Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4046

Appeal PA19-00031

University of Ottawa

June 1, 2020

Summary: In this order, the adjudicator does not uphold the University of Ottawa's decision to refuse to process part of a two-part access request it received under the *Freedom of Information and Protection of Privacy Act* as frivolous or vexatious under section 10(1)(b) of the *Act*. The adjudicator finds that this part is not frivolous or vexatious and she orders the university to continue to process it, as it had initially begun to do after issuing a fee estimate and interim access decision. Given the scope of this part of the request, however, the university is permitted additional time to issue its final access decision.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31, as amended, sections 10(1)(b) and 27.1; section 5.1 of Regulation 460.

Orders Considered: Orders M-850, M-906, PO-2634, PO-3257, PO-3298 and PO-4035.

OVERVIEW:

[1] This order addresses an individual's appeal of the decision issued by the University of Ottawa (the university) in response to part of a multi-part access request she submitted to the university under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to records relating to her postgraduate medical education (PGME) program at the university, including records about her residency at the Children's Hospital of Eastern Ontario (CHEO). She asked for meeting minutes, notes, files, and correspondence, including emails, mentioning her, and listed 18 specific physicians; the request stated that additional physicians could be identified as participants in the committees, departments, programs, offices and roles

listed in the request. For any emails that were identified as responsive, the requester also sought the backup emails of those physicians. This order addresses only the portion of the request related to seeking access to the backup emails, which the university identified as the "second part" of the request.

[2] In response to it, the university issued an interim access decision dated September 13, 2018, including a fee estimate of $4,500.00 to process the request for the backup emails. The university issued a revised fee estimate of $2,250.00 on October 22, 2018 and requested a deposit of $1,125.00 before it would proceed with processing that part of the request. The requester advised the university in early December that she wished the university to process it.

[3] Subsequently, however, the university reconsidered its position and issued a new decision on December 13, 2018 in which it denied access to the backup emails on the basis of its view that this part of the request is "frivolous or vexatious" under section 10(1)(b) of the *Act*. In this decision, the university stated:

> Access to backup emails is refused because I have concluded that this part of your request is frivolous and vexatious pursuant to section 10(1)(b) of the *Freedom of Information and Protection of Privacy Act*. More specifically, the university takes the position that this part of your request is frivolous and vexatious because, as stated under section 5.1(a) of Regulation 460, it is a part of a pattern of conduct that amounts to an abuse of the right of access and would interfere with the operations of the university and CHEO.

[4] The requester, now the appellant, appealed the university's decision to this office, which appointed a mediator to explore the possibility of resolution. During mediation, the mediator communicated with the appellant, the university and CHEO to discuss the issues. Ultimately, a mediated resolution of the appeal was not possible because the university maintained that the request is frivolous or vexatious as that term is contemplated in section 10(1)(b) of the *Act* and section 5.1(a) of Regulation 460. CHEO supported the university's position.

[5] As the appellant decided to pursue the appeal at adjudication, it was transferred to the adjudication stage of the appeal process. During my inquiry, I invited and received representations from the parties, which were shared in accordance with Practice Direction Number 7 and the IPC's *Code of Procedure*.

[6] In the initial Notice of Inquiry sent to the university, I asked it to clarify and explain the involvement of CHEO in this appeal, given my understanding that the appellant had originally made separate access requests to the university and to CHEO, the teaching hospital where she worked as a medical resident. The university explained that since the request was largely focussed on the appellant's PGME program and, based on Orders PO-3257 and PO-3298,[1] it reached an agreement with CHEO that since

[1] In these orders, two physicians who held both clinical positions at a teaching hospital and faculty positions with the University of Ottawa were identified in an access request. Adjudicator Stephanie Haly

the university had a greater interest in the records and was in a better position to respond to the request, the appellant's request to CHEO would be transferred to the university.[2] That being said, the university noted that most physicians use their teaching hospital's email account, rather than their university-provided email account, for their university-related tasks, hence the continued involvement of CHEO in the matter to assist with record searches. I accept this submission, and I proceed on the basis that the university is entitled to request from CHEO records relating to the appellant's academic performance during her medical residency.

[7] For the following reasons, I find that the university has not established a pattern of conduct that represents an abuse of the right of access or that would interfere with the operations of the institution under section 5.1(a) of Regulation 460. I also find that the university has not established that the appellant's request was made in bad faith or for a purpose other than to obtain access for the purpose of section 5.1(b). Accordingly, I find that the second part of the appellant's is not frivolous or vexatious under the *Act*, and I order the university to (continue to) process it, subject to the time limit set by this order. My order does not preclude the parties from agreeing to a narrower scope to this second part of the request dealing with backup emails.[3]

DISCUSSION:

Is the appellant's request frivolous or vexatious within the meaning of section 10(1)(b)?

[8] The sole issue before me in this appeal is whether or not the appellant's request is frivolous or vexatious, as contemplated by section 10(1)(b) of the *Act*, considered together with section 5.1 of Regulation 460. Section 10(1)(b) reads, in part:

> 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.

[9] This section provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This is a powerful discretionary authority and should not be exercised lightly, as it can have serious implications on the ability of a requester to obtain information under the *Act*.[4] On appeal to this office, the burden of proof is on the university to provide sufficient support for its decision to declare the request

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held that records created by university faculty members relating to a medical resident's enrollment and performance in a PGME program are in the control of the university. These orders also establish that for the purpose of the labour relations and employment records exclusion in section 65(6), it is the (teaching) hospital that is the employer of the resident.

[2] Under section 25(2) of the *Act.*

[3] As discussed in the body of this order and as contemplated by the order provisions.

[4] Order M-850.

frivolous or vexatious.[5]

[10] If an access request is found to be frivolous or vexatious, this office will uphold the institution's decision, to deny access on that basis. In addition, this office may impose conditions such as limiting the number of active requests and appeals the appellant may have in relation to a particular institution.[6]

Grounds for frivolous or vexatious claim under section 5.1 of the Regulation

[11] In its revised decision, the university relies on section 5.1(a) of Regulation 460 under the *Act*, which provides that:

> 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;

[12] However, the university's representations in this appeal suggest that it also relies on section 5.1(b) of the Regulation, which applies where

> > (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.

[13] To establish the requirements of section 5.1(a) of Regulation 460, a finding of a pattern of conduct on the part of the requester is required before proceeding to a determination of whether the pattern of conduct amounts to an abuse of the right of access or would interfere with the institution's operations. Previous orders have explored the meaning of the phrase "pattern of conduct." In Order M-850, former Assistant Commissioner Tom Mitchinson stated:

> [I]n my view, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way).

[14] In determining whether a request forms part of a pattern of conduct that amounts to an abuse of the right of access, institutions may consider a number of factors, including the cumulative effect of the number, nature, scope, purpose, and timing of the request.[7]

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

[15] In order for me to find that the appellant's request forms part of a pattern of conduct that would interfere with the operations of the university, I must be satisfied that responding to it would obstruct or hinder the range or effectiveness of the university's activities.[8] Interference is a relative concept, and must be judged on the basis of the circumstances a particular institution faces. For example, a small municipality may face interference with its operations from a more limited pattern of conduct than a large provincial government ministry would, and the evidentiary onus on the institution would vary accordingly.[9]

[16] In assessing the application of section 5.1(b) of the regulation, which deals with circumstances where a request is made in bad faith or for a purpose other than to obtain access, the institution need not demonstrate a "pattern of conduct".[10] 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.[11]

[17] In order to qualify as a "purpose other than to obtain access", the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.[12]

[18] In seeking the university's representations, I specifically asked it to address why the administrative or practical burden that could result from processing the appellant's request could not be dealt with by the time extension and fee provisions in sections 27 and 57 of the *Act.* I also asked the university to comment on the appellant's proposed narrowing of part two of the request, which would see the university search the backup emails of 10 doctors within a four-year period (2015-2018).[13]

The university's representations

[19] The university submits that the appellant's right to access information has been "fully addressed" by the university's processing of the first part of the request which, it says, includes approximately 10,000 pages of disclosed records.

[20] The university also submits that searching backup emails would reveal duplicative information, and that the "nature and scope" of the second part of the request is essentially identical to the first part. It further notes that a backup search may reveal fewer responsive records than the original search, as the university (and/or CHEO) would only be able to search the database using certain keywords (such as the appellant's name).

[21] The university argues that the appellant also has a purpose other than access in asking the university to process the remainder of the request. The university submits

[8] Order M-850.
[9] Order M-850.
[10] Order M-850.
[11] Order M-850.
[12] Order MO-1924.
[13] The university has previously indicated that this narrowed scope would not change their response.

that it is reasonable to conclude this because the appellant is insisting on pursuing a search of backed up emails even though she has already received a large volume of records. In the university's view, the second part of the appellant's request is "designed to create additional work unnecessarily for individuals not only at the university, but also at the teaching hospital [CHEO] resulting in an abuse of the right of access."

[22] Further, the university submits that having processed the first part of the request, it now knows the large number of responsive records and also that processing the second part of the request would put an "unreasonable burden" on the university and CHEO. The university also says that it will be "impossible to retrieve all records relevant to the request," because it is only able to locate them using the appellant's name, and some responsive records do not contain her name. The university explains this by noting that many records deemed responsive to the first part of the appellant's request were about her, but did not name her in the email and it submits that it would therefore be "impossible for an IT technician to retrieve as there would be no practical 'key-words' to use to retrieve those emails."

[23] The university reiterates its view that "most, if not all" of the records responsive to the second part of the request would be duplicative of those already recovered and explains the nature of the burden of processing it as follows:

> … given the magnitude of records known to exist as a result of completion of the first part of the appellant's request, it is clear that searching, retrieving, processing, reviewing, analyzing the email back-ups would create an unreasonable burden to the university and the teaching hospital and interfere with the operations of both institutions.
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> The university submits responding to the second part of the request would require an inordinate amount of staff time and resources from both the university's and teaching hospital's FOI offices and IT departments as well as the time of physicians where consultations may be required would unreasonably interfere with the operations of both institutions.

[24] The university refers to the authority of the IPC to impose conditions on the processing of requests and asks that I require the appellant to demonstrate a reasonable basis for the belief that additional responsive records may exist beyond those that will merely duplicate what she has already received. The university submits that if I am satisfied of such a reasonable basis, I should restrict the appellant's right of access to the backup emails to a "limited, precise time period for specific physicians." The university also requests that it be permitted to process the search of backup emails as a new request, with recourse to standard time extension and fee provisions.

The appellant's representations

[25] The appellant submits that the purpose of the request was to obtain additional records concerning the appellant's enrolment in the university's PGME program that might be of assistance in advancing an academic appeal and related matters. The

appellant submits that the backup search is an important issue. She notes that some emails she has already received referred to other messages that had not been disclosed. The appellant says that she understood that it was possible that emails had been deleted from individuals' email inboxes and, accordingly, she wants to pursue access to backup information that may yet be located and retrieved.

[26] The appellant also notes that while she agreed to reduce the scope of the request, and to splitting the request into interim releases, she did not agree to an indefinite suspension or abandonment of the part of the request seeking backed up information. She further notes that the fee estimate of October 2018 did not contain any indication that the processing of the second part of the request would be indefinitely deferred.

[27] The appellant maintains that no pattern of conduct has been established and her request is therefore not frivolous or vexatious. The appellant argues that follow-up on a single request cannot be considered excessive. She further notes that she provided a specific scope to the request and that it is intended to further a legitimate interest in the records. The appellant maintains that "there is no valid basis upon which to find that the request was made simply for 'nuisance' value or merely to harass, break or burden the institution."

[28] Regarding interference with the university's operations, the appellant submits that the university is a large institution with dedicated IT personnel, and that it has not demonstrated that processing the request for backup emails would hinder its activities. The appellant also suggests that if the university determined the estimated fee was no longer accurate, it ought to have communicated that; rather, "it abruptly chose to invoke paragraph 10(1)(b) of the Act instead of raising that new information with the appellant and discussing either revising the fee estimate or identifying ways of further narrowing the request so as to remain within the original estimate." Further, the appellant says, decisions such as Order M-906 indicate that institutions cannot deem a request frivolous or vexatious on basis of interference with its operations where other mechanisms exist for addressing the administrative burden (e.g., the ability to charge fees). The appellant submits that not having availed itself of these options or having explored processing alternatives, the university cannot rely on this ground for finding the request frivolous or vexatious.

[29] Regarding the university's suggestion that the appellant be required to demonstrate a reasonable basis for her belief that additional responsive records exist in backup emails, the appellant submits that this would effectively shift the burden of proof onto the appellant to show that the request is not frivolous or vexatious. The appellant notes this is contrary to established IPC precedent, citing Order PO-3121.

Analysis and decision

[30] I agree with the appellant that in the determination of section 10(1)(b), the onus does not rest with her to establish, or provide a reasonable basis for believing, that records responsive to the second part of her request exist, over and above the records

disclosed in response to the first part of her request. The university's position in this respect conflates the issue of reasonable search with the frivolous or vexatious issue before me, where the burden of proof rests with the university. I find that the university has not provided the requisite evidence to discharge the onus of establishing that the second part of the appellant's request is frivolous or vexatious under the *Act*. I review the evidence under sections 5.1(a) and 5.1(b) of Regulation 460, below.

Section 5.1(a) - pattern of conduct

[31] To establish section 5.1(a), the university was required to show that the request forms part of a pattern of conduct amounting to an abuse of the right of access or interfering with the operations of the institution. According to Order M-850, a finding that there is a pattern of conduct requires "recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way)." The cumulative nature and effect of a requester's behaviour may also be relevant in this determination.[14]

[32] The university provided information about the difficult nature of an eventual search and the expected volume of any records recovered, which both speak to interference with its operations. However, the university did not directly address whether the appellant's request forms part of a pattern of conduct for the purpose of section 5.1(a) of Regulation 460, a finding that is a precondition to deciding whether the pattern of conduct also reflects an abuse of the right of access or would interfere with operations. Indeed, the university provides no evidence of prior requests by the appellant (and the appellant denies it), similar or not. I am left to suppose that the university considers the appellant's actions within the arc of this single request to be a pattern of conduct sufficient to deem the request frivolous or vexatious.

[33] The issue of whether a single request may amount to a pattern of conduct has been considered by this office. In Order M-850, the adjudicator considered that a broad single request was not sufficient on its own to establish a pattern of conduct as contemplated by section 5.1(a). In Order PO-4035, the adjudicator confirmed the approach in Order M-850, and found that a broad single request, which was circumscribed by specific parameters like the one at issue here, was not sufficient to be considered an abuse of the right of access. In this appeal, I find the mere fact that the appellant's request is broad is not itself sufficient to establish a pattern of conduct that amounts to an abuse of the right of access; nor do I find the evidence before me as to the nature, purpose or timing of the second part of the appellant's request is sufficient to support such a finding.

[34] Both parties' submissions refer to the existence of parallel academic proceedings regarding the subject matter of this appeal. However, previous IPC orders have determined that "abuse of a right of access" under section 5.1(a) involves consideration of matters under the access scheme in the *Act*;[15] it is not intended to include

[14] Order MO-2390.
[15] Orders M-906, M-1066, M-1071, MO-1519, and P-1534.

proceedings in other fora. In Order M-906, relied on by the appellant, the adjudicator found that the appellant's "complaints and litigation" were not part of a "pattern of conduct", as defined in Order M-850, because they were unrelated to access under the *Act* and, therefore, could not be considered to constitute "recurring incidents of related or similar requests." Here, while I accept that matters concurrent and related to this appeal may also be expending the university's resources, the only relevant matter for my analysis under section 5.1(a) is this appeal and the request leading to it.

[35] Moreover, on the evidence, even if I were satisfied that a pattern of conduct on the part of the appellant had been established, I find that the university has not provided sufficient evidence to establish that responding to it would obstruct or hinder the range or effectiveness of the university's activities for the purpose of section 5.1(a). The university did not sufficiently detail why its concerns about the strain on its resources as a result of processing the second part of the request could not be addressed by the time extension and fee provisions in sections 27 and 54. The provisions exist to relieve at least some of the burden of large or otherwise onerous requests.

[36] After considering the evidence and the second part of the appellant's request, I find that the university has not established that it forms part of a pattern of conduct amounting to an abuse of right of access, or interfering with the university's operations, and I do not uphold the university's decision to refuse to process it under section 5.1(a) of Regulation 460.

Section 5.1(b) – bad faith or an objective other than access

[37] Although the university's revised decision relied on section 5.1(a) of Regulation 460 for refusing to process the second part of the request, the university also argued during the inquiry that the appellant has an objective other than access in seeking to have her request processed. As these arguments allude to section 5.1(b), I will address them.

[38] In its representations on the purpose of the request (section 5.1(a)), the university argues that the appellant's request "is designed to create additional [unnecessary] work" for the university and CHEO. This, among other concerns expressed, suggests a view that the appellant has an objective other than access, even "furtive will or ill design"[16] in pursuing the second part of the access request. I do not accept the suggestion. The university's evidence does not establish any improper objective behind the request. My consideration of the evidence satisfies me that the appellant's primary motivation has consistently been to obtain access to records responsive to the second part of her request.

[39] The university also claims that it is reasonable to conclude that the appellant has an ulterior motive in pursuing the remainder of the request, because the appellant has already received a significant number of records from the processing of the first part. I

[16] Order M-850 and PO-3738-I.

do not agree with this proposition. The search of email backups was part of the appellant's request from the very beginning; the university's position that the appellant has not shown that emails were deleted does not support the supposition that follows, which is that the appellant's request is for a purpose other than to obtain access. Notably, past orders have held that having an objective to obtain information to further a dispute between the requester and an institution is a legitimate exercise of the right of access.[17] In my view, therefore, the appellant's intention to take issue with a decision on her participation in the university's PGME program, or to take another action against the university, does not support a finding that the second part of her request was made in bad faith or for a purpose other than to obtain access under section 5.1(b).[18] For these reasons, I find that the university has not established section 5.1(b).

Remedy

[40] Given my conclusion that the university has not established that the appellant's request is frivolous or vexatious, I do not uphold the university's December 2018 frivolous or vexatious decision. This effectively returns the parties to the position they were in just before the university issued that decision, with the appellant having accepted the revised fee estimate and seeking to have the university process the second part of her request in accordance with the university's fee estimate of $2,250 dated October 22, 2018.[19] This process must now proceed in light of my decision.

[41] Having said this, I accept that processing the second part of the request will place a significant burden on the university. There appears to be no precedent for an adjudicator allowing recourse to additional time extensions where a request is found to not be frivolous or vexatious; the usual order is that the institution must issue an access decision within the time permitted under the *Act*. Here, there is already the interim access decision and fee estimate from October 2018, mentioned above. This office has previously addressed situations where an institution's compliance within standard timelines is likely not possible because thousands of pages of records may be identified as responsive. In Order PO-2634, the adjudicator addressed the appeal of an interim decision and fee estimate where approximately 42,000 pages of records were expected to be identified as responsive. After what seemed to be agreement on a narrowed scope to the request, the requester paid the 50% fee deposit, and the institution then claimed a 13-month time extension under section 27 of the *Act*. The requester appealed. Order PO-2634 establishes the appropriate process and timing for time extension claims by institutions in relation to an interim access decision and fee estimate.[20] In that appeal, various factual matters around the timing of the scope

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[17] Order MO-1924.
[18] Orders MO-1168-I and MO-2390.
[19] The university's September 13, 2018 fee estimate of $4,500.00 to process the backup emails was replaced by its October 22 revised fee estimate of $2,250.00. The appellant did not appeal either fee estimate.
[20] It was necessary for the adjudicator to resolve issues with the approach to sections 24, 26 and 27 of the *Act*. The issues in Order PO-2634 were outlined as follows: Was the ministry's request for a time extension submitted within the time period required by the *Act*? If the ministry's time extension was not submitted within the time period required by the *Act*, is the ministry in a deemed refusal position for

narrowing, fee deposit, and time extension were in dispute, unlike the situation in this appeal. However, once these were resolved, the adjudicator had to review the reasonableness of the time extension and acknowledged the difficulty the institution would encounter in processing such a voluminous request. In that case, the adjudicator ordered, first, the institution to prepare an index of the records for the appellant, followed by the appellant confirming interest in pursuing the records, including the scope of the request, and finally, upon that occurring, the institution issuing a final access decision approximately five months from the date of the order concluding that appeal.

[42] I agree with the approach in Order PO-2634 and will apply it in this appeal. I have considered the university's evidence regarding the challenges of processing the request, and without commenting on the fee estimate, which is not in issue in this appeal, I find it reasonable to allow the university additional time to process the second part of the appellant's request. I have considered that the university will not be starting completely anew or from the beginning of the process; consultations with CHEO about retrieving the records were already undertaken. I have also considered that the parties may agree on a reduced scope to the request. Finally, in light of the circumstances and the parties' agreement that a revised fee estimate may be appropriate, I will allow the university to revise its estimate if necessary.

[43] By all accounts, the parties were initially able to work together in a productive manner and found a way for the university to process the first part of the request by prioritizing aspects of it and by the university effecting disclosure through interim releases of records. In my view, this could equally be the case for the second part of the request, following my decision, and based on the order provisions, below.

ORDER:

1. I do not uphold the university's decision that the second part of the request is frivolous or vexatious. The university is ordered to issue a final access decision on this part of the request.

2. This order does not preclude the appellant from narrowing the second part of her request, in which case the university would be in a position to issue a revised fee estimate. In the alternative, the university may issue a revised fee estimate based on the request as it stands.

3. Whether or not the appellant narrows her request and/or the university issues a new fee estimate, I order the university to produce a final access decision and send it to the appellant no later than **September 1, 2020**, subject to the

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failing to respond to the appellant's request within the appropriate time? If the ministry's time extension was submitted within the time period required by the *Act*, is the time extension reasonable in the circumstances of this appeal?

provisions of sections 28 and 29, and without recourse to a further time extension under section 27.

4. The timelines noted in order provision 3 may be extended if the university is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original Signed by: June 1, 2020

Daphne Loukidelis
Adjudicator