Federal Court  Cour fédérale

**Date: 20160808**

**Docket: T-1453-14**

**Citation: 2016 FC 683**

**Ottawa, Ontario, August 8, 2016**

**PRESENT: The Honourable Mr. Justice Gleeson**

**BETWEEN:**

**THE INFORMATION COMMISSIONER OF CANADA**

**Applicant**

**and**

**TORONTO PORT AUTHORITY**

**Respondent**

**and**

**CANADIAN PRESS ENTERPRISES INC.**

**Added Party**

**PUBLIC JUDGMENT AND REASONS**

## I. Introduction

### A. *Nature of the Matter*

[1] The Information Commissioner of Canada [the Commissioner or OIC] brings this application for judicial review pursuant to paragraph 42(1)(a) of the *Access to Information Act*, RSC 1985, c A-1 [ATIA] on behalf of Canadian Press Enterprises Inc. for an order directing the Toronto Port Authority, now Ports Toronto [TPA], to disclose the Minutes of a TPA Audit and Finance Committee [the Committee] Meeting.

### B. *Background*

[2] TPA is a government business enterprise that owns and operates three pieces of infrastructure in the City of Toronto: Billy Bishop Toronto City Airport, formerly known as the Toronto City Centre Airport [TCCA], the Port of Toronto and the Outer Harbour Marina.

[3] TPA is established under the provisions of the *Canada Marine Act*, SC 1998, c 10 [Marine Act]. TPA is accountable to the Canadian Government through Transport Canada. It maintains a nine member Board of Directors appointed by all three levels of government [Board], some of who sit as members of the Committee. There is no dispute that for the purpose of paragraph 3(a) of the ATIA, TPA is a "government institution" included in Schedule I of the ATIA.

[4] On December 23, 2008 the Committee met [the Meeting] and minutes of that meeting were generated [the Minutes].

[5] On June 8, 2009, a Canadian Press Reporter [the Requester] filed an access to information request with TPA requesting, among other documentation, the "notes/minutes/recordings" of the Meeting. On September 10, 2009, TPA refused to release any part of the Minutes to the Requester on the basis that they contained commercial and financial information, the release of which would prejudice TPA's competitive position and were therefore exempt from disclosure under the ATIA.

[6] As a result of the TPA refusal, the Requester filed a complaint with the Commissioner dated September 24, 2009. On October 19, 2009 the OIC notified TPA of the complaint and its intention to carry out an investigation. On November 19, 2010, the OIC contacted TPA and requested the relevant documents from TPA and that they provide the underlying rationale for the exemptions claimed.

[7] On January 31, 2011, TPA responded to the OIC reasserting its position that the Minutes contained commercial information that would prejudice TPA's competitive position and that TPA was relying on paragraphs 18(a) and 18(b) of the ATIA in refusing to disclose the Minutes to the Requester.

[8] On March 28, 2011 the OIC requested that TPA provide a detailed rationale/justification for each instance where it sought to maintain an exemption under paragraphs 18(a) and 18(b) and

that TPA advise whether it had considered severing any of the information and disclosing part of the Minutes as required by section 25 of the ATIA.

[9] The OIC did not receive a formal response to its March 28, 2011 request. On September 16, 2011 the OIC wrote to the President and Chief Executive Officer of TPA [the "Head"] pursuant to paragraph 35(2)(b) of the ATIA inviting TPA to provide representations and evidence by October 5, 2011 demonstrating (1) that the Minutes fall within the scope of the paragraphs 18(a) and 18(b) exemptions; and (2) how TPA had exercised its discretion to withhold the information under those exemptions. The letter further requested that TPA consider whether portions of the Minutes could be reasonably severed under section 25 of the ATIA.

[10] In the September 16, 2011 letter the OIC also expressed the preliminary view that TPA had not discharged its onus of demonstrating that: (1) the Minutes fall within the scope of the exemptions under paragraphs 18(a) or 18(b); (2) it had reasonably exercised its discretion in not disclosing the Minutes to the Requester; and (3) it had given due consideration to whether or not the Minutes could be severed and partly disclosed pursuant to section 25 of the ATIA.

[11] On November 16, 2011, the Head of TPA responded to the OIC, stating that the exemptions claimed under paragraphs 18(a) and 18(b) need to be considered in the context of TPA's commercial mandate as set out at section 4 of the *Marine Act*. The Head's reply advises that efforts were made to sever information pursuant to section 25 of the ATIA and advances TPA's rationale for not being in a position to sever any of the information in the Minutes. In this

letter TPA also invokes the mandatory exemptions relating to third party information set out at paragraphs 20(1)(b) and 20(1)(d) of the ATIA.

[12] On December 21, 2011 the OIC wrote to the Head of TPA pursuant to paragraph 35(2)(b) of the ATIA inviting further representations on the subsection 20(1) exemptions. The OIC also advised that it remained unconvinced that TPA had properly applied the section 18 exemptions again inviting further representations. On January 13, 2012, the Head of TPA provided further representations reiterating TPA's position in relation to the claimed exemptions.

[13] In February, March and April of 2013 the OIC and TPA wrote to the private sector third party whose information formed the basis for TPA's subsection 20(1) exemptions. The OIC advised the third party that it was not convinced that the subsection 20(1) exemptions applied to the information in issue and was therefore seeking submissions from the third party. The third party did not reply to the OIC correspondence.

[14] On September 12, 2013, the Commissioner wrote to the Head of TPA, pursuant to subsection 37(1) of the ATIA advising that based on the representations provided by TPA and the evidence gathered in the course of the OIC investigation, the claimed exemptions were generally not justified and the Requester's complaint was well-founded. The Commissioner recommended that the Minutes be released in their entirety [the Subsection 37(1) Recommendation] and requested that TPA inform her of whether it intends to implement the recommendation or provide reasons for not taking the recommended action. The Commissioner

further stated that upon being advised of TPA's position on the recommendation the results of the investigation would be reported to the Requester.

[15] Subsequent to the subsection 37(1) Recommendation there were further discussions between the OIC and TPA. The Head of TPA wrote to the Commissioner on October 28, 2013 [the October 28, 2013 Letter] consenting to the disclosure of a redacted version of the Minutes although TPA maintained its position that the whole of the Minutes were exempt based on the exemptions claimed under paragraphs 18(a) and 18(b) and subsection 20(1). In this Letter the Head of TPA also states "further that the Minutes represent an account of consultations and deliberations of directors, officers and employees of the TPA, which may be exempted under s. 21(1)(b) of the Act."

[16] For the purpose of this application, paragraph 21(1)(b) is a discretionary exemption that allows for the non-disclosure of accounts of consultations or deliberations of directors, officers or employees of a government institution. TPA had not previously identified or relied on the paragraph 21(1)(b) exemption. TPA subsequently delivered a severed or redacted version of the Minutes to the Requester again asserting paragraph 21(1)(b) as a basis for non-disclosure of the redacted portions of the Minutes [the Redacted Minutes].

[17] As a result of TPA's position the OIC entered into an email exchange with the Requester to determine if the Requester was satisfied with the TPA disclosure of the Redacted Minutes. The OIC expressed the view that the disclosure fell well short of what had been recommended. In response, the Requester advised the OIC that he remained interested in pursuing the file and

would like as much information as possible to be released. The OIC advised the Requester that there remained an opportunity to further negotiate with TPA and asked whether there was something specific in the Minutes being sought. The Requester confirmed that "I wouldn't say there's anything specific. My concern is more around the fact that a significant amount of the information is still redacted."

[18] The OIC informed TPA via email that the Requester was not satisfied with the disclosure and indicated that as a result the OIC would proceed with its process. TPA inquired as to the basis of the dissatisfaction to determine if there was something more that might be provided to resolve the situation. The OIC subsequently advised TPA that the Requester wants access to the Minutes in their entirety.

[19] On May 12, 2014, the OIC's report and recommendation was issued to the Requester pursuant to subsection 37(2) of the ATIA [the Final Report]. The Final Report concludes that the complaint was well-founded, that the Commissioner's recommendation to TPA was that the latter release the Minutes in their entirety, and that the OIC had recorded the complaint as unresolved on the basis that TPA's action taken was inadequate. The Final Report notes that TPA raised the paragraph 21(1)(b) exemption for the first time on October 28, 2013 after the Commissioner reported her findings to TPA. In this regard the Final Report concludes that TPA failed to meet its burden in justifying the application of the paragraph 21(1)(b) exemption and had also failed to provide any evidence to demonstrate a weighing of the factors for and against disclosure and the exercise of discretion in applying the exemption.

[20] On May 13, 2014, the Requester consented to the Commissioner applying to the Federal Court, pursuant to paragraph 42(1)(a) of the ATIA, for a review of TPA's refusal to disclose the Minutes in their entirety.

C. *The Redacted Minutes*

[21] As mentioned above, TPA provided the Redacted Minutes to the Requester. Those Redacted Minutes are in the applicant's Public Application Record. The Redacted Minutes detail several topics and issues, including discussions relating to the purchase and financing of a new ferry to service the TCCA. The Redacted Minutes set out the following in this regard:

> 3. Ferry
>
> The Committee had before it a report from the Acting President & CEO outlining New Ferry Financing Options – BMO Term Sheet with a recommendation that the Committee approve the $5 million Credit Facility made available by the Bank of Montreal ("BMO") for the purchase of a second Ferry, to provide service to the TCCA. The report also set out BMO Term Loan Conditions for the new credit facility.
>
> The Acting President & CEO reported that Management was seeking approval of the New Ferry and that the total cost including engineering, project management and soft costs totalled $4.85 million.
>
> The Acting President & CEO advised that Management had gone through the Request for Proposals ("RFP") process and had received bids from three ship builders.
>
> The Acting President & CEO reported that there was a substantial difference between bidders from lowest to highest and Management was pleased with the results and were currently negotiating with the lowest bidder to refine the amount.

[22] On the following page of the Redacted Minutes it states "The Director of TCCA reported that in terms of budget price and the bid/ask range Hike Metals ('Hike'), the lowest bidder, was satisfied they could meet the price."

[23] Later in the Redacted Minutes it states:

> It was moved by Mr. Mark McQueen that the Audit & Finance Committee recommend to the Board of Directors construction of a New Ferry to TCCA and the project cost not to exceed $4,850,000.00. Motion carried.
>
> Approved. Mr. Henley voted against the motion.

[24] On the next page it states:

> The Acting President & CEO indicated that it was his recommendation that the Committee approve the credit facility of $5 million made available by BMO and forward the Committee's recommendation to the Board of Directors for approval.
>
> > It was moved by Mr. Mark McQueen and seconded by Mr. Colin Watson that the Committee approve the $5 million Credit Facility made available by the Bank of Montreal for the purchase of a second ferry to provide service to the TCAA. Motion carried.
>
> Approved. Mr. Henley voted against the motion.

D. *The Watson Report*

[25] On June 25, 2009 the Office of the Conflict of Interest and Ethics Commissioner released a report titled the Watson Report. The Watson Report, which is publicly available, responds to an allegation by Christopher Henley, a member of the Board, that Colin Watson, another Board

member was in a potential conflict of interest in participating in matters before the Board relating to a proposal to acquire a new ferry. That participation included the Meeting of which the Minutes are the subject. The Ethics Commissioner concludes that no conflict existed. In reaching this conclusion the Watson Report details many of the issues and circumstances that have been redacted from the Minutes.

[26] A primary issue in this dispute pertains to whether the Watson Report negates the applicability of any of the exemptions to the Minutes, as well as the effect of the Watson Report on the exercise of discretion in the Head of TPA's refusal to disclose the Minutes in their entirety.

[27] I find that the Watson Report is a credible and detailed document that is focused on the ferry acquisition, and reports on the acquisition process including the December 23, 2008 Meeting. For the reasons provided below, I conclude that the Watson Report does indeed negate the application of some of the ATIA exemptions to portions of the Minutes, and that the nature of the Watson Report was a relevant factor for the purpose of the exercise of discretion pursuant to paragraph 21(1)(b) of the ATIA.

## II. Preliminary Matters

### A. *Confidentiality Order*

[28] Prior to the hearing of this application, Prothonotary Mireille Tabib, acting pursuant to Rules 151 and 152 of the *Federal Courts Rules*, SOR/98-106 [*Federal Courts Rules*] and

subsection 47(1) of the ATIA, issued a confidentiality order on July 29, 2014 [the Confidentiality Order] to protect the substance of the information at issue in this matter.

[29] At the outset of the hearing, counsel for the respondent made submissions on the need to proceed in camera for a portion of the hearing. After discussion with the parties, and with the intent of minimally infringing on the open Court principle, the Court heard those submissions requiring an examination of the Minutes themselves and relating to the application of the ATIA exemptions claimed in camera. The Court also heard some argument relating to the respondent's consideration of the discretionary exemptions and remedy in camera. The Court heard the majority of the oral submissions in public.

B. *Further Submissions Received from the Parties*

[30] At the hearing of this matter, counsel for the applicant raised the issue of the availability of the paragraph 21(1)(b) exemption to the respondent. Counsel for the respondent objected to the applicant raising this issue, arguing that it was not raised in the Notice of Application or the Memorandum of Fact and Law. The respondent was of the view that in the circumstances it could not properly respond. The applicant was of the view that the issue was directly tied to the respondent's prematurity argument and as such was a matter that was properly before the Court.

[31] Counsel for the respondent agreed that an opportunity to provide post-hearing submissions may address the concern. I therefore heard the applicant's oral arguments on the issue, and the respondent's brief oral response. The Court received additional written

submissions from the respondent on October 30, 2015 and a reply from the applicant on November 6, 2015.

[32] In the further written submissions the respondent maintains its objection to the Commissioner pursuing the argument that TPA is barred from relying on the 21(1)(b) exemption. The respondent submits that the opportunity to provide further submissions does not correct the evidentiary prejudice it has suffered as a result of not having the opportunity to introduce evidence relating to the exchanges between the OIC and TPA in the period before and after TPA made the paragraph 21(1)(b) refusal. Those submissions also argue that even if the applicant could raise this new argument in oral submissions, the argument is of little effect as the applicant never raised this issue at any time during the OIC's process including in the Final Report when the Commissioner concluded TPA did not meet its burden of justifying its refusal under paragraph 21(1)(b) of the ATIA.

[33] I am satisfied that the 21(1)(b) exemption was available to TPA for the reasons set out below.

C. *Minutes and Relevant Legislation*

[34] The Minutes are reproduced in full at Appendix A. Relevant extracts from the ATIA, the *Marine Act*, and the *Port Authorities Management Regulations*, SOR/99-101 are reproduced at Appendix B.

## III. Issues

[35] The Commissioner argues that TPA has failed to prove that the information redacted from the Minutes is exempt under the ATIA and that the Head of the TPA did not reasonably exercise his discretion in October, 2013 when determining that the Minutes would not be released in their entirety. The Commissioner further argues that TPA cannot rely on the exemption under paragraph 21(1)(b) of the ATIA because TPA failed to claim it prior to the issuance of the Commissioner's Subsection 37(1) Recommendation on September 12, 2013.

[36] TPA argues the entirety of the Minutes is exempt from disclosure based on the exemptions identified, individually or in combination, and that the Head of TPA reasonably exercised his discretion in disclosing the Redacted Minutes to the Requester. TPA further argues that the Commissioner prematurely brought this application for judicial review as the Commissioner did not pursue any investigation of TPA's reliance on the paragraph 21(1)(b) exemption.

[37] In order to determine whether or not the Minutes should be made available to the Requester in their entirety, it is necessary that the Court consider and determine the following issues:

(1) What is the applicable standard of review?

(2) Is the application for judicial review premature? This requires consideration of two sub-issues:

i) Was TPA in a position to claim an additional basis for exemption under paragraph 21(1)(b) after receiving the Commissioner's Subsection 37(1) Recommendation on September 12, 2013; and

ii) Was the OIC obligated to further investigate or engage with the Requester as a result of TPA's claim of the paragraph 21(1)(b) exemption after receiving the Subsection 37(1) Recommendation?

(3) Do the exemptions TPA has claimed under paragraphs 18(a), 18(b), 20(1)(b), 20(1)(d) and/or 21(1)(b) apply to the Minutes?

(4) If the discretionary exemptions under paragraphs 18(a), 18(b) and/or 21(1)(b) apply to any part of the Minutes:

i) Which party has the burden of demonstrating whether the Head of TPA reasonably exercised his discretion in deciding not to disclose redacted portions of the Minutes; and

ii) Did such a reasonable exercise of discretion occur in this case?

(5) If the Court determines that the application should be allowed in full or in part, what is the appropriate remedy?

## IV. Overview of the ATIA

[38] Prior to addressing the issues raised, an overview of the ATIA's purpose and the jurisprudence interpreting the right to access records, the role of exemptions and the option to sever a record will be helpful.

[39] In *Merck Frosst Canada Ltd v Canada (Health)*, [2012] 1 SCR 23 at paras 21-22 [*Merck*], Justice Cromwell for the majority of the Supreme Court of Canada set out that Court's jurisprudence on the purpose of the ATIA:

> [21] The purpose of the Act is to provide a right of access to information in records under the control of a government institution. The Act has three guiding principles: first, that government information should be available to the public; second, that necessary exceptions to the right of access should be limited and specific; and third, that decisions on the disclosure of government information should be reviewed independently of government (s. 2(1)).
>
> [22] In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 61, La Forest J. (dissenting but not on this point) underlined that the overarching purpose of the Act is to facilitate democracy and that it does this in two related ways: by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and officials may be held meaningfully to account to the public. This purpose was reiterated by the Court very recently, in the context of Ontario's access to information legislation, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815. The Court noted, at para. 1, that access to information legislation "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society". Thus, access to information legislation is intended to facilitate one of the foundations of our society, democracy. The legislation must be given a broad and purposive interpretation, and due account must be taken of s. 4(1), that the Act is to apply notwithstanding the provision of any other Act of Parliament.

[40] The Court adopts a broad interpretation of the right of access under subsection 4(1) of the ATIA because it “may be considered quasi-constitutional in nature” (*Canada (Information Commissioner) v Canada (Minister of National Defence)*, [2011] 2 SCR 306 at para 40). The Supreme Court of Canada has held that while paragraph 2(b) of the *Canadian Charter of Rights and Freedoms* does not guarantee access to information, “Access is a derivative right which may arise where it is a necessary precondition of meaningful expression on the functioning of government” (*Ontario (Public Safety and Security) v Criminal Lawyers’ Association*, [2010] 1 SCR 815 at para 30 [*Criminal Lawyers’ Association*]).

A. *Right of Access, Exemptions & Severance*

[41] The ATIA, specifically subsection 4(1) provides a broad "right of timely access" (*Statham v Canadian Broadcasting Corp*, 2010 FCA 315 at para 1, 326 DLR (4th) 228, [*Statham*]) to any record under the control of a government institution, subject to "a number of exemptions from the general rule of disclosure" (*Merck* at paras 24, 96). Hence "The interpretation of a statutory exception in the Act must respect the purpose of the Act as stated in subsection 2(1) while at the same time give effect to the purpose of the exception. The right of the public to know the workings of government is not absolute. It must yield to the values sought to be protected by the statutory exceptions" (*3430901 Canada Inc v Canada (Minister of Industry)*, [1999] FCJ No 1859 at para 44, 177 FTR 161 (TD) [*Telezone FC*]).

[42] Yet "When it is remembered that subs. 4(1) of the Act confers upon every Canadian citizen and permanent resident of Canada a general right to access and that the exemptions to that general rule must be limited and specific, I think it clear that Parliament intended the exemptions to be interpreted strictly" (*Rubin v Canada (Canada Mortgage and Housing Corp)*, [1988] FCJ No 610 at para 25, 52 DLR (4th) 671 (CA), [*Rubin*]). Those exemptions exist from sections 13 to 24 of the ATIA, and as determined by the Supreme Court of Canada in *Merck* at paragraph 97:

> [97] They may be categorized according to whether they are class- or harm-based exemptions and according to whether they are mandatory or discretionary. Where there is a class exemption, the exemption applies to all records determined to fall into that class of record. However, a harm-based exemption applies only if the specified harm or risk of harm is present. Some exemptions are mandatory: once the record has been shown to fall within the exemption, the head of the institution has no discretion and must refuse to disclose it, subject only to any applicable override, such as the one found in s. 20(6), a topic not in issue here. Other

> exemptions are discretionary: once there has been an initial determination that the record falls within the statutory exemption, the head has discretion as to whether or not disclosure will be refused or granted.

[43] The subsection 20(1) exemption for third party confidential information is mandatory, in that "if the record falls within the exemption, the head must refuse to disclose it (putting aside the s. 20(6) public interest override)" (*Merck* at paras 24, 98). By contrast the exemptions under paragraphs 18(a) and 18(b) and 21(1)(b) are discretionary.

[44] However, regarding subsection 20(1) "The duty not to disclose these sorts of third party information must be read with s. 25 of the Act, which may be called the severance provision. It requires the institution to disclose any part of a record that does not contain material which the institution is authorized not to disclose and which can reasonably be severed from any part that does contain exempted material" (*Merck* at para 25). Therefore, "the general right of access is subject to a duty on government institutions not to disclose these types of third party information, including information that would normally be subject to disclosure, but cannot reasonably be severed from the exempted third party information" (*Merck* at para 26). The severance provision under section 25 applies to all exemptions, mandatory and discretionary (*Canadian Council of Christian Charities v Canada (Minister of Finance)*, [1999] FCJ No 771 at para 20, 168 FTR 49 (TD) [*Canadian Council of Christian Charities*]).

## V. Standard of Review

[45] The parties do not dispute the applicable standard of review: "The question whether the claimed exemptions apply is reviewed on the basis of correctness. The question of whether the

discretion was properly exercised is reviewed on the basis of reasonableness" (*Canada (Information Commissioner) v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 104 at para 18, 360 DLR (4th) 176 [*Minister of Public Safety and Emergency Preparedness*]). When the Court reviews whether the information falls within an exemption under the ATIA, it does so *de novo*; but a *de novo* review does not apply to the exercise of discretion question (*Canada (Information Commissioner) v Canada (Minister of Industry)*, 2001 FCA 254 at para 85, 45 Admin LR (3d) 182 [*Telezone FCA*], *Ucanu Manufacturing Corp v Defence Construction Canada*, 2015 FC 1001 at para 45 [*Ucanu*]).

## VI. Prematurity

[46] The jurisprudence relating to the complaint process and the steps that must be exhausted prior to seeking judicial review are discussed below. In this case however, the question of prematurity is bound up with the question of whether TPA failed to invoke the paragraph 21(1)(b) exemption in a timely manner and, if it did not, does the exemption remain available to TPA.

### A. *The Complaint and Investigation Process under the ATIA*

[47] Based on the general right of access, an individual can make a request to a government institution for access to any record under its control (Subsection 4(1)). Where such a request is made, the government institution is obligated to; (1) make every reasonable effort to assist the requester; (2) respond to the request accurately and completely; and (3) provide timely access to the record in the format requested subject to the regulations (Subsection 4(2.1)). Furthermore, the

government institution must also give written notice to the requester as to whether or not it will give access to the record or a part thereof (Paragraph 7(a)). If the government institution determines that the record requested is exempt under a provision in the ATIA and refuses access on that basis it must state the specific provision on which it based the refusal (Paragraph 10(1)(b)). Upon receiving a refusal, a requester can, within sixty days of receiving the notice of refusal, complain to the Commissioner in writing (Section 31). Once the Commissioner receives the complaint she must, subject to the ATIA, investigate (Paragraph 30(1)(a)).

[48] In the context of discussing a deemed refusal, not the issue in this case, to give access to a record under subsection 10(3) of the ATIA, Justice Desjardins in *Canada (Information Commissioner) v Canada (Minister of National Defence)*, [1999] FCJ No 522 at para 20, 240 NR 244 (CA) [*National Defence*] explained the investigation process under the ATIA:

> [20] The Commissioner may then initiate a complaint under section 30 of the Act. He notifies the head of the institution (section 32). He conducts the investigation, in the course of which the institution is given a reasonable opportunity to make representations (subsection 35(2)) and for the purposes of which the Commissioner has extraordinary powers (section 36), including the power to summon and enforce the appearance of persons in the same manner and to the same extent as a superior court of record (paragraph 36(1)(a)), to enter any premises occupied by the government institution (paragraph 36(1)(d)) and to examine any record, as no record may be withheld from him on any grounds (subsection 36(2)). He provides the head of the institution with a report containing his findings and recommendations (paragraph 37(1)(a)). He may specify the time within which the head is to give him notice of any action taken or proposed to be taken to implement the recommendations or reasons why no such action has been or is proposed to be taken (paragraph 37(1)(b)); and reports the findings of his investigation to the complainant (subsection 37(2)), but where a notice has been requested under paragraph 37(1)(b)) no report shall be made until the expiration of the time within which the notice is to be given to the Commissioner.

[49] Justice Desjardins also noted that the Commissioner "is the master of his procedure pursuant to section 34 of the Act" (*National Defence* at para 21).

B. *How & When Can an Application for Judicial Review be Brought under the ATIA?*

[50] Sections 41 and 42 allow for the bringing of applications for judicial review against a government institution that has refused access to a record.

[51] At paragraphs 31 to 32 in *Lukacs v Natural Sciences and Engineering Research Council of Canada*, 2015 FC 267, 472 FTR 157 [*Lukacs*], Justice Anne Mactavish explained the Federal Court of Appeal's jurisprudence on the conditions an applicant under section 41 of the ATIA must meet before applying to the Federal Court for judicial review:

> [31] In *Statham v. Canadian Broadcasting Corp*., 2010 FCA 315 at para. 64, [2012] 2 F.C.R. 421, the Federal Court of Appeal identified three prerequisites that an individual seeking access to information must satisfy before applying to the Federal Court under section 41 of the Act. These are:
>
> > 1. The applicant must have been "refused access" to a requested record;
> >
> > 2. The applicant must have complained to the OIC about the refusal; and
> >
> > 3. The applicant must have received a report of the OIC under subsection 37(2) of the Act.
>
> [32] As Justice Stratas observed in *Whitty v. Canada (Minister of the Environment)*, 2014 FCA 30, at para. 8, 460 N.R. 372, section 41 of the Act "is a statutory expression of the common law doctrine that, absent exceptional circumstances, all adequate and alternative remedies must be pursued before resorting to an application for judicial review".

[52] An application brought under section 41 not meeting these conditions would be premature.

[53] Paragraph 42(1)(a) allows the Commissioner to apply for judicial review of any refusal to disclose a record under the ATIA or part thereof in respect of an investigation carried out if the Commissioner has the consent of the requester. The Commissioner brought this judicial review application pursuant to that provision.

C. *Is the Application Premature?*

[54] The respondent submits that the application is premature: TPA did not refuse to disclose further redacted portions of the Minutes as the Requester asked in his November, 2013 correspondence with the OIC, rather the OIC failed to ask TPA to disclose further redacted portions of the Minutes. The Requester took the position, after the release of the Redacted Minutes by TPA, that too much of the information had been redacted; the Requester did not, as the OIC presumed, take the position that the entirety of the Minutes needed to be disclosed. TPA submits that the OIC did not provide TPA with the opportunity to address the Requester's concern with redacted portions of the Minutes, but instead prematurely proceeded with this application on the mistaken belief that the Requester was seeking disclosure of the Minutes in their entirety.

[55] As a result, TPA argues that there was no refusal to release further information and that the OIC did not seek submissions from TPA in relation to the paragraph 21(1)(b) exemption prior to providing its Final Report to the Requester. Instead the Commissioner simply concluded

that the paragraph 21(1)(b) exemption was not justified and the entire Minutes should be disclosed. TPA argues that in doing so the Commissioner failed to exhaust the informal methods of resolving the dispute arising from the Requester's concern. I respectfully disagree.

[56] In *Luckacs*, Justice Mactavish considered the propriety of a government institution amending its grounds for refusing access to a document once a complaint has been filed with the OIC. Justice Mactavish considered *Tolmie v Canada (Attorney General)*, [1997] FCJ No 1417 (TD) where Justice McGillis concluded that on the facts of the case the government institution was entitled to raise an additional ground during the course of the OIC investigation. Justice Mactavish goes on to then state at paragraph 51 of *Lukacs* that:

> [51] It is thus clear that there is no blanket prohibition on the ability of government institutions to amend the grounds relied upon to justify the refusal of access to documents once a complaint has been filed with the OIC, and that they can amend the grounds of exemptions during the OIC investigative process.

[57] The availability for a respondent to amend the grounds for exemptions claimed during the OIC's investigative process therefore engages a consideration of the question of whether the investigation is complete at the point the government institution claims a new exemption. The OIC argues that the investigation was complete upon delivery of the Subsection 37(1) Recommendation on September 12, 2013. TPA argues that the investigation was not complete until the Requester was notified of the results of the investigation under subsection 37(2) of the ATIA in the Final Report dated May 12, 2014.

[58] Section 34 of the ATIA vests in the Commissioner the discretion and authority to "determine the procedure to be followed in the performance of any duty or function of the

Commissioner under the Act." The ATIA prescribes requirements for the Commissioner to give notice before commencing an investigation and a reasonable opportunity for representations in the course of an investigation of a complaint to the head of the government institution (Section 32 and paragraph 35(2)(b)) respectively. It also extends certain powers to the Commissioner (Section 36), requires that the Commissioner notify the head of a government institution where it finds a complaint well-founded, and allows the Commissioner to request that the head of the government institution provide reasons where a recommendation will not be implemented (Subsection 37(1)). However, the ATIA does not prescribe when an investigation is complete.

[59] Nowhere in the ATIA does it state that an investigation is complete upon providing the head of the government institution the Commissioner's recommendations under subsection 37(1) but before providing the requester the final report under subsection 37(2). As discussed earlier, sections 41 and 42 contain the conditions precedent to be met before the requester or the Commissioner can bring an application for judicial review. Section 41 requires the requester receive a report under subsection 37(2) that constitutes the results of the Commissioner's investigation and paragraph 42(1)(a) requires that the Commissioner have carried out the investigation. However, neither provision specifies whether the investigation was carried out or complete after the Commissioner provides a report to the head of the government institution pursuant to subsection 37(1) but before providing the investigation report to the requester under subsection 37(2).

[60] The case-law also supports the proposition that the ATIA lacks a firm rule on when a government institution can no longer claim a new discretionary exemption and by implication

when the OIC's investigation into a complaint is complete. Justice Mactavish held in *Lukacs* at paragraph 46 that "The jurisprudence has, moreover, established that a government institution can indeed amend the grounds asserted for denying access if it does so before the OIC has reported in relation to an access complaint."

[61] Justice Richard Southcott in *Ucanu* at paragraph 85 referred to this principle: "The Court's recent decision in *Lukacs v Natural Sciences and Engineering Research Council of Canada*, 2015 FC 267 has clarified that a government institution is permitted to amend its grounds for refusal after a complaint has been filed with the Information Commissioner and while it remains under investigation by the Information Commissioner."

[62] Some might call this a loophole, but in my view the ATIA does not create a specific timeline for when an investigation is complete because of the preference to leave the decision regarding timelines in the hands of the Commissioner provided that the Commissioner complies with the mandatory requirements in the ATIA such as giving the head of the government institution a reasonable opportunity to make representations during the investigation: "The investigation the Commissioner must conduct is the cornerstone of the access to information system. It represents an informal method of resolving disputes in which the Commissioner is vested not with the power to make decisions, but instead with the power to make recommendations to the institution involved" (National Defence at para 27).

[63] Therefore, subject to meeting the mandatory requirements of the ATIA, Parliament has vested in the Commissioner the discretion to determine the procedure to follow when

investigating a complaint under the ATIA, including the completion of the investigation. When there is a dispute, as is the case here, the Court will consider all of the circumstances of the particular case both subjective and objective. As such, while I am not prepared to conclude that an investigation will never be complete prior to reporting to the complainant under subsection 37(2), the circumstances in this case, including the conduct of the OIC, lead me to conclude that the Commissioner did not view or treat the investigation as complete when delivering the Subsection 37(1) Recommendation to TPA on September 12, 2013.

[64] In reporting to TPA, the Commissioner outlined the results of the investigation and then chose to provide TPA with a period of time to: (1) consider the recommendations made; and (2) in the event TPA did not agree asked that TPA "please provide me with reasons why you will not be taking the recommended action." The Commissioner did not specify whether TPA could claim new exemptions at that time. Furthermore, the OIC, in communications with the Requester after the delivery of the subsection 37(1) Recommendation and receipt of TPA's response, does not signal that the investigation is complete, rather the opposite. The OIC advised the Requester that the opportunity remains to "negotiate further with TPA." Finally and perhaps most persuasively, is the Commissioner's Final Report to the Requester in May of 2014. In that Final Report, completed many months after TPA identified the paragraph 21(1)(b) exemption in reply to the Subsection 37(1) Recommendation, the OIC does not take the position that the exemption was not available to TPA in October of 2013. Rather, under the heading "Investigation", the OIC described TPA's claiming the paragraph 21(1)(b) exemption for the first time in the October 28, 2013 Letter. Subsequently, the OIC concludes that TPA "has not met its burden of justifying the application of paragraph 21(1)(b) of the Act and that it has not provided any evidence that it has

exercised its discretion to invoke the exemption, taking into consideration relevant factors for and against disclosure as of the date of its decision to apply the exemption."

[65] As a result I am of the view that the OIC investigation was ongoing, albeit substantially concluded, in September of 2013 and as such TPA remained in a position to rely on a previously unidentified exemption to justify non-disclosure of the Minutes.

[66] However, TPA's ability and decision to claim the paragraph 21(1)(b) exemption in October of 2013, did not trigger an obligation upon the Commissioner to reopen or recommence what was in effect a substantially completed investigation as the respondent argues.

[67] As noted above, section 34 of the ATIA establishes the Commissioner as the master of her procedure (*National Defence* at para 21). In this role it is appropriate for the Commissioner to consider all of the circumstances in determining how to advance a complaint through the process. In this case the circumstances demonstrate that:

(1) TPA had been actively engaged by the OIC at the outset of the complaint;

(2) TPA had been requested to provide representations on numerous occasions, throughout the investigation process asking that it identify the exemptions it was relying on, justifying those exemptions and demonstrating, in the case of the discretionary exemptions, that it had validly exercised its discretion in considering the obligation to sever under section 25 of the ATIA;

(3) TPA had been placed on notice as early as September 16, 2011 that the OIC had formed the preliminary view that the Minutes did not fall within the scope of the claimed section 18 exemptions, that TPA had not demonstrated that it had reasonably exercised its discretion and that TPA had not given due consideration to severance of the Minutes under section 25, concerns that were repeated in subsequent exchanges of correspondence;

(4) On December 21, 2011 the OIC informed TPA of its concerns as they related to the subsection 20(1) exemption that TPA identified in November, 2011;

(5) The ATIA imposes a duty on government institutions to make every reasonable effort to assist requesters as well as provide timely access to requested records (Subsection 4(2.1)) and to identify the specific basis for a refusal to disclose (Paragraph 10(1)(b));

(6) The investigation had been ongoing for a four year period; and

(7) Reliance on the paragraph 21(1)(b) exemption was raised for the first time virtually at the end of a lengthy investigation in the October 28, 2013 Letter, and in identifying the exemption TPA did not set out any justification for its application, or attempt to demonstrate how it had discharged its section 25 duty to sever, a matter I address later in this decision.

[68] Having considered all of these circumstances I am of the view that it was open to the Commissioner to conclude that further formal investigation was not required. It was also

appropriate for the Commissioner to rely on the failure of TPA to advance any meaningful justification in claiming the paragraph 21(1)(b) exemption to conclude in the Final Report, that TPA had failed to provide any justification for its reliance on the paragraph 21(1)(b) exemption.

[69] The prerequisites set out in *Lukacs* at paragraph 31, modified for the section 42 context, were all satisfied prior to the applicant initiating this judicial review application under paragraph 42(1)(a) of the ATIA: (1) the Requester was "refused access" to a requested record in TPA's control; (2) the Requester made a complaint to the OIC; (3) the OIC carried out an investigation of the Requester's complaint; (4) the Requester received a report of the OIC under subsection 37(2) of the Act; and (5) the Requester provided consent to the Commissioner to bring this judicial review application.

[70] The respondent relies on *National Defence* in support of its prematurity argument. *National Defence*, however, addresses a situation where the Commissioner deprived the government institution of the investigation process under the ATIA. In that case the Commissioner instituted a new complaint, immediately decided the complaint and then filed an application for judicial review without giving the government institution an opportunity to respond (*National Defence* at paras 22-23).

[71] By contrast, when the Court assesses the totality of the circumstances of this case it becomes apparent that the respondent here was extended a number of opportunities to claim exemptions and provide the basis being relied upon to justify those exemptions. TPA was not deprived of an investigation as mandated under the ATIA as a result of its refusal to disclose the

Minutes to the Requester in 2009. TPA made submissions over a four year period. In contrast to *National Defence*, the OIC conducted a full investigation over a prolonged period of time and chose not to pursue further investigation when TPA identified paragraph 21(1)(b) as a basis for exemption after substantial completion of the investigation.

[72] To impose an obligation upon the Commissioner to relaunch an investigation in these circumstances would open the door to substantially delayed investigations should government institutions identify claims for exemptions on a piecemeal basis. Such a result would, in my view: (1) frustrate the investigation process; (2) be contrary to the duties imposed upon government institutions under subsection 4(2.1) and paragraph 10(1)(b) of the ATIA to make every reasonable effort to assist requesters and to identify the specific provision of the ATIA for a refusal, respectively; (3) undermine the Commissioner's role as the master of her own process; and (4) potentially undermine the quasi-constitutional right of timely access (*Statham* at para 1).

[73] *National Defence* stands for the proposition that the Commissioner cannot seek judicial review from the Court without having investigated the complaint as required by the ATIA (*National Defence* at para 27). Similarly, a government institution cannot rely on its failure to claim an exemption in a timely manner during the Commissioner's investigation to argue that the Commissioner failed to give it an opportunity to respond to the negative conclusion on its late claimed exemption.

[74] The application is not premature.

## VII. Are the Exemptions TPA has Relied on Applicable to the Minutes?

[75] Prior to undertaking an analysis of TPA's redactions and the ATIA exemptions TPA relied on to support those redactions I will set out the law as it relates to the exemptions claimed.

[76] TPA originally relied upon paragraphs 20(1)(b) and 20(1)(d) to redact portions of the Minutes on the basis that the redacted information contained third party information within the meaning of subsection 20(1). TPA abandoned this position in its oral submissions and I have therefore not addressed subsection 20(1) in this analysis.

### A. *The Jurisprudence*

#### (1) Paragraphs 18(a) and 18(b)

[77] The parties do not dispute the well-established principle that as the party claiming the exemptions, TPA has the onus of proving on a balance of probabilities that the exemptions it has claimed apply to the Minutes (*Toronto Sun Wah Trading Inc v Canada (Attorney General)*, 2007 FC 1091 at para 9, 161 ACWS (3d) 517). The question becomes what evidence TPA must bring to discharge this onus of proof, particularly where there is a requirement to establish either a substantial value or a reasonable likelihood of substantial value in the information (Paragraph 18(a)) or prejudice, interference with contractual or other negotiations (Paragraph 18(b)).

[78] In *Brainhunter (Ottawa) Inc v Canada (Attorney General)*, 2009 FC 1172, 356 FTR 166, Justice Luc Martineau held, at paragraph 25, that establishing the confidential nature of the

information requires the party claiming the exemption to "provide actual direct evidence of the confidential nature of the remaining information which must disclose a reasonable explanation for exempting each record. Evidence which is vague or speculative in nature cannot be relied upon to justify an exemption under subsection 20(1)." Justice Martineau further held at paragraph 32 that establishing a reasonable expectation of probable harm requires showing a direct link between the disclosure and the alleged harm and "An applicant cannot demonstrate a reasonable expectation of probable harm simply by attesting in an affidavit that such a result will occur if the records are released." Similarly in *Canada Post Corp v Canada (Minister of Public Works and Government Services)*, 2004 FC 270, 247 FTR 110 [*Canada Post*], Justice Elizabeth Heneghan held at paragraphs 45 and 46:

> [45] Affidavit evidence that is vague or speculative is insufficient to establish the reasonable expectation of probable harm that is required pursuant to subsection 20(1)(c); see *SNC-Lavalin, supra* and *Canadian Broadcasting Corporation, supra*.
>
> [46] I acknowledge the affidavit evidence filed by the Applicant as part of the confidential Application Record contains many details concerning the alleged harm that could enure to the Applicant if the records were disclosed. However, the detail of an affidavit is not determinative of whether certain records meet the criteria for exemption pursuant to subsection 20(1)(c).

[79] These evidentiary principles while expressed in the subsection 20(1) context apply to the section 18 context.

[80] On the issue of speculation, the Federal Court of Appeal in *Attaran v Canada (Minister of Foreign Affairs)*, 2011 FCA 182 at paras 32-34, 337 DLR (4th) 552 [*Attaran*] explained the difference between an inference as a matter of logic and speculation in the context of determining the issue of whether the Head exercised his/her discretion:

[32] Drawing an inference is a matter of logic. As stated by the Newfoundland Supreme Court (Court of Appeal) in *Osmond v. Newfoundland (Workers' Compensation Commission)* (2001), 200 Nfld. & P.E.I.R. 203 at paragraph 134:

> [...] Drawing an inference amounts to a process of reasoning by which a factual conclusion is deduced as a logical consequence from other facts established by the evidence. Speculation on the other hand is merely a guess or conjecture; there is a gap in the reasoning process that is necessary, as a matter of logic, to get from one fact to the conclusion sought to be established. Speculation, unlike an inference, requires a leap of faith.

[33] In *Squires v. Corner Brook Pulp and Paper Ltd.* (1999), 175 Nfld. & P.E.I.R. 202 (C.A.) the same court reviewed early Supreme Court of Canada and House of Lords jurisprudence which discussed the distinction between inference and conjecture. Justice Cameron, writing for the Court, stated:

> [113] In *Canadian Pacific Railway Company v. Murray*, [1932] S.C.R. 112 at pp. 115-117 the Court approved the following from *Jones v. Great West Railway Co.* (1930), 47 T.L.R. 39:
>
> The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference. The cogency of a legal inference of causation may vary in degree between practical certainty and reasonable probability.
>
> [114] The House of Lords in *Caswell v. Powell Duffryn Associated Collieries Ltd.* [1940] A.C. 152 noted the difference between conjecture and the drawing of an inference in these terms at pp. 169-70.
>
> Inference must be carefully distinguished from conjecture or speculation. There can be no inference

> unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.
>
> […]
>
> [34] An inference cannot be drawn where the evidence is equivocal in the sense that it is equally consistent with other inferences or conclusions.

(a) *Financial, Commercial, Scientific or Technical Information*

[81] In considering how the terms “financial, commercial, scientific or technical” are to be interpreted it is helpful to note that the same terminology is found at paragraph 20(1)(b) of the ATIA in the context of third party information.

[82] In *Merck*, the Supreme Court of Canada took the opportunity at paragraphs 139 - 142 to summarize years of well-established statements from this Court’s jurisprudence relating to financial, commercial, scientific or technical information in the context of discussing paragraph 20(1)(b):

> [139] First, the terms "financial, commercial, scientific or technical" should be given their ordinary dictionary meanings. As MacKay J. in *Air Atonabee* stated, at p. 268:
>
> > ... dictionary meanings provide the best guide and that it is sufficient for purposes of subs. 20(1)(b) that the information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood.

> [140] Second, the case law also holds that in order to constitute financial, commercial, scientific or technical information, the information at issue need not have an inherent value, such as a client list might have, for example. The value of information ultimately "depends upon the use that may be made of it, and its market value will depend upon the market place, who may want it, and for what purposes, a value that may fluctuate widely over time" (*Air Atonabee*, at p. 267).
>
> [141] Finally, I agree that administrative details such as page and volume numbering, dates and location of information within the records are not scientific, technical, financial or commercial information (*AstraZeneca*, at para. 73).
>
> [142] In general, the same can be said about the formatting and structure of submissions such as the choice to use a graph or table to present information or the precise organization and ordering of sections of a document the general contents of which are the subject of publicly available guidelines as is the case here: see, e.g., *Société Gamma*, at pp. 63-64. Of course, whether or not the exemption applies must be considered in light of the nature of the information and the evidence in the particular case.

[83] In *Merck*, the Supreme Court of Canada definitively held at paragraphs 196 and 206 that a reasonable expectation of probable harm remains the test for determining whether documents are exempt under paragraphs 18(b) and 20(1)(b) and 20(1)(d):

> [196] It may be questioned what the word "probable" adds to the test. At first reading, the "reasonable expectation of probable harm" test is perhaps somewhat opaque because it compounds levels of uncertainty. Something that is "probable" is more likely than not to occur. A "reasonable expectation" is something that is at least foreseen and perhaps likely to occur, but not necessarily probable. When the two expressions are used in combination -- "a reasonable expectation of probable harm" -- the resulting standard is perhaps not immediately apparent. However, I conclude that this long-accepted formulation is intended to capture an important point: while the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless do more than show that such harm is simply possible. Understood in that way, I see no reason to reformulate the way the test has been expressed.

> […]
>
> [206] To conclude, the accepted formulation of "reasonable expectation of probable harm" captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.

(2) 21(1)(b): Account of Consultations or Deliberations

[84] The ATIA does not define the terms “account”, “consultations” or “deliberations.” In accordance with the Supreme Court of Canada’s determination in *Merck*, those terms should be given their ordinary dictionary meanings (*Merck* at para 139).

[85] Although not a binding document, the Treasury Board Secretariat’s *Access to Information Manual* [Manual] contains a useful discussion of the meaning of the various terms under paragraph 21(1)(b), and both of the parties relied on that document, albeit for different interpretations of the application of paragraph 21(1)(b);

> **11.18.4** Paragraph 21(1)(b) – Account of consultations or deliberations
>
> The exemption provided by paragraph 21(1)(b) of the Access to Information Act relates to an account of consultations or deliberations involving officials or employees of government institutions, a minister of the Crown or the staff of a minister of the Crown.
>
> This provision has four key components: account, consultation, deliberation and identity of individuals involved.
>
> 1. **Account**
>
> Because the term "account" is not defined in the Act, Parliament intended it to have an ordinary dictionary definition: a particular

statement or narrative of an event or thing; a relation, report or description.

Written exchanges of views qualify as an account. Examples include exchanges of memoranda setting out the views of their authors; and a memorandum that has been returned to its author with the views of the recipient handwritten on it.

What about unsolicited views? An unsolicited memorandum to an official or a minister setting out the views of another official on a particular subject can also be considered an account of consultation.

The purpose of paragraph 21(1)(b) is to protect the views expressed during consultations or deliberations in order that these continue to be expressed frankly and candidly. Paragraph 21(1)(b) does not apply to factual information or subject headings of records, unless the disclosure of the factual information or the heading would reveal the views expressed.

The account must be either of a consultation or a deliberation. These terms are not defined in the Act and take their ordinary meaning as follows.

2. **Consultation**

Consultation means:

◦ the action of consulting or taking counsel together: deliberation, conference;

◦ a conference in which the parties (for example, lawyers or medical practitioners) consult and deliberate.

3. **Deliberation**

Deliberation means:

◦ the action of deliberating (to deliberate: to weigh in mind; to consider carefully with a view to a decision; to think over); careful consideration with a view to a decision;

◦ the consideration and discussions of the reasons for and against a measure by a number of councillors.

> 4. **Identity of individuals involved**
>
> The final component of paragraph 21(1)(b) concerns the identity of the individuals who must be involved in the consultations or deliberations if the exemption is to apply. It is sufficient that one of the following individuals be involved for paragraph 21(1)(b) to apply:
>
> a. directors, officers or employees of a government institution;
>
> b. a minister; or
>
> c. the staff of a minister.
>
> On the basis of these definitions, only that information describing the advice provided, the consultations undertaken, or the exchange of views leading to a particular decision would qualify as an account exemptible under paragraph 21(1)(b).

[86] Justice Sharlow held in *Telezone FC* at paragraphs 45 to 47 that "The exceptions in paragraphs 21(1)(a) and (b) are aimed at preserving the integrity of the government decision making process. The underlying policy consideration is that too much public disclosure could inhibit open and frank communication between government advisers and decision makers." Unlike the exemptions under sections 18 and 20, paragraph 21(1)(b) does not require proof of harm. Instead the Court reviews "the disputed material in light of the evidence as to how and why it came into existence. Once that is understood, it should be possible to determine whether the exception claimed for each particular item should be upheld, based on the language of the exception read in its ordinary sense."

[87] In *Canadian Council of Christian Charities* Justice Evans explains at paragraphs 30 – 32, 36 and 39 the purpose of the subsection 21(1) exemption, specifically paragraphs 21(1)(a) and

21(1)(b). Justice Evans addresses the nature of information captured under the exemption and emphasizes the necessity of accountability when considering the exemption:

> [30] Despite the importance of governmental openness as a safeguard against the abuse of power, and as a necessary condition for democratic accountability, it is equally clear that governments must be allowed a measure of confidentiality in the policy-making process. To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies.
>
> [31] It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighing of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness.
>
> [32] On the other hand, of course, democratic principles require that the public, and this often means the representatives of sectional interests, are enabled to participate as widely as possible in influencing policy development. Without a degree of openness on the part of government about its thinking on public policy issues, and without access to relevant information in the possession of government, the effectiveness of public participation will inevitably be curbed.
>
> […]
>
> [36] Since citizen participation is more likely to be effective if it comes early in the policy-making process, subsection 21(1) should not be given a broader interpretation than its wording clearly requires. A central purpose of the Access to Information Act is, after all, to enhance the democratic foundations of government, and accountability.
>
> […]

> [39] It is difficult to avoid the conclusion that the combined effect of paragraphs 21(1)(a) and (b) is to exempt from disclosure under the Act a very wide range of documents generated in the internal policy processes of a government institution. Documents containing information of a factual or statistical nature, or providing an explanation of the background to a current policy or legislative provision, may not fall within these broad terms. However, most internal documents that analyse a problem, starting with an initial identification of a problem, then canvassing a range of solutions, and ending with specific recommendations for change, are likely to be caught within paragraph (a) or (b) of subsection 21(1).

[88] The jurisprudence also recognizes that “facts”, “advice” and “recommendations” are not airtight compartments, an issue addressed in *Telezone FC* and *Telezone FCA*. In *Telezone FC*, Justice Sharlow held at paragraphs 58 and 63:

> [58] It is not always possible to put "facts", "advice" and "recommendations" in airtight compartments. Many documents have more than one aspect. For example, an official may advise the Minister that a particular criterion ought to be given a particular weighting for a certain policy reason, or recommend that an application with a certain characteristic ought to be awarded a specified number of points. A written record of such advice or recommendation is correctly described as "advice or recommendations" to the Minister even if it is also a record of the fact that the official considered a particular weighting or awarding of points. In such a case, the exception in paragraph 21(1)(a) applies despite the factual aspect of the record.
>
> […]
>
> [63] This memorandum describes facts, in the sense that the writer is describing events that occurred. Those events, however, comprise the analysis that the writer and his colleagues and consultants undertook in reaching their conclusions. The entire memorandum is an account of deliberations by one or more government officials. To the extent that it contains advice to the working group as to the merits of the financial aspects of the licence applications, it also falls into the category of advice or recommendations.

[89] Similarly, in *Telezone FCA* Justice Evans states at paragraphs 55-57:

> [55] I accept that the benefit of paragraph 21(1)(a) should be reserved for the opinion, policy or normative elements of advice, and should not be extended to the facts on which it is based. I also accept that, whenever reasonably practicable, the factual component of advice must be severed under section 25 and disclosed, although, as the Judge observed at paragraph 58 of her reasons, advice and facts may be so intertwined as to preclude this.
>
> [56] However, it is in my view untenable to characterise as essentially factual the documents emanating from members of the working group that deal with the percentage weightings. The reason for the group's informing the selection panel, and ultimately the Minister, of the bases of their evaluations was to suggest to the Minister the appropriate rankings of the applications, and not just to give an account of how they had gone about their work. The percentages represented the working group's view, approved by the Assistant Deputy Minister, of the relative importance of the various government objectives being pursued through the allocation of the licences.
>
> [57] In my opinion, the content of the documents is predominantly normative, rather than merely factual, and thus brings them within the rationales underlying paragraph 21(1)(a) for exempting records from disclosure. This conclusion is not affected by the fact that the working group was implicitly, rather than expressly, advising the Minister of the relative importance that should be attached to the various evaluative factors in making the ultimate decision.

B. *Consideration of the Redactions*

[90] I will next examine the exemptions claimed by TPA in the Redacted Minutes. Both parties conducted a paragraph by paragraph analysis of the Redacted Minutes and often rely on the same case-law and authorities. As the respondent has made the exemption claims, I summarize the respondent’s position first and then set out the applicant’s response in this part of the Reasons.

[91] After providing an overview of the parties' arguments on the applicability of the exemptions I undertake an analysis of the redactions grouped by topic or issue. In considering the redactions, I set out: (1) those portions of the Redacted Minutes where TPA claimed an exemption; (2) the ATIA exemption being relied upon; (3) the parties' submissions on the applicability or lack thereof of those exemptions; and (4) my analysis and determination as to the applicability of the claimed exemption. In setting out the text of the relevant extracts from the Minutes I often include some surrounding text for context. The text TPA redacted is reflected in bold font.

(1) Overview of the Respondent's Position on the Applicability of the Exemptions

[92] The respondent submits the discretionary exemption under paragraph 21(1)(b) of the ATIA applies to the entirety of the Minutes because the latter is an account of deliberations that disclose the manner in which TPA conducts business.

[93] The respondent argues in its Memorandum of Fact and Law that "The redacted portions of the Minutes contain a direct account of the deliberations undertaken by TPA's Audit Committee on several critical issues, a number of which related directly to the decision to purchase a ferry" to service the TCCA. Furthermore, the respondent argues these deliberations "are a normative rather than factual … because instead of simply outlining various facts for consideration, they are an account of a discussion of the most appropriate way for TPA to conduct its business on these issues."

[94] The respondent submits that the mere fact that the Minutes reflect a discussion of factual circumstances should not lead one to conclude that they are not a record of deliberations. Similarly the respondent submits that simply because the facts are public in another context does not mean the deliberation of those facts is public. The respondent also argues that even the procedural matters within the Minutes fall within the exemption because they too are an account of deliberations.

[95] In addition the respondent submits that paragraphs 18(a) and 18(b) of the ATIA are applicable to aspects of the Redacted Minutes. The respondent argues those portions of the Minutes contain valuable information regarding TPA's signing authority, capital expenditure strategy and procurement process, among other things. The respondent submits that making this information public would disclose TPA's proprietary practices giving its competitors such as Pearson International Airport, Buffalo International Airport and other neighbouring port and transportation authorities an unfair competitive advantage.

[96] In making these submissions, the respondent often relies on the affidavit of Alan Paul, a Vice President and Chief Financial Officer of TPA.

[97] The respondent originally relied upon paragraphs 20(1)(b) and 20(1)(d) to redact portions of the Minutes, but as noted above the respondent abandoned this position in its oral submissions. I have therefore not addressed subsection 20(1) in this analysis.

(2) Overview of Applicant's Position on the Applicability of the Exemptions

[98] In written argument the applicant submits that much of the information in the Minutes is factual, in the public domain or innocuous and thus not exempt.

[99] The applicant submits the information the respondent refused to disclose is not commercial or financial information within the meaning of paragraph 18(a). The applicant further argues the respondent failed to prove that the information, even if financial or commercial in nature has substantial value or is reasonably likely to have substantial value.

[100] With respect to the respondent's reliance on paragraph 18(b), again the applicant submits there is no basis to conclude that any of the non-disclosed information will result in a risk of harm that is beyond merely possible or speculative, or that would prejudice TPA's competitive position. The applicant further submits disclosure of the Minutes prepared more than six years ago, will not impact contractual or other negotiations since no such negotiations are ongoing for the purchase of a ferry.

[101] In regard to paragraph 21(1)(b) the applicant notes it did not investigate the paragraph 21(1)(b) claim due to: (1) the respondent's late identification of the exemption; (2) the absence of any representations from the respondent regarding the applicability of the exemption; (3) the absence of any explanation from the respondent for not raising the exemption earlier in the process; (4) the Requester's right to timely access; and (5) the Commissioner's obligation to the Requester to issue a subsection 37(2) report. However, the applicant argues that the paragraph

21(1)(b) exemption is not applicable where the information in question is largely factual in nature, and that TPA had a duty pursuant to section 25 of the ATIA to sever the factual component of the Minutes and disclose this information to the Requester. The applicant submits the redacted information is largely factual, innocuous and/or is in the public domain and therefore the respondent cannot rely on the paragraph 21(1)(b) exemption.

[102] In oral argument counsel for the applicant clarified that it was not the applicant's position that paragraph 21(1)(b) could not apply to any portion of the Redacted Minutes.

(3) Page 1 – Approval of Previous Minutes

(a) *Text of the Minutes*

> The Committee had before it, for review and approval, draft Minutes of November 21, 2008.
>
> **The Committee Chair indicated he understood that Mr. Christopher Henley had changes to the draft Minutes that the Committee had not seen.**
>
> Deferred.

(b) *Exemption Claimed by the Respondent*

[103] Counsel for the respondent advised at the hearing that contrary to the position taken in written representations, the respondent is not relying on paragraphs 18(a) and 18(b) in support of this redaction. The respondent relies solely on paragraph 21(1)(b) in support of this redaction.

(c) *Respondent's Submissions*

[104] The respondent submits the redacted sentence is a deliberation under paragraph 21(1)(b) and that it demonstrates discord between the Committee members. The respondent further argues that those minutes of a previous Committee meeting are confidential since the Committee regularly discusses sensitive matters which could prejudice TPA's competitive position or ability to negotiate. Disclosure of the delay in approving the minutes of a previous meeting might also lead to the perception that Committee business was not dealt with in a timely manner again to the prejudice of TPA's competitive position.

(d) *Applicant's Submissions*

[105] The applicant submits information about an attendee of the Meeting proposing changes to the minutes of that meeting is innocuous information and not exempt.

(e) *Analysis*

(i) Paragraph 21(1)(b)

[106] The sole question in respect of this redaction is whether or not the fact that a member of the Committee proposed changes to the draft minutes of a previous meeting reflects a "consultation" or "deliberation" in this context. In my view it does not.

[107] While minutes of a meeting of an executive committee will normally report "consultations" and "deliberations" such documents are not exempted in their totality simply on

the basis that they would be expected to reflect deliberations and consultations (*Rubin* at para 28). The redaction TPA seeks to maintain does not identify a problem, purport to analyse or consider an issue, canvass solutions or contain a recommendation (*Council of Christian Charities* at para 39). It is simply a factual statement to the effect that a member of the Committee is proposing changes to the draft minutes of a previous Committee meeting that other members have yet to review. This objective, factual statement does not reflect discord as the respondent submits, nor does it betray the content of consultations or deliberations that may have occurred previously or in the course of the Meeting.

(f) *Conclusion*

[108] The paragraph 21(1)(b) exemption is not applicable. TPA has not advanced a basis upon which non-disclosure of this sentence can be maintained.

(4) Page 2 – PILTS Discussion

(a) *Text of the Minutes*

> The Acting President & CEO reported that TPA was awaiting a decision on PILTS and that he had learned that the Dispute Advisory Panel had been reappointed, which meant the same people would be making a decision on what to do with the information that had been presented during the hearing. **The Acting president and CEO advised that the Windsor Port Authority would be commencing a hearing on PILTS shortly.**

(b) *Exemptions Claimed by the Respondent*

[109] In written submissions, the respondent relied on paragraphs 18(b), 20(1)(b) and 20(1)(d), and 21(1)(b) in redacting this portion of the Minutes. At the hearing, counsel for the respondent

advised that TPA is no longer relying on paragraphs 20(1)(b) or 20(1)(d) as the Windsor Port Authority [WPA], a government institution, is not a third party for the purpose of subsection 20(1).

(c) *Respondent's Submissions*

[110] The respondent submits this redacted sentence reflects deliberations on factual information and falls within the scope of the paragraph 21(1)(b) exemption. The respondent also submits the information redacted is exempt under paragraph 18(b) as it was provided to the Committee in preparation for litigation and in strict confidence. The respondent submits disclosure would interfere with WPA's negotiations with the City of Windsor for future Payments in Lieu of Taxes [PILTS] amounts owed. It also reveals TPA's strategy in relation to its own PILTS process with the City of Toronto.

(d) *Applicant's Submissions*

[111] Information that the WPA may have pursued a PILTS hearing seven years ago is not exempt, given that it is public knowledge that all Port Authorities make PILTS payments to their respective municipalities pursuant to the *Payment In Lieu of Taxes Act*, RSC 1985, c M-13.

(e) *Analysis*

(i) Paragraph 18(b)

[112] The sentence TPA declined to disclose is a factual statement; however, as noted in *Telezone FC*, at paragraph 58, "It is not always possible to put 'facts', 'advice' and 'recommendations' in airtight compartments." In this case the redacted factual information discloses TPA's interest in the status of PILTS proceedings as they relate to other government business enterprises.

[113] There is evidence contained in Mr. Paul's affidavit to the effect that there is an ongoing PILTS dispute with the City of Toronto. However, the cross-examination of Mr. Paul on his affidavit establishes that PILTS payments by TPA and WPA are matters of public record. The cross-examination also indicates the PILTS dispute with the City of Toronto has been to some extent resolved, although the evidence is not entirely clear on this point.

[114] Based on the evidentiary record I am not persuaded that the reasonable expectation of probable harm standard has been met (*Merck* at para 206). There is simply insufficient evidence to allow me to conclude that disclosing that "the Windsor Port Authority would be commencing a hearing on PILTS shortly" could reasonably be expected to prejudice the competitive position of TPA. The redaction cannot be sustained on the basis of paragraph 18(b).

(ii) Paragraph 21(1)(b)

[115] The information does, however, identify an issue or problem that is of direct relevance to the Committee's role and function as it relates to taxing authorities (*Canadian Council of Christian Charities* at para 39) and as such, I am satisfied that it reflects an account of consultations or deliberations to which paragraph 21(1)(b) applies.

[116] The applicant's argument to the effect that PILTS payments are public knowledge and that the redacted statement relates to a matter that is more than seven years old is not relevant to the availability of the paragraph 21(1)(b) exemption. These are factors that TPA must consider in determining whether it should disclose the information, notwithstanding the availability of the discretionary exemption, an issue addressed later in these Reasons.

(f) *Conclusion*

[117] The paragraph 18(b) exemption is not applicable. The redaction falls within the scope of the paragraph 21(1)(b) exemption.

(5) Page 3 and Page 4, but not including the last paragraph of Page 4 – Rolls Royce, ULG, Hike Metals and the RFP process

(a) *Text of the Minutes*

> The Director of TCCA advised that Management talked to each of the companies by teleconference in order to explore the issues and also passed on critical details that were needed for ship builders. The Director of TCCA indicated that all of the ship builders were concerned about the delivery of the vessel keeping in mind the closure of the Seaway in late December. **The Director of TCCA**

> **updated on the timeline for production of the thruster units and reported that Rolls Royce had committed to the delivery of thrusters to shipbuilders by October 27, 2009 provided that they had authorization to proceed by December 31, 2008. Management had communicated that information to the ship builders who had come back with proposals.** The Director of TCCA reported that one of the proponents had declined to bid on the project.
>
> **The Committee Chair noted that a ship builder needed a commitment in order to meet the tight schedule that was laid out for them and that December 31, 2008 was a critical date.**
>
> The Director of TCCA indicated that the ship builders were aware of the terms and date of delivery and that a penalty would be built into the contract if the bidder did not meet the target date. The Director of TCCA indicated that the builders were quite confident that the target date could be met.
>
> **Mr. Henley asked for the rationale for the decline by the Upper Lakes Group from the bidding process. The Director of TCCA advised that no reasons or rationale or specific details for the decision were provided by the company but that the company had been provided with all the bidding information that was provided to other builders, but had respectfully declined to bid.**
>
> The Director of TCCA reported that in terms of budget price and the bid/ask range Hike Metals ("Hike"), the lowest bidder, was satisfied they could meet the price **and not exceed $4.35 million**.
>
> **The Acting President & CEO reported that there would be negotiations with regards to Hike's bid price as TPA have allowed for an additional amount based on certain components.**

(b) *Exemptions Claimed by the Respondent*

[118] The respondent relied on paragraphs 18(a) and 18(b), and 21(1)(b) to justify the non-disclosure of all of the redacted information.

[119] In written submissions the respondent also relied on paragraphs 20(1)(b) and 20(1)(d) for the information pertaining to the Upper Lakes Group [ULG]. In oral submissions the respondent advised it was no longer relying on the subsection 20(1) exemption for the information pertaining to the ULG.

(c) *Respondent's Submissions*

[120] The respondent submits the redacted information contains details of TPA's general Requests For Proposals [RFP] review procedure and specific information such as its willingness to enter into further negotiations with Hike Metals. The respondent argues this information is not in the public domain, is of value, and disclosure could prejudice future negotiations as bidders may believe they are in a position to renegotiate aspects of their bids or make contractual amendments to suit their needs after submitting a bid price to TPA.

[121] Specifically the respondent argues: (1) information on thrusters from Rolls Royce is commercial information that is linked to further negotiations with Hike Metals on delivery dates; (2) disclosing the commercial information relating to ULG would prejudice the respondent's position since it would allow the limited number of bidding companies to know that the pool of bidders is even smaller thus allowing companies to enhance their competitive position and lead to the submission of higher bid prices; (3) the $4.35 million dollar maximum price is valuable commercial information that could inhibit TPA's ability to obtain the best deal in future RFPs because it would allow potential bidders to have in depth knowledge of TPA's project costs allowing bids to be tailored; and (4) in oral argument, counsel for the respondent argued that

despite the opening of a pedestrian tunnel connecting the TCCA to the mainland, the issues arising out of the ferry purchase remain relevant as there is still a ferry in operation.

[122] The respondent further argues that the redacted information reflects consultations and deliberations on strategies for the building and purchase of a ferry. The respondent submits that simply because the decisions flowing from the deliberations of the Committee are now in the public domain, including the awarding of the contract to Hike Metals, this does not alter that paragraph 21(1)(b) protects the deliberations contained in the Minutes.

(d) *Applicant's Submissions*

[123] The applicant argues the redacted information is innocuous and not exempt. The information regarding the Rolls Royce commitment and Hike Metals relates to completed contracts, the maximum value of the contract is not information that remains confidential after the awarding of a government contract and the information is in the public domain.

[124] The applicant argues the redacted information on Hike Metals is not exempt because (1) the further negotiations with Hike Metals relate to additional features on the ferry; (2) it is public knowledge that Hike Metals was the lowest bidder and received the contract, that the maximum price was $4.85 million, that negotiations were completed many years previously; (3) the Marylyn Bell Ferry was built and operational in 2010 and the schedule and deadlines are long past; and (4) TPA is not planning another ferry purchase in the foreseeable future. The applicant also notes Hike Metals did not object to the release of the redacted information and identifies the recent completion of the pedestrian tunnel to the TCCA.

[125] In addition, the applicant submits the redaction of $4.35 million price to Hike Metals is not exempt since TPA awarded the contract to Hike Metals and the monetary terms of a government contract conducted through a confidential bidding process do not remain confidential due to the government's obligation to disclose spending of public funds (*Société Gamma Inc v Canada (Department of Secretary of State)*, [1994] FCJ No 589 at para 8, 27 Admin LR (2d) 102 (TD); *Canada Post* at paras 39-40).

[126] The applicant also argues that the redacted information is factual and does not fall within the purview of paragraph 21(1)(b). The decisions in this matter have been made and implemented and the decision making process is no longer exempt.

(e) *Analysis*

(i) Paragraph 18(a)

[127] Some of the redacted information may well engage TPA's "commercial" and "financial" interests where those terms are given their ordinary dictionary meaning (*Merck* at para 139) within the context of TPA's role as a government business enterprise. Information related to bidders, supplier deadlines, negotiated price increases and maximum bid prices is information that relates to the ongoing conduct of business by TPA. However TPA failed to demonstrate by way of direct evidence that the information has substantial value or is reasonably likely to have substantial value, a key component of the paragraph 18(a) exemption. The redacted information appears to reflect normal commercial or business practice where a business enterprise is

undertaking a major capital expenditure, not confidential commercial and financial information reasonably likely to have substantial value.

[128] Information that might be of substantial value, for example the "not to exceed" value of the contract is publicly available information that is set out in the Watson Report.

[129] Both TPA's correspondence with the OIC and Mr. Paul's affidavit speaks to the unique nature of TPA's procurement policy, and that the information pertaining to: (1) the number of bids received; (2) the substantial differences between the bids; (3) TPA management being pleased with the RFP result; (4) further negotiations were conducted following the RFP process; (5) a contingency allowance was established for cost overruns; (6) the explanation of the bidding process; and (7) the urgent need for a decision in order to meet delivery deadlines, is all information that is of market value and disclosure is likely to hinder TPA's ability to obtain the most competitive deal in future RFP processes. This assertion is not reflective of the facts.

[130] With the exception of the information relating to the urgent need for a decision, many of the details identified in Mr. Paul's affidavit are disclosed in the Watson Report and other publicly available documents, and all are set out in the disclosed portions of the Minutes.

[131] With respect to the timing of the decision, the suggestion that this information is reasonably likely to have substantial value is at best, speculative.

[132] The redacted information as it relates to Rolls Royce, ULG, Hike Metals and the RFP process does not fall within the scope of paragraph 18(a).

(ii) Paragraph 18(b)

[133] The evidence of prejudice to TPA's competitive position or interference with contractual or other negotiations is equally speculative. The respondent asserts that disclosure of the RFP information is likely to hinder TPA's ability to obtain the most competitive deals in future RFP processes and points specifically to a process undertaken in the construction of a pedestrian tunnel connecting the TCCA to the mainland, a project counsel for the respondent advised is now complete. This assertion of prejudice or harm fails to cross the line from conjecture to a reasonable expectation of probable harm (*Brainhunter* at paras 25, 32). In addition, and as noted earlier, the public nature of most if not all of what the respondent seeks to redact is also fatal to any reliance upon paragraph 18(b) to justify these redactions.

(iii) Paragraph 21(1)(b)

[134] The redacted information does, in my view, fall within the scope of paragraph 21(1)(b). While certainly much of the information is, as asserted by the applicant, factual in nature, it is these very facts that underpin the consultation and deliberations that the head of a government institution may refuse to disclose.

[135] The applicant states at paragraph 107 of its Confidential Memorandum of Fact and Law that paragraph 21(1)(b) does not apply as "the information redacted from the 2008 Minutes is largely factual, innocuous and/or is in the public domain."

[136] The applicant has not cited any authority in support of the proposition that the public nature of the information redacted from the Minutes equates to the inability of TPA to rely on the paragraph 21(1)(b) exemption in refusing to disclose the Minutes, and I cannot agree with this bald proposition. Unlike the section 18 exemption, which requires that; (1) the information fall within the scope of the definition; and (2) for the purpose of paragraph 18(a) the information is of substantial value or reasonably likely to have substantial value and under paragraph 18(b) there is a reasonable expectation of probable harm or prejudice due to disclosure, paragraph 21(1)(b) does not require a government institution to demonstrate harm or prejudice (*Telezone FC* at paras 46-47). Parliament has given the head of a government institution the discretionary ability to refuse disclosure of accounts of consultations or deliberations by those individuals identified in paragraph 21(1)(b) without qualification.

[137] While this view leads to the conclusion that the paragraph 21(1)(b) exemption applies to "a very wide range of documents" (*Canadian Council of Christian Charities* at para 39), it is tempered by the discretionary nature of the exemption, a discretion that must be exercised by the head of a government institution in a manner that promotes the objectives and principles of the ATIA (*Criminal Lawyers Association* at paras 46, 66; *Minister of Public Safety and Emergency Preparedness* at para 49). In this case I am satisfied that TPA correctly concluded that the

redacted information falls within the scope of paragraph 21(1)(b). The exercise of discretion is considered later in these Reasons.

(f) *Conclusion*

[138] The paragraph 18(a) and 18(b) exemptions are not applicable. Paragraph 21(1)(b) applies to the redacted information in this part.

(6) Page 4 last paragraph, Pages 5 through 8 and the first redacted paragraph of Page 9 – Financing Options for the Ferry & Internal Debate

(a) *Preliminary Note*

[139] Unlike the other parts of this analysis, the analysis of the last paragraph of page 4 to the first half of page 9 will occur in two parts. First I will consider issues relating to the financing options for the new ferry under all of the exemptions claimed and second I will consider the specific issue of whether any of the exemptions should apply to this information because that information discloses an internal debate between Committee members.

(b) *Text of the Minutes*

> The Acting President & CEO spoke on the Credit Facility that was made available by the Bank of Montreal for the purchase of a second ferry at the TCCA **and advised of the December 31, 2008 expiry date of the offer. The Acting President & CEO spoke on Term Loan Conditions, reported on TPA's relationship with BMO, indicated that he would be watching the market and that at some point decisions would need to be made on the issue of interest rate strategy. The Acting President & CEO stated that it would be his recommendation to enter into the Credit Facility Agreement with BMO and draw down on that Agreement while building the Ferry.**

The Committee Chair asked for comments.

**Mr. McQueen provided comments on the movement of credit prices in today's market and with respect to the monitoring of credit by the Acting President & CEO he believed that further parameters should be put in place as to what TPA was looking for and was trying to accomplish in order to be fair to the CEO and suggested that TPA solidify a strategy on interest rates. The Acting President & CEO indicated that he would be pleased to discuss it with the Audit & Finance Committee in an effort to reduce risk.**

**The Committee Chair asked Mr. Stewart whether he had any views on the matter since the issue was a major capital acquisition for TPA. Mr. Stewart did not have any views on the issue.**

> **It was moved by Mr. Mark McQueen that the Audit & Finance Committee recommend to the Board of Directors construction of a New Ferry to TCCA and the project cost not to exceed $4,850,000.000.**

**The Committee Chair asked whether Mr. Henley would second the motion. Mr. Henley indicated that he was not going to vote on the issue and the Committee Chair asked whether Mr. Henley could provide his reasoning for not voting.**

**Mr. Henley indicated that from his standpoint he had not understood the business case at this point in time and indicated that the Board meeting scheduled for later this morning would be helpful on that front and as far as he understood the Board would be reviewing scenarios, numbers and some of the other issues during its meeting.**

**The Committee Chair indicated that the Committee was prepared to discuss the matter here at the Audit & Finance Committee meeting in an effort to clarify and explain any issues.**

**Mr. Henley indicated that from what he read in [omitted…… ……] legal opinion he gathered that the writer, [omitted... ……..], would be available at the Board meeting [omitted…….....]. Mr. Henley indicated that he understood the issue of capacity and that the issue he had was that TPA would be taking on an additional $5 million of debt which he didn't see any upside on and the**

**question for him was that with the debt TPA would be adding to the $15 million credit facility that pre-dated any of the Board tenures. Mr. Henley indicated that from his standpoint he did not see the upside of taking on additional debt.**

**Mr. McQueen indicated that the Jacobs Consulting Report had already made clear what the business case was and the Board certainly had discussions both at the Board and Committee levels about the business case and according to the Consultants hired by the TPA and AIF forecasts were shared some time ago along with current aircraft versus 16 and indicated there was a lot of business case data and many different pieces of the puzzle have been discussed along the way.**

**Mr. Watson stated that the practical answer is if the Board does not approve the New Ferry now, if in the future, TPA had any kind of ferry breakdown it would be shipping people to the TCCA on a barge and TPA would not be able to service Porter Airlines aircraft requirements and the business case will break down.**

**Mr. Henley stated that he was saying that the Committee should have a full discussion of the issues.**

**The Acting President & CEO reported that he thought that the Committee had already had discussions on different levels of the AIF and indicated that there were different levels discussed in the Board package and took the Committee through the cash flow forecasts from 2009 to 2013 based on 14 aircraft.**

**The Acting President & CEO indicated that the report covered the existing debt service, CAPEX and new debt for the New Ferry and that TPA was currently above the five-year average break-even number for enplaned passengers.**

**Mr. Henley indicated that what was being presented by the Acting President & CEO was largely what he was looking for, but noted that he had only received the information yesterday and he wanted to understand the information.**

**Mr. McQueen stated that perhaps the Committee Chair could have the Acting President & CEO or the Director of TCCA take Mr. Henley through some slide information.**

**Mr. Henley indicated that he did not have the time as he was getting ready to drive down for the Board meeting.**

**Mr. McQueen suggested that Mr. Henley call into the meeting from his car.**

**At 8:50 a.m., Mr. Christopher Henley left the teleconference. The meeting adjourned and resumed at 9:00 a.m., and Mr. Henley re-joined the meeting via teleconference.**

**The Acting President & CEO provided a review of Porter numbers, reviewed budget numbers that were presented on November 21, 2008 followed by enplaned passenger numbers.**

**The Acting President & CEO reviewed the net amount of AIF revenue, debt service on $15 million, capital, CAPEX with debt service and all the capital expenditures, net AIF available and cumulative balance AIF. The Acting President & CEO advised that the sensitivity analysis provided a clear perspective should Porter go down to a level below what they were anticipating.**

**Mr. McQueen summarized and reviewed business cases based on the information using various load factors and reviewed the downside case.**

**The Acting President & CEO spoke on the flexibility of the AIF and noted that its collection and spending were tied together and continued to clarify the numbers.**

**Mr. McQueen reviewed what was available in 2008 and 2009 to pay down the loan and concluded that by supporting the new Ferry TPA would be better equipped to pay down the debt rather than if it did not support the New Ferry.**

**Mr. Henley indicated that he did not have the document in question in front of him and found it difficult to follow and noted that one option for TPA would be to increase the AIF.**

**The Acting President & CEO reviewed AIF scenarios.**

**Mr. McQueen noted that jacking up the AIF was in a way hurting TCCA by sending passengers to Pearson.**

> It was moved by Mr. Mark McQueen that the Audit & Finance Committee recommend to the Board of Directors construction of a New Ferry to TCCA and the project cost not to exceed $4,850,000.00. Motion carried.

Approved. Mr. Henley voted against the motion.

> Financing for New Ferry
>
> **The Acting President & CEO indicated that $5 million was available to TPA, it was a demand loan which fell under the existing loan agreement with the Bank of Montreal and TPA had until December 31, 2008 to sign the document.** The Acting President & CEO indicated that it was his recommendation that the Committee approve the credit facility of $5 million made available by BMO and forward the Committee's recommendation to the Board of Directors for approval.
>
> > It was moved by Mr. Mark McQueen and seconded by Mr. Colin Watson that the Committee approve the $5 million Credit Facility made available by the Bank of Montreal for the purchase of a second Ferry to provide service to the TCCA. Motion carried.
>
> Approved. Mr. Henley voted against the motion.

(c) *The Exemptions Claimed*

[140] In written submissions, the respondent relies on paragraphs 18(a) and 18(b) and paragraph 21(1)(b) with respect to all of the information redacted from the last paragraph of page 4 and pages 5, 6, 7, 8 and the first redacted paragraph of page 9 of the Minutes.

[141] In oral submissions respondent's counsel indicated that TPA continues to rely on paragraphs 18(a) and 18(b) to the extent that the information relates to the financing aspects and options under consideration but conceded not everything in this portion of the Redacted Minutes are within the scope of paragraphs 18(a) and 18(b). In adopting this position counsel did not specifically identify what portions of the redactions paragraphs 18(a) and 18(b) did not apply to, relying instead on the respondent's Confidential Memorandum of Fact and Law.

[142] Paragraph 105 of the respondent's Confidential Memorandum of Fact and Law states that the final paragraph of page 4, paragraphs 2-4 of page 5, the second paragraph on page 6 and the first paragraph of page 9 of the Minutes relate to the financing options for the to-be-purchased ferry. Paragraph 109 refers to the Jacobs Consulting Report on pages 6 and 7 of the Minutes and paragraphs 110 to 112 discuss the Airport Improvement Fees [AIF] issue for the purpose of paragraph 18(a) and implies that paragraph 18(b) applies as well.

[143] However, the respondent's Confidential Memorandum of Fact and Law does not clearly and unambiguously identify specifically what exemptions the respondent is relying on in relation to each of the redacted paragraphs which the respondent submits reflects an apparent conflict between board members. As such I have considered the application of all of the originally claimed exemptions to all redacted portions of the Minutes identified above as being relevant to this issue.

(d) *Part I: Financing of the Ferry*

(i) Respondent's Submissions

[144] The respondent argues the redacted portions of the Minutes reflect detailed discussions of the financing options for the to-be-purchased ferry. The redacted information includes the recommendation that the Committee approve a $5 million credit facility with the Bank of Montreal [BMO]. This information could reasonably be expected to impact upon and prejudice TPA's competitiveness and negotiating position as other companies planning to bid on future RFP processes will obtain knowledge of how TPA handles its costs.

[145] Regarding the information on the Jacobs Consulting Report, the respondent relies on paragraphs 18(a) and 18(b) to justify the redaction of the discussion of that Report but advances little in the way of a substantive argument to support this position. The respondent's Confidential Memorandum of Fact and Law at paragraph 109 simply states:

> Similarly, while the Jacobs Consulting Report discussed at pages six and seven of the Minutes has been made public, the fact that the Jacobs Consulting Report was discussed in the context of the larger debate with Mr. Henley over financing the ferry purchase is not public information. It bears repeating, the fact that a single detail contained in the account is not confidential does not make the entire account public.

[146] In addition, the respondent submits disclosing that the Committee considered various AIFs scenarios would undermine TPA's competitive advantage over other local airports and also prejudice TPA's negotiating position with airlines and airport users. The information is commercial and financial information that is of value, and to provide competitors such as Pearson International Airport and Buffalo International Airport access to these deliberations carries a very significant risk.

[147] The respondent further argues that the redacted portions of pages 4, 5, 6, 7, 8 and part of page 9 of the Minutes reflect detailed discussions of the process for financing the ferry and fall under paragraph 21(1)(b) of the ATIA. The respondent argues that simply because it is now public knowledge that the respondent (1) drew from the credit facility; (2) received the Jacobs Consulting Report for the purpose of ferry financing; and (3) eventually raised AIFs does not prevent the respondent from relying on the paragraph 21(1)(b) exemption to refuse disclosure of the deliberations on those three issues. Deliberations leading to a decision are separate and distinct from the decision itself.

(ii) Applicant's Submissions

[148] In this part and below, the applicant takes issue with the respondent's unduly broad application of paragraph 21(1)(b) to pages 4 to 9 of the Minutes, arguing such a broad application is contrary to both subsection 2(1) of the ATIA that provides that exceptions to the right of access should be limited and specific and the respondent's duty of severance under section 25 under the ATIA.

[149] The applicant submits the information on TPA's plan to enter into a $5 million dollar credit facility with BMO for the purpose of building the ferry is not exempt since TPA did enter into this credit facility and did draw on it to build the ferry. TPA also disclosed the information about the demand loan in its audited financial statement which is now public knowledge and not confidential.

[150] The applicant submits that the Watson Report refers to the Jacobs Consulting Report and relies on the public's knowledge of the Watson Report to advance the position that the information relating to the discussion of the Jacobs Consulting Report is not subject to any of the exemptions claimed.

[151] In addition, the applicant submits that the information set out in the Minutes relating to AIFs is innocuous. The applicant argues the redactions relating to the discussion of the potential use of the AIFs for the purpose of financing the ferry are not exempt since the public knows TPA

used AIFs to fund the ferry and TPA's audited financial statements publicly disclose detailed information about AIFs including an increase in those fees.

[152] In oral submissions, counsel for the applicant conceded that the statements on page 8 of the Minutes that "one option for TPA would be to increase the AIF" and "Mr. McQueen noted that jacking up the AIF was in a way hurting TCCA by sending passengers to Pearson", could possibly fall under paragraph 21(1)(b) of the ATIA.

(e) *Analysis*

(i) Paragraph 18(a)

[153] Information relevant to both the financing of the proposed ferry purchase and the issue of interest rate strategy engage TPA's "commercial" and "financial" interests. The information relates to TPA's ongoing conduct of business.

[154] Once again however, there is no direct evidence to support the conclusion that the information has or is reasonably likely to have substantial value (*Brainhunter* at paras 24-25). The Watson Report discloses that: (1) at the Meeting the Committee passed a motion to approve the $5 million credit facility from BMO to finance the purchase of the new ferry to provide service to the TCCA; (2) the cost of the ferry construction not exceed $4.85 million; and (3) at the January 21, 2009 Board meeting, four TPA Directors were concerned with the absence of a proper business plan and alternate funding options in relation to the acquisition of a new ferry, and only one bank having been canvassed for the $5 million loan.

[155] The Watson Report does not disclose that the financing offer from BMO was to expire on December 31, 2008, the nature of TPA's relationship with BMO or the question of interest rate strategy. However, both interest rate strategy and TPA's credit facility with the BMO are disclosed in some detail in TPA's publicly available financial statements, and the Watson Report implies that the credit facility with BMO was to be valid until December 31, 2008.

[156] Considering all of these circumstances, the evidence in support of TPA's position that the information is of value is speculative at best. Mr. Paul's affidavit indicates that the value of the information relates to the potential risk of tailored bids and an undermining of the competitive process in future RFPs. However attesting that the information has value and the disclosure would cause a possible harm is insufficient (*Brainhunter* at paras 24-25, 32).

[157] The same reasoning applies to the discussion of AIFs since, as the applicant submitted, the public knows TPA used AIFs to pay for the new ferry and TPA's audited financial statements publicly disclose detailed information about the AIFs. While the respondent asserts value in the information, the evidence of value is limited to the fact that TPA's current AIF is $5 below that of Pearson. However, the evidence also discloses that TPA's annual financial statements include a discussion on AIFs, set out the history of the fee, the use of the fee, the amount collected on an annual basis and identifies fee increases. In light of the detailed nature of the publicly available information regarding the AIFs, I am not persuaded that there is any commercial or financial value in information demonstrating that the Committee discussed this fee in considering the financing of a capital project.

[158] Regarding the Jacobs Consulting Report, the respondent has not advanced an argument that demonstrates either the commercial or financial nature of this information or that it is reasonably likely to have substantial value. The paragraph 18(a) exemption is of no application.

(ii) Paragraph 18(b)

[159] The respondent has similarly failed to provide evidence demonstrating a reasonable expectation of probable harm. The public nature of much of the information TPA seeks to redact, such as the credit facility with BMO, coupled with the vague and speculative nature of the affidavit evidence does not support a conclusion that the redacted information could reasonably prejudice the competitive position of TPA or interfere with contractual or other negotiations undertaken by TPA.

[160] The evidence of prejudice arising from disclosure of the AIFs information is similarly non-persuasive. The respondent's affiant states that disclosure of the discussion of AIFs would "risk leading the public to believe that it is considering increasing the presently charged AIF. This would in turn cause possible users to look at other airport options." There is no objective evidence cited in support of the assertion that disclosure of a 2008 discussion by the Committee would lead the public to believe an increase to the current AIFs is being contemplated or that an increase would cause possible users to look at other airport options. This amounts to nothing more than a highly speculative assertion.

[161] Regarding the reference to the Jacobs Consulting Report, as with paragraph 18(a), the respondent has not advanced a persuasive argument to demonstrate prejudice to its competitive

position or interference with contractual or other negotiations. The argument advanced relates instead to the application of the 21(1)(b) exemption. The paragraph 18(b) exemption is of no application.

(iii) Paragraph 21(1)(b)

[162] Subject to some qualifications identified in the Part II analysis below, the redacted information on financing options reflects an account of consultations and deliberations. The vast majority of the redacted text reflects the facts, issues and circumstances being taken into account by the directors, officers and employees participating in the Meeting to address the issue of financing the proposed new ferry, which includes exploring different financing options such as entering a credit facility or raising the AIFs for the new ferry's construction. This information falls within the scope of the paragraph 21(1)(b) exemption. Again the applicant's submissions that these decisions have since been made public and that much of the information is public are not factors that render the discretionary exemption unavailable to TPA.

[163] The same reasoning applies to the Jacobs Consulting Report. The public nature of the information arising from other sources does not negate the availability of the paragraph 21(1)(b) exemption to the members' deliberations over the Jacobs Consulting Report.

(iv) Conclusion

[164] The paragraph 18(a) and 18(b) exemptions are not applicable. Subject to the analysis in the next part, the redactions fall within the scope of the paragraph 21(1)(b) exemption.

(f) *Part II: Internal Disagreement between Committee Members*

(i) Respondent's Submissions

[165] For the purpose of paragraphs 18(a) and 18(b), the respondent submits that public disclosure of the internal disagreement between Committee members would likely prejudice TPA's future negotiating position by creating the perception that bidders could divide and conquer members of the Committee and inhibit open and frank communication.

[166] In relying on paragraph 21(1)(b), the respondent submits this portion of the Minutes marks the beginning of a heated internal disagreement between Committee members on the financing of the Ferry and this is exactly the type of deliberations paragraph 21(1)(b) protects: the back and forth, the stops and starts between the members. The respondent further submits that the different opinions expressed by members of the Committee are not public. The respondent argues that the Watson Report does not disclose this information; rather it discloses what occurred at a subsequent Board meeting and is not relevant to the deliberations at the Committee.

(ii) Applicant's Submissions

[167] The applicant submits the information in the Minutes showing an internal conflict among Committee members does not fall under any of the claimed exemptions since much of the details discussed and the nature of that internal conflict was previously made public. Specifically the following information is in the public domain (1) Mr. Henley's conflict of interest complaint

against Mr. Watson in 2009; (2) the Watson Report contains information about TPA's Board who were deadlocked on all issues that required decisions and information about the disagreements on the purchase of a new ferry including in relation to different financing options; (3) PricewaterhouseCoopers investigated and reported on Mr. Henley's complaint of a conflict of interest against Mr. Watson regarding the latter's vote in favour of a new ferry acquisition and bank financing; and (4) the Watson Report made public the voting intentions of each of the members on the issue of new construction of the new ferry, including at the Meeting.

(g) *Analysis*

(i) Paragraph 18(a)

[168] The respondent's reliance on paragraph 18(a) in the respondent's record as a basis to exempt information relating to conflict between Board members is not advanced in either the respondent's written or oral argument. The information does not disclose trade secrets or financial, commercial, scientific or technical information and as such paragraph 18(a) does not apply to any of the redactions.

(ii) Paragraph 18(b)

[169] The respondent relies on the statement made by Mr. Paul at paragraph 50 of his affidavit: "The disclosure of such disagreements would likely prejudice TPA's future negotiating position by creating a misperception as to how TPA conducts business" to argue that disclosing the information evidencing the internal conflict would likely create a misconception that bidders can divide and conquer members of the Committee to favour its bid. This is nothing more than

speculation and falls short of demonstrating that disclosure of this information could reasonably prejudice TPA.

[170] The respondent also argues that disclosure would erode TPA's ability to receive the best possible advice from the Committee and inhibit open and frank communications between Committee members. This is a concern that the 21(1)(b) exemption addresses and is more appropriately considered below.

(iii) Paragraph 21(1)(b)

[171] The majority of this information reflects an account of deliberations. I agree with the respondent's submissions, this information pertains to "false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the reweighing of the relevant importance of the relevant factors as a problem is studied more closely" (*Canadian Council of Christian Charities* at para 31). As such the discretionary exemption under paragraph 21(1)(b) is available with respect to most but not all of the redactions.

[172] Specifically, page 5 of the Minutes sets out a motion on the construction of a new ferry: "It was moved by Mr. Mark McQueen that the Audit & Finance Committee recommend to the Board of Directors construction of a New Ferry to TCCA and the project cost not to exceed $4,850,000.00." This motion is followed by a lengthy discussion, all of which has been redacted. Subsequent to that discussion the motion appears at page 8 and is identical to the motion as set out at page 5. The respondent redacted the language of the motion at page 5 but disclosed it at

page 8. While one might reasonably argue that this is reflective of an exercise of discretion under the second stage of the exemption analysis, the respondent has not advanced any rationale for this discrepancy beyond arguing in oral submissions that the pages between the two motions demonstrates a time gap and a discussion. The fact that there was a discussion is not exempted by paragraph 21(1)(b). Disclosing that the motion was moved twice with a time gap between the motions does not disclose an account of consultations or deliberations. This paragraph is to be disclosed.

[173] At page 7 of the Minutes the respondent has also redacted the following paragraphs:

> Mr. McQueen suggested that Mr. Henley call into the meeting from his car.
>
> At 8:50 a.m., Mr. Christopher Henley left the teleconference. The meeting adjourned and resumed at 9:00 a.m., and Mr. Henley re-joined the meeting via teleconference.

[174] This exchange does not reflect an account of consultations or deliberations between Committee members. Nor is there anything disclosed in these two paragraphs that betrays or discloses the issues being considered by the Committee or that an internal conflict was occurring. These paragraphs do nothing more than reflect an administrative or logistical exchange intended to allow the Meeting to continue. This information is not subject to the paragraph 21(1)(b) exemption. Similarly and as determined above it also does not fall within the scope of the section 18 exemptions. These two paragraphs are to be disclosed.

(iv) Conclusion

[175] The paragraph 18(a) and 18(b) exemptions are not applicable. The majority of the redaction falls within the scope of the paragraph 21(1)(b) exemption, however the identified paragraphs on pages 5 and 7 do not. These redactions are to be disclosed.

(7) Pages 9 - 10 – 2009 Draft Business Plan and Budget

(a) *Text of the Minutes*

> 3. 2009 Draft Business Plan & Budget
>
> The Committee had before it the 2009 Draft Business Plan and Budget and the Acting President & CEO provided a synopsis.
>
> The Acting President & CEO reviewed berthing revenues at the OHM and the TCCA.
>
> **[omitted……. ……. ……] The Acting President & CEO noted that there were a number of things in the capital budget TPA has deferred to 2010 to be reviewed at that time and Management have provided a revised Tab A and Cash Flow Forecast. The Acting President & CEO stated that TPA remained on the side with the required bank covenants, in the revised version of the budget**
>
> Received.

(b) *Exemptions Claimed by the Respondent*

[176] The respondent claims the exemptions under paragraphs 18(a), 18(b) and 21(1)(b).

(c) *Respondent's Submissions*

[177] The respondent submits the redacted information touches upon commercial and financial information relating to credit strategy, draft plans and budgets, and berthing revenues. The respondent submits this information is of substantial value since it discloses the Committee's process for analyzing TPA's financial position. This information, the respondent submits would allow competitors to tailor their own RFP and general purchasing practices to render TPA less competitive.

(d) *Applicant's Submissions*

[178] The applicant submits the substantive information is in the public domain and there is no basis upon which the respondent can exempt the information from disclosure. The applicant further submits that [omitted……..] is not exempt since it does not say what was deferred but rather that there was a deferral.

(e) *Analysis*

(i) Paragraph 18(a)

[179] Again the evidence is nothing more than an assertion of value on the part of the respondent's affiant. There is no evidence on how this information demonstrates the Committee's process for analyzing its own financial position or how competitors might make use of it in their own purchasing practices to disadvantage TPA. Assertion of value is not sufficient to invoke the paragraph 18(a) exemption.

(ii) Paragraph 18(b)

[180] Similarly the evidence that disclosure of the information would prejudice TPA's competitive position or interfere with contractual or other negotiations is limited to assertions that are not supported by any objective evidence to demonstrate that prejudice asserted could be reasonably expected to arise.

(iii) Paragraph 21(1)(b)

[181] I again disagree with the applicant's argument that 21(1)(b) is not available on the basis that the information is factual in nature. The Minutes are reflective of a Committee meeting that is undertaken to exchange information for the purpose of ensuring the members are in a position to knowledgeably engage in discussion, express opinion and reach decisions on a consensus or majority basis relevant to the purposes and objectives of TPA as established by Parliament in the *Marine Act*. The information is directly tied to the functions of the Committee, and as such its factual nature does not, in my respectful opinion, disqualify it from the application of paragraph 21(1)(b) (*Canadian Council of Christian Charities* at para 39).

(f) *Conclusion*

[182] The paragraph 18(a) and (b) exemptions are not applicable. The redactions fall within the scope of the paragraph 21(1)(b) exemption.

(8) First Half of Page 10 - Cheque Signing Authorities

(a) *Text of the Minutes*

**4. Cheque Signing Authorities**

**The Committee had before it a report from the Acting President & CEO on Cheque Signing Authorities recommending that the Audit & Finance Committee approve a resolution for the addition of Mr. Amir Jiwani, TPA's new controller, as a cheque signing authority for the TPA.**

> **It was moved by Mr. Mark McQueen and seconded by Mr. Christopher Henley that the Committee approve the addition of Mr. Amir Jiwani, Controller, as a cheque signing authority for the TPA. Motion carried.**

**Approved.**

(b) *Exemptions Claimed by the Respondent*

[183] The respondent claims paragraphs 21(1)(b), 18(a) and 18(b) over this information.

(c) *Respondent's Submissions*

[184] TPA argues information relating to cheque signing authority represents financial and commercial information and that its disclosure would open TPA to greater risk of theft, fraud or undue influence.

[185] TPA further argues the information is a deliberation, falling within the scope of paragraph 21(1)(b).

(d) *Applicant's Submissions*

[186] The applicant argues this information is not exempt. The fact that Mr. Amir Jiwani is TPA's controller is disclosed publicly in TPA's annual reports. The applicant further argues that the "alleged risk of theft, fraud or undue influence is wildly speculative" and remote. Moreover, the heading of this section and the word "Approved" should not fall under any of the exemptions.

(e) *Analysis*

(i) Paragraph 18(a)

[187] While the respondent submits that paragraph 18(a) applies it did not advance an argument or evidence to this effect. Instead the argument relates to paragraph 18(b). The paragraph 18(a) exemption is not available.

(ii) Paragraph 18(b)

[188] The respondent asserts prejudice to TPA should this information be released, but there is no evidence beyond the bald assertion to demonstrate that disclosure could reasonably be expected to prejudice TPA's competitive position or interfere with contractual or other negotiations. I concur with the applicant's view that the assertion is speculative and the harm feared remote.

(iii) Paragraph 21(1)(b)

[189] The information redacted is factual in nature, reflective of standard corporate governance and does not reflect deliberations but rather a simple and non-controversial decision to extend cheque signing authority to the TPA controller, an individual whose role, function and identity is publicly known. This information does not fall within the scope of a 21(1)(b) account of consultations or deliberations and as such the 21(1)(b) exemption is not available to the respondent.

(f) *Conclusion*

[190] None of the claimed exemptions are available to the respondent. The heading "4. Cheque Signing Authorities" and the text that follows up to, and including, "Approved" at page 10 of the Minutes shall be disclosed.

(9) Second Part of Page 10 to the Redaction on Page 11 - Renewal of Chattel Mortgage

(a) *Text of the Minutes*

**5. Stolport Corp. - Renewal of Chattel Mortgage**

**The Committee had before it a report from the Acting President & CEO on the renewal of the Chattel Security Mortgage Agreement with Stolport Corporation recommending that the Committee approve the renewal of the Hangar 1 Chattel Mortgage Security Agreement with Stolport Corporation [omitted……... ……]**

**It was moved by Mr. Christopher Henley and seconded by Mr. Mark McQueen that the Committee approve for recommendation to the**

> **Board of Directors the renewal of the Hangar 1 Chattel Mortgage Security Agreement with Stolport Corporation [omitted……**
> **……**
> **……**
> **……**
> **……**
> **…….]**
>
> **Approved.**

(b) *Exemptions Claimed by the Respondent*

[191] The respondent relies on paragraphs 18(a) and 18(b) and paragraph 21(1)(b) to justify the redaction.

(c) *Respondent's Submissions*

[192] The respondent submits this information discloses not [omitted……...
…….] The respondent submits there is no indication that the mortgage is on the public record. The respondent argues the mortgage is commercial and financial information of value in that it provides insight into TPA's business practice and holdings. Information on interest rates could also prejudice TPA's other real estate negotiations.

[193] The respondent further argues that the information is a deliberation, falling within the scope of paragraph 21(1)(b).

(d) *Applicant's Submissions*

[194] The applicant submits the information on the approval of the recommendation to renew the Chattel Mortgage Security Agreement with Stolport Corporation is not exempt since (1) the chattel mortgage is paid off; (2) the terms of real estate mortgage and rates of interest are publicly available due to their registration with the Land Registry; and (3) chattel mortgages are registered and publicly available. The applicant confirmed in oral argument that there was no evidence that the chattel mortgage had been registered.

(e) *Analysis*

(i) Paragraph 18(a)

[195] Information relating to mortgage rates and terms falls within the scope of the terms "commercial" and "financial" information. In this case the respondent asserts the information has substantial value as it provides insight into TPA's business practices and holdings. While this may be the case, the evidence does not go beyond the assertion of value and provide any basis for the Court to conclude there is substantial value or that it is reasonably likely that there is substantial value in the information. The elements of the paragraph 18(a) exemption are not established.

(ii) Paragraph 18(b)

[196] The respondent asserts prejudice in that disclosure of the interest rate in particular could impact upon future real estate negotiations. In addition to this assertion of prejudice the

respondent noted there is no evidence to demonstrate that the mortgage was registered or otherwise made available to the public. While the applicant argued that the mortgage would be registered and publicly available, counsel for the applicant conceded in oral submissions that it had not confirmed if the mortgage had in fact been registered. In the circumstances I am satisfied that the assertion of prejudice coupled with the non-registration of the mortgage is sufficient to establish that disclosure of the terms of the mortgage, including interest rate, could reasonably prejudice TPA's future competitive position.

[197] In light of my conclusion the following words at pages 10 and 11 fall within the scope of paragraph 18(b): (1) [omitted……] and (2) [omitted…… ……] The remainder of the redacted information does not.

(iii) Paragraph 21(1)(b)

[198] The information redacted from this portion of the Minutes involves background and facts necessary to allow the Committee to determine whether it would approve the recommendation to the Board of the renewal of a chattel mortgage. This is the type of matter that would normally require an exchange of ideas and views among Committee members and the Minutes reflect the consultations and deliberations, albeit limited, undertaken in rendering the decision. The 21(1)(b) exemption is available to the respondent.

(f) *Conclusion*

[199] The paragraph 18(a) exemption is not applicable. The paragraph 18(b) exemption may be relied on to exempt the following words on pages 10 and 11, (1) [omitted…….....

……] and (2) [omitted……..

……..

……] The paragraph 21(1)(b) exemption is applicable to the redacted text.

(10) Page 12 – Business Arising

(a) *Text of the Minutes*

THE TORONTO PORT AUTHORITY
AUDIT & FINANCE COMMITTEE

BUSINESS ARISING FROM MEETING HELD DECEMBER 23, 2008

| Assignee | Business | Completion Date: |
|---|---|---|
| **[omitted]** | **[omitted…… …… .....]** | **[omitted…… ……. ]** |

BUSINESS ARISING FROM PRIOR MEETINGS

| | | |
|---|---|---|
| AP | Report back on Association of Canadian Port Authorities best practices approach to IFRS. | Ongoing. |
| **AP** | **Mr. Christopher Henley to clarify his position on Davies Ward payment of invoices in written form.** | **Outstanding.** |
| **KL** | **To investigate whether the Roof Restoration of Terminal A would qualify under the Heritage Preservation Program (Heritage Canada).** | **Outstanding.** |

(b) *Exemptions Claimed by the Respondent*

[200] In the respondent's record, paragraphs 18(a) and 18(b) and paragraph 21(1)(b) are identified in support of the redactions. In oral submissions the respondent advised that only paragraph 21(1)(b) would be relied upon.

(c) *Respondent's Submissions*

[201] The respondent argued the information reflects an account of deliberations and should be exempted.

(d) *Applicant's Submissions*

[202] The applicant submitted in oral argument that the information is not deliberations but a "to do list", is innocuous and the exemptions do not apply.

(e) *Analysis*

(i) Paragraph 21(1)(b)

[203] The information redacted from this portion of the Minutes identifies matters and issues arising out the December 23, 2008 Meeting and prior meetings of the Committee. I am not persuaded by the applicant's view that this is nothing more than a "to do" list. This is an account of active issues under deliberation by the Committee and as such is subject to being exempted from disclosure on the basis of paragraph 21(1)(b).

(f) *Conclusion*

[204] The paragraph 21(1)(b) exemption is applicable to the redacted text.

C. *Summary – Availability of Claimed Exemptions*

[205] Based on the jurisprudence summarized above and the analysis undertaken, I have concluded:

(1) The respondent has not identified a valid exemption in support of the redaction made at page 1 of the Minutes;

(2) The respondent has not identified a valid exemption in support of the redaction in the middle of page 5 of the Minutes (see paragraph 172 above);

(3) The respondent has not identified a valid exemption in support of the redaction of paragraphs 6 and 7 on page 7 of the Minutes (see paragraph 173 and 174 above);

(4) The respondent has not identified a valid exemption in support of the redaction of the first half of page 10 of the Minutes (see paragraph 190 above);

(5) That the paragraph 18(a) exemption is not applicable to any of the redactions relied upon by the respondent;

(6) That the paragraph 18(b) exemption applies only to identified extracts (see paragraph 197 and 199 above) in the second half of page 10 and the beginning of page 11 of the Minutes;

(7) That the 21(1)(b) exemption is applicable to all of the redactions except those identified in subparagraphs (1) - (4) above.

## VIII. Exercise of Discretion

[206] Having concluded that the respondent may rely on discretionary exemptions in support of a number of the redactions made to the Minutes, I now will consider the issue of discretion as it relates to the Head of TPA's decision to rely on the available discretionary exemptions. I conducted my analysis of the exercise of discretion issue by examining all of the evidence in the record, including the entire history of the OIC's investigation and the correspondence provided by TPA during the investigation (*Attaran* at para 35; *Telezone FCA* at para 114).

### A. *Burden to Demonstrate Whether the TPA Reasonably Exercised its Discretion*

[207] The jurisprudence establishes that the burden of proof in demonstrating whether or not the respondent exercised its discretion in a reasonable manner in relation to the paragraph 18(b) and the paragraph 21(1)(b) exemptions is dependent upon the circumstances before the Court (*Attaran* at paras 20 and 24).

[208] In *Attaran* Justice Dawson reviewed both *Ruby v Canada (Solicitor General)*, [2000] FCJ No 779, 187 DLR (4th) 675 (CA) [*Ruby*] and *Telezone FCA* and addressed the issue of burden of proof in some detail.

[209] In *Ruby*, a case involving an application for the disclosure of personal information under the *Privacy Act*, RSC 1985, c P-21, the Federal Court of Appeal concluded at paragraph 38 that where an applicant has "no knowledge of the personal information withheld, no access to the record before the court, and no adequate means of verifying how discretion to refuse disclosure was exercised" the applicant could not be expected to assume the burden of establishing that the exercise of discretion was considered and how the government institution exercised the discretion to refuse disclosure.

[210] The Federal Court of Appeal in *Telezone FCA* considered and distinguished *Ruby* since some of the circumstances present in *Ruby* were not present before the Court in *Telezone FCA*, stating at paragraph 96:

> [96] Some of these circumstances are not present in the case before us. In particular, the Commissioner and Telezone are well aware of the nature of the information about the decision-making process that Industry Canada has refused to disclose. In addition, the Commissioner and counsel for Telezone know the content of the material filed in confidence with the Court, including explanations by officials of Industry Canada of the factors considered in the exercise of the discretion to disclose. The essence of the appellants' complaint is that, in the absence of an affidavit by the Minister's delegate who decided not to disclose the requested documents, they have effectively been deprived of an opportunity to conduct a cross-examination.

[211] In *Attaran*, the Federal Court of Appeal confirmed that the burden of proof does not automatically fall upon either the applicant or respondent to demonstrate that the head of a government institution considered the exercise of discretion where information has been exempted from disclosure on the basis of discretionary exemptions under the ATIA. In addressing the issue, Justice Dawson concludes at paragraphs 26 and 27:

> [26] [T]he appellant is unaware of the precise content of the unredacted record, unaware of the *ex parte* evidence filed by the respondent and unaware of the *ex parte* submissions made by the respondent in the *in camera* hearing. The public affidavits were silent on what if any factors were considered in the exercise of discretion. The Federal Court provided no explanation for its conclusion that the respondent had considered the exercise of discretion. The appellant argues there is no evidence in the public record that consideration was given to the exercise of discretion. He has no means of verifying from the *ex parte* record if the discretion was exercised.
>
> [27] In my view, the circumstances in this case are analogous to those before this Court in *Ruby*. **The appellant cannot be required in this case to bear the burden of establishing on a confidential record he cannot access that the respondent failed to give consideration to the exercise of discretion** [emphasis added]. The burden of proof is on the respondent to establish that the discretion was exercised in a reasonable manner.

[212] I am of the view that the circumstances in this case are much closer to those in *Telezone FCA* than the circumstances in *Attaran* and *Ruby*. The applicant in this case is the Commissioner, not the Requester, and the Commissioner has access to the unredacted Minutes and the lengthy exchange of correspondence between the OIC and TPA. The respondent submits that the exchange of correspondence demonstrates TPA's rationale for not disclosing all of the Minutes to the Requester.

[213] In the public cross-examination on his affidavit, Mr. Paul notes that the determination of what to redact from the Minutes was the subject of legal advice over which privilege was being maintained. However, Mr. Paul also states in the cross-examination that TPA has disclosed the information that identifies the factors considered in disclosing the Redacted Minutes. I am therefore satisfied that the applicant is in a position to assume the burden of proof on the

question of whether the respondent failed to consider the relevant factors in reaching its decision on the redaction of the Minutes.

B. *Was the Discretion Exercised Reasonably?*

[214] In *Criminal Lawyers' Association* the Supreme Court of Canada explains, at paragraphs 66 and 67, the nature of the exercise of discretion in the context of discussing the *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, an explanation that is of application to the ATIA (*Attaran* at para 14):

> [66] [T]he "head" making a decision under s. 14 and s. 19 of the *Act* has a discretion whether to order disclosure or not. This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, the head must determine whether the exemption applies. If it does, the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made.
>
> [67] The head must consider individual parts of the record, and disclose as much of the information as possible. Section 10(2) provides that where an exemption is claimed, "the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions".

[215] In considering the exercise of TPA's discretion, it is not for the Court to determine how it would have exercised the discretion, rather the Court merely reviews on administrative law grounds, the legality of the exercise of discretion in light of the purpose of the statute and the exemption claimed (*Canadian Council of Charities* at para 19). The Court determines if the exercise of discretion occurred in good faith and for some reason rationally connected to the

purpose for which the discretion was granted (*Telezone FC* at para 112). The Court also asks whether "the responsible officials had considered all the factors that they were obliged by law to consider" (*Telezone FCA* at para 97).

[216] Justice Stratas also explained factors relevant to consider in the exercise of discretion in *Minister of Public Safety and Emergency Preparedness* at para 49 where he states:

> [49] These questions are for the access coordinators to decide afresh. That discretion is to be exercised mindful of all of the relevant circumstances of this case, the purposes of the Act, and the principles set out in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815 at paragraph 66.

[217] Justice Gibson's decision in *Hutton v Canada (Minister of Natural Resources)*, [1997] FCJ No 1468 at para 18, 137 FTR 110 (TD) in turn provides that the head of the government institution can consider the nature of the government institution in order to assess the discretionary decision:

> [18] I turn then, to the second issue, the review of the discretionary decision of the Minister. I am satisfied that the evidence provided on behalf of the Minister is sufficient to demonstrate that the disclosure of the information could reasonably be expected to prejudice the competitive position of C.E.R.L. I am also satisfied that, in the current climate of fiscal restraint, protection of the competitive position of C.E.R.L. is an important public policy concern. In the result then, I conclude that the discretion vested in the Minister was properly exercised.

[218] Finally, *Bronskill v Canada (Minister of Canadian Heritage)*, 2011 FC 983, 339 DLR (4th) 679 [*Bronskill*], a case that both parties cite, sets out many relevant non-exhaustive factors one can consider in the assessment of whether the decision maker should exercise its discretion

in the given case. While the Federal Court of Appeal in *Bronskill v Canada (Minister of Canadian Heritage)*, 2012 FCA 250, 356 DLR (4th) 192, varied this Court's decision it did not do so on grounds relating to the factors identified by Justice Simon Noël, which include:

1. The purpose of the exemption;
2. The passage of time;
3. The principles and objectives of the ATIA;
4. That one cannot use the ATIA to hide embarrassment or illegal acts;
5. The public interest, inclusive of all relevant interests; and
6. The prior public disclosure of information is a factor militating for disclosure (the information is in the public domain).

[219] In this case the disclosure of the redacted Minutes, notwithstanding the applicability of the paragraph 21(1)(b) and paragraph 18(b) exemption, demonstrates that the Head of TPA recognized he had discretion to disclose the Minutes and did so in part. The issue is whether or not the applicant has demonstrated that TPA committed a reviewable error in the exercise of that discretion.

[220] TPA argues that it reasonably exercised its discretion in redacting the Minutes. I respectfully disagree. The applicant has established, on a balance of probabilities, that on one hand, TPA considered irrelevant factors and on the other ignored relevant factors in exercising its discretion in this matter, a reviewable error.

[221] First, the Head of TPA erred by refusing to consider the passage of time and the completion of certain processes as factors in the exercise of discretion. In the November 16,

2011 letter to the OIC, the Head of TPA expressly disagreed that the passage of time and the completion of certain processes are factors that would negate otherwise applicable exemptions under the ATIA, and at no time did the Head of TPA abandon that position in the exercise of discretion:

> Moreover, to the extent that the Worksheet identifies information related to processes which may have been completed, the TPA disagrees that the completion of such processes or the passage of time negates exemptions under the Act which are otherwise applicable. The TPA cannot determine a temporal element to the Act and the exemptions set out therein. In the absence of express language in the Act or jurisprudence confirming such an interpretation, the TPA disagrees that the completion of certain processes or the passage of time is a factor which would negate otherwise applicable exemptions under the Act. With respect, the TPA disputes the jurisdiction of the Information Commissioner to impute a temporal requirement into the Act and the exemptions set out therein.

[222] This interpretation of the ATIA is contrary to the jurisprudence which holds that "This discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case" (Criminal Lawyers' Association at para 66; Minister of Public Safety and Emergency Preparedness at paras 48-49). The Head of TPA's position is also contrary to Bronskill at paras 218-219, which held "The passage of time is a factor, among others", and I repeat that the respondent on judicial review cited *Bronskill* as an authority outlining non-exhaustive factors which the head may consider in the assessment of whether to exercise the discretion in a given case.

[223] In the circumstances of this case where there has been a significant passage of time, and much of the information is in the public domain, the passage of time and the completion of

certain process are factors relevant to the exercise of discretion. Failure to consider these factors was a reviewable error in relation to both paragraphs 18(b) and 21(1)(b) of the ATIA.

[224] Next, part of the rationale advanced for non-disclosure of the Minutes by the Head of TPA in the October 28, 2013 Letter to the OIC was the need to balance "public and private interests with the public's right to know." Counsel for the respondent, having conceded that the subsection 20(1) exemptions are not triggered by the content of the Minutes also concedes, by implication, that no private third party rights are engaged. There were no private interests to be balanced in the exercise of TPA's discretion. Its reliance on this balancing of private interests in the exercise of discretion demonstrates reliance on an irrelevant consideration or factor.

[225] Further, TPA's failure to claim the paragraph 21(1)(b) in a timely manner and set out its basis for relying on the exemption has deprived the Court of TPA's explicit rationale for redacting some portions of the Minutes while disclosing other portions to which the 21(1)(b) exemption would also seem to apply.

[226] Specifically, in identifying paragraph 21(1)(b) as a basis upon which TPA may refuse disclosure, after receipt of the Subsection 37(1) Recommendation from the Commissioner, TPA made no mention of the public nature of much of the information in the Minutes, the contents of the Watson Report, or the content of TPA's annual financial disclosure. The failure to recognize these factors leads the Court to conclude that these relevant factors were neither considered nor weighed in determining what would be disclosed to the Requester.

[227] I accept that reliance on paragraph 21(1)(b) could be implicit in TPA's stated desire not to undermine its internal processes, an objective identified by TPA in earlier correspondence with the OIC. However, TPA's stated concern throughout the process was with the potential prejudice of its competitive position through disclosure and therefore its reliance on section 18 of the ATIA. Having waited until the OIC's investigation was substantially complete to claim reliance on paragraph 21(1)(b) as a ground for refusing to disclose the Redacted Minutes triggered a need, in my view, for TPA to demonstrate how its discretion was being exercised. This is particularly so where TPA's refusal to disclose had been the subject of a four year investigation by the Commissioner and the public Watson Report disclosed in significant detail the ongoing internal dispute that TPA had previously identified as a significant concern in the commercial and financial context.

[228] I also acknowledge, as submitted by the respondent that the Watson Report is focused upon the subsequent Board meetings, not the Committee Meeting that is the subject of the Minutes. However, the internal dispute, the conflict of interest concerns and the divergence of views that were identified in the Watson Report were clearly the issues underlying the Committee discussions in the Meeting. The Committee discussions involved the same Board members identified in the Watson Report, dealing with the same subject, the new ferry purchase, and the ultimate decision was considered in the Watson Report. Any damage or prejudice that would occur to TPA's position as a result to its competitors knowing about this internal dispute would appear to have been incurred with the public disclosure of the Watson Report. These factors, in the context of this complaint, are all directly relevant to whether or not disclosure of the Minutes could inhibit future open and frank communications between Committee members

(*Telezone FC* at para 45) and in turn the exercise of discretion as it relates to the paragraph 21(1)(b) exemption.

[229] Finally, and perhaps most decisively the answers from Mr. Paul on the cross-examination of his affidavit lead me to conclude that the scope of the factors considered by TPA in the exercise of discretion related to the paragraph 21(1)(b) exemption were limited. During the cross-examination Mr. Paul explained that the statement made by the Head of TPA in the October 28, 2013 Letter that "TPA understands the need to balance public and private interests with the public's right to know" was the reason why TPA exercised its discretion. Mr. Paul further notes "and this investigation was ongoing and so we wanted to be as transparent as we felt we could." Furthermore, in response to a question as to why TPA maintained the position for four years that it would not release a word of the Minutes to the public Mr. Paul stated that TPA changed its mind in October 2013 due to "a desire to be as transparent as we possibly could, while protecting the commercial and financial information we felt was important to protect our competitive position."

[230] When Mr. Paul was asked who disabused TPA as of October 28, 2013 of the notion that the un-redacted information in the Minutes was not confidential and commercial he stated in-house legal advice had been provided. Mr. Paul was then advised by applicant's counsel that he had the "full opportunity to tell me what factors were considered in the exercise of the discretion to release or not release information in these 12 pages of minutes. So you are telling me legal advice. Anything else, sir?" Mr. Paul referred to paragraph 26 of his public affidavit, which applicant's counsel read into the cross-examination record which states:

> In response to the Commissioner's letter of September 12, 2013, after consultation with the Commissioner's office and Mr. Christian Picard and Ms. Emily McCarthy in particular, and in a good faith effort to balance the interest in keeping the public informed with the need to keep certain critically commercially sensitive information confidential, TPA consented to the disclosure of a redacted version of the Minutes in a letter to the OIC dated October 28, 2013. In the October 28, 2013 letter to the OIC, and prior to the OIC providing [the Requestor] with a final report, TPA indicated that the redacted portions of the Minutes are also subject to the exemption found at paragraph 21(1)(b) of the Act since they constitute "an account of consultations or deliberations in which directors, officers or employees of a government institution participate."

[231] After reading that paragraph into the record the following exchange occurred between Mr. Paul and the applicant's counsel:

> Q. So, Mr. Paul, does this paragraph trigger any other information as to the factors that were taken into account in the exercise of the discretion to release or not release the minutes?
>
> A. No, I think that issue is clear, and it was always my understanding that would be the reason why we would release the information.
>
> Q. What were the good faith efforts that you employed to balance the public's right to know?
>
> A. It was again through legal counsel and discussions with legal counsel and CEO we came to that decision.
>
> Q. Anything else to add?
>
> A. No, nothing else.
>
> Q. Just so that I am clear, Mr. Paul, did you do anything else in the exercise of discretion to release or it release from what you have told me?
>
> A. No. As I say, we had the discussion internally and we made the decision.
>
> Q. Okay. So legal advice you are not going to provide me solicitor/client privileged information in terms of documents so

> that covers that. Is there any other non-solicitor/client privileged document that reflects how you went about exercising your discretion to release or not release, and when I say you I mean TPA?
>
> A. Not that I am aware of.

[232] The answers undermine Mr. Paul's statement at paragraph 32 of his public affidavit that "In its correspondence with the OIC, TPA emphasized to the OIC on a number of occasions the importance of keeping the Audit Committee's meeting minutes confidential because they contained deliberations of its directors, officers and employees" as standing for the proposition that TPA claimed paragraph 21(1)(b) before October 28, 2013. The answers on cross-examination coupled with TPA's failure to specifically claim paragraph 21(1)(b) pursuant to its obligation under paragraph 10(1)(b) of the ATIA until October 28, 2013 leads me to conclude that on a balance of probabilities the Head of TPA did not turn his mind to the specific issue of the exercise of discretion under paragraph 21(1)(b) until late in the process after receiving in-house legal advice, not throughout the process as is indicated in Mr. Paul's affidavit.

[233] Although the Head of TPA made reference to Committee deliberations in correspondence dated November 16, 2011 in justifying non-disclosure of the Minutes, that reference is made in the context of not prejudicing TPAs commercial or financial position under section 18, rather than the disclosure of an account of deliberations, and the answers given by Mr. Paul on cross-examination confirms this:

> The TPA maintains its position that this information is exempted pursuant to ss.18(a) and 18 (b) of the Act. Paragraphs 3-8 address Mr. Henley's opposition to the ferry purchase and provide very specific details regarding the Committee members' deliberations and the extent of Mr. Henley's knowledge of the business and financial case for purchase of the ferry.

> The Committee's deliberations concerning the business and financial case for purchase of the ferry are commercial and financial information of substantial value to the TPA. Furthermore, disclosure of the Committee member conflicts may prejudice the TPA's competitive position and interfere with negotiations regarding future acquisitions.

[234] TPA cannot rely on this reference to deliberations made in November, 2011 for the purpose of claiming the exemptions under paragraph 18(a) and 18(b) to buttress a claim that there was a reasonable exercise of discretion relating to paragraph 21(1)(b) on October 28, 2013.

[235] Thus, I conclude TPA did not consider all of the relevant factors, most importantly the public nature of much of the information it chose to not disclose to the Requester. The October 28, 2013 Letter from TPA, paragraph 26 of Mr. Paul's affidavit and Mr. Paul's evidence on cross-examination indicates that the "effort to balance the interest in keeping the public informed with the need to keep certain critically commercially sensitive information confidential" drove the discretionary decision in this case. This falls far short of an active consideration of the relevant factors in play. These factors included: (1) the passage of time; (2) the staleness of the decisions, issues and processes discussed in the Minutes; (3) the contents of previous public statements by TPA as they related to the contents of the Minutes, both in financial disclosures and in news releases; and (4) the contents of the Watson Report. Consideration of these factors in turn needed to be informed by the purposes and objectives of the ATIA. As noted by the applicant at paragraph 115 of the Memorandum of Fact and Law "A conclusory statement in a cover letter that TPA was committed to transparency is not evidence that the head asked whether, having regard to all the relevant interests (including the public interest in disclosure) disclosure should be made."

[236] In my view the applicant has demonstrated a failure on the part of the respondent to consider and address relevant factors in the exercise of discretion under the ATIA, a reviewable error in the exercise of its discretion in relation to both the paragraph 21(1)(b) and paragraph 18(b) exemptions.

## IX. Remedy

[237] Having concluded that:

A. The paragraph 21(1)(b) discretionary exemption applies to most, but not all, of the redacted information;

B. The discretionary paragraph 18(b) exemption is applicable in one instance;

C. The discretionary paragraph 18(a) exemption does not apply to any portion of the Minutes;

D. None of the claimed exemptions apply in four cases; and

E. The respondent has committed a reviewable error in considering the basis upon which it would maintain the discretionary exemptions available to it.

[238] The Court will order that the respondent disclose the portions of the Redacted Minutes to which no exemption applies and that the matter will be returned to the respondent to reconsider its reliance on the discretionary exemptions available to it in light of these Reasons.

[239] With respect to the question of costs the applicant identifies the public interest nature of the litigation and Sub-rule 53(2) of the *Federal Courts Rules* in advancing the position that the Commissioner does not seek costs. The Court is in agreement. Costs will not be awarded.

## JUDGMENT

**THIS COURT'S JUDGMENT is that:**

1. The application is granted;
2. The matter is returned to the respondent for redetermination in accordance with these Reasons;
3. The respondent shall deliver a redacted version of the Minutes to the Requester within thirty (30) days of this Judgment disclosing the previously redacted information at:
    i. page 1 of the Minutes;
    ii. the redaction in the middle of page 5 of the Minutes as specified in this decision;
    iii. the redactions at paragraphs 6 and 7 of page 7 of the Minutes as specified in this decision;
    iv. the redaction on the first half of page 10 of the Minutes as specified in this decision;
4. No costs are awarded.

"Patrick Gleeson"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | T-1453-14 |
| **STYLE OF CAUSE:** | THE INFORMATION COMMISSIONER OF CANADA v TORONTO PORT AUTHORITY AND CANADIAN PRESS ENTERPRISES INC. |
| **PLACE OF HEARING:** | OTTAWA, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 19, 2015 |
| **PUBLIC JUDGMENT AND REASONS:** | GLEESON J. |
| **DATED:** | JUNE 17, 2016 |

**APPEARANCES:**

| | |
|---|---|
| Mr. Richard Dearden<br>Mr. David Demirkan | FOR THE APPLICANT |
| Mr. Martin Masse<br>Ms. Jenna Anne de Jong | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Gowling Lafleur Henderson, LLP<br>Lawyers, Patent and Trade-mark Agents<br>Ottawa, Ontario | FOR THE APPLICANT |
| Norton Rose Fulbright Canada, LLP<br>Barristers & Solicitors / Patent and Trade-mark Agents<br>Ottawa, Ontario | FOR THE RESPONDENT |

# Appendix A

CONFIDENTIAL

**THE TORONTO PORT AUTHORITY**
**AUDIT AND FINANCE COMMITTEE MEETING**



**APPROVED**
**Minutes of Meeting**
**Held**
**December 23, 2008**

**Present:**
**Colin Watson, Chair (teleconference)**
**Mark McQueen (teleconference)**
**Christopher Henley (teleconference)**

**Also Present:**
**Alan Paul, Acting President & CEO**
**Ken Lundy, Director of TCCA**
**Angus Armstrong, Chief of Security & Harbourmaster**
**Mary Zamrij, Recording Secretary**
**Steve Stewart, Deloitte & Touche (teleconference)**
**Ronald Podolny, Interim Corporate Secretary, Davies Ward Phillips & Vineberg LLP**

The meeting took place in the Toronto Port Authority ("TPA") Board Room at 60 Harbour Street, Toronto.

The Committee Chair called the meeting to order at 8:00 a.m. and confirmed that the meeting was properly constituted.

1. Approval of Minutes

The Committee had before it, for review and approval, draft Minutes of November 21, 2008.

The Committee Chair indicated he understood that Mr. Christopher Henley had changes to the draft Minutes that the Committee had not seen.

Deferred.

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers
ATIA s. 18(a) – confidential commercial or financial information
ATIA s. 18(b) – disclosure expected to prejudice TPA's competitive position

2. CFO's Report

The Acting President & CEO reported that TPA was awaiting a decision on PILTS and that he had learned that the Dispute Advisory Panel had been reappointed, which meant the same people would be making a decision on what to do with the information that had been presented during the hearing. The Acting President & CEO advised that the Windsor Port Authority would be commencing a hearing on PILTS shortly.

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers

ATIA s. 18(a) – confidential commercial or financial information

ATIA s. 20(1)(b) and s. 20(1)(d) – third party information

The Acting President & CEO reported that TPA was preparing for its year-end audit which would commence in February 2009 and that the Audit Plan was being prepared by Deloitte & Touche. The Acting President & CEO reported that TPA was maintaining positive financial results which had improved in October and even more so in November, and TPA was still on track with TCCA starting to show returns for TPA.

3. Ferry

The Committee had before it a report from the Acting President & CEO outlining New Ferry Financing Options – BMO Term Sheet with a recommendation that the Committee approve the $5 million Credit Facility made available by the Bank of Montreal ("BMO") for the purchase of a second Ferry, to provide service to the TCCA. The report also set out BMO Term Loan Conditions for the new credit facility.

The Acting President & CEO reported that Management was seeking approval of the New Ferry and that the total cost including engineering, project management and soft costs totalled $4.85 million.

The Acting President & CEO advised that Management had gone through the Request for Proposals ("RFP") process and had received bids from three ship builders.

The Acting President & CEO reported that there was a substantial difference between bidders from lowest to highest and Management was pleased with the results and were currently negotiating with the lowest bidder to refine the amount.

The Director of TCCA addressed critical points in the bidding process to explain the process to the Committee.

The TPA advertised in the Globe and Mail and L'Express and the government electronic service Mercks and in total four respondents submitted qualifications for review by Management and Management were satisfied with the types of responses that were received following which an internal team was formed to advise and contact each of the companies and explore capabilities, resources and discuss in depth the approach that would result in their bid submissions to TPA.

The Director of TCCA advised that Management talked to each of the companies by teleconference in order to explore the issues and also passed on critical details that were needed for ship builders. The Director of TCCA indicated that all of the ship builders were concerned about the delivery of the vessel keeping in mind the closure of the Seaway in late December. The Director of TCCA updated on the timeline for production of the thruster units and reported that Rolls Royce had committed to the delivery of thrusters to shipbuilders by October 27, 2009 provided that they had authorization to proceed by December 31, 2008. Management had communicated that information to the ship builders who had come back with proposals. The Director of TCCA reported that one of the proponents had declined to bid on the project.

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers
ATIA s. 18(a) – confidential commercial or financial information
ATIA s. 18(b) – disclosure expected to prejudice TPA's competitive position

The Committee Chair noted that a ship builder needed a commitment in order to meet the tight schedule that was laid out for them and that December 31, 2008 was a critical date.

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers
ATIA s. 18(a) – confidential commercial or financial information
ATIA s. 18(b) – disclosure expected to prejudice TPA's competitive position

**The Director of TCCA indicated that the ship builders were aware of the terms and date of delivery and that a penalty would be built into the contract if the bidder did not meet the target date. The Director of TCCA indicated that the builders were quite confident that the target date could be met.**

Mr. Henley asked for the rationale for the decline by the Upper Lakes Group from the bidding process. The Director of TCCA advised that no reasons or rationale or specific details for the decision were provided by the company but that the company had been provided with all the bidding information that was provided to other bidders, but had respectfully declined to bid.

ATIA s. 21(1)(b) - account of consultations or deliberations of TP directors or officers
ATIA s. 18(a) – confidential commercial or financial information
ATIA s. 18(b) – disclosure expected to prejudice TPA competitive position

**The Director of TCCA reported that in terms of budget price and the bid/ask range Hike Metals ("Hike"), the lowest bidder, was satisfied they could meet the price** and not exceed $4.35 million.

ATIA s. 20(1)(b) and s. 20(1)(d) – third party information

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers
ATIA s. 18(a) – confidential commercial or financial information
ATIA s. 18(b) – disclosure expected to prejudice TPA's competitive position

The Acting President & CEO reported that there would be negotiations with regards to Hike's bid price as TPA have allowed for an additional amount based on certain components.

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers
ATIA s. 18(a) – confidential commercial or financial information
ATIA s. 18(b) – disclosure expected to prejudice TPA's competitive position

The Acting President & CEO spoke on the Credit Facility that was made available by the Bank of Montreal for the purchase of a second Ferry at the TCCA and advised of the December 31, 2008 expiry date of the offer. The Acting President & CEO spoke on Term Loan Conditions, reported on TPA's relationship with BMO, indicated that he would be watching the market and that at some point decisions would need to be made on the issue of interest rate strategy. The Acting President & CEO stated that it would be his

recommendation to enter into the Credit Facility Agreement with BMO and draw down on that Agreement while building the Ferry.

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers
ATIA s. 18(a) – confidential commercial or financial information
ATIA s. 18(b) – disclosure expected to prejudice TPA's competitive position

**The Committee Chair asked for comments.**

Mr. McQueen provided comments on the movement of credit prices in today's market and with respect to the monitoring of credit by the Acting President & CEO he believed that further parameters should be put in place as to what TPA was looking for and was trying to accomplish in order to be fair to the CEO and suggested that TPA solidify a strategy on interest rates. The Acting President & CEO indicated that he would be pleased to discuss it with the Audit & Finance Committee in an effort to reduce risk.

The Committee Chair asked Mr. Stewart whether he had any views on the matter since the issue was a major capital acquisition for TPA. Mr. Stewart did not have any views on the issue.

> It was moved by Mr. Mark McQueen that the Audit & Finance Committee recommend to the Board of Directors construction of a New Ferry to TCCA and the project cost not to exceed $4,850,000.00.

The Committee Chair asked whether Mr. Henley would second the motion. Mr. Henley indicated that he was not going to vote on the issue and the Committee Chair asked whether Mr. Henley could provide his reasoning for not voting.

Mr. Henley indicated that from his standpoint he had not understood the business case at this point in time and indicated that the Board meeting scheduled for later this morning would be helpful on that front and as far as he understood the Board would be reviewing scenarios, numbers and some of the other issues during its meeting.

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers
ATIA s. 18(a) – confidential commercial or financial information
ATIA s. 18(b) – disclosure expected to prejudice TPA's competitive position

The Committee Chair indicated that the Committee was prepared to discuss the matter here at the Audit & Finance Committee meeting in an effort to clarify and explain any issues,

Mr. Henley indicated that from what he read in [omitted.....] legal opinion he gathered that the writer, [omitted.....] would be available at the Board meeting [omitted .....] Mr. Henley indicated that he understood the issue of capacity and that the issue he had was that TPA would be taking on an additional $5 million of debt which he didn't see any upside on and the question for him was that with the debt TPA would be adding to the $15 million credit facility that pre-dated any of the Board tenures. Mr. Hanley indicated that from his standpoint he did not see the upside of taking on additional debt.

Mr. McQueen indicated that the Jacobs Consulting Report had already made clear what the business case was and the Board certainly had discussions both at the Board and Committee levels about the business case according to the Consultants hired by the TPA the AIF forecasts were shared some time ago along with current aircraft versus 16 and indicated there was a lot of business case data and many different pieces of the puzzle have been discussed along the way.

Mr. Watson stated that the practical answer is if the Board does not approve the New Ferry now, if in the future, TPA had any kind of ferry breakdown it would be shipping people to the TCCA on a barge and TPA would not be able to service Porter Airlines aircraft requirements and the business case would break down.

Mr. Henley stated that he was saying that the Committee should have a full discussion of the issues.

**ATIA s, 21(1)(b) - account of consultations or deliberations of TPA directors or officers**
**ATIA s. 18(a) - confidential commercial or financial information**
**ATIA s. 18(b) - disclosure expected to prejudice TPA's competitive position**

The Acting President & CEO reported that he thought that the Committee had already had discussions on different levels of the AIF and indicated that there were different levels discussed in the Board package and took the Committee through the cash flow forecasts from 2009 to 2013 based on 14 aircraft.

The Acting President & CEO indicated that the report covered the existing debt service, CAPEX and new debt for the New Ferry and that TPA was currently above the five-year average break-even number for enplaned passengers.

Mr. Henley indicated that what was being presented by the Acting President & CEO was largely what he was looking for, but noted that he had only received the information yesterday and he wanted to understand the information.

Mr. McQueen stated that perhaps the Committee Chair could have the Acting President & CEO or the Director of TCCA take Mr. Henley through some slide information.

Mr. Henley indicated that he did not have the time as he was getting ready to drive down for the Board meeting.

Mr. McQueen suggested that Mr. Henley call into the meeting from his car

At 8:50 a.m., Mr. Christopher Henley left the teleconference. The meeting adjourned and resumed at 9:00 a.m., and Mr. Henley re-joined the meeting via teleconference.

The Acting President & CEO provided a review of Porter numbers, reviewed budget numbers that were presented on November 21, 2008 followed by enplaned passenger numbers.

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers
ATIA s. 18(a) – confidential commercial or financial information
ATIA s. 18(b) – disclosure expected to prejudice TPA's competitive position

The Acting President & CEO reviewed the net amount of AIF revenue, debt service on $15 million, capital, CAPEX with debt service and all the capital expenditures, net AIF available and cumulative balance AIF. The Acting President & CEO advised that the sensitivity analysis provided a clear perspective should Porter go down to a level below what they were anticipating.

Mr. McQueen summarized and reviewed business cases based on the information using various load factors and reviewed the downside case.

The Acting President & CEO spoke on the flexibility of the AIF and noted that its collection and spending were tied together and continued to clarify the numbers.

Mr. McQueen reviewed what was available in 2008 and 2009 to pay down the loan and concluded that by supporting the new Ferry TPA would be better equipped to pay down the debt rather than if it did not support the New Ferry.

Mr. Henley indicated that he did not have the document in question in front of him and found it difficult to follow and noted that one option for TPA would be to increase the AIF.

The Acting President & CEO reviewed AIF scenarios.

Mr. McQueen noted that jacking up the AIF was in a way hurting TCCA by sending passengers to Pearson.

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers
ATIA s. 18(a) – confidential commercial or financial information
ATIA s. 18(b) – disclosure expected to prejudice TPA's competitive position

It was moved by Mr. Mark McQueen that the Audit & Finance Committee recommend to the Board of Directors construction of a New Ferry to TCCA and the project cost not to exceed $4,850,000.00. Motion carried.

Approved. Mr. Henley voted against the motion.

Financing for New Ferry

The Acting President & CEO indicated that $5 million was available to TPA, it was a demand loan which fell under the existing loan agreement with the Bank of Montreal and TPA had until December 31, 2008 to sign the document. The Acting President & CEO indicated that it was his recommendation that the Committee approve the credit facility of $5 million made available by BMO and forward the Committee's recommendation to the Board of Directors for approval.

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers
ATIA s. 18(a) - confidential commercial or financial information
ATIA s. 18(b) - disclosure expected to prejudice TPA's competitive position

It was moved by Mr. Mark McQueen and seconded by Mr. Colin Watson that the Committee approve the $5 million Credit Facility made available by the Bank of Montreal for the purchase of a second Ferry to provide service to the TCCA. Motion carried.

Approved. Mr. Henley voted against the motion.

3. 2009 Draft Business Plan & Budget

The Committee had before it the 2009 Draft Business Plan and Budget and the Acting President & CEO provided a synopsis.

The Acting President & CEO reviewed berthing revenues at the OHM and the TCCA.

[omitted.....
.....
.....] The Acting President & CEO noted that there were a number of things in the capital budget TPA has deferred to 2010 to be reviewed at that time and Management have provided a revised Tab A and Cash Flow Forecast. The Acting President & CEO stated that TPA remained on the side with the required bank covenants, in the revised version of the budget.

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers
ATIA s. 18(a) - confidential commercial or financial information
ATIA s. 18(b) - disclosure expected to prejudice TPA's competitive position

Received.

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers
ATIA s. 18(a) - confidential commercial or financial information
ATIA s. 18(b) - disclosure expected to prejudice TPA's competitive position

4. Cheque Signing Authorities

The Committee had before it a report from the Acting President & CEO on Cheque Signing Authorities recommending that the Audit & Finance Committee approve a resolution for the addition of Mr. Amir Jiwani, TPA's new Controller, as a cheque signing authority for the TPA.

It was moved by Mr. Mark McQueen and seconded by Mr. Christopher Henley that the Committee approve the addition of Mr. Amir Jiwani, Controller, as a cheque signing authority for the TPA. Motion carried.

Approved.

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers
ATIA s. 1B(a) - confidential commercial or financial information

5. Stolport Corp Renewal of Chattel Mortgage

The Committee had before It a report from the Acting President & CEO on the Renewal of the Chattel Security Mortgage Agreement with Stolport Corporotion recommending that the Committee approve the renewal of the Hangar 1 Chatel Mortgage Security Agreement with Stolport Corporation [omitted.....]

It was moved by Mr. Christopher Henley and seconded by Mr. Mark McQueen that the Comittee approve for recommendation to the Board of Directors the renewal of the Hangar 1 Chattel Mortgage Security Agreement with Stolport Corporation [omitted.....

.....

.....]

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers
ATIA s. 18{a) - confidential commercial or financial information
ATIA s. 18{b) - disclosure expected to prejudice TPA's competitive position

[omitted.....
.....]

Approved

ATIA s. 21(1)(b) - account of consultations or deliberations of TPA directors or officers
ATIA s. 18(a) -confidential commercial or financial information
ATIA s. 18(b) – disclosure expected to prejudice TPA's competitive position

**At 9:25 a.m., Management left the meeting room. The Interim Corporate Secretary remained in the meeting room.**

**6. In-Camera**

**At 9:25 a.m., the Committee commenced an in-camera meeting session.**

THE TORONTO PORT AUTHORITY
AUDIT & FINANCE COMMITTEE

BUSINESS ARISING FROM MEETING HELD DECEMBER 23, 2008

| Assignee | Business | *Completion Date* |
|---|---|---|
| **[omitted]** | [omitted..... .....] | [omitted..... .....] |

**BUSINESS ARISING FROM PRIOR MEETINGS**

| | | |
|---|---|---|
| **AP** | **Report back on Association of Canadian Port Authorities best practices approach to IFRS.** | **Ongoing.** |
| AP | Mr. Christopher Henley to clarify his position on the Davis• Ward payment of invoices in written form • | |
| KL | To Investigate whether the Roof Restoraion of Terminal A would qualify under the Heritage Preservation Program (Heritage Canada) • | OUIII&rtdlnQ. |

ATIA s. 21(1)(b) - account ot consultations or ael1berat1ons ot TPA directors or officers
ATIA s. 18(a) - confidential commercial or financial information
ATIA s. 18(b) - disclosure expected to prejudice TPA's competitive position

## Appendix B

X. Relevant Legislation

*Access to Information Act*, RSC 1985, c A-1:

| | |
|---|---|
| […] | […] |
| 2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government. | 2. (1) La présente loi a pour objet d'élargir l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant susceptibles de recours indépendants du pouvoir exécutif. |
| 3. In this Act, | 3. Les définitions qui suivent s'appliquent à la présente loi. |
| "government institution" means | «institution fédérale» |
| (a) any department or ministry of state of the Government of Canada, or any body or office, listed in Schedule I, and | a) Tout ministère ou département d'État relevant du gouvernement du Canada, ou tout organisme, figurant à l'annexe I; |
| "head", in respect of a government institution, means | « responsable d'institution fédérale » |
| (a) in the case of a department or ministry of state, the member of the Queen's Privy Council for Canada who presides over the department or ministry, or | a) Le membre du Conseil privé de la Reine pour le Canada sous l'autorité duquel est placé un ministère ou un département d'État; |

(b) in any other case, either the person designated under subsection 3.2(2) to be the head of the institution for the purposes of this Act or, if no such person is designated, the chief executive officer of the institution, whatever their title;

b) la personne désignée en vertu du paragraphe 3.2(2) à titre de responsable, pour l'application de la présente loi, d'une institution fédérale autre que celles visées à l'alinéa

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

4. (1) Sous réserve des autres dispositions de la présente loi mais nonobstant toute autre loi fédérale, ont droit à l'accès aux documents relevant d'une institution fédérale et peuvent se les faire communiquer sur demande :

(a) a Canadian citizen, or

a) les citoyens canadiens;

(b) a permanent resident within the meaning of subsection 2(1) of the Immigration and Refugee Protection Act, has a right to and shall, on request, be given access to any record under the control of a government institution.

b) les résidents permanents au sens du paragraphe 2(1) de la Loi sur l'immigration et la protection des réfugiés.

4. (2.1) The head of a government institution shall, without regard to the identity of a person making a request for access to a record under the control of the institution, make every reasonable effort to assist the person in connection with the request, respond to the request accurately and completely and, subject to the regulations, provide timely access to the record in the format requested.

4(2.1) Le responsable de l'institution fédérale fait tous les efforts raisonnables, sans égard à l'identité de la personne qui fait ou s'apprête à faire une demande, pour lui prêter toute l'assistance indiquée, donner suite à sa demande de façon précise et complète et, sous réserve des règlements, lui communiquer le document en temps utile sur le support demandé.

[…]

[…]

7. Where access to a record is requested under this Act, the head of the government institution to which the request is made shall, subject to sections 8, 9 and 11, within thirty days after the request is received,

(a) give written notice to the person who made the request as to whether or not access to the record or a part thereof will be given; and

(b) if access is to be given, give the person who made the request access to the record or part thereof.

[…]

10. (1) Where the head of a government institution refuses to give access to a record requested under this Act or a part thereof, the head of the institution shall state in the notice given under paragraph 7(a)

(a) that the record does not exist, or

(b) the specific provision of this Act on which the refusal was based or, where the head of the institution does not indicate whether a record exists, the provision on which a refusal could reasonably be expected to be based if the record existed,

7. Le responsable de l'institution fédérale à qui est faite une demande de communication de document est tenu, dans les trente jours suivant sa réception, sous réserve des articles 8, 9 et 11 :

a) d'aviser par écrit la personne qui a fait la demande de ce qu'il sera donné ou non communication totale ou partielle du document;

b) le cas échéant, de donner communication totale ou partielle du document.

[…]

10. (1) En cas de refus de communication totale ou partielle d'un document demandé en vertu de la présente loi, l'avis prévu à l'alinéa 7a) doit mentionner, d'une part, le droit de la personne qui a fait la demande de déposer une plainte auprès du Commissaire à l'information et, d'autre part :

a) soit le fait que le document n'existe pas;

b) soit la disposition précise de la présente loi sur laquelle se fonde le refus ou, s'il n'est pas fait état de l'existence du document, la disposition sur laquelle il pourrait vraisemblablement se fonder si le document existait.

and shall state in the notice that the person who made the request has a right to make a complaint to the Information Commissioner about the refusal.

[…]

18. The head of a government institution may refuse to disclose any record requested under this Act that contains

(a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Canada or a government institution and has substantial value or is reasonably likely to have substantial value;

(b) information the disclosure of which could reasonably be expected to prejudice the competitive position of a government institution or to interfere with contractual or other negotiations of a government institution;

[…]

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

[…]

(b) financial, commercial, scientific or technical

[…]

18. Le responsable d'une institution fédérale peut refuser la communication de documents contenant :

a) des secrets industriels ou des renseignements financiers, commerciaux, scientifiques ou techniques appartenant au gouvernement du Canada ou à une institution fédérale et ayant une valeur importante ou pouvant vraisemblablement en avoir une;

b) des renseignements dont la communication risquerait vraisemblablement de nuire à la compétitivité d'une institution fédérale ou d'entraver des négociations — contractuelles ou autres — menées par une institution fédérale;

[…]

20. (1) Le responsable d'une institution fé- dérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :

[…]

b) des renseignements financiers, commerciaux,

information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

[…]

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

21. (1) The head of a government institution may refuse to disclose any record requested under this Act that contains

[…]

(b) an account of consultations or deliberations in which directors, officers or employees of a government institution, a minister of the Crown or the staff of a minister participate,
if the record came into existence less than twenty years prior to the request

[…]

25. Notwithstanding any other provision of this Act, where a request is made to a government institution for access to a record that the head of the institution is authorized to refuse to disclose under this Act by reason of information

scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

[…]

d) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

21. (1) Le responsable d'une institution fé- dérale peut refuser la communication de documents datés de moins de vingt ans lors de la demande et contenant :

[…]

b) des comptes rendus de consultations ou délibérations auxquelles ont participé des administrateurs, dirigeants ou employés d'une institution fédérale, un ministre ou son personnel;

[…]

25. Le responsable d'une institution fédérale, dans les cas où il pourrait, vu la nature des renseignements contenus dans le document demandé, s'autoriser de la présente loi pour refuser la communication du document, est cependant

or other material contained in the record, the head of the institution shall disclose any part of the record that does not contain, and can reasonably be severed from any part that contains, any such information or material.

tenu, nonobstant les autres dispositions de la présente loi, d'en communiquer les parties dépourvues des renseignements en cause, à condition que le prélèvement de ces parties ne pose pas de problèmes sérieux.

[…]

[…]

30. (1) Subject to this Act, the Information Commissioner shall receive and investigate complaints

30. (1) Sous réserve des autres dispositions de la présente loi, le Commissaire à l'information reçoit les plaintes et fait enquête sur les plaintes :

(a) from persons who have been refused access to a record requested under this Act or a part thereof;

a) déposées par des personnes qui se sont vu refuser la communication totale ou partielle d'un document qu'elles ont demandé en vertu de la présente loi;

[…]

[…]

31. A complaint under this Act shall be made to the Information Commissioner in writing unless the Commissioner authorizes otherwise. If the complaint relates to a request by a person for access to a record, it shall be made within sixty days after the day on which the person receives a notice of a refusal under section 7, is given access to all or part of the record or, in any other case, becomes aware that grounds for the complaint exist.

31. Toute plainte est, sauf dispense accordée par le Commissaire à l'information, déposée devant lui par écrit; la plainte qui a trait à une demande de communication de document doit être faite dans les soixante jours suivant la date à laquelle le demandeur a reçu l'avis de refus prévu à l'article 7, a reçu communication de tout ou partie du document ou a pris connaissance des motifs sur lesquels sa plainte est fondée.

32. Before commencing an investigation of a complaint under this Act, the Information Commissioner shall notify the

32. Le Commissaire à l'information, avant de procéder aux enquêtes prévues par la présente loi, avise le

head of the government institution concerned of the intention to carry out the investigation and shall inform the head of the institution of the substance of the complaint.

responsable de l'institution fédérale concernée de son intention d'enquêter et lui fait connaître l'objet de la plainte.

[…]

[…]

34. Subject to this Act, the Information Commissioner may determine the procedure to be followed in the performance of any duty or function of the Commissioner under this Act.

34. Sous réserve des autres dispositions de la présente loi, le Commissaire à l'information peut établir la procédure à suivre dans l'exercice de ses pouvoirs et fonctions.

35. (1) Every investigation of a complaint under this Act by the Information Commissioner shall be conducted in private.

35. (1) Les enquêtes menées sur les plaintes par le Commissaire à l'information sont secrètes.

(2) In the course of an investigation of a complaint under this Act by the Information Commissioner, a reasonable opportunity to make representations shall be given to

(2) Au cours de l'enquête, les personnes suivantes doivent avoir la possibilité de présenter leurs observations au Commissaire à l'information, nul n'ayant toutefois le droit absolu d'être présent lorsqu'une autre personne présente des observations au Commissaire à l'information, ni d'en recevoir communication ou de faire des commentaires à leur sujet :

*(a)* the person who made the complaint,

*a)* la personne qui a déposé la plainte;

*(b)* the head of the government institution concerned, and

*b)* le responsable de l'institution fédérale concernée;

*(c)* a third party if

*c)* un tiers, s'il est possible de le joindre sans difficultés, dans le cas où le Commissaire à l'information a l'intention de recommander, aux termes du

(i) the Information Commissioner intends to recommend the disclosure

under subsection 37(1) of all or part of a record that contains — or that the Information Commissioner has reason to believe might contain — trade secrets of the third party, information described in paragraph 20(1)(b) or (b.1) that was supplied by the third party or information the disclosure of which the Information Commissioner can reasonably foresee might effect a result described in paragraph 20(1)(c) or (d) in respect of the third party, and

(ii) the third party can reasonably be located.

However no one is entitled as of right to be present during, to have access to or to comment on representations made to the Information Commissioner by any other person.

[…]

37. (1) If, on investigating a complaint in respect of a record under this Act, the Information Commissioner finds that the complaint is well-founded, the Commissioner shall provide the head of the government institution that has control of the record with a report containing

(a) the findings of the investigation and any recommendations that the Commissioner considers appropriate; and

paragraphe 37(1), la communication de tout ou partie d'un document qui contient ou est, selon lui, susceptible de contenir des secrets industriels du tiers, des renseignements visés aux alinéas 20(1)b) ou b.1) qui ont été fournis par le tiers ou des renseignements dont la communication risquerait, selon lui, d'entraîner pour le tiers les conséquences visées aux alinéas 20(1)c) ou d).

[…]

37. (1) Dans les cas où il conclut au bienfondé d'une plainte portant sur un document, le Commissaire à l'information adresse au responsable de l'institution fédérale de qui relève le document un rapport où :

a) il présente les conclusions de son enquête ainsi que les recommandations qu'il juge indiquées;

(b) where appropriate, a request that, within a time specified in the report, notice be given to the Commissioner of any action taken or proposed to be taken to implement the recommendations contained in the report or reasons why no such action has been or is proposed to be taken

b) il demande, s'il le juge à propos, au responsable de lui donner avis, dans un délai déterminé, soit des mesures prises ou envisagées pour la mise en oeuvre de ses recommandations, soit des motifs invoqués pour ne pas y donner suite.

(2) The Information Commissioner shall, after investigating a complaint under this Act, report to the complainant and any third party that was entitled under subsection 35(2) to make and that made representations to the Commissioner in respect of the complaint the results of the investigation, but where a notice has been requested under paragraph (1)(b) no report shall be made under this subsection until the expiration of the time within which the notice is to be given to the Commissioner.

(2) Le Commissaire à l'information rend compte des conclusions de son enquête au plaignant et aux tiers qui pouvaient, en vertu du paragraphe 35(2), lui présenter des observations et qui les ont présentées; toutefois, dans les cas prévus à l'alinéa (1)b), le Commissaire à l'information ne peut faire son compte rendu qu'après l'expiration du délai imparti au responsable de l'institution fédérale.

41. Any person who has been refused access to a record requested under this Act or a part thereof may, if a complaint has been made to the Information Commissioner in respect of the refusal, apply to the Court for a review of the matter within forty-five days after the time the results of an investigation of the complaint by the Information Commissioner are reported to the complainant under

41. La personne qui s'est vu refuser communication totale ou partielle d'un document demandé en vertu de la présente loi et qui a déposé ou fait déposer une plainte à ce sujet devant le Commissaire à l'information peut, dans un délai de quarante-cinq jours suivant le compte rendu du Commissaire prévu au paragraphe 37(2), exercer un recours en révision de la décision de refus devant la

subsection 37(2) or within such further time as the Court may, either before or after the expiration of those forty-five days, fix or allow.

Cour. La Cour peut, avant ou après l'expiration du délai, le proroger ou en autoriser la prorogation.

42. (1) The Information Commissioner may

42. (1) Le Commissaire à l'information a qualité pour :

(a) apply to the Court, within the time limits prescribed by section 41, for a review of any refusal to disclose a record requested under this Act or a part thereof in respect of which an investigation has been carried out by the Information Commissioner, if the Commissioner has the consent of the person who requested access to the record;

a) exercer lui-même, à l'issue de son enquête et dans les délais prévus à l'article 41, le recours en révision pour refus de communication totale ou partielle d'un document, avec le consentement de la personne qui avait demandé le document;

(b) appear before the Court on behalf of any person who has applied for a review under section 41; or

b) comparaître devant la Cour au nom de la personne qui a exercé un recours devant la Cour en vertu de l'article 41;

(c) with leave of the Court, appear as a party to any review applied for under section 41 or 44.

c) comparaître, avec l'autorisation de la Cour, comme partie à une instance engagée en vertu des articles 41 ou 44.

(2) Where the Information Commissioner makes an application under paragraph 1(a) for a review of a refusal to disclose a record requested under this Act or a part thereof, the person who requested access to the record may appear as a party to the review.

(2) Dans le cas prévu à l'alinéa (1)a), la personne qui a demandé communication du document en cause peut comparaître comme partie à l'instance

[…]

[…]

48. In any proceedings before the Court arising from an

48. Dans les procédures découlant des recours prévus

application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

aux articles 41 ou 42, la charge d'établir le bien-fondé du refus de communication totale ou partielle d'un document incombe à l'institution fédérale concernée.

49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

49. La Cour, dans les cas où elle conclut au bon droit de la personne qui a exercé un recours en révision d'une décision de refus de communication totale ou partielle d'un document fondée sur des dispositions de la présente loi autres que celles mentionnées à l'article 50, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner à cette personne communication totale ou partielle; la Cour rend une autre ordonnance si elle l'estime indiqué.

50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

50. Dans les cas où le refus de communication totale ou partielle du document s'appuyait sur les articles 14 ou 15 ou sur les alinéas 16(1)c) ou d) ou 18d), la Cour, si elle conclut que le refus n'était pas fondé sur des motifs raisonnables, ordonne, aux conditions qu'elle juge indiquées, au responsable de l'institution fédérale dont relève le document en litige d'en donner communication totale ou partielle à la personne qui avait fait la

demande; la Cour rend une autre ordonnance si elle l'estime indiqué.

*Canada Marine Act*, SC 1998, c 10:

| | |
|---|---|
| […] | […] |
| 4. In recognition of the significance of marine transportation to Canada and its contribution to the Canadian economy, the purpose of this Act is to | 4. Compte tenu de l'importance du transport maritime au Canada et de sa contribution à l'économie canadienne, la présente loi a pour objet de : |
| (*a.1*) promote the success of ports for the purpose of contributing to the competitiveness, growth and prosperity of the Canadian economy; | *a.1*) promouvoir la vitalité des ports dans le but de contribuer à la compétitivité, la croissance et la prospérité économique du Canada; |
| […] | […] |
| 8. (1) The Minister may issue letters patent — that take effect on the date stated in them — incorporating a port authority without share capital for the purpose of operating a particular port in Canada if the Minister is satisfied that the port | 8. (1) Le ministre peut délivrer des lettres patentes — prenant effet à la date qui y est mentionnée — pour la constitution d'une administration portuaire sans capital-actions en vue d'exploiter un port spécifique au Canada, s'il est convaincu que les conditions suivantes sont réunies : |
| (*a*) is, and is likely to remain, financially self-sufficient; | *a*) le port est financièrement autonome et le demeurera vraisemblablement; |

*Port Authorities Management Regulations*, SOR/99-101:

| | |
|---|---|
| […] | […] |
| 7(2) A port authority shall prepare and maintain | 7(2) L'administration portuaire tient et conserve : |
| (a) at its registered office, a record of what transpired at the last six annual meetings held under the Act; and | a) à son siège social, un livre où figurent les comptes rendus des six dernières réunions annuelles tenues en vertu de la Loi; |
| (b) at its registered office or at such other place in Canada as the board of directors thinks fit, a record of the minutes of meetings and resolutions of the board of directors and committees of directors. | b) à son siège social ou en tout lieu au Canada convenant aux administrateurs, un livre où figurent les procès-verbaux des réunions et les résolutions du conseil d'administration et de ses comités. |
| […] | […] |
| 10. (1) Subject to subsection (2), any person may examine records referred to in subsection 7(1) and paragraph 7(2)(a) during the normal business hours of the port authority. | 10. (1) Sous réserve du paragraphe (2), toute personne peut consulter les livres visés au paragraphe 7(1) et à l'alinéa 7(2)a) pendant les heures normales d'ouverture des bureaux de l'administration portuaire. |
| (2) Subject to the Privacy Act, any person may examine records referred to in paragraph 7(1)(c) during the normal business hours of the port authority. | (2) Sous réserve de la Loi sur la protection des renseignements personnels, toute personne peut consulter les livres visés à l'alinéa 7(1)c) pendant les heures normales d'ouverture des bureaux de l'administration portuaire. |
| (3) To the extent that examination of records is authorized under subsection (1) or (2), extracts from the records may be taken | (3) Dans la mesure où la consultation des livres est autorisée en vertu des paragraphes (1) ou (2), des extraits de ceux-ci peuvent être obtenus : |

(*a*) free of charge by the Minister and creditors of the port authority or the agents or legal representatives of the creditors; and

(*b*) on payment of a fee that is reasonable and does not exceed the fees prescribed under the Access to Information Act, by any other person.

(4) Records referred to in paragraph 7(2)(b) and section 8 shall at all reasonable times be open to inspection by the directors.

*a*) gratuitement, par le ministre ainsi que par les créanciers de l'administration portuaire et les mandataires des créanciers;

b) en contrepartie du paiement de frais qui sont raisonnables et n'excèdent pas ce qui est prévu sous le régime de la Loi sur l'accès à l'information, par toute autre personne.

(4) Les livres et documents visés à l'alinéa 7(2)b) et à l'article 8 peuvent être consultés par les administrateurs à tout moment opportun.