

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3284-I

Appeal MA14-94

Brantford Hydro Inc.

February 3, 2016

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. Interim Order MO-3205-I was then issued and upheld the mandatory section 10(1) (third party information) exemption and did not uphold the discretionary section 6(1)(b) (closed meeting) exemption. Order MO-3205-I also partially upheld the sections 7(1) (advice or recommendations), 11 (economic and other interests) and 12 (solicitor-client privilege) exemptions. BHI was ordered to re-exercise its discretion concerning the information subject to these three discretionary exemptions. In this second interim order, the adjudicator determines that BHI did not properly re-exercise its discretion and orders it to re-exercise its discretion again.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 7(1), 11(a) and (c), 12.

Orders and Investigation Reports Considered: Interim Orders MO-3205-I and PO-3560-I.

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.

[5] The appellant advised the mediator that he was not pursuing access to the information denied pursuant to section 14(1) of the *Act*. 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] As mediation did not resolve all of the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry. Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[7] I then issued Interim Order MO-3205-I, where I upheld the sections 10(1) and 12 exemptions and did not uphold the section 6(1)(b) exemption. I also partially upheld the sections 7(1) and 11 exemptions and ordered BHI to re-exercise its discretion concerning the information subject to these two discretionary exemptions. I also determined that the attachments to the meeting minutes fell within the scope of the request.

[8] BHI then disclosed the information ordered disclosed and issued a decision with respect to the attachments to the minutes, disclosing them in part. The appellant appealed that decision and appeal file MA14-94-2 was opened. That appeal will be dealt with in a separate order.

[9] In Interim Order MO-3205-I, I found that, in exercising its discretion concerning the information that I found subject to sections 7(1), 11 and 12, BHI took into account

irrelevant considerations and failed to take into account relevant considerations. In particular, I found that:

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.

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

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."

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.

[10] BHI re-exercised its discretion and continued to withhold the information I had found subject to sections 7(1), 11 and 12. It sent the appellant, with a copy to this office, its decision concerning the re-exercise of its discretion.

[11] In this order, I find the BHI did not re-exercise its discretion in a proper manner and order it to re-exercise its discretion again.

RECORDS:

[12] The records remaining at issue consist of 33 meeting minutes dated between January 2010 and November 2013. At issue in this appeal are the portions subject to the discretionary exemptions in sections 7(1) and 11(a) and (c) and 12.

DISCUSSION:

Did BHI properly re-exercise its discretion?

[13] In BHI's decision letter in support of its re-exercise of discretion to continue to withhold the information at issue, it states that despite the age of the records, the information at issue is considered sensitive information. It states that:

The records are the minutes of the meetings of the Board of Directors of BHI and, as such, contain the decisions of the Board of Directors, as well as the advice and recommendations of the senior officers and employees of BHI. The information reflects the lines of business and types of ventures BHI pursued over the time-period reflected.

[14] With respect to the advice or recommendations exemption in section 7(1), BHI states that it is concerned that release of information that information will erode the ability of its officers and employees to freely and frankly advise and make recommendations, and will erode their neutrality and their effectiveness.

[15] With respect to the economics or other interests exemption in section 11, BHI states that it maintains its position that access to certain portions of the minutes of meetings of the Board of Directors will bring negative consequences to it as:

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 taxpayers of the City of Brantford will be disadvantaged if the revenue the City relies on through BHI is compromised.

As was found by the Adjudicator in Interim Order MO-3205-I, BHI's primary purpose is to generate profit for its shareholder, the Brantford Energy Corporation, which is wholly owned by the City of Brantford. 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 and ability to respond to market concerns and create corporate strategy.

[16] With respect to the solicitor-client privilege exemption in section 12, BHI states that the portions of the records identified contain legal advice provided to the Board of Directors for its consideration of issues before the board. It states that it is important to maintain solicitor-client privilege over these portions of the records as they refer to ongoing obligations of the corporation and ongoing corporate relationships.

[17] In response, the appellant wants to have BHI's re-exercise of discretion reviewed.

Analysis/Findings

[18] I find in re-exercising its discretion, BHI has properly not taken into account the following irrelevant considerations that it had initially relied on:

- that it had the right to conduct all of its meetings *in camera*,
- that the *Act* only applies to its records that relate to personal information or breach of privacy, and
- that the *Act* did not apply to meeting minutes.

[19] However, I find that in re-exercising its discretion, BHI has not considered the individual information in the records as directed in Interim Order MO-3205-I, nor has it considered the relevant factors that I listed in that order with respect to the withheld information in the records. These relevant factors are set out above and include:¹

- the purposes of the *Act*,
- the age of the information as it applies to the specific information at issue,
- whether disclosure will increase public confidence in the operation of the institution,
- whether the appellant has a compelling need to receive the information, and
- whether the matter referred to in the record has been pursued, or has been completed, or may now be public information.

[20] I find that in re-exercising its discretion, BHI has primarily re-iterated the exemptions at issue, namely sections 7(1), 11 and 12, as well as most of the representations previously made by it.

¹ See also Interim Order PO-3560-I.

[21] Section 7(1) - BHI has relied on section 7(1), which reads:

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.

[22] In reviewing the information at issue, which is several years old, I find that a significant amount of the information for which 7(1) applies is information that is merely recommending whether a procedural matter should be approved or concerns recommendations about matters that have already been finalized.

[23] In my view, disclosure of much of the information in the records for which section 7(1) applies may not result in BHI's officers and employees not being able to freely and frankly advise and make recommendations within the deliberative process of government decision and policy-making. Nor do I find that disclosure of this type of information will erode their neutrality and effectiveness. I find that BHI has not considered the actual substance of the information in its re-exercise of discretion concerning all of the exemptions at issue and instead has made a blanket decision to withhold the information.

[24] Section 11 - BHI has relied on sections 11(a) and (c), which read:

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;

[25] In its representations in support of its re-exercise of discretion, BHI is concerned about a loss of revenue from being exposed to potential attack by competitors. When re-exercising its discretion in July 2015, the information at issue in the records was upwards of five and half years old. It appears from my review of the information at issue that there are matters for which the section 11 economic and other interests exemption has been claimed that concern discussion of potential transactions that were not concluded or transactions that would have been completed and would be public knowledge.

[26] By not considering the individual information in the records, BHI has not exercised its discretion under sections 11(a) or (c) concerning information that would not result in a loss of revenue from being exposed to potential attack by competitors.

[27] Section 12 - BHI has relied on section 12, which reads:

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.

[28] BHI has claimed section 12, the solicitor-client privilege exemption, for a limited amount of information in Records 17, 30 and 31. In Interim Order MO-3205-I, I found that the information at issue in Records 30 and 31 was subject to section 11(c), therefore, I only considered the application of section 12 to the information at issue in Record 17, which consisted of two severances.

[29] BHI is concerned that disclosure of the information for which it has claimed section 12 refers to ongoing obligations of the corporation and ongoing corporate relationships. Record 17 is dated January 2012. I find that in re-exercising its discretion, BHI has not considered whether the specific information at issue is ongoing. Based on my review of the information at issue, it appears that at least some of it does not refer to ongoing matters.

CONCLUSION

[30] I find that BHI did not re-exercise its discretion in a proper manner concerning the information that I found in Interim Order MO-3205-I subject to the discretionary exemptions in sections 7(1), 11 and 12. Accordingly, I am requiring BHI to re-exercise its discretion again, taking into account my findings above and in Interim Order MO-3205-I.

ORDER:

1. I order BHI to re-exercise its discretion in accordance with the analysis set out above and in Interim Order MO-3205-I concerning the information in the records subject to sections 7(1), 11 and 12 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 this information, 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 re-exercise of discretion, and its explanation to the appellant, with the copy to this office, by no later than **February 25, 2016**. 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.

2. I remain seized of this matter pending the resolution of the outstanding issues in this appeal.

Original Signed by: _____

Diane Smith
Adjudicator

February 3, 2016 _____