Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3935

Appeals MA17-126 and MA17-134

Toronto Hydro Corporation

July 8, 2020

Summary: The appellant submitted two access requests to Toronto Hydro Corporation and Toronto Hydro-Electric System Limited (together Toronto Hydro) seeking records relating to Toronto Hydro's costs and communications pertaining to the appellant's two previous access requests, which were the subject of Order MO-3575. Toronto Hydro claimed that the requests at issue in this appeal were frivolous and vexatious and, in the alternative, 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) of the *Municipal Freedom of Information and Protection of Privacy Act*. The appellant appealed Toronto Hydro's decisions to this office. The adjudicator finds that the requests are not frivolous or vexatious, and does not uphold Toronto Hydro's decision to refuse to confirm or deny the existence of any records on the basis of section 8(3), in conjunction with section 8(1)(l).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 1, 4(1)(b), 8(1)(l), 8(3), 20.1(1); Regulation 823, sections 5.1(a) and 5.1(b); *Securities Act*, RSO 1990, c S.5, sections 1, 76(2).

Orders Considered: Orders M-850, MO-1782, MO-3575, MO-3643 and PO-2435.

OVERVIEW:

[1] Previously, in Appeals MA16-132 and MA16-133 the same media requester in the appeals before me, sought access to information from Hydro Corporation (THC) and Toronto Hydro-Electric System Limited (THESL) (together "Toronto Hydro") under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the timeframe between September 1, 2014, and January 1, 2016. Those requests were

for the following information:

> Request 1 (Appeal MA16-132)
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> 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.
>
> 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.

[2] Toronto Hydro relied on section 8(3) (refuse to confirm or deny) in conjunction with section 8(1)(l) (facilitate commission of an unlawful act) of the *Act* in order to refuse to confirm or deny the existence of any records responsive to these two requests.

[3] Appeals MA16-132 and MA16-133 were resolved by Order MO-3575. In that order, former Senior Adjudicator Frank Devries undertook an extensive review of Toronto Hydro's obligations under the applicable securities laws and upheld 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*, with reference to section 76(2) of the *Securities Act*[1].

[4] As set out in Order MO-3575, former Senior Adjudicator DeVries was satisfied that disclosure of the requested information, if it existed, could reasonably be expected to facilitate the commission of an unlawful act, and that the risk of harm was "well

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[1] *Securities Act*, RSO 1990, c S.5. Section 8(3) of the *Act* and section 76(2) of the *Securities Act* are reproduced in the body of the order that follows.

beyond the merely possible or speculative."[2] He was satisfied that any responsive records, if they existed, would qualify for exemption under section 8(1)(l) of the *Act*.

[5] He was also satisfied that confirming or denying the existence of records responsive to either of the two requests at issue before him could reasonably be expected to itself convey information that could facilitate the commission of an unlawful act under section 8(1)(l).

[6] He wrote the following at paragraphs 122 and 123 of his decision:

> [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 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.

[7] While former Senior Adjudicator DeVries was conducting the inquiry that resulted in Order MO-3575, Toronto Hydro received the requests now at issue before me. The two requests were for access to the following information, for a different time period, being from January 22, 2016 to December 31, 2016:

> Request 3 (Appeal MA17-126)

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

> Details of any spending by Toronto Hydro on consultants and/or any other outside agencies and/or any internal overtime costs that resulted from my requests to Toronto Hydro, both dated Jan. 22, 2016 regarding potential privatization plans. …
>
> This request encompasses any and all responses to myself, or to the Information and Privacy Commissioner of Ontario as part of the appeal procedure, and will include but not be limited to, fees paid to [named law firm] ([including two named lawyers]) and [named securities expert].
>
> Request 4 (Appeal MA17-134)
>
> Copies of all records (including but not limited to emails from work and/or personal email accounts, BlackBerry messages, letters, reports, notes to file, calendars and diary or agenda entries) reports mentioning me, [requester's name] (by name, partial name, or as "[named news outlet] reporter" or any other description), and/or my Freedom of Information requests dated January 22, 2016 … originating from, sent to or cc'ing the following Hydro staff: [five named individuals]. My request covers any correspondence to, from or cc'ing outside agencies including any representatives of [named law firm] and [named securities expert].

[8] In response to requests 3 and 4, Toronto Hydro issued two decision letters. Each decision letter reviewed the details of the requests and stated:

> … Toronto Hydro cannot confirm or deny the existence of any of the [requested] records for the period January 22, 2016 to December 31, 2016, pursuant to sections 4(1), 8(1)(l) (including in respect of obligations under applicable securities laws), 8(3), 20.1(1) and 22(2) of the *Act* […]

[9] It added:

> As per section 20.1(1) of *MFIPPA*, among the reasons your request is being refused is our belief that it is frivolous and/or vexatious. As you are aware, you have multiple access to information requests to Toronto Hydro in respect of which appeals are currently pending before the Information and Privacy Commissioner. We believe that this request is part of a continued attempt by you to request records that are the subject of, or which pertain to, the existing appeals. Additionally, your express indications to us that you intend to build a story in the media around your existing appeals lead us to believe that this request amounts to an abuse of the right of access, is made in bad faith and/or is made for a purpose other than to obtain access. …

[10] Toronto Hydro also reserved the right to rely on additional or alternative objections and/or exemptions, including section 12 (solicitor-client privilege) of the *Act*.

[11] The requester (now the appellant) appealed the access decisions.

[12] Mediation did not resolve appeals MA17-126 and MA14-134 and they were moved to the adjudication stage of the appeals process and assigned to former Senior Adjudicator Frank Devries.

[13] The adjudicator decided not to send a Notice of Inquiry in these appeals until the issuance of his decision in Appeals MA16-132 and MA16-133. As noted above, those appeals were resolved by Order MO-3575.

[14] Appeals MA17-126 and MA17-134 were subsequently transferred to me to complete the adjudication stage.

[15] During my inquiry into these appeals, I sought and received representations from Toronto Hydro and the appellant. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. In making my determinations in these appeals, I reviewed and considered all the materials that the parties provided.

[16] As both of the appeals involve the same parties and share common issues I have decided to address them both together in this order.

[17] In this order, I find that the requests are not frivolous or vexatious under section 4(1)(b) of the *Act* and do not uphold Toronto Hydro's decision to refuse to confirm or deny the existence of any records on the basis of section 8(3), in conjunction with section 8(1)(l). I order Toronto Hydro to issue a fresh access decision without relying on either provision.

ISSUES:

A. Was Toronto Hydro entitled to deny access on the ground that the requests for access were frivolous or vexatious under section 4(1)(b) of the *Act*?

B. Was Toronto Hydro entitled to refuse to confirm or deny the existence of records under section 8(3) of the *Act*?

DISCUSSION:

Issue A: Was Toronto Hydro entitled to deny access on the ground that the requests for access were frivolous or vexatious under section 4(1)(b) of the *Act*?

[18] Section 4(1)(b) of the *Act* states:

> 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.

[19] Section 20.1(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 19,
>
> > (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
> >
> > (c) that the person who made the request may appeal to the Commissioner under subsection 39(1) for a review of the decision.

[20] Sections 5.1(a) and (b) of Regulation 823 prescribe that:

> A head … shall conclude that the request for a record or personal information is frivolous or vexatious if:
>
> > (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.

[21] Section 4(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, and therefore it should not be exercised lightly.[3]

[22] An institution has the burden of proof to substantiate its decision that a request is frivolous or vexatious.[4]

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[3] Order M-850.
[4] Order M-850.

Section 5.1(a): pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution

[23] As indicated above, section 5.1(a) of Regulation 823 provides that a request is frivolous or vexatious if, among other things, it is part of a "pattern of conduct that amounts to an abuse of the right of access."

[24] In Order M-850, former Assistant Commissioner Tom Mitchinson commented on the meaning of "pattern of conduct". He stated:

> [I]n my view, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way).

[25] A pattern of conduct that would "interfere with the operations of an institution" is one that would obstruct or hinder the range of effectiveness of the institution's activities.[5]

[26] Interference is a relative concept that must be judged on the basis of the circumstances a particular institution faces. For example, it may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government ministry, and the evidentiary onus on the institution would vary accordingly.[6]

[27] The following factors may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

> *Number of requests*
>
> Is the number excessive by reasonable standards?
>
> *Nature and scope of the requests*
>
> Are they excessively broad and varied in scope or unusually detailed? Are they identical to or similar to previous requests?
>
> *Purpose of the requests*
>
> Are the requests intended to accomplish some objective other than to gain access? For example, are they made for "nuisance" value, or is the requester's aim to harass government or to break or burden the system?

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[5] Order M-850.
[6] Order M-850.

Timing of the requests

> Is the timing of the requests connected to the occurrence of some other related event, such as court proceedings?[7]

[28] The institution's conduct also may be a relevant consideration weighing against a "frivolous or vexatious" finding. However, misconduct on the part of the institution does not necessarily negate a "frivolous or vexatious" finding.[8]

[29] Other factors, particular to the case under consideration, can also be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access.[9]

[30] The focus should be on the cumulative nature and effect of a requester's behaviour. In many cases, ascertaining a requester's purpose requires the drawing of inferences from his or her behaviour because a requester seldom admits to a purpose other than access.[10]

Section 5.1(b) bad faith

[31] Under the "bad faith" portion of section 5.1(b), a request will qualify as "frivolous" or "vexatious" where the head of the institution is of the opinion, on reasonable grounds, that the request is made in bad faith. If bad faith is established, the institution need not demonstrate a "pattern of conduct".[11]

[32] The term "bad faith" has been defined in Order M-850 by former Assistant Commissioner Mitchinson as:

> 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 fulfill 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 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.

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[7] Orders M-618, M-850 and MO-1782.
[8] Order MO-1782.
[9] Order MO-1782.
[10] Order MO-1782.
[11] Order M-850.

Section 5.1(b): purpose other than to obtain access

[33] 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.[12] Previous orders have found that an intention by the requester to take issue with a decision made by an institution, or to take action against an institution, is not sufficient to support a finding that the request is "frivolous or vexatious".[13]

[34] Where a request is made for a purpose other than to obtain access, the institution need not demonstrate a "pattern of conduct".[14]

Toronto Hydro's representations

[35] In support of its position, Toronto Hydro included affidavits from a Supervisor, External Financial Reporting as well as a securities expert with its representations.

[36] Toronto Hydro states that while the appellant's first two requests were being processed, it received the two requests at issue in the appeals before me, and recounts an email exchange with the appellant that took place shortly thereafter.

[37] It then explains how its ability to deal with the two requests at issue in this appeal is constrained by its obligations under the *Securities Act*[15], and by the determinations of former Senior Adjudicator DeVries in order MO-3575.

[38] Toronto Hydro explains 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.

[39] The objective of the 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.

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[12] Order M-850.
[13] Orders MO-1168-I and MO-2390.
[14] Order M-850.
[15] *Securities Act*, RSO 1990, c S.5.

[40] It submits that the Disclosure Policy prohibits selective disclosure of material information, including with respect to changes in share ownership that may affect control of Toronto Hydro Corporation, 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.

[41] Similarly, it states that 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.

[42] Toronto Hydro also bases its position on a disclosure policy entitled National Policy 51-201, Disclosure Standards (NP-51-201)[16] which provides that "changes in share ownership that may affect control of the company" may constitute material information.[17] It also states that the Ontario Securities Commission has consistently held that information regarding possible changes in corporate ownership constitutes a material fact.[18]

[43] Toronto Hydro submits that in order to comply with its securities law obligations, it has never made or authorized 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.

The requester has demonstrated a pattern of conduct that amounts to an abuse of the right of access

[44] Toronto Hydro submits that it was never its intention to prevent the appellant, or any other member of the media from learning any publicly disclosable information about its operation. It submits that in spite of its efforts to cooperate, the appellant has, through a series of twitter postings that were without evidentiary foundation, "attempted to draw negative public attention to Toronto Hydro". It reproduced the twitter postings in the affidavit of its Supervisor, External Financial Reporting.

[45] Toronto Hydro submits that:

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[16] National Policy 51-201, *Disclosure Standards* (2002), 25 OSCB 4492-4508 [NP 51-201].
[17] National Policy 51-201, *Disclosure Standards* (2002), 25 OSCB 4492-4508 [NP 51-201], s 4.3.
[18] *AIT Advanced Information Technologies Corp., Re* (2008), 31 OSCB 712 [AIT Corp.] at para 211; *Leung, Re* (2008), 31 OSCB 6777 at para 9.

> As evidenced by his conduct, the appellant appears to be more concerned with pursuing a personal dispute with Toronto Hydro, than with conveying important information to the public that the public would not otherwise receive.

[46] Toronto Hydro submits that there are reasonable grounds to conclude that the requests form part of a pattern of conduct that amounts to an abuse of the right of access.

Number, nature, scope and timing of requests

[47] Toronto Hydro submits that Request 4[19] at issue before me is extremely broad and intentionally framed to get at some of the very same information and details as sought in the appellant's earlier requests in regards to whether Toronto Hydro is or was considering a fundamental transaction, which were addressed by former Senior Adjudicator DeVries in Order MO-3575. Toronto Hydro submits:

> … While the requested information does not expressly repeat the language of the 2016 appeals, it most certainly overlaps and is expressly framed to relate directly to the 2016 appeals.
>
> Additionally, and extremely importantly, the 2017 requests were made while the 2016 appeals were ongoing - clearly in an attempt to gain information relevant to the 2016 appeals, including regarding appeal strategy and associated cost. It is apparent on the face of the requests that the appellant is not motivated by the desire to obtain access, but rather, to advance a personal dispute regarding the 2016 appeals in the media - something which he expressly acknowledged publicly in contemporaneous "tweets" as outlined above. In so doing, the appellant is attempting to use *MFIPPA* as a tool to advance a personal agenda. Such conduct should not be countenanced by the Commissioner.
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> Indeed, the requests are not of the sort wherein the appellant is requesting information which may be relevant in possible future civil litigation (which Toronto Hydro readily acknowledges is the sort of request that the Commissioner has recognized as a valid information request). Rather the appellant's requests are aimed at circumventing his 2016 appeals and advancing a public narrative against Toronto Hydro, an object which runs counter to the spirit and intent of *MFIPPA*.

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[19] Being the request at issue in appeal file number MA17-134.

Purpose of the requests

[48] Toronto Hydro submits that the requests and contemporaneous tweets demonstrate the appellant's true intention - to use the freedom of information process to accomplish objectives unrelated to access.

[49] Toronto Hydro submits:

> … Specifically the appellant has personalized his request, aiming directly at Toronto Hydro senior executives and the time and money spent by Toronto Hydro in responding to his earlier appeals, wherein the Commissioner upheld Toronto Hydro's decisions.

[50] Relying on Order MO-1782, Toronto Hydro submits that the requests and contemporaneous tweets demonstrate that the appellant is pursuing a personal agenda apart from access as his own words signal a desire to carry on a conflict with Toronto Hydro, in addition to seeking information.

The requester has demonstrated a pattern of conduct that would interfere with the operations of the institution

[51] Toronto Hydro submits that in light of the scope of Request 4 at issue before me, and despite former Senior Adjudicator DeVries' findings in Order MO-3575, the appellant has continued his pursuit of records that he is not entitled to receive. It submits that this is because the request would necessarily encompass records, if any, outlining whether Toronto Hydro is or was considering a fundamental transaction.

[52] Toronto Hydro submits:

> By continuing to sustain such requests in the face of a prior disposition of the issue, the appellant is interfering with the operations of Toronto Hydro insofar as Toronto Hydro has no alternative but to respond to such requests and related appeals. To do otherwise and capitulate to the request would give rise to a breach of securities laws …

The requests were made in bad faith

[53] Toronto Hydro submits that the appellant's appeals are not motivated by a genuine purpose:

> … Rather, the requests and contemporaneous tweets demonstrate that the appellant is motivated by a purpose not contemplated under *MFIPPA* - namely, to get at the very information sought in his 2016 appeals and to pursue a personal campaign against Toronto Hydro. Seeking to use *MFIPPA* in this way is to abuse the access system.

The requests were made for a purpose other than to obtain access

[54] Toronto Hydro submits that as outlined in their representations there are two fundamental problems with the requests that run counter to the objects and intent of *MFIPPA*:

> They are aimed at circumventing the 2016 appeals; and
>
> They have been framed in a way to assist with pursuing a personal agenda and to advance a conflict against Toronto Hydro.

The appellant's representations

[55] In his representations, the appellant recounts his history as a respected senior reporter at his newspaper and of his awards for investigative reporting and feature writing. He submits that:

> … My reporting in January 2016, that officials from Hydro and Mayor John Tory's office were involved in backroom discussions on a possible privatization of Hydro, was initially denied. It was however confirmed that September when Mayor Tory said the city needed to consider selling part of Hydro.
>
> My work provided an invaluable service to the public in giving them early notice of the possible sale, which was pulled from consideration amid strong public opposition to the plan.

[56] He submits that freedom of information requests "are one of the tools of my trade."

[57] The appellant submits that the authorities cited by Toronto Hydro are distinguishable and that Toronto Hydro is attempting to equate him with people who have a personal grudge, a pecuniary interest, or both.

[58] He submits:

> … I have no personal interest in getting information from Toronto Hydro, only a professional interest as a journalist trying to hold a large public institution to account for its spending and actions.
>
> I have no "purpose other than to obtain access." My job, why I'm paid by the [news outlet] and widely lauded for my stories, is to be the public's eyes on institutions including Hydro, Waterfront Toronto and many others.
>
> Hydro, for example, seeks to equate me with a Midland requester (Order M-850) who admitted "having fun in filing requests." I am not having fun. I am doing my job.

[59] The appellant submits that only two of his four requests remain at issue:

> … As to the number of requests, two requests are at issue now, after a decision based on two others. In no universe could four requests be considered a number that would cause logistical problems for Hydro or evidence of bad intent. Hydro cites a case where a man filed 28 requests (Appeal MA-020122-2)[20] with a municipality between 1998 and 2003. There is no valid comparison with my actions.

[60] The appellant further submits that, unlike that case, his requests are not similar to those filed previously. He adds:

> … My new requests are for legal fees related to Hydro fighting me, and internal Hydro discussions about me and my requests. My previous requests were for internal records about privatization preparations and consultants hired to help make them. If Hydro found that some of those records could not be disclosed as a result of IPC's finding in the previous case, Hydro could make that argument for severing the records.

[61] The appellant argues that there are many precedents for the Commissioner ordering institutions to reveal information, including communications about a requester, as well as legal fees incurred in the course of business. He submits that examples of his first point include people requesting and receiving their own police and health records. With respect to the second, the appellant submits that there are decisions of the IPC ordering the disclosure of the sum of money paid by an institution to a solicitor[21]. The appellant also points to Order PO-2435, which disclosed payment information relating to physicians hired as consultants for the provincial E-Physician Project.

[62] He submits that:

> Sources, including those who first alerted me to Hydro's backroom privatization push, have provided me with information about how Hydro handled my FOI requests and I would like to match that information with the records. Hydro can apply to sever records that might be covered by an exemption, and I can appeal those attempts, but once again Hydro is asking for blanket protection from scrutiny.

[63] He argues that the requests at issue before me relate tangentially to the earlier requests but are for very different types of information. He submits that in the previous appeals Toronto Hydro successfully argued that information about a possible privatization was core, substantial and material information about the electrical utility,

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[20] Addressed in Order MO-1782.
[21] The appellant references Order PO-3245 in support of this submission,

but that these requests are different:

> In these requests, I am merely asking for details of legal fees spent by a public institution to fight my previous requests. The issue of privatization is not actually relevant at all - the costs and any details of them would not reveal anything to me or my readers about any such plans, merely how much public money Hydro was willing to spend to fight an FOI appeal.
>
> On my request for communications about me, I accept that it is possible there could be some information related to privatization and that Hydro could invoke that earlier decision in an attempt to sever some records. But I urge IPC to not hand a large public institution a blunt club that allows it to preemptively smash any attempt to make internal records public.

[64] The appellant submits that there is no evidence to support a finding that his requests are frivolous or vexatious nor is there evidence of any intent that he seeks the records for "nuisance" value, or to harass government. He adds:

> … I seek the records to write news stories and inform the public. My requests are not overly broad or overly specific, and executing them should not overly burden a large corporation such as Toronto Hydro.
>
> In the Niagara case cited[22], the requester "appears to personalize the request to an unreasonable degree. He insists that certain persons be questioned." I have never singled out Hydro employees or board members for questioning, or scorn, or personalized my quest, or verbally harassed them. I want the information and frankly don't care who provides it. I have acted professionally and Hydro has offered no evidence to the contrary.

[65] With respect to Toronto Hydro's submission that the timing of the requests at issue before me suggests they were done to assist the earlier appeals, the appellant submits:

> … This is nonsense. First, anyone familiar with the time it takes to get information through FOI when the institution is fighting access would not expect these requests to be fulfilled in time to help me in any way with my original appeals. Secondly, there is no evidence that the content of these [freedom of information requests] would in any way help me with those appeals. As previously stated, I seek the information to help inform me of

[22] MO-1782.

> Hydro's actions and to help write stories about the conduct of a public institution.

[66] Finally, the appellant addresses the issue of his tweets cited by Toronto Hydro as evidence he is on a "campaign" to "draw negative public attention to Toronto Hydro." He submits that:

> Hydro has cherry-picked a handful of tweets, some of them admittedly cheeky, as evidence of ill-intent. In doing so, Hydro has provided the IPC an incomplete and misleading sample of my posts that, even as presented, are not evidence I am "pursuing a personal agenda and advancing a conflict against Toronto Hydro."
>
> Since 2009 I have tweeted, according to Twitter, about 160,000 times. My search of my own Twitter feed using the terms "Toronto Hydro" and "@TorontoHydro" turned up approximately 130 posts over several years. In other words, 0.0008125% of my total tweets have been about Hydro.
>
> Of those 130, Hydro purposely left out the majority that are not about my FOI requests or attempts to get privatization information.
>
> […]
>
> Of my tweets that deal with Hydro's privatization push, many are simply links to news stories that I have written including "Tory ally rejects Toronto Hydro privatization" Nov. 23, 2016 … .
>
> Also, to offer the tweets cited by Hydro as evidence of ill will is to misunderstand, purposely or otherwise, journalists' use of social media. I invite the adjudicator to look at the feeds of journalists including Washington Post's David Fahrenthold, who won a Pulitzer Prize for his work exposing Donald Trump's false philanthropic campaigns and tweeted frequently, and cheekily, about his quest.
>
> Writing about attempts to get information from an institution [is] not evidence of ill will towards it.

[67] The appellant closes his submissions by stating that for this office to find the requests were frivolous or vexations would, in his opinion, send a very dangerous message - "that a respected journalist at one of Canada's biggest news organizations cannot request, in a professional manner, information from a publicly owned institution."

Toronto Hydro's reply representations

[68] In reply, Toronto Hydro submits that its core position is that the appellant is seeking to obtain the very information that he sought in the 2016 appeals. Toronto

Hydro submits:

> … In so doing, [the appellant] is not only asking the Commissioner to revisit the very same issues that were engaged in the 2016 appeal, but he is also seeking to advance a collateral attack on the decision of Senior Adjudicator DeVries in Order MO-3575. This approach is abusive and inconsistent with the purposes of Ontario's access to information regime.

[69] Toronto Hydro submits that the language used to define the scope of the requested information, "leaves no doubt that considerable overlap is contemplated". Toronto Hydro submits:

> … Indeed, [the appellant] himself acknowledges that his requests, as framed, could include the same information that formed the subject of the 2016 appeals (i.e. information related to a possible privatization of Toronto Hydro). Toronto Hydro urges the Commissioner not to allow [the appellant] to distort the purposes of *MFIPPA* by obtaining previously denied records through a reframed request.
>
> The Commissioner has held that the *MFIPPA* regime should not be engaged in indirectly obtaining information that was the subject of a separate proceeding. In MO-3643, a requester sought access to two affidavits that had been filed by the City of Greater Sudbury involving the City and the same requester. In upholding the City's decision to refuse access, Adjudicator Faughnan held that allowing access would be antithetical to the purposes of *MFIPPA* …

[70] Toronto Hydro submits that now that the 2016 appeals have been decided, the substantial overlap still remains between the requests. It submits that in pursuing these appeals the appellant is attempting to have the same issues re-litigated and is advancing an indirect challenge to the former senior adjudicator's determinations. Toronto Hydro submits that the appellant is not seeking to ensure the accuracy of information pertaining to him in Toronto Hydro's possession nor is he attempting to secure information for any other valid purpose under the legislation. Toronto Hydro submits that the appellant's actions amount to an abuse of process.

The appellant's sur-reply submissions

[71] The appellant disputes Toronto Hydro's assertions that the requests are the same. He submits:

> … Previously I sought all records related to any preparations for a possible privatization of Toronto Hydro. Now I am seeking the amount spent by Hydro, within a defined period, to fight my attempts to get information. They are related because the same institution is involved, and one request refers to another, but they are materially different in what they seek, their

> timeframe, and their scope. As noted in my earlier submissions, IPC is on record as upholding requests for the amounts public institutions have spent on lawyers and consultants. No matter how many experts it hires, Hydro cannot make a request for information about privatization the same as a request for how much it spent on consultants to fight a reporter's FOI request. Hydro is attempting to make itself immune from all FOI requests by raising *Securities Act* concerns which in no way apply to a sum spent to fight me.
>
> …
>
> Finally, I will repeat that Hydro's attempts to portray my appeal as vexatious and frivolous is completely without merit. I am a professional journalist attempting to get a publicly owned corporation to disclose how much money it spent on a limited, defined task. There is nothing personal or frivolous about it. I urge you to let the appeal proceed, where Hydro can argue exemptions just like other institutions, and not to take the drastic step of rejecting it outright.

Analysis and finding

[72] As set out above, Toronto Hydro has the burden of proof to substantiate its decision to declare a request to be frivolous and vexatious.

[73] I will now address the relevant factors listed above.

Section 5.1(a): Pattern of conduct that amounts to an abuse of the right of access

Number of requests

[74] Toronto Hydro refers to the appellant having made four requests in all. Two of them were addressed in Order MO-3575. Only two remain. This is not an excessive number of requests by reasonable standards.

Nature and scope of the requests

[75] As Toronto Hydro argues that the requests at issue before me overlap with the requests at issue before the former senior adjudicator in Order MO-3575, it is useful to compare them.

[76] The appellant's first request at issue in Order MO-3575, which was the subject of appeal number MA16-132, was for:

> 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.
>
> 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.

[77] The second request at issue in Order MO-3575, which was the subject of appeal number MA16-133, was 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.

[78] The timeframe for those first two requests was between September 1, 2014 and January 1, 2016.

[79] The first request at issue before me, being the subject of appeal number MA17-126, is for the following:

> Details of any spending by Toronto Hydro on consultants and/or any other outside agencies and/or any internal overtime costs that resulted from my requests to Toronto Hydro, both dated Jan. 22, 2016 regarding potential privatization plans. …
>
> This request encompasses any and all responses to myself, or to the Information and Privacy Commissioner of Ontario as part of the appeal procedure, and will include but not be limited to, fees paid to [named law firm] ([including two named lawyers]) and [named securities expert].

[80] The second request at issue before me, which is the subject of appeal MA17-134, is for:

> Copies of all records (including but not limited to emails from work and/or personal email accounts, BlackBerry messages, letters, reports, notes to file, calendars and diary or agenda entries) reports mentioning me, [requester's name] (by name, partial name, or as "[named news outlet] reporter" or any other description), and/or my Freedom of Information requests dated January 22, 2016 … originating from, sent to or cc'ing the following Hydro staff: [five named individuals]. My request covers any correspondence to, from or cc'ing outside agencies including any representatives of [named law firm] and [named securities expert].

[81] The time frame for these two requests was a different time period, being from January 22, 2016, the date of his original requests, to December 31, 2016.

[82] In my view, there is not the degree of overlap asserted by Toronto Hydro and its securities expert with respect to the two sets of requests. The two requests at issue in this appeal are for access to information arising out of how Toronto Hydro addressed his two requests before the former senior adjudicator, and are not for information relating any transaction that was the subject of the first two requests. In that regard, in my view, he seeks access to information about the fees Toronto Hydro paid to the lawyers and the securities expert, or other consultants, who acted for Toronto Hydro in the appeals that resulted in Order MO-3575 as well as records mentioning his name, or identifying him by another descriptor in relation to Toronto Hydro's internal discussions about the appellant and/or his requests in the context of the appeals before the former senior adjudicator. He seeks that information from the date of the first set of requests. The time-period of the first set of requests and the second set of requests do not overlap.

[83] Accordingly, I agree with the appellant when he states that in the first request he sought all records related to any preparations for a possible privatization of Toronto Hydro and that he is now seeking information pertaining to the amount spent by Toronto Hydro, and communications pertaining to him or his requests, to resist his attempts to get the information he sought in the first set of requests.

[84] In that regard, the fact that some responsive records may fall within the scope of the findings in Order MO-3575 does not automatically mean that all responsive records in the present appeals would be subject to the findings in that order.

[85] Finally, I find that the circumstances in Order MO-3643 are distinguishable from the circumstances before me at issue in this appeal. In Order MO-3643, the requester was seeking two affidavits that an adjudicator had decided to withhold in the course of an inquiry at adjudication. The findings in Order MO-3643 were based on the issue of access to the two affidavits having been previously decided. As I have discussed above, that is not the case in the appeals before me, as the requests before me are for different information than the requests that were at issue before the former senior adjudicator.

Purpose of the requests

[86] Toronto Hydro goes to great lengths to allege that the two requests before me were made for an improper purpose. I do not agree. The requester is a member of the media. His job is to report and he uses access to information requests to accomplish that purpose. As Louis Brandeis wrote quite famously,

> Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.[23]

[87] In that regard, the appellant's use of social media and the comments he made do not, in my view, support an allegation that he is conducting a personal vendetta. It is his job to investigate and to report the news.

Timing of the requests

[88] Toronto Hydro submits that the requests are frivolous or vexatious because the last two requests were made while the first two were being processed. In my view, the appellant was free to make the requests for the information at issue herein at any time, whether during or after the completion of the adjudication of the first set of requests. I accept that the appellant's second set of requests arose as a result of information he received regarding the processing of his first set of requests. As it happens, the former senior adjudicator delayed the inquiry of the appeals in the second set of the requests until he had completed addressing the first.

Conclusion

[89] Considering all the above, I find that Toronto Hydro has failed to provide sufficient evidence to satisfy me that the appellant's requests at issue are part of a pattern of conduct that constitutes an abuse of the right of access.

Section 5.1(a): pattern of conduct that would interfere with the operations of the institution

[90] As set out above, for Toronto Hydro to satisfy this element, the pattern of conduct must be one that would obstruct or hinder the range of effectiveness of Toronto Hydro's activities. The evidence that Toronto Hydro provides in support of its position is not sufficient to establish that processing the requests would meet the threshold for interference with the operations of an institution as established in the jurisprudence. Toronto Hydro is a large institution. Remaining at issue are these two requests for discrete information. Processing these two requests would not, in my view, interfere with its operations, within the meaning of section 5.1(a).

Section 5.1(b): bad faith

[91] As set out above, the term "bad faith" has been defined in Order M-850 by former Assistant Commissioner Mitchinson as:

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[23] Louis Brandeis (1914), "What Publicity Can Do", in Other People's Money and How the Bankers Use It. New York: Frederick A. Stokes Company.

> 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 fulfill 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 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.

[92] Again, I repeat that the appellant is a journalist whose job is to investigate and to report. And that, in my view, is what he was doing. In any event, Toronto Hydro has failed to lead sufficient evidence to establish the appellant's conscious doing of a wrong because of dishonest purpose or moral obliquity.

Section 5.1(b): purpose other than to obtain access

[93] 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.[24]

[94] Based on my findings above, it is not necessary to address this in great detail other than to say that I am satisfied that the appellant's goal was to obtain access to the requested information. In any event, Toronto Hydro has failed to lead sufficient evidence to establish that the appellant's purpose was other than to obtain access.

Final Conclusion

[95] Toronto Hydro has not established that the appellant's two requests at issue before me are frivolous or vexatious within the meaning of section 4(1)(b). Accordingly, I will now consider whether Toronto Hydro is entitled to refuse to confirm or deny the existence of records under section 8(3) in conjunction with section 8(1)(l) of the *Act*.

Issue B: Was Toronto Hydro entitled to refuse to confirm or deny the existence of records under section 8(3)?

[96] Toronto Hydro makes an alternative argument, namely that if the two requests are not found to be frivolous or vexatious, then it relies on section 8(3) in conjunction with section 8(1)(l) of the *Act* to refuse to confirm or deny the existence of any records responsive to the appellant's requests.

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

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[24] Order M-850.

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

[98] 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*.

[99] 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).[25]

[100] 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:

> 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.

[101] It is not enough for Toronto Hydro to take the position that the harms under section 8(1)(l) are self-evident.[26] Toronto Hydro must provide detailed 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.[27]

Toronto Hydro's representations

[102] Toronto Hydro's position is that the records, if they exist, would qualify for exemption pursuant to section 8(1)(l) because their disclosure would cause Toronto Hydro to violate its obligations under the *Securities Act*. Furthermore, Toronto Hydro submits that confirming or denying the existence of the requested information would itself require Toronto Hydro to disclose a "material fact", also in contravention of its

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[25] OrderPO-2450.
[26] Order PO-2040 and *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[27] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paragraphs 52 to 54.

securities law obligations.

The records (if they exist) would qualify for exemption under section 8(1)(l)

[103] In support of its position that the records, if they exist, would qualify for exemption under section 8(1)(l), Toronto Hydro provides a detailed overview of the applicable securities regime, and then addresses some of the appellant's earlier submissions. It also provides affidavits sworn by a Supervisor, External Financial Reporting and a securities expert, along with his report.

[104] Toronto Hydro cites section 76(2) of the *Securities Act* in particular, which contains the following prohibition against the disclosure of a material fact or material change that has not been previously disclosed:

> 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.

[105] Section 1 of the *Securities Act* provides that "material fact", when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities.

[106] Toronto Hydro also refers to the direction provided by National Policy 51-201, Disclosure Standards (NP-51-201), discussed above[28].

[107] It adds that instead of reiterating his request for privatization plans, which would be a more blatant abuse and *res judicata*, in these requests the appellant is indirectly seeking access to information that Order MO-3575 determined he could not access directly. It submits that the 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 because it would reveal information regarding whether or not a change in Toronto Hydro's corporate ownership is or was anticipated, when no such information has been generally disclosed.

[108] Toronto Hydro submits that similarly, the request for details of spending[29] suffers from the same problem as the appellant's second request at issue in Order MO-3575[30] because disclosure of these costs, if any, could also reasonably be expected to inform

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[28] Toronto Hydro refers in particular to section 3.3(8) regarding communication to the media.
[29] Being the request at issue in Appeal MA17-126.
[30] Being the request at issue in Appeal MA16-133.

the appellant of "a material fact or material change with respect to the issuer." It submits that:

> For example, if the costs were significant and involved multiple consultants and/or agencies, this could reasonably be expected to reveal information about a material fact or material change. Similarly, if the costs were insignificant and named few (if any) consultants this would also reveal that type of information. [Footnote omitted]
>
> ….
>
> 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).

[109] Toronto Hydro submits that in light of the above and the direction in National Policy 51-201, Disclosure Standards (NP 51-201) as discussed in Order MO-3575, "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."

[110] 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 would be a breach of the anti-tipping provisions of the *Securities Act*. Toronto Hydro submits that his disclosure of any information he receives would directly contravene the obligations that his receipt of such information would carry under Ontario securities law.

[111] Toronto Hydro also submits that disclosure of the requested information, if it exists, may breach restrictions against "pre-marketing" securities.

[112] Toronto Hydro adds that the importance of freedom of the press, "does not trump" its obligations under securities law.

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 section 8(1)(l)

[113] Toronto Hydro submits that it is prohibited from confirming or denying the existence of any responsive records under its securities law obligations, and therefore section 8(3) of *MFIPPA* should apply.

[114] Toronto Hydro submits that:

> … 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. [Footnotes omitted]

[115] In his initial report provided in the appeals before me, the expert refers to his earlier report provided to the former senior adjudicator in the course of the adjudication that resulted in Order MO-3575, and states:

> There have been no changes in securities law that would impact in any material respect the expert opinion set out in my 2016 Report. The observations, opinions and conclusions set out in my 2016 Report remain the same today.
>
> The observations, opinions and conclusions set out in my 2016 Report have not been altered in any material way due to the passage of time. In particular, information that was material information in 2016 would remain material information today.

The appellant's representations

The records (if they exist) would not qualify for exemption under section 8(1)(l)

[116] The appellant rejects Toronto Hydro's contention that the determinations in Order MO-3575 would automatically apply to deny access to the information he seeks in the appeals before me. He asks that the office consider these remaining two requests before me separately, on their own merits.

[117] The appellant takes the position that none of the requested information would qualify as a "material fact". He submits that:

> … Legal fees spent fighting two FOI [requests] is not a material fact that would have a significant effect on the market price or the value of Hydro's securities.
>
> Likewise, internal discussions about how to handle my requests could not reasonably be considered material facts.

[118] He adds that if there is any chance any particular record did confirm or expose privatization efforts, Toronto Hydro would be free to attempt to sever the record.

[119] With respect to Toronto Hydro's reliance on section 76(2) of the *Securities Act* for the argument that it is prohibited from disclosing material facts, the appellant submits:

> While this argument was accepted in Order MO-3575, it is based on a fundamental misunderstanding of securities law and regulations, which require continuous disclosure of material facts. See the continuous disclosure requirements in National Instrument 51-102 […]. [Footnote omitted]
>
> […]
>
> Thus, Toronto Hydro's version of securities law is incorrect and creates a "catch-22." If it is correct and the information I am seeking is a material fact, then it is required to be disclosed before Toronto Hydro issues securities to the public. The fact that their officers/directors periodically signed certificates saying all material facts have been disclosed indicates that either those certificates are false, or the information I am seeking is not truly material. Toronto Hydro cannot have it both ways.

[120] He closes his submissions with a request to have this office use independent experts to assess the arguments.

Toronto Hydro's reply representations

[121] In reply, Toronto Hydro submits that the appellant's position is not consistent with its expert's evidence, which concluded that the requested information is "material". Toronto Hydro further submits that the requested information "overlaps considerably" with the information sought in the 2016 appeals. Toronto Hydro submits that:

> … With respect to Appeal MA17-134, in which [the appellant] seeks records from Toronto Hydro's internal files regarding the 2016 appeals, [Toronto Hydro's expert] confirms that [the appellant] (and others) "could draw inferences from the quantum and nature of the information traffic, even if highly redacted documents were presented to him that excised any explicit references to a privatization or sale of shares in [Toronto Hydro]". [Toronto Hydro's expert] summarized the risks from a securities regulation perspective as follows:
>
> > Many (or most) of the documents that might exist in response to [the appellant's] request [in appeal MA17-134] would contain material privileged information of the type sought by [the appellant] in the 2016 appeals MA16-132 and MA16-133, and enjoined from disclosure in Senior Adjudicator DeVries' decision in MO-3575.

[122] With respect to the request at issue in appeal MA17-126, Toronto Hydro submits:

> … [Toronto Hydro's expert] opines that the volume and nature of communications between Toronto Hydro and "outside agencies", as well

> as the identities of those "outside agencies", would permit parallel inferences. In [Toronto Hydro's expert's] words, there is a "very great risk that such information will convey material information concerning whether any privatization or sale of shares had been contemplated".
>
> It is especially troubling that [the appellant] has not only requested the total fees incurred by Toronto Hydro in dealing with his requests, but has set out at considerable length numerous requested details of those fees, including, among other things, details of the quantum of fees paid to specific external lawyers and experts. The extent of involvement from senior external legal counsel and securities law experts in resisting [the appellant's] initial requests could reveal non-trivial details about the possible existence, type and extent of records prepared in respect of whether there was a possible privatization – in [Toronto Hydro's Expert's] words, "the fodder for material inferences about whether [Toronto Hydro] had contemplated a privatization or other change in ownership". [Footnotes omitted]

[123] Toronto Hydro further argues that in his submissions the appellant misunderstands the difference between material facts and material changes. Toronto Hydro submits that while it is required to disclose material changes as part of Ontario's continuous disclosure regime, there is no analogous requirement to disclose material facts. Toronto Hydro submits that:

> [It] has never taken the position that the information requested by [the appellant], either in the 2016 or 2017 appeals would constitute a material change. However, as recognized by [Toronto Hydro's expert], the materiality threshold for a material change is higher than that for a material fact. In other words, "not all material facts will be significant enough to constitute a change in the business, operations or capital of the issuer and therefore be a material change".[31] [Footnote omitted]
>
> …
>
> In the context of material changes, Toronto Hydro has and will continue to promptly disclose any and all material changes in accordance with the provisions of the *Securities Act* and applicable National Instruments. Contrary to [the appellant's] assertions, however, the same regulatory requirement does not attach to material facts.

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[31] In support of this submission Toronto Hydro references *Re AiT Advanced Information Technologies Corp*, (2008), 31 OSCB 712 (Ont. Sec. Comm.) at paragraph 210.

[124] Toronto Hydro further submits that, contrary to the appellant's assertions, the fact that the requested information was not included in a prospectus referenced by the appellant does not constitute an admission that the information is not material.

[125] Toronto Hydro submits:

> The [appellant's] argument fails at the first step: notwithstanding its materiality, there was no requirement at law for Toronto Hydro to disclose the requested information in its prospectus.
>
> …
>
> Reading the prospectus disclosure requirements in harmony with the policy goals of Ontario's continuous disclosure regime, it is clear that a narrowed interpretation is necessary in order to effectively control for the risks of premature disclosure. Indeed, in [Toronto Hydro's expert's] view, the prevention of premature disclosure requires that the material facts sought by [the appellant], if any, could not have been disclosed in the May 2017 Prospectus.

[126] Toronto Hydro submits that in other contexts - including in relation to tipping, insider trading and selective disclosure - the OSC has made clear that preliminary, amorphous information can constitute a material fact. As a result, the omission of information responsive to the appellant's requests in Toronto Hydro's May 2017 Prospectus, if any, does not constitute an admission that the information is not material, nor does it entail that Toronto Hydro is at liberty to disclose such information.

[127] In his second report filed by Toronto Hydro in support of its position in the appeals before me, its securities expert argues that the information requested by the appellant, if it exists, could reasonably be expected to reveal information about a material fact.

[128] Toronto Hydro's expert sets out the following as part of the foundation for his position with respect to the request at issue in appeal MA17-134:

> Considering hypothetically any decision on Toronto Hydro's part concerning how to respond to [the appellant's] initial requests, Toronto Hydro would have to do an internal assessment (possibly involving communications with outside agencies and/or lawyers) of the nature and materiality of any documents that may bear on the question of a possible privatization or sale of shares of [Toronto Hydro]. This assessment may have produced fresh documents, many of which might name [the appellant]. The documents, if they exist, would fall into one or other of the following categories:

> (a) If a privatization or sale of shares in [Toronto Hydro] had in fact been considered, the fresh documents may refer to previously generated documents dealing with that possible privatization or sale of shares in [Toronto Hydro], and/or summarize the information contained in those documents; or
>
> (b) If a privatization or sale of shares in [Toronto Hydro] had not been considered, the documents would make reference to this fact and to the absence of documents responsive to [the appellant's] request.

[129] Toronto Hydro's expert states that in accordance with the findings in Order MO-3575, "disclosure of many or all of any freshly generated documents mentioning [the appellant] will also involve a breach of Ontario securities law".

[130] Continuing his consideration of the request at issue in appeal MA17-134 he states that the five named individuals all appear to be members of Toronto Hydro's senior management team who would have been involved in assisting in evaluating a possible privatization or sale of shares in Toronto Hydro. He states that:

> … The extent and nature of any information traffic between these individuals could easily convey material information about whether a privatization or sale of shares in [Toronto Hydro] was in fact considered. For example:
>
> (a) If no privatization or sale of shares in [Toronto Hydro] had been considered, there would likely be little information traffic following [the appellant's] 2017 request (since each of these individuals could quickly affirm that they have no knowledge of any such plans).
>
> (b) If there was a high amount of information traffic, that would be consistent with a privatization or sale of shares in [Toronto Hydro] having been considered.
>
> Thus, [the appellant] (and others) could draw inferences from the quantum and nature of the information traffic, even if highly redacted documents were presented to him that excised any explicit references to a privatization or sale of shares in [Toronto Hydro].

[131] Toronto Hydro's expert states that, similarly, inferences may be drawn from the volume and nature of communication between Toronto Hydro and "outside agencies" and/or Toronto Hydro's legal counsel. He adds that "[a]lso telling would be the identity of any "outside agencies" contacted. Submitting that this might include an investment bank, he explains that if Toronto Hydro had decided to explore a privatization or sale, it is likely that one would have been contacted for an opinion on a variety of issues arising therefrom. He states that:

> … In short, the very fact that an investment bank may have been contacted following [the appellant's] 2016 requests, and the volume of traffic with such an investment bank, could convey material information about whether a privatization or sale of shares in [Toronto Hydro] had ever been considered.
>
> In like fashion, if no investment banker was contacted after [the appellant's] 2016 requests for information, this would likely lead to the inference that [Toronto Hydro] had never, in fact, contemplated a privatization or sale of shares in [Toronto Hydro].

[132] Regarding the request at issue in appeal MA17-126, Toronto Hydro's expert states:

> The quantum of any spending by [Toronto Hydro] (both externally and internally) in response to [the appellant's] requests, if any, is very likely a function of whether [Toronto Hydro] had ever considered effecting a privatization or sale of shares in [Toronto Hydro]. Moreover, revealing "the details of any spending" must necessarily involve the identification of those consultants or outside agencies who may have performed work for [Toronto Hydro]. As I have already noted, there is a very great risk that such information will contain material information concerning whether any privatization or sale of shares had been contemplated.
>
> Similarly, identifying the "details" of any spending on [Toronto Hydro's] lawyers could provide a roadmap of [Toronto Hydro's] concerns in their efforts to formulate a response to [the appellant's] requests, and could easily provide the fodder for material inferences about whether [Toronto Hydro] had contemplated a privatization or other change in ownership.
>
> It is clear that the information requested by [the appellant] in the instant appeals, if it exists, could reasonably be expected to reveal information about a material fact. It could not be produced to [the appellant], as to do so would result in selective disclosure.

[133] With respect to the appellant's submissions on the Toronto Hydro prospectuses the expert states:

> Since neither prospectus contained any of the material sought by [the appellant], [the appellant] argues that this effectively constitutes an admission by [Toronto Hydro] that the information that he seeks is not material. This, however, does not follow from the structure of the OSA [*Ontario Securities Act*] or a more nuanced understanding of the concept of "material fact".

The appellant's sur-reply representations

[134] In sur-reply representations, the appellant submits that:

> Hydro is also trying to have it both ways. During my previous appeal for privatization records that Hydro won, the corporation argued strenuously that on principle and by law it could in no way confirm or deny it ever made any privatization preparations. Fine. But now it is saying that my new request for a sum of money spent fighting an FOI appeal is about privatization and [is a] material fact and therefore invokes *Securities Act* protections. Those positions are incompatible. What is at issue is simply a sum that tells me nothing whatsoever about any earlier, separate discussions within Hydro. To fight me Hydro hired Norton Rose, a top Bay Street firm, and University of Toronto securities expert. There is no doubt about that based on the submissions to IPC. Whether Hydro spent $10,000 or $100,000 or $1,000,000 fighting my request discloses nothing except that Hydro, a corporation wholly owned by the citizens of Toronto, spent a certain sum fighting my FOI request. …

Analysis and Findings

[135] Section 1 of *MFIPPA* sets out the purposes of the *Act*. That section reads as follows:

> The purposes of this *Act* are,
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of information should be reviewed independently of the institution controlling the information; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[136] 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.[32]

[137] For section 8(3) to apply, Toronto Hydro must demonstrate 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

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).[33]

[138] I will address the second part first.

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)?

[139] I agree with the former senior adjudicator's analysis in Order MO-3575 regarding the legal obligations faced by Toronto Hydro, including its obligations under section 76(2) of the *Securities Act* regarding the requests at issue before him in that appeal.

[140] However, in my view, the requests at issue in this appeal differ both in nature and temporally from those that were before the former senior adjudicator.

[141] As set out above, the two requests at issue in this appeal are for access to information arising out of how Toronto Hydro addressed the appellant's two requests before the former senior adjudicator, and are not for information relating to any transaction that was the subject of the first two requests. In that regard, in my view, he seeks access to information about the fees Toronto Hydro paid to the lawyers and the securities expert, or other consultants, who acted for Toronto Hydro in the appeals that resulted in Order MO-3575 as well as records mentioning his name, or identifying him by another descriptor, in relation to Toronto Hydro's internal discussions about the appellant and/or his two original requests. He seeks that information from the date of the first set of requests. The time-period of the first set of requests and the second set of requests do not overlap.

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[32] Order P-339.
[33] Order PO-2450.

[142] Furthermore, the appellant is well aware that Toronto Hydro hired lawyers and a securities expert to advocate its position in the appeals before the former senior adjudicator DeVries. It also stands to reason that internal consultations took place in Toronto Hydro regarding the first set of his requests.

[143] Unlike the former senior adjudicator in Order MO-3575, I am not satisfied that if Toronto Hydro were to confirm to the appellant that records responsive to either of the requests before me exist, or do not exist, that this could reasonably be expected to inform the appellant of "a material fact or material change with respect to the issuer". I am similarly not satisfied that confirming that records responsive to either of the two requests before me exist, or do not exist, could reasonably be expected to inform the appellant regarding whether Toronto Hydro had contemplated privatization or other change in ownership or of "a material fact or material change with respect to the issuer".

[144] In that regard, I find that, in light of the application of *MFIPPA*, and the manner in which requests are addressed and exemptions applied, the opinion of the securities expert casts the net too widely, and the submissions of Toronto Hydro about the consequences of confirming or denying the existence of records is too speculative to establish harm.

[145] The securities expert's first report in this appeal refers to the state of the law in relation to the appellant's first two requests, as it existed in 2016, upon which former senior adjudicator DeVries based his determinations in Order MO-3575. It does not specifically address the second set of requests at issue before me. His second report hypothesizes Toronto Hydro's approach to addressing the second set of requests before me. That said, the framework to address a request, and Toronto Hydro's search obligations are set out in *MFIPPA* and in the jurisprudence of this office. If I were to accept the wide scope of Toronto Hydro and the expert's opinion, even confirming or denying the existence of a record that simply sets out an invoice amount or a communication that simply mentions the appellant's name or his original two requests, would be subject to exemption under section 8(3). Surely, in light of the purposes of *MFIPPA*, and the section 8(3) exemption, that cannot be the case.

[146] To use the example provided by the former senior adjudicator in Order MO-3575, if the appellant were to request records responsive to either of the two requests before me every three months, all that would show would be whether or not Toronto Hydro continued to spend money with respect to the previous two original requests or that communication continued about the appellant or his original requests. I am not satisfied that this would provide the appellant with information regarding a material fact with respect to the reporting issuer before that information has been generally disclosed.

[147] In my view, Toronto Hydro has failed to provide sufficient evidence to establish that the simple step of disclosure of the mere existence or non-existence of records pertaining to spending and costs related to his earlier request or communications that mention him and/or his requests would communicate to the appellant information that

would run afoul of Toronto Hydro's legal obligations under securities law and thereby fall under section 8(1)(l) of the *Act*.

[148] Accordingly, I am not satisfied that confirming or denying the existence of records responsive to either of the requests at issue before me could reasonably be expected to itself convey information that could facilitate the commission of an unlawful act under section 8(1)(l). Since the second part of the two-part test under section 8(3) is not met, it is unnecessary to address the first part of the test.

[149] I conclude by pointing out that not allowing Toronto Hydro to invoke the application of section 8(3), does not mean that the records must be disclosed, only that Toronto Hydro cannot maintain its position to refuse to confirm or deny the existence of responsive records.

ORDER:

1. I do not uphold Toronto Hydro's decision to refuse to confirm or deny the existence of responsive records or its finding that the request is frivolous or vexatious.

2. I order Toronto Hydro to produce an access decision and send it to the appellant no later than **August 28, 2020**, subject to the provisions of sections 19, 21, 22 and 45 of the *Act*, and without recourse to a further time extension. Toronto Hydro is to send me a copy of the decision letter when it is sent to the appellant.

3. The timelines noted in order provision 2 may be extended if Toronto Hydro is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original signed by | July 8, 2020

Steven Faughnan
Adjudicator