

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3575

Appeals MA16-132 and MA16-133

Toronto Hydro Corporation

March 13, 2018

Summary: The requester submitted two access requests seeking records related to the sale of any ownership of Toronto Hydro Corporation and Toronto Hydro-Electric System Limited (Toronto Hydro). Toronto Hydro refused to confirm or deny the existence of any responsive records pursuant to sections 8(3) in conjunction with section 8(1)(l) (facilitate the commission of an unlawful act). The requester appealed Toronto Hydro's decisions to this office and Toronto Hydro requested that this office dismiss the appeals pursuant to section 39(2.1) of the *Act*. The request to dismiss the appeals is denied, but Toronto Hydro's decision to refuse to confirm or deny the existence of any records on the basis that to do so would facilitate the commission of an unlawful act is upheld.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 8(1)(l), 8(3), 22(1), 22(2), 39(2.1), 42; *Securities Act*, RSO 1990, c S5, sections 1, 76(2).

Orders and Investigation Reports Considered: PO-2017

OVERVIEW:

[1] Toronto Hydro Corporation (THC) and Toronto Hydro-Electric System Limited (THESL) (together "Toronto Hydro") received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) from the same media requester (now the appellant).

[2] The timeframe for both requests was between September 1, 2014, and January 1, 2016. They were sent to Toronto Hydro on the same day, and read as follows:

Request 1 (Appeal MA16-132)

All communications (written, electronic and otherwise) including, but not limited to, reports, emails, letters, notes, memos, notes to file, and records of meetings and phone conversations, that mention or concern in any way the possible sale of any ownership in Toronto Hydro, through any mechanism including, but not limited to, an initial public offering (IPO). This includes any form of privatization or sale of Toronto Hydro sale or assets.

[3] The requester specified that this request covered any polling or public survey information; communications that were to, from or mentioned any member of Toronto Hydro's board of directors; and communications to, from or mentioning certain named individuals.

Request 2 (Appeal MA16-133)

The estimated cost of any work done on the topic of any possible sale, initial public offering (IPO) or privatization, in part or full, of Toronto Hydro. That work should include, but not be limited to: legal, consultants, polling, and regulatory experts. Please break down the costs by category.

Decisions

[4] In response to the two requests, Toronto Hydro issued two decision letters. Each decision letter reviewed the details of the request and also stated:

... Toronto Hydro cannot confirm or deny the existence of any of the [requested] records for the period September 1, 2014 to January 1, 2016, pursuant to sections 8(1)(l) (including in respect of obligations under applicable securities laws), 8(3) [refuse to confirm or deny the existence of records] and 22(2) of the *Act*.

[5] The appellant appealed Toronto Hydro's decisions to this office.

The intake stage of the process

[6] During the intake stage of the appeal process, Toronto Hydro noted that in addition to being subject to *MFIPPA*, it is also a reporting issuer under Ontario securities law. Toronto Hydro took the position that because of its legal obligations under the *Securities Act*, it could not confirm or deny the existence of responsive records, as to do so would constitute a breach of its obligations under securities law. Specifically, Toronto Hydro mentioned the following obligations:

- Section 76(2) of the Ontario *Securities Act* prohibits issuers from informing any person of a material fact or material change with respect to the issuer before the material fact or material change has been generally disclosed; and
- National Policy 51-201 – *Disclosure Standards* (NP 51-201) similarly recognizes the prohibition against informing any person of a material fact or material change that has not been generally disclosed. Further, NP 51-201 specifically states that “the necessary course of business exception would not generally permit a company to make a selective disclosure of material undisclosed information to the media.”

[7] Toronto Hydro stated that confirming or denying the existence of the requested records would constitute a contravention of the above-noted securities laws, as to do either would “constitute the provision of material information which has not been generally disclosed.” Toronto Hydro also stated that “[t]here is no exemption under the Securities Act which would lawfully permit Toronto Hydro to make such disclosure.”

[8] Toronto Hydro also submitted that it is “plain and obvious” that the appeals warrant no further action, and asked that this office dismiss the appeals at the intake stage under section 5.01 of the IPC’s *Code of Procedure for MFIPPA*, which concerns the Intake Stage of the appeal process and states:

The IPC screens all appeals received. The IPC may dismiss an appeal which is not within its jurisdiction or which, in its view, does not warrant further action.

[9] Alternatively, Toronto Hydro submitted that this office should dismiss the appeals under section 39(2.1) of the *Act*, on the basis that the notices of appeal do not and cannot present a reasonable basis for concluding that the records sought exist.

[10] The appellant received a copy of Toronto Hydro’s submissions and was invited to submit representations in response, which he did. In his response submissions, the appellant took the position that: 1) these appeals should not be dismissed at the intake stage of the process; 2) Toronto Hydro cannot rely on the referenced sections of the *Securities Act* to refuse to confirm or deny access to any responsive records; and 3) access to the requested information is in the public interest on the basis that Toronto Hydro is wholly owned by the city of Toronto, employs thousands of civil servants, and provides a service that the entire population of the city relies upon.

[11] The Registrar determined that these appeals should not be dismissed at the intake stage of the process. In light of the issues raised in this appeal, these files were transferred to the inquiry stage of the appeal process. During the inquiry into these appeals, I sought and received representations from Toronto Hydro and from the appellant. Representations were shared in accordance with section 7 of the IPC’s *Code of Procedure and Practice Direction 7*.

[12] In this order, I dismiss Toronto Hydro's request to dismiss these appeals under section 39(2.1) of the *Act*. However, I uphold Toronto Hydro's decision to refuse to confirm or deny the existence of any records on the basis of the exemption in section 8(3) of the *Act*.

DISCUSSION:

Preliminary matter - Should this office exercise its discretion to dismiss these appeals under section 39(2.1)?

[13] Section 39(2.1) reads:

The Commissioner may dismiss an appeal if the notice of appeal does not present a reasonable basis for concluding that the record or the personal information to which the notice relates exists.

[14] This section provides this office with the authority to exercise its discretion and dismiss an appeal if the notice of appeal does not present a reasonable basis for concluding that the requested record exists.

Representations

[15] Toronto Hydro takes the position that section 39(2.1) operates to foreclose "fishing expeditions" for information that may or may not exist by placing an onus on requesters to provide a "reasonable basis" to conclude that responsive records exist. Toronto Hydro submits that the appellant did not, nor could he have, produced reasonable evidence that the requested information exists in his Notices of Appeal.

[16] In support of its position, Toronto Hydro advises that it became a reporting issuer under the *Securities Act* in 2003 when it began offering debentures to the public, and is currently a reporting issuer in Ontario and every other province in Canada. Toronto Hydro submits that as a reporting issuer, it is subject to extensive obligations under the *Securities Act*. In an effort to comply with those obligations, Toronto Hydro has a number of internal compliance measures in place, including its Disclosure Policy and its Amended and Restated Shareholder Direction.

[17] The objective of the Disclosure Policy is:

[...] to ensure that communication to the public about Toronto Hydro Corporation (the Corporation) and its subsidiaries (collectively, with the Corporation, Toronto Hydro) are timely, factual, and accurate, align with other Toronto Hydro policies and are broadly disseminated in accordance with all applicable legal and regulatory requirements.

[18] The Disclosure Policy prohibits selective disclosure of material information,

including with respect to changes in share ownership, changes in corporate structure, major corporate acquisitions or dispositions, changes in capital structure, and public or private sale of additional securities. It also prohibits the provision of any undisclosed material information to the media, and requires that Toronto Hydro not generally comment, affirmatively or negatively, on rumours.

[19] Similarly, the Shareholder Direction, which governs the relationship between Toronto Hydro's Board of Directors and the City of Toronto, as its sole shareholder, prohibits disclosure of any confidential information about Toronto Hydro or the City.

[20] Toronto Hydro submits that in order to comply with these obligations, it has never made any public disclosure or comment relating to a decision to sell through any mechanism, including but not limited to an IPO or the privatization or sale of any Toronto Hydro shares or assets, or the estimated cost of any work done in relation thereto, beyond the fact that any such decision is reserved for the City. On this basis, Toronto Hydro maintains that it is not possible for the appellant to have provided in his Notices of Appeal a reasonable basis for believing that records responsive to his request exist.

[21] Toronto Hydro cites Order PO-2017, in which it claims this office considered a functionally identical provision in the provincial equivalent to the *Act*, the *Freedom of Information and Protection of Privacy Act*. It submits that in that decision, the adjudicator confirmed that the appellant must provide a reasonable basis for concluding that responsive records exist and that, given that the appellant had only cited a belief that records about a specific meeting "should exist", the adjudicator dismissed the appeal. Toronto Hydro submits that the appellant's basis for concluding that responsive records exist in these appeals is speculative and unsupported, which is even less of a basis than what was provided by the appellant in PO-2017.

[22] Toronto Hydro therefore submits that the appellant has failed to discharge his burden of proof under section 39(2.1). Accordingly, Toronto Hydro requests that this office apply this discretionary power to dismiss these appeals on the basis that the appellant has not disclosed a reasonable basis for concluding that any responsive records exist.

[23] The appellant objects to Toronto Hydro's representations on this preliminary issue. He submits that the wording of *MFIPPA* does not require requesters to know exactly which document they are seeking when they submit an access request. He states it is not possible for a requester to know the specifics of a document before asking for it, and that requiring one to do so would undermine the need for Freedom of Information legislation. He also states that he was advised by reputable sources that responsive records may exist and that there is "no good reason to allow a publicly owned institution to hide [the details sought in the request] from the public." He indicates that he has submitted many freedom of information requests with less specificity than was provided in his requests to Toronto Hydro.

[24] In reply, Toronto Hydro submits that the appellant,

... could not possibly have presented a reasonable basis for concluding that the Requested Information exists, given that Toronto Hydro has at no time, including prior to [the appellant's] requests or at the time of Toronto Hydro's decisions, made any public disclosure, or any other comment, relating to any decision to sell through any mechanism, including but not limited to an IPO or the privatization or sale of any Toronto Hydro shares or assets, or the estimated cost of any work done in relation thereto, except to say that any such decision rests with the City alone.

[25] Regarding the appellant's referenced confidential sources of information, Toronto Hydro maintains that the appellant falls short of meeting the burden of presenting a reasonable basis for concluding that the requested records exist. Toronto Hydro maintains that any general acknowledgment that it has retained third party consultants in the normal course of business is irrelevant to the appellant's access to information requests for information regarding "the estimated cost of any work done on the topic of any possible sale, initial public offering (IPO) or privatization, in part or in full, of Toronto Hydro." Toronto Hydro submits that there is no reasonable basis to conclude that the requested information exists and, as in PO-2017, any belief that the records "should exist" is insufficient.

[26] In sur-reply representations, the appellant submits that he has more than met the burden required of appellants in filing a notice of appeal. He maintains that Toronto Hydro's position is based on flawed logic: Toronto Hydro submits that if it has not confirmed the existence of records, there can be no reasonable basis for an *MFIPPA* request. The appellant submits that subscribing to this logic would give public institutions control over the process and a "de facto veto" on all requests. He states that this is not how the access to information system is supposed to work.

Analysis

[27] In the circumstances, I will not be exercising my discretion to dismiss this appeal on the basis of section 39(2.1) for the following reasons.

[28] To begin, I reject Toronto Hydro's position that in order for any appeal to proceed, an appellant must provide evidence that records exist. Section 22(1) and (2) of the *Act* identify some of the obligations on an institution in responding to an access request. These sections read:

(1) Notice of refusal to give access to a record or part under section 19 shall set out,

(a) where there is no such record,

(i) that there is no such record, and

(ii) that the person who made the request may appeal to the Commissioner the question of whether such a record exists; or

(b) where there is such a record,

(i) the specific provision of this Act under which access is refused,

(ii) the reason the provision applies to the record,

(iii) the name and position of the person responsible for making the decision, and

(iv) that the person who made the request may appeal to the Commissioner for a review of the decision.

(2) A head who refuses to confirm or deny the existence of a record as provided in subsection 8 (3) (law enforcement), ... shall state in the notice given under section 19,

(a) that the head refuses to confirm or deny the existence of the record;

(b) the provision of this Act on which the refusal is based;

(c) the name and office of the person responsible for making the decision; and

(d) that the person who made the request may appeal to the Commissioner for a review of the decision

[29] Section 22(1)(a) specifically identifies the obligations on an institution in responding to an access request in situations where no record exists, and includes referencing a requester's right to appeal the decision. Section 22(1)(b) identifies some of the institution's obligations where there is a responsive record. Section 22(2) identifies the obligations on an institution when its decision is to refuse to confirm or deny the existence of a record.

[30] The overall scheme of the legislation and the wording of section 39(2.1) make it clear that the discretionary decision to dismiss an appeal in circumstances where there exists no "reasonable basis for concluding that the record ... exists" applies in situations where an institution has indicated that no records exist, and an appellant is disputing this claim. In those circumstances, this office has the discretion to dismiss the appeal.

[31] However, in circumstances where an institution is refusing to confirm or deny the

existence of records, it cannot be the case that an appellant must provide a reasonable basis for concluding that a record exists. The institution, which is the only party with knowledge of whether or not a record exists, cannot choose to rely on its right to refuse to confirm or deny the existence of records and then suggest that the appellant has some obligation to confirm that a record exists.

[32] I find support for this position in section 42 of the *Act*, which reads:

If a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head.

[33] This section states that in circumstances where an institution is claiming the application of a specified exemption in the *Act*, the onus is on the institution to establish that the specified exemption applies. Clearly, by refusing to confirm or deny the existence of records under section 8(3) of the *Act* (which requires that one of the exemptions in section 8(1) or (2) apply), the institution is relying on an exemption. The burden of proof is therefore on Toronto Hydro in these appeals. I do not accept its position that section 39(2.1) is engaged in these circumstances.

[34] I have also considered PO-2017, referenced by Toronto Hydro. I note that, despite Toronto Hydro's submissions, PO-2017 did not engage the provincial equivalent of section 39(2.1), which would be section 50(2.1) of *FIPPA*; rather, the issue before the decision-maker was whether the institution conducted a reasonable search for records as required by section 24, and the decision determined that it had.

[35] I have also reviewed the British Columbia IPC decision referenced by Toronto Hydro.¹ I note that the adjudicator in that decision found that the records requested were excluded from the scope of the relevant Act, and that this was "plain and obvious" based on the evidence before him. That decision is distinguishable from the circumstances before me. However, I also note that the adjudicator in that decision set out certain principles to be applied in exercising the discretion not to hold an inquiry.² These included that:

- the institution must show why an inquiry should not be held;
- the appellant does not have a burden of showing why the inquiry should proceed; however, where it appears obvious from previous orders and decisions that the outcome of an inquiry will be to confirm that the institution properly

¹ A decision of the Office of the Information and Privacy Commissioner of British Columbia [*Vancouver Coastal Health Authority*, Decision F13-01], referenced in Toronto Hydro's earlier submissions.

² This decision of the BC IPC applied in the context of the BC Act, which has different wording than *MFIPPA*. However, this office also has the discretion to choose to proceed with an inquiry or not, as section 41(1) of *MFIPPA* uses permissive rather than mandatory language.

applied the *Act*, the appellant must provide "some cogent basis for arguing the contrary";

- the reasons for exercising discretion in favour of not holding an inquiry are open-ended and include mootness, situations where it is plain and obvious that the records fall under a particular exception or outside the scope of the *Act*, and the principles of abuse of process, *res judicata* and issue estoppel; and
- it must in each case be clear that there is no arguable case that merits an inquiry.

[36] Even if I were to apply the above principles, I would find that Toronto Hydro has not established that it "appears obvious from previous orders and decisions that the outcome of an inquiry," nor that any of the factors in third bullet point apply. I am not aware of any decision of this office that has addressed the possible application of section 8(3) in the context of possible breaches of the *Securities Act*.

[37] Accordingly, I will review the application of the exemption claimed by Toronto Hydro.

Issue: Do the discretionary exemptions at sections 8(1)(l) and 8(3) apply to the records?

[38] Toronto Hydro relies on section 8(3) in conjunction with section 8(1)(l) in order to refuse to confirm or deny the existence of any records responsive to the appellant's requests.

[39] Section 8(3) of the *Act* states:

A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

[40] This section acknowledges the fact that in order to carry out their mandates, institutions must sometimes have the ability to withhold information in answering requests under the *Act*.

[41] For section 8(3) to apply, the institution must demonstrate that:

1. The records (if they exist) would qualify for exemption under section 8(1)(l); and
2. Disclosure of the fact that records exist (or do not exist) would itself convey information that could reasonably be expected to harm one of the interests sought to be protected by sections 8(1) or 8(2).

[42] In order to satisfy part 1 of that test, Toronto Hydro must demonstrate that the responsive records, if they exist, would be exempt from disclosure under section 8(1)(l),

which states:

(1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,

(l) facilitate the commission of an unlawful act or hamper the control of crime.

[43] It is not enough for Toronto Hydro to take the position that the harms under section 8(1)(l) are self-evident.³ Toronto Hydro must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁴

Representations

Toronto Hydro's representations

[44] Toronto Hydro submits that sections 8(1)(l) and 8(3) of the *Act* apply as confirming or denying the existence of the requested information would itself require Toronto Hydro to disclose a "material fact" and thereby violate its obligations under the *Securities Act*.

[45] In support of its position, Toronto Hydro provides a detailed overview of the applicable securities regime, and then addresses some of the appellant's earlier submissions. In support of its representations, it also provides an affidavit sworn by a senior manager of finance.

[46] Toronto Hydro begins by identifying its obligations as a "reporting issuer" under the *Securities Act*. It states that Toronto Hydro Corporation (THC) became a "reporting issuer" under that Act in 2003 when it began offering debentures to the public and is currently a reporting issuer in Ontario and in every other province in Canada. It identifies that it is therefore subject to the extensive obligations applicable to reporting issuers under the *Securities Act*. It also states that Toronto Hydro-Electric System Limited (THESL), as a wholly-owned subsidiary of THC, is in a "special relationship" with THC for the purposes of section 76(2) of the *Securities Act*, and that its conduct is therefore also legally constrained by those positive obligations under that Act.

[47] Toronto Hydro states that it approaches its obligations under securities laws very seriously and with the utmost diligence and care. It states:

³ Order PO-2040 and *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).

⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

In an effort to ensure compliance with such obligations, THC has a number of internal compliance measures and processes in place, including through its Disclosure Policy (the **Disclosure Policy**) and Amended and Restated Shareholder Direction Relating to Toronto Hydro Corporation dated May 10, 2013 (the **Shareholder Direction**) which governs the relationship between THC's board of directors and the City of Toronto (the **City**) as its sole shareholder.

Among other things, THC's Disclosure Policy describes its objectives as follows:

The objective of this disclosure policy is to **ensure that communications to the public about Toronto Hydro Corporation** (the Corporation) and its subsidiaries (collectively, with the Corporation, Toronto Hydro) **are timely, factual and accurate**, align with other Toronto Hydro policies **and are broadly disseminated in accordance with all applicable legal and regulatory requirements.**⁵

Section 4(c) of the Disclosure Policy prohibits selective disclosure of material information, including specifically with respect to: (i) changes in share ownership that may affect control of the Corporation; (ii) changes in corporate structure, such as reorganizations or amalgamations; [...] (iv) major corporate acquisitions or dispositions; (v) changes in capital structure; [...] and (vii) public or private sale of additional securities.⁶ The Disclosure Policy specifically prohibits the provision of any undisclosed material information to the media⁷ and mandates that "Toronto Hydro will not generally comment, affirmatively or negatively, on rumours."⁸

The Shareholder Direction similarly prohibits disclosure by Toronto Hydro in respect of any confidential information about Toronto Hydro or the City of Toronto. Specifically, section 4.4 of the Shareholder Direction states that "[t]he Shareholder and the directors and officers of [THC] will ensure that no confidential information of the Shareholder or Toronto Hydro is disclosed or otherwise made available to any Person," except in limited circumstances (which are inapplicable here).⁹ Section 6.3 expressly extends this obligation to subsidiaries of THC, which includes THESL.¹⁰

⁵ Referencing Toronto Hydro's Disclosure Policy.

⁶ Disclosure Policy, s 4(c).

⁷ Disclosure Policy, s 4(g).

⁸ Disclosure Policy, s 4(f).

⁹ Amended and Restated Shareholder Direction Relating to Toronto Hydro Corporation dated May 10, 2013.

¹⁰ Shareholder Direction, s 6.3

In compliance with these obligations, Toronto Hydro has never, including prior to [these access requests] or at the time of Toronto Hydro's decisions, made any public disclosure, or any other comment, relating to any decision to sell through any mechanism, including but not limited to an IPO or the privatization or sale of any Toronto Hydro shares or assets, or the estimated cost of any work done in relation thereto – beyond the fact that any such decision is reserved for the City.¹¹

[48] Toronto Hydro then states that disclosure of the requested information, or confirming or denying its existence, would require Toronto Hydro to violate its obligations under securities law. Toronto Hydro takes the position that the Ontario Legislature has crafted a detailed and comprehensive legislative scheme, the *Securities Act*, with the aim of protecting investors and fostering confidence in capital markets. The *Securities Act* imposes a number of positive obligations on issuers, including Toronto Hydro, which are clearly defined and subject to very limited, context-specific exemptions.

[49] Toronto Hydro cites section 76(2) in particular, which contains the following prohibition against the disclosure of a material fact:

No issuer and no person or company in a special relationship with an issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the issuer before the material fact or material change has been generally disclosed. (emphasis added by Toronto Hydro)

[50] The term "material fact" is defined in section 1 of the *Securities Act* as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities." Toronto Hydro notes that NP 51-201 makes it clear that "changes in share ownership that may affect control of the company" may constitute material information.¹² It also states that the Ontario Securities Commission has consistently held that information regarding possible changes in corporate ownership constitutes a material fact.¹³

[51] In light of this regulatory scheme, Toronto Hydro submits the following:

... the act of either confirming or denying the existence of the Requested Information would constitute disclosure of a material fact in contravention of Toronto Hydro's securities law obligations, on the basis that it would in

¹¹ Toronto Hydro references the supporting affidavit.

¹² National Policy 51-201, *Disclosure Standards* (2002), 25 OSCB 4492-4508 [NP 51-201], s 4.3.

¹³ *AIT Advanced Information Technologies Corp., Re* (2008), 31 OSCB 712 [AIT Corp.] at para 211; *Leung, Re* (2008), 31 OSCB 6777 at para 9.

effect impart upon [the appellant] (as well any other party to whom such confirmation or denial was made) information regarding whether or not a change in Toronto Hydro's corporate ownership is anticipated. No such information has been generally disclosed.

Accordingly, such a disclosure would, *in itself*, be unlawful pursuant to section 76(2) of the *Securities Act*. Notably, any disclosure with respect to the Requested Information to [the appellant] would not be "in the necessary course of business," and therefore would not engage the only exemption found in section 76(2). [emphasis by Toronto Hydro]

[52] Toronto Hydro notes that the appellant has already acknowledged that he has no relationship, business or otherwise, with Toronto Hydro.

[53] Toronto Hydro then cites NP 51-201, which states "... the necessary course of business exemption would not generally permit a company to make a selective disclosure of material undisclosed information to the media." In light of this direction, Toronto Hydro submits that "disclosure of any requested information (if any), or confirming or denying its existence to [the appellant], would represent clear defiance of Ontario's securities laws and national policies."

[54] Toronto Hydro also submits that disclosure of the requested information, if it exists, may breach restrictions against "pre-marketing" securities. The *Securities Act* prohibits issuers from "trading" in securities unless certain requirements are met, such as the issuance of a prospectus. The term "trade" is broadly defined in section 1 of the *Securities Act* to include "any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of [the sale of any security]."

[55] In addition, Toronto Hydro expresses concern about the appellant's intention to make public any existing responsive information as soon as he receives it. Toronto Hydro submits that the appellant's subsequent disclosures could impart additional liability on Toronto Hydro and/or its directors, officers, or employees who assist in responding to the information requests, as well as on the appellant and the newspaper at which the appellant works, for breaching the anti-tipping provisions of the *Securities Act*.

[56] Toronto Hydro notes that during the intake stage of the appeals, the appellant questioned the relevance of the selective disclosure and tipping prohibitions in this case on the basis that Toronto Hydro does not issue equity to the public. Toronto Hydro disputes this position, and states that it has issued debentures to the public in open markets since 2003.

[57] Toronto Hydro then provides representations in support of its position that these debentures fall within the definition of "security" under the *Securities Act*. It refers to the fact that the definition of the term "security" in section 1(1) of that act includes

debentures. In supporting materials prepared by its securities law expert,¹⁴ Toronto Hydro identifies that at present, it has in excess of \$2 billion in outstanding debentures and that, even though Toronto Hydro has taken no active steps to create a market in its outstanding debentures, there is “a highly active (if decentralized) market.” It then identifies various ways in which its debentures are traded including via privately negotiated sales (mostly involving pension funds, mutual funds, etc.), via private sales facilitated by a quotations and trade reporting system, via institutional bond brokers or particular investment dealers, etc. It submits,

... the prices of Toronto Hydro’s debentures could be affected by selective disclosure of a material fact, potentially jeopardizing the integrity of the capital markets. In particular, the value of debentures very much depends on changes in the control or financial position of the issuer. As explained by Toronto Hydro’s securities law expert ..., “there is a very real risk that anyone with privileged access to information regarding the probable or possible future ownership structure of Toronto Hydro will be in a position to exploit that information for profit by engaging in insider trading.” This is the exact risk that the relevant provisions of the *Securities Act* are designed to foreclose, and [the appellant’s] arguments regarding the shareholder base of Toronto Hydro completely fail to take this into account.¹⁵

[58] Toronto Hydro’s supporting material also refers to its position that confirming or denying the existence of the requested information would itself constitute a material fact that could give rise to liability for insider trading. It refers to the fact that, at any given time, the market price of an issuer’s securities reflects the market’s expectations of what will happen in the future, and that any new information bearing on any possible sale, initial public offering (IPO) or privatization of Toronto Hydro could result in a change in the price of its debentures.

[59] The material provided by the securities expert references this and identifies how disclosure of whether the requested documents exist or not would provide new information to the market about the likelihood of a future privatization transaction or sale of shares. It notes that Toronto Hydro is currently owned by the City of Toronto, and that an institution like the city is unlikely to default on its obligations to debenture holders, as this could affect the city’s credit rating and cost of borrowing, and could have far-reaching consequences. It notes, however, that if Toronto Hydro were privatized, concerns about the city’s credit rating would no longer exist and, coupled with the fact that an independent entity may be more likely to run on a strictly profit-making basis, debenture holders might conclude that such a change in ownership would

¹⁴ Toronto Hydro references an affidavit sworn by this individual in support of a number of the submissions Toronto Hydro makes on the application of the *Securities Act* to the requested information.

¹⁵ Toronto Hydro references a report prepared by its securities law expert.

affect the value of the debentures.

[60] Toronto Hydro also addresses the appellant's assertion that a decision to sell shares in Toronto Hydro can only be made by City Council after lengthy consultations, and that this "completely obliterates" the risk of insider trading. Toronto Hydro disputes the appellant's position, which it interprets to be that any information that might result from his requests is not material. Toronto Hydro states that both courts and tribunals have found that information of an inchoate or speculative nature may still be "material" for the purposes of insider tipping. Toronto Hydro also states that its obligations under the *Securities Act* are clear and unambiguous, and are aimed at protecting investors from unfair, improper or fraudulent practices, and fostering fair and efficient capital markets and confidence in capital markets.

[61] Toronto Hydro submits that a breach of any of the referenced securities law obligations carries significant consequences; namely, a fine of up to \$5,000,000 and/or imprisonment pursuant to section 122 of the *Securities Act*. On this basis, Toronto Hydro submits that the threshold for triggering the exemption at section 8(1)(l) of *MFIPPA*, "a risk of harm that goes beyond merely possible or speculative," has been met and that the exemption should apply. Toronto Hydro further submits that it is unambiguously precluded from confirming or denying the existence of any responsive records by its securities law obligations, and therefore section 8(3) of *MFIPPA* should also apply.

[62] Toronto Hydro further submits that the section 8(1)(l) and 8(3) exemptions should apply on the basis that any disclosure of material information to the appellant would result in the facilitation of unlawful acts by the appellant. In support of this position, Toronto Hydro points to sections 76(2) and 76(5)(e) of the *Securities Act*, which prohibit selective disclosure by an issuer or any person in a "special relationship" with an issuer, and defines "special relationship" as arising when "a person or company [...] learns of a material fact or material change with respect to the issuer from any other person or company described in this subsection." Toronto Hydro notes that the appellant has definitively stated his intention to disclose any material information provided to him, which it submits would directly contravene the obligations that his receipt of such information would carry under Ontario securities law.

[63] In response to the appellant's representations, made at the Intake stage, alleging that Toronto Hydro has not complied with its obligations under the *Act* because it failed to conduct a review to determine if responsive records exist, Toronto Hydro submits that its decision to refuse to confirm or deny the existence of responsive records is unrelated to whether it checked to see if such records exist. Toronto Hydro submits that it was mindful of its obligations under both *MFIPPA* and the *Securities Act* when responding to the appellant's requests.

[64] Toronto Hydro also rejects the appellant's submissions regarding the public's interest in Toronto Hydro's ongoing activity on the basis that any such interest, and the

importance of freedom of the press, are immaterial to its obligations under the *Securities Act*. Toronto Hydro submits that it has been careful not to contravene its legal obligations when interacting with the media. It has recently confirmed to the media that any decision to sell, through any mechanism, any Toronto Hydro shares or assets is reserved for its sole shareholder, the City of Toronto. In recognition of the public's interest in its affairs, Toronto Hydro submits that it remains "actively engaged with the media in order to facilitate the dissemination of publicly disclosable information that may be in the public interest."

[65] Next, Toronto Hydro addresses the appellant's submission that once the responsive records, if any, are disclosed to him, he will immediately disclose it to the public through his newspaper's website, thereby eradicating any concern that the information would not be "generally disclosed." In response, Toronto Hydro cites NP 51-201, which provides that information will be considered "generally disclosed" if disseminated in a manner calculated to effectively reach the marketplace and if investors have had a reasonable amount of time to analyze the information. Toronto Hydro submits that disclosure through a media website would fail to meet those requirements because, among other things, it would fail to provide equal access to the information. Toronto Hydro also submits that it is not for the appellant or this office to determine when information is able to be disclosed by Toronto Hydro as a reporting issuer. Toronto Hydro submits that this responsibility falls squarely on the reporting issuer, or the securities law regulator, the Ontario Securities Commission, in the event of a conflict.

Appellant's representations

[66] The appellant submits that Toronto Hydro's position that the information requested constitutes "material information" is false and overblown. He submits that even if he were to obtain the information requested, it would not likely materially affect Toronto Hydro and the third party sale of its debentures. The appellant's arguments in support of his position are summarized as follows:

- The information is already public via various referenced newspaper articles, and any details likely to be in any Hydro response (names of consultants, what they were hired to do, and the amounts they were paid) would merely elaborate on information already made public.
- Toronto Mayor John Tory, the chief executive of the City of Toronto which is the sole shareholder of Hydro, has answered questions about two of the consultants who worked on his 2014 campaign and talked publicly about a possible Toronto Hydro privatization.
- The Mayor has also announced the end of any plans to move ahead with an initial public offering of Toronto Hydro shares, and that Toronto Hydro will not be privatized in any way under his watch. The requested documents are now of

even less material importance - they are part of the historical record of an aborted plan.

- A Toronto Hydro board member has answered questions about possible privatization talk, and has confirmed publicly that Hydro has looked at "scenarios".¹⁶ Nobody has suggested he is at risk of prosecution under securities law, which raises questions about Toronto Hydro's position on the possible application of section 8(1)(l).
- In 2015, an NDP researcher was able to get, through Access to Information, essentially the same information about the privatization of Hydro One that he is seeking about Toronto Hydro (ie: consulting contracts including the name of the consultancy, the value of the contract and a description of the services provided). No *Securities Act* implications were raised, and the information about those consultants was made public by multiple media outlets with no evidence that it had any impact on the markets or the privatization of Hydro One which, unlike the proposal for Toronto Hydro, actually happened with an initial public offering.

[67] With regard to the implications of the Ontario *Securities Act*, the appellant submits that Toronto Hydro's position rests on the argument that acknowledgment of responsive records could violate securities legislation and put its staff, the appellant, and the newspaper he works for at risk of prosecution. The appellant contends that this position is "nonsense" and an "unproven and unprecedented attempt to keep basic information out of the public spotlight." His reasons can be summarized as follows:

- Toronto Hydro is not a private company with a shareholder, but is wholly owned by the City of Toronto and is subject to *MFIPPA* like any city department. The arguments it makes about securities law, insider trading and tipping really applies to private, publicly traded companies, and the only way in which the request relates to securities law is the fact that Toronto Hydro issues debentures which some people later sell privately.
- The *Securities Act* does not trump *MFIPPA* which has quasi-constitutional status, as recognized by the Supreme Court of Canada.
- The *Securities Act* contains "rare instances where, it is explicitly stated, freedom of information laws do not apply," (for example, continuous disclosure reviews).

¹⁶ The appellant provides the following quotation by the board member from a newspaper article: "I'm not saying that, I'm saying we're not part of the decision-making on that at all. Obviously the city has been checking with the company... the board hasn't been directly involved in anything about this outside or [sic] providing information. I mean, they've asked us to look at scenarios, as I understand it, and the company's provided them with that information."

The type of information requested is not specifically exempted, and the *Securities Act* ought not to apply.

- The disclosure of information by a public body such as Toronto Hydro under *MFIPPA* is “in the necessary course of business.”
- National Policy 51-201 is an interpretation, for guidance on the application of securities law. It has some force but does not have the same force as the provisions of the *Securities Act* itself, and cannot supersede *MFIPPA* and Toronto Hydro’s responsibilities under it.

[68] The appellant also submits that in order to avoid being placed in legal jeopardy, Toronto Hydro could release the requested information by means of a press release to everyone at the same time, including him, other reporters, every single Torontonian who owns part of the utility, and people beyond the city. He submits that disclosure in this manner would eradicate concerns about insider trading and tipping, while discharging Toronto Hydro’s responsibility as a publicly owned company subject to the *Act*.

[69] The appellant also submits that I should disregard the submissions on Toronto Hydro’s Disclosure Policy as well as the affidavit provided by the securities law expert, both of which were provided by Toronto Hydro in support of its submissions. With regard to the Disclosure Policy, the appellant submits that Toronto Hydro’s redactions to this policy make it impossible to determine whether other portions might contradict its position. With regard to the expert affidavit, the appellant submits that it is improper for an institution to use submissions from an expert on Canadian law in its submissions to this tribunal – that it would create a “terrible precedent”, and that allowing institutions to submit such evidence leaves the public at “an impossible disadvantage.”

[70] The appellant also provides affidavit evidence in support of his position.

Toronto Hydro’s reply representations

[71] In reply, Toronto Hydro submits that the appellant has “fundamentally misapprehend[ed]” the nature of the section 8 exemptions, while also disregarding the applicable securities legislation and obligations to which Toronto Hydro must, by law, comply.

[72] Toronto Hydro states that it does not have any obligation to offer interviews to individual reporters or news outlets, and maintains that it has not selectively offered interviews to any of the appellant’s competitors with regard to the information sought through these appeals.

[73] In response to the appellant’s submission that it is “improper for an institution to make a submission from an expert on Canadian law” in its submissions, Toronto Hydro notes that this office’s *Code of Procedure* explicitly permits the use of affidavit and

other evidence in appeals before the Commissioner. Toronto Hydro submits that use of expert evidence is commonplace where issues fall outside of the tribunal's expertise, as is the case here where the interpretation and application of securities law and how it interacts with *MFIPPA* is at issue. Toronto Hydro also submits that the appellant's argument regarding the fairness of allowing Toronto Hydro to submit expert evidence is untenable, as the appellant is in a position to do so himself should he so choose.

[74] Toronto Hydro notes that the appellant's representations speak to responsive information regarding consultants hired on the potential privatization of Toronto Hydro; however, Toronto Hydro submits that the requests are far broader than simply the "details of consultants hired". Rather, the requests encompass, "all communications ... that mention or concern in any way the possible sale of any ownership in Toronto Hydro ..."

[75] Toronto Hydro submits that on a plain reading of section 76(2) of the *Securities Act* and related decisions of the Ontario Securities Commission, the disclosure of any responsive information, if it exists, or confirming or denying its existence, would constitute disclosure of a material fact. Again, Toronto Hydro stresses that its obligations as a reporting issuer, including abiding by the prohibition against selective disclosure, are borne by it alone. Therefore, any comments made by Mayor Tory or the referenced board member are immaterial to Toronto Hydro's obligations under securities law. Toronto Hydro also submits that the appellant neglected to mention the portions of the board member's statements that highlight the sensitivities Toronto Hydro faces as a reporting issuer, for example: the board member explained that the requested information was "confidential, because we're an issuer, not a public company, we have to be very careful, anything we provide that isn't made available to everybody."

[76] Regarding the appellant's references to information disclosed to a requester about Hydro One, Toronto Hydro submits that this information is irrelevant, and that the news articles included in support of the appellant's submissions post-date Hydro One's public announcement of its initial public offering on April 16, 2015.

[77] Toronto Hydro offers a number of comments in response to the appellant's submissions on the implications of the *Securities Act*. They can be summarized as follows:

- The *Securities Act* applies to Toronto Hydro as a reporting issuer without reservation.
- *MFIPPA* and the *Securities Act* do not act in conflict, nor "trump" one another; rather, *MFIPPA* is "a complete statutory regime which contains an enumerated list of exemptions from disclosure in certain circumstances, including with respect to the obligation to confirm or deny the existence of records."

- The government did, in fact, “provide a specific exemption to preclude the application of MFIPPA to the type of information [the appellant] seeks on these appeals” in sections 8(1)(l) and 8(3). Toronto Hydro submits that there is no need for the *Act* to “spell out each and every circumstance to which an exemption may apply; this effect was achieved by virtue of the inclusion of the enumerated exemptions contained in *MFIPPA*, including those in section 8.
- Regarding the appellant’s position that the requested information can or would be disclosed “in the necessary course of business”, Toronto Hydro states that neither the existence of the access to information requests, nor the fact that Toronto Hydro has staff to respond to such requests, makes the requests “in the necessary course of business.” It refers to NP 51-201, which indicates that the necessary course of business exemption “would not generally permit a company to make a selective disclosure or material undisclosed information to the media.”
- In response to the appellant’s submissions concerning Toronto Hydro’s reliance on NP 51-201 in its representations, Toronto Hydro submits that NP 51-201 simply confirms the selective disclosure prohibition in section 76(2) of the *Securities Act*, any contravention of which would constitute an “unlawful act” for the purposes of section 8(1)(l) of *MFIPPA*.
- In response to the appellant’s suggestion that Toronto Hydro release the responsive information by press release, Toronto Hydro states “any decision to release material information to the public is an issue for Toronto Hydro’s board of directors alone,” and is not a place for the appellant to be offering suggestions or advice.

Appellant’s sur-reply representations

[78] In sur-reply representations, the appellant addresses some of Toronto Hydro’s submissions and clarifies his position. His representations are summarized as follows:

- Toronto Hydro is using the *Securities Act* as a shield to its responsibilities under *MFIPPA*.
- Regarding Toronto Hydro’s submissions on its expert evidence, the appellant submits that this office should disregard the expert’s affidavit, as it does not need an expert witness to explain the law.
- The appellant agrees that the scope of his requests is greater than simply seeking information relating to consultants hired by Toronto Hydro; however, the fact that his submissions focused on consultants does not lighten Toronto Hydro’s responsibility as a public institution to disclose as much responsive information as possible.

- The appellant maintains that the timing of the disclosures by Hydro One in response to an access request is relevant to Toronto Hydro's responsibilities under *MFIPPA*. He acknowledges that the disclosures were made after the privatization announcement had been made, but that they were made prior to shares going on sale in November 2015.
- The appellant states that, in the event that the *Securities Act* implications are accepted, they would have "vanished the moment that Mayor John Tory declared that no Toronto Hydro privatization would occur and city council affirmed it by a majority vote on December 13, 2016."
- The appellant maintains that in stating that it is up to Toronto Hydro's board of directors to decide what material will be made public confirms that Toronto Hydro is not meeting its obligations under *MFIPPA*.

Analysis and Findings

[79] Toronto Hydro submits that responsive records, if they exist, would qualify for exemption under section 8(1)(l) of the *Act*. On this basis, Toronto Hydro states that it is relying on section 8(3) of the *Act* to refuse to confirm or deny the existence of information responsive to the appellant's request.

[80] Section 8(3) gives an institution discretion to refuse to confirm or deny the existence of a record in certain circumstances.

[81] A requester in a section 8(3) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 8(3), Toronto Hydro is denying the appellant the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.¹⁷

[82] For section 8(3) to apply, Toronto Hydro must provide detailed and convincing evidence to establish that disclosure of the mere existence of responsive records itself conveys information that could reasonably be expected to harm one of the interests sought to be protected by sections 8(1) or 8(2). To satisfy this requirement, Toronto Hydro must establish the following:

1. The records (if they exist) would qualify for exemption under sections 8(1) or (2); and

¹⁷ Order P-339.

2. Disclosure of the fact that records exist (or do not exist) would itself convey information that could reasonably be expected to harm one of the interests sought to be protected by sections 8(1) or 8(2).¹⁸

Part one: If responsive records exist, would they qualify for exemption under section 8(1)(l)?

[83] In support of its section 8(3) claim, Toronto Hydro relies on section 8(1)(l) which states:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

facilitate the commission of an unlawful act or hamper the control of crime.

[84] As noted above, it is not enough for Toronto Hydro to take the position that the harms under section 8(1)(l) are self-evident.¹⁹ Toronto Hydro must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.²⁰

[85] Generally, the section 8 exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.²¹

[86] The purpose of the exemption contained in section 8(1)(l) is to provide institutions with the discretion to preclude access to records in circumstances where disclosure of the records could reasonably be expected to lead to the harm set out in that section; namely, facilitating the commission of an unlawful act or hampering the control of crime. Toronto Hydro bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm.

[87] Toronto Hydro submits that disclosure of the responsive records, if they exist, would necessarily cause Toronto Hydro to violate its legal obligations as a reporting issuer under the *Securities Act*.

[88] I note that, in taking this position, Toronto Hydro appears to be stating that not only would the disclosure of the requested records (if they exist) facilitate the commission of an unlawful act, but that disclosure itself would constitute an unlawful

¹⁸ Orders P-1656, PO-2450.

¹⁹ Order PO-2040 and *Ontario (Attorney General) v. Fineberg*, cited above.

²⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

²¹ *Ontario (Attorney General) v. Fineberg*, cited above.

act (including breaching section 76(2) of the *Securities Act*). Toronto Hydro also provides representations in support of its position that, because the appellant's stated intention is to make any existing responsive records public as soon as he receives them, disclosure to him could result in breaches of other provisions of the *Securities Act*, including the anti-tipping and selective disclosure provisions.

[89] In these appeals, in order to decide whether the exemption in section 8(1)(l) applies, I must review the nature of the requests, as Toronto Hydro argues that disclosure of any records responsive to the requests (if they exist) would result in the identified harms. The appellant's first request is for:

All communications ... including ... reports, emails, letters, notes, memos, notes to file, and records of meetings and phone conversations, that mention or concern in any way the possible sale of any ownership in Toronto Hydro, through any mechanism including, but not limited to, an initial public offering (IPO). This includes any form of privatization or sale of Toronto Hydro sale or assets. ...

The second request is for:

The estimated cost of any work done on the topic of any possible sale, initial public offering (IPO) or privatization, in part or full, of Toronto Hydro. That work should include, but not be limited to: legal, consultants, polling, and regulatory experts. Please break down the costs by category.

[90] Toronto Hydro states that disclosure of the requested information would require Toronto Hydro to violate its obligations under securities law, in particular, section 76(2) of the *Securities Act*, which reads:

No issuer and no person or company in a special relationship with an issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the issuer before the material fact or material change has been generally disclosed.

[91] Based on the detailed representations set out above, I am satisfied that disclosure of the requested information, if it exists, could reasonably be expected to facilitate the commission of an unlawful act. I make this finding for a number of reasons.

[92] To begin, I am satisfied that Toronto Hydro is an entity to which the provisions of section 76(2) of the *Securities Act* applies. Based on Toronto Hydro's representations, I am satisfied that THC became a "reporting issuer" under that Act in 2003 when it began offering debentures to the public, that it is currently a reporting issuer in Ontario and in every other province in Canada, and that it is subject to the obligations applicable to reporting issuers under the *Securities Act*. I am also satisfied that THESL,

as a wholly-owned subsidiary of THC, is in a "special relationship" with THC for the purposes of section 76(2) of the *Securities Act*, and that its conduct is therefore also legally constrained by those positive obligations under that Act.

[93] Furthermore, I am satisfied that disclosure of the requested information (if it exists) could reasonably be expected to result in a breach of section 76(2) of the *Securities Act*. That section prohibits a body covered by the provisions of the *Securities Act* from informing another person "of a material fact or material change with respect to the issuer" before the material fact or material change has been generally disclosed.

[94] The term "material fact" is defined in section 1 of the *Securities Act* as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities." I accept that the debentures issued by Toronto Hydro are "securities" as defined in the *Securities Act*. Accordingly, information that would reasonably be expected to have a significant effect on the market price or value of the debentures would constitute a "material fact."

[95] As referenced by Toronto Hydro, the Ontario Securities Commission has consistently held that information regarding possible changes in corporate ownership constitutes a material fact.²² In addition, NP 51-201 confirms that "changes in share ownership that may affect control of the company" may constitute material information.²³

[96] The first request is for any records that "mention or concern in any way the possible sale of any ownership in Toronto Hydro" including "an initial public offering [and] any form of privatization or sale of Toronto Hydro sale or assets." Based on the broad scope of this request, I am satisfied that disclosure of any responsive records could reasonably be expected to constitute disclosure of a material fact in contravention of Toronto Hydro's securities law obligations, on the basis that it would reveal information regarding whether or not a change in Toronto Hydro's corporate ownership is anticipated, when no such information has been generally disclosed. I make this finding based on the representations of Toronto Hydro and based on my review of the wording of section 76(2) of the *Securities Act*. It is difficult to consider circumstances where the possible sale of ownership, sale of assets, or an initial public offering would not constitute a "material fact or material change" with respect to a reporting issuer.

[97] The second request is for the "estimated cost of any work done on the topic of any possible sale, initial public offering (IPO) or privatization ... of Toronto Hydro" including legal, consultants, polling, and regulatory experts. Although this request is restricted to the cost of any work done on the identified topics, I am also satisfied that disclosure of any responsive records, if they exist, would constitute disclosure of a

²² *AIT Advanced Information Technologies Corp., Re* (2008), 31 OSCB 712 [AIT Corp.] at para 211; *Leung, Re* (2008), 31 OSCB 6777 at para 9.

²³ National Policy 51-201, *Disclosure Standards* (2002), 25 OSCB 4492-4508 [NP 51-201], s 4.3.

material fact in contravention of Toronto Hydro's securities law obligations. I make this finding on the basis that disclosure would reveal information regarding whether or not a change in Toronto Hydro's corporate ownership is anticipated. Responsive records, if they exist, would identify the costs incurred by Toronto Hydro of "any work done on the topic of any possible sale, initial public offering (IPO) or privatization ... of Toronto Hydro." In my view, disclosure of these costs, if any, could also reasonably be expected to inform the appellant of "a material fact or material change with respect to the issuer." For example, if the costs were significant, this could reasonably be expected to reveal information about a material fact or material change. Similarly, if there were no costs or the costs were not significant, this would also reveal that type of information.

[98] I also find that breaching section 76(2) of the *Securities Act* would constitute an "illegal act" for the purpose of section 8(1)(l).²⁴ The nature of the offence which would result from breaching section 76(2) and the consequent penalties satisfy me that this requirement under section 8(1)(l) is satisfied. As a result, I am satisfied that disclosure of the requested records (if they exist) would itself constitute an unlawful act. Furthermore, I am satisfied that disclosure of the requested records could reasonably be expected to facilitate the commission of an unlawful act. Disclosure of records in response to an access request would provide requesters with information not otherwise available to the public and could reasonably be expected to result in the harms identified in section 8(1)(l).²⁵

[99] I have also considered a number of the appellant's arguments in support of his position that section 8(1)(l) is not engaged.

[100] I reject the appellant's arguments that applying section 76(2) of the *Securities Act* in the context of section 8(1)(l) of *MFIPPA* results in a "conflict" between these acts. Section 8(1)(l) simply refers to an "illegal act." An illegal act can include various offences, including breaches of federal or provincial statutes and/or regulations. Section 8(1)(l), an *MFIPPA* exemption, almost by definition requires reference to other legislation in order to find that it applies.

[101] I also reject the appellant's argument that the exception to the offence provision in section 76(2) applies because disclosure of information by a public body such as Toronto Hydro under *MFIPPA* is "in the necessary course of business." There is no question that responding to FOI requests constitutes part of an institution's obligations

²⁴ "Law enforcement" includes investigations into possible violations of municipal by-laws (Order M-16), the Criminal Code (Order M-202), and other statutes (see, for example, MO-1416), which could lead to court proceedings. See also Orders 89, P-302, MO-1805 and MO-2043.

²⁵ My decision is not based on the identity of the appellant, but rather on the principle that disclosure of the records must be viewed as disclosure to the public generally. If disclosed, the information in the records would potentially be available to all individuals (See Orders P-1537 and PO-2461). I also find that the appellant's commitment to "immediately publish" the information has no impact on the application of section 8(1)(l).

in the “ordinary course of business”: however, responding can include issuing a decision denying access or refusing to confirm or deny the existence of records – as Toronto Hydro did in this case.

[102] I also do not accept the appellant’s submission that Toronto Hydro ought not to be able to submit expert evidence in the form of affidavit evidence. As Toronto Hydro notes, *Practice Direction Number 6* of the IPC’s *Code of Procedure for appeals under the Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act* expressly allows the use of affidavit evidence in appeals before the Commissioner. The kind of evidence required to demonstrate the alleged harms set out in section 8(1)(l) will vary depending on the type of issue and seriousness of the consequences. In this appeal Toronto Hydro’s representations identify their arguments in support of their position that the relevant exemptions apply. They have chosen to provide supporting affidavit evidence, including an affidavit by an expert in securities law. In the circumstances, it is clearly open to Toronto Hydro to provide such supporting evidence, and it simply forms part of the materials provided to me in making my decision.²⁶

[103] I have also considered the parties’ positions regarding the fact that a requester was able to use access to information legislation to obtain similar information about the privatization of Hydro One (ie: consulting contracts including the name of the consultancy, the value of the contract and a description of the services provided). Both parties acknowledge that these disclosures were made after Hydro One’s public announcement of its initial public offering. I accept Toronto Hydro’s position that decisions made in that context are not determinative of the issue, and am satisfied that the facts are distinguishable from the circumstances before me.

[104] Lastly, I have considered the appellant’s position that certain information about possible privatization is already public. He argues that any details likely to be in any Toronto Hydro response would “merely elaborate” on information already made public, and that it is now old information which “cannot affect the markets in any way and cannot be considered a material fact” under section 76 of the *Securities Act*.

[105] In support of his position, the appellant has referenced various items of information that have been made public throughout the course of these appeals. Initially the appellant referred to certain information set out in referenced newspaper articles and statements made by a Hydro Board member. He also referred to later statements made by the Toronto Mayor, who announced that Toronto Hydro would not be privatized in any way under his watch. In his sur-reply representations he refers to a later decision made by city council regarding Toronto Hydro.

[106] Throughout these appeals Toronto Hydro has consistently confirmed that it has

²⁶ See also Order PO-3703-I.

never, including prior to the requests or at any time of its decisions:

... made any public disclosure, or any other comment, relating to any decision to sell through any mechanism, including but not limited to an IPO or the privatization or sale of any Toronto Hydro shares or assets, or the estimated cost of any work done in relation thereto – beyond the fact that any such decision is reserved for the City.

[107] Toronto Hydro also confirms that the positive obligations set out in the *Securities Act* demonstrate the “acute scrutiny” that governs Toronto Hydro as a reporting issuer. It again notes the significant consequences to it for breach of its obligations. As noted above, Toronto Hydro also refers to the statements made by its board member that highlight the sensitivities Toronto Hydro faces as a reporting issuer, where the member explained that the requested information was “confidential, because we’re an issuer, not a public company, we have to be very careful, anything we provide that isn’t made available to everybody.”

[108] Toronto Hydro responded to the appellant’s references to the Mayor’s statement as follows:

... any statements made by [the Toronto Mayor] about his view not to pursue a transaction such as an IPO, are wholly irrelevant to these appeals. Toronto Hydro’s obligations as a reporting issuer, including the prohibition against selective disclosure, are Toronto Hydro’s alone. Any comments made by [the Toronto Mayor] do not affect these obligations in the slightest.

[109] I have reviewed the material provided by the appellant referencing the information that has been made public regarding these issues. Although clearly certain information regarding the privatization of Toronto Hydro has been made public, I am satisfied that Toronto Hydro itself has not made any public disclosure about these issues beyond the general statements referenced above (ie: that the decision is the city’s and that they, as a reporting issuer, are constrained from commenting).

[110] The reference in section 76(2) of the *Securities Act* that no issuer is to inform others of a material fact before the material fact has been “generally disclosed” requires the information to be disclosed by the issuer in “a manner calculated to effectively reach the marketplace and if investors have had a reasonable amount of time to analyze the information.” This responsibility falls squarely on the reporting issuer.

[111] I have found above that disclosure of the requested records (if any exist) would constitute disclosure of a material fact in contravention of Toronto Hydro’s securities law obligations, and would provide requesters with information not otherwise available to the public. The appellant asks me to find that, because of the information that has been made public, the disclosure of the requested records (if any exist) would no longer

constitute disclosure of a material fact in contravention of Toronto Hydro's securities law obligations, or that the material fact has been generally disclosed. On my review of the nature of the information that has been made public, I am not satisfied that this information impacts Toronto Hydro's specific obligations as a reporting issuer regarding disclosure of the requested information from Toronto Hydro itself. The public information is different in kind from the specific information requested from Toronto Hydro itself by the appellant.

[112] In making this decision I have considered whether the public information means that any disclosure of the requested information (including whether or not it exists) could no longer result in a breach of section 76(2). I am satisfied that it could still result in a breach of that section. As an example, if a current Toronto Hydro employee chose to disclose the information responsive to the requests to a broker who then acts on that information, it is not clear to me that the section 76(2) provisions of the *Securities Act* would not be engaged.

[113] As a final matter, I note the appellant's interest in accessing and publishing information responsive to his requests, and his position that the public ought to have access to this information. However, I note that NP 51-201 states that "... the necessary course of business exemption would not generally permit a company to make a selective disclosure of material undisclosed information to the media." In these circumstances, I accept that for the purpose of section 76(2) of the *Securities Act*, outside of the specified "general disclosure" requirements referenced above, disclosure to any select individual would constitute disclosure of a material fact in contravention of Toronto Hydro's securities law obligations, whether it is disclosure to a selected media representative, a selected debenture holder or any other person.

[114] I am satisfied that disclosure of the requested information, if it exists, could reasonably be expected to facilitate the commission of an unlawful act, and that the risk of harm is "well beyond the merely possible or speculative."²⁷ In summary, I am satisfied that any responsive records, if they exist, would qualify for exemption under section 8(1)(l) of the *Act*.

Part two: Would disclosure of the fact that records exist (or do not exist) itself convey information that could reasonably be expected to harm one of the interests sought to be protected by section 8(1)?

[115] Toronto Hydro relies on section 8(3) in conjunction with section 8(1)(l) in order to refuse to confirm or deny the existence of any records responsive to the appellant's requests.

[116] Section 8(3) of the *Act* states:

²⁷ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

A head may refuse to confirm or deny the existence of a record to which subsection (1) or (2) applies.

[117] This section acknowledges the fact that in order to carry out their mandates, institutions must sometimes have the ability to withhold information in answering requests under the *Act*.

[118] As noted above, a requester in a section 8(3) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 8(3), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power that should be exercised only in rare cases.²⁸

[119] I have found that disclosure of the responsive records, if they exist, could reasonably be expected to result in the harms set out in section 8(1)(l) and therefore would qualify for exemption under that section 8(1)(l). However, an institution relying on section 8(3) of the *Act* must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under section 8(1). The institution must establish that disclosure of the mere existence or non-existence of such a record would communicate to the requester information that would fall under section 8(1) of the *Act*.²⁹

[120] In support of its position that confirming or denying the existence of records would also breach the applicable provision of the *Securities Act*, Toronto Hydro references the regulatory scheme set out above. It then submits:

... the act of either confirming or denying the existence of the Requested Information would constitute disclosure of a material fact in contravention of Toronto Hydro's securities law obligations, on the basis that it would in effect impart upon [the appellant] (as well any other party to whom such confirmation or denial was made) information regarding whether or not a change in Toronto Hydro's corporate ownership is anticipated. No such information has been generally disclosed.

[121] On my review of the representations set out above, I am satisfied that confirming or denying the existence of records responsive to either of the requests could reasonably be expected to itself convey information that could facilitate the commission of an unlawful act under section 8(1)(l).

[122] I am satisfied that if Toronto Hydro were to confirm for a requester that records responsive to either of the requests exist, this could reasonably be expected to inform the requester of "a material fact or material change with respect to the issuer." The

²⁸ Order P-339.

²⁹ Orders P-344, P-542.

same result would occur if Toronto Hydro were to confirm that records responsive to either of the requests do not exist.

[123] As an example, if a requester were to request records responsive to either of the requests in these appeals every three months, it is not difficult to see how receiving a response either confirming or denying the existence of records (regardless of whether they were to be disclosed) would provide a requester with information about whether or not a change in Toronto Hydro's corporate ownership is anticipated. If the response to the first three requests was that "no records exist", this would provide a requester with such information (presumably that no change is anticipated). If the response to the fourth request was that "records exist", this would also provide a requester with such information. In either case, the requester would be provided with information regarding a material fact with respect to the reporting issuer before this information has been generally disclosed. On this basis, I am satisfied that confirming or denying the existence of responsive records engages section 8(1)(l) of the *Act* and, in turn, that section 8(3) of the *Act* applies to the information requested .

[124] Above I addressed the appellant's position that because certain information has been disclosed through newspaper articles and other statements made to the public, the provisions in section 8 of the *MFIPPA* ought not to apply. For the same reasons set out above, I find that the public statements, which were not made by Toronto Hydro as a reporting issuer, do not impact its responsibilities under the applicable securities laws.

[125] Finally, having reviewed Toronto Hydro's representations, I am satisfied that it properly exercised its discretion in responding to the appellant's requests, and that it took into account appropriate considerations when deciding to neither confirm nor deny the existence of any responsive records pursuant to sections 8(1)(l) and 8(3) of the *Act*.

ORDER:

I uphold Toronto Hydro's decision to refuse to confirm or deny the existence of responsive records and dismiss the appeals.

Original Signed by: _____
Frank DeVries
Senior Adjudicator

_____ March 13, 2018