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Governance Insights: Protecting Information to Protect Process – When is it Appropriate to Restrict a Director’s Access to Board Records?

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When is a board of directors permitted to withhold information from one of its members? Although the Canadian corporate statutes generally grant directors a blanket right to inspect board and committee minutes, there is uncertainty as to whether a board could nonetheless withhold from a director minutes prepared in connection with a conflict of interest transaction (such as an M&A transaction in which the director has a special interest) or an internal investigation (of which the director is the subject).

In such “conflict scenarios,” the interested director’s access to information may compromise the board’s ability to freely investigate and deliberate the matter or to assert privilege on behalf of the corporation. Managing access to information can thus become an essential governance tool for independent decision-making. For this reason, directors should be mindful of access issues at the outset of any board-led process that requires the management of director conflicts.

In this edition of *Governance Insights*, we discuss practices that can assist a board in protecting the confidentiality of, and privilege attaching to, materials prepared in connection with situations that engage director conflicts.

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