

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4165

Appeals PA21-00092 and PA21-0093

Ontario Agency for Health Protection and Promotion

July 15, 2021

Summary: Public Health Ontario (PHO) received two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) on April 30, 2020 for emails relating to lab testing capacity and the coronavirus. On May 28, 2020, PHO applied extensions of time to both requests, without specifying the length of time extension it required. It cited the impact of the COVID-19 pandemic on its operations as one of the reasons for the extension. After receiving multiple status updates from PHO without any final decisions, the requester filed these appeals with this office. This order finds that PHO is deemed to have refused access under section 29(4) of the *Act*. The adjudicator takes into account the extraordinary circumstances of the pandemic in deciding on the appropriate remedy.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. F.31, as amended, sections 26, 27 and 29.

Orders and Investigation Reports Considered: Order PO-2634.

OVERVIEW:

[1] On April 23, 2020, the requester (a member of the media) sent the following two access requests under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) to Public Health Ontario (PHO):

A digital machine-readable copy of all emails related to lab testing capacity sent or received by [the Chief Executive Officer and President of PHO] between February 1, 2020 and the date of receipt of this request.
[Request 2020-01]

A digital, machine-readable copy of all novel coronavirus related emails sent or received by [the Chief Executive Officer and President of PHO] from December 1, 2019 through January 31, 2020. For the scope of the search please include all emails that include at least one of the following keywords: Coronavirus, China, Wuhan or Pandemic. [Request 2020-02]

[2] PHO received the requests on April 30, 2021. On May 28, 2020, PHO responded to the requester, acknowledging receipt of the requests. PHO applied extensions of time to both requests pursuant to section 27 of the *Act* and noted that the reasons for the extensions fell under subsections (a) (large number of records that would unreasonably interfere with the operations of the institution) and (b) (consultation with a person outside the institution are necessary). PHO noted that the request also requires consultations with other organizations. It also referred to their focus on COVID-19 response and stated that they would update the requester every 30 days or less. PHO did not specify the length of the time extension.

[3] On numerous occasions¹, the requester followed up with PHO and was advised that it was unable to specify the length of the extension. On February 1, 2021, the requester (now the appellant) filed appeals with this office. PA21-00093 was opened to address Request 2020-01 and PA21-00092 was opened to address Request 2020-02.

[4] The IPC has established special procedures for processing deemed refusal appeals, under which an Acting Adjudicator seeks to help the parties achieve a mediated resolution. These appeals were thus assigned to an Acting Adjudicator initially to explore potential resolution of the appeals.

[5] During the discussions with the Acting Adjudicator, PHO provided the following information:

These requests are in progress at Public Health Ontario (PHO). A preliminary record search has been conducted, resulting in more than 6,000 pages of records. A review of a sample of the records reveals that some exemptions will likely apply, particularly with respect to advice or recommendations (FIPPA s. 13), records that contain third party information (FIPPA s. 17), and records that would reveal information received in confidence from another government (FIPPA s. 15).

As we have indicated in our correspondence with the requester:

- PHO's ability to process FOI requests is directly impacted by the pandemic, as we are prioritizing critical COVID-19 response activities.

¹ In response to the appellant's status update requests, PHO's responded with correspondence dated May 28, 2020, June 30, 2020, July 30, 2020, August 31, 2020, and September 30, 2020.

- The request is for a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution (PHO).
- Consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit.

For clarity, Public Health Ontario provides scientific and technical advice and support to clients working in government, public health, health care and related sectors, and the PHO Laboratory provides laboratory testing services to health care providers. During the pandemic, PHO works with the Ministry of Health, local public health units and other health system partners to provide evidence and expertise that will support COVID-19 efforts. In these exceptional circumstances, large requests are taking considerably longer than usual to process due to prioritization of COVID-19 response activities.

Given these circumstances, PHO would welcome the opportunity to work with you and the requester to clarify the request to enable a more timely response satisfactory to the requester. Alternatively, PHO would be pleased to work with you in determining an acceptable decision date for the request.

[6] The appellant responded by clarifying Request 2020-02/PA21-00092 as follows:

A digital, machine-readable copy of all novel coronavirus related emails sent or received by [the Chief Executive Officer and President of PHO] from December 1, 2019 through January 31, 2020. For the scope of the search please include all emails that include a combination of the following keywords: "Coronavirus" and "China", "Coronavirus" and "Wuhan", "Pneumonia" and "China", and "Pneumonia" and "Wuhan"

[7] The appellant also asked how many responsive records were located in response to Request 2020-01/PA21-00093. In response, PHO advised that 4900 pages of records had been located in the search for Request 2020-01/PA21-00093 and 1600 pages of records had been located in the search for Request 2020-02/PA21-00092.

[8] The appellant subsequently narrowed Request 2020-01/PA21-00093 to the following:

A digital, machine-readable copy of all emails related to lab testing capacity sent directly by [the Chief Executive Officer and President of PHO] and received directly by [the Chief Executive Officer and President of PHO] (please exclude all emails Donnelly was cc'ed on) between February 1, 2020 and April 9, 2020. I am also happy to eliminate any duplicates of the same email thread that might appear in the records.

[9] Following this, PHO advised that the number of responsive pages in the clarified request for Request 2020-02/PA21-00092 was approximately 600 pages, not including surrounding pages, which may be part of an email message or thread in which a responsive page is contained.

[10] On April 21, 2021, PHO provided the following timelines for issuing its decisions:

With respect to your request to provide timelines for the decisions, we have estimated decision dates to the best of our ability during the exceptional circumstances of the COVID-19 pandemic. During the pandemic, PHO has been prioritizing critical COVID-19 response activities, and the demand for this continues to be very high during the current third wave. In this context, we estimate the following decision dates for these requests:

Request 2020-01/PA21-00093 (Lab testing capacity email) *Requester has indicated this is first priority. Decision date: July 16, 2021

Request 2020-02/PA21-00092 (Coronavirus related email) Decision date: August 13, 2021

These dates have been determined taking into account what is realistic in the circumstances given the large number of records and the prioritization of critical COVID-19 response activities, and are based on the likelihood that consultations with persons outside PHO will be necessary to comply with the requests.

For clarity, Public Health Ontario provides scientific and technical advice and support to clients working in government, public health, health care and related sectors, and the PHO Laboratory provides laboratory testing services to health care providers. During the pandemic, PHO works with the Ministry of Health, local public health units and other health system partners to provide evidence and expertise that will support COVID-19 efforts. In these exceptional circumstances, large requests are taking considerably longer than usual to process due to prioritization of COVID-19 response activities.

[11] The appellant was not satisfied with this response and requested that the appeals proceed to adjudication.

[12] The IPC transferred these appeals to the adjudication stage and, as the adjudicator assigned to these appeals, I began my inquiry by issuing a Notice of Inquiry. I received representations from PHO, which I provided to the appellant, inviting her to submit representations. I received representations from the appellant, which I shared with PHO, which subsequently provided reply representations.

[13] During the inquiry process, PHO confirmed the approximate number of

responsive records:

- 2860 pages (of the original approximately 4900 pages from the preliminary review) responsive to the revised search parameters for Request 2020-01/PA21-00093 (Lab testing capacity email); and
- 600 pages (of the original approximately 1600 pages from the preliminary search) responsive to the revised search parameters for Request 2020-02/PA21-00092 (Coronavirus-related email).

[14] In this order, I find that PHO is deemed to have refused access under section 29(4) of the *Act*, given its failure to specify the length of extension of time to issue decisions as required by section 27. I order PHO to issue a final decision for Request 2020-01/PA21-00093 by no later than August 15, 2021 and a final access decision for Request 2020-02/PA21-00092 by no later than August 31, 2021, without recourse to any further time extensions but subject to any required notices to affected third parties.

ISSUES:

- A. Did PHO respond to the request for access in accordance with section 26 of the *Act*? Is PHO deemed to have refused access pursuant to section 29(4) of the *Act*?
- B. What is the appropriate remedy in the circumstances?

DISCUSSION:

Issue A: Did PHO respond to the request for access in accordance with section 26 of the *Act*? Is PHO deemed to have refused access pursuant to section 29(4) of the *Act*?

The legal framework

[15] The primary issue for me to determine in these appeals is whether the extension of time claimed by PHO to respond to the appellant's requests was made in accordance with sections 26 and 27 of the *Act*.

[16] Section 26 of the *Act* states that the head of an institution shall, subject to sections 27 (time extension), 28 (third party notice) and 57 (payment of fees), give written notice of its decision on an access request within 30 days after the request is received.

[17] The ability to extend the timeline for issuing a decision is addressed in section 27 of the *Act*, which states:

(1) A head may extend the time limit set out in section 26 for a period of time that is reasonable in the circumstances, where,

- (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the time limit would unreasonably interfere with the operations of the institution; or
- (b) consultations with a person outside the institution are necessary to comply with the request and cannot reasonably be completed within the time limit

(2) Where a head extends the time limit under subsection (1), the head shall give the person who made the request written notice of the extension setting out,

- (a) *the length of the extension;*
- (b) the reason for the extension; and
- (c) that the person who made the request may ask the Commissioner to review the extension.

[*emphasis added*]

[18] Section 28 of the *Act* sets out obligations to give notice to affected third parties, as well as time limits for giving notice and responding to the requester after such notice.

[19] Where a head fails to issue a decision on access within the legislated framework, section 29(4) of the *Act* applies. This section states:

A head who fails to give the notice required under section 26 or subsection 28(7) concerning a record shall be deemed to have given notice of refusal to give access to the record on the last day of the period during which notice should have been given.

[20] Previous orders have applied the above provisions in finding that a decision to extend the time for responding to a request must be issued within the initial 30 day time limit for responding to a request.² Failure to issue a time extension decision within thirty days may result in a deemed refusal.³ While institutions are discouraged from issuing a second time extension, a second time extension may be acceptable if it is

² Orders P-234, M-439 M-581, MO-1748, PO-2634.

³ Orders MO-1777, PO-2634.

given in a timely manner and meets the conditions in section 27.⁴

[21] Prior to the expiry of a valid extension, and subject to sections 28 and 57 (fees) of the *Act*, an institution must issue a “final decision”, consisting of a written notice stating whether or not access to the record or a part thereof will be given. If access is to be given, the institution must provide the record to the requester. If a final access decision is not issued prior to the expiry of the extension, the institution may be in a “deemed refusal” pursuant to section 29(4) of the *Act*.

[22] Other IPC orders have found that an interim decision/fee estimate must also be issued within the initial 30-day time limit for responding to a request⁵, otherwise, the institution would be in a “deemed refusal” pursuant to section 29(4) of the *Act*.

[23] In Order PO-2634, the IPC commented on the “time-driven approach” to responding to access requests under the *Act*:

Although it may seem inappropriate, and possibly even harsh, to state that barring exceptional circumstances, the consequence of being one day late is that a section 27 time extension may not be claimed, it is entirely consistent with the time-driven approach to responding to access requests established in sections 24 through 29 of the *Act*. In order to have meaningful time limits for taking steps in an access request, it is sometimes necessary to take a “bright line” approach to the establishment of such limits, as the legislature itself has done. In my view, the requirement that a decision to claim a time extension be communicated to the requester within the original time frame for responding to a request (30 days) is consistent with sections 26 and 27, and with the legislative scheme in sections 24 through 29. In order to be effective, the expiry of a time limit must have consequences.

[24] Against this legal framework, these appeals raise the issue of how this “time-driven approach” applies in the extraordinary circumstances of the COVID-19 pandemic.

Representations

Representations of PHO

[25] PHO submits that it played a central role in the COVID-19 pandemic response. It provides extensive representations explaining its mandate and role, and the impact of the COVID-19 pandemic on its operations. Specifically, it advises that:

⁴ Orders PO-2514, PO-3849.

⁵ Orders MO-1520-I, PO-2634.

In the face of COVID-19, PHO has responded to an extraordinary and exponential demand for scientific and technical advice and support from its clients as they worked to respond to the pandemic. PHO has been able to meet these demands through an extensive redeployment of staff into COVID-19 response roles and recruitment of additional staff. However...routine day-to-day operational work within many of PHO's program areas has had to be delayed or deferred as a result of the shifting focus and capacity constraints of PHO's clients.

[26] It provides several examples of PHO's COVID-19 role and activities, including laboratory response, public health response, scientific guidance, test methodologies and vaccine safety surveillance. In addition, PHO advises that it hired approximately 700 mostly temporary staff to support pandemic response activities and continuation of other mandated responsibilities.

[27] PHO submits that it responded to the requests for access in accordance with section 26 of the *Act*. It advises that it received the appellant's two requests on April 30, 2020 and that it gave written notice to the requester within 30 days of receiving the requests that an extension of time pursuant to section 27 was necessary and outlining why it was necessary. In addition, PHO advises that it did not specify the length of the extension because, due to the demands of COVID-19, it was unable to estimate when it would be in a position to issue decisions.

[28] It specifically advises that the requests were received within weeks of a declaration of emergency by the Ontario government and when employees who would otherwise be involved in responding to the requests were shifting to working from home. It also advises that the demands on PHO and its staff increased dramatically and from all its clients, in particular the Ministry of Health and the Ontario government, all of whom were working 12 hours or more, seven days a week.

[29] PHO submits that the requests were challenging as they sought emails sent to or from PHO's CEO, who deals in highly sensitive information and at times, confidential information. In addition, PHO advises that its CEO was absent due to illness and resigned several months later. Accordingly, he was unable to assist with the identification of records. In addition, it submits that there was no one readily available to categorize the identified records.

[30] PHO submits that individual employees were redeployed as needed to meet the new demands and specifically, its privacy office faced increased demands for privacy advice, input on privacy impact assessments, review of research, data transfer, collaboration and other agreements to enable the new initiatives. It explains that there has been an exponential increase in work related to both *FIPPA* and the *Personal Health Information Protection Act*, including a demand for general privacy consultations due to the ever-changing nature of the pandemic and the need to put out as much information (and data) as possible for PHO's stakeholders and the public.

[31] In support of this, PHO submits that it received and responded to:

- more than 4800 requests for support from key stakeholders relating to COVID-19 during the fiscal year compared to 2418 in 2019/20 and 1740 in 2018/19;
- over 13,100 inquiries to its general mailbox, compared to approximately 500 such inquiries per year; and
- over 1800 media requests compared to 344 in 2019 and 311 in 2018.

[32] PHO submits that “[t]his is why PHO was unable to estimate decision dates in the first instance and through waves of COVID-19 each of which was more intense and consequently more demanding on PHO, than the previous one.” It explains that it continues to process the requests with its limited capacity.

[33] PHO provided the following timelines for issuing decisions for the requests:

Timeline	Request 2020-01/PA21-00093	Request 2020-02/PA21-00092
Verify integrity of records, recover misprinted documents	29-Apr to 07-May-2021	29-Apr to 07-May-2021
Privacy Office review of records; prepare for program area review	10-May to 25-May-2021	25-May to 16-Jun-2021
Program area review of records	26-May to 02-Jun-2021	17-Jun to 24-Jun-2021
Prepare records for disclosure	03-Jun to 09-Jun-2021	25-Jun to 05-Jul-2021
Prepare index of records	10-Jun to 14-Jun-2021	06-Jul to 09-Jul-2021
Conduct external consultation – prepare and send records	15-Jun to 21-Jun-2021	12-Jul to 16-Jul-2021
Review feedback from external consultations; consult PHO programs respecting consultations; draft decision letter; obtain approvals	12-Jul to 15-Jul-2021	09-Aug to 12-Aug-2021
Finalize decision letter; send to requester	16-Jul-2021	13-Aug-2021

[34] PHO submits that key members of the PHO leadership will review the requests, which may also require consultation with others and issuing notices under section 28 of the *Act*. It also provides information on the roles engaged in by PHO leadership in connection with the response to COVID-19.

[35] PHO further submits that the COVID-19 pandemic has seen requests trending upwards. It explains that it has responded to the increase in requests by increasing the availability of information outside of the *FIPPA* request process, by co-opting individuals from other areas of PHO to assist in searching and preparing records, and hiring an additional access and privacy analyst.

[36] PHO makes reference to public notices of this office related to the COVID-19 pandemic.⁶

[37] In response to the question of whether PHO is in a deemed refusal position pursuant to section 29(4) of the *Act*, PHO made reference to the exceptional and extenuating circumstances under which it is operating. It submits that its inability to respond more promptly was directly related to a need to avoid unreasonable interference with the operations of PHO. Despite these circumstances, PHO further submits that it has continued to work, as it can, on the requests. Because of this, PHO submits that this is not an instance of a deemed refusal and that it will issue notices as required by the *Act* in due course.

[38] PHO submits that it was not and is not possible for PHO to respond to the requests any faster than it is doing, and that it is responding in good faith and in as timely a manner as possible given the extraordinary circumstances.

Representations of appellant

[39] The appellant submits that PHO has failed to issue decisions to her requests within the legislated timeframe, and has failed to communicate in writing the length of the extension needed, as required by section 27(2) of the *Act*.⁷ She also submits that these failures mean that section 29(4) of the *Act* applies to the requests. In addition, she submits that PHO should be considered to be in a deemed refusal position and this office should order PHO to issue decisions for both appeals. The appellant notes PHO's own admission that it did not specify the length of the time extension it needed to respond to the request.

[40] The appellant refers to the notice on the IPC's website, which states "the expectation to comply with Ontario's access laws remains in effect" during the COVID-19 pandemic. She also points to the "readily available mechanisms" in sections 27(1) and (2) of the *Act*, which allow institutions to seek time extensions required to respond to access requests. She submits that PHO could have utilized the mechanisms available within the *Act* to request a proper time extension with a deadline, given the "exceptional and extenuating circumstances" PHO was facing but it did not.

⁶ <https://www.ipc.on.ca/newsrelease/ipc-closure-during-covid-19-outbreak/> as updated May 7, 2021 and <https://www.ipc.on.ca/newsrelease/ipc-closure-during-covid-19-outbreak/> as updated May 7, 2021

⁷ The appellant refers to Orders PO-2595 and PO-2634.

[41] The appellant confirms that she mailed the requests to PHO on April 23, 2020 and that PHO confirmed in its May 28, 2020 letter that it received the requests on April 30, 2020. Her position is that the 30-day timeline under the *Act* began on April 30, 2020 and that PHO chose not to follow the requirements set out in section 27(2) of the *Act* for time extensions by failing to provide the length of the time extension in its letter.

[42] Despite this, the appellant points out that she did not immediately file deemed refusal appeals with this office given the COVID-19 pandemic, and instead allowed months to go by between her check-ins with PHO. She further notes that she did not file such appeals until approximately ten months after PHO received her request and after PHO continued to send the same form response to her status requests rather than tangible information on the status of the requests.

[43] The appellant submits that PHO did not do everything it could to limit interference with its operations by working with her to expedite the requests or limit the amount of work/hours needed for these requests. In addition, she submits that PHO's inability to respond faster does not give it the authority to operate outside the parameters of what is required by the *Act*.

[44] The appellant believes that it was only after the acting adjudicator got involved that she started to receive information about the work PHO had completed on the requests, including the number of preliminary records its search yielded.

[45] She submits that at no time in the first ten months during which PHO had her requests did it contact her about whether she would be open to narrowing the scope of the requests. She states that she would have narrowed the scope of her requests sooner without involving this office had PHO informed her of the volume of responsive records.

[46] In addition, the appellant submits that while responding to the COVID-19 pandemic is the priority for PHO, that role does not give PHO the license to defy its legislative requirements under the *Act* and to respond to requests in whatever manner it likes, especially given that the requests relate to matters of high public interest – what and when PHO knew about the coronavirus, and how prepared it was to meet the needs of a pandemic.

[47] She submits that the *Act* addresses the importance of access to this kind of information through its legislated deadlines and criteria for requesting time extensions, to ensure that institutions do not withhold information in perpetuity.

[48] She notes that PHO's statement that "the notices required by the Act will be issued in due course" does not negate the fact that it's been more than a year since PHO received the requests and the decision have yet to be issued. As PHO never sought a proper time extension under the *Act*, she submits that it is in a deemed refusal situation.

PHO's reply representations

[49] In response to the appellant's assertion that PHO "chose not to follow the requirements set out in section 27(2) for the time extensions by failing to provide the length of the time extension", PHO replies that it did not choose to do this. PHO states that it was unable to provide the length of a required extension because PHO had no means of reasonably assessing how long, under the circumstances then in effect, it would take to process the requests. It claims that responding in a way that suggested it did would have been misleading.

[50] PHO submits that it gave notice to the appellant, indicating that an "as yet undetermined" extension would be required. It also submits that it periodically updated the appellant about the circumstances so she would be aware of when PHO might determine what period of time would be reasonable in the circumstances. It further submits that it was unable to estimate a timeline that it might be able to meet without unduly interfering with the provincial response to COVID-19 until April 21, 2021, acknowledging that these timelines are subject to provincial demands on PHO and the availability of other organizations with which PHO needs to consult prior to reaching decisions on individual records.

[51] PHO submits that contrary to the appellant's representations, it has worked very hard to be in a position to issue decisions. According to PHO:

if a genuine inability to respond with information required by the *Act*, while continuing to work towards a position in which the information could be given, must be treated as a deemed refusal, then PHO will respect the IPC's decision and will look to the IPC for guidance on how to respond should PHO ever find itself in a similar unforgiving circumstances.

[52] In response to the appellant's assertion that she would have narrowed the scope of the requests sooner, PHO submits that it repeatedly invited the appellant to reach out to PHO if she had any questions and notes that her first attempt to narrow the requests was through an appeal to the IPC. PHO further submits that the appellant's representations do not take into account the challenges that PHO identified in its initial representations.

[53] The PHO also submits that, based on the work it has done to date on the two requests, it understands that the organizations with which it needs to consult are simply not in a position to do so in a timely manner. While PHO did provide an estimated timeline within which it expected be able to issue decisions, it now states that it will need additional time.

Analysis and Finding

[54] The IPC has recognized that the COVID-19 pandemic has resulted in challenges for institutions in responding to access to information requests. The IPC's website states:

Will institutions be required to respond to requests for access to or correction of information during this time?

The expectation to comply with Ontario's access laws remains in effect, and institutions should continue to process access requests. However, if you've made a request for general or personal information from a public-sector organization, you should expect delays. Because of the COVID-19 outbreak, many public sector staff are working remotely and may not be in a position to search for the records you are asking for as quickly as they might otherwise do.

Given that these are exceptional circumstances, we understand that some organizations will be unable to meet the 30-day response requirement. As such, we will consider these circumstances when processing appeals relating to deemed refusals.

[55] The expectation that institutions must continue to respect their transparency obligations even during the pandemic was further emphasized in a public Joint Statement of the Federal, Provincial and Territorial Access and Privacy Commissioners issued June 2, 2021:

"[...] Federal, provincial and territorial institutions must recognize the importance of transparency, and uphold the right of access to information during an emergency by ensuring business continuity plans include measures for processing requests for access.

Institutional leaders must provide clear guidance and direction on the ongoing importance of information management in this new operating environment, which may include working remotely. Properly documenting institutional decisions and any resulting actions, and organizing and storing such documentation in a manner that enables timely access to such documentation are central to principles of open, transparent and responsible government. [...]"⁸

[56] I acknowledge the exceptional and extenuating circumstances under which PHO was operating during the COVID-19 pandemic. This is not in dispute. What is less clear is the extent to which these circumstances can operate to relieve institutions such as PHO from complying with the requirements of the Act.

[57] On a plain reading of sections 26 and 27, and consistent with prior IPC orders, the requirement to provide a response within 30 days can only be lifted in very specific circumstances. One of those is where an institution has issued a time extension under

⁸ <https://www.ipc.on.ca/wp-content/uploads/2021/06/2021-06-02-fpt-news-release-on-joint-resolution-final.pdf>

section 27. However, section 27 has its own mandatory requirements, one of which is that a decision to extend time must state the length of the intended time extension. It is not hard to imagine the policy purpose for such a requirement, as it enables requesters to make an assessment on whether the time extension is “reasonable”, as required by section 27, and to make an informed decision on whether to appeal the decision to extend time. In the circumstances here, had such a decision been made and appealed, the IPC would have determined whether the time extension was reasonable.

[58] In this case, PHO gave notice to the appellant of an extension of time, within the required 30-day time period. However, it did not specify the length of the extension.

[59] While PHO described its inability, in the face of the extraordinary circumstances, in estimating the length of a time extension, it has not argued that this is not a mandatory condition of a valid time extension decision, or given me any basis on which I could waive this statutory requirement. In this sense, PHO is transparent about its failure to comply with the requirements of section 27. I have sympathy for the position in which PHO found itself in April 2020 and the ensuing months and, indeed, so does the appellant, who did not file these appeals until ten months had elapsed from the submission of her requests. However, given the failure to issue a valid time extension decision, PHO was not relieved of the obligation to provide a decision pursuant to section 26, and section 29(4) applies.

[60] I therefore find that PHO is in a deemed refusal position because its written notice of extension did not set out the length of the extension.

Issue B: What is the appropriate remedy in the circumstances?

[61] In light of my finding above, it is now necessary for me to determine the appropriate remedy in the circumstances of these appeals.

[62] Once an institution is found to be in a deemed refusal, it is the IPC’s usual practice to direct the institution to issue a final decision to the appellant, if it has not already done so. In some cases, the IPC has issued orders directing the institution to provide a decision within ten days of the date of the order, subject to notification of affected parties.⁹ In one case, the IPC ordered the institution to issue a decision approximately one month after its order, while in another, it gave the institution a timetable of steps culminating in a decision approximately three months after its order.¹⁰

[63] The IPC’s orders in deemed refusals are generally crafted to take into account the circumstances of the appeals, such as ordering the institution to provide the appellant with an index of records as an initial step, outlining timelines that permit the

⁹ Orders PO-3794, PO-3769, PO-3747.

¹⁰ Orders PO-3849, PO-2634.

institution to notify affected third parties, deciding to impose a lengthier deadline for issuing a decision, barring the institution from charging fees, and relying on the deemed refusal as a factor in favour of fee waiver.¹¹

[64] From these orders, it is clear that I have discretion to fashion an appropriate remedy taking into account all the circumstances before me.

Representations

Representations of PHO

[65] PHO submits that any decision by this office other than the one that enables PHO to make a decision on the requests as required by the *Act* and, at a minimum, in accordance with the timelines proposed by PHO, would be inconsistent with the very purpose of the *Act* and cause unreasonable interference to PHO's and the province's pandemic response. In addition, it submits that a decision that provides additional time beyond the minimum estimated by PHO would cause less interference to PHO's operations and would accommodate the fact that the PHO executive team and the organizations that may need to be consulted are leading the pandemic response in Ontario and Canada.

[66] PHO provides estimated minimum timelines for completion of each request based on the assumptions that PHO can rely on program area resources to take time from their regular duties for request processing and that organizations with whom PHO must consult prior to making a decision are available to review the records.

[67] According to PHO, while PHO may be able to meet these timelines without unreasonable interference with its operations, a shorter response time would not be reasonable.

Representations of the appellant

[68] The appellant submits that PHO should be ordered to issue its decisions on the standard ten-day timeline used in other deemed refusal orders issued by this office. With reference to the detailed timeliness provided by PHO, the appellant submits that it is unclear why it took PHO a year to gather the responsive records and begin reviewing the records. She further submits that PHO:

could have picked away at [these] request[s] week by week, over the last 14 months and would have been able to issue a decision by now, with no major burden to its resources but instead a detailed plan on completing this request was not established until after [she] filed deemed refusal appeals with the IPC.

¹¹ See Orders PO-2634, MO-2475, MO-3807, PO-1998 and 193.

[69] In addition, the appellant submits that PHO is not the only institution subject to the *Act* that has been actively engaged in Ontario's COVID-19 pandemic response, and that other institutions have faced similar challenges and have still managed to fulfill their statutory obligations under the *Act*.

[70] In the alternative, the appellant requests that, if I decide to issue an order to give PHO more time to issue its decisions than is standard, PHO should not be given any additional time beyond its proposed dates to issue the decisions.

PHO's reply representations

[71] PHO submits that if it is not allowed the necessary time to make decisions, without proper consultations, it may result in more appeals. It states that despite its best efforts, it continues to work in circumstances that remain relentlessly challenging and that the organizations with which it needs to consult are simply not in a position to respond in a timely manner. As I indicate above, it also submits that while it did provide an estimated timeline within which it expected to be able to issue decisions, it now appears that PHO it will need additional time.

Analysis and Finding

[72] The evidence submitted by the PHO to describe the "exceptional and extenuating circumstances" under which it has been operating are compelling. The impact of the pandemic on its operations is undeniable. While from one month to another, the intensity of the pandemic may vary, I have no reason to think that the operations of PHO do not continue to be challenged. This is a factor in favour of not imposing a short deadline within which to issue its decisions.

[73] Other factors are the number of records at issue – approximately 2860 pages for one request and 600 for the other. While these numbers are not of the same volume as some of the orders cited in my discussion, it is still a considerable number of records to review. Further, I accept that the nature of the records will require PHO to consult with external parties, as well as PHO leadership, who are the very people at the heart of the PHO's pandemic responsibilities.

[74] Also relevant is PHO's submission that it has received an increased number of requests during the pandemic, and its description of the measures it has taken to respond to this increase. As described above, federal, provincial and territorial information and privacy commissioners and ombudsman, including this office's Information and Privacy Commissioner, have called on public institutions to recognize the importance of transparency, and uphold the right of access to information during an emergency by ensuring business continuity plans include measures for processing requests for access. It appears that PHO has taken steps to try to maintain its ability to respond to requests for access to information, but still faces challenges in meeting the demand.

[75] Weighing in favour of issuing an order with a short deadline to respond, I take

into account the fact that the appellant's requests were received by PHO on April 30, 2020, which is over 14 months ago. Presumably, over these 14 months, PHO has been making progress in preparing its response to these requests.

[76] Moreover, while it was evidently difficult for PHO to meet its statutory timelines in this case for valid reasons, particularly given its central role in managing the pandemic, other health organizations were able to rise to similar challenges. As documented in the most recent annual report of the IPC, hospitals covered by the *Act* averaged 92.8% compliance in responding to access to information requests within statutory timelines, during 2020.¹²

[77] Finally, I take into account the fact that these requests cover matters of significant public interest, concerning the preparedness of the central provincial agency responsible for supporting the province through the pandemic.

[78] In considering the appropriate order, I am mindful of the comments made by Senior Adjudicator Higgins in PO-2634, with respect to making "a sound remedy":

This raises the question of what remedy to impose as it is clearly impractical to order that a final access decision be produced instantly in respect of what the Ministry claims to be 42,000 pages of responsive records. Even if this estimate is high, as the appellant contends, it is still apparent that it will take more than a few days to formulate a final access decision.

...

Therefore, in my view, it would be unfair to the Ministry to require an immediate final access decision on all the records. If the Ministry is correct that there are 42,000 pages, it would also be impossible to comply with such an order. This would not be a sound remedy.

[79] In arriving at my order, I consider the most compelling factor to be the critical role of PHO in supporting the province's response to the pandemic and the evidence as to the impact of this on its operations. I find it would not be a "sound remedy" to impose a short deadline on PHO's response to these requests that it cannot meet, in view of its persuasive submissions describing its ongoing challenges, as well as its submission on the need to consult with others whose ability to respond is also affected by the pandemic.

[80] Considering all these circumstances, I will direct PHO to issue a final decision by August 15, 2021 for Request 2020-01/PA21-00093 and by August 31, 2021 for Request 2020-02/PA21-00092, subject to any requirement to give notice under section 28 of the

¹² <https://www.ipc.on.ca/wp-content/uploads/2021/06/ar-2020-stats-e.pdf>

Act.

ORDER:

I order PHO to issue final access decisions and send the decisions to the appellant and myself no later than **August 15, 2021** for Request 2020-01/PA21-00093 and no later than **August 31, 2021** for Request 2020-02/PA21-00092, subject to the provisions of sections 28 and 29, and without recourse to a time extension under section 27.

Original signed by: _____

Sherry Liang
Assistant Commissioner

July 15, 2021 _____