

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4344

Appeal PA22-00083

Ministry of Education

January 27, 2023

Summary: The appellant sought access to information about the assessed value to replace individual publicly funded Ontario school buildings or the assessed 5-year repair costs for each of these schools from the Ministry of Education (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The ministry denied access to this information relying on the discretionary economic and other interests exemption in sections 18(1)(c) or 18(1)(d) of the *Act*.

In this order, the adjudicator finds that the information at issue in the record is not exempt and orders it disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 18(1)(c) and 18(1)(d).

OVERVIEW:

[1] At issue in this appeal is the assessed value to replace individual publicly funded Ontario school buildings or the assessed 5-year repair costs for each of these schools.

[2] Specifically, the Ministry of Education (the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to:

Any information, data or emails related to the School Facility Condition Information and/or School Facility Condition Assessment Program from

the Office of the Chief Information Officer, Community Services I&IT Cluster, the Minister's Office, and the Deputy Minister's Office...

[3] Prior to issuing a decision, the ministry clarified the scope of the information sought by the requester to be:

The Latest School Facility Condition Index Information (Report) available.

[4] The ministry issued a decision denying access to the responsive record under the discretionary economic and other interests exemption in section 18(1) of the *Act*.

[5] The requester, now the appellant, appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was appointed to attempt a resolution of this appeal.

[6] During mediation, the ministry clarified it was relying on sections 18(1)(c) and (d) of the *Act* to deny access to the record. The ministry maintained its position, which was shared with the appellant. The appellant informed the mediator they wished to pursue the appeal at adjudication.

[7] As mediation was not able to resolve the appeal, the matter proceeded to the adjudication stage, where an adjudicator may conduct an inquiry. I decided to conduct an inquiry.

[8] Representations were sought and exchanged between the parties in accordance with the IPC's *Practice Direction 7*. With its reply representations, the ministry disclosed more information from the record to the appellant and issued a supplemental decision letter.

[9] In this order, I find that the information remaining at issue in the record is not exempt under sections 18(1)(c) or 18(1)(d) and I order the ministry to disclose this information to the appellant.

RECORD:

[10] Remaining at issue is the information in two columns of one record, a 77-page School Facility Condition Index: Latest School-Level Information Report (the report). This report contains information about approximately 4,000 individual schools and contains information about the assessment of the condition of these schools as of the latest available date of the assessment as of 2019.

[11] The two columns at issue in the report are titled, "Asset Replacement Value (\$)" and "Assessed 5-year Renewal Needs (\$)." The ministry defines these terms as:

- Asset Replacement Value (ARV), the total expenditure required to replace the facility [the school building] based on the capacity of the building, inclusive of construction costs, design costs, project management costs and project administrative costs, as of the date of the assessment;
- Assessed 5-year Renewal Needs, the repair and replacement work that should be undertaken in the in a five-year window (year of assessment plus four years) based on the life cycle and condition of school building components as of the date of the assessment.

DISCUSSION:

Does the discretionary economic and other interests exemption at sections 18(1)(c) or 18(1)(d) apply to the information at issue in the record?

[12] The purpose of section 18(1) is to protect certain economic and other interests of institutions. It also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental organizations.¹

[13] Sections 18(1)(c) and (d) 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 position of an institution;

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

[14] An institution resisting disclosure of a record on the basis of sections 18(1)(c) or (d) cannot simply assert that the harms mentioned in those sections are obvious based on the record. It must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, the institution should not assume that the harms are self-evident and can be proven simply by repeating the description of harms in the *Act*.²

¹ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

² Orders MO-2363 and PO-2435.

[15] The institution must show that the risk of harm is real and not just a possibility.³ 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.⁴

Representations

[16] In its initial representations, made prior to its supplemental decision letter and when it was withholding the entire report, the ministry states that the report comprises school board school facility condition data collected through the School Condition Assessment Program (SCAP). It is used by the ministry to understand the condition of schools in the province and make both short- and long-term decisions regarding funding for school boards for school facility renewal and improvements.

[17] It states that the report contains the assessed value of work to be completed at a particular school and that the only information it shares publicly is that which is relevant to each school board.

[18] The ministry states that the report supports its decision-making concerning school board requests for Ministerial approval to use proceeds of disposition funds from the sale of a school board's real property for purposes other than school renewal. It states that the report assists the ministry in understanding sector-wide condition and renewal needs and how that fits into broader government infrastructure needs. This information, the ministry says, is critical to its assessment of the capital related needs of school boards and for fiscal planning. It states that:

The assessment data provided through SCAP, on which the ... report is based, is an important tool for school boards to understand expected replacement and repair costs in their schools. School boards use this data as a benchmark for expected costing of the replacement or repair when conducting procurement for capital projects. If that information is in the hands of those vendors bidding on capital projects, it provides valuable insight into what school boards are likely to pay for the work.

[19] The ministry submits that the release of the report could reasonably be expected to compromise the ministry's economic interests and competitive position by sharing commercially sensitive and valuable information with the public that could compromise the school boards' abilities to obtain the best value for money in procurement for capital projects.

[20] Regarding section 18(1)(c), the ministry states that it has a direct financial

³ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

⁴ *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.

interest in school boards obtaining the “best possible price” for capital projects. The ministry states that if the report is made public, it could be viewed by anyone, including those organizations interested in bidding on school board capital projects. These organizations would gain knowledge of the assessed value of work to be completed at a particular school. It states that:

...By revealing the assessed value of the renewal work, vendors bidding on capital projects can gain direct insight into the school board’s perceived value of the work, and by extension, what it would be willing to pay. This can reasonably be expected to influence the bids made by vendors, and drive up the cost of those capital projects, and produce less favourable results in that procurement. As the primary funder of school boards, the Ministry’s economic interests would, in turn, be prejudiced.

[21] For section 18(1)(d), the ministry relies on the representations made in support of the application of section 18(1)(c) and submits that disclosure of the record could reasonably be expected to injure the financial interests of Ontario.

[22] The ministry states that the report contains sensitive financial information about the renewal costs and replacement values of school boards. It states that the report details independent assessors’ findings about the value of school board capital and the value of the work needed to be completed in the next 5 years, which gives direct insight into both the ministry’s and the school boards’ expectation for capital costs. As a result, it submits that this would undermine the school board’s ability to obtain the best value on capital projects.

[23] The ministry states:

In the hands of potential vendors, this information could reasonably be expected to be exploited when they place their bids on capital projects. Critical information about the school board’s perceived value of the work to be completed could reasonably be expected to be used by potential vendors to set their prices at or near the maximum perceived value for that work, based on the figures in the ...report, rather than setting a price reflective of their expenses and expected profit margin. School boards, and by extension the ministry, would be particularly vulnerable in situations involving urgent repairs, which would not likely be the subject of competitive procurements.

In so doing, the school board, and by extension, the ministry (as the school board’s primary funder), would be forced to pay more money for equivalent work. This would be a direct result of the advantage gained by vendors from the figures contained in the ...report, if that report were to be released.

[24] In response, the appellant states that the provincial government has previously disclosed the School Facility Condition information, the information at issue in the report, as has various school boards, including the Toronto District School Board.

[25] The appellant states that in the past the ministry has disclosed previous versions of the report online and that when the appellant made the request in this appeal the previous report, dated 2017, was still available online. The appellant states that although the 2017 version of the report is no longer available on the ministry website, copies of it, as well as the 2016 version, can be found can still be found online through the Ontario government internet archive.⁵

[26] The appellant submits that given that the 2016 and 2017 reports were released to the public, the burden is on the ministry to explain how releasing the record at issue, the 2019 report, is harmful to the institution's or government's economic interests.

[27] The appellant submits that given that similar information was previously publicly disclosed and the risks and harms alleged in this appeal did not materialize, the ministry has failed to provide a sufficient explanation for why this risk will materialize now. They state that in their response, the ministry did not provide specific examples of harms that occurred the last time this information was shared publicly.

[28] The appellant states that the ministry provides each school board with the information from the record on their own schools and, in some cases, such as the Toronto District School Board (the TDSB), the board can choose to publish their index online. In the case of the TDSB, the information published contains even more detail than what the province's School Facility Condition Index provides. The appellant submits that if the province's largest school board sees no harm materializing from publishing their school facility condition index, then the ministry does not have a valid reason for denying access to the same information.

[29] The appellant disagrees with the ministry that publishing the School Facility Condition Index online undermines school boards' ability to obtain the best value on capital projects. They submit that the TDSB would not do so if it would run counter to the TDSB's requirements under the Broader Public Sector Procurement Directive, which requires school boards to maximize the value they receive from the use of public funds.

[30] The appellant submits that it is speculative to say that the release of information

⁵ Ontario Ministry of Education - School Facility Condition Data, Assessment Cycle 2011-2015, Last updated August 22, 2016
https://web.archive.org/web/20220531220409/http://www.edu.gov.on.ca/eng/parents/renewal_data.html
I found at:
<https://web.archive.org/web/20220426045232/http://www.edu.gov.on.ca/eng/parents/fci.html> Ontario Ministry of Education - School Facility Condition Data, Assessment Cycle 2016-2020, Last Updated: October 10, 2017 at:
https://web.archive.org/web/20220531220450/http://www.edu.gov.on.ca/eng/parents/renewal_data_2017.html

about school facility conditions would automatically mean that vendors would put forward bids with higher prices on projects, or that school renewal needs would be unmet. The appellant states that it is reasonable to assume that the TDSB would not publish this information if it had significant negative financial consequences for the organization.

[31] Following receipt of the appellant's representations, the ministry issued a supplementary access decision and disclosed the report except for two columns of information titled, "Asset Replacement Value (\$)" (the ARV) and "Assessed 5-year Renewal Needs (\$)."

[32] Simultaneously, the ministry provided reply representations responding to the appellant's representations and addressing the two columns of information remaining at issue in the report. In its reply representations, the ministry relies on its initial representations that the information about expected capital costs would undermine an individual school board's ability to obtain the best value on capital projects. It also argues that disclosure of either column of information would reveal the other column's data because the disclosed Facilities Condition Index (the FCI) rating for each school listed is calculated by dividing a building's Assessed 5-Year Renewal Needs by its ARV.

[33] Concerning the public availability of previous reports, as noted above, the ministry acknowledges that the provincial government released the 2016 and 2017 versions of the report. The ministry is also aware that the TDSB has published data of the FCI rating of each of its schools along with a list of the renewal needs of each of its schools with the urgency rating of each renewal need.

[34] The ministry states, however, that the data published by the TDSB is not equivalent to the data published by the ministry. For example, it states that the FCI rating provided by TDSB is different from the FCI rating given by the ministry in the FCI Report at issue in this appeal.⁶ It states that the TDSB also publishes the total value of the renewal needs of all the schools of the TDSB, which is not broken down by school and, most significantly, the TDSB does not report the Asset Replacement Value (ARV) or the 5-Year Renewal Needs for each of its schools listed in the ministry's FCI Report, which is the information over which the ministry claims the section 18(1) exemption.

[35] The ministry submits that a decision by a previous government or another institution to release the same or similar records is irrelevant to the IPC's decision on

⁶ The ministry refers to the statement on the TDSB's website: "While the Ministry's FCI is based on anticipated renewal needs for the next five years starting at the time of the assessment, the Toronto District School Board (TDSB) data is based on one year, and includes repairs done during the year." The ministry also refers to the TDSB website at: [https://www.tdsb.on.ca/About-Us/Accountability/Renewal-Needs-Backlog-and-Facility-Condition-Index/Facility-Condition-Index#:~:text=Index%20\(FCI\)%3F-The%20Facility%20Condition%20Index%20\(FCI\)%20rating%20is%20a%20measurement%20of,Asset%20Replacement%20Value%20\(ARV\)](https://www.tdsb.on.ca/About-Us/Accountability/Renewal-Needs-Backlog-and-Facility-Condition-Index/Facility-Condition-Index#:~:text=Index%20(FCI)%3F-The%20Facility%20Condition%20Index%20(FCI)%20rating%20is%20a%20measurement%20of,Asset%20Replacement%20Value%20(ARV)) as well as providing information about a sample TDSB school at: <https://www.tdsb.on.ca/Find-your/Schools/School-FCI/schno/3432>

whether an institution's claim of an exemption under the *Act* is applicable.

Findings

[36] To recap, the ministry relies on sections 18(1)(c) and (d), which 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 position of an institution;

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario.

[37] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.⁷

[38] Section 18(1)(d) requires an institution to establish that disclosure of the information in the record reasonably be expected to be injurious to its financial interests.

[39] As set out above, to establish sections 18(1)(c) or 18(1)(d), the ministry was required to provide detailed evidence about the potential for harm. A risk of harm well beyond the merely possible or speculative must be demonstrated, although the ministry was not required to prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.⁸

[40] As stated above, two columns of information remain at issue in the report:

- the ARV of an individual school building, which is the cost to replace an individual school building as of the date of the assessment, and
- the Assessed 5-year Renewal Needs, which is the assessed value of the work to be performed on individual schools in the five-year period following the assessment date.

⁷ Orders PO-2014-I, MO-2233, MO-2363, PO-2632, and PO-2758.

⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, *supra*.

[41] For the reasons that follow, I find that the ministry has not demonstrated that disclosure of the information at issue could reasonably be expected to prejudice its economic interests or competitive position, or be injurious to its financial position and the information is therefore not exempt from disclosure under sections 18(1)(c) or 18(1)(d).

[42] I disagree with the ministry that disclosure of the information at issue could provide vendors bidding on capital projects direct insight into what a school board would be willing to pay for this work to be completed.

[43] The ARV in the report reveals the assessed replacement cost of a school building as of the date of the assessment. The Assessed 5-year Renewal Needs in the report reveals the total estimated value of work that should be undertaken in a five-year period, starting in the year of assessment, to conduct repairs to a school. Both values were calculated in 2019 or earlier, as early as 2011. As well, some schools only contain the ARV value as these schools do not have an assessment date. Further, the 5-year assessments are also no longer current as the relevant 5-year period has already elapsed, or in the case of 2019 assessments,⁹ will imminently elapse.

[44] Considering the nature of the information and its age, I find that neither the ARV nor the Assessed 5-year Renewal Needs could reasonably be expected to reveal information to a potential bidder that would assist bidders in determining what a particular school board would be willing to pay for a capital project to be completed at a particular school. In my view, both of the items at issue are global estimated figures showing either the replacement value of an entire school building or the estimated total 5-year value of all of the repairs needed to be done at a particular school.

[45] Further, the information at issue is not broken down as to the type of repair needed to be done at a particular school, therefore, I find that a potential bidder could not ascertain what the cost of a particular repair is expected to be.

[46] Additionally, the Assessed 5-year Renewal Needs is not broken down into annual figures. Therefore, there is no way to tell from the report what the estimated cost of repair is for a particular year, or even that of the most recent year.

[47] I also find that the ARV figures in the report, now several years past their assessment date, are not reliable indicators of either the current ARV (the cost to replace an entire school building), nor could it reasonably be expected to reveal the information about the expected cost of a capital project at a particular school.

[48] In summary, I find that ministry's arguments that disclosure could reveal information to potential bidders are speculative and do not stand to reason when one considers the nature of the information and its age.

⁹ The 2019 assessment date entries make up less than 20 percent of the total entries in the record.

[49] Therefore, I find that the information at issue in the record could not reasonably be expected to result in either less competitive or higher cost bids for repairs to be undertaken at a particular school as claimed by the ministry. As such, it could not reasonably be expected to increase the cost of repairs that need to be paid by a school board to undertake repairs at a particular school.

[50] In reaching my conclusions in this appeal, I have considered that the ministry has previously publicly disclosed all of the same information in the past and yet has not proffered any detailed evidence about the harms that this disclosure may have had. I have also considered the ministry's argument that the related information published by the TDSB is different than that at issue in the record. However, upon review of this information, I find that the TDSB information is even more detailed and specific than that at issue in this appeal and does not assist the ministry in establishing its harms argument under section 18(1)(c) or 18(1)(d).¹⁰

[51] In conclusion, I find that disclosure of the information at issue in the record could not reasonably be expected to prejudice the ministry's economic interests or competitive position and section 18(1)(c) does not apply. I also find that section 18(1)(d) does not apply, as disclosure of the information at issue in the record could not reasonably be expected to be injurious to the financial interests of individual school boards or the ministry by implication which provides the majority of funding to school boards.

[52] Therefore, as the information at issue in the record is not exempt under the claimed sections 18(1)(c) or 18(1)(d) exemptions, I will order the ministry to disclose this information to the appellant.¹¹

ORDER:

1. I order the ministry to disclose the information at issue in the record to the appellant by **February 28, 2023**.

Original Signed By: _____

Diane Smith
Adjudicator

January 27, 2023

¹⁰ The TDSB reveals the projects needing repair at individual schools and the urgency of such repairs, as set out in the individual sample school link provided by the ministry at: <https://www.tdsb.on.ca/Find-your/Schools/School-FCI/schno/3432>

¹¹ The appellant raised the application of the section 23 public interest override in their representations, however, as I have found the information at issue in the record not exempt, it is not necessary for me to consider the application of section 23.