Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4135

Appeals MA19-00635 and MA19-00656

Regional Municipality of Waterloo

December 10, 2021

Summary: A media requester filed a request under the *Act* for specific sections of a contract between the municipality and a named company relating to the company's supply of light rail vehicles to the municipality. The municipality located the relevant portions of the contract and notified the company and Metrolinx (the affected parties) in accordance with section 21 of the *Act*. The affected parties submitted representations. After considering the affected parties' representations, the municipality issued a decision denying the requester access to the responsive information under the mandatory exemption in section 10(1) (third party commercial information) of the *Act*. The municipality later revised its decision granting the requester full access to the information requested. The affected parties (now the appellants) appealed the municipality's decision, claiming the application of section 10(1) to the information. During the inquiry, Metrolinx raised the application of the mandatory exemption in section 9 and the discretionary exemption in section 11 to the information at issue. In this order, the adjudicator upholds the municipality's decision. She finds that sections 9, 10 and 11 do not apply to the information at issue and orders the municipality to disclose it to the requester.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 9 and 10(1).

Orders and Investigation Reports Considered: Orders MO-2186, MO-2468-F, P-257, P-1137, PO-3676 and PO-3986.

OVERVIEW:

[1] The requester, a member of the media, filed a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) with the Regional

Municipality of Waterloo (the municipality) for access to

> Sections of the General Contract governing the commercial terms of supply of light rail vehicles to the Region of Waterloo by [named company] that pertain to the stipulations of non-performance, liquidated damages, penalty clause, and/or breach of contract.

[2] The municipality located the General Contract and notified two affected parties, Metrolinx and the company identified in the request (the company), to obtain their views regarding disclosure of the contract in accordance with section 21 of the *Act*.

[3] After considering the third parties' representations, the municipality issued a decision denying the requester access to the requested portions of the contract pursuant to section 10(1) (third party information) of the *Act*. The municipality later revised its decision, granting the requester access to the requested portions of the contract on the basis that the requirements of section 10(1) were not established.

[4] The affected parties (now the appellants) appealed the municipality's decision to disclose the requested information and Appeals MA19-00635 and MA19-00656 were opened.

[5] During mediation, the requester confirmed their interest in pursuing access to the relevant portions of the contract and raised the possible application of the public interest override in section 16 of the *Act*. The appellants maintained their position that the contract was exempt from disclosure under section 10(1) of the *Act*.

[6] A mediated resolution was not possible and the appeals were transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. The adjudicator who was originally assigned the appeal decided to conduct a joint inquiry of Appeals MA19-00635 and MA19-00656 due to the overlapping facts, issues and information at issue. The appellant in Appeal MA19-00635 is Metrolinx and the appellant in Appeal MA19-00656 is the company identified in the request. I will refer to the two appellants as Metrolinx and the company, respectively.

[7] The adjudicator began the inquiry by inviting and receiving representations in response to the facts and issues identified in the Notice of Inquiry, which included the application of section 10(1) (third party information) and the public interest override in section 16 of the *Act*. In its representations, Metrolinx also claimed the application of the discretionary exemption in section 11 (economic interests). The adjudicator added the potential application of section 11 as an issue in the appeal. In its representations, the company consented to the disclosure of some of the information at issue and provided the IPC with a redacted copy of the requested portions of the contract, indicating the information it consented to have disclosed. However, as Metrolinx maintained its position that all of the information at issue is exempt, none of the responsive information could be disclosed to the requester, pending the decision on the appeals.

[8] The adjudicator then invited the municipality and the requester to submit representations in response to the Notice of Inquiry and the non-confidential portions of the appellants' representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The requester submitted representations. The municipality did not submit representations.

[9] The appeal was then transferred to me to continue the adjudication of the appeals. Upon review of the files, I decided to seek further supplementary representations from Metrolinx regarding whether I should allow it to raise the application of the discretionary exemption in section 11 to the requested portions of the contract. Metrolinx submitted representations on this issue and additionally stated the municipality should have raised the mandatory exemption in section 9 (intergovernmental relations) to the information at issue. I then invited the municipality to make submissions on the application of section 9 to the information at issue. The municipality declined to make submissions. Finally, I sought and received more fulsome representations on the application of section 9 to the information at issue from Metrolinx.

[10] In the discussion that follows, I find the appropriate exemption to consider in respect of Metrolinx's interests is section 11 and not section 10(1). I find that sections 9, 10(1) and 11 do not apply to the information at issue. I dismiss the appeals and order the municipality to disclose the information to the requester.

RECORD:

[11] The information at issue consists of sections GC30 and GC39 of the General Contract between the company and the municipality that was specified in the request (the general contract). The municipality identified these sections as responsive to the requester's request for sections "governing the commercial terms … that pertain to the stipulations of non-performance, liquidated damages, penalty clause, and/or breach of contract."

ISSUES:

A. What is the appropriate exemption to consider in respect of Metrolinx's interests: section 10(1) or 11?

B. Does the mandatory exemption at section 10(1) (third party commercial information) apply to the information at issue?

C. Does the mandatory exemption at section 9 (intergovernmental relations) apply to the information at issue?

D. Does the discretionary exemption at section 11 (economic and other interests) apply to the information at issue?

DISCUSSION:

Issue A: What is the appropriate exemption to consider in respect of Metrolinx's interests: section 10(1) or 11?

[12] As discussed above, Metrolinx and the company appealed the municipality's decision to disclose the requested sections of the general contract, claiming the application of section 10(1) of the *Act*. Metrolinx is an Agency of the Government of Ontario and an institution under the *Act*. This raises the issue of whether section 10(1) or 11 is the correct exemption to consider in respect of Metrolinx's interests. Broadly speaking, both exemptions are designed to protect certain economic and other interests of businesses and institutions, respectively.

[13] In Order MO-2468-F, the adjudicator considered whether an institution may claim the application of the mandatory exemption in section 10(1) to records, including agreements. The adjudicator reviewed the jurisprudence of this office and found that the appropriate exemption to be considered for the type of information at issue in two agreements is section 11. The adjudicator referred to Order MO-2186, in which the adjudicator considered a situation where a municipality submitted a proposal to an institution under the provincial *Act* in response to a Request for Proposals issued by the provincial institution. Regarding the municipality's ability to rely on section 10(1) of the *Act*, the adjudicator in Order MO-2186 found,

> … the exemption under section 10(1) is not applicable to the records at issue in this appeal. This office has long held that section 10(1) is designed to protect the confidential "informational assets" of **businesses or other organizations** that provide information to institutions. This finding has been upheld in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.). In this case, the parties are two public bodies, not businesses or other non-public sector organizations.
>
> This view is supported by the ability an institution has to exempt records from disclosure under section 9. That section may be claimed to exempt information received in confidence by municipal institutions from government bodies, as opposed to business entities. I also note that where the objective of denying access is to protect the business interests of an institution such as the Municipality, the exemption in section 11 of the *Act* (economic and other interests) exists for this purpose. [emphasis in original]

[14] I note Metrolinx raised the application of both sections 9 and 11 in its representations. I will consider each exemption below.

[15] I agree with the principles explained above and find the appropriate exemption to consider in relation to the harms to Metrolinx is section 11. I make this finding due to the types of harms Metrolinx claims could reasonably be expected to result from the

disclosure of the information at issue and the fact that Metrolinx is an institution under the *Act*.

[16] I note in Order PO-3676, the adjudicator considered the third-party commercial interests of the Ontario Power Generation (the OPG), which was a third party and an institution under the *Act*. The adjudicator noted that some previous orders have found that, in certain circumstances, an institution's economic and other interests are to be protected by the exemption in section 11, and not by the third-party exemption in section 10(1)[1]. However, other previous decisions have considered the OPG's interests under the provincial equivalent to section 10(1) of the *Act*.[2] The adjudicator stated the section 17(1) claim had been argued by both the IESO (the institution that received the request) and the OPG for OPG's information that they claimed was supplied to the IESO. In that appeal, the request was made to the IESO and that institution decided that the OPG's interests were engaged as the records contained information that the OPG supplied to it. In the circumstances of that appeal, the adjudicator decided to review the OPG's economic and other interests under section 17(1).

[17] It is not clear the end result in Order PO-3676 would have changed if the analysis had taken place under section 11, rather than section 10(1), given that the harms in the two sections are similar and the adjudicator's finding that the records in that appeal were exempt under the provincial equivalent of section 10(1). In fact, the adjudicator stated:

> I also note that, although the wording of the subsections in sections 17(1)(a) and 18(1)(c) and (d) are similar, the test in section 17(1) is, in some ways, more onerous, as it requires the third party to establish that the information at issue was also supplied by it in confidence to the IESO.

[18] Based on my review of the information at issue and the circumstances surrounding the creation of the contract, in my view, it is appropriate to consider Metrolinx's arguments about its economic interests under section 11 and not section 10(1). In any case, given my findings below, Metrolinx's section 10(1) arguments would not succeed, given the circumstances in which the general contract was negotiated and the fact that I have found that disclosure could not reasonably be expected to prejudice Metrolinx's interests.

Issue B: Does the mandatory exemption at section 10(1) (third party commercial information) apply to the information at issue?

[19] The appellants claim sections GC30 and GC39 of the general contract are exempt from disclosure under section 10(1) of the *Act*. Specifically, the company claims the

---

[1] See, for example, Order MO-2468-F.
[2] See, for example, PO-2500, PO-2068 and PO-295 but also see O. Reg 424/03.

application of sections 10(1)(a), (b), and (c) to small portions of the information at issue, while Metrolinx claims the application of section 10(1) to all of it. However, as discussed above, I will consider Metrolinx's arguments under section 11, below.

[20] The municipality did not make representations regarding the application of section 10(1) in the inquiry.

[21] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[3] where specific harms can reasonably be expected to result from its disclosure.[4]

[22] Sections 10(1)(a), (b), and (c) state:

> 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, if 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[.]

[23] For section 10(1) to apply, the parties arguing against disclosure, in this case, the company, 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;

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 paragraph (a), (b) and/or (c) of section 10(1) will occur.

---

[3] *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.*).
[4] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: type of information

[24] The company submits the information at issue is commercial information.

[25] The requester submits the information at issue is not commercial information because they did not request information about profit or loss, or pricing, but strictly the penalties that would result if the supplier fails to deliver the light rail vehicles on time, how they will be calculated and paid out.

[26] The IPC has described *commercial information* as follows:

> … information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.[5] The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.[6]

[27] Based on my review of the information at issue, I find it is commercial information within the meaning of section 10(1) of the *Act*. The information at issue is part of a commercial agreement between the company and the municipality for the purchase and sale of light rail vehicles for the municipality's light rail transit system. Given this context, the information at issue clearly fits within the meaning of commercial information as described above. Therefore, I find part 1 of the three-part test for the application of section 10(1) has been satisfied.

Part 2: supplied in confidence

[28] There are two requirements for this part of the section 10(1) test. The first is that the information be *supplied* to the institution. The second is that the information was supplied *in confidence*.

Supplied

[29] The requirement that the information have been *supplied* to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[7]

[30] 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.[8]

---

[5] Order PO-2010.
[6] Order P-1621.
[7] Order MO-1706.
[8] Orders PO-2020 and PO-2043.

[31] The contents of a contract between an institution and a third party will not generally qualify as having been *supplied* for the purpose of section 10(1). Contractual provisions are generally considered to be mutually generated, rather than *supplied* by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.[9]

[32] There are two exceptions to this general rule:

1. The *inferred disclosure* exception which applies where disclosure of the information in a contract would permit someone to make accurate inferences about underlying non-negotiated confidential information supplied to the institution by a third party.[10]

2. The *immutability* exception which applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs.[11]

Parties' Representations

[33] For background, Metrolinx states that in June 2010, the Toronto Transit Commission (the TTC), Metrolinx and the company entered into an assignment agreement in which a portion of a contract between the TTC and the company was assigned to Metrolinx. Specifically, the terms regarding the option to purchase additional light rail vehicles from the company was assigned to Metrolinx. This assignment agreement also permitted the Regional Municipality of Waterloo to join the contract. Metrolinx states that when the municipality entered into the general contract with the company for the purchase of the company's light rail vehicles, the terms and conditions of the assignment agreement were extended to the municipality for its use, including the vehicle pricing.

[34] The company states the general contract governs the commercial terms of its supply of the light rail vehicles to the municipality. The company states the contract was negotiated by itself and the municipality and the parties agreed to incorporate part of an existing contract between Metrolinx and the company into the general contract. Specifically, the company states,

> Indeed, the original [Metrolinx] contract which was included in the Region contract with [The company] **has been modified following negotiations** between [The company] and the Region to suits [*sic*] the

---

[9] 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*).
[10] Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.
[11] *Miller Transit*, cited above at para. 34.

> Region's procurement needs. Some of those negotiations included the liquidated damages and fleet defect clauses part of the records requested (GC30 and GC39). [Emphasis added]

[35] The requester submits the information at issue was not supplied to the municipality in confidence because it is information contained in a contract. As such, the information at issue was mutually generated rather than *supplied* within the meaning of section 10(1) of the *Act*.

[36] As stated above, the municipality did not make submissions in response to the Notice of Inquiry.

Analysis and Findings

[37] Based on my review of the information at issue and the parties' representations, I find the information at issue is the product of negotiations between the municipality and the company, who were the parties to the general contract. The company clearly states in its representations that the information at issue was modified following negotiations between itself and the municipality. In other words, while the information at issue may have been based on the terms and conditions of a contract between Metrolinx and the company, it was modified during negotiations between the company and the municipality. As previously stated, 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 10(1) unless one of the exceptions to this general rule is established.

[38] In addition, I find the information at issue in sections GC30 and GC39 is not subject to the immutability or inferred disclosure exceptions. None of the parties claimed the application of the immutability exception and I find it does not apply to the information at issue. Metrolinx refers to the application of the inferred disclosure exception in its representations, but it did not provide any details regarding any non-negotiated information that could be accurately inferred if the information at issue was disclosed or whether that information related to the company or to Metrolinx only. Without any further details, it is unclear what inferences could be made with the disclosure of sections GC30 and GC39. Therefore, I find neither exception to the general rule that information in contracts is not *supplied* applies here.

[39] In conclusion, I find the information at issue was not *supplied* within the meaning of section 10(1) of the *Act*. Since the information was not *supplied*, it was not *supplied in confidence* and part 2 of the three-part test under section 10(1) is not met. As all three parts of the section 10(1) test must be met for the application of the exemption, section 10(1) does not apply to the information at issue.

Issue C: Does the mandatory exemption at section 9 (intergovernmental relations) apply to the information at issue?

[40] Metrolinx submits that section 9(1)(d) applies to the information at issue. Section 9 of the *Act* protects certain information that an institution has received from other

governments.[12] Section 9(1) states, in part,

> A head shall refuse to disclose a record if disclosure could reasonably be expected to reveal information the institution has received in confidence from,
>
> (a) the Government of Canada;
>
> (b) the Government of Ontario or the government of a province or territory in Canada;
>
> (c) the government of a foreign country or state;
>
> (d) an agency of a government referred to in clause (a), (b) or (c)…

[41] The purpose of the section 9 exemption is to ensure that institutions under the *Act* can continue to receive information that other governments might not be willing to provide without some assurance that it will not be disclosed.[13]

[42] For a record to qualify for exemption under section 9, the institution must establish that:

1. the information was received by the institution in confidence; and
2. disclosure of the record could reasonably be expected to reveal information that it received from one of the governments, agencies or organisations listed in the section.[14]

[43] The exemption is meant to protect the interests of the organization that provided the information, not the institution that received it. Whether the provider of the information is concerned about its disclosure or not in a specific case can be important in deciding whether the information was received *in confidence*.[15]

[44] Metrolinx claims the application of section 9 to the information at issue. Metrolinx states it is an Ontario Crown agency. As such, it qualifies as "another government" for the purposes of section 9(1)(d).

[45] The municipality did not make submissions on the application of section 9 to the information at issue although it was invited to do so.

---

[12] The IPC has issued several orders on the purpose of a similar exemption under section 15 of the provincial *Freedom of Information and Protection of Privacy Act*: see Orders PO-2247, PO-2369-F, PO-2715, PO-2734.
[13] Order M-912.
[14] Order MO-1581, MO-1896 and MO-2314.
[15] Orders M-844 and MO-2032-F.

[46] As stated above, the record at issue is a contract between the company and the municipality. Metrolinx acknowledges that the agreement was signed between the municipality and the company and was not received by the municipality from Metrolinx. However, Metrolinx submits the information contained in the agreement is "fundamentally based" on its negotiated terms, which were provided to the municipality in confidence to enable the municipality to purchase vehicles at a lower price and with more favourable terms.

[47] I find the information at issue does not qualify for exemption under section 9(1)(d). I accept that Metrolinx is an agency of the government of Ontario. However, I do not accept Metrolinx's claim that it provided the information at issue to the municipality. As discussed above and confirmed by the company, the information at issue was the product of negotiations between the company and the municipality. While the information may have been "fundamentally based" on terms negotiated by Metrolinx, it is not actually information that was provided by Metrolinx to the municipality. Furthermore, because the information at issue was negotiated and modified by the company and the municipality to suit the municipality's needs, the information at issue cannot reasonably be expected to reveal information received by the municipality from Metrolinx.

[48] Therefore, I find section 9 does not apply to exempt the information at issue from disclosure.

Issue D: Does the discretionary exemption at section 11 (economic and other interests) apply to the information at issue?

[49] Metrolinx relies on the discretionary exemptions in sections 11(c) and (d) of the *Act* to the information at issue. These sections state,

> A head may refuse to disclose a record that contains,
>
> > (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive interests of an institution;
> >
> > (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

[50] An institution, in this case, Metrolinx, resisting disclosure of a record on the basis of sections 11(c) or (d) cannot simply assert the harms mentioned in these sections are obvious based on the record. Metrolinx must provide *detailed* evidence about the risk of harm if the record is to be disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, the party claiming the

application of the exemption should not assume the harms are self-evident and can be proven simply by repeating the discretion of the harms in the *Act*.[16]

[51] Metrolinx must show that the risk of harm is real and not just a possibility.[17] However, it does not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[18]

[52] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.[19]

[53] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. It recognizes that institutions may have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse to disclose information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[20]

[54] Section 11(c) requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[21]

[55] With regard to section 11(d), the institution must provide sufficient evidence to demonstrate that disclosure of the information in the record could reasonably be expected to be injurious to its financial interests.

[56] Metrolinx reiterates the information at issue is based on the terms of a contract between itself and the company. As such, the disclosure of the information at issue could reasonably be expected to prejudice its economic interests because it will allow for accurate inferences to be made about its contract with the company. Metrolinx submits it is "impossible" to disclose the information at issue without also disclosing its own light rail vehicle contract with the company.

[57] Specifically, Metrolinx states that section GC30 outlines the expectations for mitigation of fleet damages. Metrolinx submits disclosure of this information would prejudice its competitive position, that of the municipality "and any other institution or government, at any level, as they attempt to negotiate contracts in the future."

---

[16] Orders MO-2363 and PO-2435.
[17] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.
[18] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616.
[19] Orders MO-2363 and PO-2758.
[20] Orders P-1190 and MO-2233.
[21] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

[58] Metrolinx states section GC39 of the record outlines the liquidated damages owed to the municipality should the company fail to perform certain work in accordance with the contract terms. Metrolinx submits that section GC39 "is one of the most important sections" of the contract as well as any future contracts with other suppliers of light rail vehicles and disclosing this information would prejudice its competitive position, that of the municipality "and any other institution or government, at any level, as they attempt to negotiate contracts in the future."

[59] Metrolinx refers to Order PO-1791, in which the adjudicator concluded that records containing price breakdowns could reasonably result in prejudice to the competitive position of an affected party if disclosure of this information could enable a competitor to gain advantage. Metrolinx submits the damages in section GC39 are "one of the strongest mechanisms available to ensure that vehicles are delivered on time and in good quality because failure to meet requirements has a financial consequence to suppliers." Metrolinx submits that institutions can use these provisions to protect themselves if there is an expectation that delays may occur. For example, Metrolinx submits an institution may request high damages from a supplier with a limited or negative track record to provide further incentive to meet the requirements in the contract.

[60] Given these circumstances, Metrolinx submits section GC39 is an important factor in its negotiating strategy when entering into contracts with new suppliers. Metrolinx states its job is to ensure vehicles are delivered on time and on budget, but if they are not, it needs to be able to recoup appropriate damages to protect publicly funded transit projects.

[61] Metrolinx states it will be negotiating contracts with light rail vehicle manufacturers for the supply of vehicles in connection with various transit projects over the next ten to fifteen years in addition to negotiations with respect to other vehicle procurements over this period. Metrolinx expects all of those contracts will contain liquidated damage provisions to protect its economic interests in connection with late delivery. As such, it is not speculative that Metrolinx will be participating in future negotiations. Metrolinx submits that disclosure of the information at issue would reveal a "key element of [Metrolinx's] bargaining position with respect to key provisions of an existing light rail vehicle contract" and would give vehicle manufacturers "significant leverage" in negotiations and severely diminish Metrolinx's bargaining power.

[62] Metrolinx submits that disclosing its "floor" or "ceiling" would impact its competitive position. Metrolinx states that it provides an essential service to the province, i.e. public transit, and relies on a limited number of private sector partners to provide goods such as light rail vehicles in this case. Metrolinx submits there are a limited number of light rail vehicle manufacturers. As such, it is important for Metrolinx to maintain its ability to negotiate with respect to key terms such as pricing, remedies available in the event of non-performance, and liquidated damages. Metrolinx submits that disclosure of the records would prejudice its negotiating position and economic interests because it would give its current suppliers more leverage and hinder its ability

to expand the number of eligible light rail vehicle manufacturers for future negotiations.

[63] I invited the municipality to respond to Metrolinx's representations but it did not do so. I did not find it necessary to invite representations from the requester, given my conclusions below.

[64] I have reviewed the information at issue and Metrolinx's representations. I find I have not been provided with sufficient evidence to establish the section 11(c) or (d) harms for the information at issue. I acknowledge that pricing information relating to Metrolinx may be sensitive to Metrolinx. However, the information at issue is in a contract between the municipality and the company. Metrolinx is not a party to the contract. As discussed above, while the record may be *based* on a contract between Metrolinx and the company, the company confirmed the information at issue was the product of negotiation between itself and the municipality and reflects the municipality's own procurement needs. Metrolinx did not provide me with a copy of the information that it alleges the information at issue is based, to enable me to compare the two. In any case, the information at issue is from a contract that it is not a party to. Given these circumstances, it is unclear how the disclosure of the information at issue could reasonably be expected to result in the harms contemplated in section 11(c) and (d) to Metrolinx.

[65] Metrolinx also states the disclosure of the information at issue could result in harm to its negotiating position with light rail vehicle manufacturers. It states that there is a very limited pool of light rail vehicle manufacturers it can contract with at this time. However, the company is one of the light rail manufacturers and is a party to the contract. As such, it is unclear how the disclosure of the company's contract terms with the municipality could reasonably be expected to hinder Metrolinx's negotiating position with the company.

[66] I am also not persuaded this disclosure could reasonably be expected to hinder Metrolinx's negotiating position with other light rail vehicle manufacturers. Metrolinx claims that the disclosure of the information at issue would give its current suppliers more leverage and hinder its ability to expand the number of eligible light rail vehicle manufacturers for future negotiations. However, it is unclear to me and Metrolinx did not provide any evidence to explain how the disclosure of two terms in a contract between the municipality and the company, which were negotiated to suit the arrangement between the municipality and the company, could reasonably be expected to impact Metrolinx's negotiating position in relation to other light rail vehicle manufacturers.

[67] Overall, I find Metrolinx's submissions to be broad and speculative, particularly since the information at issue is in a contract that Metrolinx is not a party to. I find Metrolinx did not provide sufficient evidence to demonstrate how the disclosure of the information at issue could reasonably be expected to prejudice its economic interests or competitive position or harm the financial interests of the province. Therefore, I find sections 11(c) and (d) do not apply to exempt the information at issue from disclosure.

ORDER:

I order the municipality to disclose sections GC30 and GC39 to the requester by **January 17, 2022** but not before **January 10, 2022** and dismiss the appeals.

Original Signed by: December 10, 2021

Justine Wai
Adjudicator