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

ORDER PO-2730

Appeal PA-040171-2

Office of the Public Guardian and Trustee

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NATURE OF THE APPEAL:

The Office of the Public Guardian and Trustee (the PGT) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> … (1) The names; (2) Last known address; (3) Occupation; (4) Place of death and (5) Date of death of deceased persons, whose names have been reported to your office after January 1, 2002 (but not including those estates that you most recently sent to us) and where the death took place at least one year ago as of the date of your response to us, for those persons who have passed away without a known will or a will that is no longer effective because the beneficiaries of the residue of the estate have either pre-deceased the deceased or their whereabouts are unknown and remain[s] unknown as the of the date of your response; and where the whereabouts of the closest next-of-kin of the deceased is unknown and where the present value of the estate is greater than one hundred thousand dollars, and where the OPGT has not received an heirship claim.
>
> We also ask that this list include the date that your office applied for a Certificate of Appointment of Estate Trustee if applicable.
>
> We also ask that this request be considered a continual request and that at the end of each month your office provides us with an updated response for a period of two years. In the event that you agree to release the information above but refuse to do so on a continual basis then please state that you refuse to respond on a continual basis as requested.

The PGT issued an interim fee decision stating that to process the request it would have to create a computer program and the fee would be $38.75. The calculation of the fee for the computer time was as follows: .50 hours @ $77.50 = $38.75.

The requester paid the required fee and the PGT issued a final decision that provided access to the information in part. The PGT advised that access to a portion of the information was denied in accordance with section 21(1) of the *Act*. The PGT specifically stated:

> Access is denied to the information relating to one individual, as this individual's date of death is less than one year from the date of your request that was received by the Ministry on April 29, 2004.

With respect to the requester's request for continuing access for each month for a period of two years, the PGT denied the request and stated as follows:

> The [PGT] advises that the subject matter of this type of request is not the kind of record that would be treated as an on-going or continuing access request as contemplated by subsection 24(3) of the *Act*. An estate record is not produced exclusively for public use and by its very nature "actively disseminated" as was

found to be the case in the Information and Privacy Commissioner's Order P-1099.

The requester (now the appellant) appealed the PGT's decision to deny access to some of the records and to deny his request for access on a continuing basis under section 24(3) of the *Act*. Accordingly, this office opened appeal number PA-040171-1.

During mediation, a decision was made to place the file on hold, with the consent of the appellant, because the issues in this appeal were similar to issues raised in Order PO-2298, and that decision was subject to a reconsideration request filed by the PGT.

Subsequently, Order PO-2590-R was issued. It resolved the PGT's reconsideration request concerning Order PO-2298. This appeal was then reopened as appeal PA-040171-2. When the appeal file was reopened, the appellant advised that he wished to continue to appeal the decision of the PGT to deny him access to some of the records and to deny his request for continuing access under section 24(3) of the *Act*.

Accordingly, efforts to resolve the issues in this appeal through mediation resumed. During this second attempt at mediation, the PGT issued a revised decision granting full access to the information that was previously withheld. However, with respect to the request for continuing access to the requested records, the PGT affirmed its previous decision. The PGT took the position that the records at issue in this appeal were not the kind of records that could be treated as an on-going or continuing access request as contemplated by subsection 24(3) of the *Act*. The appellant decided to proceed with the appeal as it related to his request for continuing access. At the conclusion of mediation, that was the sole ongoing issue.

As no further mediation was possible, this appeal was moved to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*. I began my inquiry by sending a Notice of Inquiry, outlining the facts and issues in the appeal, to the PGT, and invited the PGT to provide representations in response. The PGT responded with representations. I then sent the Notice of Inquiry to the appellant along with the PGT's complete representations, and invited the appellant to provide representations, which the appellant subsequently did.

In its initial representations, the PGT noted that the records are specifically produced on a request-by-request basis and submitted that section 24(3) of the *Act* could not apply "[if] the record does not exist at the time of the scheduled access" provided for in that section. In other words, because the requested record would not exist on the scheduled access date, the PGT takes the position that section 24(3) cannot apply. As a consequence of this argument, I decided, in addition to inviting the PGT to reply to the appellant's representations, to also invite its representations on the impact of the definition of "record" in section 2 of the *Act*. Paragraph (b) of the definition refers to a "record that is capable of being produced from a machine readable record," and was interpreted by the Divisional Court in *Toronto (City) Police Services Board v. Ontario (Information and Privacy Commissioner)*, [2007] O.J. No. 2442, leave to appeal granted November 29, 2007 (M35279 and M35285) (C.A.). Accordingly, in addition to "continuing

access," the impact of the definition of "record" is also an issue in this appeal, which I will consider under a separate heading below.

Accordingly, I provided a Notice of Inquiry and a complete copy of the appellant's representations to the PGT. The Notice of Inquiry invited the PGT's representations in reply to the appellant's representations, as well as on the impact of the definition of "record", which the PGT subsequently provided.

Finally, I shared the PGT's complete reply representations with the appellant, accompanied by a sur-reply Notice of Inquiry, and invited the appellant's sur-reply representations, which he provided.

RECORDS:

The request is for continuing access on a monthly basis for a period of two years to the names, last known addresses, occupations, place of death and date of death for all deceased persons whose names have been reported to the office of the PGT after January 1, 2002 who meet the following criteria:

- persons who passed away without a known will or a will that is no longer effective because the beneficiaries of the residue of the estate have either pre-deceased the deceased or their whereabouts are unknown; and
- the whereabouts of the closest next of kin are unknown; and
- where the present value of the estate is greater than one hundred thousand dollars; and
- where the OPGT has not received an heirship claim.

In addition, the appellant requests the date that the PGT applied for a Certificate of Appointment of Estate Trustee, if applicable.

DISCUSSION:

IMPACT OF THE DEFINITION OF "RECORD"

Introduction

The record already disclosed in this case was produced from a machine readable record, and if continuing access is granted, future responsive records would also be produced from machine readable records. "Record" is defined in section 2 of the *Act*, and paragraph (b) of the definition directly addresses "machine readable" records. In its representations, the PGT questions whether

the records that would be produced in the future would actually meet the requirements of paragraph (b).

Section 10 provides a right of access to "a *record* in the custody or under the control of an institution…." If records to be produced from machine readable records do not meet the requirements of paragraph (b), they would not be considered "records" within the meaning of the definition in section 2, and could not be accessed under the *Act*. Accordingly, although this issue arose in the midst of my adjudication of this appeal, it must be resolved before I can consider whether continuing access to a "record" could be granted.

Section 2 of the *Act* states:

> "record" means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,
>
> > (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
> >
> > (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;

Section 2 of Regulation 460 under the *Act* states:

> A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution.

The answer to the PGT's argument that records to be produced in the future may not qualify as a "record" under paragraph (b) of the definition is provided by the very wording of that paragraph. This section indicates that the term "record" includes a record "that is *capable of being produced* from a machine readable record." In other words, the "record" has not been produced yet, but it is considered to be a record under the *Act*. This view finds support in *Yeager v. Canada (Correctional Services)*, [2003] F.C.J. No. 73 (C.A.), leave to appeal dismissed [2003] S.C.C.A. No. 120, in which the Federal Court of Appeal considered similar language in the federal *Access to Information Act* and concluded that "… a new and distinct record must be produced from an existing machine readable record."

The PGT makes several other arguments based on the definition of "record". When I invited representations on this subject, I included a copy of the Divisional Court's decision in *Toronto (City) Police Services Board* (cited above). In that case, the Court found that the adjudicator had failed to consider whether the method of producing the record from machine readable data was "normally used by the institution." It went on to find that the method used to produce the record was *not* "normally used by the institution" and, "… in fact, did not exist." For this reason, Order MO-1989 was quashed.

As noted above, *Toronto (City) Police Services Board* is subject to an appeal to the Court of Appeal that was argued recently, and on which judgment has been reserved (Court file numbers C48066 and C48067). As a consequence, I have considered whether it was necessary for me to await the Court of Appeal's judgment in that case before issuing this order. In my view, however, it is not necessary for me to do so because the issues in *Toronto (City) Police Services Board* were so closely tied to the facts of that case. In the current appeal, I *am* asking myself whether the method of producing the record is "normally used by the institution," and I have sufficient evidence to make that determination. Accordingly, I conclude that it is not necessary for me to defer my decision in this case pending the outcome of the appeal in *Toronto (City) Police Service Board*.

In its decision, the Divisional Court identified that the following three questions must be canvassed in analyzing paragraph (b) of the definition:

1. Is there a record capable of being produced from a machine-readable record?

2. Is this record under the control of the institution?

3. Can the record be produced "by means of computer hardware and software of any other information storage equipment and technical expertise normally used by the institution"?

The Court went on to indicate that if requirement 3 is met, there remains the additional requirement (imposed in this case by section 2 of Regulation 460, quoted above) that producing the record must not "unreasonably interfere with the operations of the institution."

Requirement 1

In its representations on requirement 1 (found in its reply representations), the PGT states that there is no single record in its possession that responds in its entirety to the appellant's request. The PGT also comments that the record produced from a machine readable record is only a partial response to the request as drafted, and a complete response would require a manual search of hundreds of estate files. The PGT identifies several data fields that are used in substitution for elements of the request as originally submitted. The PGT goes on to indicate that "the [appellant] is fully aware of this practice and has acceded to it by filing monthly "list" requests for access to data base records, then following up with requests for extracts of non-machine readable records from specific estate files." As well, the PGT comments that it cannot guarantee

the accuracy or completeness of the records produced by means of extracts from its machine readable records.

The appellant responds in sur-reply by stating that it:

> … has submitted requests in a two-stage process simply because that has been the only option available to this point. … The appellant has tailored its monthly requests to meet what it understands are the applicable parameters for this data as stored by [the PGT]. Since the [PGT] asserts that this is not the case, the appellant requests that the [PGT] be ordered to disclose data parameters so that search requests can be made in a manner that is most efficient and ensures the disclosure of records that are responsive to the requests.

The appellant has not made an access request for the data parameters and the question of access to that information is not before me. I will therefore not order the PGT to disclose that information. Nevertheless, these submissions of the PGT, responded to by the appellant, threaten to expand the issues in this inquiry beyond the definition of "record" in the context of continuing access, to include: (1) the scope of the request; (2) whether the proposed data elements included in the record are in fact responsive; and (3) whether the information is accurate.

In my view, the issues before me do not include scope of the request, responsiveness, or the accuracy of the records to be produced if the request qualifies for continuing access. It is significant that the PGT has already produced a record in response to the very request that is to be the subject of continuing access when, during the mediation of this appeal, it disclosed a record that it had produced from a machine readable record. The appellant has not objected to the scope attributed to the request, the responsiveness or accuracy of this record, nor has it asked to have these issues added to this appeal. Accordingly, these matters have not been expressly appealed. As well, the issue of whether the definition of "record" is met by the records to be produced in the context of continuing access, which would presumably contain the same data fields as the record already produced, does not require me to address the questions of scope, responsiveness or accuracy, and I therefore conclude that these issues also do not arise by implication in this appeal.

As noted, the issues before me are the impact of the definition of "record" on the continuing access request and the issue of continuing access itself. In my view, submissions on the scope of the request, the responsiveness of the record produced (or to be produced) in response, and the accuracy of the information, are irrelevant to those issues.

Clearly, in view of the fact that the PGT has been producing records from machine readable records, in order to respond to previous "list" requests, and has in fact already produced a record in response to the request that is the foundation of this appeal, I have no doubt that there is a record (or records) capable of being produced from machine readable records. I find that requirement 1 is met.

Requirement 2

The PGT concedes that the records are under its control, and requirement 2 is therefore met.

Requirement 3

As regards requirement 3, the PGT submits that it has had to retain a "technology consultant" to create a software program to extract the relevant data in order to produce a record responsive to the appellant's requests. The PGT says that it has no such person on its staff and, further, that the reports are not produced on a "regular and routine basis" by the PGT's database. The consultant must change the "date and other field parameters" for each request. The reports produced are not used by anyone in the PGT's office. The PGT submits:

> It now appears that in accordance with the recent decision of the Divisional Court [in *Toronto (City) Police Services Board*, cited above], the hiring of a consultant to write and execute a special software in order to extract the requested date, exceeds the plain language requirements of … the *Act* and would no longer be required. Consequently, the [PGT] would no longer be required to produce such records.
>
> The IPC's views on this point are respectfully requested.

As indicated above, I have concluded that the situation in *Toronto (City) Police Services Board* is distinguishable from the present appeal. Unlike the situation in that case, I *am* in this instance turning my mind to the question of whether the software used to produce the record is "normally used by" the PGT, and I have the necessary evidence to make this decision.

The PGT describes the program used to produce the records as "software", and if that is accurate, the relevant question under paragraph (b) of the definition is whether the record can be produced "by means of computer hardware and software normally used by the institution." The PGT does not argue that the hardware is not "normally used" by it, and this is therefore not an issue. The question relates to the software, or possibly technical expertise. Given that the time required for the consultant to write the necessary "special software" in the PGT's initial response in this case was .5 hours, I am somewhat dubious that the creation of entirely new software is involved in this process. As discussed below, the PGT indicates that the consultant is required to change the date and field parameters to meet each new request. In my view, that sounds more like the application of "technical expertise" to modify existing software. In any event, the question is the same: is the software and/or technical expertise needed to extract the relevant information "normally used" by the institution?

Turning to the submissions of the PGT, I would begin by observing that the question of whether a record produced from a machine readable record meets the requirements of paragraph (b) does *not* turn on whether a consultant must be retained to create special software, or whether the purpose for doing so is to answer an access request rather than to meet some internal purpose of the PGT. There is no law suggesting that either of those matters is relevant. Rather, as I have

already noted, the question is whether the software or technical expertise used to produce the record is "normally used" by the PGT.

Before leaving this point, however, I would also note that in the context of responding to an access request, the development of a computer program and the use of a consultant are both contemplated by section 6, paragraph 5 of Regulation 460. This section contemplates fees "*for developing a computer program or other method of producing a record from a machine readable record.*" Paragraph 6 of that same section allows invoiced costs to be passed on to requesters, and this would include consultant's costs. Accordingly, the need to develop a computer program or retain a consultant cannot be determinative of whether a record produced from a machine readable record meets the requirements of paragraph (b) of the definition of "record".

I now turn to the question of whether the software or technical expertise that produces the record is "normally used" by the PGT. On the PGT's own evidence, as confirmed by the appellant's representations, the PGT has been producing these records "for the past decade." In doing so, the consultant who the PGT retains to "create a software program" is simply required "to change the date and field parameters" to accommodate each new request. In my view, this modification in response to each new request is not sufficient to mean that the software or technical expertise is not "normally used" by the PGT. Rather, the history of the appellant's requests and the PGT's responses indicates that the software or technical expertise used to produce the records is "normally used by the institution." Accordingly, I find that requirement 3 is met.

Unreasonable Interference

Since all three requirements are met, it is necessary to consider whether "the process of producing" the record "would unreasonably interfere with" the operations of the PGT. If it would, then the record to be produced from the machine readable record "is not included in the definition of record" under section 2 of Regulation 460.

On this point, the PGT submits that it must retain a consultant for this purpose, and if continuing access is granted, it would be required to do so monthly. The PGT expresses concerns that it would be required to do manual searches to produce exactly what the appellant has requested rather than records like those produced to date, which the PGT says would constitute "unreasonable interference" and occupy 30 to 60 minutes of staff time per estate. The PGT further submits that only the seven Estate Analysts employed by it could do this work, and assigning them to this task would make it difficult for the PGT to meet its business objectives.

In my view, the simple fact of being required to retain a consultant is not, in and of itself, evidence of unreasonable interference. The consultant is not a PGT staff member assigned to other duties, so there can be no "interference" on that basis. And as noted earlier, the Regulation expressly provides for fees to be charged for this work. I am not satisfied that the need to retain consultant constitutes "unreasonable interference" in the circumstances of this case.

With respect to the manual search argument, which seems to arise from a concern that the appellant will change his approach and begin demanding records that respond to the request more precisely than what the PGT currently produces, and that are accurate, I find that these arguments are not in fact directed at whether producing a machine readable record will unreasonably interfere with PGT operations. Rather, this submission addresses the paper record searches that the PGT states would be required to produce more precisely responsive information. Producing paper records based on manual searches is not the subject of section 2 of Regulation 460 and is, in any event, compensable under the fee structure in the *Act*. As well, the production of paper records from manual searches is not before me in this appeal. I have already found that the issues of scope of the request, responsiveness and accuracy of the records are not at issue in this appeal, and are irrelevant to the issues that I must decide. Accordingly, this argument does not assist the PGT.

Based on the foregoing analysis, I therefore find that producing responsive records from the machine readable records, in the manner followed by the PGT to date, does not constitute unreasonable interference with the operations of the PGT.

Conclusion

Given my findings that that the three requirements under paragraph (b) of the definition of "record" are met, and that producing the responsive records is not an "undue interference" with the operations of the PGT, I conclude that the requested records are capable of being produced from a machine readable record within the meaning of paragraph (b) of the definition of "record" in section 2 of the *Act*. They are therefore "records' under the *Act*.

CONTINUING ACCESS

Continuing access is provided for in section 24(3) of the *Act*, which states:

> The applicant may indicate in the request that it shall, if granted, continue to have effect for a specified period of up to two years.

Sections 24(4) and (5) also address the issue of continuing access. These sections state:

> (4) When a request that is to continue to have effect is granted, the institution shall provide the applicant with,
>
> (a) a schedule showing dates in the specified period on which the request shall be deemed to have been received again, and explaining why those dates were chosen; and
>
> (b) a statement that the applicant may ask the Commissioner to review the schedule.

> (5) This Act applies as if a new request were being made on each of the dates shown in the schedule.

In Order 164, former Commissioner Sidney B. Linden considered the application of section 24(3) to a report prepared for the Ontario Human Rights Commission. The former Commissioner stated:

> I am of the view that subsections 24(3) and (4) are intended by the Legislature to apply to the kind of record which is likely to be produced and/or issued in a series; for example, the results of public opinion polls which are conducted by an institution on a regular basis. These subsections are not intended to provide ongoing access to the kind of record of which only one edition is produced, as in the present case.

Order 164 was referred to in Order P-1099, in which former Assistant Commissioner Tom Mitchinson found that Ministry news releases were the types of records appropriately included within the scope of section 24(3). With respect to the news releases, the former Assistant Commissioner stated:

> In my view, they are produced on a frequent and regular basis and actively disseminated by the Ministry without the need to consider and apply any exemption claims included in the Act. Although the content of each news release is different, they are not different in type, and I can see no point in requiring the appellant to make periodic formal requests for access to these records, which would unquestionably result in unnecessary administrative costs.

In Order PO-1681 Adjudicator Laurel Cropley considered an application for continuing access under section 24(3) of the *Act* to records about a specific birth registration. Adjudicator Cropley found that section 24(3) did not apply to the records at issue in that appeal. She stated:

> It is clear from a review of the records that they are all unique and, although they deal with an on-going matter, they are not the kind of records which the Ministry would produce on a regular basis as contemplated in Order 164. Therefore, I agree with the Ministry that the records responsive to this request are not the kind of records to which section 24(3) applies.

The PGT submits that:

- the record is not produced automatically but is specially produced upon receipt of a new request by creating a computer program to match the specific parameters of the particular request;

- each list produced pursuant to a request must be scrutinized to ensure that only relevant information that is disclosable under previous orders of this office, and to which no exemptions apply, will be disclosed;

- continuing access is not mandated by Order 164 because the records are not produced "in series";

- a requester's right to continuing access is conditional upon access having been granted in the original request and, as in Orders P-641 and PO-1681, the records here require individual examination, with the result that section 24(3) does not apply;

- in Order 82, continuing access to records that did not exist at the time of the original request was denied because a right of access under section 10 of the *Act* must exist at the time of the original request, and in this case, no such right existed because the records did not exist at the time of the initial request.

The PGT goes on to refer to Orders P-1103 and P-1108, which found, respectively, that an individual's OHIP claims file and complaints about a specific individual are not produced in series or on a regular basis, and accordingly, continuing access under section 24(3) was not available.

The PGT's initial representations also refer to Order P-1099 and argue that, because the records are not produced exclusively for public use or "actively disseminated," section 24(3) does not apply. The presence of those factors in Order P-1099 provided a basis for the conclusion that continuing access to news releases was mandated by section 24(3). In my view, the former Assistant Commissioner was not establishing these criteria as requirements for section 24(3) to apply; on the contrary, they were simply factors he considered in concluding that continuing access would be appropriate in that case. The presence or absence of these factors is not necessarily determinative.

As well, the PGT submits that "[a] continuing access request is not appropriate *where the record is being created each time only for the requester* and not part of a record already produced by the institution." [My emphasis.]

The appellant responded to these representations of the PGT. He submits as follows concerning Order 164, in which former Commissioner Linden developed the requirement that the records be produced "in series":

> [u]nfortunately, former Commissioner Linden did not expand on his comments or provide an explanation of the underlying rationale for his conclusion. Following orders have also regularly followed this principle, but have provided little analysis to assist i[n] understanding the reasoning behind it.
>
> The Appellant respectfully submits that the most likely rationale in support of this conclusion is the avoidance of creating unreasonable administrative burdens for the institution. That is, where the records requested are in each case unique or sufficiently dissimilar so as not to be easily created in a routine or regular manner, it would be an unreasonable burden to impose on an institution a responsibility to generate the records on an ongoing basis.

> In this case, while the contents of each record will be unique (as were the press releases that were the subject matter of Order P-1099), the process used to create them will be identical in each case. …

Later in his initial submissions, the appellant makes similar comments about the discussion of section 24(3) in Order P-1681.

With respect to the PGT's argument that section 24(3) cannot apply due to the need to individually scrutinize the responsive records in each request, the appellant refers to section 24(5) and its stipulation that "[t]his Act applies as if a new request were being made on each of the dates shown in the schedule" produced under section 24(4)." The appellant also quotes former Commissioner Linden in Order 164 indicating that disclosure on the scheduled dates is not "automatic"; rather, "upon each such date, the request shall be deemed to have been received again, and a new decision respecting disclosure must be made."

The appellant also states that if the ongoing access request is denied, it will have to submit requests monthly, resulting in unnecessary delays.

I have carefully considered these submissions, the relevant provisions of the *Act* and the previous orders of this office in which the issue of continuing access has been considered. I conclude that the subject is in need of a comprehensive review.

To that end, I note that section 24(3) provides that an access request may stipulate that it shall, "… if granted, continue to have effect for a specified period of up to two years." This could be taken to mean that the access request must be granted in full and involve no denial of access or need for separate assessment each time. This interpretation underlies some of the arguments advanced by the PGT, as summarized above.

While I agree that the words, "if granted" in section 24(3) do mean that some access must be granted at first instance in order for continuing access to arise under section 24(3), I do not agree that full access must be granted or that no consideration may be given as to what level of access to grant in requests that arise later, under the "continuing access" schedule mandated by section 24(4). In my view, that interpretation is contradicted by section 24(5) which, as noted by the appellant, provides that the *Act* "… applies as if a new request were being made on each of the dates shown in the schedule." This suggests that the records responsive to the request on a particular scheduled date must be scrutinized to determine whether access will be granted. It also suggests that, if compensable expenses are incurred in responding on one of the scheduled dates, fees are to be charged under the *Act*.

I also note that section 24(3) does not refer to any particular type of record that may be subject to continuing access. It does not refer to records produced "in series", or records that are all of a similar character or type. In fact, the right is very broadly expressed, as the legislative history makes clear. Sections 24(3), (4) and (5) did not appear in the original bill, and were added when section 24 was considered by the Committee of the Whole House on June 15, 1987. MPP Norm Sterling moved the amendment that added these subsections to the bill, in wording identical to

what was subsequently enacted as sections 24 (3), (4) and (5). At the time of their introduction and adoption, he explained their purpose as follows (Hansard, June 15, 1987, pp. 1387-8):

> These subsections to section 24 *widen the right of access so that a person may receive information from a government institution, in most cases on a continuing basis*. Therefore, a person would make a request that he wanted to receive certain data or a certain kind of record over a period of time up to two years and would receive from the head of the institution a schedule on which that information could be presented to the applicant.
>
> The information commissioner has the right, as I understand the section, to review that schedule and make certain the schedule is reasonable in scope. If the flow of data stops, then the person applying for the information would have the right to go to the commissioner and complain about the cessation of his receiving information over a period of time. No other act I am aware of has a right to continue the flow of information. Therefore, I believe it will be good in terms of the right … of members of the public to monitor programs put forward by the government and to be able to call them into accountability, which is of course the reason this act is all about.
>
> This is the sum total of the reasons for this amendment. I believe it strengthens the right of access to information. [Emphasis added.]

In this regard, I note that section 9 of the Alberta *Freedom of Information and Protection of Privacy Act* provides for a "continuing request" in terms that are identical in substance to sections 24(3), (4) and (5) of the *Act*. My review of decisions under that section indicates that it has not been interpreted to apply only to records produced "in series," nor has its application been otherwise restricted. In Order 97-019 issued by the Information and Privacy Commissioner of Alberta, no adverse comment was made concerning the availability of a continuing request for files, memos, interdepartmental memos, notes, and recommendations on a topic that concerned the requester. These are clearly not records that would be produced "in series" or on a predictable schedule.

However, I agree with the appellant's view that former Commissioner Linden's underlying purpose in applying continuing access to records produced "in series" in Order 164 was to avoid "unreasonable administrative burdens for the institution."

Given the fee provisions of the *Act* and Regulation 460, I am unable to see how a broad interpretation of the right of continuing access does, in fact, create an administrative burden. More particularly, it is not clear how a continuing access request would impose any different kind of administrative burden than a one time access request, or more pertinently in this case, a series of one-time access requests. Context for this view is added by considering the following: (1) section 24(3) permits requesters to specify a shorter period of time than two years, if that suits the circumstances or the expected timing of when records would come into being; and (2) even more to the point, institutions are entitled to specify the schedule of dates when the request

is deemed to have been received again, which I assume would be calculated to suit the circumstances of the request, subject to an appeal of the specified schedule to this office. In my view, therefore, avoidance of an added administrative burden does not justify restricting the availability of continuing access. In keeping with legislative history, I believe this provision should be interpreted broadly, and not restricted to records produced "in series".

A possible exception to this analysis arises in the case of a request where it is impossible or highly unlikely that further responsive records would come into being during the continuing access period. In that case, the institution would have the option of refusing the continuing access request, or issuing a schedule with very few dates on it. These decisions are appealable to this office under sections 24(4)(b) and 50(1) of the *Act*. In this appeal, however, it is clear that there will always be new information when the next request is processed, and this exception does not apply.

A second exception arises from the inclusion of the words, "if granted" in section 24(3); if access is fully denied in response to the initial request, these words indicate that section 24(3) does not apply. In this appeal, however, no exemptions have been claimed and access was granted to the record responsive to the initial request.

With respect to the PGT's argument that continuing access should not be available where the record is being produced especially for the requester, I conclude that this is an irrelevant consideration. I have found, above, that the record qualifies as a "record" under paragraph (b) of the definition of this term in section 2 of the *Act*. Section 24(3) makes no reference to, or exception for, a record produced from a machine readable record to respond to a request, and I see no basis for denying the availability of continuing access on this basis.

The argument that the record must exist on the date of the first request is not sustainable. If that were the case, it is difficult to comprehend why requesters would not simply ask for the records all in one request. The whole idea of continuing access clearly contemplates records that come into existence *after* the first request. In my view, this argument does not assist the PGT.

As noted, the PGT also argues that continuing access cannot apply because of the need to scrutinize each record produced in response to the continuing access requests. I agree with the appellant that section 24(5), which indicates that the request is deemed to have been received again on each date specified in the schedule, and contemplates the possible application of exemptions, fees and other provisions of the *Act*, and therefore provides a full answer to this argument.

With respect to the PGT's objection that production of the records must be "automatic" to qualify for continuing access, I believe section 24(5) is also relevant. In responding on a scheduled date where no new record exists or can be produced, if the request is "deemed to have been received again," the institution would simply state that no record exists. The requirements for an access decision in that situation are spelled out in section 29(1)(a).

To summarize, I conclude that the only possible exceptions to the requirement to grant continuing access arise where (1) there is no possibility that future responsive records will come into existence during the continuing access period, or (2) access is denied in full to the initial request under the *Act*.

Neither of these exceptions applies in this case. I therefore find that the appellant's request qualifies for continuing access under sections 24(3), (4) and (5), and I will therefore order the PGT to provide a proposed schedule to the appellant as contemplated by section 24(4).

ORDER:

The appellant's request qualifies for continuing access. I order the PGT to provide a proposed schedule for continuing access to the appellant as contemplated by section 24(4), no later than **November 21, 2008**. For greater certainty, the PGT may charge applicable fees under the *Act* for each access decision under the continuing access regime.

Original Signed by: October 30, 2008
John Higgins
Senior Adjudicator