

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3289

Appeal MA14-94-2

Brantford Hydro Inc.

February 22, 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. In Interim Order MO-3205-I, the adjudicator ordered BHI to issue an access decision to the appellant concerning the attachments to the records, which were reports to its Board of Directors. BHI did so and disclosed the attachments in part. The appellant then sought access to portions of two reports, which BHI had claimed were exempt by reason of the discretionary exemptions in sections 7(1) (advice or recommendations) and 11(c) (economic and other interests).

This order partially upholds the application of the exemption in section 7(1) to portions of two reports. This order also does not uphold the application of the section 11(c) exemption.

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

Orders and Investigation Reports Considered: MO-3205-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 additional exemptions to deny access to portions of the responsive records. In addition, BHI advised the mediator that it took 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.

[5] After the exchange of representations between the parties, I issued Interim Order MO-3205-I, in which I ordered partial disclosure of the records at issue. In that order, I included the following order provision:

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.

[6] In accordance with this order provision, BHI issued an access decision letter to the appellant agreeing to disclose in part all of the attachments at issue, which are the reports to the BHI Board of Directors referred to in the minutes.¹

[7] The appellant advised that he is only appealing the severances in two reports and appeal file MA14-94-2 was opened. The two records at issue in this appeal are:

- Record 1 - Report BHI-1001-004, dated January 28, 2010,
- Record 2 - Report BHI-1103-004, dated March 10, 2011.²

[8] I sought and received representations from BHI and the appellant as to the information remaining at issue in both records in accordance with section 7 of the IPC

¹ The minutes are the records at issue in appeal file MA14-94.

² The appellant has indicated that the information at issue in Record 2 relates to his company and he consents to the disclosure of this information.

Code of Procedure and Practice Direction 7.

[9] In this order, I partially uphold the application of the discretionary advice or recommendations exemption in section 7(1) and do not uphold the application of the discretionary economic and other interests exemption in section 11(c).

RECORDS:

The records at issue are:

- Record 1 - Report BHI-1001-004, dated January 28, 2010,
- Record 2 - Report BHI-1103-004, dated March 10, 2011.

[10] BHI applied the discretionary exemption in section 7(1) (advice or recommendations) to the severances in Record 1 and sections 7(1) and 11(c) (economic and other interests) to the severances in Record 2.

ISSUES:

- A. Does the discretionary advice or recommendations exemption at section 7(1) apply to the information at issue in the records?
- B. Does the discretionary economic and other interests exemption at section 11(c) apply the information at issue in Record 2?
- C. Did the institution exercise its discretion under section 7(1)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the discretionary advice or recommendations exemption at section 7(1) apply to the information at issue in the records?

[11] 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.

[12] 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.³

[13] "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.

[14] "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.⁴

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

[16] 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.⁵

[17] 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.⁶

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

- factual or background information⁷
- a supervisor's direction to staff on how to conduct an investigation⁸

³ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

⁴ See above at paras. 26 and 47.

⁵ Order P-1054

⁶ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

⁷ Order PO-3315.

- information prepared for public dissemination⁹

[19] BHI states that it is a corporation established by the City of Brantford under section 142(1) of the *Electricity Act, 1998*, S.O. 1998 (the *EA*) and that its business is primarily telecommunications and fibre optics, home comfort systems, sentinel lights and electricity generation. BHI states that its primary purpose is to generate profit for its shareholder, the Brantford Energy Corporation which is wholly owned by the City of Brantford.

[20] BHI states that the records contain financial, technical, business, and strategic planning matters, considerations of the risks and liabilities of a business opportunity with the appellant, as well as requests for instructions from the Board of Directors.

[21] BHI states that the records contain the recommendations and advice of employees of BHI to the Board of Directors for their consideration of the appropriate course of action to take regarding the passing of amendments to a specific policy, as well as the consideration of a business proposal by the appellant's company. It states that the purpose of the reports is for employees and officers of the institution to present their views to the Board of Directors and seek approval for their recommendations.

[22] BHI describes Record 1 as a report prepared by an employee of BHI, giving advice to the Board of Directors on amending a policy. It states that the only paragraphs that have been severed are those wherein the recommended course of action is set out and the opinion and advice of the employee is provided to the Board of Directors. It further states that all factual information, as well the policy itself, have been provided to the appellant.

[23] BHI describes Record 2 as a report prepared by an employee seeking direction from the Board of Directors on a proposed business relationship with the appellant's company. It states that all factual information contained within the report has been disclosed and the remaining paragraphs relate to the recommendations proposed by employees of BHI and their analysis.

[24] The appellant states that BHI has not provided the requisite evidence to establish the application of this exemption.

Analysis/Findings

The records at issue are:

⁸ 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.).

⁹ Order PO-2677.

- Record 1 - Report BHI-1001-004, dated January 28, 2010,
- Record 2 - Report BHI-1103-004, dated March 10, 2011.

[25] Record 1 is entitled "Travel and Expense Policy Amendment".¹⁰ The purpose of this report is to seek the Board of Director's approval to amend this policy to define provisions with respect to business entertainment. Attached to this report is a copy of the policy and the proposed amendment. BHI has withheld the information in the Recommendation, Analysis, and Conclusion sections of the record in full. It has also withheld part of the information in the Background section of this record, as well part of the proposed policy amendment in the attachment.

[26] As stated above, factual or background information¹¹ and information prepared for public dissemination¹² have been found not to qualify as advice or recommendations.

[27] I find that the information at issue in the Background section of Record 1 is factual or background information. I also find that some of the information in the Analysis section is factual information concerning the provisions of the policy or is information about the policy prepared for public dissemination. As this information does not contain advice or recommendations or reveal the same, it is not advice or recommendations within the meaning of section 7(1) and I will order it disclosed.

[28] The remaining information at issue in Record 1, namely the information at issue in the Analysis, and Conclusion sections and the proposed policy amendment, is evaluative analysis of information and its disclosure would reveal advice or recommendations within the meaning of section 7(1). I find that none of the exceptions in section 7(2) apply to this information. Therefore, subject to my review of BHI's exercise of discretion, I find this information exempt.

[29] Record 2 is entitled "Business Development - [a division of BHI] – [appellant's business name] Proposal". The purpose of this report is to "...present for the consideration of the ...Board of Directors the unsolicited business development proposal submitted by [the appellant]". Attached to this report is an excerpt from the appellant's business website. BHI has withheld in full the Recommendation, Strategic Planning Context, Analysis, Financial Implications, and Conclusions sections of this record.

[30] I find that the information in the Recommendation section of Record 2 is information that was prepared for public dissemination, as it specifically states that it would be made public. Therefore, section 7(1) does not apply to the information in the Recommendation section of Record 2. As no other exemptions have been claimed for

¹⁰ Travel and Expense Policy, referred to as the policy in this order.

¹¹ Order PO-3315.

¹² Order PO-2677.

this information, I will order it disclosed.

[31] I also find that the some of the information in the Analysis and Financial Implications sections of Record 2 is factual or background information. As this information does not contain advice or recommendations or reveal the same, it is not advice or recommendations within the meaning of section 7(1) and I will order it disclosed.

[32] I find that the remaining information at issue in Record 2, namely the remaining information in the Analysis and Financial Implications sections and the information in the Strategic Planning Context and Conclusions sections, is an evaluative analysis of information and reveals advice within the meaning of section 7(1). I find that none of the exceptions in section 7(2) apply to this information. Therefore, subject to my review of BHI's exercise of discretion, I find that this information is exempt.

[33] BHI has also claimed section 11(c) to withhold the information in the Strategic Planning Context, Analysis, Financial Implications, and Conclusions sections in Record 2. For the sake of completeness, I will also consider the application of this exemption.

B. Does the discretionary economic and other interests exemption at section 11(c) apply the information at issue in Record 2?

[34] BHI has applied section 11(c) to all but the first severance in Record 2. Section 11(c) states:

A head may refuse to disclose a record that contains,

information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[35] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.¹³

[36] For section 11(c) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will

¹³ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

depend on the type of issue and seriousness of the consequences.¹⁴

[37] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹⁵

[38] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.¹⁶

[39] BHI states that the report that comprises Record 2 was delivered to the Board of Directors to evaluate whether to do business with the appellant. It states that disclosure of the information at issue could reasonably be expected to prejudice its business decisions and strategies and financial and risk assessments, as well it could affect any future business relationship between BHI and the appellant. It further states that disclosure could also negatively affect BHI in relation to any future bids for work or business proposals put forward by the appellant as he would have a detailed knowledge of the assessments undertaken and the future plans of BHI, which would give him an unfair advantage.

[40] The appellant states that his company is not a competitor of BHI and that BHI's only competitors are large publicly traded companies who through their annual reports or press releases detail capital expenditures, revenue numbers, and clients.

Analysis/Findings

[41] 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.¹⁷

[42] This exemption 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.¹⁸ The exemption requires

¹⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹⁵ Order MO-2363.

¹⁶ Orders MO-2363 and PO-2758.

¹⁷ Orders P-1190 and MO-2233.

¹⁸ AS is required for section 11(a).

only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.¹⁹

[43] Record 2 is dated March 2011 and is a report:

To present for consideration of the BHI Board of Directors the unsolicited business development proposal [of February 2011] submitted to Management by [the appellant's name, title, and company name].²⁰

[44] As stated in the disclosed portions of this record, BHI management is required to assess any business development opportunity under the provisions of its Business Development Evaluation Policy. This includes assessing a number of considerations including whether this proposal is consistent with BHI's strategic plan. In Record 2, BHI's Chief Executive Officer/Chief Financial Officer (CEO/CFO) is reporting to the Board's Chair and Directors as to his review and analysis of the appellant's proposal. Withheld from Record 2 is the advice the CEO/CFO gave the Board as to whether to pursue the appellant's proposal.

[45] The information in Record 2 is from 2011 and arose as a result of the appellant's email exchange with BHI about the possibility of his company doing business with it. A formal written proposal was not provided, nor did BHI agree to the appellant's request to meet with BHI management to discuss his proposal in person.

[46] Based on the age, content, and subject matter of the record, I do not agree that disclosure of the information for which section 11(c) has been claimed could affect in a negative way any future business relationship between BHI and the appellant. Nor do I find that this information would now provide the appellant, or any other business, with detailed knowledge of the assessments undertaken and the future plans of BHI.

[47] Based on my review of the information at issue in Record 2, I find that disclosure could not reasonably be expected to prejudice BHI's economic interests or its competitive position and section 11(c) does not apply to the information at issue in Record 2.

[48] Accordingly, I find that the information at issue in Record 2 is not exempt under section 11(c).

C. Did the institution exercise its discretion under section 7(1)? If so, should this office uphold the exercise of discretion?

[49] The section 7(1) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its

¹⁹ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

²⁰ Information from the disclosed portions of Record 2.

discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[50] 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.

[51] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²¹ This office may not, however, substitute its own discretion for that of the institution.²²

[52] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²³

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

²¹ Order MO-1573.

²² Section 43(2).

²³ Orders P-344 and MO-1573.

- 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.

[53] BHI states that in denying access under section 7(1) to the portions of the records at issue, it disclosed the portions of the reports that were factual, but exercised its discretion to sever portions of the reports containing opinions, advice and recommendations of employees delivered to the Board of Directors for consideration during their deliberations on two courses of action. It states that:

The harms that would result if the severed portions of the reports are disclosed are less sharing of opinions, less fulsome, neutral and critical assessment by employees of issues to be considered by the Board of Directors and less frankness in dealings with the Board of Directors, all of which are key to BHI's profitability and good decision making processes.

[54] The appellant did not provide representations on this issue.

Analysis/Findings

[55] Based on my review of the records and BHI's representations in their entirety, I find that it exercised its discretion in a proper manner and did not take into account irrelevant factors. The information that I have found subject to section 7(1) contains the advice or recommendations of BHI's management to its Board of Directors and is information about whether to amend BHI's Travel and Expense Policy or whether to pursue discussions with the appellant about his company possibly doing business with BHI.

[56] Accordingly, as I have found that BHI exercised its discretion in a proper manner concerning the information I found subject to section 7(1), I will uphold its exercise of discretion concerning this information.

ORDER:

1. I order BHI to disclose the information in the records I have found not exempt to the appellant by **March 14, 2016**. For ease of reference, I have provided BHI with a copy of the records highlighting the information that should be disclosed.
2. I uphold the BHI's decision to withhold the remaining information at issue in the records.

3. In order to verify compliance with order provision 1, I reserve the right to require a copy of the records disclosed by BHI to be provided to me.

Original Signed by: _____

Diane Smith
Adjudicator

February 22, 2016 _____