway to establish avenues outside the access to information process that would provide clients with access to information about their client records.

Oversight of proactive publication

Committee members had questions about the oversight of the proactive publication requirements set out in Part 2. The request-based system and the new proactive publication provisions of the Act would operate in tandem with a common goal of making government information more open and transparent.
As my predecessor mentioned at Committee, the House of Commons amended Bill C-58 to clarify that Canadians would still be able to make a request under Part 1 to institutions subject to Part 1 for the original versions of records that they proactively release under Part 2. This will enable a requester to validate the information that has been proactively published. The Information Commissioner would have oversight of the records released under Part 1 in response to those requests.

Institutions are bound to comply with the legislated proactive publication requirements. I have no doubt that, as is currently the case, the media and public would be swift to identify any failings on the part of an institution to proactively publish materials as required by the legislation.

With respect to how we could assess the effectiveness of proactive publication overall, at the systemic level, we believe the best approach would be to undertake a study of this question in the context of the five year reviews of the Act. A report on this issue could provide insight to Parliamentarians on the extent to which the new Part 2 of the Act is contributing to greater openness and transparency for Canadians.

Additional funding for the Office of the Information Commissioner

The Government will continue to support the Information Commissioner in her important work. Budget 2018 set aside $2.9M for 2018-19 to support the Information Commissioner’s work to reduce the backlog of complaints in her office. We have also made available funding of up to $5.1M from 2019-20 to 2021-22, and $1.7M ongoing to support the Information Commissioner in implementing the changes proposed in Bill C-58.

Requesters will continue to be able to make access to information requests in writing

Committee members expressed concern about access to the system for those Canadians without access to the internet. Nothing in Bill C-58 will take away from Canadians’ right to make an access to information request in writing.

Duty to document decisions and decision-making processes

Committee members asked about the need for a legislated duty to document. Current Treasury Board policies already require employees to document decisions and decision-making processes. Under the Treasury Board’s Policy on Information Management, deputy heads are responsible for ensuring that decisions and decision-making processes are documented to account for and support the continuity of departmental operations, permit the reconstruction of the evolution of policies and programs, and allow for independent evaluation, audit, and review. The Policy also states that all employees are responsible for documenting their activities and decisions. In addition, under the TBS Information Management Protocol – Instant Messaging Using a Mobile Device, employees are responsible for safeguarding and preserving records of business value, including emails and PINs.
Protecting judicial independence and security of judges

We thank the Committee for their comments and observations about the importance of ensuring that Bill C-58 respects the important constitutional principle of judicial independence. Bill C-58 is not intended to undermine this principle. We are of the view that Bill C-58’s proactive publication regime, which includes a carve-out with respect to information the publication of which could interfere with judicial independence, has been carefully crafted to strike the right balance between protecting judicial independence and enhancing transparency and accountability of government for the expenditure of public funds.

In addition, we are aware that concerns have been raised by the Canadian Superior Courts Judges Association, reiterated by the Canadian Bar Association, with respect to the proactive publication of individual judges’ expenses and judges’ security. We take the protection of the integrity of our judicial system seriously and for this reason the bill includes a provision (section 90.23 of clause 38) that provides that the publication of information is not required if the publication could compromise the security of persons, infrastructure or goods.

The Commissioner for Federal Judicial Affairs and the Registrar of the Supreme Court of Canada are best-placed to assess whether information can be disclosed without infringing judicial independence and without compromising the security of judges. These offices are at arm’s length from other departments and were established by Parliament in part to ensure the protection of judicial independence. The Commissioner and the Registrar have the mandate, the expertise, the relationships and the context to work collaboratively with judges to ensure that the judicial independence exemption and the security exemption are applied appropriately.

The Committee asked why the Canadian Judicial Council was excluded from the application of Bill C-58. The reason is that, unlike the other court-related entities that have been included in the bill, the Canadian Judicial Council does not provide administrative support to courts or judges. Rather, the Canadian Judicial Council is an independent body composed of the 39 chief and associate chief justices from superior courts across the country, statutorily mandated to administer the judicial discipline process and to promote efficiency, uniformity and high quality judicial services.

Proactive publication requirements in relation to contracts

Committee members had questions about the scope of the requirement for a minister’s office to proactively publish information on contracts over $10,000. This requirement – along with analogous requirements applicable to senators, members of the House of Commons, parliamentary entities, government institutions and institutions that support superior courts – would apply to contracts entered into for the provision of goods and services, as well as to agreements or arrangements which contain provisions of a contractual nature. For example, the proactive publication requirement would apply to a contract for professional, technical or administrative services or expertise, as long as the contract does not give rise to an employer-employee relationship between the contracting authority and the other party.

.../7
To be clear, the provisions of Bill C-58 related to the proactive publication of contracts by ministers’ offices, senators, members of the House of Commons, parliamentary entities, government institutions and institutions that support superior courts are not intended to apply to individual contracts of employment.

*Safeguarding parliamentary privilege*

Several members have raised concerns regarding the impact of proposed sections 71.12 and 71.14 on the determination of questions of privilege in the Senate.

As mentioned when Minister Gould appeared before your Committee, Bill C-58 is not intended to alter the procedure by which Houses of Parliament determine questions of privilege, nor to affect the privileges enjoyed by both Houses and their respective members. Section 71.12 therefore serves as a safeguard allowing the Speaker of the Senate to prevent the disclosure of information when such a disclosure would constitute a prima facie breach of privilege. The Government is of the view that the Rules of the Senate do not conflict with the provisions of Bill C-58. In accordance with precedents established in the Senate and with relevant provisions of the Rules, such as those found at Chapter 13, the Speaker will be required to hear debates on questions of privilege and Senators will retain their ability to appeal a Speaker’s ruling. As for section 71.14, its intent is to support the continued existence of parliamentary privilege and to shield determinations made by Speakers of both Houses of Parliament from review or control by the Courts.

*Consultations with Indigenous stakeholders*

The Government takes the input and concerns of Indigenous stakeholders seriously. In the development of Bill C-58, the Government held online consultations in May and June 2016 on proposed reforms and was pleased to receive three submissions from First Nations organizations (the Assembly of First Nations, Directors of Claims Research Units, and the First Nations Financial Management Board). These submissions supported providing a strong order-making power to the Information Commissioner, and also identified the need to review and strengthen the Act’s protections for First Nations’ financial, social, political, cultural, spiritual, environmental, and traditional information. Treasury Board of Canada Secretariat officials continue to meet regularly with National Claims Research Directors, and will engage Indigenous organizations in the development of guidance to government institutions so that the Act is applied in a manner that is responsive to First Nations efforts to further their claims.
To address Indigenous stakeholders' concerns, the Government supported several amendments to Bill C-58 in the House of Commons. Most importantly, Bill C-58 was amended to require the Information Commissioner's approval before a government institution can decline to act on a request deemed to be vexatious or to have been made in bad faith. In addition, my predecessor indicated during his appearance before the Committee that he would be supportive of an amendment in the Senate to eliminate requirements to provide a specific subject matter, time period, and the type of record being sought, due to Indigenous groups' concern about the potential for this clause to be misused, particularly when it comes to First Nations land claims.

The Treasury Board of Canada Secretariat is providing support to the National Claims Research Directors, the Indigenous Bar Association, and the Union of British Columbia Indian Chiefs to undertake analysis of Bill C-58 to identify implications for First Nations. The Treasury Board of Canada Secretariat will continue to engage with Indigenous organizations and with key departments and agencies, such as Crown-Indigenous Relations and Northern Affairs Canada, to ensure access to information processes are responsive to Indigenous peoples' needs.

Further, the Treasury Board of Canada Secretariat, in partnership with Crown-Indigenous Relations and Northern Affairs Canada, will consult with all stakeholders about the feasibility of transferring additional Crown-Indigenous Relations and Northern Affairs Canada records that are of historical or archival value to archival institutions. The findings will be reported to Parliament in the context of the first full review of the Act that will follow coming-into-force of Bill C-58.

In closing, I would like to thank the Committee for its thoughtful review of the issues involved in amending Canada's access to information system. I look forward to working with you to shape an access to information system that will meet Canadians' needs for government information in the digital age.

Yours sincerely,

The Honourable Jane Philpott, M.D., P.C., M.P.

c.c.: Senator Peter Harder, P.C., Government representative in the Senate
Senator Pierrette Ringuette, New Brunswick

Enclosures:

1. Enforcement of the Information Commissioner's orders under Bill C-58
2. Access Fact Sheet: Frivolous and Vexatious Requests (Information and Privacy Commissioner of Ontario)
3. Interpretation Bulletin: Section 15 – Permission to disregard access request (Office of the Information and Privacy Commissioner, New Brunswick)
4. Applying to the Commissioner for Approval to Disregard an Access to Information Request (Office of the Information and Privacy Commissioner, Newfoundland and Labrador)

5. Practice Note: Authorization to Disregard Requests (Office of the Privacy Commissioner of Alberta)

6. Provincial examples: Frivolous and vexatious access to information requests
Enforcement of the Information Commissioner’s orders under Bill C-58

Overview

Under Bill C-58, the Information Commissioner’s orders are legally binding when they are issued by the Information Commissioner. They do not need to be filed with the Federal Court to have binding effect.

Bill C-58 creates a specific and specialized process for review of an order of the Information Commissioner. A government institution that failed to comply with the Information Commissioner’s order and disregarded the review process set out in the bill would be acting unlawfully and contrary to the rule of law. In such an unlikely situation, it would be possible to compel the government to follow the Information Commissioner’s order through a mandamus proceeding.

Existing process

Under the current Access to Information Act (ATIA), if a requester is dissatisfied with the records they receive or the way their request was handled, they may make a complaint to the Information Commissioner. The Information Commissioner’s office will investigate, and may recommend the release of information or other remedial action. If the government institution does not follow the non-binding recommendation, the requester (s. 41), or the Information Commissioner, with the consent of the requester (s. 42), can apply to the Federal Court for a court order compelling disclosure. The Information Commissioner’s office has had a general practice of applying to Federal Court in each instance where government institutions have declined to implement its non-binding recommendations. This general practice has resulted in only a handful1 of Information Commissioner-initiated section 42 applications each year; government institutions overwhelmingly comply with the non-binding recommendations of the Information Commissioner.

Order-making powers under Bill C-58

Bill C-58 would transform the Information Commissioner’s power to recommend disclosure or other remedial measures into an order-making power, eliminating the need for the Information Commissioner to initiate enforcement proceedings under section 42 of the ATIA. Bill C-58 would empower the Information Commissioner to independently issue a binding order mandating disclosure, rather than requiring her to go to the Federal Court to request an order as is currently the case.

Under Bill C-58, the Information Commissioner’s orders would be binding on the Crown since the ATIA is duly enacted federal legislation that clearly and also explicitly (s. 76) binds the federal Crown. Under Bill C-58, a government institution subject to an Information Commissioner’s order would have only two lawful options: the government institution could (i) comply with its terms; or (ii) if the government institution had serious concerns with the order, challenge the terms of the order by initiating an application for review by the Federal Court.

---

1 The Office of the Information Commissioner would be the best source of exact figures on the number of section 42 applications it initiates each fiscal year.
Where a government institution’s interpretation of the law leads it to conclude that it cannot or should not comply with an order of the Information Commissioner, under the terms of Bill C-58, and more generally by the rule of law, it would be required to initiate the following process:

- A government institution has 30 business days in which to make its decision: subsection 41(2).
- To challenge an order, the government institution must apply to the Federal Court for review under subsection 41(2).
- If an application to the Federal Court is made by a government institution, subsection 41.1(1) stays the legal requirement to comply with an order that would otherwise exist.
- The Federal Court’s role is to undertake a review de novo: section 44.1. Consistent with the practice under the current ATIA, this means that the Federal Court is empowered to independently determine in a new proceeding what the legislation requires a government institution to do.
- If the Federal Court determines that the head of the institution is required to disclose records or take other remedial action, it can issue an order to this effect.
- If the Federal Court determines that the head of the institution is not required to disclose records or otherwise comply with an order of the Information Commissioner, it will issue an order relieving the government institution of its obligation to comply with the Information Commissioner’s order.

This is the process set out in the Bill for challenging the Information Commissioner’s orders. Government institutions are legally required to follow this process if they do not intend to comply with an order of the Information Commissioner. This process ensures that any disputes about the Commissioner’s orders would be resolved quickly in the Federal Court. It is worth noting again that government institutions already overwhelmingly comply with the Information Commissioner’s recommendations made under her current authorities. There is no reason to expect that this would change once the Commissioner has the power to make binding orders.

A government institution that neither complied with the Information Commissioner’s order nor followed the process set out in Bill C-58 to challenge its terms would be acting unlawfully and contrary to the rule of law. Ignoring or otherwise disregarding the Information Commissioner’s order is not an option that is legally available to a government institution.

Once the period to apply for review of the matter that is subject of an order by the Federal Court has expired, the Information Commissioner would have the authority to publish her final report, including any order made, which would ensure that the public and media would be aware of an order made against an institution.

**Mandamus proceedings**

In a truly unlikely scenario in which a government institution ignored the rule of law and failed to respond lawfully to an order of the Information Commissioner, a mandamus proceeding could be brought before the Federal Court. Such a proceeding could be brought by the requestor, or by the Information Commissioner acting on the requestor’s behalf (s. 42). Mandamus is an order of the court that requires the institution to comply with a legal duty. Mandamus is available when there is a public
law duty to act, the order would be of some practical value or effect and the balance of convenience favours granting the order. The Federal Court would determine these matters on the balance of probabilities. If the Federal Court was convinced that the institution had failed to comply with an order of the Commissioner, the conditions for mandamus would be met. Failure to comply with a mandamus order would be enforceable by contempt proceedings.

**Contempt of court proceedings**

The Committee has asked whether the Information Commissioner should be able to file her orders in Federal Court. It should be noted that this is not required to make the orders binding; they are binding under the bill as drafted.

In such a scenario, if a government institution did not comply with the legally binding order but did not apply to Federal Court within the timeframes set out in Bill C-58 for review of the order, then the Information Commissioner could file her order in the Federal Court. Contempt of court proceedings could be initiated by either the requester, or by the Information Commissioner acting on the requester’s behalf (s.42).

Contempt of court hearings proceed in two stages. The first stage is a “show cause” hearing in which an order must be secured requiring the person alleged to be in contempt (the head of an institution) to appear to answer the allegations against him or her. A prima facie case that contempt of court has been committed must be established before such an order will be issued. In the “show cause” hearings, the Court must determine whether the affidavit evidence establishes that the head of a government institution has knowingly disobeyed a certified order of the Information Commissioner.

The second stage is the contempt hearing. This is analogous to the trial of a criminal offence, with a higher standard of proof than in a mandamus proceeding. The alleged contempt must be proven beyond a reasonable doubt. Evidence at the hearing is oral and the person alleged to be in contempt cannot be compelled to testify. The penalties for contempt are significant. The maximum term of imprisonment is five years less a day. There is no limit on the amount of the fine that can be imposed.
Frivolous and Vexatious Requests

The Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act (the acts) give individuals the right to access their own information and general records held by an institution unless an exemption applies or the request is frivolous or vexatious.

An institution may refuse to give access to a record if it decides the request is frivolous or vexatious. The requester can appeal this decision to the Information and Privacy Commissioner (IPC).

This fact sheet explains what a frivolous or vexatious request is, what institutions should do when they receive this type of request, what a requester can do if an institution claims their request is frivolous or vexatious and the IPC’s role in an appeal.

WHAT IS A FRIVOLOUS OR VEXATIOUS REQUEST?

A request is frivolous or vexatious if it is:

- part of a pattern of conduct that
  - amounts to an abuse of the right of access
  - interferes with the operations of the institution
- made in bad faith or
- made for a purpose other than to obtain access

Each of these grounds is explained below.
Pattern of Conduct—Abuse of the Right of Access

To determine whether a request is an abuse of the right of access, the IPC considers:

- the number of requests
- whether they are excessively broad and varied in scope or unusually detailed, or are similar to previous requests
- whether they are made for an unreasonable or illegitimate purpose, such as to annoy or harass the government or to burden the system
- 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
- any other factors that may be relevant

Pattern of Conduct—Interferes With the Operations of an Institution

A pattern of conduct that would interfere with the operations of an institution is one that would obstruct or hinder the institution’s activities. The circumstances of the particular institution must be considered. For example, it would take less to interfere with the operations of a small municipality compared to a large ministry. It is up to the institution to show that the requester’s pattern of conduct unreasonably interfered with the institution’s operations.

However, it is the responsibility of the institution to ensure reasonably adequate resources are available to respond to access requests.

EXAMPLE: A university claimed a request was frivolous or vexatious because the requester had made 38 previous requests that were unusually broad and repetitive and represented over 20 percent of the total requests received by the university in an 18-month period. The university stated that the number of requests adversely affected its ability to meet the overall demand for access to information services. In upholding the university’s decision in Order PO-3188, the IPC decided that a number of factors weighed in favour of a frivolous and vexatious finding including that the request was part of a pattern of conduct that interfered with the operations of the institution. The IPC added that it was unreasonable for the institution to be expected to allocate so much of its limited resources to respond to these numerous broad and similar requests.
Bad Faith
Bad faith refers to a requester’s state of mind and not simply bad judgment or negligence, but requires intent.

**EXAMPLE:** The IPC found a request was made in bad faith in Order M-850 and was therefore frivolous and vexatious. The requester stated that he was testing or examining the boundaries of the act or was having fun in filing requests. The IPC also considered that some of the requests were made for the purpose of harassing an employee who was involved in an action brought by the requester in another forum.

Purpose Other Than to Obtain Access
A request is made for a purpose other than to obtain access if the requester is motivated not by a desire to obtain access, but by some other objective.

**EXAMPLE:** In Order MO-2488, the IPC found a request was made for a purpose other than to obtain access and was therefore frivolous or vexatious because:

- the requester made 54 requests with 372 parts in two years
- the requests were unusually detailed and excessively broad
- the requester sent more than 300 emails to the institution in a six-month period and telephoned staff almost daily, as well as increased the volume and complexity of the requests over time, as a court action against the institution progressed
- the requester was already in possession of many of the records she requested

Requesters do not need to justify a request and the acts do not place limits on what a requester can do with the information once access has been granted.

**EXAMPLE:** The fact that a requester intended to use a record for a purpose such as to dispute a number of the institution’s land transactions did not mean that the request was for a purpose other than to obtain access. The IPC concluded in Order M-906 that to find that a request is frivolous or vexatious on the basis that a requester may use the information to oppose actions taken by an institution would be contrary to the spirit of the acts, which exist in part as an accountability mechanism for government organizations.
HOW SHOULD INSTITUTIONS RESPOND TO FRIVOLOUS OR VEXATIOUS REQUESTS?

The institution must provide written notice to the requester where it believes the request is frivolous or vexatious. The notice must include the reason for the decision and inform the requestor of their right to appeal to the IPC.

WHAT CAN A REQUESTER DO IF AN INSTITUTION DECIDES THAT THEIR REQUEST IS FRIVOLOUS OR VEXATIOUS?

Requesters can appeal the institution's decision to the IPC. Requesters should be prepared to respond to claims made about their conduct and to explain to the IPC how their request is not frivolous or vexatious.

For more information on the appeal process, see the IPC's publication, *The Appeal Process and Ontario's Information and Privacy Commissioner* at www.ipc.on.ca.

HOW CAN AN INSTITUTION ESTABLISH THAT A REQUEST IS FRIVOLOUS OR VEXATIOUS?

In an appeal to the IPC, it is up to the institution to establish that the request is frivolous or vexatious. Institutions should maintain detailed records of their interactions with requesters including information about the:

- number of requests
- nature and size of the requests
- timing of the requests and their relationship to other events
- apparent or stated purpose of the request
- nature and quality of the interaction between the requester and institution staff

WHAT CAN THE IPC DO WHEN IT RECEIVES AN APPEAL?

If the IPC agrees that a request is frivolous or vexatious, it may uphold the institution's decision not to process the request. The IPC may also impose conditions on a requester such as:

- limiting the requester to one request or appeal at any given time
- requiring the requester to notify the IPC and the institution if seeking to proceed with any existing appeals or requests
- setting a two-year time limit on pursuing any outstanding appeals
• restricting a request to specific information relating to a single subject matter
• prohibiting the requester from contacting the institution with respect to processing their requests unless the institution contacts the requester first
• requiring the institution to only respond to the requester if communication is received by mail and relates to filing an access request or responding to a request for clarification

If the IPC does not agree that a request is frivolous or vexatious, it may order the institution to respond to the request by issuing an access decision.

WHAT CAN INSTITUTIONS DO TO BETTER MANAGE REQUESTS?

Requests that do not meet the standard of frivolous or vexatious may still be challenging. An institution can take steps to help manage such requests including:

• publishing records disclosed in response to freedom of information requests on their websites (subject to privacy concerns)
• developing policies to enable proactive disclosure
• working with the requester to focus or clarify the request
• applying the fee provisions of the acts
• applying the time extension provisions of the acts

To learn more about making a freedom of information request and how to comply with privacy and access laws, visit the IPC’s website: www.ipc.on.ca.
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 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 requests 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 communicate with us at the following contact information:

65, rue Regent, bureau 230
Fredericton, NB E3B 7H8

📞: 506-453-5965 (Toll free: 1-888-755-2811)
✉️: 506-453-5963
✉️:accès.info.vieprivée@gnb.ca  ✉️: access.info.privacy@gnb.ca

www.info-priv-nb.ca
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).
Applying to the Commissioner for Approval to Disregard an Access to Information Request

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 (i.e. government department) may not be the same for a small public body (i.e. 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.
Applying to the Commissioner for Approval to Disregard an Access to Information Request

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

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

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

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)
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
The Commissioner has the power to authorize a public body, custodian or organization to disregard certain access requests or correction requests made to the public body, custodian or organization.

The criteria for authorizing a public body, custodian or organization to disregard a request or requests are set out in section 55(1) of the *Freedom of Information and Protection of Privacy Act* (FOIP Act), section 87(1) of the *Health Information Act* (HIA), and section 37 of the *Personal Information Protection Act* (PIPA). The criteria that must be met under those provisions of the legislation are:

- Because of their repetitious or systematic nature, the requests would unreasonably interfere with the operation of the public body, custodian or organization, or amount to an abuse of the right to make those requests.

- One or more of the requests are frivolous or vexatious.

The following outlines the Commissioner’s general practice when considering applications to disregard requests under the FOIP Act, HIA and PIPA:

1. The public body, custodian or organization applying for authorization to disregard a request or requests must provide the Commissioner with a written submission that includes evidence and argument about how the criteria under the legislation are met.

2. When the public body, custodian or organization applies to the Commissioner for authorization, it must at the same time provide a copy of its written submission to the person whose request is affected, and confirm with the Commissioner that it has done so.

3. The Commissioner will allow the person whose request is affected to provide a written submission in reply. The person must provide a copy of the written submission to the Commissioner and at the same time to the public body, custodian or organization.

4. There will be no further opportunity for the parties to provide any additional information to the Commissioner unless the Commissioner requests additional information.

5. The Commissioner will decide whether to authorize the public body, custodian or organization to disregard the request or requests and will issue a written decision, which the Commissioner will provide to the parties. The Commissioner may decide to publish the decision.

---

1 Examples of decisions made by the Commissioner that discuss evidence and arguments are available at [www.oipc.ab.ca](http://www.oipc.ab.ca).
Provincial examples:
Frivolous and vexatious access to information requests

ALBERTA

- **Repeatedly filing access requests to renew the complaint period** (OIPC 000234)
  - The requestor made three separate requests to the University of Alberta to access personal information. Although some requests were for new information, the requests also overlapped with previous access requests.
  - After receiving the third request, the university contacted the requestor to clarify its scope.
  - The university was informed that the repeated requests were intended to renew the review period to file a complaint with the Information and Privacy Commissioner about content that had been redacted in the earlier releases.
  - The Commissioner concluded that the requests were an abuse as the purpose was not to obtain access to records.

- **Submitting a high volume of requests to harass an institution** (OIPC 006221)
  - The requestor initially sought police reports about himself. Subsequent requests sought large volumes of information about the requestor’s children, his wife, and information about specific Calgary Police Services employees.
  - The requestor had been involved in a family dispute which required police intervention. Following this incident, the requestor filed 20 access requests for information about 81 police employees and sent more than 1,000 emails to various other members of the police services.
  - Calgary Police Services sought permission from Alberta’s Information and Privacy Commissioner to disregard the requests.
  - The Commissioner concluded that the volume and repetitive nature of the requests indicated vexatious intent and were designed to harass the police department. The requests were therefore deemed an abuse of the right of access.

BRITISH COLUMBIA

- **Using the access to information system to harass an institution** (F05-01)
  - A fired employee of BC Hydro submitted an access request for more than 100 records relating to documents about his former employment.
  - The requestor had previously obtained access to the documents requested from his prior grievance, arbitration, and Workers’ Compensation Board recourse processes pursued against BC Hydro.
  - The requestor informed BC Hydro he intended to submit 3,000 new access requests unless his former employer released specific information he was seeking.
  - BC Hydro applied to the Information and Privacy Commissioner of BC for relief on the basis that the requests were repetitious, frivolous, and vexatious.
The Commissioner concluded that the threat to submit 3,000 new requests was intended to harass BC Hydro and indicated that the systematic requests would continue. The requests were therefore deemed to be frivolous and vexatious.

**Using access to information in an effort to pressure an institution to collect new data (F08-10)**
- The requestor submitted a large series of repetitive requests to the BC Ministry of Environment about effluent allegedly produced by a local fish farm.
- The requestor repeatedly requested water testing data that she was told was not collected. The requestor then informed the Ministry that she would begin to file weekly requests for such data.
- The Ministry of Environment contended that the requestor was not using the Freedom of Information and Protection of Privacy Act for its intended purpose. The requests were therefore vexatious and systematic.
- The adjudicator agreed with the Ministry and observed that the requests were being used as leverage to pressure the Ministry to conduct water testing desired by the requestor.
- The adjudicator who reviewed the case concluded requests were therefore an abuse of the right of access as they were not intended to obtain records.

**Making requests in bad faith (F17-18)**
- The requestor submitted an access request with the City of White Rock to obtain a video which had become temporarily inaccessible due to a broken web-link.
- After becoming aware of the problem, the City instructed the software company responsible for the web-site to repair the issue, which it did the next day. Having been made aware of the repair the requestor filed new access requests for correspondence between the City and the software company.
- The City applied to the Office of the Information and Privacy Commissioner to disregard the requests they deemed to be frivolous and vexatious.
- The adjudicator who reviewed the case concluded that the request for the video was frivolous as it was publicly available. The follow-up request for correspondence between the city and the software company suggested that the requestor did not trust city staff. The request was therefore determined to be frivolous and issued in bad faith.

**ONTARIO**

**Using the access to information system to harass an institution (MO-3292, 2016)**
- The requestor submitted a series of access requests in an attempt to demonstrate that records he believed should have been released were being withheld by the City of Brampton.
- The requestor reported that he possessed records from a similar request previously filed by a third party. Some records from that prior release were not included in his request.
- The requestor informed the City that he intended to continue submitting requests to show that records he sought were being intentionally withheld.
- The City informed the requestor that records which are transitory are not held indefinitely, and that a series of transitory records had recently been destroyed.
- The City denied the follow-up access requests on the grounds they were frivolous and vexatious. The requestor filed a complaint.
- The City’s decision was upheld by the adjudicator who reviewed the case. She observed that the requests were being used as a springboard to attack the city, and the requestor had little interest in obtaining records he was already in possession of.
- The requests were therefore deemed to be an abuse of the right of access.

**Pattern of conduct that amounts to an abuse of right to access (PO-3188, 2013)**

- The requester made a series of 38 access requests to the University of Ottawa over an eighteen-month period. The requests were often repetitive in nature and focused first on the activities of 2 professors, and then on the University’s action in responding to his requests. The requests were extremely broad in nature.
- The University issued a decision declining to proceed with one request on the basis that it was frivolous and vexatious.
- The adjudicator upheld the University’s decision, agreeing that the number of requests made and their repetitive nature established a pattern of conduct that amounted to an abuse of the right of access. The adjudicator also found that the very broad nature of many of the requests placed an unreasonable burden on the University’s resources.
- The adjudicator’s decision provided that the requester’s right of access be limited to one active appeal or request at a time for a period of one year.

**Using access requests to harass (MO-850, 1996)**

- The requestor sought the names of all members of the Midland’s Town Council, their secretaries, all office staff, and the names of all employees of the Town who were related to past or present council members.
- The requestor had a history of submitting a high volume of requests, some of which sought to identify large numbers of individuals or locations which were used to locate other responsive records.
- The requestor acknowledged he saw “nothing wrong with testing or examining the boundaries of the (Municipal Freedom of Information and Protection of Privacy) Act or having fun in filing requests.”
- The Town highlighted the requestor’s history of submitted detailed requests for purposes other than to obtain access, and pointed to specific requests which were intended to harass an employee who was involved in an action brought by the requestor in another forum.
- The Assistant Commissioner concluded that such requests were made in bad faith and were thus frivolous and vexatious.