

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3667

Appeals MA17-408, MA17-468 and MA17-507

North Bay Hydro Services Inc.

October 5, 2018

**Summary:** The appellant submitted three requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to North Bay Hydro Services Inc. (NBHS) for a variety of records. NBHS issued decisions on all three requests taking the position that they are frivolous or vexatious as described in section 4(1)(b) of the *Act* and section 5.1 of Regulation 823 made under the *Act*. In this order, the adjudicator finds that the NBHS has not established, on reasonable grounds, that the requests at issue are frivolous or vexatious. She orders NBHS to issue access decisions.

**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), and section 5.1 of Regulation 823.

**Orders Considered:** Orders M-850, M-859, M-864, M-906, MO-1488, P-1534.

### OVERVIEW:

[1] This order considers three appeals involving the same appellant and *North Bay Hydro Services Inc.* (NBHS). The appellant filed three requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

Any and all agreements covering the co-generation facility located at [a particular hospital] including but not limited to the funding, construction,

ownership and operation of the facility. Electronic records are preferred. [Appeal MA17-408]<sup>1</sup>

Electronic copies of the financial statements for NBHS for the years 2013 – 2016. [Appeal MA17-468]

Legal costs incurred by NBHS including the names of legal firms representing NBHS involved in the requests and appeals filed under the *Freedom of Information Act* and identified by the Information and Privacy Commission as Appeals MA13 – 312, MA13 – 344 and MA13 – 344-2 for the period Jan 1, 2013 – June 30, 2017. [Appeal MA17-507]

[2] NBHS issued decisions, denying access on the basis that all three requests are frivolous or vexatious under section 4(1)(b) of the *Act*.

[3] In its decisions, NBHS also stated that if this office determined that the requests were not frivolous or vexatious, NBHS would deny access to the responsive records under the following exemptions:

- sections 10(1), 11(c), (d), (e), 13, 14(1), and/or 15(a) of the *Act* (Appeal MA17-408)
- sections 10(1), 11(a), (c), (d), and 14(1) of the *Act* (Appeal MA17-468)
- sections 10(1), 11(a), (c), (d), and 12 of the *Act* (Appeal MA17-507)

[4] The appellant appealed NBHS's decisions. As mediation did not resolve the appeals, they proceeded to adjudication for an inquiry.

[5] NBHS subsequently requested that this office address the frivolous or vexatious issue first, and if necessary, subsequently deal with the exemption claims. The adjudicator originally assigned to the appeals agreed to do so. Accordingly, he invited representations from the parties only on the issue of whether the appellant's requests are frivolous or vexatious under section 4(1)(b) of the *Act*.

[6] The adjudicator sought representations from both parties, seeking and receiving representations from NBHS initially, and then from the appellant. The parties' initial representations were shared with each other in accordance with this office's sharing practices set out in the *Code of Procedure*. The adjudicator determined that it was not necessary for NBHS's reply representations to be shared with the appellant.

[7] The appeals were then transferred to me to continue the adjudication of whether the appellant's requests are frivolous or vexatious under section 4(1)(b) of the *Act*.

[8] In this order, I find that NBHS has not established that any of the requests are

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<sup>1</sup> The numbers in square brackets relate to the appeal numbers assigned by this office to each of the three requests.

frivolous or vexatious. I order NBHS to issue access decisions for each of them.

## **DISCUSSION:**

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

[9] The sole issue to be determined in these appeals are whether the appellant's requests for access are frivolous or vexatious.

[10] Section 4(1)(b) 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.

[11] Section 5.1 of Regulation 823, made under the *Act* elaborates on the meaning of the phrase frivolous or vexatious:

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.

[12] Section 4(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. As this discretionary power can have serious implications on the ability of a requester to obtain information under the *Act*, it should not be exercised lightly.<sup>2</sup> An institution has the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.<sup>3</sup>

### ***Grounds for a frivolous or vexatious claim***

[13] NBHS takes the position that the appellant's requests are frivolous or vexatious for all four of the reasons that a request can be deemed as such described in section 5.1 of Regulation 823. Specifically, under paragraph (a) of section 5.1 of Regulation

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<sup>2</sup> Order M-850.

<sup>3</sup> Order M-850.

823, NBHS submits the requests are part of a pattern of conduct that amounts to an abuse of the right of access, and also that they are part of a pattern of conduct that would interfere with its operations. Under paragraph (b) of section 5.1 of Regulation 823, NBHS submits the requests were made in bad faith and also for a purpose other than to obtain access. For the reasons that follow, I disagree with NBHS and find that it has not established on reasonable grounds that the requests are frivolous or vexatious under section 4(1)(b) of the *Act*.

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

[14] 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. Previous orders of this office have explored the meaning of both elements of this phrase.

Pattern of conduct

[15] I must first determine whether NBHS has established that a pattern of conduct exists in the context of the three requests before me.

[16] In Order M-859, former Assistant Commissioner Tom Mitchinson commented on the meaning of the term 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).

[17] NBHS submits that the requests made by the appellant satisfy the pattern of conduct requirement because the three requests at issue, coupled with two of the appellant's prior requests, constitute recurring incidents of related or similar requests. The appellant submits that five requests in four years is insufficient to establish a pattern of conduct as contemplated by section 5.1(a) of Regulation 823.

[18] In establishing a pattern of conduct, previous orders have looked at the number of requests, the time over which they were submitted and their content. For example, patterns of conduct have been established in cases where a requester filed 15 similar and detailed requests over 18 months, the first seven having been submitted at two-week intervals;<sup>4</sup> 23 related and similar requests (some of which were identically worded) filed over a 21-month period;<sup>5</sup> and 14 requests over an 11 month period, some of which were duplications of numerous previous requests submitted by the requester.<sup>6</sup> Conversely, in Order MO-1477, former Assistant Commissioner Mitchinson found that six requests over a 12-month period is not, in itself, sufficient to establish a pattern of conduct.

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<sup>4</sup> Order M-864.

<sup>5</sup> Order PO-1872.

<sup>6</sup> Order M-947.

[19] In the appeals before me, over the course of three months the appellant submitted three separate requests to NBHS for access to distinct types of information. Taking into consideration the facts before me and the prior orders mentioned above, in my view, neither the number nor timing of these three requests can reasonably be described as a pattern of conduct. Even if I consider that the appellant previously submitted two other requests to NBHS, several years prior, I do not accept that five requests over the course of four years constitute reasonable grounds to conclude a pattern of conduct.

[20] NBHS also submits that the appellant's requests for intervenor status in cost of service applications with the Ontario Energy Board in both 2010 and 2015, by its related company, constitute recurring incidents with which the appellant is connected in a material way. The appellant argues that his intervenor status in the applications is a "non-issue in this appeal."

[21] In addition to the number and timing of the requests, other orders have considered whether various types of behaviour or activities on the part of requesters, alone, or in conjunction with the number of requests, amount to a pattern of conduct. In Order M-906, Adjudicator John Higgins found that various actions taken by the appellant outside of the freedom of information access scheme such as complaints and litigation "are not part of a 'pattern of conduct' as defined in Order M-850 because they are unrelated to access under the Act and are not 'recurring incidents of related or similar requests.'" Similarly, in Order P-1534 former Assistant Commissioner Mitchinson determined that a distinction must be made between formal requests for access under the *Act* and contact between the requester and an institution outside of the *Act*.

[22] In keeping with Orders M-906 and P-1534, I do not accept that the appellant's involvement in a process or processes that are completely separate from the access to information scheme set out under the *Act* (whether or not those processes involve the NBHS itself or organizations that are related to the NBHS) is relevant to a determination under the *Act* of whether the requests before me exhibit a pattern of conduct, as set out in section 5.1(a) of Regulation 823.

[23] I am not satisfied that the evidence supplied by NBHS has established, on reasonable grounds, that a pattern of conduct, as contemplated by section 5.1(a) of Regulation 823, exists with respect to the three requests submitted by the appellant. However, even if a pattern of conduct could be said to exist, for the reasons that follow, I do not accept that NBHS has established that in the circumstances of these requests, such pattern amounts to an abuse of the right of access.

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

[24] NBHS takes the position that the appellant's conduct amounts to an abuse of the right of access as required by the first part of section 5.1(a) of Regulation 823. Prior orders have determined that to establish that a particular pattern of conduct amounts

to an abuse of the right of access, a number of factors should be considered.<sup>7</sup> In the circumstances of this appeal, I will be considering the number, the timing, the nature and scope, as well as the purpose and intent of the appellant's requests.

### **Number and timing**

[25] With respect to the number and timing of the requests, for similar reasons as those outlined above in my discussion of whether a pattern of conduct was established, I do not accept that three requests over the course of three months, or even five requests over the course of five years, can, based on the number and timing alone, reasonably be considered to be an abuse of the right of access. Therefore, I must consider whether other factors contribute to a finding of such abuse.

### **Nature and scope**

[26] NBHS submits that an abuse of the right of access is evident from the nature and scope of the appellant's requests. Specifically, it submits that the request in Appeal MA17-408 is "excessively broad"; the request in Appeal MA17-468 is a "repetitive request"; and the request in Appeal MA17-507 is an "unusually detailed request."

[27] The appellant disagrees that his request in Appeal MA17-408 is excessively broad as he submits he is asking "for the primary financial details of ownership and operation of the Hospital co-generation plant." He submits that his request in Appeal MA17-468 is not repetitive as it seeks access to financial statements for those years subsequent to the ones requested in an earlier request that resulted in Appeal MA13-344-2. He submits that requests for financial statements of different years are not similar or duplicate requests. With respect to his request in Appeal MA17-507, he submits that it "is not detailed and merely involves supplying the amounts charged by lawyers for their services related to NBHS and their claims for various denial of request exemptions."

[28] Considering the nature and scope of the three requests before me, I note that in each of them, the appellant seeks access to distinct types of information. For Appeal MA17-408 he seeks access to agreements; for Appeal MA17-468 he seeks access to financial statements; and for Appeal MA17-507 he seeks access to information relating to legal costs incurred as a result of freedom of information requests. From my review, I find there is no duplication or overlap among them.

[29] NBHS argues that the request in Appeal MA17-468 "is a repetitive request that revisits a similar request the appellant submitted in 2013 for financial statements for years ending 2009-2011." That previous request, which gave rise to Appeal MA13-344-2, is indeed a request for financial statements but for years preceding those identified in the request in Appeal MA17-468. In my view, it is disingenuous of NBHS to suggest that a requester is only entitled to make a single request for financial statements of specified years without being deemed to be frivolous or vexatious, particularly when such documents are generated on a continual basis. I do not accept that a previous request for financial statements generated in different years than those sought by the request

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<sup>7</sup> Order M-850.

at issue provides reasonable grounds to establish that the appellant is engaging in a pattern of conduct that amounts to an abuse of the right of access.

[30] I also disagree that the request in Appeal MA17-408 for “[a]ny and all agreements covering the co-generation facility located at [a particular hospital] including but not limited to the funding, construction, ownership and operation of the facility” is “excessively broad” as submitted by NBHS. Under section 1(a) of the *Act*, the public has a right of access to information under the control of institutions with exemptions from this right being limited and specific. From my review of the appellant’s request in Appeal MA17-408, it is clear that he is seeking access to agreements relating to a specific and identified facility. While such a request may generate many records, in my view, it is not unreasonable to request access to such information under the *Act*. Also, the fact that a request may generate a lot of responsive records does not negate the appellant’s right of access and, on its own, does not amount to reasonable grounds upon which to conclude a pattern of conduct that amounts to an abuse of the right of access.

[31] In my view, the request in Appeal MA17-507, which is for legal fees incurred by NBHS with respect to dealing with three identified freedom of information appeals generated over an identified period of time, cannot be described as an “unusually detailed request.” This request is for a specific type of information (legal fees), for three specific freedom of information files, for a specific period. In my view, the amount of detail provided should be helpful in the processing of the request so that NBHS can target its search and locate the responsive records. I do not accept that the way the appellant has detailed the information to which he seeks access establishes, on reasonable grounds, that it can be considered to be part of a pattern of conduct that amounts to an abuse of the right of access. Additionally, if by describing the request as “excessively detailed” NBHS is suggesting it would generate a significant number of responsive records, as discussed above with respect to the request in Appeal MA17-408, the very fact that a request might produce a large number of responsive records does not negate the appellant’s right of access to the information he is entitled to under the *Act*, nor can it reasonably be said to consist, on its own, to be reasonable grounds upon which to establish a pattern of conduct that amounts to an abuse of the right of access.

### **Purpose and intent**

[32] Addressing the purpose of the appellant’s requests, NBHS submits that in the current appeals, “the clear inference that may be drawn [is] that the [appellant’s] requests have been submitted for no other purpose than their nuisance value, and they are made without reasonable or legitimate grounds.” It submits:

Although the [appellant] has continued to maintain that he is acting in the public interest as Treasurer for [a local association], he has single-mindedly pursued a campaign against only on [sic] North Bay Hydro and its related companies, and sometimes as a corollary target, the City.

[33] To support its position, NBHS references an attached affidavit of its president and Chief Operating Officer (COO) who explains that the appellant has a long history of approaching the North Bay Chamber of Commerce, various city councillors, and of appearing before City Council of North Bay to launch attacks against the city's hydro companies and its staff. NBHS's president and COO also indicates that the appellant submits letters to the editor in various local newspapers making serious allegations against NBHS (for example, misrepresenting facts and concealing money) with an aim to discredit its employees as well as those of North Bay hydro companies.

[34] NBHS further submits that the appellant is engaging in a "campaign of misinformation" and his "plain intent" in filing these request is to "harass, interfere with, and burden the city's hydro companies and the people who run and work at these companies."

[35] The appellant submits that NBHS has failed to establish that his requests have been submitted for the purpose of their nuisance value and that they are without reasonable or legitimate grounds. He submits that there has been no evidence supplied to indicate that he has any improper objective or collateral intention to use the information in an illegitimate manner. The appellant also states that NBHS's representations alleging his intent to harass, interfere with, and burden the city's hydro companies are subjective and unsupported by evidence.

[36] The appellant also disputes NBHS's allegations that he has launched attacks against the city's hydro companies and staff and the various forums identified in its representations, and points to the content of several of the letters to the editor that were supplied by NBHS in its representations to demonstrate that they contain no accusatory or inflammatory language.

[37] In reply, NBHS states that the appellant either simply denies that there is any truth to NBHS's initial representations without further explanation or simply asserts that an alternate set of facts is true. It submits that in either case, the appellant fails to provide any evidentiary basis or corroborating evidence in support of his positions.

[38] Past orders of this office have recognised that the conduct of requesters often gives a much more accurate picture of their purpose than do their words. Consequently, as is suggested by Order M-864, adjudicators have relied on evidence of the requester's use of the freedom of information process to accomplish objectives unrelated to access in order to conclude that they have abused the right of access.<sup>8</sup>

[39] In the circumstances of this request, I find that I have insufficient evidence to support a conclusion that the appellant's purpose in filing the three requests at issue in this order was to accomplish an objective unrelated to access. Although it is clear that the appellant is engaged in proceedings in which NBHS and its related companies are also involved, and he is engaged in how NBHS conducts its business, I note that previous orders of this office have found that the abuse of the right of access described

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<sup>8</sup> Orders M-947 and MO-1519.



in section 5.1(a) of Regulation 823 refers only to the access process under the *Act*, and is not intended to include proceedings in other forums.<sup>9</sup> Additionally, although the appellant clearly has a particular interest in the business of NBHS and its related companies, I do not accept that they are relevant to a determination of whether his requests are frivolous or vexatious under the *Act*, including whether they are part of a pattern of conduct that amounts to an abuse of process.

[40] Although in reply, NBHS states the appellant has failed to provide any evidentiary basis or corroborating evidence in support of his position that the purpose or intent of his requests is to obtain access to the information, NBHS is reminded that it bears the burden of proof in this respect. In my view, NBHS has failed to discharge its burden as it has not provided sufficient evidence to establish, on reasonable grounds, that the appellant does not actually seek access to the information responsive to the requests.

[41] I acknowledge that there has been some tension in the interactions between the appellant and the NBHS. However, I do not find that I have sufficient evidence before me that supports a conclusion that the appellant has no interest in the information that he seeks through the freedom of information access scheme or that he has filed the requests for the purpose and intent of harassing NBHS. From my review of the requests, they are clear, well detailed and appear to target specific types of information about specific subject matters. I accept that the appellant, who appears to be highly engaged in how NBHS conducts its business, would have a legitimate purpose and intent to seek access to this type of information. Therefore, I am not of the view that his requests are for a purpose or intent that amount to an abuse of the right of access. Based on the evidence before me, I accept that the purpose and intent of the appellant's requests are reasonable and that he is legitimately exercising his right of access to information held by a public institution as set out in section 4(1) of the *Act*.

### **Summary**

[42] Having considered the number and timing of the three requests at issue, their nature and scope and the appellant's purpose and intent in filing them, I am not satisfied that NBHS has provided sufficient evidence to demonstrate there exist reasonable grounds to conclude that they are part of a pattern of conduct that amounts to an abuse of the right of access as contemplated by section 5.1(a) of Regulation 823. Accordingly, I find that NBHS cannot claim that the requests are frivolous or vexatious under section 4(1)(b) of the *Act* on this basis.

Section 5.1(a) – Pattern of conduct that would interfere with the operations of the institution

[43] As set out above, the second part of section 5.1(a) of Regulation 823 provides that a request is frivolous or vexatious if it is part of a pattern of conduct that would interfere with the operations of the institution.

[44] For the same reasons as those stated above, I do not accept that the three

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<sup>9</sup> Orders M-906, M-1066, M-1071 and P-1534.

requests at issue before me exhibit a pattern of conduct as that phrase has been interpreted by this office. However, again, in the event that a pattern of conduct were established, I will consider whether such pattern of conduct could be said to interfere with the operations of the institution. In the circumstances before me, I do not accept that NBHS has provided sufficient evidence to establish, on reasonable grounds, that it would.

[45] 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.<sup>10</sup> 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.<sup>11</sup>

[46] NBHS submits that it is a small company incorporated under the *Ontario Business Corporations Act* based in the municipality of North Bay. It submits that it has seven employees and that it has insufficient resources to have a dedicated staff or department to deal with freedom of information requests. NBHS submits that the requests at issue were primarily dealt with by its president and COO, along with its finance manager, which means that valuable resources are diverted away from the required day-to-day operations of NBHS. It submits that the three requests were all received within a three-month period in 2017 and as it did not have the staff to handle them, it was required to retain legal counsel to assist which has resulted in an increased financial burden.

[47] NBHS submits that even if the requests may not appear to be a significant burden, the time required in order to respond to them, search for the responsive records, notify the affected third parties, liaise and consult with legal counsel, engage in mediation discussions, draft representations and potentially reply representations, coupled with limited staff, has resulted in a major interference with the operations of NBHS.

[48] NBHS further submits that the relief measures provided in the *Act*, such as the provisions allowing for an extension of time to respond to a requester and the provisions permitting the charging of fees for searching and preparing records, are not sufficient to cover the actual time and resources that are diverted away from running the company.

[49] NBHS also submits that I must not only consider the impact of these three requests within the scope of the *Act* and the framework of freedom of information, but that I must also take into account the other means by which the appellant interferes with its operations. It explains that the numerous newspaper submissions made by the requester are designed to attack and discredit its staff which contributes to its diminished public confidence and negatively impacts its public image thereby interfering

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<sup>10</sup> Order M-850.

<sup>11</sup> Order M-850.

with its operations. It submits that this is the appellant's true intent.

[50] The appellant submits no evidence has been offered to support a conclusion that a pattern of conduct exists that would interfere with NBHS's operations, and that the requests are not onerous enough to do so. He submits the resources required to deal with his requests are minimal, as the requests are for records under the control of NBHS that should be easily obtainable from their records holdings. He submits the time to engage in mediation and to draft representations is a direct result of NBHS's own decision to claim exemptions to deny access to the responsive records on the grounds that they are frivolous or vexatious.

[51] The appellant also refutes NBHS's allegations that his newspaper submissions are interfering with operations by negatively impacting its public image. He submits that a review of this newspaper submission submitted by NBHS with its representations supports his position that no newspaper submissions have ever been made regarding NBHS; his submissions have related to one of NBHS's related companies.

[52] Previous orders have established that for "interference" to be found, an institution must, at minimum, provide evidence that responding to a request would "obstruct or hinder the range of effectiveness of the institution's activities."<sup>12</sup> However, in Order MO-1488, Adjudicator Laurel Cropley found where 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. While institutions are not obligated to retain more staff than is required to meet its operational requirements, she stated that an institution must allocate sufficient resources to meet its freedom of information obligations. In that order she also stated:

In my view, rather than shifting the responsibility onto appellants, the city should perhaps look to its own resources and consider whether they are sufficient to meet the needs of an institution of its size.

[53] Adjudicator Cropley's reasoning is relevant and applicable to the circumstances before me. Taking it into consideration, I find that NBHS cannot reasonably rely on interference with its operations as a ground for finding that the requests at issue are frivolous or vexatious under section 4(1)(d) for the following reasons.

[54] I have considered the three requests and have found that their number, timing, nature, scope and purpose and intent do not amount to an abuse of the right to access. In my view, given a requester's right of access to information under section 4(a) of the *Act*, they are not unreasonable requests to be made of an institution

[55] I acknowledge that NBHS has a small staff and takes the position that it cannot handle the processing of these three requests. However, I note that NBHS also argues that the relief provided by the *Act* such as cost recovery mechanisms and time extensions would not permit it to mitigate or avoid such interference. It does not

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<sup>12</sup> Order M-850.

elaborate further in this respect. NBHS's submissions on this point suggest that it is of the view that as it has insufficient resources to process the requests, it is entitled to deny the appellant his right of access under section 4(1) of the *Act*. I do not accept that an institution can evade its legal obligations under the *Act* on the basis that it is insufficiently staffed to do so.

[56] Previous orders have established that denying a requester his right of access under the *Act* is a serious matter and that the interference complained of must not be of a nature for which the *Act* or the jurisprudence provides relief.<sup>13</sup> In the circumstances of this appeal, I do not accept that I have been provided with sufficient evidence to support a conclusion that this is the case, and therefore, I do not accept that in submitting these three requests the appellant has engaged in a pattern of conduct that can reasonably be said to interfere with NBHS's operations.

[57] NBHS also submitted that I must not only consider the impact of the requests within the scope of the *Act* and the framework of freedom of information, but I must also take into account the other means by which the appellant interferes with its operations. Again, I follow the aforementioned orders of this office to conclude that section 5.1(a) of Regulation 823 refers only to the access process under the *Act*. In keeping with these orders, I do not accept that the appellant's interactions with NBHS (or any of its related companies) outside of the scope of the *Act* are to be taken into consideration when determining whether the requests at issue exhibit a pattern of conduct that would interfere with the operations of NBHS.

[58] Additionally, even if I were to take into account the appellant's interactions with the NBHS outside the *Act*, I am not satisfied that I have been provided with sufficient evidence to find that they exhibit a pattern of conduct that would interfere with the operations of NBHS.

### Summary

[59] As I am not satisfied that NBHS has provided sufficient evidence to establish, on reasonable grounds, that any pattern of conduct that might exist would interfere with the operations of the institution, as contemplated by section 5.1(a) of Regulation 823, I find that NBHS cannot claim section 4(1)(b) of the *Act* on this basis.

### *Section 5.1(b) – Request is made in bad faith or for a purpose other than to obtain access*

[60] Section 5.1(b) of Regulation 823 provides that a request is frivolous or vexatious, if the head can establish on reasonable grounds that it is made in bad faith or for a purpose other than to obtain access. There are no further requirements. In both instances, the institution does not need to demonstrate a pattern of conduct.<sup>14</sup>

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<sup>13</sup> Order M-1071

<sup>14</sup> Order M-850.

### Bad faith

[61] NBHS submits that there are reasonable grounds to conclude that the appellant's three requests were made in bad faith. It submits that the appellant has:

...single-mindedly pursued a vendetta against the city and its hydro companies since the early 2000's, including appearing before council, submitting letters to the editor, making accusatory remarks and attacks on NBHS, its related companies and the character and integrity of its staff, including sending individual harassing emails which have called their integrity into question without merit, fuelling his "campaign of misinformation."

[62] NBHS submits that the requests have been intentionally submitted for the purpose of pressuring or harassing the city's hydro companies and that this office is "not a means of broadcasting one's grievances against an institution or a municipality and its individual staff."

[63] In response, the appellant again submits that NBHS has inappropriately characterized his emails as accusatory remarks and attacks on NBHS. He attached examples of such emails to his representations. He also disputes that they call into question the integrity of staff and fuel a campaign of misinformation as alleged by NBHS.

[64] Having considered the representations of the parties and the requests at issue in these appeals, I do not accept that there is sufficient evidence before me to establish that the appellant submitted any of the three requests before me in bad faith.

[65] In Order M-850, former Assistant Commissioner Mitchinson commented on the meaning of the term bad faith. He indicated that bad faith is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of a dishonest purpose or moral underhandedness. He went on to conclude that it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with secret design or ill will. Additionally, in Interim Order MO-1168-I Adjudicator Cropley stated that in determining whether a request was made in bad faith, "[t]he question to ask is whether the appellant had some illegitimate objective in seeking access under the *Act*."

[66] Although I understand that NBHS takes the position the appellant has a vendetta against it, in my view, it has not established that the appellant is seeking this particular information because of a dishonest purpose or as a result of moral underhandedness. I also do not accept that he has an illegitimate objective in seeking access to the information. The appellant clearly has some questions with respect to how NBHS conducts its business and seeks access to certain records that it holds. In my view, this is a legitimate reason to seek access to information held by an institution under the *Act*.

[67] Additionally, there is nothing in the *Act* which delineates what a requester can

and cannot do with information once access has been granted;<sup>15</sup> it is the exemptions therein that were established to protect information that the legislature deemed could be withheld from the public. Previous orders have made it clear that the fact that an appellant may choose to use information disclosed to him under the *Act* in a manner that is disadvantageous to the institution does not mean that its reasons in using the access scheme were not legitimate.<sup>16</sup> Additionally, other orders have similarly concluded that once it is determined that the request was made for the purpose of obtaining access (or for legitimate reasons), this purpose is not contradicted by the possibility that the appellant may also intend to use the documents against the institution or to make the records public once access is granted.<sup>17</sup>

[68] Based on the evidence before me, I conclude that all three of the appellant's requests were made for legitimate reasons, specifically, for the purpose of obtaining access to the requested information. In keeping with prior orders of this office, I do not accept that the fact that the appellant may use the information that he is entitled to have disclosed to him under the *Act* to call into question actions of the NBHS or its staff is indicative that they were submitted in bad faith. I also do not accept the fact that the appellant has previously called NBHS's actions into question indicates that the requests were submitted in bad faith.

[69] In my view, NBHS has not established, on reasonable grounds, that the appellant's three requests were made in bad faith as contemplated by section 5.1(b) of Regulation 823. Accordingly, I find that it cannot claim section 4(1)(d) of the *Act* on this basis.

#### Purpose other than to obtain access

[70] 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.<sup>18</sup> However, 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.<sup>19</sup>

[71] NBHS acknowledges that previous decisions have held that requesters are permitted to seek information for the purposes of publicizing what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.<sup>20</sup> However, it submits that the appellant has taken his campaign against the city and its hydro companies one step further and has not only made it his sole mission to publicize what he believes to be inappropriate or problematic but has spread half-truths and misinformation, has named and contacted individual staff directly, as well as harassed them with inappropriate remarks.

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<sup>15</sup> Order M-1154.

<sup>16</sup> Orders M-864, MO-1168-I, MO-1472-F.

<sup>17</sup> Orders MO-1269 and P-1534.

<sup>18</sup> Order M-850.

<sup>19</sup> Orders MO-1168-I and MO-2390.

<sup>20</sup> Order MO-1924

[72] The appellant disputes the allegation that his underlying purpose in filing the requests that are at issue is to harm NBHS or to interfere with its operations. He submits that his requests draw no public attention and that they were filed for the purpose of shedding light on the operations of NBHS. He submits that there is presently no publically available financial information about NBHS, and neither the public nor the media are allowed to attend NBHS meetings. He submits that the only way this information can be obtained is under the *Act* and indicates that if NBHS suggested another method of obtaining the information he seeks he would be happy to consider it.

[73] I do not accept that NBHS has established, on reasonable grounds, that the requests at issue were made for a purpose other than to obtain access under section 5.1(b) of Regulation 823. I do not accept that it has provided sufficient evidence to meet this threshold.

[74] In Order MO-1924, former Senior Adjudicator Higgins provided extensive comments on when a request may be found to have a purpose other than to obtain access. Commenting on the institution's argument that the objective of the request was to obtain information for the purpose of litigation, he stated:

This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above and abstract desire to obtain information. Clearly, such purposes are permissible. Access to information legislation exists to ensure government accountability and to facilitate democracy (see *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC)). This could lead to request for information that would assist a journalist in writing an article or a student in writing an essay. The *Act* itself, by providing a right of access to one's own personal information (section 36(1)) and a right to request correction of inaccuracy is a legitimate purpose. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.

To find that these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have a "right of access to information about themselves." In order to qualify as a "purpose other than to obtain access," in my view, the request would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

[75] I adopt the approach set out by former Senior Adjudicator Higgins in Order MO-1924 for the purposes of this appeal.

[76] In the circumstances before me, I am not satisfied that NBHS has established, on reasonable grounds, that the appellant has an improper objective above and beyond

a collateral intention to use the information in some legitimate manner or that the appellant's request was made for a purpose other than to obtain access.

[77] I accept, on the evidence before me, that the appellant has a legitimate and genuine interest in the information at issue, even if it is to assist him in a dispute with NBHS or its affiliated companies or to publicize what he considers to be inappropriate or problematic decisions that it undertakes in conducting its business. Again, I acknowledge that the appellant's interactions with the NBHS have been persistent and continued but this does not alter my view that he has filed the requests for the legitimate purpose of obtaining access to the requested records.

[78] I find that NBHS has not established, on reasonable grounds, that the requests are frivolous or vexatious because they were made for a purpose other than to obtain access as contemplated by section 5.1(b) of Regulation 823. Therefore, I find that NBHS cannot deny access to the requested information under section 4(1)(b) of the *Act* on this basis.

### **Conclusion**

[79] The tests under section 5.1 of Regulation 823 set thresholds that must be met to establish that a request is frivolous or vexatious. In my view, as set out in my reasoning above, in the circumstances of these appeals, none of those thresholds have been met. Based on the evidence before me, I find that NBHS has not established on reasonable grounds that the requests before me are frivolous or vexatious as that phrase has been defined in section 5.1 of Regulation 823. Accordingly, I find that they are not entitled to deny access to the responsive records under section 4(1)(b) of the *Act* on the basis that the requests are frivolous or vexatious.

### **Next steps**

[80] I note that in its decision letters, NBHS claimed exemptions in the alternative if it was determined that the requests were not found to be frivolous or vexatious. However, during the mediation of these appeals, the responsive records were not provided to this office, and during adjudication it was determined that the threshold issue of whether the requests are frivolous or vexatious was to be resolved initially. Accordingly, the application of the exemptions to any records that are responsive to the requests was not addressed in these appeals.

[81] I have found that NBHS has not established that the requests are frivolous or vexatious. Despite the fact that in its decisions, denying access on the grounds that the requests were frivolous or vexatious, it also identified exemptions that it would claim if its decision was not upheld, I will order NBHS to issue new decision letters on each of the three requests to the appellant. NBHS should identify all responsive records and any exemptions that it claims for them.

[82] Once the appellant receives and reviews the decision letters, including any responsive records or portions of responsive records that are to be disclosed to him, if



the appellant wishes to appeal any or all of those decisions, he may do so pursuant to section 39 of the *Act*. This office will open new files, but as they stem from the same appeals addressed in this order, new appeal fees under section 39(1.1) will not be charged.

**ORDER:**

I do not uphold NBHS's decision that the requests are frivolous or vexatious and order it to issue decisions for each of the three requests in accordance with the *Act*, without recourse to a time extension. For the purposes of section 19, 22 and 23 of the *Act*, the date of this order shall be deemed to be the date of the request.

Original Signed by: \_\_\_\_\_  
Catherine Corban  
Adjudicator

\_\_\_\_\_ October 5, 2018