Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER PO-3775

Appeals PA15-385, PA15-386, PA15-387, PA15-388, PA15-389, PA15-390, and PA15-391

Ministry of Community Safety and Correctional Services

October 5, 2017

**Summary:** The appellant organization made seven requests to the ministry for records relating to nuclear emergency management and nuclear safety. These requests followed 42 other requests made by the appellant to the ministry over the previous three years, and after the ministry and the appellant had agreed on how to process any of those previous outstanding requests. After receiving the seven additional requests, the ministry issued a decision stating that the requests were "frivolous and vexatious" for the purpose of section 10(1)(b) of the *Act* and section 5.1(a) of Regulation 460.

In this order, the adjudicator finds that the appellant's requests are not frivolous and vexatious for the purpose of the *Act*, and orders the ministry to issue access decisions in response to them.

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

**Orders and Investigation Reports Considered:** PO-2151.

## OVERVIEW:

[1] In April of 2015, the Ministry of Community Safety and Correctional Services (the ministry) received a series of seven requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from an environmental activist organization through its representative (hereafter both referred to as the appellant) for various records

relating to nuclear emergency management and nuclear safety. In response to the seven requests, as described further below, the ministry took the position that the requests are frivolous and vexatious.

[2] By way of background, the ministry had previously received a total of 42[1] requests from the appellant, which were submitted to the ministry from 2012 to 2014. The appellant was unsatisfied with how the ministry was processing those requests and filed a number of deemed refusal appeals with this office. As a result, the ministry and the appellant entered an agreement in March of 2015 in which the ministry set out a schedule as to how it would process the 23 remaining requests, and the appellant withdrew his appeals of those requests.

[3] The seven requests at issue in this appeal were submitted in two separate letters dated April 8 and 22, 2015. In its letter to the ministry dated April 8, 2015, the appellant made the following three requests:

> **Request 1:** Please provide the minutes [of] the Nuclear Emergency Management Coordination Committee (NEMCC) that took place on April 12, 2012. [A named individual] will have access to these minutes.
>
> **Request 2:** Please provide [any] minutes of the Nuclear Emergency Management Coordination Committee (NEMCC) that were produced between January 1st and March 31st 2015. [A named individual] will have access to these minutes.
>
> **Request 3:** Please provide any briefing notes or power point presentations provided to the Minister on nuclear emergency planning issues between January 1st and March 31st 2015.

[4] In its letter to the ministry dated April 22, 2015, the appellant made the following four requests:

> **Request 1:** Please provide the report attached to the presentation "Nuclear Emergency Response Questions," which is dated February 28, 2014. This presentation was released in response to request CSCS-A-2014-0295. Slide 11 of the presentation indicates there was a report attached.
>
> **Request 2:** Please provide a copy of all comments the OFMEM submitted on [Ontario Power Generation's] proposed guidelines scenario for Beyond Design Basis Accidents. These comments were referenced in request CSCS-A-2014-02950.
>
> **Request 3:** Please provide a copy of the letter [that was] sent from [a named Fire Marshal Chief] to [a named individual at the Canadian Nuclear

[1] There is some question as to the exact number of prior requests received from the appellant. For the purpose of this review, I will consider the higher number of 42 as the number of previous requests.

> Safety Commission] on March 9th 2015 regarding K1 pre-distribution. Note I made an inform [sic] request for this letter of Ministry staff, but received no response or acknowledgement.
>
> **Request 4:** Please provide copies of the documents attached to [a named individual] (Planning Officer, Planning and Exercise Section) April 3 2014 email. The email was sent at 10:48 am. The subject line is "NEMCC – Follow Up."

[5] By letter dated April 17, 2015, the ministry acknowledged receipt of the first three access requests and advised that the requests would not be opened until the appellant's remaining (earlier) requests had been closed. The ministry's letter stated:

> I am writing regarding your three access requests under [the *Act*], received by [the Ministry] on April 17, 2015.
>
> These requests will not be opened until the remaining 20 requests have been closed.
>
> To provide some background, on December 23, 2014, the Ministry advised you that the processing of your numerous requests would unreasonably interfere with the operations of the institution. At that time, we explained that moving forward our office would deal with only three active requests at any given time.
>
> On March 13, 2015, the Ministry agreed to a scheduled release of your 23 remaining requests.
>
> You currently have 20 outstanding requests which have yet to be completed, therefore, as mentioned above, the three requests received by our office today, will be opened and file numbers assigned to them when the backlog has been cleared.

[6] By letter dated May 5, 2015, the ministry acknowledged receipt of the next four access requests and, in a letter very similar to its April 17th letter, advised that the four requests would not be opened until the appellant's remaining requests (now identified as 18 remaining requests) had been closed. The ministry's letter also confirmed that the additional four requests "will be opened and file numbers assigned to them when the backlog has been cleared."

[7] The appellant then filed an appeal of the ministry's "refusal to respond" to its access requests and believed that this qualified as a "deemed refusal" under the *Act*.

[8] Upon receiving the appeal letter, this office notified the ministry that this "deemed refusal" appeal letter had been received. The ministry then issued a decision to the appellant dated July 2, 2015 in which it advised that it was refusing to process the requests on the basis that they are frivolous and vexatious in accordance with

section 27.1 of the *Act*. The decision letter stated:

> This letter is in response to the above requests you submitted to [the Ministry], under [the *Act*], on April 17 and May 5, 2015 respectively.
>
> These requests are in addition to your previous 17 requests which we are currently managing, as well as the 25 requests already processed by the Ministry.
>
> In order to alleviate the burden such a large volume of requests would put on the Ministry, we attempted to negotiate a timed release of your requests. However, rather than respond to the Ministry's correspondence, you proceeded to submit new requests.
>
> Upon receipt of the most recent requests, the Ministry wrote to you, indicating that the processing of your numerous requests would unreasonably interfere with the operations of the institution and explained that moving forward, our office would deal with only three active requests at any given time.
>
> On June 29, 2015, the Information and Privacy Commissioner/Ontario (IPC) contacted the Ministry to notify us of the fact that you had lodged deemed refusals in relation to the above requests and that a decision must be issued.
>
> Please be advised that the Ministry is refusing to process the above noted requests in accordance with section 27.1 of the *Act*, which states that a head may refuse 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.
>
> Regulation 460, 5.1 further states that:
>
> > "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,
> >
> > > (a) the head is of the opinion on reasonable grounds that the request ... would interfere with the operations of the institution;

[9] The appellant confirmed that he wished to continue with these appeals. These files were then transferred to the inquiry stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry to the ministry, initially, inviting the ministry to address the issue of whether the requests are frivolous or vexatious. The ministry provided representations in response. I then sent the Notice of Inquiry to the appellant, along with a complete copy of the institution's

representations, and the appellant also provided representations. I shared the appellant's representations with the ministry, and the ministry made reply representations.

In this order, I find that the appellant's requests are not frivolous and vexatious for the purpose of the *Act*, and I order the ministry to issue access decisions in response to them.

## RECORDS:

[10] The records requested in the seven requests resulting in these appeals are various records relating to nuclear emergency management and nuclear safety, as particularized in the requests set out above.

## DISCUSSION:

### Are the requests for access frivolous or vexatious?

#### *General Principles*

[11] The sole issue in these appeals is whether the appellant's seven requests are frivolous or vexatious under section 10(1)(b) of the *Act*. This section reads:

> 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.

[12] Section 5.1 of Regulation 460 under the *Act* elaborates on the meaning of the terms "frivolous" and "vexatious". This section reads:

> 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,
>
> > (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.

[13] Section 10(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.[2]

[14] An institution has the burden of proof to substantiate its decision that a request is frivolous or vexatious.[3]

[15] The ministry takes the position that the seven requests are frivolous and vexatious because of the application of the grounds in section 5.1 of Regulation 460, and specifically:

- The appellant's conduct amounts to an abuse of the right of access; [5.1(a)]
- The appellant's conduct interferes with the institution's operations; [5.1(a)]
- The appellant acted in bad faith. [5.1(b)]

[16] Both the ministry and the appellant provided representations relating to the background to these appeals, and then provided representations on the specific grounds listed above. I will first review their general representations and then address the specific grounds.

### *General representations – background*

*The ministry's representations*

[17] The ministry begins by stating that although it processes numerous requests (5516 in 2013), it seldom applies section 10(1)(b), and is usually able to work pro-actively with requesters with a large number of requests to prioritize requests and arrange a "scheduled release". It states that it "has been unable to negotiate a 'scheduled release' arrangement" with the appellant (presumably for the seven requests at issue in these appeals). The ministry submits that the appellant made 49 access requests between 2012 and April of 2015, and that one request involves over 1000 pages of records. It also states that the number of requests has steadily increased over time, from 4 in 2012, 17 in 2013, 21 in 2014, and then the seven requests in April of 2015, which are the subject of these seven appeals. The ministry submits that the prior 42 requests were "cumulative in their impact upon the ministry, and help to explain our approach toward the final seven."

[18] The ministry submits the 49 requests all relate to nuclear emergency planning and safety, and that almost all responsive records would be located in the Planning and Exercises Unit of the Office of the Fire Marshall and Emergency Management. The ministry states that the Unit "is staffed by a single full-time program manager, and one full-time and one part-time employee." The ministry further describes the Unit's "critical role in planning for, and responding to emergencies, both nuclear and non-nuclear." It

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

also notes an increasing number of "external consultations" from other institutions or organizations to determine the ministry's position regarding similar access requests for nuclear emergency management, and then submits "the cumulative effect of these consultations has acted to further challenge the ability of [the Unit] to discharge its mandate." The ministry suspects that these other requests are also initiated by the appellant.

[19] The ministry states that on December 23, 2014, it advised the appellant that the number of requests received from it was unreasonably interfering with its operations and that going forward the ministry would only deal with three active requests at a time. The ministry submits that it and the appellant "agreed… on March 13, 2015, to a scheduled release of 23 remaining requests" which had become "deemed refusals". The ministry further submits that:

> … it is implied that as a result of this arrangement, the Ministry would not process any further related requests from the appellant until this scheduled release had been completed, and all of the remaining 23 requests had been processed. The Ministry believed that the scheduled release arrangement struck a fair and reasonable balance by providing the appellant with access to records, without causing undue harm to the operations of [the Unit].

[20] The ministry states that the seven requests at issue in these appeals were then submitted on April 8th and 22nd. It submits:

> The appellant decided, notwithstanding the fact that the scheduled release arrangement was successfully reducing the backlog of requests, to appeal the Ministry's decision to not respond to the 7 requests until the backlog had been processed. The Ministry claims the appellant's appeal of the Ministry's decision is both frivolous and vexatious.

[21] The ministry notes that the backlog of the 23 remaining requests was being processed in the meantime, and as of the date of the writing of its representations, only 3 access requests remained to be processed. It is my understanding that all 23 of those requests have been processed.

*The appellant's representations*

[22] The appellant states that he "started filing information requests with [the ministry] in 2012 following the Fukushima disaster." The appellant raises the ministry's behaviour as an issue, submitting that the ministry: (i) "has never responded to any of my requests on time"; (ii) "typically processes requests by issuing acknowledgement letters, but not setting timelines"; and (iii) "has acted completely unaccountably for the past three years, ignoring both the requirements and spirit of [the Act]."

[23] The appellant submits that "the ministry's ongoing unaccountable conduct is the actual problem that needs to be addressed in these appeals", and "it is effectively a

denial of the right of access under the Act." The appellant states that during the three-year period, the ministry "did not issue letters informing me of time-extensions" and "simply ignored my requests", and therefore "the requests built up".

[24] The appellant provided a copy of a letter he sent to the ministry in November 2014 in response to its request to prioritize four specific requests (not among the seven requests at issue in this appeal). The letter identifies the appellant's position that the ministry "has been unable to respond to any of my requests over the past two years within the requirements set out by [the *Act*]" and "has yet to respond to requests from two years ago." In this letter, the appellant submits that the ministry's request to "prioritize" requests "contravenes the requirements laid out in sections 26 and 27 of [the *Act*]" and he refuses to prioritize them, instead requesting the ministry "respect your obligations under section 26 of the *Act* and properly respond to each of my requests by [a specified date]."

[25] The appellant also referred to documentation he sent to this office in February 2015 regarding "the majority of the outstanding requests," and its reference to the ministry's "systemic failure to respond to my request[s] within reasonable and accountable timelines". The appellant submits that the ministry acknowledged that the responses to these requests were overdue.

[26] Regarding the agreement he made in March of 2015 to withdraw his appeals of the outstanding requests at that time based on the ministry's schedule as to how it would process the 23 requests, the appellant states that he was "being constructive" and "accepted a proposed timeline for responding to the requests instead of having them all categorized as 'deemed refusals.'" However, he states that "in accepting this schedule I made no commitment to not file any additional requests."

[27] Regarding the seven requests at issue in these appeals, the appellant states that, contrary to the requirements in the *Act*, the ministry did not even assign processing numbers to those requests, nor did it inform him of any time extensions.

*The ministry's reply representations*

[28] The ministry provided reply representations in which it disputes a number of the statements made by the appellant in his representations.

## Grounds for a frivolous or vexatious claim

[29] In light of this background information, I will consider the three specific grounds relied on by the ministry in support of its claim that the requests are frivolous or vexatious. However, I will first address one issue raised by the ministry.

[30] The ministry refers to the small size of the Planning and Exercises Unit of the Office of the Fire Marshall and Emergency Management, and its role and various responsibilities. The ministry also refers to its role in providing "external consultations" from other institutions or organizations to determine the ministry's position regarding

similar access requests for nuclear emergency management, and that this further challenges the ability of the Unit to discharge its mandate. The ministry then states that it "suspects" that these other requests are also initiated by the appellant. I accept that providing advice to other ministries may be one of the roles of the Unit, and will generally take this into account in making my decision; however, without further information, I will not consider as a factor in any of the grounds set out below the speculation that the appellant may have initiated one or more of these other requests to other institutions or organizations.

### *Pattern of conduct that amounts to an abuse of the right of access*

[31] In support of its position that the request is part of a pattern of conduct that amounts to an abuse of the right of access, the ministry refers to several factors including the number of requests made by the appellant, the nature and scope of the requests, the purpose of the requests, and the timing of the requests. The appellant then responds to the factors raised by the ministry.

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

- The number of requests – 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 – Whether they are intended to accomplish an objective other than gaining access, such as being made for "nuisance" value or for the purpose of harassing the institution or burdening its system.
- The timing of the requests – Whether they are connected to the occurrence of some other related event, such as court proceedings.[4]

[33] 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 not necessarily negate a "frivolous or vexatious" finding.[5]

[34] 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.[6]

[35] 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

[4] Orders M-618, M-850 and MO-1782.
[5] Order MO-1782.
[6] Order MO-1782.

other than access.[7]

### ***Analysis and Findings***

[36] I will now review the factors raised by the ministry to determine whether there is a pattern of conduct that amounts to an abuse of the right of access.

*Number of requests*

[37] The ministry submits that the seven requests, added to the 42 requests previously submitted, "are excessive by reasonable standards" because the requests have "targeted" a specific small Unit and cumulatively affected the Unit's ability to perform "critical emergency planning functions". The ministry relies on IPC Order MO-1782, holding that "the focus should be on the cumulative nature and effect of a requester's behaviour".

[38] The ministry highlights the specific Unit's "critical role in safeguarding the well-being of Ontario residents, in that it is responsible for planning for both nuclear as well as non-nuclear emergencies". The ministry also relies on IPC Order PO-3188 which upheld a university's decision under section 10(1)(b) where requests targeted only two professors. The ministry submits that similar reasoning should be applied in these appeals, "because the burden of responding to the 49 requests … has fallen on one small office within the Ministry."

[39] The appellant submits that the ministry's assertion that these seven requests are excessive is not a reasonable position compared to other ministries and agencies. He states that he is a regular user of Freedom of Information provincially and Access to Information federally, and that other ministries and agencies "regularly *accept* and process a similar number of requests on a *monthly basis*." They also inform him in writing when his requests may unreasonably constrain operations, and may use the option under the *Act* to extend processing times. He then states that, with respect to the current requests:

> I would not have file[d] these appeals if the Ministry had simply acknowledged these requests and informed me of the extensions it required and is entitled [to] under the Act.
>
> In its representations, the Ministry tries to conflate these requests with the thirty requests it had ignored over the past three years. First, thirty requests over a three-year period or about ten a year is not excessive by any reasonable measure. Second, in my view these requests, which the Ministry ignored arguably in bad faith, are not relevant to the current appeals.

[40] I note that the ministry and the appellant refer to a different quantity of requests

[7] Order MO-1782.

prior to the seven at issue in these appeals. The ministry refers to 42 other requests since 2012, while the appellant refers to 30 "ignored" requests over a three-year period.

[41] In either case, I do not find the number of requests to be "excessive by reasonable standards". Accepting the higher number of 49 requests from 2012 to April of 2015, this results in a calculation of approximately 15 requests per year. Although high, in my view, this is not an excessive number.

*Nature and scope of the requests*

[42] The ministry submits that the 49 total requests (including the seven at issue) overlap "because they all relate to nuclear emergency management and safety", and they are sometimes "so closely related that they can be considered duplicative". On this point, the ministry refers to seven earlier requests (not among the seven at issue in these appeals) as demonstrating the duplicative nature of the requests, and submits that the requests are "closely related enough to support a finding that a pattern of conduct exists that amounts to an abuse of the right of access."

[43] The appellant submits that he was "mindful to scope the requests as narrowly as possible to make document retrieval as easy as possible", in order to cut down on search and consultation time and reduce the ministry's burden. He states that, whenever possible, he will "name a specific document, a date range, and even who in the Ministry will be in possession of the document." In his experience, "requests scoped in this way can be processed within the thirty-day limit", and in his view, this demonstrates he "made these requests in good faith."

[44] I find that, generally, the nature and scope of the requests are narrow and specific. In particular, on my review of the seven requests resulting in the seven appeals before me, I find them to be very specific and focussed, identifying with considerable precision the type of record requested. The appellant clearly identifies the specific information that he is interested in, and restricts the requests to that information.

[45] I have also considered the ministry's representations on the other requests received. The ministry notes that "one request involves over 1000 pages of records", and also highlights seven requests (not those specifically at issue in these appeals) which have minor substantive differences and may appear to be very similar. I note that while some of those seven requests have similarities, there are significant differences. For example, two separate requests for records, each for a different ministry official, will likely yield different results, although there could also be some overlap. In the circumstances, and based on the wording of the requests, the fact that some requests may have some overlapping records does not support a finding that the requests are identical or sufficiently similar to each other.

*Purpose of the requests*

[46] The ministry submits that it can be inferred that the seven requests made by the

appellant shortly after the agreement to process the other earlier requests in a specified manner, and the appellant's insistence that they be processed at the same time as the earlier requests, would lead to a "break or burden of the system". It states:

> … the purpose of the scheduled release arrangement was to create a system to ensure an orderly and timed response to the requests, which would minimize the harm to the operations of the Planning and Exercises Unit. The Ministry spent considerable time working with the appellant and the IPC towards the establishment of the scheduled release arrangement. By submitting the 7 requests at the same time as the requests subject to the scheduled release arrangement were being processed, the Ministry submits that it can be inferred that the appellant was trying to defeat the execution of the arrangement. The Ministry relies upon Order MO-1782, which states:
>
> > "... ascertaining the purpose of requesters requires the drawing of inferences from their behaviour because it is seldom the case that requesters admit to a purpose other than access."

[47] The appellant submits:

> My goal in filing these requests is to shed light on the government's oversight of offsite nuclear emergency plans. The provincial government, which also owns the province's nuclear stations, is responsible for ensuring Ontarians are adequately protected in the event of a nuclear accident.
>
> Following the Fukushima disaster, however, Ontario took no (publicly reported) actions to assess the adequacy of Ontario's offsite nuclear emergency plans. [The appellant] is very concerned that [the] province's nuclear emergency plans are inadequate.

[48] The appellant then refers to previous orders which confirm that nuclear emergency planning is of significant public interest,[8] and he indicates his view that the ministry's failure to process his requests is a *de facto* denial of access.

[49] In considering the evidence, I am not satisfied that the purpose of the requests was to accomplish an objective other than gaining access. The appellant clearly has an interest in the records requested and, based on the specific wording of the seven requests resulting in these appeals, I find that they are narrowly scoped and for specifically identified records. I am not satisfied that the appellant has made the requests for any "nuisance" value or for the purpose of harassing the institution or burdening its system.

[50] In the circumstances, I find that the purpose of the appellant's requests is to

[8] He refers specifically to Order P-901.

obtain access to the requested information, and they are not intended to accomplish an objective other than gaining access.[9]

*Timing of the requests*

[51] The ministry submits:

> The Ministry is unaware of the reason for the timing of the appellant's requests. The appellant has not explained why he has submitted the requests only weeks after the scheduled release arrangement was reached, or why the 7 new requests need to be processed now, as opposed to at the end of the scheduled release arrangement, in accordance with the arrangement. The Ministry submits that the fact that the appellant has not offered any explanation supports a frivolous or vexatious finding.

[52] The appellant submits:

> It has been almost five years since the Fukushima disaster began. I have been making requests that have been effectively ignored by the Ministry since 2012. I'm trying to gather information to assess the adequacy of nuclear emergency plans and to ensure reactor operators don't have undue influence on the development of these plans.
>
> I feel the Ministry's ongoing failure to process my requests shows a pattern of conduct that has undermined my right to access under the Act.
> …

[53] In considering the timing of the requests, I accept that the ministry may have been frustrated that the appellant's seven requests were made shortly after the scheduled release arrangement for the other requests was entered into. However, as noted above, the appellant takes the position that, in accepting the scheduled arrangement, he "made no commitment to not file any additional requests." In its reply representations, the ministry accepts that the arrangement agreed to between the parties did not specifically restrict the appellant from making further requests.[10] The ministry states, however, that "the appellant knew or ought to have known that the ministry developed the scheduled release arrangement with the expectation that it would not process further requests from the appellant relating to the Planning and Exercises Unit until such time as the requests subject to the arrangement were processed."

[54] In the circumstances, I am satisfied that the timing of the seven requests does not support a finding that the appellant was engaged in a pattern of conduct that amounts to an abuse of the right of access. I note that the appellant's seven requests

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[9] See Order PO-3691.
[10] I am not commenting on whether any such arrangement would be possible under the *Act*.

resulting in these appeals are for very specific documents, and that a number of the requests appear to have been made as a result of receiving records in his earlier requests. For example, one of the requests submitted on April 22, 2015 is for a report referenced as an attachment to a document released to the appellant pursuant to one of his earlier requests. At least for some of the seven requests, the appellant requested access to specific records whose existence he only became aware of through the more recent disclosures provided by the ministry.

[55] In summary, and considering the factors set out above, I find that the ministry has not established that the appellant was engaged in a pattern of conduct that amounts to an abuse of the right of access.[11]

### ***Pattern of conduct that would interfere with the operations of the institution***

[56] 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.[12]

[57] 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.[13]

*Representations*

[58] The ministry submits:

> … the scheduled release arrangement was an attempt on the part of the Ministry to ensure that the appellant's requests would not interfere with the operations of the Planning and Exercises Unit. We submit that the appellant's refusal to comply with the intent of the scheduled release arrangement has therefore had the effect of interfering with its operations.

[59] The ministry also provides representations about the Unit responsible for processing the requests:

> All or almost all of the responsive records are located in the Planning and Exercises Unit, which is staffed by a single program manager, and one full-time and one part-time employee. It is these staff who end up searching for responsive records, because they are the only ones familiar enough with the records being requested to retrieve them. The receipt of

[11] As noted, I make this decision based on the specific, focused nature of the seven requests at issue. I may have come to a different conclusion if the requests were broader and/or overlapping.
[12] Order M-850.
[13] Order M-850.

> 49 requests over a 28 month period, when added to the 28 requests for consultations that the Ministry has received from other institutions and other public organizations during that same time frame, and the fact that the Planning and Exercises Unit was responsible for assisting with the PEOC's [Provincial Emergency Operations Centre's] response to the James Bay flooding evacuations as the same time as the 7 requests were submitted this past April cumulatively challenged the ability of the Planning and Exercises Unit to discharge its duties.
>
> The Planning and Exercises Unit plays a critical role in safeguarding the well-being of Ontario residents, in that it is responsible for planning for both nuclear as well as non-nuclear emergencies (e.g., it plays a similar planning role with respect to responding to severe weather and pandemic emergencies, as examples). During emergency declarations, Planning and Exercises Unit staff plays an additional role because Unit staff must also assist the PEOC in responding to the emergency.
>
> … the burden of responding to the 49 requests and 28 consultations has fallen on one small office within the Ministry.

[60] The appellant did not submit representations explicitly under the heading of "interference with the operations", but elsewhere in his representations he submits:

> [Other] Ministries and agencies process requests in a more open and accountable manner. When my requests may unreasonably constrain operations, they inform me in writing that they will use their option under the Act to extend processing times. These letters provide extension deadlines that can vary from 30 [days] to a year. If the Ministry or agency subsequently can't meet these deadlines, they inform [me] they will be extending the processing period again but with new deadlines.

### ***Analysis and findings***

[61] Order PO-2151 identified the nature of the information required to establish an "unreasonable interference with the operations of an institution" as follows:

> Previous orders of this office have considered the meaning of the term "unreasonable interference with the operations of an institution" in the context of claims that a request is frivolous or vexatious. Although made in a different context, they provide some guidance in assessing this issue.
>
> Applying the findings in these previous orders, it appears that in order to establish "interference", an institution must, at a minimum, provide evidence that responding to a request would "obstruct or hinder the range of effectiveness of the institution's activities" (Order M-850). ...

> ... [W]here an institution has allocated insufficient resources to the freedom of information access process, it may not be able to rely on limited resources as a basis for claiming interference (Order MO-1488).
>
> In Order M-583, former Commissioner Tom Wright noted that, "government organizations are not obliged to maintain records in such a manner as to accommodate the various ways in which a request for information might be framed."
>
> Similarly, government organizations are not obligated to retain more staff than is required to meet its operational requirements. I qualify this point, however, by adding, as I noted above, that an institution must allocate sufficient resources to meet its freedom of information obligations (Order MO-1488).
>
> In my view, a determination that producing a record would unreasonably interfere with the operations of an institution is dependent on the facts of each case.[14]

[62] Furthermore, in considering the appellant's pattern of conduct, I have taken in to account the quantity of the requests as well as their nature and scope, as discussed above.

[63] With respect to whether the pattern of conduct interferes with the operation of the institution, I find that I have not been provided with sufficient evidence to satisfy me that it would do so. I accept that the Unit with knowledge of the subject matter of the request is small and has various responsibilities; however, I note that the ministry agreed to a scheduled release of responses to the earlier requests, and has done so. In order to find interference, I must find that the seven specific requests resulting in these appeals are such that processing them, in addition to the other requests that are being processed, would interfere with the operations of the institution. Based on my review of the seven requests, I find that they would not. In particular, I note that some of the seven requests are for one document or attachment, or minutes from a specific meeting, and that all of them are for quite specific and/or for narrowly defined time periods.

[64] Other than the ministry's general statements about the size of the Unit and the manner in which it agreed to the "scheduled release" arrangement for prioritizing and dealing with the appellant's requests, and the information set out above, I have no other specific information about how processing these additional seven requests would interfere with the operations of the institution. The ministry's reference to the Unit assisting the PEOC in responding to the emergency also provides no further information about the nature of this assistance and the extent to which the Unit's operations were affected.

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[14] See also Order PO-2752.

[65] Accordingly, in the circumstances, I find that the ministry has not provided sufficient evidence to establish a pattern of conduct that would interfere with the operations of the institution.[15]

***Bad faith***

[66] Where a request is made in bad faith, the institution need not demonstrate a "pattern of conduct".[16]

[67] "Bad faith" has been defined 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.[17]

[68] The ministry submits that the appellant acted in bad faith when he submitted the seven additional requests, and appealed the ministry's decision to delay processing those requests until the end of the scheduled release arrangement. It states:

> The appellant agreed to the scheduled release arrangement. The purpose of the scheduled release arrangement was to create a schedule for eliminating the backlog of requests. The Ministry submits it is implied that as part of the scheduled release arrangement, that the Ministry would delay processing related new requests until the outstanding requests were processed.

[69] The Ministry submits that all of the following are indicia of bad faith:

a. At no time during the discussions leading to the scheduled release arrangement did the appellant advise the Ministry that he was going to continue submitting requests during the time that the scheduled release arrangement was in place;

b. The appellant knew or ought to have known that the Ministry developed the scheduled release arrangement with the expectation that it would not process further requests from the appellant relating to the Planning and Exercises Unit until such time as the requests subject to the arrangement were processed;

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[15] I also note the appellant's apparent willingness to work with the ministry by stating that he "would not have file[d] these appeals if the ministry had … acknowledged these requests and informed me of the extensions it required and is entitled [to] under the *Act.*"
[16] Order M-850.
[17] Order M-850.

c. The appellant has acted unreasonably in expecting the Ministry to respond to both the backlog of 23 requests that were subject to the scheduled release arrangement, at the same time as the 7 new requests; and,

d. The appellant has not explained why he wants the Ministry to respond to the 7 requests prior to the end of the scheduled release arrangement. This lack of explanation is an example of the appellant's unwillingness to work with the Ministry to address the challenges inherent in responding to 49 requests during a 28-month period.

[70] The appellant did not make representations explicitly related to "bad faith." However, he did identify the purpose of his requests as follows;

> My goal in filing these requests is to shed light on the government's oversight of offsite nuclear emergency plans. The provincial government, which also owns the province's nuclear stations, is responsible for ensuring Ontarians are adequately protected in the event of a nuclear accident.
>
> Following the Fukushima disaster, however, Ontario took no (publicly reported) actions to assess the adequacy of Ontario's offsite nuclear emergency plans. [The appellant] is very concerned that [the] province's nuclear emergency plans are inadequate. … Nuclear emergency planning is of significant public interest.

[71] On my review of the circumstances of these appeals, I am not satisfied that the requests resulting in these appeals were made in bad faith. Based on the nature and wording of the requests, I find that the requests made by the appellant were made for a genuine purpose. They were not designed to mislead or deceive, nor did they result from a refusal to "fulfil some duty or other contractual obligation." I note that previous decisions have confirmed that "bad faith" is not simply bad judgement or negligence, but rather implies the conscious doing of a wrong because of dishonest purpose or moral obliquity.

[72] There is insufficient evidence before me to suggest that, with respect to the access requests before me, the appellant is acting with some dishonest or illegitimate purpose or goal. Although the timing of the seven additional requests did overlap with the ministry's processing of his earlier requests, I am satisfied that the appellant legitimately seeks access to the information that he has requested, and I am unable to ascribe "furtive design or ill will" on his part. As a result, I find that the ministry has failed to establish that the requests were made by the appellant in bad faith.

**Conclusion**

[73] For the reasons set out above, I find that the appellant's requests are not frivolous and vexatious under the *Act*, and I will order the ministry to issue access decisions in response to them.

## ORDER:

1. I do not uphold the ministry's decision that the appellant's requests in these seven appeals are frivolous or vexatious.

2. I order the ministry to issue access decisions for these seven appeals in accordance with section 26 of the *Act*, treating the date of this order as the date of the requests.

Original signed by
Frank DeVries
Senior Adjudicator

October 5, 2017