Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3738-I

Appeal PA14-283

Ministry of Economic Development, Employment and Infrastructure

June 20, 2017

Summary: An individual submitted a 20-part request under the *Act* to the Ministry of Economic Development, Employment and Infrastructure for access to records pertaining to the restructuring of General Motors Canada Limited (GMCL) in 2009. Following the notification of the relevant third parties, the ministry decided that it would grant partial access to the responsive records, while relying on a number of exemptions, including section 17(1), to withhold information. The third party GMCL appealed the ministry's decision to this office, asserting that all of the responsive records ought to be withheld on the basis that the request is frivolous or vexatious or an abuse of process. An inquiry was conducted into this issue. The adjudicator finds that the appellant is not entitled to rely on the frivolous or vexatious provisions when MEDEI did not. The adjudicator also finds that the request does not constitute an abuse of process at common law.

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

Orders and Investigation Reports Considered: Orders M-850, MO-2635, PO-1755, PO-1924, PO-2490, PO-2866 and PO-2906.

Cases Considered: *British Columbia (Workers' Compensation Board) v. Figliola,* 2011 SCC 52; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.

OVERVIEW:

[1] This interim order addresses a threshold issue raised by the decision of the Ministry of Economic Development, Employment and Infrastructure (the ministry or

MEDEI)[1] in response to a 20-part request for access under the *Act* for records related to General Motors Canada Limited (GMCL). The subject matter of the 20-part request touched on issues related to the 2009 insolvency and restructuring of GMCL,[2] including government analysis/concerns, communications with governments, key agencies and organizations, and, additionally, pension and dealer issues.

[2] The request, after clarification was sought and obtained from the requester, stated:

1. We would request all documents and communications between the government of Ontario and both the Federal Government of Canada and [GMCL] with respect to the government's approval of [GMCL's] revised restructuring plan on May 31st, 2009.

2. We would request all documents and communications documenting the government of Ontario's demand that [GMCL] terminate the contracts of 240 dealers by the end of 2010.

3. We would request all documents and communications documenting the government of Ontario's communications with [an identified individual with Industry Canada].

4. We would request all documents and communications in the possession of the government of Ontario, between [the identified individual with Industry Canada] and [GMC] in the United States or between [the identified individual with Industry Canada] and [GMCL].

5. We would request all documents and communications in the possession of the government of Ontario, between [the identified individual with Industry Canada] and the U.S. Treasury department.

6. We would request all documents and communications confirming the government of Ontario's preference that [GMCL] not file for bankruptcy protection.

7. We would request all documents and communications with respect to the Ontario Government's concern about the complexity of a concurrent double CCAA Canadian bankruptcy proceeding in conjunction with the U.S. 363 proceeding.

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[1] At the date of this order, the institution is known as the Ministry of Economic Development and Growth.
[2] Order PO-3154 (2013 CanLII 3817) contains a helpful overview of the events surrounding the GM (US and Canada) financial bailout, which was drawn from *Trillium Motor World Inc. v. General Motors of Canada Limited*, 2011 ONSC 1300 and the ministry's representations in that appeal.

8. We would request all documents and communications with respect to the Ontario Government's concerns with respect to the impact of [GMCL] filing on other entities including the supply base to the industry.

9. We would request all documents and communications with respect to the Ontario Governments precondition of the resolution of the dealer issues for there to not be [a GMCL] bankruptcy filing.

10. We would request all documents and communications concerning the Government of Ontario's precondition, that there be a resolution of the inter-company note between [GMCL] and the Nova Scotia bond holders, for there to not be [a GMCL] bankruptcy filing.

11. We would also request all documents and communications between the Ontario government and [an identified individual who works for GMC].

12. We would request all documents and communications, in the possession of the Government of Ontario, with respect to the expected tax refund, estimated at $600 million, which [GMCL's] management believed the company would not receive in the event of a Canadian bankruptcy proceeding.

13. We would request all documents and communications, in the possession of the Government of Ontario, with respect to the concerns relating to the potential event of default with respect to the financing of the CAMI[3] joint venture between [GMCL and another named motor company] filed for bankruptcy.

14. We would request all documents and communications with respect to the Ontario Governments approval of the cancellation of the contingency plan to file a bankruptcy proceeding for [GMCL] after 7:00am on June 1, 2009.

15. We would request all documents and communication in the possession of the Government of Ontario, with respect to the concerns of resolving [GMCL's] pension obligations to the [identified union] and its members.

16. We would request all communications, between the Government of Ontario and [an identified individual], concerning the restructuring of [GMCL's] Dealer Network from December 1st, 2008 through the present.

17. We would request all documents and communications, in the possession of the Government of Ontario, with respect to the concerns that [a GMCL] bankruptcy filing would impose a significant expense such as legal fees.

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[3] Canadian Automotive Manufacturing Inc.

18. We would request all documents and communications, in the possession of the Government of Ontario, with respect to the concerns that [GMCL] filing would have a negative business impact on [GMCL].

19. We would request all documents and communications, in the possession of the Government of Ontario, with respect to concerns relating to the impact on [GMCL] of the loss of Net Operating Losses should [GMCL] file for bankruptcy.

20. We would request all communications between the Government of Ontario and [an identified individual who works for GMCL] concerning the restructuring of [GMCL's] Dealer Network from December 1st, 2008 through the present.

[3] The requester provided further clarification indicating that he seeks access to "all the communication aspects of the related information which would include correspondence, reports and any associated documents and any emails that contain communication specific to the request that substantiates the issues."

[4] After identifying third parties whose interests may be affected by disclosure of records responsive to the request, the ministry notified GMCL as one of them under section 28(1)(a) of the *Act* to offer it an opportunity to provide submissions on disclosure of records relating to the company. GMCL provided a two-part response to the notice and argued in both parts that the ministry should deem the request to be "frivolous or vexatious" under section 10(1)(b) of the *Act*.

[5] Following consideration of GMCL's comments, the ministry subsequently advised GMCL that it would be granting partial access to the records identified as responsive to Parts A and B of the request, while denying access to portions under sections 17(1)(a) and (c) (third party information). Other portions were to be withheld as non-responsive. The ministry also stated the following regarding the position GMCL had taken on the *bona fides* of the request itself:

> The ministry has considered your representations with respect to electing to exercise its discretion pursuant to section 27.1 of the *Act* that these 20 requests are considered to be frivolous [or] vexatious. It is the ministry's opinion that these requests do not fit the criteria as laid out in the legislation to qualify to be frivolous [or] vexatious… As such, the ministry is not considering this option.

[6] GMCL appealed the ministry's decision to this office. The original requester did not.

[7] Prior to the start of the mediation stage of the appeal, the ministry issued a supplementary decision relating to the records in Part C of the request. The same exemptions were claimed to deny access to portions of Part C records as with Parts A and B. As GMCL had also argued that the ministry should refuse to disclose the Part C records on the basis that the request was frivolous or vexatious and/or an abuse of

process, the ministry reiterated to GMCL that it would not be exercising its discretion to declare the request as such. The ministry also advised GMCL that it would not be applying section 17(1)(b) as claimed, based on both the evidence provided and a past IPC decision, Order PO-3154. GMCL also appealed this part of the ministry's decision, but the requester did not.

[8] During mediation, GMCL (the appellant) confirmed its position that none of the records should be disclosed to the requester on the basis that the request is frivolous or vexatious and an abuse of process. The result of this position is that the ministry has not disclosed any of the responsive records to the requester. It was not possible to resolve the appeal through mediation and it was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*.

[9] The adjudicator sent a Notice of Inquiry to the appellant, seeking representations on the issue of whether it was entitled to claim the application of the frivolous or vexatious provision in *FIPPA* and the issue of whether its claim that the request was an abuse of process could have the effect of preventing disclosure of the records. Once GMCL's representations were received, the adjudicator sent a Notice of Inquiry to the original requester and the ministry, along with a complete copy of the appellant's representations, seeking their representations, which were received. Next, the adjudicator sought reply representations from the appellant by providing a copy of the ministry's and the requester's representations, with some portions withheld as confidential in accordance with the criteria in Practice Direction 7 and the IPC Code of Procedure. GMCL submitted reply representations.

[10] The appeal was then transferred to me for disposition. In this interim order, I find that GMCL is not entitled to rely on the frivolous or vexatious provisions in *FIPPA* and that the request is, itself, not frivolous or vexatious under the *Act* or an abuse of process at common law.

ISSUES:

A. Is GMCL, the third party appellant, entitled to invoke the frivolous or vexatious provisions in the *Act* when the head of the institution does not?

B. If the answer is no, is the access request an abuse of process at common law?

DISCUSSION:

[11] As the two issues in this appeal are highly entwined, I have decided to address them together.

[12] The crux of GMCL's position is that sufficient grounds exist, based on the nature and scope, timing and purpose of the request, as well as the relationship between the

requester and GMCL, for the head of the institution to have exercised his or her discretion to declare the request to be frivolous or vexatious. Effectively, GMCL argues that I ought to compel the ministry to declare the request to be frivolous or vexatious by not upholding MEDEI's decision not to rely on this provision in the first instance. Alternatively, GMCL argues that the request constitutes an abuse of process at common law and ought to be refused on that basis.

[13] The factual context and basis of GMCL's claim is provided below, but I will start by setting out the "frivolous or vexatious" provisions in *FIPPA* and Regulation 460.

Section 10(1)(b) of the *Act* provides that:

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

Next, section 27.1(1) of the *Act* states:

> A head who refuses to give access to a record or a part of a record *because the head is of the opinion that the request for access is frivolous or vexatious*, shall state in the notice given under section 26,
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> > (a) that the request is refused because *the head is of the opinion* that the request is frivolous or vexatious;
> >
> > (b) *the reasons for which the head is of the opinion* that the request is frivolous or vexatious; and
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> > (c) that the person who made the request may appeal to the Commissioner under subsection 50(1) for a review of the decision. [Emphasis added.]

[14] Past orders have affirmed that the onus of establishing that an access request falls within these categories rests with the institution.[4]

[15] Section 10(1)(b) will apply if "the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious," a requirement that is reflected in the notice provision in section 27.1(1). Sections 5.1(a) and 5.1(b) of Regulation 460, which outline the circumstances under which such a conclusion may be drawn, reiterate that requirement:

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[4] Order M-850.

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

Representations

The appellant, GMCL

[16] GMCL begins by stating that it is not claiming that it may determine whether the request is frivolous or vexatious and that it acknowledges past IPC orders that have held that the discretion is exercisable only by the head of an institution. However, GMCL argues that as a third party affected by the ministry's decision, it is entitled to rely on MEDEI to properly and fairly exercise its discretion under section 10(1)(b) of the *Act* and section 5.1 of the Regulation. Further, the appellant submits that in this specific situation, not invoking the frivolous or vexatious provisions makes it clear that the head did not give "proper, genuine and realistic consideration to the merits of the particular case," resulting in an improper use of the head's discretionary power.

[17] GMCL submits that the head should have considered that a decision to process the request would result in the ministry knowingly facilitating the breach of a private agreement – the settlement agreement between the requester and GMCL here. In this situation, GMCL argues, the head retains the discretion to declare that the request is made in bad faith as against the institution. GMCL argues that because the requester did not disclose that he was a party to the settlement agreement with GMCL when he made the request, the ministry was prevented from properly exercising its discretion because it did not consider this relevant factor.

[18] GMCL refers me to a decision where the BC Information and Privacy Commissioner authorized the Insurance Corporation of British Columbia – under BC's equivalent frivolous or vexatious provisions - to disregard the requester's multiple, overlapping access requests; he had submitted them to ICBC seemingly in protest to a motor vehicle collision settlement that did not satisfy him.[5] The BC Commissioner held that ICBC acted reasonably in taking this position because the matter between ICBC and the requester was considered to be fully and finally dealt with through the settlement. Here, GMCL is concerned that "the requestor's conduct amounts to bad

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[5] ICBC Auth. (s. 43) 02-02, [2002] B.C.I.P.C.D. No. 57.

faith in contractual performance" – the standard GMCL argues is applicable in this context – with reference to the terms of the settlement agreement. GMCL argues that the requester "owes GMCL a duty of good faith in regards to the performance of his obligations under the Settlement Agreement."

[19] GMCL then describes the rationale for, and development of, the doctrine of abuse of process, explaining how it applies to this tribunal and in the particular circumstances of this appeal. According to the appellant,

> It is apparent from the plain language of the release provisions of the Settlement Agreement that the parties intended to fully and finally resolve all matters between them that relate to the subject matter of the settled action, the dealership agreements, and GMCL's restructuring in 2009, and expressly set this out in a written settlement agreement.

[20] Further, GMCL states that the doctrine of abuse of process is triggered when allowing a proceeding to continue would "violate principles such as finality and the integrity of the administration of justice," which is consistent with the doctrine's purpose of preventing unfairness by preventing abuse of the decision-making process.[6] In the appellant's view, the request amounts to an abuse of process because allowing the FOI process to proceed would be manifestly unfair given the intended finality of the settlement agreement between the parties on both substantive and procedural matters. Quoting from *Figliola*, the appellant relies on the reasons of Abella J., to the effect that tribunals ought to be less concerned with "doctrinal catechisms" and more attentive to the goals of fairness and finality in decision-making because "Justice is enhanced by protecting the expectation that parties will not be subjected to the re-litigation in a different forum of matters they thought had been conclusively resolved."[7] The appellant argues that in this appeal, justice would best be served by finding the request to be an abuse of process because this would promote not only finality and fairness, but also "related public interest considerations concerning judicial economy, consistency and the integrity of the administration of justice."[8]

[21] The appellant relies on *Danyluk v. Ainsworth Technologies Inc.* for the following memorable quote:

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[6] The appellant cites several Supreme Court of Canada cases, including: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63; *Behn v. Moulton Contracting Ltd.,* 2013 SCC 26 and *British Columbia (Workers' Compensation Board) v. Figliola,* 2011 SCC 52.

[7] Cited above, at para. 36.

[8] The appellant cites section 23(1) of the *Statutory Powers Procedure Act,* which gives tribunals the authority to make orders or give directions in relation to proceedings before it to prevent abuse of its processes. The appellant gives several examples of decisions where allegations brought by a party to a tribunal to which the *SPPA* applies have been dismissed as an abuse of process, including *Corbiere v. University of Sudbury*, 2012 HRTO 309.

> A litigant, to use the vernacular, is only entitled one bite at the cherry… An issue, once decided, should not generally be re-litigated, to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue cost, and inconclusive proceedings are to be avoided.[9]

[22] The appellant submits that abuse of process may be found even where a settlement agreement between parties does not contain specific language, but where it is apparent from the agreement that the parties intended to bar future litigation with respect to all outstanding issues. The appellant cites *Dickson v. General Motors of Canada Ltd.,*[10] a case said to be analogous to this appeal, where the applicant entered into a settlement agreement "intended to resolve all outstanding employment issues" with GMCL and then raised allegations before the Ontario Human Rights Tribunal that were found to be the subject of the settlement agreement and, thus, an abuse of process. The key question in that determination was whether it would be unfair to permit the proceeding to continue given the terms of the settlement and the circumstances overall. The appellant lists the fairness considerations taken into account in *Dickson*[11] and then submits that considerations of finality, fairness and prevention of abuse have been applied in past IPC decisions to bar a requester from seeking access to a record he has previously agreed not to pursue. The appellant refers to Order PO-1755, where the adjudicator did not permit a requester to resile from positions taken on certain issues during mediation of the appeal because allowing this party to "unilaterally frustrate the timely and orderly resolution of the appeal" would also compromise the integrity of the process. The appellant submits that this "is exactly what the Requester has done in this case." The appellant claims that three of the considerations mentioned in *Dickson,* cited above*,* should be considered here as justification for barring the access request as an abuse of process: the parties entered into a settlement agreement that was intended to resolve all outstanding issues; the settlement agreement was supported by consideration and resulted in a significant financial benefit to the requester; and all known outstanding disputes between the parties that related to the settled action and GMCL's 2009 restructuring were withdrawn, which is evidence of the intention of all parties to fully and finally resolve all issues.

[23] The appellant suggests that permitting the request to proceed in this matter would make the ministry and the IPC complicit in an abuse of process. GMCL develops

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[9] 2001 SCC 44 (CanLII); as referred to in *Zu v. Hamilton (City),* 2010 HRTO 2461 at paras. 37-39.
[10] 2013 HRTO 1347.
[11] Considerations of fairness there included: the withdrawal of the employee's grievance according to the terms of the settlement, the significant financial benefit accruing to the employee under the settlement, the employer's reliance on the settlement as marking an end to potential litigation by the employee, the uncertainty permitting the case to proceed would inject into dispute resolution processes, the resulting reluctance of employers to enter into agreements when proceedings are allowed, and the fact that the tribunal has no role in assessing the appropriateness of the settlement agreement.

the argument that because the requester did not initially divulge the existence of the settlement agreement, this effectively misled the ministry into making its decision that the request was not frivolous or vexatious. The appellant submits that:

> This is an additional layer of unfairness undermining the integrity of the decision-making process that should not be countenanced by [the IPC] on this appeal. [The IPC] has the ability to rectify the abuse of process by rejecting a bad faith request made under the *Act.*

[24] Finally, the appellant submits that the appropriate remedy in this instance would be to deny the requester access to "records containing information about, or provided to an institution by, the Appellant where such documents in the possession of an institution relate to the subject matter of the Settlement Agreement." According to GMCL, this remedy would not bar the requester from making other access requests under the *Act* as long as their subject matter is unrelated to the settlement agreement. In this way, "the integrity of the information request process and of the bargain that the Appellant sought and paid for under the Settlement Agreement" would be preserved.

The ministry's position

[25] MEDEI's representations are relatively brief and focus on the wording of the frivolous or vexatious provisions in the *Act* and the Regulation. The ministry maintains its position that the request at issue is not frivolous or vexatious because it was neither part of a pattern of conduct that could be considered an abuse of the right of access nor would responding to it interfere with MEDEI's operations. The ministry adds that it does not view the request as having been made in bad faith or for a purpose other than to obtain access and claims, further, that the appellant did not provide sufficient evidence to establish any of these factors. In this context, therefore, the ministry states that it was required to respond to the request.

[26] As for the appellant's abuse of process claim, MEDEI takes no position on whether the request could be considered an abuse of process because the ministry is not a party to the settlement agreement between GMCL and the requester. MEDEI says that it is therefore unable to comment on whether the agreement would prevent the parties from exercising access rights related to the other party under *FIPPA.*

Original requester's submissions

[27] In response to GMCL's submissions on the frivolous or vexatious issue, the requester notes that Order PO-2906, which was cited by GMCL, relies on Order PO-2490, where the adjudicator exhaustively reviewed these provisions in a similar situation and concluded that only the head of an institution may rely upon them, not an appellant. Further, the requester points to the ministry's consistent denial of GMCL's entreaty that the head ought to exercise the discretion to designate the request

"frivolous or vexatious," saying that "there can be no clearer response to this issue than the opinion of the ministry."

[28] Regarding GMCL's submission that the access request should be refused because under the settlement agreement any future "claim" is barred, the requester notes that the agreement does not contain a definition of "claim." According to the requester, the settlement agreement is a very detailed document and use of the word "claim" in that context suggests that it has a very narrow definition and refers to a claim in pursuit of financial damages against GMCL or its employees through the legal system. Further, the requester suggests that GMCL's characterization of "administrative claim" as equivalent to "request for information" is "an incredible stretch of the English language."

[29] In response to GMCL's concerns about the fact that he did not mention that he was a party to a settlement agreement with it when he filed the access request, the requester points to the wording of section 10(1) of the *Act*, which provides that "… every person has a right of access to a record or a part of a record in the custody or under the control of an institution… My identity is irrelevant to the Act [emphasis in original]." Similarly, the requester states that he knows of no requirement under the *Act* that he ought to have notified the ministry that he was a party to the settlement agreement.

[30] With respect to GMCL's assertion that his access request amounts to an abuse of process at common law, the requester again refers to Order PO-2490 where Senior Adjudicator John Higgins held that an access request could not, by itself, be viewed as a collateral attack on civil proceedings. The requester comments on the reasons from *Danyluk,* cited above, relating to the objective of finality in litigation by suggesting that although finality is of importance, "finality does take second place to the truth at any stage of the proceedings." The requester's comment is directed at an assertion made earlier in his representations, not yet otherwise outlined, that his main source of information about this entire situation has always been through access to information because he has not otherwise been able to obtain the information he wants from GMCL. He refers to the adage that "knowledge is power" and submits that "the only way to ensure that the truth is protected is through access to information."

[31] The requester submits that while GMCL argues that his actions go against "the bargain it paid for" under the settlement agreement and refer to him receiving "substantial" compensation, one's evaluation of quantum is dependant on one's point of view. And, in any event, the requester states that "despite the absurdity of the situation in which the settlement agreement was signed, I know that we have complied [with] that agreement and have upheld every provision of it and we have not made any claims."

GMCL's reply

[32] GMCL disagrees with the ministry's assertion that it provided insufficient evidence

to establish that the request was made in "bad faith" for the purpose of section 5.1(b). The appellant claims that the requester has admitted that "a Settlement Agreement exists with respect to the subject matter of the Information Access Requests" and reiterates its position that the requester's pursuit of this access to information request amounts to a breach of the agreement because he covenanted not to pursue such "claims" by the settlement agreement. The appellant maintains that the requester's continuation of the request therefore constitutes bad faith.

[33] Regarding the requester's suggestion that GMCL ought to have known that he was making access requests, GMCL responds that had it in fact known, it would have made it a condition to payment under the settlement agreement that he withdraw his access requests. GMCL states that it could not have had any reasonable expectation that a counter-party to the agreement would "flagrantly breach its contract." With respect to the requester seeking to distinguish the Supreme Court of Canada case relied on by GMCL on the subject of good faith performance of contractual obligations,[12] GMCL argues that:

> [he] is confusing his original complaint against GM – a complaint he settled in the Settlement Agreement – with **the current issue, which is whether [he] has performed his obligations under the Settlement Agreement in good faith** [emphasis added].

[34] GMCL also disputes the requester's "narrow and non-legal opinion" of what constitutes a "claim" within the meaning of the agreement, arguing that it is "inconsistent with the general tenor and spirit of a settlement agreement." The appellant adds that the requester's apparent view that the settlement agreement is not fair does not entitle him to unilaterally determine that he will not comply with it. GMCL states that although it respects the right of citizens to file access to information requests, generally, filing such a request after specifically agreeing not to do so contractually constitutes bad faith for the purpose of section 5.1(b) of the Regulation.

[35] The remainder of GMCL's representations are concerned with countering comments made by the requester that, in GMCL's view, allege unfair dealing by GMCL. GMCL states that these matters were addressed previously by the courts and ought not to be re-litigated here.[13] For the purpose of this inquiry, it is unnecessary to wade further into either party's representations on the subject.

Analysis and findings

[36] A finding that a request is frivolous or vexatious is serious and requires sufficient evidence to support such a finding, given the implications for a requester's access rights

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[12] *Bhasin v. Hrynew*, 2014 SCC 71.

[13] For this submission, GMCL sets out excerpts from *Trillium Motor World Ltd. v. General Motors of Canada Limited*, 2015 ONSC 3824.

under the *Act*.

[37] As a preliminary matter, however, I must address the issue of whether GMCL, as the appellant, is entitled to raise and rely on the "frivolous or vexatious" provisions in the *Act*.

[38] The clear message from the parts of sections 10(1)(b) and 27.1(1) that were emphasized in italics in the introduction to this issue is that the provisions were included in the *Act* for the benefit of institutions. The condition precedent for the application of section 10(1)(b) is that "the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious," a requirement that is repeated in the notice provision outlined in section 27.1(1).[14] The requirement that a frivolous or vexatious declaration be made as result of the head forming such an opinion on reasonable grounds is also contained in sections 5.1(a) and (b) of Regulation 460, also outlined above.

[39] In past decisions of this office that address this issue, there is agreement that the frivolous or vexatious provisions were included in the *Act* by the Legislature to protect the interests of a government institution in administering the access scheme, not the interests of other parties outside government. An analogy may be made with the legislative decision to include discretionary exemptions in the *Act.* As with discretionary exemptions, it is generally thought that if the Legislature had intended for the frivolous or vexatious provisions to be available for non-government parties to invoke, it would have done so through express language like that used in the third party information and personal privacy exemptions in sections 17(1) and 21(1) of the *Act*.[15] Therefore, I agree with Senior Adjudicator Higgins in Order PO-2490 that the lack of express statutory language affording outside parties the right to rely on section 10(1)(b) and the other provisions is an "insurmountable hurdle" to such a claim.

[40] It should be noted that the appellant concedes that it cannot itself claim the frivolous or vexatious provisions; instead, GMCL seeks to frame the issue as a concern with MEDEI's exercise of discretion under them. GMCL argues that the ministry's exercise of discretion is reviewable in this instance because it failed to give "proper, genuine and realistic consideration to the merits of the particular case," thereby effectively facilitating the "breach of a private agreement" between the requester and GMCL. In considering this argument, I find the reasons of Adjudicator Laurel Cropley in Order PO-2050 helpful:

> … [P]revious orders of this office have consistently held that the application of the frivolous and vexatious provisions is only relevant to the use of the "processes" of the *Act* (see, for example: Order MO-1488). Essentially, once it is determined that a request has been made for the

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[14] Orders MO-2635, PO-2906, PO-2688 and PO-2490.
[15] See Order PO-2050.

> purpose of obtaining access (or for legitimate reasons), **this purpose is not contradicted by the possibility that the requester may also intend to use the documents against the institution (or any other party)** (see: Orders MO-1269, P-1534 and MO-1488, for example). In my view, the frivolous and vexatious provisions of the *Act* were enacted to provide institutions with a tool to enable them to address abuses of the processes of the *Act*. I cannot see how such abuses would impact on affected persons in a way that would trigger the application of this provision [emphasis added].
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> …
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> Moreover, the frivolous and vexatious provisions were not intended to be used by institutions or individuals to prevent disclosure of records that would otherwise be available under the *Act* because these parties do not like the nature of the request or the person requesting the information. As I noted above, the focus of the affected person's concerns is the use to which the requester may put the records if they are disclosed. In my view, this concern is more appropriately dealt with under the "harms" provisions of various exemptions set out in the *Act.*

[41] I agree with the conclusions of the adjudicators who have considered this issue before me. In particular, I agree that the frivolous or vexatious provisions are not intended to be available to outside parties objecting to disclosure of records that would be otherwise subject to the *Act* simply because they are suspicious of the requester's motives or the nature of the request.[16] This office has consistently held that the identity of a requester is generally not relevant to the decision-making process of the head, a point I address further, below. Similarly, I am not persuaded that there is any basis upon which to review the MEDEI's decision not to designate the request frivolous or vexatious based on the principles associated with exercise of discretion. From the information available to me, I am not persuaded that the ministry considered irrelevant factors or that it otherwise exercised its discretion improperly. In the circumstances, therefore, I find that GMCL is neither entitled to declare that the request is frivolous or vexatious itself; nor is it entitled to substitute its own view of the request for that of the head.

[42] However, while GMCL may not avail itself of *FIPPA's* frivolous or vexatious provisions, it does, as a party to an IPC appeal, have a right to argue that a request constitutes an abuse of process at common law. In turn, it is well established that I have the authority to permit a request to proceed or dismiss it based on a finding that allowing it to proceed would be an abuse of process.[17] The principles that would apply

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[16] Order PO-2688.

[17] Orders PO-2906, PO-2490 and MO-2635. All refer to Order M-618, where former Commissioner Tom Wright concluded that the authority of the IPC, as an administrative tribunal, to prevent abuses of its own

to reviewing an allegation that a request is an abuse of process or "frivolous or vexatious" at common law are, to a significant extent, the foundation of the frivolous or vexatious provisions of the *Act*.[18] This means that past orders and other case law will continue to assist me in deciding this issue, particularly those IPC decisions where adjudicators were reviewing abuse of process claims made by outside parties, not institutions.[19]

[43] The grounds considered in determining whether a request constitutes an abuse of process at common law are found in the wording of sections 5.1(a) and 5.1(b) of Regulation 460: pattern of conduct, bad faith and purpose other than to obtain access.

[44] Briefly, however, I note that the appellant has clearly stated that it does not allege that the request is indicative of a pattern of conduct on the part of the requester. A "pattern of conduct" requires recurring incidents of related or similar requests by the requester under the *Act*[20] and no such evidence has been provided to suggest such a pattern. As there is no evidence to support a finding that the request is part of a "pattern of conduct," I find that no abuse of process is established on this basis.

[45] As has been stated, however, the crux of GMCL's argument is essentially that the act of filing of this access request by the requester amounts to "bad faith" under section 5.1(b) of the Regulation. According to the appellant, because the requester is a knowing party to a settlement agreement with GMCL on the subject matter, he ought to have disclosed this fact to MEDEI to permit a proper determination as to the true frivolous or vexatious nature of this request. Both of these actions demonstrate bad faith, it is suggested. Other arguments by GMCL suggest that the requester seeks to exercise access rights under the *Act* to circumvent a private contractual obligation that he not do so. In my view, the implication of these latter arguments is that there is a purpose behind the requester's request other than to obtain access.

[46] In Order M-850, former Assistant Commissioner Tom Mitchinson commented on the meaning of the term "bad faith," stating that it is:

> The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive. ... "bad faith" is not simply bad judgement or negligence, but

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process was supported by *Sawatsky v. Norris* (1992), 10 O.R. (3d) 67, where, "even absent the express power to deal with abuses of process granted by section 23 of the Statutory Powers Procedure Act … 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)." See section 52(2) *FIPPA.*

[18] Order MO-2635.

[19] Orders PO-2906, PO-2688, PO-2490, PO-2050 and MO-2635.

[20] Order M-850.

> rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.

[47] In the same decision, the former assistant commissioner concluded that a request is "made for a purpose other than to obtain access" if the requester is motivated not by a desire to obtain access, but by some other objective. In Order MO-1924, Senior Adjudicator John Higgins responded to an institution's argument that the objective of obtaining information to further a dispute between it and the requester was not a legitimate exercise of the right of access. In rejecting that position, Senior Adjudicator Higgins stated:

> This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above an abstract desire to obtain information. Clearly, such purposes are permissible. Access to information legislation exists to ensure government accountability and to facilitate democracy (see *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403). This could lead to requests for information that would assist a journalist in writing an article or a student in writing an essay. The *Act* itself, by providing a right of access to one's own personal information (section 36(1)) and a right to request correction of inaccurate personal information (section 36(2)) indicates that requesting one's personal information to ensure its accuracy is a legitimate purpose. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.
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> To find that these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have a "right of access to information about themselves". In order to qualify as a "purpose other than to obtain access", in my view, the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

[48] I agree with these formulations of the principles and adopt them in my review of GMCL's submissions in this appeal. In sum, however, based on the circumstances before me, I am not satisfied that the requester is making the request for a purpose other than to obtain access to the requested records or that submitting this access request constitutes bad faith on the requester's part such that the request ought to be deemed an abuse of process.

[49] I note that no limitation is put on the right of access "every person" enjoys under

section 10(1) of the *Act,* unless an exemption applies or the head forms an opinion on reasonable grounds that the request is frivolous or vexatious. In this context, I accept the point made by the requester in this appeal that, as a general rule, the identity of a requester is irrelevant. As stated in Order PO-1998:

> Access to information laws presuppose that the identity of requesters, other than individuals seeking access to their own personal information, is not relevant to a decision concerning access to responsive records. As has been stated in a number of previous orders, access to general records under the *Act* is tantamount to access to the public generally, irrespective of the identity of a requester or the use to which the records may be put.

[50] GMCL submits, essentially, that the determination here cannot be made in a vacuum: the requester's identity is relevant because this particular individual specifically agreed – and was contractually obligated - not to file an access request. However, as suggested above, many past orders affirm that a requester's access rights under the *Act* are intended to co-exist with any rights that party may have in the context of litigation. Allegations of "collateral attack" are most often made where parties to litigation also find themselves called upon to participate concurrently in an appeal process under the *Act.* In Order PO-2490: Senior Adjudicator Higgins reviewed *Garland v. Consumers' Gas Co.*[21] where the Supreme Court of Canada stated:

> The doctrine of collateral attack prevents a party from undermining previous orders issued by a court or administrative tribunal….[22] Generally, it is invoked where the party is attempting to challenge the validity of a binding order in the wrong forum, in the sense that the validity of the order comes into question in separate proceedings when that party has not used the direct attack procedures that were open to it (i.e., appeal or judicial review).

[51] In Order PO-2490, the senior adjudicator rejected the appellant's claim that the request was a collateral attack because of "the extremely different and separate processes involved." This particular aspect of the finding, although it arose in somewhat different circumstances, informs my conclusions about the request in this appeal.

[52] GMCL argues that the "plain language of the release provisions of the Settlement Agreement" demonstrates the parties' intention to resolve *all* matters between them. GMCL also argues that this finality would be warranted "even [if the] settlement agreement between the parties does not contain specific language, but where it is apparent from the agreement that the parties intended to bar future litigation with respect to all outstanding issues." The evidence provided in this appeal, however, does

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[21] [2004] 1 S.C.R. 629 (SCC).

[22] Here, the senior adjudicator cites *Toronto (City) v. C.U.P.E., Local 79*, *supra,* and D. J. Lange, The Doctrine of Res Judicata in Canada (2000), at pp. 369-70.

not clearly establish this intention. The relevant clause of the settlement agreement itself was not (in fact, likely could not be) put before me and the requester vociferously disagrees with the meaning given to "claim" or "administrative claim" by GMCL; he does not accept that an access to information request constitutes a prohibited claim under the settlement agreement. Instead, the requester's understanding is that it refers to "a claim in pursuit of financial damages against GMCL or its employees through the legal system." Simply put, there is no reasonable evidentiary foundation for me to pronounce upon the meaning of "administrative claim" in the agreement. However, the issue need not be decided on this basis.

[53] GMCL drew my attention to the reasons of Abella J. in *Figliola,* cited above, particularly the exhortation to eschew "doctrinal catechisms" in applying it and be attentive to the goals of fairness and finality in decision-making. Conversely, in my view, GMCL's interpretation of the settlement agreement terms as barring any access requests by the requester on "the subject matter of the settled action, the dealership agreements, and GMCL's restructuring in 2009" must not, in turn, result in unfairness to the requester.

[54] In arguing bad faith on the part of the requester, GMCL seeks to re-frame the issue squarely before me – whether the access request is an abuse of process for the purpose of an inquiry under *FIPPA* – as a matter of whether the requester has "performed his obligations under the Settlement Agreement in good faith." That is, if I accept that the requester has breached a contractual duty of good faith by submitting this particular access request, I should be satisfied that he has acted in bad faith and that an abuse of process has thereby been established. That the requester may owe GMCL this duty is not, in fact, the issue here. Regardless, my views on the subject would not be determinative.

[55] Relying on *Dickson* and others, GMCL argues that considerations of finality, fairness and prevention of abuse of process have been applied in past IPC decisions to bar a requester from seeking access to a record he has previously agreed not to pursue. In my view, Order PO-1755 does not assist the appellant: the adjudicator was addressing something that had happened earlier in the same IPC appeal process and she simply exerted control over the IPC's own processes to promote the expeditious and orderly resolution of the appeal. This is in accordance with the principle discussed in *Danyluk* that "a person should only be vexed once in the same cause." What the jurisprudence establishes is that proceeding with an application may constitute an abuse of process when the parties have *previously settled the subject-matter of the application.* This suggests that the proceedings involve the same parties, facts and issues. It also suggests that the remedy available would also be substantially similar, if not equivalent. In arguing against the continuation of this request, however, GMCL's position does not acknowledge that a finding of abuse of process presumes a rough equivalency between the two proceedings or applications in question. In my view, this is why many of the cases cited by GMCL are distinguishable in the circumstances of this appeal: each of the tribunals to which an application had been made in those cases had

jurisdiction similar or equivalent to the one that had oversight over the previous decision or agreement that was challenged or otherwise at issue. I am unable to conclude that is the case here.

[56] What were the implications of MEDEI processing the access request under *FIPPA*? The settlement agreement is between GMCL and the requester and the institution is not even a party. The ministry – as a non-party to the agreement that forms the basis of GMCL's objection to the request – concluded that reasonable grounds did not exist for it to declare the request to have been made in bad faith, either under section 5.1(b) of Regulation 460 or as an abuse of process at common law. Seemingly, the ministry understood that even if the requester obtained access to the information requested, that information could do no more than provide the impetus to seek another end. Indeed, even if disclosed records provided an impetus for the requester to try to open up the settlement agreement, GMCL could respond in the proper venue. The proper venue is not this appeal. My only authority lies with the review of MEDEI's decision under *FIPPA*. Clearly, I have no authority to make any order affecting the requester and GMCL in any forum other than this one. Accordingly, based on the evidence before me, I am not persuaded that the requester has engaged in any "conscious doing of a wrong because of dishonest purpose or moral obliquity" by submitting this access request. I find that the requester's decision to exercise his rights under *FIPPA* does not constitute "bad faith."

[57] It ought to be noted here that the MEDEI's access decision did not involve full disclosure of the responsive records. GMCL was notified and consulted and in the end, MEDEI applied a number of exemptions, including the mandatory third party exemption, which was established specifically to protect the confidential business information of third parties. Further, the requester has not appealed those exemptions.

[58] In conclusion, GMCL has failed to satisfy me that reasonable grounds exist to establish that the access request is made in bad faith or for a purpose other than to obtain access. I therefore dismiss the appellant's arguments related to "abuse of process" whether they are considered in the context of the specific provisions in the *Act* or section 5.1 of Regulation 460 or the context of "abuse of process" at common law.

ORDER:

1. Given my finding that the request is not frivolous or vexatious or an abuse of process, I dismiss the appellant's appeal of that part of MEDEI's July 16, 2014 decision.

2. I remain seized of this appeal to address any outstanding issues.

Original Signed by: June 20, 2017
Daphne Loukidelis

Adjudicator