

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3205-I

Appeal MA14-94

Brantford Hydro Inc.

June 5, 2015

Summary: Brantford Hydro Inc. (BHI) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* for access to its Board of Directors' meeting minutes for the years 2010 to 2013. BHI located 33 sets of minutes and denied access to them pursuant to sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 10(1) (third party information), 11 (economic or other interests), and 12 (solicitor-client privilege).

This order upholds the sections 10(1) and 12 exemptions and does not uphold the section 6(1)(b) exemption. This order also partially upholds the sections 7(1) and 11 exemptions. BHI was ordered to re-exercise its discretion concerning the information subject to the discretionary exemptions. This order also determines that the attachments to the meeting minutes fall within the scope of the request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 7(1), 7(2)(a), 10(1), 11(a) and (c), 12, 17; *Electricity Act, 1998*, section 142.

Orders and Investigation Reports Considered: Order MO-2088.

OVERVIEW:

[1] Brantford Hydro Inc. (BHI) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) for access to its Board of Directors' meeting minutes for the years 2010 to 2013.

[2] BHI located 33 sets of minutes responsive to the request and issued a decision to the requester to deny access to them pursuant to the discretionary closed meeting exemption at section 6(1)(b) of the *Act*. In addition, it advised the requester of the following:

Brantford Hydro Inc. is a private corporation established under Section 142(1) of the *Electricity Act, 1998* [the *EA*]. Meetings of the Brantford Hydro Inc. Board of Directors are held in accordance with the provisions of the *Business Corporations Act*, R.S.O 1990, Chapter B16. There are no requirements under that *Act* to hold these meeting in the presence of the public.

[3] The requester (now the appellant) filed an appeal of BHI's decision.

[4] During the course of mediation, BHI issued a revised decision to the appellant advising that in addition to section 6(1)(b) of the *Act*, it was relying on sections 7(1) (advice or recommendations), 10(1) (third party information), 11 (economic or other interests), 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act* to deny access to portions of the responsive records. In subsequent discussions with the mediator, BHI confirmed that it was also denying access to a portion of Record 27 because it was not responsive to the request.

[5] The appellant advised the mediator that he was not pursuing access to the information denied pursuant to section 14(1) of the *Act*. As a result, this section and portions of Records 5, 7, 17, 18, 31 and 33 are no longer at issue in this appeal. The appellant also confirmed he was not pursuing access to the one portion of Record 27 denied as not responsive to the request and as such, this information is no longer at issue in the appeal. However, the appellant confirmed that he wished to pursue access to the remaining information in the meeting minutes, including any attachments to those minutes.

[6] In response, BHI advised the mediator that it takes the position that attachments to the meeting minutes fall outside the scope of the request and suggested that the appellant submit a new request if he is interested in pursuing access to them.

[7] As no further mediation was possible, this file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, seeking the representations of BHI. BHI provided representations.¹

[8] I also sought the representations of an affected party on the application of the mandatory third party exemption in section 10(1) to Record 11. The affected party responded, objecting to the disclosure of its information, as it was concerned about the confidentiality of its own and its customers' information.

[9] I then sent a Notice of Inquiry to the appellant, along with a copy of BHI's representations. The appellant provided representations in response. These representations were then sent to BHI, which provided representations in reply.

[10] In this order, I uphold the sections 10(1) and 12 exemptions and do not uphold the section 6(1)(b) exemption. I also partially uphold the sections 7(1) and 11 exemptions and I order BHI to re-exercise its discretion concerning the information subject to these discretionary exemptions. I also determine that the attachments to the meeting minutes fall within the scope of the request.

RECORDS:

[11] The records remaining at issue consist of 33 meeting minutes. BHI has withheld them in full and has claimed the application of section 6(1)(b) to them. It has also applied sections 7(1) and 11(a) and (c) and 12 to portions of the minutes, and section 10(1) to one portion of Record 11.

[12] BHI has also claimed that the attachments to the minutes are not responsive to the request.

ISSUES:

- A. Does the discretionary closed meeting exemption at section 6(1)(b) apply to the records?
- B. Does the discretionary advice or recommendations exemption at section 7(1) apply to Records 1-3, 6-8, 10-12, 14-16, 18-21, 28, 29 and 33?
- C. Does the mandatory third party exemption at section 10(1) apply to Record 11?

¹ As BHI did not provide representations on the applicability of section 11(e) to the records, nor did it identify this exemption on any of the records, section 11(e) is no longer at issue in this appeal.

- D. Does the discretionary economic and other interests exemptions at sections 11(a) and 11(c) apply to Records 1-5, 8-15, 18, 20-24 and 26-33 and apply to Records 1-7, 9, 11, 14, 19, 21-25 and 28-33 respectively?
- E. Does the discretionary solicitor-client privilege exemption at section 12 apply to Record 17?
- F. Did the institution exercise its discretion under sections 7(1), 11 and 12? If so, should this office uphold the exercise of discretion?
- G. What is the scope of the request? Are the attachments to the meeting minutes responsive to the request?

DISCUSSION:

A. Does the discretionary closed meeting exemption at section 6(1)(b) apply to the records?

[13] Section 6(1)(b) reads:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[14] For this exemption to apply, the institution must establish that:

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting²

[15] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;³ and

² Orders M-64, M-102 and MO-1248.

- “substance” generally means more than just the subject of the meeting.⁴

[16] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.⁵

[17] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.⁶

[18] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, was the purpose of the meeting to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting?⁷

[19] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution’s *in camera* meeting, not merely the subject of the deliberations.⁸

[20] BHI was asked as part of its representations on this exemption to provide answers to the following questions.

1. Did a council, board, commission or other body, or a committee of one of them, hold a meeting? If so, was the meeting held in the absence of the public? Please explain.
2. What is the statute and specific section that authorizes the holding of the meeting in the absence of the public? Was there a resolution closing the meeting to the public? Please explain, and provide a copy of the section and/or resolution.

³ Order M-184.

⁴ Orders M-703 and MO-1344.

⁵ Order MO-1344.

⁶ Order M-102.

⁷ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

⁸ Orders MO-1344, MO-2389 and MO-2499-I.

3. Has a procedural by-law been passed under section 238(b) of the *Municipal Act* or any applicable analogous provision? Does the by-law include requirements for closed meetings? Please describe any such requirements and provide a copy of the by-law. Do these requirements pertain to the type of closed meeting that occurred in this case?
4. Were all required conditions for holding a closed meeting met? Were all required notices for holding a closed meeting provided to those entitled to notice? Please explain, and provide any relevant documentation.
5. Was a vote taken at the closed meeting? Was the vote authorized to be held at a closed meeting? If so, on what authority was the vote taken?
6. How would disclosure of the record reveal the actual substance of the deliberations at the meeting, and not merely the subject of the deliberations? Please explain, and provide evidence in support of your position.
7. Would the disclosure of any part of the record reveal the actual substance of the deliberations that took place at the closed meeting? If so, could any part of the record be disclosed?⁹

[21] BHI states that it has claimed this exemption for all of the records, which are minutes that record the meetings of its Board of Directors. It explains that BHI is a corporation established by the City of Brantford, a municipal corporation, under subsection 142(1) of the *Electricity Act, 1998*, (the *EA*) which permits a municipal corporation to incorporate under the *Business Corporations Act, 1990*, for the purpose of generating, transmitting, distributing or retailing electricity. It states that:

Although BHI is subject to the *Act*, the *Electricity Act, 1998*, states that BHI is not a "local board" of the municipality which created it... Therefore BHI is not required to follow the *Municipal Act, 2001*, S.O. 2001 ("Municipal Act, 2001"), and in particular its open meeting requirements in section 239... In addition there are no open-meeting requirements under the *Electricity Act, 1998*, or the *Business Corporations Act, 1990*.

If the legislature intended that the minutes of the meetings of the Board of Directors be public it would have subjected BHI to the open meeting requirements of the *Municipal Act, 2001*. The refusal to classify BHI as a local board is an indication that the legislature intended that municipalities be somewhat shielded from the rules of transparency that they are normally subject to when they incorporate a company and use it solely as a profit generating vehicle and not as a vehicle through which they

⁹ *St. Catharines (City) v. IPCO*, cited above.

provide traditional programs and services associated with their public function.

Although the *Act* applies to BHI, it applies to records other than meeting minutes when those records relate to personal information or breach of privacy, which are the few instances where the activities of BHI can breach the *Act*.

[22] The appellant states that section 6(1)(b) only allows a head to refuse to disclose a record when a statute authorizes holding that meeting in the absence of the public, and that BHI has failed to present any statutory authority that states it is authorized to hold a meeting in the absence of the public. The appellant also states that it is irrelevant whether BHI is a local board since, as a corporation incorporated under section 142 of the *EA*, it is subject to all of the provisions of *MFIPPA*.¹⁰

[23] The appellant states that for the purposes of the exemption in section 6(1)(b), it is clear that BHI met in the absence of the public and that no specific statute has been identified by BHI that authorizes the holding of a meeting in the absence of the public, nor has a procedural by-law been passed under section 238(b) of the *Municipal Act*.

[24] In reply, BHI states that section 142(6) of *EA* authorizes the holding of its meetings in the absence of the public, since that section specifically states that BHI is not a local board for purposes of any act, meaning it is not subject to the open meeting requirements of section 239 of the *Municipal Act, 2001*.

[25] BHI further states that disclosure of the records would reveal the actual substance of the deliberations of the meeting as the records are the minutes of meetings of the Board of Directors, where major decisions are made about the management and operations of BHI. BHI states that it would be inconsistent with the treatment of BHI as "not a local board" under the *EA*, and therefore not subject to the same access and public attendance rules as meetings of City Council. BHI also states that its corporate governance model is such that its Board of Directors functions mostly independently the Brantford Energy Corporation, the holding company, and the City of Brantford.

Analysis/Findings

[26] BHI has claimed the section 6(1)(b) exemption for all of the records, 33 sets of BHI Board of Director minutes, on the basis that all of the records are minutes of closed meetings. However, I note that that are several instances in the records that refer to

¹⁰ The appellant refers to the regulations enacted under *MFIPPA*. Ontario Regulation 372/91 provides that every corporation incorporated under section 142 of the *Electricity Act, 1998* is an institution under *MFIPPA*.

portions of meetings being “moved into *in camera* session”.¹¹ This conflicts with BHI’s position that all of the meetings were closed, in their entirety. Other than stating that it incorrectly applied the *Municipal Act*, BHI has not explained how the section 6(1)(b) closed meeting exemption applies to all of the records when the records indicate that only certain portions of the Board of Director meetings were held in camera.

[27] In contrast to its claim that section 6(1)(b) applies to all of the records, I note that BHI has claimed that section 6(1)(b) of *MFIPPA* does not apply to it as it is not a local board. In support of this argument, it relies on section 142(6) of the *EA* which reads:

A corporation incorporated pursuant to this section shall be deemed not to be a local board, public utilities commission or hydro-electric commission for the purposes of any Act.

[28] However, I note that the following provisions of *MFIPPA* and Regulation 372/91 enacted under *MFIPPA* deems BHI to be an institution under the *MFIPPA* and, therefore, subject to *MFIPPA*.

[29] Section 2(1) of *MFIPPA* provides that an institution” means,

(a) a municipality,

(b) a school board, municipal service board, city board, transit commission, public library board, board of health, police services board, conservation authority, district social services administration board, local services board, planning board, local roads board, police village or joint committee of management or joint board of management established under the *Municipal Act, 2001* or the *City of Toronto Act, 2006* or a predecessor of those Acts,

(c) any agency, board, commission, corporation **or other body designated as an institution in the regulations;**

[30] Regulation 372/91 enacted under *MFIPPA* states:

1. (1) The following bodies are designated as institutions:

1. Belmont Improvement Area Board of Management.
2. Each board established for transitional purposes under section 7 of Ontario Regulation 204/03 (Powers of the

¹¹ For example, page 3 of Record 6, page 1 of Record 21, and page 2 of Record 23.

Minister or a Commission in Implementing a Restructuring Proposal) made under the *Municipal Act, 2001*.

2.1 The Board of Governors of Exhibition Place.

2.2 The Board of Management of the Hummingbird Centre for the Performing Arts.

3. Centre in the Square Inc.

4. Revoked: O. Reg. 48/12, s. 1 (2).

4.1 Every corporation incorporated under section 142 of the *Electricity Act, 1998*.

4.2 The Downtown Improvement Area Board of Management.

4.3 The Hamilton Entertainment and Convention Facilities Inc.

5. Joint committees of management established under the *Community Recreation Centres Act*, all such committees.

6. Kitchener Housing Inc.

6.1 Every local housing corporation incorporated under Part III of the *Social Housing Reform Act, 2000*.

7. Municipal Property Assessment Corporation.

8. Every source protection authority as defined in subsection 2 (1) of the *Clean Water Act, 2006*.

9.-11. Revoked: O. Reg. 343/08, s. 1 (3).

12. Toronto Atmospheric Fund.

[emphasis added by me]

[31] BHI is a corporation enacted under section 142 of the *Electricity Act, 1998*; therefore, it is designated as is an institution under Regulation 372/91 enacted under *MFIPPA*. As an institution under section 2(1)(c) of the definition of this term in *MFIPPA*, BHI is subject to *MFIPPA*'s provisions, including the access provisions and the closed meeting exemption at section 6(1)(b).

[32] Section 6(1)(b) provides that a head of an institution may refuse to disclose a record that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[33] The records are minutes of Board of Directors' meetings of the BHI, an institution under *MFIPPA*. BHI states that its directors supervise the management of the business and affairs of BHI. Therefore, I conclude that BHI's Board of Directors is a board or other body of an institution under section 6(1)(b) and minutes of its meetings are subject to *MFIPPA*.¹²

¹² See Interim Order MO-2683-I.

[34] I will now consider whether the three-part test under section 6(1)(b) has been met.

Part 1 - a council, board, commission or other body, or a committee of one of them, held a meeting

[35] It is clear from the minutes and the representations of the parties that BHI's Board of Directors held meetings. The records are the minutes of these meetings. Therefore, part 1 of the test has been met.

Part 2 - a statute authorizes the holding of the meeting in the absence of the public

[36] BHI has focused its representations on the lack of a statutory requirement to hold open meetings. However, the exemption in section 6(1)(b) is directed to when a closed meeting can be held. I agree with the appellant that BHI has failed to present any statutory authority that states BHI is authorized to hold a meeting in the absence of the public.

[37] The only statutory authority BHI has referred to is section 142(6) of the *EA* that deems BHI not to be a local board. However, BHI is not an institution under *MFIPPA* as a result of being a local board under section 2(1)(b) of the definition of institution. It is an institution under section 2(1)(c) of *MFIPPA* by reason of being a corporation incorporated under section 142 of the *EA*.¹³

[38] The second part of the test for exemption under section 6(1)(b) requires the institution to establish that a meeting was properly held *in camera*. As this part of the test has not been met, the records cannot be exempt under section 6(1)(b).

[39] I will consider whether the records are exempt by reason of the other exemptions claimed by BHI.

B. Does the discretionary advice or recommendations exemption at section 7(1) apply to Records 1-3, 6-8, 10-12, 14-16, 18-21, 28, 29 and 33?

[40] Section 7(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

¹³ See Regulation 372/91 enacted under *MFIPPA*.

[41] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.¹⁴

[42] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[43] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.¹⁵

[44] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[45] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.¹⁶

[46] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.¹⁷

[47] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 7(1).¹⁸

¹⁴ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

¹⁵ See above at paras. 26 and 47.

¹⁶ Order P-1054

¹⁷ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

¹⁸ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

[48] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information¹⁹
- a supervisor's direction to staff on how to conduct an investigation²⁰
- information prepared for public dissemination²¹

[49] BHI states the meeting minutes contain items called "decision-making matters" or "discussion matters" where recommendations are given and received. BHI states that the recommendations relate to decisions regarding financial and accounting matters, human resources, business and strategic planning, marketing, technical and infrastructure matters, updates on business opportunities and negotiations, considerations of risk and liabilities, and receipt of instructions. BHI states that:

The recommendations are provided by officers and employees of the institution but also by consultants. The purpose is to provide updates to the Board of Directors and seek their direction where appropriate. Advice is also sometimes provided but for the most part senior officers who perform the day-to-day operations of BHI present their views to the Board of Directors and seek that their recommendations be approved. The directors of BHI supervise the management of the business and affairs of BHI (section 115(1) *Business Corporations Act*, 1990). Disclosure of the meeting minutes will prevent people employed or retained by BHI from being able to freely and frankly advise and make recommendations and would irreparably damage the decision-making process at BHI.

[50] The appellant submits that although it is possible that the minutes contain advice or recommendations of an officer, employee or consultant of BHI, that entire records ought not to be excluded. The appellant relies on the exceptions to section 7(1) in section 7(2) of *MFIPPA*.

[51] The appellant also disagrees with BHI's harm argument and states that by disclosing advice or recommendations, it helps ensure that employees and consultants are accountable for the advice and recommendations they make.

[52] In reply, BHI states that none of these exceptions in section 7(2) apply to the minutes as they record the course of the meeting and the advice and recommendation that was received by the Board of Directors, and other agenda items.

¹⁹ Order PO-3315.

²⁰ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

²¹ Order PO-2677

Analysis/Findings

[53] BHI was asked in the Notice of Inquiry to answer the following questions about the information at issue in the records for which it has claimed section 7(1):

- What is the advice?
- What is the recommended course of action?
- Was the advice given by an officer or employee of an institution or a consultant retained by an institution? Please explain.
- If the advice or recommendation is not contained in the record, how could disclosure of the record reveal the advice or recommendation?

[54] As detailed above, BHI states that the recommendations relate to decisions made by the Board of Directors to provide updates to them and seek their direction. However, BHI has not provided representations on the specific information at issue in the records. As set above, BHI only claimed section 7(1) for certain information in specific records.

[55] Based on my review of the records, I agree with BHI that most of the information it has identified in Records 1-3, 6-8, 10-12, 14-16, 18-21, 28, 29 and 33 as subject to section 7(1), is properly subject to this exemption. This information is either recommendations that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, or advice that involves an evaluative analysis of information. This information is exempt under section 7(1), subject to my review of BHI's exercise of discretion.

[56] However, I find that some of the information is factual material within the meaning of section 7(2)(a), which is a mandatory exception to the section 7(1) exemption. The exception in section 7(2)(a) covers objective information²² and does not contain a public servant's opinion pertaining to a decision that is to be made, but rather provide information on matters that are largely factual in nature.

[57] Factual material refers to a coherent body of facts separate and distinct from the advice and recommendations contained in the record.²³ This factual information is not inextricably intertwined with the advice or recommendations such that section 7(2)(a) does not apply.²⁴

²² *John Doe v. Ontario (Finance)*, cited above, at para. 30.

²³ Order 24.

²⁴ Order PO-2097.

[58] As the factual material in the records falls into the exception in section 7(2)(a), it cannot be withheld under section 7(1). Where no other exemption has been claimed for this factual information, I will order it disclosed.

C. Does the mandatory third party exemption at section 10(1) apply to Record 11?

[59] BHI has provided representations on the application of sections 10(1)(a) and 10(1)(b) to the information on page 1 of Record 11. These sections state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

[60] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.²⁵ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.²⁶

Representations

[61] BHI states that Record 11,²⁷ the minutes of a presentation by the affected party to the BHI Board of Directors, contains commercial and financial information, including specific data and information about the buying and selling of merchandise. It states that this record includes a discussion about pricing and revenue, risks and liabilities, financing models, timing of work and potential terms of partnership.

²⁵ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).

²⁶ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

²⁷ The minutes of the May 18, 2011 Board of Directors meeting.

[62] BHI states that this information was supplied directly to BHI by the affected party and its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by the affected party.

[63] BHI states that the information at issue in Record 11 is of a type that is not otherwise disclosed or available from sources to which the public has access and was prepared for a purpose that would not entail disclosure. It states that the information was presented at a closed meeting of the Board of Directors of BHI and that its purpose was to allow the Board to examine the potential for partnership with the affected party.

[64] BHI states that the industry the affected party belongs to is very competitive and that the affected party is just starting to become established in the City of Brantford. It states that the minutes contain a discussion of the affected party's revenue and profit models.

[65] Referring to section 10(1)(a), BHI states that if a competitor can obtain disclosure of the minutes of the affected party's presentation to the Board of Directors, the competitor can become versed in the type of business offering that this company engages in and pursue similar clients or opportunities, which would be prejudicial to the company's competitive position.

[66] Arguing in favour of the application of section 10(1)(b), BHI states that if companies believe their presentations to the BHI Board of Directors can become public, then they may be reticent to discuss their business plans in front of the Board of Directors, which is the body responsible for the business and affairs of BHI. BHI further states that its mandate is to generate profits and that:

It is in the public interest that similar information continues to be supplied to BHI and that companies doing business with it not feel that their competitive information is subject to disclosure. Moreover, it is in the public interest that a municipality such as the city be permitted to own and profit from business corporations such as BHI, which profits reduce reliance on tax revenue. The harm that would result is less sharing of business information and less frankness in dealings with the Board of Directors, all of which are key to BHI's profitability.

[67] The affected party states that privacy is a primary concern for it and that it promises privacy to its customers. It has a particular concern with disclosure of private banking and personal information.

[68] The appellant states if BHI entered into a contract with the affected party, the negotiated terms of an agreement are generally to be disclosed, as "this reflects the

importance of taxpayers knowing the terms of the agreements entered into by institutions."²⁸

[69] The appellant also disputes that the affected party had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided to BHI. He points out that BHI is related to the City of Brantford and that it may not be reasonable for the affected party to actually expect the information only to be shared with BHI, and not to be shared with its shareholder, Brantford Energy Corporation, or with the City of Brantford itself.

[70] In reply, BHI states that the actual expectation of confidentiality of the affected party is irrelevant.

Analysis/Findings

[71] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

[72] BHI states that the information at issue contains commercial and financial information. These types of information listed in section 10(1) have been discussed in prior orders, as follows:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.²⁹ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.³⁰

²⁸ The appellant relies on Order MO-2468-F.

²⁹ Order PO-2010.

³⁰ Order P-1621.

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.³¹

[73] Based on my review of the information at issue in Record 11, I agree with BHI that it contains commercial information as it is information related to the sale of goods and services by the affected party. The information is also financial information as it contains the pricing range of a product sold by the affected party.

[74] Therefore, I find that part 1 of the test has been met.

Part 2: supplied in confidence

Supplied

[75] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.³²

[76] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.³³

[77] Based on my review of the information at issue, I find that it was directly supplied by the affected party to BHI. The affected party made a presentation directly to the BHI Board of Directors and Record 11 contains the minutes of this presentation.

In confidence

[78] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.³⁴

³¹ Order PO-2010.

³² Order MO-1706.

³³ Orders PO-2020 and PO-2043.

³⁴ Order PO-2020.

[79] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure³⁵

[80] Based on my review of the information at issue, I agree with BHI that it is of a type of information that is not otherwise disclosed or available from sources to which the public has access and was prepared for a purpose that would not entail disclosure. The information was presented at a closed meeting of the Board of Directors of BHI.

[81] As the information concerns a potential for a business relationship between BHI and the affected party, I find that it was communicated to the institution on the basis that it was confidential and that it was to be kept confidential. Accordingly, I find that the information at issue in Record 11 was supplied in confidence and that part 2 of the test under section 10(1) has been met.

Part 3: harms

[82] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.³⁶

[83] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.³⁷

³⁵ Orders PO-2043, PO-2371 and PO-2497.

³⁶ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

³⁷ Order PO-2020.

[84] The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 10(1).³⁸

[85] Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.³⁹

Section 10(1)(a): prejudice to competitive position

[86] The record contains a general proposal by the affected party about becoming a potential partner with BHI related to the sale of the affected party’s products.

[87] The affected party is concerned about disclosure of its private banking and personal information practices. From my review of the information at issue, I do not see any specific banking or personal information in Record 11.

[88] The affected party is also concerned about the privacy of its customers; however, the record does not identify any of the affected party’s customers, other than a potential customer in BHI as set out in BHI’s representations.

[89] The record describes in detail a presentation by the affected party to BHI as a potential customer in 2011. I find that I do not have sufficiently detailed and convincing evidence that disclosure could significantly prejudice the competitive position of the affected party. I do not agree with BHI that disclosure of the minutes of the affected party’s presentation to BHI’s Board of Directors could reasonably be expected to result in a competitor becoming versed in the type of business offering that this company engages in to allow it to pursue similar clients or opportunities. In my view, the minutes do not contain sufficient information to inform a competitor of the affected party’s business, such that disclosure could reasonably be expected to prejudice significantly the competitive position of the affected party.

[90] I also find that I do not have any evidence that disclosure could reasonably be expected to interfere significantly with the contractual or other negotiations of the affected party.

[91] Therefore, I find that the harms test under section 10(1)(a) has not been met.

Section 10(1)(b): similar information no longer supplied

[92] According to BHI, it is corporation established by the City of Brantford and its business is primarily telecommunications and fibre optics, home comfort systems such as water heaters, water softeners and HVAC, sentinel lights and electricity generation.

³⁸ Order PO-2435.

³⁹ Order PO-2435.

BHI's primary purpose is to generate profit for its shareholder, the Brantford Energy Corporation which is wholly owned by the City of Brantford.

[93] Brantford Power, not BHI, is the company responsible for distributing electricity in Brantford. BHI's mission statement indicates that it is to deliver environmentally sustainable telecommunications and energy related services that enhance the competitiveness of businesses and the quality of life for customers. Its vision is to become a leader in Brantford and surrounding areas by growing its business lines through strategic investments and partnerships enhancing BHI's value to both its customers and shareholder.⁴⁰

[94] Concerning section 10(1)(b), BHI states that if companies believe their presentations to the BHI Board of Directors can become public, then they may be reticent to discuss their business plans in front of the Board of Directors, which is the body responsible for the business and affairs of BHI.

[95] It is clear from my review of the information at issue that the affected party was making a presentation to the Board of Directors in order to secure a partnership with it which would enhance the value of BHI. I have no evidence that BHI entered into a contract with the affected party. I agree with BHI that, in the circumstances of this appeal, it is in the public interest that similar information as that at issue, which is a presentation for a proposed partnership between BHI and the affected party, continues to be supplied to BHI.

[96] The affected party's presentation contains information about its costs, profits, ownership structure, income, and liabilities. I agree with BHI find that companies proposing to do business with it, should not feel that their competitive information is subject to disclosure.

[97] I find that disclosure of the information at issue in Record 11 could reasonably be expected to result in similar information no longer being supplied to the institution, where it is in the public interest that similar information continue to be so supplied.

[98] In making this finding I have taken into account the findings of Adjudicator Frank DeVries in Order MO-2088, when he considered the application of section 10(1)(b) to a proposal to purchase, remediate and redevelop a particular property. In that order, he stated that:

In my view companies doing business with public institutions, such as the City, understand that the identity of the team assembled by it, as well as past work experience on similar projects, is often an important part of a competitive selection process. I find that it is simply not credible to argue

⁴⁰ <http://www.brantfordhydro.com/corporate/mission.shtml>

that the City would be provided with less information of this nature in future. In addition, I do not accept that the prospect of the release of the type of information contained in the portions of the records which I have found do not qualify under section 10(1)(a) could reasonably be expected to result in a reluctance on the part of companies to participate in future projects.

Accordingly, I am not satisfied that it is reasonable to expect that companies will no longer supply similar information to the City, and I find that the requirements for section 10(1)(b) have not been met.

[99] As noted above, the information at issue in this appeal is not information about the identity of the team assembled by the affected party, nor is it information about the affected party's past work experience on similar projects. The information at issue in this appeal is more substantive.

[100] BHI is concerned that disclosure would result in less sharing of business information by proposed partners and less frankness in these proposed partners' dealings with BHI's Board of Directors, which would affect its profitability. I find that this harm could reasonably be expected to result if similar information as to that in the record was no longer supplied to BHI by its proposed partners.

[101] Accordingly, I find that part 3 of the test under section 10(1)(b) has been met and the information on page 1 of Record 11, for which this exemption has been claimed, is exempt.

D. Does the discretionary economic and other interests exemptions at sections 11(a) and 11(c) apply to Records 1-5, 8-15, 18, 20-24 and 26-33 and apply to Records 1-7, 9, 11, 14, 19, 21-25 and 28-33 respectively?

[102] Section 11 states in part:

A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[103] The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report)⁴¹ explains the rationale for including a “valuable government information” exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[104] The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 11.⁴²

[105] Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.⁴³

[106] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution’s economic interests, competitive position or financial interests.⁴⁴

[107] BHI has applied section 11(c) to more portions of the records than it has applied section 11(a). Therefore, I will consider section 11(c) first.

Section 11(c): prejudice to economic interests

[108] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.⁴⁵

⁴¹ Toronto: Queen’s Printer, 1980.

⁴² Orders MO-1947 and MO-2363.

⁴³ Order MO-2363.

⁴⁴ Orders MO-2363 and PO-2758.

⁴⁵ Orders P-1190 and MO-2233.

[109] This exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.⁴⁶

[110] For section 11(c) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.⁴⁷

[111] BHI states that the meeting minutes for which this exemption was claimed contain information about the following:

- dividend considerations;
- taxation considerations;
- acquisitions and divestitures and timing associated therewith;
- terms of employment;
- terms of insurance;
- lending and risk profile information;
- planned capital works; and
- valuation of business lines.

[112] BHI states that:

Some of its competitors include businesses that offer home comfort services, as well as Internet and fibre optic services and installations, to large industries and institutions in Brantford and the County of Brant. They also include companies in the business of energy generation. Some of its customers include major local and regional institutions and businesses. The nature of BHI's business is local and competitive.

⁴⁶ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

⁴⁷ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

Therefore it is reasonable to assume that once a local competitor can compel disclosure of meeting minutes through this appeal, and gain access to BHI's business directions and decisions, other competitors will quickly learn about the information or seek similar disclosures. It is also reasonable that the local media will gain access to this information. Because of its affiliation with the City of Brantford, BHI has been the focus of the media in the recent past. In fact the requester commented on BHI's business to the press in an article from the [newspaper name and date]. The article demonstrates the unique scrutiny that BHI already receives due to its affiliation with the City of Brantford.

BHI is not supported by the taxpayers of the City of Brantford. It pays fair market value for all the goods and services it procures, whether from the City or otherwise as it is required to do so in accordance with the *Municipal Act, 2001*, which prohibits the provision of assistance through bonuses to a commercial enterprise.

Access to the minutes of meetings of the Board of Directors will bring negative consequences to BHI. BHI's business dealings and strategies, financial and procurement methods, its human resources and governance will be exposed thereby exposing the company to potential attack by competitors who are not subject to similar laws and regulations and causing harm to BHI's revenue and profits. The logical conclusion of this is that the taxpayers of the City of Brantford will be disadvantaged if the revenue the City relies on through BHI is compromised. The harm that will result if the meeting minutes are disclosed is less sharing of business information and less frankness in dealings with the Board of Directors, all of which are key to BHI 's profitability.

[113] The appellant states that BHI is an internet service provider and has only national, not local, competitors i.e. Rogers and Bell. He states that because of heavy infrastructure costs this precludes other companies from entering the market.

[114] In response to the news article provided by BHI, the appellant states that the local paper contacted him as a customer of BHI along with other BHI internet customers about their comments on the internet being down for over 24 hours and how it had a devastating effect to private businesses, City depts., school boards, etc.

[115] He also points out that BHI is accountable to its shareholder, the city. BHI's directors are selected by City of Brantford councillors and that this highlights the city's responsibility and accountability to its shareholder and the taxpayers.

Analysis/Findings

[116] Based on my review of the information for which section 11(c) has been claimed,⁴⁸ I agree with BHI that this exemption applies to most of the information for which it has been claimed. This information is about various economic transactions that BHI is involved or has considered being involved in. BHI has listed these types of transactions above.

[117] I do not agree with the appellant that BHI is only an internet service provider with limited competitors. BHI's representations and the records indicate that it is involved in not only telecommunications and fibre optics, but home comfort systems, sentinel lights and electricity generation.

[118] I find that disclosure of most of the information for which BHI has claimed section 11(c) could reasonably be expected to prejudice its economic interests or competitive position. This information concerns the economic interests of BHI where it competes for business with other public or private sector entities. BHI's primary purpose is to generate profit for its shareholder, the Brantford Energy Corporation which is wholly owned by the City of Brantford.

[119] For example, I find that the identified information at page 5 of Record 22 is not subject to section 11(c). This information merely discusses moving the meeting in camera and does not reveal information that is subject to the section 11(c) exemption. I will consider the application of section 11(a), which has also been claimed for this information.

Section 11(a): information that belongs to government

[120] BHI also claimed section 11(c) for most of the information for which section 11(a) has been claimed. I will consider now whether section 11(a) applies to the information that is not subject to section 11(c) or 7(1). This information includes information found at Record 20, page 4, Record 21, page 1, Record 22, pages 1 and 5.

[121] For section 11(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;
2. belongs to an institution; and
3. has monetary value or potential monetary value.

⁴⁸ That I have not found subject to section 7(1).

Part 1: type of information

[122] BHI submits that the records contain financial and commercial information. These types of information listed in section 11(a) have been discussed in prior orders:

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁴⁹

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.⁵⁰ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁵¹

[123] BHI states that the minutes of Board of Directors meetings contain the financial outlook of BHI at certain time frames and present to the Board of Directors various business opportunities being pursued by management. It states that:

The records contain the costs of buying, selling or exchanging merchandise and services and that Boards of Directors' meetings exist as a forum for presenting commercial and financial information so that the Board has a picture of the health of the company and can make business decisions in that context.

[124] The appellant disputes this submission by BHI, as it publishes its financial statements online as part of an annual report of the Brantford Energy Corporation.

Analysis/Findings re part 1

[125] I agree with BHI that the remaining information in the records that it has identified as subject to section 11(a) consists of financial and commercial information, as described by BHI in its representations. Therefore, part 1 of the test has been met for the information identified specifically by BHI in the records as subject to section 11(a).

⁴⁹ Order PO-2010.

⁵⁰ Order PO-2010.

⁵¹ Order P-1621.

Part 2: belongs to

[126] BHI submits that the minutes belong to it and include confidential business information such as business leads, customers, potential opportunities for profit and other methods of bolstering the financial position of BHI. It submits that the minutes reflect an effort by BHI to use its human resources to develop its lines of businesses. BHI states that it should not be placed in a position to have to reveal the work product of its officers and employees, since an equivalent company in the private sector would not be subjected to such a standard of transparency. It states that the minutes were taken by its employees and constitute its corporate records in which BHI has a proprietary interest.

[127] The appellant did not address this issue in his representations.

Analysis/Findings re part 2

[128] The term “belongs to” refers to “ownership” by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to “belong to” an institution, it must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[129] Examples of the latter type of information may include trade secrets, business-to-business mailing lists,⁵² customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others.⁵³

[130] The portions of the records BHI has specifically identified as subject to section 11(a) in the records are the BHI Board of Directors discussion of BHI business, including its staffing costs and requirements, its business plans, and its financial affairs.

⁵² Order P-636.

⁵³ Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.

[131] I do not agree with BHI that it BHI should not be placed in a position to have to reveal the work product of its officers and employees, since an equivalent company in the private sector would not be subjected to such a standard of transparency. That is not the test under section 11 of *MFIPPA*. As an institution under MFIPAA, it is subject to its provisions regarding disclosure of non-exempt information.

[132] The information at issue is not traditional proprietary information, such as a copyright, trade mark, patent or industrial design. However, it can be described as confidential business information that has been treated confidentially. The information derives its value to the organization from not being generally known.

[133] The appellant points out in his representations in response to part 3 of the test under section 11(a) that BHI publishes its financial statements annually as part of an annual report of the Brantford Energy Corporation. BHI does not dispute that its financial statements are published online. I find that the information in the records does not include financial statement information that have been published online.

[134] Therefore, I find that part 2 of the test under section 11(a) has been met for the information that BHI has identified in the records as subject to this exemption.

Part 3: monetary value

[135] BHI states that all of the records contain the financial outlook of BHI as it stood at certain times and present to the Board of Directors various business opportunities being pursued by management.

[136] BHI states that the meetings of the Board of Directors are where management and the Board discuss business opportunities and the ways in which BHI can be profitable. It states that if BHI's competitors can access this information, they can use the information to approach BHI's customers and partners to provide similar services and ventures with the advantage of knowing the BHI strategy, strengths and weaknesses. It states that the minutes have intrinsic monetary value as they represent business opportunities, business divestment and prudent risk management which may result in monetary loss or gain.

[137] The appellant disputes that the records, which BHI has described as containing its financial outlook, should be exempt under section 11(a) as BHI publishes its financial statements online, as part of an annual report of the Brantford Energy Corporation. He states that, BHI as a corporation 100% owned by the Brantford Energy Corporation, which in turn is wholly owned by the City of Brantford, has responsibilities to its shareholder, the City of Brantford and that its records should be accessible.

[138] In reply, BHI states that the annual report provided by BHI is a yearly snapshot, and retrospective in nature. It states that the annual report is entirely different from the meeting minutes where decisions about the business and affairs of the corporate are discussed and recorded.

Analysis/Findings re: part 3

[139] To have “monetary value”, the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.⁵⁴

[140] The fact that there has been a cost to the institution to create the record does not mean that it has monetary value for the purposes of this section.⁵⁵ In addition, the fact that the information has been kept confidential does not, on its own, establish this exemption.⁵⁶

[141] The records are minutes of meetings of the Board of Directors of BHI from 2010 to 2013. Some of the information at issue for which section 11(a) has been claimed is about business leads, customers, potential opportunities for profit and other methods of bolstering the financial position of BHI. This information represents business and other opportunities for financial gain for BHI. I find that disclosure of this information would deprive BHI of the monetary value of that information. Part 3 of the test under section 11(a) has been met for this information.

[142] However, I find that part 3 of the test has not been met for the second severance on page 4 of Record 20, the last severance on page 1 of Record 21, and the severances on pages 1 and 5 of Record 22, as this information does not have monetary value or potential monetary value. Based on my review of this information which is not information about business leads, customers, potential opportunities for profit and other methods of bolstering the financial position of BHI, I find that BHI has not provided me with detailed and convincing evidence as to how disclosure of this information would deprive BHI of its monetary value. As no other exemptions apply to this information, I will order it disclosed.

E. Does the discretionary solicitor-client privilege exemption at section 12 apply to Record 17?

[143] Although section 12 was claimed for certain information in Records 17, 30 and 31, I have found that the information at issue in Records 30 and 31 is subject to section

⁵⁴ Orders M-654 and PO-2226.

⁵⁵ Orders P-1281 and PO-2166.

⁵⁶ Order PO-2724.

11(c). Therefore, I will only consider the application of section 12 to the information at issue in Record 17.⁵⁷ This section states as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[144] Section 12 contains two branches. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[145] BHI submits that branch 1 solicitor-client communication privilege applies. It states that Record 17 contains requests for legal advice from the City Solicitor's office during a confidential meeting.

[146] The appellant's representations focus on the exercise of BHI's discretion under this section, which will be addressed below.

Analysis/Findings

[147] Based on my review of the two severances at issue in Record 17, I agree that they are subject to solicitor-client communication privilege as they are direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.⁵⁸

[148] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.⁵⁹

[149] The privilege applies to "a continuum of communications" between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.⁶⁰

[150] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.⁶¹

⁵⁷ This information concerns one severance on the first page of Record 17 and another severance on the second page of Record 17.

⁵⁸ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

⁵⁹ Orders PO-2441, MO-2166 and MO-1925.

⁶⁰ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

⁶¹ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

[151] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.⁶²

[152] I find that there has been no disclosure to outsiders of this privileged information in Record 17 so as to constitute a waiver of privilege. Therefore, subject to my review of BHI's exercise of discretion, the two severances in Record 17 are exempt under section 12.

F. Did the institution exercise its discretion under sections 7(1), 11 and 12? If so, should this office uphold the exercise of discretion?

[153] The sections 6(1)(b), 7(1), 11 and 12 exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[154] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[155] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁶³ This office may not, however, substitute its own discretion for that of the institution.⁶⁴

[156] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁶⁵

- the purposes of the *Act*, including the principles that
 - information should be available to the public

⁶² *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.).

⁶³ Order MO-1573.

⁶⁴ Section 43(2).

⁶⁵ Orders P-344 and MO-1573.

- individuals should have a right of access to their own personal information
- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[157] BHI states that the request was made to a company that is in the communications and home comfort business, and not in government in the sense of dealing with matters that affect the fundamental rights and interests of citizens. It states that:

BHI's business and affairs do not generally cause harm to fundamental rights and interests of citizens such that transparency under the *Act* is required to avoid such harm. It is logical that BHI would deny access to meetings of the Board of Directors by a requester that had previously sought to do business with it and is potentially its competitor.

The meetings of the Board of Directors constitute a forum for discussion where business decisions are made that affect the direction of BHI. If the legislature intended a certain level of transparency for these meetings where business occurs, it would have subjected BHI to the open meeting requirements of the *Municipal Act, 2001*, the same way that it has

subjected the City of Brantford, when it makes business decisions, to open meeting requirements. Unlike BHI however, the City is supported by the taxpayers of the City of Brantford. BHI pays fair market value for all the goods and services it procures, whether from the City or otherwise as it is required to do so in accordance with the *Municipal Act, 2001*, which prohibits the provision of assistance through bonuses to a commercial enterprise.

The refusal to classify BHI as a local board is an indication that the legislature intended that municipalities be somewhat shielded from the rules of transparency that they are normally subject to when they incorporate a company and use it solely as a profit generating vehicle and not as a vehicle through which they provide traditional programs and services associated their public function. In order for the City of Brantford to fully leverage the business units of BHI, and in order for BHI to be as profitable as possible, which is its mandate, there has to be some protection afforded to its business information, which is recognized by section 142(6) of the *Electricity Act, 1998*.

The harm that will result if the meeting minutes are disclosed is less sharing of business information and less frankness in dealings with the Board of Directors, all of which are key to BHI's profitability. Although the *Act* applies to BHI, it applies to records other than meeting minutes when those records relate to personal information or breach of privacy.

[158] The appellant points out that BHI, in denying access to all of the records, has not exercised its discretion properly. He states that it is not an ordinary corporation, but one where its sole shareholder is owned by the City of Brantford. He points out that BHI's representations in this appeal were prepared by the Assistant City Solicitor, which suggests that BHI is not an entity completely separate from the city. He states that as a related entity of the City of Brantford, BHI ought to operate in a more transparent manner. He states that:

In this case, the requester wants to ensure that BHI is making appropriate business decisions. He also wants to make sure BHI is accountable to the taxpayers, since BHI is a subsidiary of the City of Brantford.

BHI has again and again referred to the fact that they are a profit generating vehicle. However, in operating behind closed doors, BHI is not offering other businesses the opportunity to do business with it. By refusing to disclose its records, it makes you question whether its decisions are impartial business decisions, or whether favoritism is taking place. With so many of its Board being a part of City Council, the

requester wants to ensure that BHI is operating in the best interests of its shareholders, and is not giving certain parties preferential treatment...

[159] The appellant lists what he considers irrelevant considerations taken into account by BHI as follows:

- It considered the identity of the requester and the fact that he had previously complained about BHI's operation in refusing to disclose the records, rather than looking at the records themselves.
- It ignored the fact that the purpose of the *Act* is that information should be available, and that exemptions should be limited and specific; rather than severing portions of the minutes.
- It failed to consider whether disclosure would increase public confidence in the operation of the institution (i.e. more transparency in its operation). As a corporation so closely tied to the city, it should offer more transparency to dispel any possible claims that they are not acting impartially.

[160] In reply, BHI states that the standard of care expected under the *Business Corporation Act, 1990*, is that every director and officer of a corporation in exercising his or her powers and discharging his or her duties to the corporation shall act honestly and in good faith with a view to the best interests of the corporation and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. It states that there is an existing mechanism for accountability of the Board of Directors and accountability of the officers and employees of BHI. The shareholder's declaration and the appointment of the Board of Directors by the City of Brantford ensure that the shareholder and ultimately the city have control over the management of BHI.

Analysis/Findings

[161] Based on my review of the records and the parties' representations, I agree with the appellant that BHI took into account irrelevant considerations and failed to take into account relevant considerations in exercising its discretion to withhold the information at issue in the records.

[162] In reviewing the records, I note that they are dated between 2010 and 2013. They concern discussions about BHI internal and business matters. Some of these matters may have not been pursued, or have already been completed, or may now be public information.

[163] In particular, BHI did not consider the individual information in each record, as well as did not take into account the following relevant considerations:

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - exemptions from the right of access should be limited and specific
- whether the requester has a compelling need to receive the information
- whether disclosure will increase public confidence in the operation of the institution
- the age of the information

[164] In exercising its discretion, BHI also improperly considered it had the right to conduct all of its meetings *in camera* and "...that municipalities be somewhat shielded from the rules of transparency that they are normally subject to when they incorporate a company and use it solely as a profit generating vehicle and not as a vehicle through which they provide traditional programs and services associated their public function."

[165] BHI also did not take into account relevant considerations when it determined that the *Act* only applies to its records that relate to personal information or breach of privacy and did not apply to meeting minutes.

[166] Accordingly, I will order BHI to re-exercise its discretion concerning the information that I have found subject to sections 7(1), 11(a) and (c), and 12.

G: What is the scope of the request? Are the attachments to the meeting minutes responsive to the request?

[167] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;

- (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[168] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.⁶⁶

[169] To be considered responsive to the request, records must "reasonably relate" to the request.⁶⁷

[170] BHI states that the request in this case stated "Brantford Hydro Board Minutes, 2010; 2011; 2012; 2013" and that it considers the responsive records be the 33 sets of minutes.

[171] The appellant states that he sought disclosure of the Board Minutes for 2010 to 2013 and that BHI ought to have reasonably interpreted this request to include the attachments. He states that BHI should have understood the request to include the attachments.

[172] In reply, BHI states that the meeting minutes reflect the discussions and decisions that took place based on advice and recommendations made by BHI Staff. If reports were mentioned in the minutes, they were for reference only and did not form an integral part of the minutes.

Analysis/Findings

[173] Several portions of the minutes refer to reports being attached to them. I find that reports that were attached to the minutes form part of the minutes and are responsive to the request. This is different from reports referred to in the minutes that were not attached to the minutes. Although a report may have been considered at a BHI Board of Directors' meeting, it may not have been attached to the minutes but only presented during the meeting or attached to the agenda.

[174] The appellant only requested the minutes of the meetings of the BHI Board of Directors from 2010 to 2013. He did not seek copies of the agendas, nor did he seek

⁶⁶ Orders P-134 and P-880.

⁶⁷ Orders P-880 and PO-2661.

copies of the reports referred to in the agendas or minutes in his request. Therefore, I find that any attachments to the minutes are responsive to the request and I will order BHI to issue an access decision regarding these items.

ORDER:

1. I order BHI to disclose to the appellant by **June 26, 2015** the information that I have found not exempt. For ease of reference, I have provided BHI with a copy of the records highlighting the information that should be disclosed.
2. I uphold BHI's decision that the information on page 1 of Record 11 is exempt under section 10(1).
3. I order BHI to re-exercise its discretion in accordance with the analysis set out above concerning the remaining information in the records and to advise the appellant and this office of the result of this re-exercise of discretion, in writing. If BHI continues to withhold all or part of these records, I also order it to provide the appellant with an explanation of the basis for re-exercising its discretion to do so and to provide a copy of that explanation to me. BHI is required to send the results of its exercise of discretion, and its explanation to the appellant, with the copy to this office, by no later than **June 26, 2015**. If the appellant wishes to respond to BHI's re-exercise of discretion and/or its explanation for re-exercising its discretion to withhold information, he must do so within 21 days of the date of BHI's correspondence by providing me with written representations.
4. I order BHI to issue an access decision to the appellant concerning the attachments to the records, treating the date of this order as the date of the request.
5. In order to verify compliance with order provisions 1 and 2, I reserve the right to require a copy of the records disclosed by BHI to be provided to me.
6. I remain seized of this matter pending the resolution of the outstanding issues in this appeal.

Original signed by: _____
Diane Smith
Adjudicator

_____ June 5, 2015