

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3543

Appeal PA14-635-2

Hydro One

October 27, 2015

Summary: Hydro One received an access request for records relating to a named wind farm project covering a five-year time period. Portions of the request overlapped with previous requests made by the same requester. In response to the request, Hydro One issued a decision which only addressed the period of time not covered by the previous requests. This order determines that Hydro One improperly narrowed the scope of the request, but that the appellant also narrowed the scope of the request during the mediation process. It also determines that the appellant is not estopped from appealing the decision, that the request is not frivolous or vexatious, and that the *Building Ontario Up Act* does not prohibit this appeal from proceeding. Hydro One is ordered to issue an access decision for the records requested.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 10(1)(b), 24, 50(1) and 65.3(5); R.R.O. 1990, Reg. 460, section 5.1; and *Bill 91, Building Ontario Up Act (Budget Measures), 2015*, S.O. 2015 C. 20, Schedule 13.

Orders Considered: Order 134, P-880.

Cases Considered: *Danyluk v. Ainsworth Technologies Inc.* [2001] 2 SCR 460.

OVERVIEW:

[1] Hydro One received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) for access to all records regarding a named wind farm

project (the wind farm project) for the time period of January 1, 2009 to November 13, 2014.

[2] On November 24, 2014, Hydro One wrote to the requester and advised as follows:

The due date for responding to your request will be December 18, 2014.

The description of records [which] you are seeking in the above-noted request is a subset of, and therefore, overlaps with, the description of records you sought under your [five previous numbered Freedom of Information (FOI) requests]. The foregoing five FOI requests cover the time period from January 1, 2009 to June 23, 2014 and, as you are aware, have already been finally dealt with or are being dealt with under [the *Act*] and therefore cannot be the subject of a subsequent new request. As such, this new [November 13, 2014] request can only deal with the time period from June 24, 2014 – November 13, 2014. We will therefore only search for the responsive records for this timeframe.

[3] On December 17, 2014, Hydro One wrote to an affected third party to seek its views on the disclosure of the records. On December 18, 2014, Hydro One wrote to the requester to advise that it was providing notice to the affected third party pursuant to section 28(1) of the *Act*. The third party provided submissions in response, and provided consent to the disclosure of the records.

[4] On December 22, 2014, the requester (now the appellant) filed a deemed refusal appeal and PA14-635 was opened. This deemed refusal appeal was closed with the issuance of a decision by Hydro One on January 16, 2015.

[5] In its decision letter, Hydro One indicated that it was writing further to its November 14, 2014 letter and that it was providing partial access to 173 pages of records. Hydro One advised that some information would be denied pursuant to section 21(1) (personal privacy) of the *Act* and because it was not responsive to the request. Hydro One also advised the appellant that he was required to pay a fee of \$235.00 before the records would be disclosed to him.

[6] On January 21, 2015, the appellant paid the fee to obtain the records and asked for clarification of the time period of the records. Hydro One disclosed the records to the appellant and confirmed that the records processed were in accordance with its November 24, 2014 letter, and covered the time period from June 24 – November 13, 2014 (time period C).

[7] On January 29, 2015, the appellant filed an appeal of Hydro One's decision.

[8] During mediation, the parties agreed that any issues regarding access to the records covered by time period C were no longer in dispute.

[9] Also during mediation, with respect to the records covering the time period from January 1, 2009 – June 23, 2014, the appellant appeared to narrow the scope of this part of the request to include only records dated August 1, 2013 – February 17, 2014. Hydro One responded by stating that the scope of the request was not at issue, that the appellant is estopped from appealing the scope, that the *Act* does not require Hydro One to respond to this request, and that the request and the appeal are frivolous and vexatious.

[10] The appellant took issue with Hydro One's position and confirmed that he continued to pursue access to records covered by the narrowed time period of August 1, 2013 – February 17, 2014.

[11] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry identifying the facts and issues in this appeal to Hydro One, initially, inviting representations on a number of issues.

[12] I received representations from Hydro One on the issues set out in the Notice of Inquiry. Hydro One also provided additional representations on certain issues which are raised as a result of the passing of the *Building Ontario Up Act*.¹

[13] I then sent the Notice of Inquiry and a complete copy of Hydro One's representations to the appellant. In addition, I invited the appellant to address whether the passing of the *Building Ontario Up Act* might impact this appeal. I received representations from the appellant regarding the issues set out in the Notice of Inquiry and a number of additional issues.

[14] In this order, I find that Hydro One improperly narrowed the scope of the request, but that the appellant also narrowed the scope of the request during the mediation process. I also find that the appellant is not estopped from appealing the decision, that the request is not frivolous or vexatious, and that the *Building Ontario Up Act* does not prohibit this appeal from proceeding. Hydro One is ordered to issue an access decision.

ISSUES:

- A. What is the scope of the request?
- B. Is the appellant estopped from requesting and/or appealing a request for records that were the subject of a previous access request?
- C. Is the request for access frivolous or vexatious?

¹ *Bill 91, Building Ontario Up Act (Budget Measures)*, 2015, S.O. 2015 C. 20, Schedule 13.

D. Does the passing of the *Building Ontario Up Act* affect this appeal?

DISCUSSION:

Issue A: What is the scope of the request?

[15] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[16] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.²

[17] In Order P-880, Adjudicator Anita Fineberg determined that records must "reasonably relate" to the request in order to be considered "responsive." She went on to state:

... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24 of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records.

[18] In Order 134, former Commissioner Sidney B. Linden also commented on the proper interpretation of section 24(2) of the *Act*, stating, among other things:

² Orders P-134 and P-880.

...the appellant and the institution had different interpretations as to what this meant: the institution felt that the files were outside the scope of the original request and should be the subject of a new one; and the appellant thought he was seeking information which he expected to receive in response to his initial request. While I can appreciate that there is some ambiguity on this point, in my view, the spirit of the Act compels me to resolve this ambiguity in favour of the appellant. The institution has an obligation to seek clarification regarding the scope of the request and, if it fails to discharge this responsibility, in my view, it cannot rely on a narrow interpretation of the scope of the request on appeal.

[19] In Order PO-1897-I, commenting on the above orders, the adjudicator noted that in the appeal under consideration in Order 134, the request was somewhat vague, and that the institution had genuine difficulty in interpreting the scope of the request. She pointed out, however, that "even there, the former Commissioner resolved the ambiguity in favour of the appellant's view of the request."

The request and response

[20] The appellant's request to Hydro One resulting in this appeal is dated November 13, 2014, and is for "[a]ll records as defined by [the Act]" regarding the wind farm project for the time period of January 1, 2009 to November 13, 2014.

[21] Hydro One responded to the request on November 24, 2014 by indicating that the due date for responding to the request was December 18, 2014. Regarding the scope of the request, Hydro One's response stated:

The description of records [which] you are seeking in the above-noted request is a subset of, and therefore, overlaps with, the description of records you sought under your [five previous numbered Freedom of Information (FOI) requests]. The foregoing five FOI requests cover the time period from January 1, 2009 to June 23, 2014 and, as you are aware, have already been finally dealt with or are being dealt with under [the Act] and therefore cannot be the subject of a subsequent new request. As such, this new [November 13, 2014] request can only deal with the time period from June 24, 2014 – November 13, 2014 [time period C]. We will therefore only search for the responsive records for this timeframe.

[22] As noted above, Hydro One then processed the request on the basis of this narrowed request, and issued an access decision on January 16, 2015 in which it indicated that it was granting partial access to 173 pages of records. The appellant paid the fee and was provided with the records. The appellant also asked Hydro One to clarify the time period of the records, and Hydro One confirmed that the records covered the time period from June 24, 2014 - November 13, 2014 (time period C), as

set out in its November 24, 2014 letter. At that point, the appellant appealed Hydro One's decision. One of the reasons for the appeal, as identified by the appellant, is that the decision only addressed part of the time period specified in the request.

[23] As noted above, during mediation, with respect to the records covering the time period from January 1, 2009 - June 23, 2014, the appellant appeared to narrow this part of the request to include only records dated August 1, 2013 – February 17, 2014 (time periods A and B). He acknowledged that he had made previous requests for all of the records, including time periods A and B, but stated that he was late in filing his appeal of Hydro One's earlier decision on access to records covering the period from August 1, 2013 - December 20, 2013 (time period A). With respect to his request for records dated from December 21, 2013 - February 17, 2014 (time period B), the appellant indicated that he did not recall having received a decision.

[24] Also during mediation, Hydro One took the position that it had not narrowed the scope of the request.

Representations

[25] In the Notice of Inquiry sent to the parties I invited them to address the issue of what is the scope of the request.

[26] In its representations, Hydro One states that the request resulting in this appeal was sufficiently detailed to allow it to identify the records responsive to the request, and that it did not need to clarify the request with the requester. Hydro One then states:

Hydro One did respond to the literal and true wording of the request as set out in the November 24, 2014 letter to the appellant. [The appellant] did not object to Hydro One's actions. He remained silent. Hydro One engaged in a search for records pursuant to the November 24, 2014 letter and thus, because of the appellant's silence to same, did not choose to define the scope of the request "unilaterally." Hydro One therefore responded to the letter and spirit of [the request], particularly in light of the numerous overlapping access requests filed by the requester. Therefore, Hydro One denies that it "unilaterally narrowed" the scope of [the request].

[27] Hydro One also submits that, because the appellant did not object to Hydro One's position as set out in its November 24, 2014 letter, the appellant is estopped from now taking the position that Hydro One narrowed the scope of the request.

[28] In his representations, the appellant takes the position that Hydro One unilaterally narrowed the scope of his request. He refers to the "5½ years of items" described in his access request, and now states that he never agreed to reduce the scope of his request in any way. In addition, the appellant argues that his request for access to the records is a new request, distinct from earlier requests because the focus

of his new request is different, and he refers to a named company which he states was "previously unknown."

Analysis and Findings

[29] To begin, I note that the appellant's request which gave rise to this appeal is very clear on its face. It is a request for all records as defined by the *Act* regarding a named company's wind farm project (the wind farm project) for the time period of January 1, 2009 to November 13, 2014. There is no ambiguity concerning the nature of the records requested, and the time period covered by the request is very clear. In that regard, I agree with Hydro One that it did not need to clarify the request with the requester.

[30] Notwithstanding the clarity of the request, Hydro One decided to consider the scope of the request to include only records covering the time period from June 24, 2014 - November 13, 2014 (time period C). I find that, by doing so, Hydro One unilaterally narrowed the scope of the request.

[31] I acknowledge that Hydro One notified the appellant by its letter of November 24, 2014 of its decision to narrow the scope of the request, and that the appellant did not specifically object to this narrowing of the request until January, 2015. However, in the circumstances of this appeal, although it is understandable why Hydro One proceeded with the narrowed request, when it became clear to Hydro One that the appellant had not narrowed his request, Hydro One should have referred back to the original request in considering the scope. I make this finding for the following reasons:

- The wording of the request and particularly the time period covered by the request is very clear;
- Hydro One unilaterally narrowed the scope of the request;
- Hydro One's November 24, 2014 letter narrowing the scope of the request stated that the date for responding to the request would be December 18, 2014, and did not indicate to the appellant that its decision narrowing the scope of the request could be appealed;
- Although the appellant never responded to Hydro One's decision to narrow the scope of the request, the appellant never directly agreed to such a narrowing;
- When the appellant received Hydro One's decision on access, he immediately asked questions about the narrowing of the request;
- When it became clear to the appellant that Hydro One had narrowed the request in the manner it did, the appellant immediately objected and appealed Hydro One's decision.

[32] In these circumstances, I find that Hydro One unilaterally narrowed the scope of the request without the appellant's agreement.

[33] For the same reasons, I do not accept Hydro One's position that, because the appellant did not object to the narrowed request as set out in the November 24, 2014 letter, he is now "estopped by conduct" from appealing the scope. The reference in that letter to the future decision which would be made, and the fact that the letter did not refer to the appellant's right to appeal, are factors supporting this finding.

[34] However, I also find that the appellant narrowed the scope of his request during mediation. The relevant portions of the Mediator's Report, provided to the parties prior to the inquiry stage of the process, read:

... the appellant narrowed this part of the request to records dated August 1, 2013 to February 17, 2014. He acknowledged that this time period had been subject to previous requests. However, his appeal of the decision for August 1 – December 20, 2013 was not allowed as he was late in filing it with the IPC. With respect to the time period of December 21, 2013 - February 17, 2014, the appellant does not recall receiving a decision and feels he is entitled to a decision that he can appeal if he is not satisfied.

....

[The appellant] ... confirmed that he continued to pursue access to the narrowed time period of August 1, 2013 to February 17, 2014.

[35] The appellant now states that he did not narrow the scope of his request. However, based on the information set out in the Mediator's Report, as well as other information contained in the material provided by the appellant where he confirms that the "critically important time period" for this appeal is "August 1, 2013 to February 18, 2014", I find that the request was narrowed by the appellant. On my review of the wording of the request, I also reject the appellant's statement that the nature of the records included in the request are different than the records previously requested.

[36] In summary, I find that Hydro One improperly narrowed the scope of the request, but that the appellant also narrowed the scope of the request somewhat during the mediation process. As a result, the scope of the request resulting in this appeal is for responsive records covering three distinct periods of time:

1. Undisputed time period C: June 24, 2014 - November 13, 2014 (for which all issues are resolved).
2. Disputed time period A: August 1, 2013 - December 20, 2013
3. Disputed time period B: December 21, 2013 - February 17, 2014.

[37] Hydro One has not issued an access decision for requested time periods A and B.

Accordingly, subject to my review of the other issues identified below, I order Hydro One to issue an access decision to the appellant in response to those requested time periods.

Issue B: Is the appellant estopped from requesting and/or appealing a request for records that were the subject of a previous access request?

[38] Hydro One takes the position that the appellant is estopped from requesting the records and/or from appealing a request for records that were the subject of a previous access request.

[39] In the Notice of Inquiry sent to Hydro One, I asked Hydro One to address whether issue estoppel applies in the circumstances of this appeal, in light of the decisions issued by this office in Orders PO-2858-I and PO-3065. These orders refer to the Supreme Court of Canada decision in *Danyluk v. Ainsworth Technologies Inc.*,³ where Justice Binnie set out the three conditions for the application of the doctrine of issue estoppel. The conditions are:

- (1) that the same question has been decided,
- (2) that the judicial decision which is said to create the estoppel was final; and,
- (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[40] Hydro One was specifically asked to address how the first and second parts of this three-part test apply in the circumstances of this appeal.

[41] Hydro One provided the following representations in support of its position that the first part of the test is met:

In this appeal, the request for records for [time periods A and B] is clearly identical to [two previous identified requests], and records he received for same. ... [Time period A] is a time period covered by his previous [identified request number] (for which he attempted to file a late appeal) and [time period B] is a time period covered by his previous [identified request number] (which he did not appeal). Thus, two decisions with respect to [time periods A and B], which the appellant received records for, have already decided the preliminary issue with respect to [the current request]. These three overlapping requests are identical to one another. The three requests are repetitive in character and are used to

³ [2001] 2 S.C.R. 460.

revisit issues that have been previously addressed. Hydro One submits that by requesting the same information for the same time periods on more than one occasion, [the current request] has already been decided.

[42] I do not accept the position taken by Hydro One. There are a number of issues before me, including determining the scope of the request resulting in this appeal (which I address above) and the issue of whether the appellant can make a new request for information which he has requested earlier. Although I accept that the request resulting in this appeal overlaps with previous requests made by the appellant, those previous requests did not conclude with any adjudicated findings.

[43] I also reject Hydro One's position that the appellant cannot appeal a decision where an earlier appeal of a similar decision was not filed within the 30-day time period. Previous orders of this office have established that the mere fact that an access request is similar or identical to an earlier access request to the same institution does not prohibit the requester from making a request or filing an appeal.⁴ Furthermore, for the reasons set out above, I do not accept Hydro One's position that this request amounts to an "abuse of process" by the appellant.

Issue C: Is the request for access frivolous or vexatious?

[44] Section 10(1)(b) of the *Act* and section 5.1 of Regulation 460, provide a summary mechanism to deal with requests that an institution deems frivolous or vexatious. This office has consistently recognized that these legislative provisions confer a significant discretionary power on institutions which can have serious implications on the ability of a requester to obtain information under the *Act*, and that accordingly, this power should not be exercised lightly.⁵

[45] Section 10(1)(b) 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.

[46] Section 5.1 of Regulation 460 states:

A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,

⁴ See Orders MO-1532 and MO-2414.

⁵ Order M-850 and more recently, Orders MO-3108 and MO-3150.

(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.

[47] Hydro One bears the burden of proof to substantiate its decision that the appellant's request is frivolous or vexatious under one of the four grounds articulated in section 5.1 of Regulation 460. These grounds are:

- The appellant's conduct amounts to an abuse of the right of access;
- The appellant's conduct interferes with the institution's operations;
- The appellant has acted in bad faith in making his request;
- The appellant is seeking access for a purpose other than to obtain access.

[48] Hydro One argues that the appellant's request is frivolous or vexatious because his conduct amounts to an abuse of the right of access, and because he has acted in bad faith and for a purpose other than to obtain access.

[49] In determining whether the appellant's conduct amounts to an abuse of the right of access, the following factors may be relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access":

- The number of requests and whether it is excessive by reasonable standards.
- The nature and scope of the requests. Whether they are excessively broad and varied in scope or unusually detailed, and whether they are identical or similar to previous requests.
- The purpose of the requests and whether they are intended to accomplish an objective other than gaining access. Whether they are made for "nuisance" value or for the purpose of harassing [the institution] or burdening its system.
- The timing of the requests connected to the occurrence of some other related event, such as court proceedings.⁶

[50] The institution's conduct may also be a relevant consideration weighing against a "frivolous or vexatious" finding. However, misconduct on the part of the institution does

⁶ Orders M-618, M-850 and MO-1782.

not necessarily negate a “frivolous or vexatious” finding.⁷ 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. 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 behaviour because a requester seldom admits to a purpose other than access.⁸

[51] Hydro One takes the position that the request is part of a pattern of conduct that amounts to an abuse of the right to access. It states that because of the nature and scope of the request, the purpose of the request, and the timing of the request, the request is frivolous and vexatious. It states that it is the “cumulative nature” which makes this a frivolous and vexatious request.

[52] Hydro One also argues that the request is made in bad faith and for a purpose other than to obtain access.

[53] With respect to whether the request is made in bad faith and for a purpose other than to obtain access, previous orders have defined “bad faith” 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 fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one’s rights, but by some interested or sinister motive. ... “bad faith” is not simply bad judgement or negligence, but 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.⁹

[54] Concerning whether an appellant is seeking access for a purpose other than to obtain access, previous orders have confirmed that a request is made for a purpose other than to obtain access if the requester is motivated not by a desire to obtain access, but by some other objective.¹⁰ 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.”¹¹ In order to qualify as a “purpose other than to obtain access” the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.¹² Where a request is made

⁷ Order MO-1782.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ Orders MO-1168-I and MO-2390.

¹² Order MO-1924.

for a purpose other than to obtain access, the institution need not demonstrate a "pattern of conduct."¹³

[55] Hydro One states:

The appellant has made numerous requests for records which he previously received and several of the requests overlapped with one another. The overlapping requests are identical to one another. The requests are repetitive in character and are used to revisit issues that have been previously addressed. Hydro One submits that by requesting the same information for the same time periods on more than one occasion, the appellant's [request] was made in bad faith or for a purpose other than to obtain access to information. It was done to circumvent the appeal process as set out in FIPPA.

It is therefore Hydro One's position that the appellant's FOI [request and the current appeal] are frivolous and vexatious. This particular FOI access request overlaps with 4 previous attempts to access the same records ..., each of which could have been appealed (two of which actually were appealed). It is therefore Hydro One's position that the fact scenario that gives rise to the appeal for [the current request] is distinguishable from the IPC's Order MO-2788, particularly because Hydro One is clearly asserting that this request is frivolous and vexatious. Accordingly, the foregoing are reasonable grounds to conclude that this request and corresponding appeal were made in bad faith.

Analysis and findings

[56] On my review of the request resulting in this appeal, the circumstances of this appeal and the representations of Hydro One, I am not satisfied that the appellant's request or appeal is frivolous or vexatious.

[57] To begin, I found that the scope of this request is for three specific time periods. Hydro One never took issue with the request for time period C and, in fact, properly processed that portion of the request without raising the frivolous and vexatious issue. Hydro One only raised the issue when its unilateral narrowing of the request was questioned. I determined above that, in the course of processing this file, the only other periods of time covered by the request are two other discrete time periods (A and B).

[58] The appellant confirms that he did not file a timely appeal of Hydro One's earlier decision covering time period A.¹⁴ With respect to time period B, Hydro One provided

¹³ Order M-850.

¹⁴ That decision granted access to certain records, and denied access to other records on the basis of identified exemptions in the *Act*.

this office with a copy of its earlier decision letter issued to the appellant relating to this time period,¹⁵ but the appellant states that he does not recall receiving this decision.

[59] Based on the evidence provided to me, I am satisfied that Hydro One properly issued access decisions in response to the previous requests for time periods A and B. However, in the circumstances, I find that the appellant's actions in requesting information he sought earlier is not a "pattern of conduct that amounts to an abuse of the right to access." The focus of the appellant's narrowed request in this appeal is for access to records or portions of records he either had not received, or does not recall receiving.

[60] I also find that the appellant is not pursuing this request for a "purpose other than to obtain access." Given the nature of the request resulting in this appeal, and the appellant's focus on the particular time periods covering records or portions of records not provided to him, I am satisfied that the appellant did not have an improper objective or a collateral intention in making the request. An intention to pursue a right of access and a right to appeal from an access decision is not an improper objective.

[61] I am also satisfied that the appellant's request and appeal were not made in bad faith. As noted above, bad faith generally implies or involves "actual or constructive fraud, or a design to mislead or deceive another" and is "not prompted by an honest mistake as to one's rights, but by some ... sinister motive." It is not simply bad judgement or negligence, but "implies the conscious doing of a wrong because of dishonest purpose or moral obliquity." In the circumstances, I find that there is no evidence to suggest that the appellant is acting in bad faith.

[62] As a result, I find that the appellant's request and appeal are not frivolous or vexatious.

Issue D: Does the passing of the *Building Ontario Up Act* affect this appeal?

[63] Hydro One raises an additional issue in this appeal, and takes the position that the passing of the *Building Ontario Up Act* affects this appeal.¹⁶ Hydro One submits that because of the passing of that Act and the resulting amendments to *FIPPA*, this office cannot issue an order requiring Hydro One to conduct a new search for records and, as a result, this appeal is effectively rendered moot and/or is statute barred.

[64] Hydro One notes that, effective on or after June 4, 2015, Hydro One is not

¹⁵ This decision also provided access to certain records, and denied access to other records on the basis of identified exemptions in the Act.

¹⁶ The *Building Ontario Up Act*, which received Royal Assent on June 4, 2015, amended *FIPPA* by adding section 65.3 to it. In my discussion of the *Building Ontario Up Act*, I will refer to the amended sections of *FIPPA*.

required to respond to new requests for access to information pursuant to *FIPPA*. It also refers to the transitional sections found in section 65.3(5)(a) and (b) of *FIPPA*, and states:

Section 65.3(5) displays the Legislature's objective to create an orderly "winding-down" of the (IPC) Commissioner's *FIPPA* powers over Hydro One. It provides the Commissioner with six months to hear, at its discretion, ongoing inquiries, after the date on which Hydro One otherwise ceased to be subject to *FIPPA* requests. This six month transitional period is long enough for the Commissioner to complete ongoing inquiries at a heightened, albeit, relatively reasonable pace.

Thus, by virtue of these afore-noted amendments to *FIPPA*, it would be entirely inappropriate for the IPC to order a remedy which would effectively require Hydro One to engage in a new search for records, as requested by the appellant. First, such an order would be inconsistent with the intent of Legislature to prevent new access to information requests during when Hydro One is subject to an [initial public offering (IPO)]. A remedy that would require Hydro One to engage in a search for records would be tantamount to a new access request.

Second, the appellant is seeking this order so that he can appeal the redactions made by Hydro One on previously issued decisions to [his earlier requests for time periods A and B]. He has been very clear in that fact. In that respect, if the IPC orders Hydro One to engage in a "new" search for records for [time periods A and B], Hydro One's redactions would be the same as what were in [its earlier decisions for those time periods]. The appellant would then appeal this "new" decision and then the IPC would be forced to rush parties' submissions in order to meet the December 4, 2015 deadline. The Legislature could not have intended such an unfair and disorderly result. This would be wrong in law, and would strip procedural fairness and due process away from Hydro One.

Hydro One therefore respectfully submits that the issues raised by the appellant [in this appeal] are rendered effectively moot by virtue of these changes to *FIPPA*. The IPC cannot issue an order for Hydro One to engage in a new search for records, as is requested by this appeal. The Legislature did not intend for this result. Accordingly, Hydro One respectfully requests that the IPC dismiss this appeal.

[65] I have considered Hydro One's position in light of the wording of the amendments. The relevant transitional sections in section 65.3 of *FIPPA* read as follows:

(2) This Act does not apply to Hydro One Inc. and its subsidiaries on and after the date on which the *Building Ontario Up Act (Budget Measures), 2015* received Royal Assent.

...

(5) Despite subsection (2), for a period of six months after the date described in that subsection,

(a) the Commissioner may continue to exercise all of his or her powers under section 52 (inquiry) and clause 59(b) (certain orders) in relation to Hydro One Inc. and its subsidiaries with respect to matters that occurred and records that were created before that date; and

(b) Hydro One Inc. and its subsidiaries continue to have the duties of an institution under this Act in relation to the exercise of the Commissioner's powers mentioned in clause (a).

(6) The powers and duties of the Commissioner to issue orders under section 54 and clause 59 (b) with respect to matters mentioned in subsection (5) continue for an additional six months after the expiry of the six-month period described in that subsection.

(7) An order issued within the time described in subsection (6) is binding on Hydro One Inc. or its subsidiaries, as the case may be.

[66] On my reading of the transitional provisions set out above, it appears that the legislature has clearly established a "winding down" or transitional period of time for which the obligations of *FIPPA* continue to apply to Hydro One. Although section 65.3(2) establishes that Hydro One is no longer an institution as of June 4, 2015, subsections (5), (6) and (7) maintain Hydro One's status as an institution for certain purposes, and confirm the authority of this office to process appeals and issue orders in certain circumstances after that date.

[67] The current appeal arose as a result of the appellant's request made to Hydro One on November 13, 2014, and his January 29, 2015 appeal of Hydro One's January 16, 2015 decision. There is no question that Hydro One was an institution at the time the request was made, at the time it issued its decision, and at the time the decision was appealed. As a result, I find that the issues in this appeal are properly before me. I am also satisfied that the transitional provisions in section 65.3 provide me with the authority to process this appeal, and require Hydro One to comply with any resulting order.

[68] In this order, I have found that Hydro One improperly narrowed the scope of the request, and I order Hydro One to issue an access decision to the appellant regarding

two specific time periods which were included in the request.

[69] Hydro One also states that, due to the amendments, it is inappropriate to require it to respond to the appellant's request. It states that such an order "would be inconsistent with the intent of Legislature to prevent new access to information requests during when Hydro One is subject to an IPO," and that requiring Hydro One to engage in a search for records would be "tantamount to a new access request."

[70] I reject Hydro One's position. Although this order requires Hydro One to respond to the relevant portions of the appellant's request, the request is not a "new access request" but in fact one that was made prior to June 4, 2015. The fact that Hydro One failed to properly process this request prior to that date does not affect its prior obligations to do so, and the transitional provisions in section 65.3 of *FIPPA* confirm that these obligations continue.

[71] Lastly, I have considered Hydro One's position that the appellant is seeking this order so that he can appeal the redactions made by Hydro One, and that any resultant appeal of Hydro One's new decision would be "rushed" and strip procedural fairness and due process away from Hydro One. Given the amendments to *FIPPA*, I have also considered whether there is any purpose served in proceeding with this appeal and issuing this order. However, I note that this order requires Hydro One to provide an access decision to the appellant for two distinct time periods, and this may result in the appellant receiving additional records.¹⁷ Once the appellant receives Hydro One's decision which it will issue as a result of this order, the appellant may choose not to appeal that decision. The issue of whether or not the appellant could appeal a decision made by Hydro One after June 4, 2015 is premature and not before me at this time.¹⁸

ORDER:

I order Hydro One to provide an access decision to the appellant regarding access to the records covered by time periods A and B, in accordance with the requirements of the *Act*, and treating the date of this order as the date of the request.

Original Signed by: _____
Frank DeVries
Senior Adjudicator

October 27, 2015

¹⁷ Including records he does not recall receiving.

¹⁸ There may be a question of whether or not an access decision issued by Hydro One after June 4, 2015 can be appealed. See, for example, Order PO-2991.