

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4112

Appeals PA19-00332 and PA19-00333

Metrolinx

February 22, 2021

**Summary:** Metrolinx received two requests from a media requester under the *Freedom of Information and Protection of Privacy Act* (the *Act*): one for records concerning a prohibition, or restrictions, on a named construction company from bidding on Metrolinx projects, and the other for correspondence between Metrolinx and the construction company concerning construction delays at a named GO Station.

After notifying the named construction company, Metrolinx granted partial access to the responsive records, denying access in part pursuant to sections 13(1) (advice or recommendations), 18 (economic and other interests), 17(1) (third party information) and 19 (solicitor-client privilege).

The construction company (the third party appellant) appealed Metrolinx's decision, objecting to disclosure of some of the information Metrolinx had decided to disclose to the requester, claiming that this additional information was exempt by reason of the mandatory exemption in section 17(1) or the mandatory personal privacy exemption in section 21(1). The construction company also wanted to raise the application of the discretionary exemptions in sections 18 and 19 to certain information. It also claimed that section 22(b) applied (information soon to be published). The adjudicator conducted a joint inquiry into the two appeals.

In this order, the adjudicator finds that the information at issue in the records is not exempt by reason of section 17(1). She does not allow the third party appellant to raise the discretionary exemptions in sections 18 and 19. She also finds that section 22(b) does not apply. As well, she finds that the records do not contain personal information; therefore, section 21(1) does not apply. She orders the information at issue in both appeals disclosed to the requester.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 2(1) (definition of "personal information"), 17(1), 18(1), 19, and 22(b).

**Orders Considered:** Orders MO-2635, P-257, and PO-3841.

## **OVERVIEW:**

[1] The records at issue in these appeals relate to construction delays regarding the construction of a Metrolinx GO Station and Metrolinx's correspondence with the construction company about these delays.

[2] Metrolinx received two requests from the same requester under *the Freedom of Information and Protection of Privacy Act (FIPPA or the Act)* for the following information:

1. All materials, held in any form, concerning a prohibition, or restrictions, on [named construction company] from bidding on Metrolinx projects.
2. All correspondence between Metrolinx and [named construction company] concerning construction delays at the [named] GO Station for the period of 2012-July 21, 2018, excluding correspondence from subcontractors of [named consultant to Metrolinx (the consultant)].

[3] For the first request, Metrolinx decided to grant partial access to the records. Metrolinx withheld portions of the records pursuant to sections 13(1) (advice or recommendations) and 18 (economic and other interests).

[4] For the second request, Metrolinx decided to grant partial access to the records, withholding portions of the records pursuant to sections 17(1) (third party information) and 19 (solicitor-client privilege).

[5] The named construction company (now the appellant) appealed Metrolinx's decisions to partially disclose the responsive records to the requester to the Information and Privacy Commissioner (the IPC). Appeal PA19-00332 was opened for the first request and Appeal PA19-00333 was opened for the second request.

[6] The requester confirmed that he did not wish to pursue access to the information in the records withheld pursuant to Metrolinx's original access decisions. The portions of the records withheld pursuant to Metrolinx's access decision are, therefore, not at issue in the appeal.

[7] Also during mediation, the appellant consented to the disclosure of some additional records to the requester. However, the requester advised that the additional disclosures made pursuant to the appellant's consent were not sufficient and that he wished to pursue access to the remaining information that Metrolinx would have

disclosed. The appellant declined to consent to additional disclosure and advised that it was relying on the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act* to oppose disclosure of certain information in the records.

[8] No further mediation was possible and the appeals were transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[9] I conducted an inquiry in which I sought and received the representations of the appellant, and I shared them with the requester, except for the confidential portions.<sup>1</sup>

[10] In its representations, in addition to the mandatory exemptions in sections 17(1) and 21(1) it initially relied on, the appellant raised the application of the discretionary exemptions in sections 18(1)(c) and 19. The appellant also raised the application of section 22(b) (information soon to be published).

[11] I added the sections 18(1)(c) and 19 exemptions, as well as the issue of whether the appellant, as a third party, could raise these discretionary exemptions, to the Notice of Inquiry sent to the requester. The requester did not provide representations in response.

[12] In this order, I find that the records do not contain personal information; therefore, section 21(1) does not apply. I also find that the information at issue is not exempt by reason of section 17(1). I do not allow the appellant to raise the discretionary exemptions in sections 18(1)(c) and 19 of the *Act*. Finally, I find that section 22(b) does not apply. I order the remaining information at issue in both appeals disclosed to the requester.

## **RECORDS:**

[13] At issue is the information that the appellant has objected to disclosure of in the portions of the records that Metrolinx has decided to grant the requester access to. The records consist of letters and emails, some of which have attachments.

[14] Other than the names, titles and emails of the appellant's employees, which I find, below, not exempt under the personal privacy exemption in section 21(1), the following information remains at issue:

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<sup>1</sup> The confidential portions of the appellant's representations consist of the name of one employee and a portion of its representations under part 3 of the test under section 17(1) (the harms test). Although I will be referring to the non-confidential representations of the appellant in this order, I have considered both the confidential and non-confidential representations in arriving at my decision in this order. Confidentiality was determined in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

**Appeal PA19-00332**

[15] The following information is at issue in Appeal PA19-00332, where the requester sought:

1. All materials, held in any form, concerning a prohibition, or restrictions, on [the appellant] from bidding on Metrolinx projects.

<b>Record #</b>	<b>Date of Record</b>	<b>Description of Record</b>	<b>Information at issue</b>
1	March 2, 2019	Unsigned letter from Metrolinx to the appellant	Entire letter except letterhead and date
2 and 18	January 15, 2018	Internal Metrolinx email	One sentence in email in Record 2 - figures regarding contract value in the attachment to Record 2 and in Record 18
3	August 8, 2017	Internal Metrolinx email	One sentence in email
4 to 9, 12, 15	December 2017, January 2018, March 2018	Draft letter from Metrolinx to the appellant	Entire draft letters
10 and 16	February 23, 2019	Unsigned letter from Metrolinx to the appellant	Entire letter
11, 13, 19	March 2, 2019	Signed version of Record 1, letter from Metrolinx to the appellant	Entire letter except letterhead and date
14	November 2017	Metrolinx internal notes	Entire notes

**Appeal PA19-00333**

[16] The following information is at issue in Appeal PA19-00333, where the requester

sought:

1. All correspondence between Metrolinx and [the appellant] concerning construction delays at the [named] GO Station for the period of 2012-July 21, 2018, excluding correspondence from subcontractors of [named consultant to Metrolinx (the consultant)].

<b>Record #</b>	<b>Date of Record</b>	<b>Description of Record</b>	<b>Information at issue</b>
5 and 20	February 9, 2017 and April 6, 2018	Letters from consultant to Metrolinx and appellant re contract status	Body of letter
13	July 22, 2016	Email chain between named consultant, Metrolinx and appellant re schedule concerns	Portions of three emails

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the mandatory third party information exemption at section 17(1) apply to the information at issue in the records?
- C. Should the appellant be allowed to raise the application of the discretionary exemptions in sections 18(1)(c) and 19 to the records?

## **DISCUSSION:**

### **Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[17] The appellant has claimed that the names and contact information of all of its employees where mentioned in the records in both appeals is personal information, and that the personal privacy exemption in section 21(1) applies to this information.

[18] It is necessary to decide whether the record contains “personal information” and, if so, to whom it relates, because the personal privacy exemption in section 21(1) only applies to personal information. That term is defined in section 2(1). The appellant relies on paragraphs (f) and (h) of the definition, which read:

“personal information” means recorded information about an identifiable individual, including,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(h) the individual’s name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

[19] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.<sup>2</sup>

[20] Sections 2(3) and (4) also relate to the definition of personal information. These sections state:

(3) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(4) For greater certainty, subsection (3) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[21] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.<sup>3</sup>

[22] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.<sup>4</sup>

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<sup>2</sup> Order 11.

<sup>3</sup>Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>4</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

[23] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>5</sup>

### ***Representations***

[24] The appellant submits that the names of its employees in the records are personal information under paragraph (f) of the definition because the information was identified as being supplied to the institution confidentially. It also submits that its employees' names are personal information within paragraph (h) as there is other personal information that has come to light related to those individuals that is private and confidential in nature.

[25] The appellant relies on the disclaimer in its emails to Metrolinx, which reads:

This email transmission is strictly confidential and intended solely for the person or organization to whom it is addressed. It may contain privileged and confidential information and if you are not the intended recipient, you must not copy, distribute, or take any action in reliance on it. IF YOU HAVE RECEIVED THIS EMAIL IN ERROR, PLEASE NOTIFY US AS SOON AS POSSIBLE AND DELETE IT. [Emphasis in original].

[26] It submits that these emails were only intended to be shared with the recipient of the email.

### ***Analysis/Findings***

[27] I find that the names of the appellant's employees in the records are not personal information according to the definition of that term in section 2(1) of the *Act*. The names of the employees identify them in a business capacity and fit within the personal information exception in section 2(3) of the *Act*. Their names are listed with their business title and/or their business email.

[28] The appellant has also not provided submissions as to why disclosure of the names would reveal other personal information about these individuals in accordance with paragraph (h) of the definition in section 2(1). As was the case in Order PO-3841, the employees' names in these two appeals are listed in the records along with their business title or their business email with the appellant, a construction company. Additionally, as in Order PO-3841, I find that the records do not reveal anything of a personal nature about these individuals such that this information about the individuals in a business capacity would nonetheless be "personal information".<sup>6</sup>

[29] In addition to the names of its employees, the appellant seeks to have withheld

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<sup>5</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

<sup>6</sup> Order PO-2225.

the business emails and business titles of its employees in the records. It did not provide any specific representations on why this information should be withheld as personal information or under section 21(1). I find that this information also identifies the appellant's employees in a business capacity and not in a personal capacity. The personal information exception in section 2(3) also applies to the employees' business titles and business emails and I find that this information is not personal information within the meaning of that term in section 2(1).

[30] I find that the addition of the disclaimer to the appellant's emails, as set out above, does not render the names and contact information at issue into personal information. Specifically, I reject the appellant's submission that the email disclaimer has any effect on my determination as to whether the information at issue is personal information within the definition of that term under section 2(1) of the *Act*. It goes without saying that there may be many reasons for desiring confidentiality other than the sharing of personal information. In my view, the business names and contact information comes within section 2(3) and is not personal information.

[31] Therefore, I find that the records do not contain personal information. Accordingly, the personal privacy exemption in section 21(1) cannot apply to the information that the appellant has claimed is subject to section 21(1). As no other exemptions have been claimed by the appellant for this information, I will uphold Metrolinx's decision to disclose the names, business titles and business emails of the appellant's employees in the records.

**Issue B: Does the mandatory third party information exemption at section 17(1) apply to the information at issue in the records?**

[32] The appellant relies on sections 17(1)(a) to (c), which read:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[33] Section 17(1) is designed to protect the confidential "informational assets" of



businesses or other organizations that provide information to government institutions.<sup>7</sup> Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.<sup>8</sup>

[34] For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b), (c) and/or (d) of section 17(1) will occur.

### ***Part 1: type of information***

#### *Representations*

[35] The appellant submits that the majority of the correspondence relates to construction schedules and delays at the project. It states that the construction schedules in Record 24 in the second request were drafted by its scheduling experts who review and analyze the contract specifications and estimate how different construction activities will be completed and how long they will take.

[36] In that regard, the appellant submits that the correspondence generated from delays to the construction schedule, as well as the construction schedules themselves, are inherently based on technical information.

[37] The appellant states that the balance of information at issue is commercial information and relates to the contractor's performance of its work.

[38] The appellant did not make representations on any of the records or the specific information at issue in the records other than for two letters in Appeal PA19-00333, Records 5 and 20.<sup>9</sup>

[39] Specifically, for part 1 of the test, it states that Records 5 and 20, which are

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<sup>7</sup> *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

<sup>8</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

<sup>9</sup> The appellant states that Records 12 and 20 in Appeal PA19-00333 are contract status letters. I take this to be an identification error since these letters are found at Records 5 and 20. The appellant mistakenly refers to Record 5 as Record 12.

letters from the consultant for the project, contain commercial information.

*Analysis/Findings*

[40] The types of information listed in the appellant's representations on section 17(1) have been discussed in prior orders:

*Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.<sup>10</sup>

*Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.<sup>11</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>12</sup>

[41] I agree with the appellant that the records reveal technical information prepared by construction professionals about the construction of the project. They also reveal commercial information about the appellant's sale of construction services to Metrolinx.

[42] Therefore, I find that part 1 of the test under section 17(1) has been met.

***Part 2: supplied in confidence***

*Supplied*

Representations

[43] The appellant submits that the information at issue was either supplied by it to Metrolinx or is information that Metrolinx has used that originated from the appellant. It states:

For example, the consultant used commercial information gathered from [the appellant] and Metrolinx to generate its commentary in the contract status letter in Records [5] and 20 [in Appeal PA19-00333]...

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<sup>10</sup> Order PO-2010.

<sup>11</sup> Order PO-2010.

<sup>12</sup> Order P-1621.

Information relating to [the appellant's] performance on the project, as seen in Records [5] and 20, certainly qualifies as information that would allow an industry player to see into the financial and commercial affairs of [the appellant].

[44] The appellant refers to Order PO-3601, where the appellant suggested that the "supplied" requirement would not be strictly applied if disclosure of the seemingly innocuous information would allow an industry player to see into the financial and commercial affairs of the third party.

#### Analysis/Findings

[45] The requirement that the information have been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.<sup>13</sup>

[46] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.<sup>14</sup>

[47] I note the appellant's reference to Order PO-3601 and the appellant in that order's argument that seemingly innocuous information could be supplied. In making my findings in this order under the supplied test, I have considered whether the information at issue in the records, including that which seems innocuous, would reveal or permit the drawing of accurate inferences with respect to information supplied by the appellant.

#### Appeal PA19-00332

[48] In Appeal PA19-00332, other than Records 2, 3, 14 and 18, the records at issue in this appeal are drafts or the final version of the same letter from Metrolinx to the appellant. This letter contains Metrolinx's evaluation of the appellant's performance under the contracts it had with Metrolinx. This letter does not quote from the contracts, but merely lists the contract number for each contract and the project the contract pertains to. The remaining information in the letter is Metrolinx's evaluation of the appellant's performance under these contracts and does not specifically discuss the terms of the contracts.

[49] The appellant did not provide representations on the application of part 2 of the test under section 17(1) that directly address any of the specific information in the records at issue in this appeal, Appeal PA19-00332.

[50] Records 1, 4 to 13, 15, 16 and 19 in Appeal PA19-00332 are the draft and final

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<sup>13</sup> Order MO-1706.

<sup>14</sup> Orders PO-2020 and PO-2043.

versions of the letter from Metrolinx to the appellant. Based on my review of the draft and final versions of this letter, I find that they do not contain information supplied by the appellant to Metrolinx. Nor am I satisfied that disclosure of the draft and final versions of the letter would reveal or permit the drawing of accurate inferences with respect to information supplied by the appellant. Therefore, I find that part 2 of the test has not been met for these records.

[51] The remaining records in Appeal PA19-00332 are Records 2, 3 and 18, which are Metrolinx internal emails with the same attachment, and Record 14, which is an internal Metrolinx note.

[52] One sentence is at issue in the emails at Records 2 and 3. These sentences contains basic information on the appellant and Metrolinx's relationship. Again, I find that these sentences do not contain information supplied by the appellant within the meaning of part 2 of the test under section 17(1).

[53] The attachments to the emails in Records 2 and 18 are the same. The appellant is opposing disclosure of the total original contract value for each of the three contracts it had with Metrolinx.

[54] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.<sup>15</sup>

[55] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.<sup>16</sup> The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.<sup>17</sup>

[56] I find that the total contract value for the three contracts listed in Records 2 and 18 is negotiated information and is not subject to either the inferred disclosure or immutability exceptions referred to above. Therefore, I find that the total contract values in these records was not supplied by the appellant to Metrolinx and part 2 of the

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<sup>15</sup> This approach was approved by the Divisional Court in *Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

<sup>16</sup> Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

<sup>17</sup> *Miller Transit*, above at para. 34.

test has not been met for this information.

[57] Therefore, I find that the information at issue in Records 1 to 16, 18 and 19 in Appeal PA19-00332 is not exempt under section 17(1).

[58] Accordingly, I have not found that any of the information in Appeal PA19-00332 was supplied by the appellant to Metrolinx and this information is not exempt under section 17(1). If I decide that the appellant is allowed to raise the application of the discretionary exemptions in sections 18 and 19, I will consider their application to this information.<sup>18</sup>

### Appeal PA19-00333

[59] In Appeal PA19-00333, certain information in three records, Records 5, 13 and 20, is at issue.

[60] Records 5 and 20 are letters from the consultant to Metrolinx and the appellant about contract status and they describe the appellant's compliance with the contract terms. At issue is the entirety of these letters, other than the addressees' and addressor's contact information, the date, and one sentence in Record 20 that Metrolinx has withheld.

[61] In Records 5 and 20, the consultant who wrote the letter is evaluating how the appellant has complied with the terms of Metrolinx's contract with the appellant.

[62] Both Records 5 and 20 are very similar. These letters are from Metrolinx's consultant and review the appellant's relationship with Metrolinx. The letters provides detail about the appellant's compliance with the contract between it and Metrolinx.

[63] The appellant submits that the baseline schedules, look ahead schedules, monthly or weekly schedule update reports, sequencing charts and any other project documents that were used by Metrolinx's consultant formulating the letters in Records 5 and 20 are information it (the appellant) supplied to Metrolinx. I find that disclosure of portions of Records 5 and 20 would reveal or permit the drawing of accurate inferences with respect to this information supplied by the appellant.

[64] This stands in contrast to the letters at Records 1, 3 to 13, 15, 16 and 19 in Appeal PA19-00332, which I have found do not contain information supplied by the appellant, but rather are overall evaluative information prepared by Metrolinx, that does not contain specific details of the information supplied by the appellant.

[65] I further find that evaluations of the appellant's performance on the project in Records 5 and 20 that do not reveal information supplied by the appellant are not supplied. Only the information that would reveal or permit the drawing of accurate

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<sup>18</sup> These matters are addressed under Issue C below.

inferences with respect to information supplied by the appellant was supplied to Metrolinx.

[66] Therefore, I find that the information in Records 5 and 20 that would reveal or permit the drawing of accurate inferences with respect to information supplied by the appellant to Metrolinx was supplied by the appellant. I will consider below whether this information in Records 5 and 20 was supplied in confidence.

[67] I find that the remaining information at issue in Records 5 and 20 was not supplied by the appellant to Metrolinx.

[68] Also at issue in Appeal PA19-00333 are portions of three emails in Record 13, which are emails between the appellant, the consultant and Metrolinx. The information severed from three emails in the email chain is information about payments made to a subcontractor by Metrolinx.

[69] Based on my review of the information at issue in Record 13, and in the absence of specific representations from the appellant on this record, I find that I do not have sufficient information to find that the information at issue in Record 13 was supplied by the appellant to Metrolinx.

#### Conclusion re Appeal PA19-00333

[70] I have found that portions of Records 5 and 20 in Appeal PA19-00333 was supplied by the appellant to Metrolinx. Disclosure of this information would reveal or permit the drawing of accurate inferences with respect to information supplied by the appellant to Metrolinx. I will consider whether this information was supplied in confidence.

[71] Part 2 of the test has not been met for the remaining portions at issue in Records 5 and 20 and for the information at issue in Record 13 in Appeal PA19-00333. I have not found that this information was supplied by the appellant to Metrolinx. Therefore, this information is not exempt under section 17(1). If I decide that the appellant is allowed to raise the application of the discretionary exemptions in sections 18 and 19, I will consider their application to this information.<sup>19</sup>

*In confidence*

#### Representations

[72] The appellant quotes a clause from its contract with Metrolinx that reads:

The Contractor [the appellant] shall not disclose or provide any technical, business, financial operational, scientific, or any other information or data

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<sup>19</sup> The appellant's claimed application of discretionary exemptions is addressed under Issue C below.

obtained by the Contractor during the course of the Work to third parties who do not require that information or data to complete any portion of the work and who are not authorized by the Owner [Metrolinx] to receive, or have access to, such confidential information.

[73] The appellant submits that it has a contractual obligation to protect the confidential information it supplies to Metrolinx and, therefore, there must be an express and/or implied reciprocal obligation for Metrolinx to also protect that confidential information.

#### Analysis/Findings

[74] I have found that certain information that reveals the appellant's baseline schedules, look ahead schedules, monthly or weekly schedule update reports, sequencing charts and any other project documents that were used by Metrolinx's consultant formulating the letters in Records 5 and 20 in Appeal PA19-00333 is information the appellant supplied to Metrolinx.

[75] In order to satisfy the "in confidence" component of part two of the test under section 17(1), the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.<sup>20</sup>

[76] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.<sup>21</sup>

[77] I have reviewed the clause in the contract between the appellant and Metrolinx quoted by the appellant and set out above. It requires the appellant to keep confidential the information it receives during the course of its work for Metrolinx. It does not require Metrolinx to keep confidential information about the appellant it obtains during the course of the appellant's work for Metrolinx.

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<sup>20</sup> Order PO-2020.

<sup>21</sup> Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

[78] Records 5 and 20 are similar letters from the consultant to Metrolinx and the appellant about the status of the appellant's contract with Metrolinx. Record 5 is dated February 9, 2017. Record 20 is dated April 6, 2018.

[79] The earlier of the letters, Record 5 is accompanied by a cover email from the consultant. Besides being sent to representatives of the addressees, Metrolinx and the appellant, Record 5 was copied to 10 other individuals.

[80] The appellant has not provided representations as to why there exists a reasonable expectation of confidentiality for the information at issue in these two letters, which letters were prepared by Metrolinx's consultant and sent to Metrolinx reporting on the status of the contract between Metrolinx and the appellant. The appellant has not provided representations as to why the information at issue in Record 5, in particular, should be considered to be made in confidence when it appears to have been widely distributed.

[81] Based on my review of Records 5 and 20, I find that I do not have sufficient information to determine that the information at issue in Records 5 and 20 was supplied to Metrolinx in confidence by the appellant. In particular, I am not satisfied that this information in these two letters was prepared for a purpose that would not entail disclosure.

[82] Therefore, part 2 of the test under section 17(1) has not been met for portions of the letters at Records 5 and 20 that I have found to have been supplied by the appellant to Metrolinx. Therefore, this information in Records 5 and 20 in Appeal PA19-00333 is not exempt under section 17(1).

[83] I will now consider whether the appellant should be allowed to raise the application of the discretionary exemptions in sections 18(1)(c) and 19 to the information at issue in both appeals, Appeals PA19-00332 and PA19-00333, which information I found not to be exempt under section 17(1).

**Issue C: Should the appellant be allowed to raise the application of the discretionary exemptions in sections 18(1)(c) and 19 to the records?**

[84] The appellant is seeking to raise the application of a discretionary exemption in section 18(1)(c) to all of the information at issue in the records. It also seeks to raise the application of the discretionary exemption in section 19<sup>22</sup> to the information at issue in Appeal PA19-00332. These sections read:

18(1) A head may refuse to disclose a record that contains,

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<sup>22</sup> The appellant refers to relying on section 19(c) in its representations; however, I believe it means section 19(b), as Metrolinx is not an educational institution or a hospital. I have reproduced section 19 in its entirety in this order.



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

19 A head may refuse to disclose a record,

(a) that is subject to solicitor-client privilege;

(b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation; or

(c) that was prepared by or for counsel employed or retained by an educational institution or a hospital for use in giving legal advice or in contemplation of or for use in litigation.

[85] This office has considered the raising of discretionary exemptions by parties that are not institutions under *FIPPA* in previous orders and has determined that third parties should only be permitted to raise discretionary exemptions in rare circumstances.<sup>23</sup> I asked the appellant to provide representations in response to the following:

Given the mandatory exemptions already claimed in this appeal, why does this case qualify as a "rare exception to the general presumption that affected parties are not entitled to raise the possible application of the discretionary exemptions."

[86] In Order MO-2635, the adjudicator explained the rationale for not generally allowing third parties to claim discretionary exemptions as follows:

[T]he Legislature expressly contemplated that the head of the institution is given the discretion to claim, or not claim, these exemptions... The affected party has not provided sufficient evidence in this case to support a finding that compelling circumstances exist that would justify the extraordinary approach of permitting an affected party to claim a discretionary exemption when the head has elected not to do so.

[87] In Order P-257, former Assistant Commissioner Tom Mitchinson, in considering the question of when a third party, or a person other than the institution that received the access request, may be entitled to rely on one of the discretionary exemptions in the *Act*, stated:

As a general rule, with respect to all exemptions other than sections 17(1) and 21(1), it is up to the head to determine which exemptions, if any, should apply to any requested record...

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<sup>23</sup> See Orders P-257 and PO-3512.

In my view, however, the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme.

In discharging this responsibility, there may be rare occasions when the Commissioner decides it is necessary to consider the application of a particular section of the *Act* not raised by an institution during the course of the appeal. This could occur in a situation where it becomes evident that disclosure of a record would affect the rights of an individual, or where the institution's actions would be clearly inconsistent with the application of a mandatory exemption provided by the *Act*.

It is possible that concerns such as these could be brought to the attention of the Commissioner by an affected person during the course of an appeal and, if that is the case, the Commissioner would have the duty to consider them. In my view, however, it is only in this limited context that an affected person can raise the application of an exemption which has not been claimed by the head; the affected person has no right to rely on the exemption, and the Commissioner has no obligation to consider it.

[88] In my view, the circumstances before me do not amount to one of the rare occasions contemplated by former Assistant Commissioner Mitchinson that would support the application to the information at issue of a discretionary exemption not relied on by Metrolinx. The appellant did not provide representations on why this case qualifies as a rare exception to the general presumption that affected parties are not entitled to raise the possible application of the discretionary exemptions.

[89] Based on my review of the appellant's representations in their entirety and the information at issue in the records, I find that this case does not qualify as one of those rare cases.

[90] In my view, the appellant's arguments on this issue reflect its concern with its own informational assets and not protecting the economic interests of Metrolinx under section 18(1)(c) or protecting Metrolinx's litigation privileged information under section 19. Therefore, I will not consider the application of either sections 18(1)(c) or 19 to the information at issue in the records.

***Another matter: section 22(b)***

[91] The appellant has also raised another matter, namely that section 22(b) of the *Act* should apply. This section reads:

A head may refuse to disclose a record where,

b) the head believes on reasonable grounds that the record or the information contained in the record will be published by an institution

within ninety days after the request is made or within such further period of time as may be necessary for printing or translating the material for the purpose of printing it.

[92] The appellant submits that the information at issue in both appeals will be published by Metrolinx within 90 days if the records are ordered disclosed by this order. The appellant says that it presumes that publication of this information is reasonably foreseeable especially in light of the bad press it has received in the last few years.

[93] Section 22(b) is intended to be claimed for records that will be made publicly available within a relatively short period of time after the request has been made under the *Act*, not where the record or the information may be made available at some unascertained future date.<sup>24</sup>

[94] I have no evidence that Metrolinx is planning to publish the information at issue in the records. The appellant's argument is circular, presupposing that publication will occur after I order disclosure. In any event, as with the appellant's attempt to raise the discretionary sections 18(1)(c) and 19 exemption claims, I also find that these appeals do not constitute a rare case where the appellant ought to be allowed to raise this discretionary exemption. I find that section 22(b) does not apply to the information at issue in Appeals PA19-00332 and PA19-00333.

### ***Conclusion***

[95] I have found that the information in the records in both appeals that the appellant has claimed to be exempt is not exempt and I dismiss its appeals.

[96] Therefore, I will order the information at issue in Appeals PA19-00333 and PA19-00332 to be disclosed to the requester by Metrolinx.

### **ORDER:**

I order Metrolinx to disclose the information at issue in Appeals PA19-000332 and PA19-00333 to the requester by **March 29, 2021** and not before **March 24, 2021**.

Original Signed by: \_\_\_\_\_

Diane Smith  
Adjudicator

February 22, 2021 \_\_\_\_\_

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<sup>24</sup> Orders M-467 and PO-2109.