

**Order No. 105/22**

**MOTION BY INSURANCE BROKERS ASSOCIATION OF MANITOBA  
SEEKING ACCESS TO CONFIDENTIAL INFORMATION  
IN THE 2023 GENERAL RATE APPLICATION**

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**September 26, 2022**

**BEFORE: Irene A. Hamilton, K.C., Panel Chair  
Robert Gabor, K.C., Chair**

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## 1. SUMMARY

By this Order, the Public Utilities Board (Board) grants the alternative relief sought, and provides further direction, in respect of the motion filed by Insurance Brokers Association of Manitoba (IBAM) seeking access to certain documents which Manitoba Public Insurance (MPI) has classified as confidential.

### 1.0 Overview

In Order No. 85/22, the Board approved the following procedure with respect to presumptively confidential material in the 2023 General Rate Application (GRA) (CSI Process):

1. Interveners (and their legal counsel, representatives, employees, advisors, consultants and assistants) and professional advisors to the Board (and their representatives, employees, consultants and assistants) seeking access to confidential material will be required to execute:
  - a. an undertaking;
  - b. a confidentiality agreement in favour of MPI; and
  - c. where applicable, a confidentiality agreement in favour of a third-party vendor.
  
2. The undertakings and confidentiality agreements set out in item 1 will apply to material filed with the Board and initially claimed as confidential by MPI, and ultimately found to be confidential by the Board following the omnibus motion referred to in item 4 below.

3. Where MPI intends to claim certain material as confidential (and therefore subject to the conditions as set out in item 1):
  - a. in the public version of the filing, MPI will indicate that a claim for confidentiality has been made over that material, and redact such information as is necessary;
  - b. MPI will file the material with the Board, with a cover letter identifying it as confidential and indicating MPI's intention to seek a determination of confidential status pursuant to Rule 13 of the Board's Rules of Practice and Procedure (the Rules); and
  - c. at the same time, MPI will provide the material claimed as confidential in a non-redacted form to those interveners and professional advisors to the Board who have provided the undertakings and confidentiality agreements set out in item 1.
  
4. Once all material claimed as confidential for the 2023 GRA has been filed with the Board, MPI will file an omnibus motion pursuant to Rule 13, seeking confidential status of the material. The Board will then determine the process it intends to follow regarding the hearing of the motion, and will issue a decision on the confidential status of the material.
  
5. Any documents or information found not to be confidential by the Board will be placed on the public record, subject to MPI's right to withdraw the material pursuant to Rule 13(5).

The Board further directed that, should any disagreements arise between the parties in the implementation of this process, the parties should attempt to resolve them informally. If a resolution could not be reached, the matter could then be brought before the Board.

In this same Order, the Board granted IBAM intervener status, on a limited basis, to intervene only on the issues of broker commissions and the broker agreement.

IBAM's motion seeks production of certain documents, claimed by MPI as confidential, and previously produced to certain other Interveners who have executed the required undertakings and confidentiality agreements. The documents relate to MPI's major IT initiative, Project Nova, and are:

1. Deloitte LLP report and Avasant report filed by MPI in response to CAC (MPI) CI 1-016; and
2. McKinsey contract filed in response to CAC (MPI) 1-34(a) and PUB1-91(b).

(the Documents)

On August 8, 2022, IBAM forwarded signed copies of the MPI confidentiality agreement and undertaking to counsel for MPI. On September 1, 2022, counsel for MPI advised that the response to CAC (MPI) CI 1-016 would include the production of the Deloitte LLP report. MPI requested that Interveners wishing to receive the Deloitte LLP report would also need to sign copies of a confidentiality agreement in favour of Deloitte LLP.

IBAM signed the Deloitte LLP confidentiality agreement and returned it to MPI on September 1, 2022.

On September 2, 2022, MPI counsel advised IBAM counsel that MPI would not release the Deloitte LLP report to IBAM, and requested that IBAM explain why it was necessary for IBAM to receive the document, following which MPI would consider its position on disclosure of the requested information.

On September 6, 2022, MPI asked that any intervenor seeking access to the McKinsey contract provide confidentiality agreements in the form provided. IBAM did so on September 8, 2022.

On September 6, 2022, IBAM counsel wrote to MPI counsel and set out the reasons why IBAM believes it is entitled to the Deloitte LLP report and the McKinsey contract. On September 7, 2022, counsel for MPI responded that it was refusing IBAM's request for access to the Deloitte LLP report and the McKinsey contract. MPI took the position that

any motion for access to the Documents should be dealt with in conjunction with the Board's hearing of MPI's omnibus motion respecting the confidentiality of documents in this GRA, as referenced above in the CSI process.

On September 9, 2022, IBAM filed a motion with the Board, seeking access to the Documents. IBAM has requested that the Board make the following Order:

1. That MPI provide the Documents to IBAM;
2. In the alternative, that MPI provide to IBAM redacted versions of the Documents, redacting only that information which the Board determines falls within the confines of Rule 13(2); and
3. Should access to the Documents, or portions thereof, be granted to IBAM:
  - a. That IBAM be granted the opportunity to issue Information Requests (IRs) respecting the documents, one week after the receipt of the Documents.
  - b. That IBAM be granted the opportunity to file Intervener evidence, or additional Intervener evidence as the case may be, in response to the information in the documents and one week after the receipt of the Documents.

On September 9, 2022, the Board received a written response on the motion from MPI, which included the Affidavit of Saskia Brouwer, sworn September 9, 2022. On September 12, 2022, IBAM submitted its reply to MPI's response.

The other Interveners in the GRA, Coalition of Manitoba Motorcycle Groups, Consumers Association of Canada (Manitoba) Inc., Taxi Coalition, and Bike Winnipeg did not file any response to the motion.

The Board did not require an oral hearing on the motion.

## 2. PARTIES' POSITIONS AND BOARD FINDINGS

### 2.0 *IBAM*

IBAM submits that its motion should not be heard at the same time as MPI's omnibus motion as this would cause it prejudice. In particular, IBAM would lose the opportunity to file IRs and evidence respecting the information in the Documents. As such, IBAM has requested that a decision respecting the motion be made as soon as possible.

IBAM argues that MPI cannot rest on mere assertions that the disclosure of the Documents will harm its competitive position in order to refuse IBAM access. Moreover, MPI has admitted that the Deloitte LLP report is four years old, and the description of Project Nova has significantly changed since that time. It is, therefore, difficult to conceive of how the disclosure of the Deloitte LLP report could harm MPI.

IBAM also disagrees with MPI's position that it is only required to provide documents to Interveners if a particular intervener can first prove the document is necessary to its intervention. IBAM states that MPI is required to produce the Documents unless the tests under Rule 13(2) of the Board's Rules of Practice and Procedure are met, but regardless, the Documents should still be disclosed based on the facts. IBAM states that a report respecting Project Nova certainly could be relevant to broker commissions and the broker agreement.

Lastly, the Board, MPI, and other Interveners will have access to the Documents and will have the ability to ask questions of IBAM witnesses if IBAM chooses to lead evidence. IBAM could therefore be placed in a prejudicial position, where its witnesses are subject to cross-examination on areas within the scope of its intervention without the benefit of access to the complete record available to the other parties to the GRA.

## 2.1 MPI

MPI submits that the Board must dismiss, stay, or adjourn the motion on one or more of the following grounds:

1. The motion is premature;
2. IBAM has failed to establish that its access to the Documents is necessary for its purposes as an intervener in the GRA; and/or
3. Given the ongoing commercial relationship between the parties, the disclosure of the information in the Documents to IBAM could reasonably be expected to cause undue financial loss to MPI, undue financial gain to IBAM or significant harm to the competitive position of MPI.

MPI further requests leave pursuant to Rules 13(4), 17(1), 22(6) and 22(7) to produce a witness to give *viva voce* testimony to support its claim of confidentiality over the information contained in the Documents.

MPI submits that the motion is premature because, pursuant to Order 86/22, Schedule B, the Documents are only deemed to be confidential pending a formal determination by the Board. Following the filing of its responses to Round Two IRs, MPI will be filing a motion seeking confidential status of all deemed confidential material. At that time, MPI submits that IBAM can challenge the confidentiality claims with respect to the Documents, and the Board can decide whether the Documents are confidential or whether they should be placed on the public record. Depending on the outcome of that motion, and unless MPI withdraws the Documents pursuant to Rule 13(5), IBAM would gain access to them without requiring any action on its part.

MPI argues that, if the Board were to hear IBAM's motion now, it would be required to consider whether the Documents contain commercially sensitive information and, if so, whether IBAM should be granted access to same notwithstanding this characterization.



MPI submits that the result of making that determination at this stage is tantamount to an abuse of process.

MPI submits that the concerns raised by IBAM about prejudice are hypothetical at this stage of the proceeding. If the Board and Interveners do not ask IBAM any questions that require it to refer to the information in the Documents, the concerns are not borne out. IBAM did not file any Round One IRs and MPI further submits that, if IBAM now wishes to ask Round Two IRs concerning the Documents, other Interveners have already asked a significant number of questions regarding the topics raised in the Documents, and the result would be an unnecessary duplication of effort.

MPI therefore submits that the necessity to access confidential information is not borne out simply because an Intervener claims a vague possibility of prejudice premised on the occurrence of conditional events.

MPI argues that the Board granted IBAM standing as an Intervener on a limited basis. If asked, IBAM could presumably respond to questions pertaining to any of the topics included in the scope of its intervention without access to the Documents, and it would not be at any disadvantage if required to do so. MPI further argues that IBAM has provided no evidence to support its claim that it must have access to the Documents.

MPI submits that the Board may dismiss IBAM's motion on the basis that IBAM has not satisfied its obligation to show that its access to the Documents is necessary. However, the Board may also decide that the motion is premature and either dismiss, stay, or adjourn it.

## 2.2 *IBAM Reply*

IBAM states that MPI's allegation that the motion is an abuse of process is entirely unfounded. IBAM's position is that it is plain and obvious that IBAM sought the Documents at the time that it did in order to be able to determine whether it wished to submit IRs with respect to the Documents. IBAM chose not to submit Round One IRs, in part in an attempt to keep its intervention as limited as possible with a specific view to submitting Round Two IRs once more information was placed on the record.

IBAM argues that the process agreed respecting confidentiality is for the benefit of MPI so that it files only one confidentiality motion after providing all confidential information for the purposes of streamlining the process. However, where an issue such as this arises, it follows that MPI should be required to respond and prove confidentiality respecting a limited number of documents so that Interveners can discharge their responsibilities to the Board.

With respect to MPI's position that Interveners need to establish their need for documents in the context of a confidentiality motion, IBAM states that this has previously been true only where the information requested is out of scope for the proceeding. In this case, the information contained in the Documents is relevant to the issues underlying the 2023 GRA.

### 2.3 *Board Findings*

Proceedings before the Board are public, and documents filed with the Board by a party to a proceeding are placed on the public record. However, the Board may receive information in confidence on any terms it considers appropriate in the public interest, when the test under Rule 13(2) is met:

- (a) If the Board is of the opinion that disclosure of the information could reasonably be expected
  - i. to result in undue financial loss or gain to a person directly or indirectly affected by the proceeding; or
  - ii. to harm significantly that person's competitive position

or

- (b) if
  - i. the information is personal, financial, commercial, scientific or technical in nature; or
  - ii. the information has been consistently treated as confidential by a person directly affected by the proceeding; and
  - iii. the Board considers that the person's interest in confidentiality outweighs the public interest in the disclosure of the information.

As pointed out by MPI, of note in this motion is that the Board has not yet ruled on the claimed confidentiality of the Documents. That will be done after MPI files the omnibus motion contemplated by the CSI process. The issue in this motion is whether, and to what extent, an approved Intervener should be denied production of material initially claimed as confidential by MPI, and provided to other Interveners, on the basis of the competitive relationship between the parties. The Board does not agree that IBAM's motion is an

abuse of process or that IBAM alone must wait for the Board's ruling on MPI's omnibus motion; rather, a balance must be struck to ensure that IBAM is, as much as possible, placed on an equal footing with other Interveners while addressing MPI's concerns about harm to its competitive position.

IBAM was granted Intervener status on a limited basis on the issues of broker commissions and the broker agreement. MPI has made a general claim about the need to protect the Documents from disclosure to IBAM, but the onus is on MPI to establish why IBAM cannot be permitted access to the information. The Board finds that more is needed from MPI to support completely withholding the Documents from an approved Intervener. That being said, the Board accepts that there may be portions of the Documents which could harm MPI's competitive position.

In the interests conducting the GRA efficiently, the Board finds that it is not necessary to hear *viva voce* evidence from MPI at this time. Taking the foregoing into consideration, the Board is satisfied that IBAM should have access to the Documents, subject to certain limitations. Accordingly, the Board grants the alternative relief requested by IBAM, along with additional direction.

MPI is to provide IBAM representatives and counsel with copies of the Documents, redacted as necessary in order for MPI to protect its competitive position with IBAM.

The Board will also allow counsel for IBAM to view an unredacted copy of the Documents at the Board's office, provided that counsel undertakes not to disclose the contents of the redacted information to IBAM without further order of the Board. The purpose of this is for counsel to determine whether there are, in fact, portions of the redacted information that should be released to IBAM in order for it to effectively participate in the GRA. If counsel determines that such disclosure is required, the Board will hear further argument on the issue; however, the parties should attempt to resolve any further procedural disputes in an informal manner so that the GRA proceeds in an orderly fashion.

The Board will permit IBAM to file one round of IRs in respect of the Documents, which are to be filed within three days of counsel viewing the unredacted Documents. In the event that IBAM declines to have counsel view the unredacted Documents, IBAM is to file IRs within three days of its receipt of the redacted version of the Documents. MPI is required to provide responses to IBAM's IRs within three business days of filing.

Lastly, the Board expects that IBAM will comply with the previously approved timetable in terms of filing its evidence, if any. The Board therefore declines to make any order for IBAM that would extend the October 7, 2022 Intervener evidence filing deadline.

### 3. IT IS THEREFORE ORDERED THAT:

3.1 MPI shall provide the following documents to representatives of and counsel for Insurance Brokers Association of Manitoba (IBAM) who have executed undertakings and agreements, redacted by MPI as necessary in order for it to protect its competitive position in relation to IBAM:

- a. Deloitte LLP report filed by MPI in response to CAC CI 1-016;
- b. Avasant report filed in response to CAC CI 1-016; and
- c. McKinsey contract filed in response to CAC 1-34(a) and PUB1-91(b).

(the Documents)

3.2 MPI's redactions of the Documents shall be limited to those portions of the Documents necessary to protect MPI's competitive position in relation to IBAM, and MPI must clearly state the rationale for each redaction on the face of the document.

3.3 MPI shall provide the Documents in accordance with 3.1 no later than **Wednesday, September 28, 2022**.

3.4 Counsel for IBAM may arrange with Board staff to attend at the Board's offices to view an unredacted version of the Documents without any IBAM representatives present. Counsel shall not remove the unredacted Documents from the Board office and shall not make a copy, or record any, of the redacted portions of the Documents.

3.5 IBAM shall file any Information Requests in respect of the Documents within three business days of the review of the unredacted the Documents by its counsel; or, in the event that IBAM declines to have counsel review the unredacted Documents, within three days of receipt from MPI.

3.6 MPI shall file responses to IBAM's Information Requests within three business days of filing by IBAM.

Board decisions may be appealed in accordance with the provisions of Section 58 of *The Public Utilities Board Act*, or reviewed in accordance with Section 36 of the Board's Rules of Practice and Procedure. The Board's Rules may be viewed on the Board's website at [www.pubmanitoba.ca](http://www.pubmanitoba.ca).

THE PUBLIC UTILITIES BOARD

"Irene A. Hamilton, K.C."

Panel Chair

"Darren Christle, PhD, CCLP, P.Log, MCIT"  
Secretary

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