Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3691

Appeal PA15-212

Office of the Public Guardian and Trustee

January 27, 2017

Summary: The appellant made a request to the Office of the Public Guardian and Trustee (the OPGT) relating to a deceased person's estate. This was one of many similar requests. In responding to the appellant's numerous requests, the OPGT indicated that it was limiting the number of requests from the appellant that it would process at any given time. The appellant appealed to this office, stating that he had not received a proper decision letter. During the processing of this appeal, the OPGT confirmed that it was taking the position that the appellant's requests were "frivolous and vexatious" under section 10(1)(b) of the *Act*.

In this order, the adjudicator finds that the number of requests submitted by the appellant amounts to a pattern of conduct that interferes with the operations of the institution, and accordingly the requests are "frivolous and vexatious" for the purpose of section 10(1)(b) of the *Act* and section 5.1(a) of Regulation 460. The appellant is restricted to five active requests at any given time. The adjudicator also finds that the institution did not issue an access decision that complied with the requirements set out in the *Act*. However, he finds that there would be no useful purpose in requiring the institution to issue a new or revised decision letter in the circumstances of this appeal.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, 10(1)(b), 26, 27.1, and 29; Regulation 460, section 5.1.

Orders and Investigation Reports Considered: Orders 28, M-618, M-697, MO-1921, MO-2201, MO-2436, and PO-2151.

OVERVIEW:

[1] The Office of the Public Guardian and Trustee (OPGT or the institution) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a lawyer at an identified law firm (the appellant) for information relating to a deceased person's estate. The request stated that it was made "for the purposes of advancing and administering the Estate of [the deceased person]" and specifically sought the following information:

- Marital status of the deceased;
- The name of the deceased's spouse;
- The names of the deceased's parents;
- Occupation of the deceased;
- Date of birth of the deceased;
- Place of birth of the deceased;
- Age of the deceased at the date of death; and
- Last known address of the deceased.

[2] The request was made in January of 2015 and was one of many requests submitted by the appellant to the OPGT.

[3] In March of 2015 the appellant filed an appeal with this office on the basis that he had not received a response from the OPGT.

[4] During the processing of this file, the Freedom of Information Coordinator (FOIC) for the Ministry of the Attorney General (the ministry), which processes requests and appeals on behalf of the OPGT, advised this office that it had previously confirmed for the appellant that, due to the number of requests the appellant had made to the OPGT, the OPGT was prioritizing his requests. The OPGT provided copies of correspondence it had earlier sent to the appellant which confirmed that the OPGT would be prioritizing the appellant's requests and dealing with five requests at a time "… in order to ensure that [the appellant's] numerous requests do not interfere with the operations of the office …." The institution therefore took the position that it had responded to the request and was not in a "deemed refusal" position.

[5] The appellant asserted that he had never agreed to prioritizing his requests, and that he is entitled to receive "fully compliant written responses within 30 days" in accordance with the requirements of the *Act*.

[6] This appeal was then transferred to the inquiry stage of the process. I sent a Notice of Inquiry identifying the facts and issues in this appeal to the institution, initially. I asked the institution to address a number of issues including:

- whether the OPGT is in a "deemed refusal" position;
- whether the access decision issued by the OPGT constituted an adequate decision letter in accordance with section 29 of the *Act*;
- whether the OPGT is taking the position that the request for access resulting in this appeal is frivolous or vexatious and, if so, whether the request is frivolous or vexatious.

[7] The OPGT provided representations in response. In its representations the OPGT confirms that it takes the position that the large number of requests made by the appellant is vexatious and an abuse of process. It states:

> It is the position of [the OPGT] that responding to the over 100 requests made by the appellant within 30 days would significantly interfere with the operations of the Ministry.
>
> As stated above, the Ministry has not issued a decision letter as it has yet to open the request in the order described to the Appellant. However, it is the position of the Ministry that the request is frivolous and vexatious within the meaning of Section 5.1 of Regulation 460 and section 10(1) of the *Act*.

[8] I then sent a Notice of Inquiry to the appellant, along with a complete copy of the institution's representations, and the appellant also provided representations to me.

[9] I note that, concurrent with or during the processing of this appeal, the appellant filed numerous additional "deemed refusal" appeals[1] with this office pertaining to his many requests to the OPGT. Due to the identical issues involved, this office put those additional appeals on hold pending the determination of this appeal.

[10] In this order I deal first with the issue of whether the appellant's request is frivolous or vexatious. I then address some of the other issues raised by the parties.

[11] In this order, I find that the number of requests submitted by the appellant amounts to a pattern of conduct that interferes with the operations of the institution, and accordingly the requests are "frivolous and vexatious" for the purpose of section 10(1)(b) of the *Act* and section 5.1(a) of Regulation 460. The appellant is restricted to five active requests at any given time.

---

[1] Approximately 65 deemed refusal appeals.

[12] I also find that the institution did not issue an access decision that complied with the requirements set out in the *Act*. However, I determine that there would be no useful purpose served in requiring the institution to issue a new or revised decision letter in the circumstances of this appeal.

RECORDS:

[13] The appellant seeks access to the following information in relation to a named deceased person: the name of the deceased's spouse; the names of the deceased's parents; and the deceased's occupation, date of birth, place of birth, age at the date of death, marital status and last known address.

[14] The appellant's other requests appealed to this office are similar in nature to the above-noted request.

DISCUSSION:

Additional background information

Duties and Practices of the OPGT in Estate Administration

[15] As background, the OPGT provided the following summary of its duties and practices in estate administration:

> The PGT has the authority under the *Crown Administration of Estates Act* to administer certain estates in Ontario. The PGT is appointed Estate Trustee in approximately 225 new estates every year and has approximately 1,400 estates under administration at any given time. The legislation imposes on the PGT a duty to identify, locate and distribute the estate to the rightful beneficiaries. The majority of estates are intestacies where there is no will, so it is necessary to determine who inherits under the *Succession Law Reform Act.* The Office of the Public Guardian and Trustee (the "OPGT") is actively involved in attempting to locate the next-of-kin, first to verify if the next-of-kin wish to administer the estate themselves, and if not, to obtain their agreement to the PGT's appointment as estate trustee.
>
> The OPGT continues to search for heirs after the PGT is appointed Estate Trustee, consistent with its duty as estate trustee. With often very little information, the Estate Analysts in the Heirship and Research Unit of the OPGT, a small unit of eight people, must build a family tree for the deceased. In many cases there is limited or conflicting information about the deceased's family and it is necessary to retain the professional services of genealogists to conduct searches for next-of-kin in countries all

> over the world. This process can sometimes be lengthy, and the family tree must be updated and sometimes corrected as additional information is received and verified.
>
> The OPGT ensures that the heirs are provided with complete information about the estate, including its value, the OPGT's fees, and the documentation which is required to distribute the estate. Upon locating an heir, the Office assists the heir with the paperwork and research that must be completed to prove the heir's rightful claim to the inheritance. The Office regularly corresponds directly with heirs in Poland, Croatia, Hungary, Ukraine, the Czech and Slovak Republics, Germany, and other countries, in their language, to respond to their questions about the status of administration and of their documentation, to send them an accounting of the estate and release form, and ensure that the funds are forwarded to them in a timely manner.

Preliminary Issue – effect of the adequacy of the decision letter

[16] One of the issues raised in this appeal is whether the institution's decision letter was adequate and conformed with the requirements of the *Act*. I find under my discussion of "additional issues" below that the decision issued by the institution did not conform to the requirements of the *Act*. In particular, although correspondence from the institution to the appellant referred to the restrictions it was placing on the number of requests it would process at a time, and stated that the appellant's actions resulted in "interference with the operations of the institution" and referred to previous orders of this office which found appellants to be frivolous and vexatious,[2] I find below that the institution at no time identified specifically to the appellant that it was taking the position that his requests were frivolous and vexatious, nor that this decision could be appealed to this office.

[17] This office may in certain circumstances order an institution to issue a decision letter in compliance with the *Act*; however, some previous IPC orders have not required an institution to do so if there would be "no useful purpose" in requiring an institution to issue a new or revised decision letter where the original decision letter was found to be inadequate. For example, in Order M-913,[3] the adjudicator found that there would be "no useful purpose" in requiring a new decision to be issued, notwithstanding the inadequacy of the original decision letter, where "the appellant has exercised his right of appeal and provided extensive representations."[4]

---

[2] Citing Orders M-618, M-697, MO-1921 and MO-2436 to support its decision to limit the number of requests.

[3] Upheld on judicial review, *Duncanson v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 2464, 175 D.L.R. (4th) 340 (Div. Ct.)

[4] See also PO-2913.

[18] In this appeal, although I find that the institution's decision was inadequate, the appellant appealed the decision, and the institution's representations identified its position that the appellant's request (in conjunction with his other requests) was frivolous and vexatious. Both parties have made representations on this issue, and I address this issue below. In these circumstances, I find that there would be no useful purpose served in requiring the institution to issue a new or revised decision letter.

Issue A: Is the request for access frivolous or vexatious?

General principles

Section 10(1)(b) reads:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

Section 5.1 of Regulation 460 reads:

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> > (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
> >
> > (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[19] Section 10(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be exercised lightly.[5]

[20] An institution has the burden of proof to substantiate its decision that a request is frivolous or vexatious.[6]

[21] The institution takes the position that the request is frivolous and vexatious

---

[5] Order M-850.
[6] Order M-850.

because of the application of the grounds in section 5.1(a) of Regulation 460. These grounds are:

- The appellant's conduct amounts to an abuse of the right of access;
- The appellant's conduct interferes with the institution's operations;

[22] The institution indicates that section 5.1(b) does not apply in the circumstances of this appeal.

[23] The institution submits that the number of requests made by the appellant is excessive and responding to such a number within 30 days would interfere with its operations. The institution described its process for limiting the appellant to five active requests at one time.

Grounds for a frivolous or vexatious claim

Pattern of conduct that amounts to an abuse of the right of access

[24] The institution takes the position that the appellant's requests form a "pattern of conduct that amounts to an abuse of the right of access."

[25] In determining whether the appellant's conduct amounts to an abuse of the right of access, the following factors may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- The number of requests and whether it is excessive by reasonable standards.
- The nature and scope of the requests. Whether they are excessively broad and varied in scope or unusually detailed, and whether they are identical or similar to previous requests.
- The purpose of the requests and whether they are intended to accomplish an objective other than gaining access. Whether they are made for "nuisance" value or for the purpose of harassing the institution or burdening its system.
- The timing of the requests connected to the occurrence of some other related event, such as court proceedings.[7]

[26] The institution's conduct may also be a relevant consideration weighing against a "frivolous or vexatious" finding. However, misconduct on the part of the institution does not necessarily negate a "frivolous or vexatious" finding.[8]

---

[7] Orders M-618, M-850 and MO-1782.
[8] Order MO-1782.

Representations

[27] In support of its position that the request is part of a pattern of conduct that amounts to an abuse of the right of access, the institution refers to the volume of requests made by the appellant. It states:

> … the number of requests made by the Appellant is excessive by reasonable standards. The Appellant made 37 requests for access between October 8, 2014 and December 2, 2014, a period of six weeks. He was advised at that time that responding to the requests within 30 days would interfere with the operations of the institution and as a result that only 5 requests would be processed at a time. He subsequently made further access requests and [to the date of the filing of the representations] has made 116 requests …: 59 requests have been dealt with and the files closed; 57 requests have not yet been opened and are inactive; 5 active requests. In addition to the requests from the Appellant, the OPGT, which is part of the Ministry, also receives numerous requests from other requesters with regard to estates which must be processed, in addition to meeting its statutory duties to administer estates and search for heirs.

[28] The appellant's position is that his request(s)[9] are not frivolous or vexatious. He states:

> … numerous [IPC] Orders establish that the *Act* clearly "requires that each request be treated separately, and that each request must be considered on its own merits to determine whether a search for responsive records would unreasonably interfere with its operations."[10]
>
> … there is nothing in the submission of the Ministry to indicate, or in the requests or conduct of the Appellant, that amount even in the slightest to reasonable grounds of bad faith by the Appellant or for a purpose other than to obtain access as lawfully permitted under the *Act*.
>
> The Appellant states that in the overwhelmingly majority of all of the requests that have been submitted by the Appellant, the response by the Ministry amounts to photocopying approximately 3 – 4 pages of existing documents on their existing file. Despite the Ministry's submission that the number of requests made by the Appellant is "excessive by reasonable standards" they then go on in their own submission to confirm that many

---

[9] Although this order only specifically addresses the appellant's appeal of the institution's response to one particular request, the analysis that follows considers the request in conjunction with the appellant's other requests to the OPGT.
[10] Order M-697.

> of the requests have already been complied with. Further in support of its position, the Ministry states that it "also receives numerous requests from other requestors with regard to estates which must be processed...". [T]he Ministry has not substantiated its decision, and it has not met the overwhelming burden of proof to substantiate its arbitrary decision. … [The IPC] should not allow the Ministry to exercise any discretion in these circumstances as it would not be within the spirit and intent of the *Act* (and which discretion it is submitted does not exist in any event and would only amount to an *ultra vires act* and an abuse of power by the Ministry).

[29] The appellant then provides a copy of a short response received from the institution in response to one of his requests, as an example of "the brevity of its FOI requests". He then states:

> There is nothing in the nature and scope, purpose of the request, or timing of the request that would indicate any abuse of process or frivolous or vexatious conduct by the Appellant.
>
> The Appellant submits that the purpose of each request is in accordance with the Act, and previous Orders of the Information Privacy Commissioner. In regard to timing the requests, the Appellant submits that prior to this Appeal being submitted, it was receiving responses to requests for information at a rate of an average of less than 1 response per week from the Ministry, and that if the Ministry's submission is that it processes 6,000 requests per year, then it is the submission of the Appellant that the Ministry's arbitrary decision to limit the number of the Appellant's requests that it will process is in itself, in the absence of any further evidence of any other administrative processing limitations imposed, on its face, prima facie, of bad faith on the part of Ministry.

[30] The appellant refers to the actions of the institution and states that it there has been bad faith on the part of the FOI office and OPGT in not complying with the 30-day time limit imposed by the *Act*. He also provides lengthy representations on his concerns regarding how the institution responded to his requests, which I address below.

Analysis and Findings

[31] I will now review the four factors set out above to determine whether there is a pattern of conduct that amounts to an abuse of the right of access.

The number of requests and whether it is excessive by reasonable standards

[32] Regarding the quantity of requests, the institution states that the appellant made 37 requests for access between October 8, 2014 and December 2, 2014. The appellant indicates in a letter to the institution that:

> … between September 29th and December 2nd, 2014 … we have made 40 access to information requests regarding deceased individuals, in addition to 2 requests regarding lists of Deceased Estates funds escheated to the Crown that have been transferred to the Consolidated Revenue Fund. We have already voluntarily limited ourselves so that the requests may be reasonably responded to.

[33] Based on the above, both the institution and the appellant note approximately 40 requests being made in an approximately 9-week period. Projecting that quantity over an entire year would result in over 230 requests.

[34] The institution has also stated that:

> [The appellant] subsequently made further access requests and to date has made 116 requests since October 2014.

[35] It is notable that, for the period of time which would result in a calculation of 230 requests a year, the appellant indicates that he has voluntarily limited the number of requests he has made.

[36] I consider the number of requests to be equal to 230/year and find that this number of requests is excessive by reasonable standards.

The nature and scope of the requests.

[37] In considering this factor, I must consider whether the requests are excessively broad and varied in scope or unusually detailed, and whether they are identical or similar to previous requests.

[38] On my review of the request resulting in this appeal, and the other requests made by the appellant, I find that the nature and scope of the requests are not excessively broad and varied in scope or unusually detailed. The appellant clearly identifies the specific information from the various files that he is interested in, and restricts the requests to that information. Although the requests are similar in nature (that is – they are for the same type of information from various files), they are not for the same information from the same files, nor do they appear to be repetitive or overlapping with other files.

The purpose of the requests

[39] In reviewing the purpose of the request, I must determine whether they are intended to accomplish an objective other than gaining access. Whether they are made for "nuisance" value or for the purpose of harassing the institution or burdening its system.

[40] The parties have provided little information about the purpose of the appellant's requests, although the appellant confirmed that he is involved in "international heir

locate and estate work". I note that the request at issue in this appeal, which is for specific historic information about the deceased individual whose estate is being administered, is similar to previous requests made by "heir tracers" (organizations that are in the business of identifying and locating heirs of estates that have not been claimed or have escheated to the Crown) and addressed in previous orders issue by this office.[11] Given the nature of the request, it appears the appellant is making the request(s) to access information to assist him in his business ventures. Based on the appellant's own statement, it appears that the number of requests he could make is constrained only by his "voluntary limit" on that number, and that he intends to continue to seek access to records of the nature requested indefinitely.

[41] In the circumstances, I find that the purpose of the appellant's request is to obtain access to the requested information, and is not intended to accomplish an objective other than gaining access.

The timing of the requests

[42] In reviewing the timing of the requests, one factor to consider is whether they are connected to the occurrence of some other related event, such as court proceedings.[12]

[43] I note that the requests are not specific to or restricted by a limited time period – for example, these requests are not specific to identified litigation or particular matters that will end.

[44] However, with respect to the timing of the requests, I note that the appellant has indicated that he has voluntarily limited the number of requests he made during the identified time period.

<u>Finding</u>

[45] In considering the factors set out above, I am not satisfied that the appellant's conduct amounts to an abuse of the right of access. Although the number of requests made by the appellant is excessive by reasonable standards, given the limited nature and scope of the requests, my finding that the purpose of the requests is to obtain access to the requested information, and the fact that the timing of the requests is not connected to other related events, I find that the institution has not established that the requests are frivolous and vexatious on the basis that the appellant's conduct amounts to an abuse of the right of access.

---

[11] See for example Orders PO-1736 and PO-1790-R (upheld on judicial review, *Public Guardian and Trustee v. David Goodis, Senior Adjudicator and John Doe, Requester*, Tor. Doc. 490/00 (Div. Ct.)), and PO-2877.

[12] Orders M-618, M-850 and MO-1782.

Pattern of conduct that would interfere with the operations of the institution

[46] A pattern of conduct that would "interfere with the operations of an institution" is one that would obstruct or hinder the range of effectiveness of the institution's activities.[13]

[47] Interference is a relative concept that must be judged on the basis of the circumstances a particular institution faces. For example, it may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government institution, and the evidentiary onus on the institution would vary accordingly.[14]

What is the pattern of conduct?

Quantity of requests

[48] I reviewed this issue above and found the number of requests to be equal to 230/year. I also found that this number of requests is excessive by reasonable standards.

[49] In addition, I note that there is no suggestion that this number will decrease over time. In fact, the appellant has confirmed that this number of requests represents his own voluntary restriction on the number of requests he makes.

The nature and scope of the requests

[50] I found above that the nature and scope of the requests are not excessively broad and varied in scope or unusually detailed. The appellant clearly identifies the specific information from the various files that he is interested in accessing, and restricts the requests to that information. Although the requests are similar in nature (that is – they are for the same type of information from various files), they are not for the same information from the same files, nor do they appear to be repetitive or overlapping with other files.

[51] However, I must also consider the impact of the nature and scope of the requests on the institution.

[52] With respect to the nature of his requests, I accept the appellant's submission that many of his requests may result in 3 - 4 pages of documents. However, the number of responsive pages does not necessarily reflect the amount of work required to respond to his requests.

[53] The institution describes its process of responding to each of the appellant's requests as follows:

---

[13] Order M-850.
[14] Order M-850.

> It takes the Ministry a significant amount of time to respond to FOI requests. Once a request is received, it is actioned to the appropriate program area, in this case the OPGT. When the OPGT receives a request, it is necessary to determine whether it has an estate file. At that time, counsel is assigned and contacts the Estate Analyst and Team Leader to determine the status of the estate (e.g. has the PGT been appointed estate trustee, have the heirs been located, has the estate been administered, etc.). For older estates the file must be requested from storage. The file is reviewed for responsive records, copies of responsive records are made and analysed to determine whether any exemptions apply and information severed where appropriate. In reviewing the records, the Estate Analyst and Counsel must verify whether the records contain the most current information as in some cases the information regarding the deceased's family was incorrect when the file was first opened. This may involve reviewing numerous reports and correspondence from genealogists and family members, vital statistic documents, court records, etc.

[54] The appellant has provided evidence that the results of one request did not require significant effort on the part of the institution; however, based on the nature of the requests and the representations of the institution, I find that responding to each request takes a significant amount of time on the part of the institution – as the institution must consider where records are located, and:

- Locate the files (from various places);
- Review the files (which may include voluminous estate files)
- Locate the requested information in the files (which may be fairly straightforward in some files, but may involve significant review of individual pages in other files);[15]
- Review the responsive information to determine whether exemptions apply, and issue access decisions in accordance with the requirements of the *Act*.

<u>Would the pattern of conduct interfere with the operations of the institution?</u>

Representations

[55] In this appeal, the request was made to the OPGT. The OPGT is an institution listed on the schedule of institutions in Regulation 460. The OPGT's duties and practices in estate administration are set out by the institution above.

---

[15] I accept that time spent searching for records can be charged back to the requester under the fee structure established in the *Act*; however, this does not necessarily speak to the issue of whether the pattern of conduct interferes with the operations of the institution.

[56] Also of note is the fact that the OPGT is part of the Ministry of the Attorney General, and that requests for access are initially processed by the FOIC for the ministry. In the material provided by the ministry, the ministry states that the appellant's pattern of conduct is interfering with the operation of the institution. It states:

> To provide some background, the Justice Cluster ministries (the Ministry of the Attorney General and the Ministry of Community Safety and Correctional Services) employ 11 FOI analysts who deal with numerous requests from various individuals (over 6000 requests were received in 2014), which makes it impossible to assign two or more analysts to deal with one requester."

[57] The ministry has also confirmed that, although the ministry's FOI office processes the request, it is actioned to the OPGT which then receives the request and must:

- determine whether it has an estate file;
- if so, assign counsel and contact the Estate Analyst and Team Leader to determine the status of the estate;
- for older estates, request the file from storage;
- review the file for responsive records;
- copy and analyse responsive records to determine whether any exemptions apply, and sever information where appropriate;
- verify the currency of the information in the files, which may involve reviewing numerous reports and correspondence from other parties.

[58] The appellant argues that the institution has shown that it can process a significant number of requests, as evidenced by their confirmation that many of the appellant's requests have already been complied with. The appellant also points to the institution's statement that it "also receives numerous requests from other requestors with regard to estates which must be processed...", presumably in support of his position that his requests are not interfering with the operations of the institution. The appellant also states that, prior to this appeal being submitted, he was receiving responses to requests for information at a rate of an average of less than 1 response per week from the institution, which in his view is unsupportable given the ministry's statement that it processes 6,000 requests per year.

[59] In addition, in response to the institution's position that the Justice Cluster ministries pool their resources to respond to FOI requests, the appellant states:

> … this confirms that the Ministry of the Attorney General "Clusters" with other Ministries in regard to resources in regard to Freedom of Information Requests. The Appellant submits therefore that, the resources of the entire Government of Ontario and all 28 Ministries are to be considered … as resources available to the Ministry of the Attorney General to assist when required by the number of requests received. It is submitted … that in a democratic, open, and transparent society it should not be possible for an institution of government to constrain properly submitted freedom of information requests by reducing the number of employees allocated to processing requests for information. Where the *Act* requires a complete written response within 30 days, the institution must comply.
>
> The Appellant submits the aforementioned statistics to show that the Ministry has the resources, or is able to obtain the resources, necessary to comply with the prescriptive 30 day time limit established in the *Act*.

Analysis and findings

[60] As noted above, a pattern of conduct that would "interfere with the operations of an institution" is one that would obstruct or hinder the range of effectiveness of the institution's activities.[16] Interference is a relative concept that must be judged on the basis of the circumstances a particular institution faces.

[61] Furthermore, Order PO-2151 identified the nature of the information required to establish an "unreasonable interference with the operations of an institution" as follows:

> Previous orders of this office have considered the meaning of the term "unreasonable interference with the operations of an institution" in the context of claims that a request is frivolous or vexatious. Although made in a different context, they provide some guidance in assessing this issue.
>
> Applying the findings in these previous orders, it appears that in order to establish "interference", an institution must, at a minimum, provide evidence that responding to a request would "obstruct or hinder the range of effectiveness of the institution's activities" (Order M-850). ...
>
> ... [W]here an institution has allocated insufficient resources to the freedom of information access process, it may not be able to rely on limited resources as a basis for claiming interference (Order MO-1488).
>
> In Order M-583, former Commissioner Tom Wright noted that, "government organizations are not obliged to maintain records in such a

---

[16] Order M-850.

> manner as to accommodate the various ways in which a request for information might be framed."
>
> Similarly, government organizations are not obligated to retain more staff than is required to meet its operational requirements. I qualify this point, however, by adding, as I noted above, that an institution must allocate sufficient resources to meet its freedom of information obligations (Order MO-1488).
>
> In my view, a determination that producing a record would unreasonably interfere with the operations of an institution is dependent on the facts of each case.[17]

[62] I have found above that 230 requests in one year is an excessive number of requests, however, it is not only the number of requests that determines whether they would interfere with the operations of an institution.[18] In making my determination, I must consider all of the circumstances.

[63] In the circumstances of this appeal, I find that the appellant's requests amount to a pattern of conduct that would interfere with the institution's operations. I make this finding based on the number of requests made by the appellant and the amount of work required by the institution to respond to each of the requests, including who within the institution is available to process the requests. In particular, I note that although the institution's FOI office initially processes the request, the requirements to review specific estate files are actioned to those within the office of the PGT familiar with the nature and content of the files.[19]

[64] I have also considered whether the relief provided by the *Act* would be sufficient to address the institution's concerns that responding to the request would interfere with its operations. This relief includes the cost recovery mechanisms provided by the *Act* which may permit the institution to mitigate or avoid any such interference.[20] In my view, and particularly based on the institution's evidence regarding the expertise required to locate and review the information contained in the estate files, I am not satisfied that the cost recovery mechanisms provided by the *Act* would permit the institution to mitigate or avoid any such interference.

[65] In addition, I note that previous orders of this office have encouraged institutions

---

[17] See also Order PO-2752.
[18] For example, in Order MO-2289, Adjudicator Corban found that 600 requests to the City of Toronto would not interfere with the operations of the institution.
[19] Although the institution references the possibility of having one or two of the 11 FOI analysts "dedicated to deal with one requester," the other information provided by the institution confirms how requests are processed, and by whom.
[20] I considered, in particular, the fee provisions in the *Act*.

to allocate resources to deal with an unexpected influx of requests;[21] however, such allocations are intended as an "emergency" solution to what is seen as a temporary situation. In this case, there is no indication that the appellant intends to cease making numerous requests to the institution. In the circumstances, I am satisfied that this "emergency" solution is not appropriate in the context of these requests.

[66] Lastly, I have considered the appellant's suggestion that there has been bad faith on the part of the institution in responding to his requests, and that this should be a factor in determining whether the request is frivolous and vexatious. In the circumstances, I find that there has not been bad faith on the part of the institution, and do not find this to affect my decision in this appeal.

[67] Accordingly, I find that the institution has established that the requests submitted by the appellant amount to a pattern of conduct that would "interfere with the operations of the institution." As a result, I find that the requests are "frivolous or vexatious" for the purpose of section 10(1)(b) of the *Act*, with reference to section 5.1(a) of Regulation 460.

Remedy

[68] Where a request is found to be frivolous or vexatious, this office will uphold the institution's decision. In addition, this office may impose conditions such as limiting the number of active requests and appeals the appellant may have in relation to the particular institution.[22]

[69] I invited representations from the parties on the possible remedy that may be appropriate in the circumstances of this appeal. The institution responded by stating:

> The IPC has the authority to impose conditions on processing FOI requests. The Ministry has limited the Appellant to five active requests at one time, which is quite generous, given that several IPC orders limit frivolous and vexatious requesters to one request at a time (e.g. MO-2436, MO-1921 and M-618). The Ministry submits the current process of limiting the Appellant to five active requests at one time is reasonable in the circumstances and should be upheld by the IPC and should also include appeals submitted by the Appellant.

[70] The appellant takes the position that, given the actions of the institution, the only appropriate remedy is for the institution to respond to his requests in accordance with the *Act*.

[71] In the circumstances, and based on the evidence provided by the parties and the

---

[21] Orders PO-2168 and MO-3230.
[22] Order MO-1782.

nature of the request(s) being made by the appellant, I find that an appropriate remedy is to restrict the appellant to five active requests at any given time. Assuming most requests are processed within 30 days, this number allows the appellant to have upwards of 60 requests processed per year.

[72] I have also considered the institution's request that, if the appellant is restricted to five active requests at any given time, this should also include appeals. Previous orders issued by this office finding that requests are frivolous and vexatious frequently restrict the total number of transactions (requests and appeals) which may proceed at a given time under the *Act*. I have considered whether the restrictions should include a restriction on the number of appeals; however, I have decided not to restrict the number of appeals because: (1) based on the information provided by the parties, there is no suggestion that denial of access to information on the basis of identified exemptions or exclusions occurs regularly with the appellant's requests; and (2) I have no evidence regarding who in the institution would be processing the appeals if they are filed with this office. As a result, I will not restrict the number of appeals which may be processed by this office in this order.

Additional issues – adequacy of the institution's decision

[73] As noted above, when this file was transferred to the inquiry stage of the process, I invited representations on a number of issues in addition to whether the OPGT was taking the position that the requests were frivolous and vexatious. These issues included whether the OPGT was in a deemed refusal position and whether the access decision issued by the OPGT constituted an adequate decision letter in accordance with the requirements of the *Act*.

<u>Background</u>

[74] In response to an earlier Notice of Inquiry sent to the parties at the intake stage of the appeal process, the institution provided this office with copies of three letters (dated December 2, 2014, December 29, 2014 and February 3, 2015) that had been sent to the appellant in relation to previous access requests made by the appellant.

[75] In the institution's December 2, 2014 letter to the appellant, with the subject line "Notice of Request for Prioritization", the institution notes that the appellant had filed 37 access requests between October 8, 2014 and December 2, 2014. At that time, 15 requests had been processed, the institution was working on 8 of the requests, and the remaining 14 requests had not yet been assigned. The letter then stated:

> On November 24, 2014, [an assigned representative] contacted you to let you know that we could not deal with all of your requests, as this would interfere with the operations of this office.
>
> At that time, you indicated that you would be making many more requests, and refused to prioritize them.

> In order to ensure that your numerous requests do not interfere with the operations of the office, we will be dealing with five requests at a time and are asking you to prioritize them accordingly by December 16, 2014.
>
> If you do not prioritize the request by the above-noted date, we will deal with them five at a time in the order listed below.

[76] The letter then set out a table listing the appellant's remaining 14 requests. It then reads:

> Any requests coming in after the date of this letter will be added, in order of arrival, to the bottom of this list.

[77] The letter concludes by inviting the appellant to send his prioritization in writing.

[78] In a responding letter dated December 10, 2014, the appellant indicated that he had "already voluntarily limited [himself] so that the requests may be reasonably responded to", noted various errors in the institution's response, and stated:

> It is our position… that we are entitled to, pursuant to section 26 of the *Act*, an accurate response within 30 days of our requests being received.

[79] In its letter of December 29, 2014, the institution stated as follows regarding the processing of the appellant's requests:

> This letter is in response to concerns you outlined in your correspondence of December 10, 2014, around the processing of your Freedom of Information requests. …
>
> Although there is a 30-day timeline set out for responding to requests under the *Act*, there may be extenuating circumstances, which on occasion could result in a further delay… In addition, there are times where the records may be voluminous and additional time is required to extract the relevant information in responding to the inquiry. Section 27(1) of the *Act* sets out these parameters. Nevertheless, in this case, the analyst dealing with the file called you to inform you that extra time was needed due to the records being in a different location. …
>
> Lastly, in our letter dated December 2, 2014, we noted you had made 37 requests to date and you have since made further requests. In order to ensure there is no interference with the operation of the institution, you were asked to prioritize your requests and that we would deal with five active requests at one time. Please review IPC orders: M-618, M-697, MO-1921 and MO-2436, which support our decision to limit the number of requests.

[80] The appellant's responding letter dated January 27, 2015 noted that he had not received a notice of extension under section 27 of the *Act* for any of his requests, and that he did not agree to the chronological processing of its requests. He stated:

> It is our position that we are entitled to received fully compliant written responses within 30 days, and that your office is legally bound by the legislation to this time period.

[81] The institution's letter of February 3, 2015 reaffirms that "[p]rioritization of [the appellant's] numerous requests will continue, in order to avoid interference with the operation of the institution, which must prioritize many work related demands with finite resources." The letter also directs the appellant to appeal any dissatisfactory decisions to this office.

[82] In May of 2015 the institution provided this office with the following explanation of its position:

> The Ministry's position is that these [appeals] are not deemed refusals. In fact, these requests have yet to be opened, because we are currently prioritizing the numerous requests received [from the appellant] and only dealing with five active requests at one time.
>
> Initially, we attempted to arrive at a solution which would be amenable to both the requester and the Ministry and we attempted to work with the requester by asking him to prioritize his numerous requests according to his needs. At that time, the individual did not contact us.
>
> In light of this, in addition to the fact that the requester continued to make numerous requests, the Ministry was placed in the position of limiting the number of active requests at one time by this individual, because his requests were interfering with the operations of the institution. …

[83] This appeal was then transferred to me to continue the inquiry stage of the process. In response to the Notice of Inquiry I sent to the appellant, the appellant provided extensive representations setting out a chronology of his responses to the institution's position. This included his correspondence with the institution between December of 2014 and April of 2015, his contacts with his MPP and representatives of OPGT to "discuss ongoing issues." The appellant summarizes his view of these attempts and states:

> … we unequivocally reject, in every sense, the Ministry's representation that the Ministry's letters of December 2, 2014, December 29, 2014, and February 3, 2015 [footnotes omitted] were parts of attempted negotiations with the Appellant, to process requests for information.

> The fact is that the Ministry arbitrarily imposed a limit on the Appellant's requests, and then attempted to negotiate the Appellant's acquiescence of the arbitrarily imposed limit. At no point in time did the Ministry come to the table to discuss processing and number of requests.
>
> In fact, it is the Appellant who made sincere attempts, which were always undertaken in a professional and courteous manner, to attempt to negotiate a reasonable resolution. …

Adequacy of the institution's decision

[84] The above events raise the issue of whether the institution's response to the appellant's request was in accordance with the requirements of the *Act.* Sections 26, 27.1 and 29 are relevant to this issue. The relevant portions read:

> 26. Where a person requests access to a record, the head of the institution to which the request is made or if a request is forwarded or transferred under section 18, the head of the institution to which it is forwarded or transferred, shall, subject to sections 27, 28 and 57, within thirty days after the request is received,
>
> > (a) give written notice to the person who made the request as to whether or not access to the record or a part of it will be given; and
> >
> > (b) if access is to be given, give the person who made the request access to the record or part, and if necessary for the purpose cause the record to be produced.
>
> 27.1 (1) A head who refuses to give access to a record or a part of a record because the head is of the opinion that the request for access is frivolous or vexatious, shall state in the notice given under section 26,
>
> > (a) that the request is refused because the head is of the opinion that the request is frivolous or vexatious;
> >
> > (b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; and
> >
> > (c) that the person who made the request may appeal to the Commissioner under subsection 50 (1) for a review of the decision.
>
> (2) Sections 28 and 29 do not apply to a head who gives a notice for the purpose of subsection (1).

> 29. (1) Notice of refusal to give access to a record or part under section 26 shall set out,
>
> (a) where there is no such record,
>
> (i) that there is no such record, and
>
> (ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists; or
>
> (b) where there is such a record,
>
> (i) the specific provision of this *Act* under which access is refused,
>
> (ii) the reason the provision applies to the record,
>
> (iii) the name and position of the person responsible for making the decision, and
>
> (iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

Representations and findings

[85] The institution takes the position that its letters sent to the appellant setting out the approach it was taking to his requests were appropriate. The institution submits that sections 26 and 29 are not applicable because of the manner in which the institution had responded to the appellant's earlier requests. It states:

> Due to the large number of requests submitted by the Appellant, the [ministry] limited the number of requests from the Appellant to five open requests at any given time in order to process his requests in a timely manner without interfering with the operations of the Ministry. This request was received by [the ministry] on January 29, 2015, however, as there were already five open requests the request was not opened.

[86] The appellant takes the position that the institution's decision does not conform with the requirements of the *Act*. He states:

> Pursuant to section 29(4) of the *Act* the Ministry has failed to provide written notice as required by section 26 of the *Act* on numerous occasions to requests by the Appellant. It is submitted that, the Ministry cannot circumvent the *Act* by its effort to constrain access to information. …

> It is a fact that each request submitted by the Appellant has been properly submitted in accordance with the *Act*, including all requirements and fees. Moreover, it is a fact that at no time has the Ministry contested this. It is also a fact that the Ministry did not respond in writing within 30 days as required by the *Act* – which is also not denied and is, in fact, admitted by the Ministry. Yet, despite the overwhelming evidence to the contrary, the Ministry continues to assert in its written submission that it is "not in a deemed refusal position"
>
> The Appellant submits that there are no Orders at present by the Information and Privacy Commissioner restricting the numbers of requests the Appellant may submit to the Ministry, or under the *Act*; and further that the Municipal Orders referred to by the Ministry in this case are under a different *Act*, and have no application to the Ministries of the Government of Ontario.

[87] The institution refers to its three letters to the appellant (dated December 2, 2014, December 29, 2014 and February 3, 2015) in support of its position that it properly responded to the appellant's requests. I note that two of these letters pre-date the particular request at issue in this appeal, but were provided to this office by the institution to support its position that it appropriately responded to the request, and to demonstrate the institution's process of limiting the appellant to five active requests and inviting him to prioritize his requests.

[88] The letters each state in varying ways that the institution seeks to "avoid interference with the operations of the institution" by limiting the appellant to five active requests and by the prioritizing of those requests. An "interference with the operation of the institution" could serve as a basis for a time extension under section 27(1) of the *Act* or as a basis for claiming a request is "frivolous or vexatious" under section 27.1(1) of the *Act* in conjunction with section 5.1(a) of Regulation 460. However, the institution did not explicitly identify that it was taking the position that the appellant's request was frivolous and vexatious until making that specific argument in its representations. Neither party takes the position that the institution issued a time extension decision.

[89] Neither of the December letters indicate any right to appeal to the IPC. While the February 3 letter does state "if you are dissatisfied with decisions being issued by our office, you have the right to appeal, within 30 days of the receipt of any decision letter to the IPC", the institution has not claimed that this letter is a "decision". In the circumstances, I find that the institution's indication of a "right to appeal" in its February letter refers generally to the decisions which the institution had been or would be issuing in response to the appellant's requests while dealing with them five at a time.

[90] I do not agree with the institution's submission that "sections 26 and 29 are not applicable". Section 26 requires that a request receive a response "within thirty days

after the request is received", and section 29 sets out the necessary contents of a decision denying access, as well as what constitutes a "deemed refusal". Accordingly, I find that there has not been a proper decision letter in response to the request at issue in this appeal.

[91] I have also considered the institution's position that it sought to enter an agreement with the appellant regarding the processing of his requests – that is – prioritizing them and processing five requests at a time. I note that the appellant "unequivocally rejects" the institution's position that its response letters constituted attempted negotiations with the appellant to process requests for information.[23]

[92] Previous orders of this office have accepted that an institution and requester may come to a mutual agreement regarding the processing of requests outside the timelines stipulated by the *Act*. In Order 28, former Commissioner Linden identified the following as a legitimate course of action that an institution might consider when compliance with the time limits set out in the *Act* places an inordinate strain on resources:

> Negotiate with the individual requester who sends in numerous requests as to whether the requester would consent to waive the 30 day limit for each of the requests in favour of a response within 30 days in respect of certain "priority" requests and a longer time for response in respect of others.

[93] Previous orders have also confirmed that there is nothing to prevent an institution and requester from negotiating a mutually agreeable schedule for the processing of a requester's multiple or numerous access requests. However, where any such negotiations fail to achieve a mutually agreeable result, it is incumbent on the institution to proceed according to the timelines specified in the *Act*. In Order M-697, the adjudicator dealt with several appeals in which the institution and appellant had initially attempted negotiations, but ultimately ended up with appeals to the IPC. The adjudicator stated:

> While I commend both parties for their earlier attempts to work together in achieving their objectives, my findings must be based on the wording of [the applicable sections of the *Act*].

[94] More recently, Commissioner Beamish confirmed the supervisory role of this office over the processes of institutions under the *Act*:

> …[W]here an institution's processes for access to information are not specifically established in the *Act* or by regulation, this office has the authority to review, comment on and establish processes for institutions.

---

[23] I note, however, that the appellant does states that he made sincere attempts to attempt to negotiate a reasonable resolution.

> In its oversight role under the *Act*, this office has the authority to control its own processes and to supervise the processes of institutions under the *Act* in a manner that is consistent with the purposes of the *Act* and with a view to minimizing or eliminating the potential for abuse.[24]

[95] Similarly, while I agree that institutions and requesters may attempt to work together in resolving access requests, if those efforts do not succeed and the matter goes to appeal, my findings must be based on the wording of the *Act*.

[96] The institution and the appellant both comment on their efforts to "work with" the other party and/or "negotiate a reasonable resolution." The institution asserts that it was attempting to negotiate, and the appellant asserts that it is he who made "sincere attempts … to attempt to negotiate a reasonable resolution." Although I will not comment on the sincerity of either side's efforts to negotiate with the other, it is evident that there was no mutual agreement regarding the processing of the appellant's numerous requests (including the one specifically at issue here). The institution took the position that the numerous requests were interfering with its operations and accordingly imposed a limit, and the appellant expected a response to each of his requests within 30 days as required by the *Act*.

[97] The institution's correspondence confirms its position that responding to the appellant's numerous requests would interfere with its operations, yet it did not explicitly claim that any of the requests were "frivolous or vexatious" until doing so in its representations on this appeal. Under section 27.1(1) of the *Act* (in conjunction with section 5.1 of the Regulation), when the head of an institution concludes that a request is "frivolous or vexatious", the *Act* allows the institution to take the position that the "request is refused". Section 27.1(1) does not provide the institution with other options.

[98] The IPC decisions relied on by the institution (M-618, M-697, MO-1921, MO-2436) do not support the institution's decision to unilaterally impose a limit on the appellant's number of active requests. In all of these decisions, the institutions issued formal decisions which either denied access, claimed a lengthy time extension, or refused to process the requests on the basis that they were frivolous or vexatious.[25]

[99] In my view, absent an agreement between an institution and a requester, the *Act* does not allow an institution to unilaterally impose a limit on the number of active requests allotted to a requester, and certainly not without first issuing a formal decision claiming section 27.1. Given what appears to be obvious dissatisfaction on the appellant's part with the institution's collective response to his numerous requests, the

---

[24] MO-2201. See also MO-2063.

[25] I do not accept the appellant's submission that the municipal *Act* and IPC orders issued under it "have no application to the Ministries of the Government of Ontario." The principles enunciated in a municipal order may be relevant in the provincial context, given that the municipal and provincial statutes are "clearly parallel" (See, for examples, Orders P-537, M-700 and P-1311).

institution's proper course of action would have been to issue a formal decision claiming section 27.1 of the *Act*. The institution did not do so, and therefore it did not issue a decision that complied with the requirements set out in the *Act*. However, as set out above, I will not review this issue further as there would be no useful purpose in requiring the institution to issue a new or revised decision letter in the circumstances of this appeal.

ORDER:

1. I find that the request which resulted in this appeal (in conjunction with the other requests made by the appellant) is frivolous or vexatious under section 10(1)(b) of the *Act*. As a result, this appeal is dismissed, without prejudice to the appellant's right to submit a new request for information in accordance with the processes set out below.

2. I impose the following conditions on the processing of any requests from the appellant with respect to the OPGT now and for a specified time in the future:

    a. For a period of one year following the date of this order, I am imposing a five-request limit on the number of requests under the *Act* that may proceed at any given point in time, including any requests that are outstanding as of the date of this order.

    b. Subject to the five-request limit described in provision 2(a) above, if the appellant wishes any of his requests that now exist with the OPGT, including the request that gave rise to this appeal, to proceed to completion, the appellant shall notify both this office and the OPGT and advise as to which matter(s) he wishes to proceed.

    c. Pending this notification, current appeals with this office shall be placed on hold and any outstanding requests stayed.

3. The terms of this order shall apply to any requests made by the appellant or by any individual, organization or entity found to be acting on his behalf or under his direction.

4. At the conclusion of one year from the date of this order, the parties may apply to this office to seek to vary the terms of this order, failing which its terms shall continue in effect until such time as a variance is sought and ordered.

5. This office remains seized of this matter for whatever period is necessary to ensure implementation of, and compliance with, the terms of this order.

Original Signed by: January 27, 2017
Frank DeVries

Senior Adjudicator