

Information and Privacy Commissioner,
Ontario, Canada



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

FINAL ORDER MO-3333-F

Appeal MA14-94

Brantford Hydro Inc.

July 12, 2016

Summary: Brantford Hydro Inc. (BHI) received a request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* for access to its Board of Directors' meeting minutes for the years 2010 to 2013. BHI located 33 sets of minutes and denied access to them. Interim Order MO-3205-I, issued after BHI's decision was appealed, partially upheld the claimed discretionary exemptions and ordered BHI to re-exercise its discretion concerning the information subject to these exemptions. In a second interim order, MO-3284-I, the adjudicator determined that BHI had not properly re-exercised its discretion and ordered it to re-exercise its discretion again. In this order, BHI's second re-exercise of discretion is upheld.

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

Orders and Investigation Reports Considered: Interim Orders MO-3205-I and MO-3284-I and Order MO-3289.

OVERVIEW:

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

[2] BHI located 33 sets of minutes responsive to the request and issued a decision to the requester to deny access to them pursuant to the discretionary closed meeting

exemption at section 6(1)(b) of the *Act*. In addition, it advised the requester of the following:

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

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

[4] During the course of mediation, BHI issued a revised decision to the appellant advising that in addition to section 6(1)(b) of the *Act*, it was relying on sections 7(1) (advice or recommendations), 10(1) (third party information), 11 (economic or other interests), 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act* to deny access to portions of the responsive records.

[5] The appellant advised the mediator that he was not pursuing access to the information denied pursuant to section 14(1) of the *Act*. However, the appellant confirmed that he wished to pursue access to the remaining information in the meeting minutes, including any attachments to those minutes.

[6] As mediation did not resolve all of the issues in this appeal, the file was transferred to the adjudication stage where an adjudicator conducts an inquiry. Representations were sought and exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

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

[8] BHI then disclosed the information ordered disclosed and issued a decision with respect to the attachments to the minutes, disclosing them in part. The appellant appealed that decision and appeal file MA14-94-2 was opened. That appeal was dealt with separately in Order MO-3289.

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

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

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

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

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

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

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

[11] I then issued Interim Order MO-3284-I, where I found that BHI did not re-exercise its discretion in a proper manner and ordered it to re-exercise its discretion again. The order provisions in that order read:

1. I order BHI to re-exercise its discretion in accordance with the analysis set out above and in Interim Order MO-3205-I concerning the information in the records subject to sections 7(1), 11 and 12 and to advise the appellant and this office of the result of this re-exercise of discretion, in writing. If BHI continues to withhold all or part of this information, I also order it to provide the appellant with an explanation of the basis for re-exercising its discretion to do so and to provide a copy of that explanation to me. BHI is required to send the results of its re-exercise of discretion, and its explanation to the appellant, with the copy to this office, by no later than February 25, 2016. If the appellant wishes to respond to BHI's re-exercise of discretion and/or its explanation for re-exercising its discretion to withhold information, he must do so within 21 days of the date of BHI's correspondence by providing me with written representations.

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

[12] In response to Interim Order MO-3284-I, BHI wrote to the appellant advising him that it had re-exercised its discretion and provided the appellant with its explanation for so doing. BHI decided to disclose the information in the records that I had found was subject to sections 7(1) and 12 and withheld the information that I had found subject to sections 11(a) or (c). It also provided the appellant with an index of records and a copy of the records as disclosed to the appellant after its re-exercise of discretion.

[13] The appellant did not provide a response to BHI's re-exercise of discretion, despite being provided an opportunity to do so as per the terms of Interim Order MO-3284-I. The appellant was also contacted by a staff member of the IPC inquiring whether he would be filing representations. The appellant did not respond to these inquiries.

[14] In this order, I uphold BHI's second re-exercise of discretion under sections 11(a) and (c) and find that the information that it has withheld under these exemptions is exempt under *MFIPPA*.

RECORDS:

[15] The information remaining at issue consist of the information withheld from 33 meeting minutes dated between January 2010 and November 2013. At issue in this order are the portions subject to the discretionary exemptions in section 11(a) and (c).

DISCUSSION:

Did BHI properly re-exercise its discretion following Interim Order MO-3284-I?

[16] In Interim Order MO-3284-I, I found that in re-exercising its discretion, BHI had primarily re-iterated the exemptions at issue, namely sections 7(1), 11 and 12, as well as most of the representations previously made by it.

[17] BHI had relied on section 7(1) for portions of the records. This exemption reads:

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

[18] I found in Interim Order MO-3284-I that a significant amount of the information for which 7(1) applied was several years old and was information that merely recommended whether a procedural matter should be approved or concerned recommendations about matters that had already been finalized. I stated:

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

[19] Following its re-exercise of discretion, BHI disclosed to the appellant all of the information that was subject to section 7(1). Therefore, the section 7(1) exemption is no longer at issue.

[20] BHI had also relied on section 12, which reads:

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

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

Record 17, dated January 2012, which consisted of two severances.

[22] BHI was concerned that disclosure of the information for which it has claimed section 12 referred to ongoing obligations of the corporation and ongoing corporate relationships. I found in Interim Order MO-3284-I that in re-exercising its discretion, BHI had not considered whether the specific information at issue was ongoing.

[23] In re-exercising its discretion under section 12 following Interim Order MO-3284-I, BHI decide to disclose the information at issue in Record 17. Therefore, the section 12 exemption is no longer at issue.

[24] Finally, BHI continued to rely on sections 11(a) and (c), which read:

A head may refuse to disclose a record that contains,

(a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;

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

[25] BHI was concerned about a loss of revenue from being exposed to potential attack by competitors. I found that when it re-exercised its discretion in response to Interim Order MO-3205-I, the information at issue in the records was upwards of five and half years old. I stated that it appeared from my review of the information at issue that there were matters for which the section 11 economic and other interests exemption had been claimed that concerned discussion of potential transactions that were not concluded or transactions that would have been completed and would be public knowledge. I stated in Interim Order MO-3284-I that:

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

[26] In deciding to continue to withhold the information subject to sections 11(a) or (c) following Interim Order MO-3284-I, BHI determined that:

the nature of the information in the records is such that, despite the age of the records, it is considered sensitive information to BHI relating to ongoing business transactions, strategic discussions regarding the direction of the company and the overall economic interests...

[27] In response to Interim Order MO-3284-I, BHI decided to disclose certain records in full and parts of other records that were at issue. As well, BHI provided the appellant with a detailed decision letter outlining its decision to still withhold access to the remaining information at issue. In its decision letter, it outlines the considerations it took into account in withholding the specific information at issue in each record that is subject to sections 11(a) and (c).

[28] BHI states that in re-exercising its discretion, it considered the purpose of the *Act*, and disclosed the greatest amount of information that it could without impacting the competitive position or economic interests of the company.

[29] BHI states that it considered the age of the information, and decided to disclose the information that is no longer sensitive due to age, but has refused to disclose information that is still relevant to its business today. BHI states that it:

...does not believe that the information withheld would increase public confidence in the company, as the type of strategic, economic and commercial information it is withholding, would be expected to be withheld in a competitive industry such as that in which BHI operates. The matters referred to in the records that are being withheld are not public matters, and are ongoing or may affect how BHI will strategically approach similar opportunities in the future. BHI has not been made aware of a compelling need for the appellant to receive the information being withheld.

[30] As stated above, the appellant did not provide representations in response.

Analysis/Findings

[31] The section 11 exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

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

[33] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹ This office may not, however, substitute its own discretion for that of the institution.²

[34] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³

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

¹ Order MO-1573.

² Section 43(2).

³ Orders P-344 and MO-1573.

[35] Based on my review of BHI's representations in support of its second re-exercise of discretion and the undisclosed information in the records, I find that BHI re-exercised its discretion in a proper manner and in accordance with my findings in Interim Orders MO-3205-I and MO-3284-I. I find that BHI took into account the relevant considerations set out above and did not take into account irrelevant considerations in this re-exercise of discretion.

[36] Accordingly, I am upholding BHI's second re-exercise of discretion under sections 11(a) and (c) of *MFIPPA* and find that the information that it has withheld under these exemptions is exempt.

ORDER:

I uphold BHI's decision to withhold the information at issue in the records under sections 11(a) and (c) of *MFIPPA*.

Original Signed by: _____
Diane Smith
Adjudicator

_____ July 12, 2016