Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-618

Appeals M_9400511, M_9400628, M_9400645, M_9400647 and M_9400728

London Police Services Board

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

This inquiry involves five appeals under section 39(1) of the Municipal Freedom of Information and Protection of Privacy Act (the Act) from decisions of the London Police Services Board (the London Board) to deny the appellant Robert Riley's (Riley) requests for certain records.

As a preliminary issue in each of these appeals, the London Board takes the position that Riley's requests and resulting appeals are "frivolous", "vexatious", "an abuse of the right of access" and "an abuse of process". Based on this position, the London Board asks that I uphold its decisions denying Riley access to the requested information, or, alternatively, that I impose reasonable limits on Riley which will prevent or remedy the alleged abuse.

Riley takes the position that the Act does not permit me to assess requests on the basis of whether they are an abuse of process as defined by the London Board. Rather, he submits that I may only assess requests on the basis of the specific exemptions from the right of access to information set out in sections 6 to 15 of the Act, and that to accept the London Board's submissions would be beyond my jurisdiction.

I will as briefly as possible outline the history of events leading to this order since they are important to an understanding of the issues now before me.

BACKGROUND:

Riley is, by all accounts, a frequent user of Ontario's freedom of information legislation. Since early 1993, he has made numerous requests for information under the Act, as well as under the provincial Freedom of Information and Protection of Privacy Act. In general, the Acts have been well used by the public with over 22,000 formal requests for information made in 1994 alone. While I have no information on the total number of requests made by Riley (ie., which have not come to this office on appeal), the records of my office indicate that Riley had filed a total of 136 appeals under both the provincial and municipal Acts as of December 5, 1994.

On December 5, 1994, Chief Julian Fantino of the London Police Service wrote five letters to my office, one addressed to Inquiry Officer Mumtaz Jiwan, and four addressed to me. Each of these letters referred to a different appeal by Riley from a decision of the London Board concerning a request for access to information under the Act. Chief Fantino's letter to the Inquiry Officer referred to Riley's requests for information as frivolous and vexatious and he advised that the London Board would not retrieve information which was the subject of the Inquiry Officer's Order M-410, dated October 26, 1994. That order had disallowed a substantial portion of the London Board's fee estimate for retrieving the requested records because the London Board had failed to justify the cost of its search time. That order did not specifically order the London Board to release the records on payment of the reduced fee.

Each of Chief Fantino's four remaining letters, addressed to me, involved appeals which had not yet gone to inquiry. The Chief again described Riley's requests as frivolous and vexatious and he indicated that the London Board would be seeking a restraining order against Riley. In each of his letters, Chief Fantino went on to say:

> [W]e will not be devoting any further resources to any matter involving Mr. Robert Riley and his requests under the [Act] until such time as the civil action, commenced by the London Police, has been resolved.

On December 9, 1994, the London Board and Chief Fantino, along with the Police Services Boards and the Chiefs of Police of Metropolitan Toronto, Sarnia and Windsor (collectively the Boards), brought an application in Ontario Court (General Division) seeking a declaration that the Act does not grant a right of access to records where the request is "frivolous, vexatious and amounts to an abuse of the right of access" under the Act. Riley and another requester, Jose Luis (Joe) Baptista (Baptista), were named along with my office as respondents in the application.

The application also sought orders from the court restraining Riley and Baptista from making further requests for information from the Boards, and declaring orders of my office to be of no force and effect to the extent that they directed the Boards to provide access to records requested by these two individuals. It should be noted that the Metropolitan Toronto Police Services Board subsequently withdrew from the application.

My office responded to the Boards' application by taking the position that a single judge of the Ontario Court, General Division, did not have jurisdiction to grant the requested relief. The basis for this position was two-fold.

Firstly, the application was premature. Issues involving the obligations of a government body (an institution) to respond to requests for information, should first be raised in the institution's decision letter to the requester and dealt with on appeal to my office should the requester be dissatisfied with the institution's response. This had not occurred in any appeals involving these Boards and either Riley or Baptista.

I would add here that while the London Board had previously brought its concerns regarding Riley's alleged abuse of the Act to the attention of my office, it had not done so in the course of an active appeal by setting out the complete factual basis for its position. Consequently, this inquiry is the first opportunity my office has had to consider and address the issue.

Secondly, it appeared that the application was, in reality, in the nature of an application for judicial review which properly should have been brought before a three judge panel of the Divisional Court pursuant to the provisions of the Judicial Review Procedure Act.

Accordingly, I instructed a lawyer in my office to bring a motion to the court to have the Boards' application stayed on the basis that a single judge was the improper forum to hear and determine at first instance, questions involving the administration of the Act.

Upon receipt of the Boards' Notice of Application, a review by my office of Riley and Baptista appeals on file indicated that the only currently active appeals involving either of these individuals and the London, Windsor or Sarnia Boards were the five Riley appeal files referred to in Chief Fantino's letters, described above. In view of the position taken by Chief Fantino in these letters and the need to have these issues determined in the proper forum, I instructed my Director of Appeals to notify Riley and the London Board that I would be proceeding to inquiry

on the issue of frivolous or vexatious requests. That notification was sent to Riley and the London Board on January 25, 1995.

The Boards' court application was heard in London before the Honourable Justice Edward Browne on January 4 and February 3 and 9, 1995, with argument on the motion brought by the lawyer for my office to have the application stayed. Those court proceedings were settled with the signing of minutes of settlement by the lawyers for the Boards and my office. Essentially, the minutes of settlement provide that the issues arising from the Boards' allegations of abuse of process would be considered and determined by my office, and that the court application and my office's motion would be put "on hold" pending my decision.

After hearing from Riley and the London Board on how they wished to see the issues characterized in the current inquiry, as well as on the question of the participation of potential intervenors (a process which took several weeks), a formal Notice of Inquiry was sent to the parties on May 9, 1995. This Notice set out basic information regarding the five appeals in question, the inquiry process, the issues I wished to see addressed, and established dates for the receipt of written and oral submissions from both the parties and intervenors.

At the same time the Notice of Inquiry was distributed, my office invited intervention applications from various institutions and individual appellants whose appeals raised similar or related issues involving alleged abuses of process. As well, applications were invited from Management Board of Cabinet, the Chair of which is the "responsible minister" for the Acts, the media and other potentially interested parties. A total of 13 intervention applications were received and I granted intervenor status to all but one applicant whose application was received several weeks too late.

The oral hearing stage of the inquiry process was originally scheduled to proceed on June 27, 28 and 29, 1995, but was adjourned on the agreement of the parties to August 29, 30 and 31, 1995, with a new schedule for the receipt and exchange of written representations.

Written representations and evidence were received from the London Board and, on the agreement of the parties, the Ontario Association of Chiefs of Police (OACP). Written representations only, with no accompanying evidence, were received from Mr. Riley's lawyer, Mr. Ben-Eliezer, and the remaining intervenors. These representations were reviewed, and with some minor deletions to protect the privacy of individual intervenors, my office distributed them to all participants in the inquiry. Supplementary representations were received from the London Board and certain intervenors, and these were distributed to all participants prior to the oral hearing stage of the inquiry.

Of the 12 intervenors who made written submissions, six indicated that they wished to participate in the oral hearing stage along with Riley and the London Board, and four actually did so. The oral hearing was open to the public. In addition, a Court Reporter was present to record the proceedings and a transcript of the oral hearing is available to the public for viewing in the library in my office. As well, it is available from the Court Reporting service on payment of its usual fee.

The principal issue before me in this inquiry is whether I have authority under the Act to relieve an institution of its obligation to respond to requests for access to records in its custody or control, or to grant some other remedy, where the requests for access are "frivolous", "vexatious", constitute an "abuse of the right of access" or are "an abuse of process". If I do have such authority, I must then consider whether I am satisfied on the basis of the evidence and representations before me that abuse of the sort alleged is, in fact, present in this particular case. Finally, if I am satisfied that the London Board has made out a case of abuse on the facts, there remains the question of what to do about it.

Before proceeding to deal with these issues, I will set out the evidence which has been placed before me by the London Board and the Ontario Association of Chiefs of Police.

EVIDENCE:

The bulk of the evidence before me consists of the four affidavits and attached exhibits originally filed in support of the London court application brought by the Boards. These affidavits describe in detail numerous requests for access to records in the custody or control of these Boards made by both Riley and Baptista since early 1993, as well as the Boards' responses and, in some cases, correspondence and notices from my office pertaining to appeals arising from certain of the requests. The requests involve a wide range of general records held by these Boards, as well as the personal information of Riley and Baptista.

Many of the requests for general records have an air of "legitimacy" about them, in the sense that it can readily be seen how obtaining the requested information would further the purposes of holding the operations of these Boards up to public scrutiny, and fostering public accountability. Other requests, such as one relating to washroom facilities and cleaning schedules, appear on their face to serve no purpose other than incurring expenditure of the time and resources of the Boards and their personnel. Still others appear to be overly expansive in scope in terms of the sheer volume of information encompassed by a single request or part of a request. For example, one request seeks a detailed listing of all arrests made or charges laid by the Metropolitan Toronto Police Service (Metro Police) over a five year period. A similar request made to the London Board seeks a detailed listing of all arrests made over a ten year period. This pattern of parallel requests to each of the four Boards is repeated throughout the affidavit material.

While I could take the time to review the specific requests in greater detail, for the purposes of this order it is sufficient to say that collectively they comprise a potpourri of various types of information which would typically be held by police services and, in many cases, by institutions generally.

The affidavit evidence also indicates that the Boards have, in some cases, objected to the form of the requests, or have raised exemptions to access under the Act, or have issued fee estimates for searching for and compiling records, or have indicated that they would be seeking time extensions beyond the usual 30 days for responding to requests. By and large, however, the Boards have processed the requests in accordance with the requirements of the Act.

By the same token, this evidence also shows that Riley has studiously used the request and appeal provisions of the Act in his efforts to secure the requested information, and appears

generally to have responded to the Boards' questions regarding clarification of the scope of his requests or for other information needed to process the requests.

As of December 9, 1994, the date the Boards brought their court application, the affidavit evidence indicates that Riley had made a total 13 requests to the London Police, 29 requests to the Metro Police, seven requests to the Windsor Police and 13 requests to the Sarnia Police. Of these 63 requests, it appears that 29 had gone to appeal resulting in eight orders and 21 abandoned appeals or successful mediation efforts by staff in my office.

As I have indicated, the affidavit material before me also sets out evidence concerning requests for access to records of these Boards and appeals made by Baptista. As I understand the position of the lawyer for the London Board, this evidence is claimed to be relevant to the issues before me concerning Riley because it is alleged that Riley and Baptista are acting in concert in an effort to burden institutions generally, and police services in particular, with excessive requests and appeals.

The requests made by Baptista follow a pattern similar to those made by Riley and, in some cases, duplicate verbatim the substance of Riley's requests. As of December 9, 1994, the affidavit evidence indicates that Baptista had made a total of one request to the London Police, 12 requests to the Metro Police, two requests to the Windsor Police and four requests to the Sarnia Police. Of these requests, it appears that 10 had gone to appeal resulting in two orders and eight abandoned appeals or successful mediation efforts by my staff. I will return shortly to the evidence of a connection between Riley and Baptista, after reviewing the remaining evidence before me concerning Riley's requests and appeals.

In addition to the affidavit evidence that was placed before Justice Browne in the Boards' court application, the London Board provided me with two supplementary affidavits relating to the Sarnia and Windsor Police. One affidavit describes five separate requests made by Riley to the Sarnia Police, by letters dated February 25, 1995, for information involving investigations of 976 and 900 exchange numbers, credit card invoices for the Sarnia Police, reported UFO sightings and cellular phone invoices, as well as for Sarnia's 1994 annual report to my office.
The other affidavit describes virtually identical requests made to the Windsor Police by Riley, by letters bearing the same date, with the additional request for copies of telephone bills showing calls placed to 976 and 900 exchanges. This affidavit also describes 13 separate requests made by Riley to the Sandwich West Police by letters dated April 7, 1995 for information similar to that requested of the Windsor and Sarnia Police, as well as for information pertaining to investigations of breaches of the Homolka trial publication ban, investigations of computer bulletin board services, internal investigations of human rights code breaches, investigations of the Communist party, and investigations into high treason, among other things. I am told that this evidence is put forward in the affidavit of the Windsor Police Freedom of Information and Privacy Co-ordinator because she is responsible for processing requests to the Sandwich West Police Service, which is located within Windsor City limits.

Finally, I have been provided with the affidavit of Deputy Chief Roger Hollingworth, of the Waterloo Regional Police Service, sworn June 27, 1995. Deputy Chief Hollingworth is Chair of the Information and Technology Committee of the OACP which represents the Chiefs of Police

of 105 municipalities in the province, as well as the Commissioner of the Ontario Provincial Police.

In his affidavit Deputy Chief Hollingworth deposes to the fact that on behalf of the OACP he surveyed all Police Chiefs in Ontario regarding requests made by Riley to their respective police services. From the 51 responses received, Deputy Chief Hollingworth advises that Riley had made a total of 772 requests to 45 of the responding police services, and had initiated appeals in 272 of those cases.

He also advises that 33 of the 51 respondents provided him with their cost estimates for processing the requests and appeals totalling in excess of $34,000. This evidence was tendered as part of the representations of the London Board and was referred to by the London Board's lawyer in his oral submissions. In addition, Deputy Chief Hollingworth attended the oral hearing and provided information on how these survey results were calculated and on five additional responding police services which had received a further 55 requests, of which 30 had resulted in appeals, at a total estimated cost to four of those police services of approximately $430.

As I indicated earlier, I have no information on the total number of requests Riley has made to institutions under the municipal and provincial Acts. However, my office does track information on the number of Riley appeals. As of December 9, 1994, the date the Boards brought their court application, Riley had 11 active and 19 inactive or "banked" appeals involving requests for information to institutions under both the provincial and municipal Acts. Banked appeals are appeals in excess of the 15 active appeal limit established by my office.

As of May 9, 1995, the date of the Notice of Inquiry, the number of active Riley appeals remained at 11, but the number of banked appeals had risen to 234. As of August 29, 1995, the first day of the oral hearing, Riley had 14 active and 563 banked appeals. As of the same date, there were 134 closed appeals involving Riley, with the vast majority of these having closed as a result of mediation or abandonment. To date, only 20 Riley appeals have gone to inquiry and resulted in the issuance of an order.

A review of the banked appeals indicates that the majority involve municipal police services, and that the requests themselves are, in many cases, similar or identical to the requests for information set out in the affidavit material of the Metro Toronto, London, Sarnia and Windsor Police Services.

Turning to the question of Riley's connection with Baptista, the affidavit evidence tends to show that Riley and Baptista have acted in concert in making freedom of information requests to institutions and appeals to this office.

The Metro Police affidavit shows that in April 1993, Baptista wrote to the Freedom of Information and Privacy Co-ordinator of the Metro Police authorizing the release to Riley of any information pertaining to him. In March 1993, Riley had provided Metro Police with what purported to be a document appointing Riley to have "full and complete power of attorney over all of [Baptista's] affairs". However, this power of attorney, apparently in aid of a request by Riley for Baptista's personal information, appears not to have been properly executed by Baptista. In August 1993, Baptista followed up on Riley's request for Baptista's personal

information by submitting his own request for the same information, which was then treated by the Metro Police as a new request and assigned a different file number.

Other references in the Metro Police affidavit evidence appear to link the activities of Riley and Baptista. For example, a press release issued by Riley on June 17, 1993 suggests that readers "Ask Dr. Joe Baptista ... what difficulties Metro Police have with faxes!", in an apparent reference to Baptista's voluminous fax communications with Metro Police.

The London Police affidavit contains an article which appeared in Toronto's Eye magazine on April 22, 1993 in which Baptista is said to have described his objective as one of intentionally burdening government and to have referred to a "Robert Ridley" (sic) as his "administrator". This article goes on to describe at some length Baptista's methods and motives for carrying out his objective.

The Windsor Police affidavit contains as exhibits five requests by five different persons for their personal information, each dated November 25, 1993, each showing that it was transmitted to the Windsor Police by fax, and each having virtually identical wording as the others. These requests were submitted by Riley, Baptista and three other persons who, to my knowledge, have no other connection to this inquiry. The similarity and timing of these requests strongly suggest that, at least on this occasion, Riley and Baptista were acting in concert in making freedom of information requests.

Before leaving the affidavit material, I would note again that the requests made by Riley and Baptista are frequently for the same information or type of information, strongly suggesting co-ordinated activity on their part.
To varying degrees, this conclusion is also borne out by four other sources.

First, in his representations to me as intervenor in the current inquiry, Baptista states:

> I think it appropriate to confirm police claims that I harass them. It makes me happy to watch them suffer, especially during difficult economic times. But the claim is irrelevant as it applies to this inquiry or the court application.
>
> I also agree with the claims made by the police that I am an administrative burden. The Commissioner is well aware of my status as a bulk user of government services. I am also sure the commissioner will agree that my contribution to the administrative burden of government departments within the Province of Ontario and related municipal agencies has resulted in the reallocation of department budgets and increased systemic error.
>
> The Commissioner is also aware and his prior annual report documents my presence accurately. It properly shows how the Information and Privacy Commissions appeals process increased by 90% and how additional employees were hired to handle the work load caused by myself.
>
> ...

> My interest in freedom of information legislation has a singular intent. I have made it very clear to the Commission and any other party that my purpose is the creation of an administrative burden for the Commission and related government agencies. Because of this I rarely pay attention to the appeal knowing that my participation, or lack of it, will have little influence on the economic factors associated with the appeal process. Therefore my time is better spent devising new methods to cause harm to government.

Baptista does not explicitly acknowledge any connection with Riley but, in the course of his submissions, defends Riley as "a friend to the police and other government agencies" in contrast to himself who is "their enemy".

Before continuing, I want to address a statement which appears in the excerpt from Baptista's submission which I have produced above. Baptista, in referring to some statistics in annual reports of my office as supporting his "success" in being "an administrative burden of government departments", says "[i]t properly shows how the Information and Privacy Commissions appeals process increased by 90% and how additional employees were hired to handle the work load caused by myself." For the record, this statement is entirely without foundation. Baptista appeals represent a small part of the increase in appeals and no additional employees were hired by my office as a result of his activities.

The London Board also provided me with a copy of a news release dated July 14, 1995 under the heading "Planet Communications and Computing Facility Announces New Information and Privacy Department". This news release states, in part:

> Planet Communications and Computing Facility, a Toronto-based communications networking service founded by Dr. Joe Baptista, is pleased to announce the creation of a new Information and Privacy Department under the direction of Mr. Robert Riley.
>
> Mr. Riley is available to assist persons in utilizing Ontario's Freedom of Information and Protection of Privacy Acts, to obtain information from government agencies. Mr. Riley is prepared to represent any person, in the course of access requests and appeals, or to simply provide direction/advice to allow any person to utilize the Acts to maximum benefit.

This news release was also sent by Riley directly to my office by fax.

In addition, the London Board has put before me a copy of an Internet communication emanating from Riley's Internet address setting out the text of a statement of claim filed by Chief Fantino as Plaintiff in an Ontario Court (General Division) action which names Baptista as Defendant. The name of the organization on whose behalf Riley circulated this material is "Centres for Studies in Government Ineptness".

Finally, in Mr. Ben-Eliezer's oral submissions concerning his client's association with Baptista, he said "there is an association. They know each other. They work together from time to time."

However, Mr. Ben-Eliezer later cautioned me that "you can't have guilt by association" and that this was "a completely irrelevant consideration" in my inquiry.

I will return to this latter submission later in this order.

DISCUSSION:

In approaching the issues before me in this inquiry, I first considered the role that the Commissioner's office plays under freedom of information legislation in this province. It is clear that a major component of that role is to resolve disputes where issues arising from requests for access to information come to the Commissioner on appeal. In the course of performing that function, the Commissioner is called upon to develop policies and processes designed to facilitate the stated purposes of the legislation and its proper administration.

The Commissioner is also required to prepare an annual report to the Legislature reviewing the effectiveness of the legislation in providing access to information and protection of personal privacy. The report must include a summary of the nature and resolution of appeals under both the municipal and provincial Acts, an assessment of the extent to which institutions are complying with the legislation and any recommendations with respect to the practices of institutions and proposed revisions to the Acts. In addition, the Commissioner is authorized to engage in research into matters affecting the carrying out of the purposes of the legislation and to receive representations from the public concerning its operation.

In the decision in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767 the Divisional Court of Ontario had occasion to comment extensively on the Commissioner's statutory mandate in the following terms:

> The commissioner exercises a supervisory function in respect of compliance by government institutions with provisions of the Act and has exclusive jurisdiction to review the decision of a head of an institution under the Act relating to a request for access (ss. 4 and 50).
>
> A person who requests access to a record, or any affected party, may appeal a head's decision and is given an opportunity to make representations to the commissioner. After receiving evidence for an inquiry and representations from the person who requested access, the head of the institution as well as any affected party, the commissioner is required to make an order disposing of the issues raised by the appeal, containing any terms and conditions the commissioner considers appropriate (ss. 52(13) and 54)... [T]he commissioner is at the apex of a complex and novel administrative scheme, involving the regulation of the dissemination of the information in the hands of hundreds of heads of government agencies, whose decision_making under the Act reaches a final administrative focus in such appeals.
>
> The commissioner not only has responsibility for all refusals of requests for access and corrections of personal information, but also manages a unique process

mandated by s. 52 of the Act, having administrative authority over the pre_decision_making process of mediation under s. 51.

The inquiry process is specialized and unique. It may be conducted in private. The commissioner is given inquisitorial or investigatory powers as well as the power to examine under oath. The procedure for participation by affected persons is governed by s. 52(13) which states:

> 52(13) The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

These unusual powers and procedure may attract judicial scrutiny on natural justice grounds; however, the uniqueness of this adjudicative process indicates that the legislature intended to confer upon the commissioner a distinctive and unusual mixture of adjudicative and administrative functions ...

The commissioner is also given administrative and adjudicative responsibility for access to government information on the one hand, and the protection of individual privacy on the other. Under the scheme of the Act, the commissioner is responsible for five overlapping and integrated activities: reviewing government decisions concerning the dissemination of information; investigating public complaints with respect to government practices in relation to the use and disclosure of personal information; reviewing government administrative and records management practices; conducting research and giving advice on issues related to access and privacy; and educating the public concerning privacy and access issues.

...

To the extent that information has become a commodity, the management of information by the commissioner is similar to the management of other commodities by other specialized tribunals which have attracted curial deference by reason of the specialized nature of their work.

...

Accordingly, the commissioner is required to develop and apply expertise in the management of many kinds of government information, thereby acquiring a unique range of expertise not shared by the courts. The wide range of the commissioner's mandate is beyond areas typically associated with the court's expertise. To paraphrase the language used by Dickson C.J.C., as he then was, in New Brunswick Liquor Corp. v. Canadian Union of Public Employees, Local 963, supra, the commission is a specialized agency which administers a comprehensive statute regulating the release and retention of government information. In the administration of that regime, the commissioner is called upon not only to find facts and decide questions of law, but also to exercise an

> understanding of the body of specialized expertise that is beginning to develop around systems for access to government information and the protection of personal data. The statute calls for a delicate balance between the need to provide access to government records and the right to the protection of personal privacy. Sensitivity and expertise on the part of the commissioner is all the more required if the twin purposes of the legislation are to be met.
>
> The commission has issued over 500 orders in the five years since its creation, resulting in an expertise acquired on a daily basis in the management of government information.
> ...
>
> Central to its task, and at the heart of its specialized expertise, is the commissioner's interpretation and application of its statute ... (John Doe, at 780-783)

Since the John Doe case was decided in June 1993, the number of orders issued by my office has risen to over 1600.

I recite these passages, and the number of orders made in appeals under both Acts, to demonstrate the breadth of experience and uniqueness of function the role of government information management entails. It is a task that, in my view, requires a sensitive and flexible approach, as experience with administering the legislation matures, and as new issues arise or old issues take on new significance with ever-changing information technologies and ever-increasing demands on limited public resources.

In the context of this inquiry, my office has had considerable experience in controlling the potential for abuse of the legislation by institutions and requesters alike. This has been done through use of the specific powers set out in the Act for reviewing decisions of institutions on the reasonableness of their searches for records or on the sufficiency of detail set out in requests (section 17), on time extensions for making a decision on access (section 20), and on fee estimates and fee waivers (section 45).

Counsel for the London Board, Mr. Caskey, made reference to the use of fee estimates and time extensions as possible means for preventing or remedying the alleged abuses of process in the case at hand. However, the main thrust of his position is that the London Board, having identified a request as frivolous, vexatious or abusive, should simply be able to deny access to the requested information. Assigning requests "non-active status" (postponing the response period) or refusing to waive a fee estimate are alternative limits which might be imposed by institutions to prevent or remedy abuse. In any of these cases, he submits, a requester would have the right to appeal to the Commissioner in the normal course, and the Commissioner would have the authority to uphold, vary or overturn the institution's decision on appeal.

Mr. Ben-Eliezer argues that his client Riley is not abusing, indeed, cannot abuse his rights of access to information under the Act. He suggests that I cannot take into account the number of requests made by a particular requester, nor can I consider the financial burden on institutions of

processing requests and appeals. Riley, he says, has the right to have his requests for information dealt with as they are submitted to the institution, subject to the institution claiming time extensions pursuant to section 20 of the Act. He submits that Riley is merely "using the enabling statute on its own terms", and that if I were to adopt Mr. Caskey's position, I would, in effect, be legislating a new exemption or adding another criterion for denying or restricting his client's access to information. This, he says, is beyond the scope of my authority under the Act.

I have heard full and able argument on both sides of this issue. I have carefully considered these submissions and the evidence before me. I have also considered the written and oral submissions of the intervenors, and am indebted to them for their thoughtful contributions to the resolution of these difficult issues.

A number of the individual intervenors echoed Mr. Ben-Eliezer's submission that I do not have the authority under the Act to permit an institution to deny access to records on the grounds of abuse of process. Some intervenors expressed concern that injecting the concept of abuse of process into the freedom of information legislative scheme would provide institutions with another mechanism to frustrate requesters in their pursuit of government information.

Others suggested that the notion of "frivolous" or "vexatious" requests required examination of a requester's reasons for seeking the information, which they felt should not be relevant to the issue of their rights to access. Still others gave examples of their own experiences dealing with requests made to unco-operative institutions and impressed on me the potential for abuse by institutions of a "new category" of exemption, should I adopt the position advanced by Mr. Caskey.

One intervenor suggested that, if I determined that the purpose of a requester in making a request was simply to "cause grief to the institution", the appropriate remedy would be to require the requester to pay the full cost of the institution providing the information. Another intervenor suggested an amendment to the legislation to permit a small fee to be charged for each request for general information, as a deterrent to potential abuse. Other intervenors urged legislative amendments to grant the Commissioner express authority to deal with frivolous, vexatious and abusive requests on a case-by-case basis. Still other intervenors took up the London Board's position that I currently have authority under the Act to deal with such requests.

I would like to briefly return to the concern expressed by certain intervenors that institutions could misuse the ability to claim that a request was either an abuse of process or frivolous or vexatious. In his submissions one intervenor provided me with a "live" example of how such misuse could occur.

This intervenor made two straightforward requests for information. In one, he requested a copy of the cellular phone bills for a particular institution for the month of September 1994. In the other, he asked for copies of the annual report for the years 1993 and 1994 that the institution is required to file with my office. The institution responded by denying access to the requested information on the grounds that the requests were "frivolous, vexatious, and amount to an abuse of the right of access".

The decision letter went on to indicate that the following factors indicated that the requests were frivolous, vexatious, or amount to an abuse of the right of access:

- the nature of your requests and the number of records to which you seek access;
- your history of appealing an institution's decision either to refuse access or to refuse to waive the fee estimate, and then abandoning your appeals;
- your refusal to pay for any of the costs associated with the search and photocopying of the records to which you seek access.

The intervenor provided a very detailed reply to the institution's decision letter which, in my opinion, effectively demonstrated that none of these factors applied in his case. The intervenor pointed out that he had not previously made a request to the particular institution. He also questioned how the institution would even know his "history" of appeals and indicated that he had appealed access decisions a total of five times and none of these appeals had involved this particular institution. He also stated that three of his appeals were resolved by mediation and that he had never abandoned an appeal. Finally, the intervenor pointed out that he had not refused to pay fees and that the institution had not even provided him with a fee estimate.

I am aware of the fact that at some point a "form" letter came into existence for use by a police service when responding to Riley requests. It appears that what the institution has done when responding to this intervenor's request is to use the "form" letter. In doing so it has highlighted the reality of the concerns of intervenors over what direction I might take in this inquiry. This example has been very much in my mind as I contemplated my conclusions on the various issues arising in this inquiry.

It is common ground between the parties, and I agree, that the Act does not expressly empower me to relieve an institution from its obligation to respond to requests on the basis that they are "frivolous", "vexatious", an "abuse of the right of access" or "an abuse of process". However, I believe that it is important to keep in mind the distinction between the existence of the statutory **right** at issue in this inquiry and the **means** available for seeking to realize that right. The former gives any member of the public the right to call on institutions for information not exempt from the disclosure requirements of the Act. The latter engages the processes of the institution when a request is made for access to records, and it engages the Commissioner's processes when a requester appeals "any decision of a head under this Act to the Commissioner."

Those processes are, in large part, specified in the Act. In other respects, they are left to the institution or to my office, as the case may be, to establish and adapt for the better administration of the Act. It is this authority over my own process which led to the establishment of a bulk user policy which limits the number of appeals my office will actively process at any one time on behalf of any one person to 15. As I understand Mr. Ben-Eliezer's submissions, neither he nor his client take issue with the necessity or propriety of instituting the bulk user policy as a means of controlling my own process, so that no one requester can burden that process with unlimited numbers of appeals to the exclusion of others also seeking to enforce their rights of access.

When "open-ended" rights are granted by legislation, such as the right of access to information set out in section 4(1) of the Act, and the Legislature has not expressly built in reasonable limits or other controls on the unbridled use of processes designed to secure those rights, in my view, it falls to those charged with administering the legislation and its processes to do so in a manner that is fair, reasonable and consistent with the legislative purpose.

Riley may, in principle, have an unlimited right of access to government information, subject only to the exemptions set out in the Act. However, in my opinion, he does not have an unlimited right of access to the processes available to secure those rights. This is the point at which, in my view, Mr. Ben-Eliezer's submissions fail to pass the most important test for the interpretation and administration of any statute - the test of reasonableness.

Taken to its logical extension, Mr. Ben-Eliezer's position leads, theoretically, to the result that one unbridled requester could deluge an institution, or for that matter all institutions, with requests of such volume and frequency, calling on all their resources to process them, so as to bring their other operations to a virtual standstill. With all due respect, this could not have been the intent of the Legislature in enacting freedom of information legislation.

The Legislature created the Office of the Information and Privacy Commissioner to administer the Act in ways that facilitate the purposes of the legislation. This mandate cannot require the Commissioner to act unreasonably in administering his own processes, or in supervising the processes of institutions. The Legislature must have intended that the Commissioner have the necessary authority to control his own processes, and to supervise the processes of institutions under the Act, so as to minimize or eliminate the potential for abuse.

I have been referred to ample and persuasive legal authority for the proposition that, as an administrative tribunal exercising quasi-judicial functions, the Commissioner is "master of his own process". On this basis I believe that I have the necessary authority to control what I identify as abuse of that process which would frustrate the intent of the Legislature in creating both a freedom of information regime and an office for its administration.

The authority of an administrative tribunal to prevent abuses of its own process is affirmed in the judgment of Misener J., of the Ontario Court (General Division), in Sawatsky v. Norris (1992), 10 O.R. (3d) 67. Judge Misener considered that, even absent the express power to deal with abuses of process granted by section 23 of the Statutory Powers Procedure Act R.S.O. 1990, as amended, a review board under the Mental Health Act "has the common law right to prevent abuse of its process, absent an express statutory abrogation of that right" (at p. 77).
This view is reaffirmed by Hirschfield J., of the Manitoba Court of Queen's Bench, in Vogel v. Manitoba (1992), 90 D.L.R. (4th) 84, where he held that a board of adjudication under the human rights legislation of that province did not act unreasonably, or fail to exercise its jurisdiction, by refusing to relitigate matters previously decided. The adjudicator in that case had held that to permit the matter to go ahead would have amounted to an abuse of process.

In Misra v. College of Physicians and Surgeons (Sask.), (1988), 5 W.W.R. 333, the Saskatchewan Court of Appeal considered that the authority to control abuse of process in that case arose as an aspect of "natural justice", the common law principle governing the fairness of proceedings of all administrative tribunals.

In addition to my ability to deal with issues involving the abuse of my own processes, there is the question of my ability to supervise the processes of institutions faced with abuse of process at the request stage. Before addressing this question, I believe it is necessary to set out my conclusions regarding the allegations of abuse of process in this inquiry.

Having carefully considered all the facts and circumstances surrounding the issues arising in this inquiry, I conclude that Riley has abused the processes established under the Act for securing access to government information. The basis for my conclusion is four-fold.

First, there is the sheer volume of Riley's requests and appeals from the decisions of institutions. They are excessive in the sense that it is unreasonable for the administrative processes of institutions and the quasi-judicial processes of the Commissioner's office to accommodate them at the rate and volume they are made. However, I am not prepared to say that this fact of volume alone would necessarily amount to an abuse of process.

The difficulties that high volumes of requests pose for government institutions may rest with the inability of such institutions to become "transparent" overnight in relation to the information they hold. It may lie equally with the inability of any quasi-judicial process to deal with all issues that might arise under the Act, including all types of information and factual circumstances, all at once. If all possible issues arising under the Act had already been decided by my office, institutions might well be in a position to improve their methods of managing and classifying information consistent with the otherwise "open-ended" legislative requirements.

Taken together with other factors, however, the excessive volume of requests and appeals may amount to an abuse of process. In my view, those other factors are present in this case.

The varied nature and broad scope of Riley's requests, such as all arrests over a 10 year period, washroom cleaning records, and UFO sightings, to name a few, together with the duplication of these otherwise unrelated requests among various police services boards over a considerable span of time, is another factor suggesting that this requester has no genuine interest in the information for its own sake, but rather for the nuisance value it generates for the processes and finite resources both of institutions and of this office.

Add to this the fact that Riley's rate of requests to institutions and appeals to this office increased dramatically following the initiation of the London court proceedings, and again following the initiation of this inquiry, and I believe I am permitted to draw the inference that Riley is endeavouring to demonstrate to these institutions and to my office just how burdensome he can be.

Finally, and perhaps most tellingly, there is Riley's association with Baptista, an individual on the public record, and by his own admission in this inquiry, as stating that his objective is to harass government and to burden or break the system. In this regard, I have considered the similarity of Riley's and Baptista's requests, their similar modus operandi, the fact that Baptista has previously made Riley his agent, the fact that Riley is now formally engaged with Baptista in Planet Communications and the association of these two individuals in media coverage. In my

view, and I make an explicit finding to this effect, Riley is acting in concert with Baptista, wittingly or otherwise, in implementing Baptista's stated objective to burden or break the system.

All these factors go to establish a pattern of abuse of process, through the excessive use of that process by this individual **requester**, for purposes unrelated to a genuine or bona fide wish to secure the information requested. I might add that Riley advanced no evidence to rebut the inferences that could be drawn from the totality of evidence before me. His lawyer's position was simply that institutions had to comply with the strict requirements of the Act, without restriction or limitation, regardless of the potentially abusive objectives of the requester or the consequent burden imposed on institutions.

If I were to accept Mr. Ben-Eliezer's submission that I am powerless to remedy the abuse which I have identified, and that I must mechanically require institutions and my office to be the subjects of that abuse, I would not be fulfilling the objectives of the legislation, but frustrating them. Notwithstanding the absence of express powers vested in the Commissioner for dealing with abuse of process, I am not prepared to serve as agent for Riley's abuse by perpetuating meaningless exercises in the expenditure of government resources merely to satisfy Riley's curiosity, or to permit him to test the system or render it dysfunctional. This would offend public policy and bring the administration of Ontario's freedom of information legislation into disrepute.

Before turning to how I intend to address this abuse, I hasten to add that I would not have concluded that any one of Mr. Riley's individual **requests**, standing alone, either could or should be considered an abuse of process on its face. Rather, it is the excessive number of the requests and appeals collectively, coupled with the other factors I have outlined, which lead me to conclude that it is this **requester** who is abusing freedom of information processes.

I also wish to deal with the position that has been put to me that I should uphold the London Board's decision to deny Riley access to the records requested on the grounds that his requests are frivolous or vexatious.

At the outset, I am not convinced of the value of the Commissioner's office and institutions engaging in the time-consuming and highly subjective exercise of examining the merit or worth of individual requests for information as a pre-condition to putting an institution to its duty to respond. I refer to The Report of the Commission on Freedom of Information and Individual (1980) "Public Government for Private People", which forms the basis of Ontario's freedom of information legislation:

> We think it unwise to restrict access to persons who can demonstrate a need for the information in question. We accept as a basic premise underlying freedom of information laws the proposition that members of the public should be entitled to have access to government information simply for the purpose of scrutinizing the conduct of public affairs. To require individuals to demonstrate a need for information would erect a barrier to access resulting in unproductive disputes over the nature and value of a particular individual's interest in obtaining access to government information.

In my view, the concepts of "frivolous" or "vexatious" do not sit comfortably with a freedom of information regime which grants an open-ended or unqualified right of access to public information of which government institutions are only the stewards.

"Frivolous" is typically associated with matters that are trivial or without merit. Information that may be trivial from one person's perspective, however, may be of importance from another's. In this regard, I recall the example offered by an institution intervenor of a request to a fire department for fire fighters' shoe sizes over a certain period of time. Seemingly trivial or without merit, but important to the shoe manufacturer who wishes to create an inventory of fire fighters' shoes to market to fire departments.

"Vexatious" is usually taken to mean with intent to annoy, harass, embarrass, or cause discomfort. Government officials may often find individual requests for information bothersome or vexing in some fashion or another. This is not surprising given that freedom of information legislation is often used as a vehicle for subjecting institutions to public scrutiny. To deny a request because there is an element of vexation attendant upon it would mean that freedom of information could be frustrated by an institution's subjective view of the annoyance quotient of a particular request. This, I believe, was clearly not the Legislature's intent.

To that extent, I agree with Mr. Ben-Eliezer that a legislative amendment would be required to permit me to uphold an institution's decision not to disclose information on the basis that a particular request is frivolous or vexatious.
Other instances of abuse of process may arise in the future. However, from my experience in administering the Acts, I believe such instances would be extremely rare.

The vast majority of requesters, appellants and institutions approach the legislation and its processes reasonably, responsibly and with a sincere wish to streamline, and not clog up, the system. Therefore, I do not want to leave the impression that the response of "abuse of process" is now routinely available to institutions to deny access to "bothersome" requesters. In my view, such a response would itself be an abuse of equal concern to that which I have considered in this inquiry, and one which would also warrant an appropriate response by my office.

CONCLUSION:

In this inquiry, the most glaring indicator of abuse is the sheer volume of requests and appeals, together with the large number of institutions engaged in processing similar requests and appeals. My goal therefore, is to fashion a remedy which is tailored to the abuse identified and which, I believe, strikes a reasonable balance between Riley's rights of access to information, the use of processes to secure access, and the administrative and fiscal capacities of institutions and my office to respond. In doing so, I do not intend to extinguish Riley's rights under the legislation, but to control the processes, and the potential for abuse of these processes, through which Riley seeks to exercise his rights.

The case law to which I have referred in support of a tribunal's authority to control abuses of its own process indicates that, where abuse is found, an appropriate course of action would be for the tribunal to refuse to hear the case. Those were cases, however, where a litigant had, in essence, sought to relitigate matters already decided in another forum. That is not the case here.

Rather the abuse in this inquiry is focused on the volume of requests and appeals which is oppressive for the numerous institutions affected and my office.

Simply refusing to hear one or more of the five appeals before me on their merits would not address the larger problems, which would continue with institutions having to process Riley requests prior to the appeal stage, and with this office having to process individual Riley appeals, even when I have found that the excessive numbers of appeals are in themselves abusive. I believe that a reasonable interpretation of the Act provides me with the appropriate authority to remedy both situations.

To the extent that there may be any question regarding my authority to create an appropriate remedy for dealing with abuse at the request stage, I find assistance in two court decisions which discuss the notion of a tribunal's implied powers. In Reference Re National Energy Board Act (1986) 29 D.L.R. (4th) 35, the Federal Court of Appeal held that in deciding whether a statute may be said to confer implied powers on a tribunal, it is important to consider whether "there was evidence of **practical necessity** for the exercise of the power to enable the regulatory body to attain the objects expressly prescribed by Parliament" (emphasis added).

In Bell Canada v. Canada (Canadian Radio-television & Telecommunications Commission (1989), 97 N.R. 15, 60 D.L.R. (4th) 682, [1989] 1 S.C.R. 1722, Justice Gonthier stated:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the Act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

I have already discussed how, in my view, the restrictive interpretation of my authority under the Act, advanced by Mr. Ben-Eliezer, could frustrate the purposes of the Act when institutions and my office are confronted by unreasonable volumes of requests and appeals. In addition, I have considered the Divisional Court's perspective on the Commissioner's role under the legislation in the John Doe case, including the following statement of the Commissioner's overall supervisory mandate:

> [T]he commissioner is at the apex of a complex and novel administrative scheme, involving the regulation of the dissemination of the information in the hands of hundreds of heads of government agencies, whose decision_making under the Act reaches a final administrative focus in such appeals.

In this inquiry I must emphasize the practical necessity of supervising the processes under the Act at the request stage, as well as at the appeal stage, because, as the London Board has shown, the harm caused by the abuse has, in large part, already occurred by the time an individual appeal comes to my office. If, having found a requester to be engaged in this pattern of abuse of process, I were to deal with these issues only on an appeal-by-appeal basis, the abuse would be perpetuated.

While I believe that the principles set out in the National Energy Board and Bell Canada cases may be sufficient, in themselves, to permit me to exercise supervisory authority over institutions and this requester at the request stage, as well as at the appeal stage, I also have the explicit authority set out at sections 43(1) and (3) of the Act to make an order "disposing of the issues raised by the appeal" which "may contain any conditions the Commissioner considers appropriate."

While I recognize that the combined effect of these sections does not give me an unlimited remedial power, I believe they embody the Legislature's intentions that the Commissioner should have the flexibility to fashion remedies in order to resolve issues in a fair and effective manner in accordance with the fundamental purposes of the Act. Further, I believe a flexible remedial power is essential to my ability to deal effectively with the particular findings I have made on the nature of the abuse in this inquiry.

Accordingly, I am declaring Mr. Riley to be engaged in a course of conduct which constitutes an abuse of the processes of institutions and this office under the Act. At the same time I am invoking my authority under section 43(3) of the Act to impose conditions on processing any Riley requests and appeals now and for a specified time into the future.

These conditions are as follows:

1. For a period of sixty (60) days from the date of this order, I will not require any institution under either the municipal or provincial Acts to answer or otherwise process any Riley requests for records or personal information, or appeals arising out of any such requests.

2. For a period of sixty (60) days from the date of this order, my office will not process any Riley appeals filed under either the municipal or provincial Acts.

3. For a period of one year following the expiry of the sixty (60) day period, I am imposing a five (5) transaction limit on the number of Riley requests and/or appeals that institutions under the municipal or provincial Acts are **collectively** required to process at any one point in time. In addition, I am limiting to one (1) the number of Riley requests and/or appeals that any individual institution is required to process at any one time, to a maximum of four (4) requests and/or appeals in the year.

4. For greater certainty, for a period of one year following the expiry of the sixty (60) day period, I will not require any institution to process any Riley requests or appeals beyond the limits set out in paragraph 3. Nor will my office process any Riley appeals beyond these limits.

5. Prior to the expiry of the sixty (60) day period referred to above, Riley may advise my office in writing as to which requests and/or appeals he wishes to proceed with, within the limits set out in paragraph 3.

6. To enable my office to oversee the implementation of these conditions, Riley will be required to submit any requests through my office, which will forward them to the

institution specified in the request. For greater certainty, I will not require any institution to process any Riley request unless it is transmitted to the institution from my office.

7. The terms of this order will apply to any requests and appeals made by Riley or by any individual, person, organization or entity found to be acting on his behalf or under his direction. For present purposes, Planet Communications is so found.

8. At the conclusion of one year and sixty (60) days from the date of this order, Riley, and/or any person or institution affected by this order, may apply to my office to seek to vary the terms of this order, failing which its terms shall continue in effect from year to year.

9. In addition to Riley, the London Board and the intervenors in this inquiry, I am directing my Registrar of Appeals to provide copies of this order to Planet Communications, to all institutions who presently have appeals involving Riley and/or Planet Communications, and to Management Board of Cabinet.

10. For greater clarity, the sixty (60) day period expires on December 17, 1995. The one year period expires on December 17, 1996.

11. I remain seized of this matter for whatever period is necessary to ensure implementation of and compliance with this order in accordance with its terms.

I wish to emphasize that these conditions do not reflect my views on the merits of any of Riley's existing requests or appeals. Riley is free to pursue any request or appeal as long as he stays within the limits I have set.

Over the next 14 months there will also be an ongoing need to supervise and implement the terms of this order. I have determined that these functions will be performed by my Director of Appeals who shall have the authority to:

1. Consult with Riley to determine which of his five (5) requests and/or appeals are to be initially processed and to notify the institutions involved of this decision.

2. Make necessary adjustments to the list of five (5) requests and/or appeals to maintain its currency and to ensure that the numerical limits specified in this order are adhered to.

3. Determine all other administrative issues that are necessarily incidental to the proper implementation of this order.

In arriving at the numerical limits set out above, I have considered a number of factors, including the amount of time institutions and my office have spent to date processing Riley requests and appeals and the average level of appeal activity of reasonably frequent users of the Acts.

With reference to other users of the Acts, I note that as of September 28, 1995 my office had 442 active appeals distributed among 327 different appellants, for an average of 1.35 appeals per appellant. (Most recently in 1994 my office received over 1500 appeals). Among the top 21 appellants at that date, Riley and one other individual headed the list at 14 active appeals each, a

Toronto newspaper was next at 10, and the remaining 18 appellants ranged in numbers down to three each for the last eight appellants on this list. The limits imposed on Riley by this order will place him at the lower range of the more active users of the Acts for a specified period of time.

It is my hope that the numerical limits and conditions established in this order will assist Mr. Riley in exercising self-discipline in prioritizing his concerns when making information requests and appeals. I also trust that this order will clearly show Mr. Riley, institutions and other requesters and participants in the processes under Ontario's freedom of information legislation that attempts by **any parties** to abuse these processes will be dealt with fairly and firmly.

Original signed by: October 18, 1995
Tom Wright
Commissioner