Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4374

Appeal PA19-00200

Metrolinx

March 30, 2023

Summary: This appeal is about access to the penalty and liquidated damages provisions contained in a contract between Metrolinx and a private corporation (the affected party) for the supply and delivery of light rail vehicles. Metrolinx issued a decision denying access to the penalty and liquidated damages provisions contained within two parts of the contract - a general conditions portion of the contract and a contract amendment - on the basis of the exemptions in section 17(1) (third party information) and 18(1) (economic and other interests). Metrolinx also denied access to the liquidated damages provisions in the contract amendment under section 19 (solicitor-client privilege) because the amendment was created as a result of settlement discussions that resolved a dispute regarding late delivery of vehicles under the contract.

In this order, the adjudicator partially upholds Metrolinx's decision. She finds that the contract amendment, and therefore the liquidated damages provisions therein, is exempt under section 19(b) (litigation privilege), because it was executed to settle litigation between Metrolinx and the affected party. However, she finds that the liquidated damages portions of the general conditions portion of the contract is not exempt under section 18(1) and orders Metrolinx to disclose it to the appellant. The adjudicator also upholds Metrolinx's search for responsive records as reasonable.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1), 18(1), 19 and 24.

Orders Considered: Orders PO-2659, PO-3011 and PO-3475.

Cases Considered: *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 (CanLII).

OVERVIEW:

[1] In 2010, Metrolinx entered into a contract with a private corporation for the supply of light rail vehicles (LRVs) for one of its rapid transit projects. The contract included provisions for penalties and liquidated damages associated with delays in the event of the late or non-delivery of vehicles. When a dispute arose about the late delivery of LRVs, Metrolinx sought to terminate the contract. Metrolinx claimed the corporation (the affected party in this appeal) was in material default, and served a Notice of Default. The affected party successfully sought to enjoin Metrolinx from terminating the contract for material default until the parties engaged in a dispute resolution process provided for in the contract; the Superior Court of Justice issued an order granting an injunction and requiring the parties to engage in the dispute resolution process.

[2] Metrolinx and the affected party entered into the dispute resolution process and settled the dispute. As part of the settlement, they executed a contract amendment in 2017 that included, among other things, revised terms governing liquidated damages and penalties associated with the late delivery of LRVs. The liquidated damages and penalties provisions in the contract amendment superseded those in the original liquidated damages provisions in the contract.

[3] This appeal is about access to the liquidated damages and penalties provisions in both the original contract and the contract amendment.

[4] After the affected party missed a deadline to deliver the LRVs, the appellant, a member of the media, made a request to Metrolinx under the *Freedom of Information and Protection of Privacy* (the *Act* or *FIPPA*) for access to information about penalties and damages levied against the affected party relating to the late delivery of LRVs. The request was for access to:

> Portions of the [affected party] contract that respond to the penalties, liquidated damages levied on [the affected party] for non-delivery and non- performance.[1]

[5] Metrolinx searched for and located two responsive records containing the requested information: the general conditions portion of a 2010 contract and a 2019 contract amendment. Pursuant to section 28 of the *Act*, Metrolinx notified the affected party for comment before issuing a decision.

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[1] The request was initially broader in scope, but the appellant narrowed it following discussions with Metrolinx.

[6] After it received representations from the affected party, Metrolinx issued a decision denying access to the responsive records in full. Metrolinx claimed that both records were exempt under sections 17 (third party information) and 18 (economic and other interests) because they "contain commercial and financial information deemed proprietary to the economic interests of Metrolinx."

[7] The appellant appealed the decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). The parties participated in mediation to explore resolution.

[8] During mediation, Metrolinx issued a revised decision. In it, Metrolinx added a claim that the discretionary exemption at section 19 (solicitor-client privilege) also applied to one of the withheld records – the contract amendment. The appellant, meanwhile, informed the mediator that she believed additional responsive records exist beyond those identified by Metrolinx. As a result, the reasonableness of Metrolinx's search for responsive records was added as an issue to this appeal.

[9] When a mediated resolution was not reached, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. During my inquiry, I received representations from Metrolinx, the appellant, and the affected party. I shared the non-confidential portions of the parties' representations among them in accordance with the IPC's *Code of Procedure* and *Practice Direction 7* on the sharing of representations.[2]

[10] Also during the inquiry, the affected party and Metrolinx dropped their reliance on the section 17 exemption. Therefore, the issues before me are whether the information at issue in the general conditions portion of the contract is exempt under section 18, and whether the information at issue in the contract amendment is exempt under sections 17, 18 or 19.

[11] Because I find below that the contract amendment is exempt under section 19(b), it is not necessary for me to consider Metrolinx's alternative claims in relation to it.

[12] In this order, I partially uphold Metrolinx's decision. I find that the contract amendment (record 2) is exempt under the statutory litigation privilege in section 19(b), and I uphold Metrolinx's decision to withhold it. I also find that the general conditions portion of the contract (record 1) is not exempt under section 18(1) and I order Metrolinx to disclose the information at issue (namely, the penalty and liquidated damages provisions) to the appellant. Finally, I uphold Metrolinx's search for responsive records as reasonable.

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[2] In accordance with *Practice Direction 7*, confidential portions of the parties' representations, including those that would reveal the contents of the records, were not shared.

RECORDS:

[13] The information at issue (the penalty and liquidated damages provisions) is contained in two records that form part of the contract between Metrolinx and the affected party. They are a 71-page 2010 document titled "General Conditions" (record 1 or general conditions portion of the contract containing liquidated damages provisions), and a 2019 40-page contract amendment titled "Contract Amendment #25" (record 2 or the contract amendment).

[14] Although the request is for access to portions of the records dealing with liquidated damages and penalties, Metrolinx claims that both records are exempt in their entirety under section 18 (economic and other interests), and that record 2 is also exempt in its entirety under section 19 (solicitor-client privilege) or section 17(1).

ISSUES:

A. Does the discretionary exemption at section 19(b) for statutory litigation privilege apply to the information at issue in record 2?

B. Does the discretionary exemption at section 18(1)(c) or (d) for economic and other interests of the institution apply to the information at issue in record 1?

C. Did Metrolinx conduct a reasonable search for responsive records?

DISCUSSION:

Issue A: Does the discretionary exemption at section 19(b) (statutory litigation privilege) apply to the information at issue in record 2?

[15] Section 19 exempts certain records from disclosure, either because they are subject to solicitor-client privilege or because they were prepared by or for legal counsel for an institution. It states, in part, that:

> 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…

[16] The IPC has referred to these sections in previous decisions as making up two "branches." The first branch, found in section 19(a), is based on common law. The second branch, found in section 19(b) contains statutory privileges created by the *Act*.

[3]The statutory and common law privileges, although not identical, exist for similar reasons. The statutory litigation privilege in section 19 protects records prepared for use in the mediation or settlement of litigation.[4] Unlike the common law privilege, termination of litigation does not end the statutory litigation privilege in section 19.[5] The privilege belongs to both parties and cannot be waived unilaterally.[6]

[17] The institution must establish that at least one branch applies. Metrolinx claimed the application of both branch 1 and 2. In the discussion that follows, I find that section 19(b), or branch 2 statutory litigation privilege, applies to record 2. It is therefore not necessary for me to consider Metrolinx's other privilege claims.

Representations

Metrolinx's representations

[18] Metrolinx submits that record 2 constitutes the settlement agreement reached between it and the affected party through mediation that resolved their contractual dispute and ended the litigation. Metrolinx says that it and the affected party negotiated the terms of record 2 extensively prior to agreeing to settle their dispute.

[19] Metrolinx submits that mediation is an integral part of the litigation process and is equally deserving of confidentiality and protection under branch 2 of section 19 of the *Act*. It submits that the ability to keep confidentiality over records related to settlement encourages third parties to engage in meaningful negotiations with government institutions and to settle disputes without the need to resort to litigation. It says that the protection afforded by the statutory litigation privilege in section 19(b) is intended to allow parties to freely discuss and offer terms of settlement in an attempt to reach a compromise, and settling matters before they result in litigation is of great public interest, as the matters are settled faster and more cost-effectively.

[20] Metrolinx argues that the terms in record 2 can therefore be distinguished from regular contract amendments and negotiations between it and private third-party counterparties.

[21] Metrolinx also made extensive representations about the possible application of settlement privilege at common law. I have not summarized these arguments because, as I will explain below, I am able to determine the issue pursuant to the statutory

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[3] Section 19(c) applies to a record 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." It is also considered to be part of the second branch of privilege, together with section 19(b). but is not before me or relevant to this appeal.

[4] *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.); *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).

[5] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer*), (2002), 62 O.R. (3d) 167 (C.A.).

[6] *Singh v. PCPO*, 2018 ONSC 203 (CanLII), at para. 33.

litigation privilege in section 19(b) of *FIPPA*.

The affected party's representations

[22] The affected party says that record 2 is a highly confidential settlement document that resolved the dispute between it and Metrolinx involving the affected party's delivery of LRVs.

[23] The affected party submits that record 2 is still in force and operational, and that it contains a provision that both parties (Metrolinx and the affected party) "will keep this amendment confidential."

The appellant's representations

[24] The appellant's representations respond mainly to Metrolinx's arguments about settlement privilege at common law. Because I have found that it is not necessary to address the common law settlement privilege, I have not repeated or summarized those arguments.

[25] The appellant says *FIPPA* is intended to be an exhaustive code and that its provisions expressly prevail over the provisions of other enactments that would restrict or prohibit access, subject only to "limited and specific" exemptions.

[26] The appellant says that *FIPPA* implements a specific policy choice to "provide a right of access to information under the control of institutions," allowing only "limited and specific" exemptions from that right of access; and ensuring an independent review of access decisions. The appellant argues that allowing settlement privilege to insulate operational contractual provisions from disclosure would effectively allow institutions to contract out of *FIPPA* whenever an amendment to an underlying contract is concluded in the context of settlement discussions.

[27] Finally, the appellant submits that Metrolinx has discussed the records' contents publicly and revealed details about them. The appellant says that Metrolinx has informed the media that record 2 (the contract amendment) includes harsher penalties than record 1 (the general conditions portion of the contract that contains liquidated damages provisions) if vehicles are not delivered on time or if their quality is unacceptable, in order to compensate Metrolinx for corresponding penalties that Metrolinx would owe to the consortium building the Eglinton Crosstown portion of the GTA rapid transit project (the consortium).[7] Specifically, the appellant says that Metrolinx has told the media that there would be financial penalties if the affected party did not deliver, has publicly compared the penalties under the two contracts, and that its CEO and President publicly confirmed the amount that Metrolinx was liable to pay per day to the consortium if vehicles were late, compared with the per late vehicle previously (under record 1).

[7] The Eglinton-Crosstown LRT.

Analysis and findings

[28] For the reasons that follow, I find that record 2 – and, therefore, the information at issue within it – is exempt under the litigation privilege contemplated in section 19(b), or, branch 2, of the *Act*.

[29] The reference to "litigation" in section 19(b) has been interpreted as including mediation and settlement discussions,[8] and both the courts and the IPC have found that settlement agreements made in contemplation of litigation are exempt from disclosure under section 19.

[30] As noted above, record 2 was prepared after Metrolinx commenced litigation against the affected party, and after the court required the parties to exercise a dispute resolution process mandated by their overarching agreement. Record 2 ended the dispute and replaced some of the liquidated damages or penalty provisions found in record 1.

[31] Courts have recognized the important public interest in protecting settlement privilege as it encourages settlements. The Ontario Court of Appeal found in *Liquor Control Board of Ontario v Magnotta Winery Corporation*[9] that alternative dispute resolution forms an integral part of the civil litigation process in Ontario. The Court also held that interpreting the word "litigation" in section 19(b) "to encompass mediation and settlement discussions is consonant with public interest considerations because the public interest in transparency is trumped by the more compelling public interest in encouraging the settlement of litigation."

[32] The Court found that statutory litigation privilege in section 19 protects records prepared for use in the mediation or settlement of litigation, including the end products of such mediation or settlement discussions, such as settlement agreements and minutes of settlement and wrote that:

> Once litigation is understood to include mediation and settlement discussions, it is apparent that the Disputed Records -- both those prepared by Crown counsel and those prepared by Magnotta -- fall within the second branch and are exempt from disclosure. Nothing more need be said to explain why the materials prepared by Crown counsel fall within the second branch. As for the materials prepared by Magnotta and delivered to the Crown, in my view, they were "prepared for Crown counsel" because they were provided to Crown counsel for use in the mediation and settlement discussions…

[33] The IPC has applied the Court of Appeal's findings in *Magnotta* to find settlement agreements and similar records exempt by reason of the statutory litigation privilege in

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[8] *Magnotta (ONCA)*, supra.
[9] 2010 ONCA 681 (CanLII), supra.

section 19.[10]

[34] Record 2 is an agreement entered into between Metrolinx and the affected party as a result of a mandatory dispute resolution process provided for in the parties' contract. The record was entered into to end the litigation commenced by Metrolinx to terminate the parties' contract on the basis of an alleged material breach. Record 2 was created as a result of negotiation between the parties during mediation in the context of litigation.

[35] It is apparent that litigation was not only contemplated but had, in fact, been commenced. By order of the Superior Court of Justice, Metrolinx was enjoined from terminating the contract for material default until engaging in the dispute resolution process provided for in the parties' general contract. The end product of the parties' mediation was record 2, which ended the litigation.

[36] From my review of record 2, I note that it contains specific reference to the parties' dispute and discontinuance of the claims arising from the Notice of Default that resulted in the litigation that record 2 settled. I therefore find that record 2 is exempt because it was executed by Metrolinx and the affected party in the settlement of litigation.

[37] Finally, although the appellant has not expressly argued waiver, the appellant submits that Metrolinx has discussed the contents of the records publicly. From the materials before me, I find insufficient basis to find that the revised liquidated damages provisions have been revealed. The comments attributed to Metrolinx's CEO and cited by the appellant relate to liquidated damages as between Metrolinx and the Eglinton Crosstown consortium, and not to liquidated damages as between Metrolinx and the affected party.

[38] Accordingly, I find that record 2 is exempt under the discretionary section 19(b) exemption. I will next consider whether Metrolinx properly exercised its discretion in denying access to it, including the liquidated damages provisions contained in it).

Should Metrolinx's exercise of discretion under section 19 be upheld?

[39] The section 19 exemption is discretionary, meaning that an institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether it failed to do so.

[40] The IPC may find that the institution erred in its exercise of discretion where, for example, it does so in bad faith or an improper purpose, takes into account irrelevant considerations, or fails to take into account irrelevant ones.

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[10] And its municipal equivalent. See, for example, Orders PO-3627, PO-3651, MO-3597 and MO-4006.

[41] Where an institution has erred in its exercise of discretion, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations, but the IPC cannot substitute its own discretion for that of the institution.

[42] The appellant submits that there is no indication in Metrolinx's responses, either to the appellant or in its representations, that Metrolinx conducted a discretionary assessment of whether it should invoke the section 19 exemption with respect to record 2 in whole or in part, or that it considered the public interest in ensuring meaningful transparency and accountability in public contracts.

[43] In arguing that record 2 is exempt under Branch 2, Metrolinx describes its consideration of the public policy interest in protecting the confidentiality of settlement discussions, and the circumstances under which the record was created. According to Metrolinx, the record includes " a strong confidentiality clause that prohibits the disclosure of specific numbers and figures" contained in it; confidentiality was essential for Metrolinx and the affected party to have had the open and frank discussions necessary to agree to the contract amendment (and thus, record 2); and that Metrolinx considered that the "significant public interest in protecting the confidentiality of settlement discussions in order to make the alternative dispute resolution process as effective as possible." Metrolinx also says that, while specific provisions in the record are not publicly available, many of the contract provisions with the affected party are, including the purchase costs of vehicles and key delivery dates.

[44] There is no evidence before me that Metrolinx failed to exercise its discretion or that it erred in its exercise of discretion under section 19. Based on the material before me, I find that, in exercising its discretion under section 19(b), Metrolinx took into account relevant considerations regarding the purpose of litigation privilege as articulated by the Court of Appeal in *Magnotta*. These included that record 2 was completed in the context of a mandatory dispute resolution process within litigation, and, specifically, to settle the dispute that resulted in the litigation; and weighing the public interest in protecting the confidentiality of settlement discussions in order to make the dispute resolution process as effective as possible by allowing the parties to have open and frank discussions against the public interest in transparency.

[45] I find that the Metrolinx did not take into account irrelevant considerations in exercising its discretion, and that the factors it did consider were relevant in the circumstances. Accordingly, I uphold Metrolinx's exercise of discretion in denying access to record on the basis of litigation privilege as contemplated by section 19(b) of the *Act*.

[46] Because section 23 cannot apply to records that are exempt under section 19 if they are privileged, I cannot consider whether there is a compelling public interest in disclosure of record 2 that outweighs the purpose of the section 19 exemption because

I have found that record 2 is subject to litigation privilege.[11]

[47] Also, because I have found that the record 2 is exempt from disclosure under section 19(b), it is not necessary for me to consider whether it is also exempt under either the mandatory exemption at section 17(1) or the discretionary exemptions at section 18(1)(c) or (d). Accordingly, I will next consider whether the information at issue in the remaining record, namely record 1, or the general conditions portion of the contract, is exempt under section 18(1)(c) or (d).

Issue B: Does the discretionary exemptions at section 18(1)(c) or (d) for economic and other interests apply to the information at issue in record 1?

[48] Section 18 of the *Act* is intended 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.[12]

[49] Metrolinx claims that record 1 is exempt under sections 18(1)(c) and (d). These state that:

> 18(1) A head may refuse to disclose a record that contains,
>
> …
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario to manage the economy of Ontario[.]

[50] An institution resisting disclosure of records on the basis of section 18(1)(c) or (d) cannot simply assert that the harms mentioned in those sections are obvious from the records. It must provide detailed evidence about the risk of harm if the records are 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.*[13]

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[11] Section 23 states as follows: "An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."

[12] *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.

[13] Orders MO-2363 and PO-2435.

[51] The institution must show that the risk of harm is real and not just a possibility,[14] although 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.[15]

[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.[16]

[53] The purpose of section 18(c) is to protect the ability of institutions to earn money in the marketplace. It recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and gives an institution discretion to refuse to disclose information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[17]

[54] As for section 18(d), Metrolinx must provide sufficient evidence to demonstrate that disclosure of the information in the records could reasonably be expected to be injurious to its financial interests.

Representations

Metrolinx's representations

[55] Metrolinx describes itself as the Crown agency responsible[18] for improving the coordination and integration of all modes of transportation in the Greater Toronto and Greater Hamilton Areas (GTA and GHA, respectively, and collectively GTHA). It says that its massive infrastructure expansion has many components, is the largest public infrastructure program in Canadian history, and that disclosure would prejudice its economic interests and negotiating position.

[56] In order to deliver the rapid transit projects, Metrolinx says it relies on different contractual models. It submits that the contract at issue in this appeal is an example of an Alternative Financing and Procurement Model (AFP), which Metrolinx says is intended to bring together private and public sector expertise to deliver a project "on time and on budget to provide cost savings for the public sector." Metrolinx says that completing these projects on time is important to commuters and businesses, especially given the projected increases of costs associated with congestion.

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[14] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[15] *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.
[16] Orders MO-2363 and PO-2758.
[17] Orders P-1190, MO-2233, MO-2363, PO-2632 and PO-2758.
[18] Under the *Metrolinx Act*, S.O. 2006, c.16.

[57] According to Metrolinx, a key goal of the AFP model is to ensure that vehicles are obtained for a fair price and that suppliers are incentivized to deliver them on time. It says the costs to the supplier and to Metrolinx are high if there are delays to these large rapid transit projects. Metrolinx says that it typically negotiates provisions to manage risks associated with non-performance, including liquidated damages in the event of non- performance. Metrolinx says that these provisions are intended to ensure that late delivery is avoided and to protect Metrolinx's economic interests in the event that late delivery occurs.

[58] Metrolinx says that in Canada, the pool of companies that can supply LRVs is small, partly because Ontario has strict policies regarding Canadian content and low-floor requirements for vehicles.[19] It says that these policies mean that Metrolinx has very few eligible LRV manufacturers from which to choose to supply the LRVs for its core services. Metrolinx says that the need for multiple unit operation and winterization features on its projects also limits the pool of manufacturers and that it currently obtains its vehicles from only two suppliers.

[59] Because there are currently only two LRV manufacturers supplying vehicles on its rapid transit projects, Metrolinx says it is very important for it to maintain whatever commercial leverage it can in negotiations with respect to key terms such as pricing and liquidated damages. It says that maintaining such leverage is important for both it and the companies involved in AFP-model projects to be in the best possible position to develop relationships with new manufacturers to increase the pool of potential manufacturers.

[60] Metrolinx submits that there is reasonable risk that disclosure of record 1 would deter other LRV manufacturers from doing business with Metrolinx out of fear that their confidential information, and especially any preferential terms provided to Metrolinx, would be disclosed, notwithstanding confidentiality clauses in the contracts. Metrolinx says that the resulting hesitation of manufacturers, as well as construction and financing partners, would create an additional obstacle to its already burdensome requirements.

[61] Metrolinx argues that disclosure would prejudice, and not enhance, its negotiation position and economic interests because it would give its current suppliers even more leverage and would hinder Metrolinx's ability to expand the number of eligible manufacturers for future negotiations.

[62] According to Metrolinx, disclosure of record 1 would reveal to LRV manufacturers a key element of Metrolinx's bargaining position with respect to a key provision in an existing contract, giving a vehicle manufacturer significant leverage in negotiations that would severely diminish Metrolinx's bargaining power. It says that, because of the limited number of eligible LRV manufacturers, it is very unlikely that those

[19] A 100% low-floor LRV is built with a continuous low floor throughout the entire vehicle.

manufacturers would use the information in the records as an indication of the amount they would need to "beat" in order to secure Metrolinx's business; rather, Metrolinx says that as a result of the eligible LRV manufacturers' significantly greater bargaining power, this information is likely to restrict Metrolinx's ability to seek more advantageous terms in negotiations.

[63] Metrolinx argues that, given its broad mandate to expand transit across the growing GTHA, any limits on its ability to negotiate optimal pricing and security terms would inevitably impact Ontario's economy as a whole. Metrolinx says that it "may be required to negotiate contracts with LRV manufacturers for the supply of LRVs in connection with various large rapid transit projects to be deployed over the next 10-15 years" and expects that all of those contracts will contain liquidated damages provisions to protect Metrolinx's economic interests.

The affected party's representations

[64] The affected party makes no specific representations on the application of section 18 to record 1. In fact, as noted above, the affected party submits that it does not object to the release of record 1 (and it follows, therefore, to the information at issue contained therein; namely, the provisions regarding penalties and liquidated damages).

The appellant's representations

[65] As noted above, the appellant submits that Metrolinx has discussed the records publicly and revealed details about them, including comparing the penalties payable under the two records.

[66] The appellant argues that the section 18 exemption has been found not to apply to now-dated information,[20] to information that was already in the public domain,[21] and to information relating to unique and complex agreements, as is often the case for large capital expenditures.[22]

[67] The appellant submits that the presence of specific negotiations currently underway or imminent is also an important factor, stating that in appeals where the application of section 18(1)(c) was upheld, the IPC was provided with examples of specific pending proposals or similar pending contracts.

[68] The appellant relies on Orders PO-3475 and PO-3011 to say that, where a government entity is contracting with private sector organizations to acquire products or services, the disclosure of negotiated payment arrangements will generally not compromise negotiation of new agreements as competitors will attempt to secure

[20] Order PO-2780.
[21] Order PO-3475.
[22] Order PO-3475.

contracts by agreeing to more favourable terms. The appellant also relies on an order of the Alberta IPC, Order F2009-028, which the appellant says found that this conclusion holds even in contexts where there are only a few potential private sector vendors.

Analysis and findings

[69] Although Metrolinx's argument is based on the record as a whole, my analysis focuses on disclosure of the information at issue – the liquidated damages and penalty provisions. I find that the information at issue in record 1 is not exempt under section 18(1) of the *Act*. I find that Metrolinx has not provided sufficiently detailed evidence that disclosing the penalty and liquidated damages provisions contained in record 1 could reasonably be expected to prejudice Metrolinx's economic interests or competitive position, or be injurious to the financial interests of the Government of Ontario or the government's ability to manage the economy. I find that Metrolinx's representations regarding the possible harms in sections 18(1)(c) and (d) are broad and speculative.

[70] For ease of reference, those sections state that:

> 18(1) A head may refuse to disclose a record that contains,
>
> …
>
> > (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
> >
> > (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario to manage the economy of Ontario[.]

[71] I do not accept Metrolinx's submission that disclosure of the liquidated damages and penalty provisions of the 2010 contract could reasonably be expected to be prejudicial to its economic interests or competitive position because it would reveal a key bargaining position in an existing contract to prospective LRV manufacturers. Though Metrolinx refers to various infrastructure projects, it has not specified when negotiations with manufacturers and suppliers for those projects are expected to begin. There is no evidence before me that those negotiations are imminent. Rather, Metrolinx submits that it may be required to negotiate contracts for projects to be deployed over the next 10-15 years. Metrolinx has not specified how disclosure could impede those future negotiations, or how disclosure of financial penalties agreed in 2010 could reasonably be expected to give manufacturers leverage or impair Metrolinx's bargaining position in the next 10-15 years, especially since financial penalties are but one aspect of a multi-faceted agreement, and, moreover, have been superseded by the penalties found in the 2017 contract amendment.

[72] I am also not persuaded that disclosure could reasonably be expected to prejudice Metrolinx's economic interests or competitive position because of a general and unspecified "fear" on the part of other LRV manufacturers that their information would be disclosed. As I understand the argument, Metrolinx suggests that other LRV manufacturers would be dissuaded from doing business with it.

[73] The IPC has previously rejected this position as unreasonable and highly speculative. For example, in Order PO-3475, the adjudicator considered the argument that disclosure of information could reasonably be expected to have a potential chilling effect on other contractual suppliers to the institution who, it was argued, would then be reluctant to provide further information in a contracting process. The adjudicator found that this is essentially an argument that disclosure would result in similar information no longer being supplied to the institution and did not accept this position. The adjudicator held that "[t]he allegation that similar information will not be provided by other future bidders is highly speculative" and was not persuaded that a similarly placed company would not provide the same level of information in order to secure an agreement with the institution.

[74] Similarly, in Order PO-3011, in considering access to an AFP[23] agreement between Infrastructure Ontario and a company for the redevelopment and operation of Ontario Service Centres, the adjudicator did not accept Infrastructure Ontario's submission that because of disclosure other private sector businesses could reasonably be expected to be disinclined to participate in joint projects if they were required to share what they considered proprietary information.

[75] The adjudicator found that it is not reasonable to suggest that participation by private sector partners in projects involving government bodies is less likely should information such as that which was at issue – the AFP contract – be made available publicly through access to information requests.

[76] I accept and adopt this reasoning here, even after considering Metrolinx's argument that its pool of suppliers is limited. I am also not persuaded that disclosure of the penalty and liquidated damages provisions in record 1 can reasonably be expected to affect Metrolinx's bargaining power for future contracts for which there may even exist only a limited number of suppliers. In my view, in keeping with the adjudicator's finding in Order PO-3475, where a government entity is contracting with private sector organizations to acquire products or services, the disclosure of negotiated payment arrangements will generally not compromise negotiation of new agreements as competitors will attempt to secure contracts by agreeing to more favourable terms.[24]

[77] Metrolinx has not provided me with any reasonable basis on which I could conclude that its bargaining position could reasonably be expected to be undermined by

[23] Alternative Financing Procurement Model. Described in paragraph 57, above.
[24] Order PO-3475.

disclosure of the penalty and liquidated damages provisions in record 1. I find this is especially so in view of Metrolinx's submission that it expects its future contracts to include liquidated damages and penalty clauses. It is therefore reasonable to conclude that such clauses are a foreseeable component of any future agreements and will be reasonably expected by future suppliers and manufacturers, such that disclosure of these now-dated penalty clauses will not have the chilling effect on future contracts that Metrolinx speculates it will.

[78] I also find that this appeal is distinguishable from Order PO-2659 on which Metrolinx relies. In PO-2659, the institution was acting as a seller seeking to attract business to the province. In this case, Metrolinx is acting as the buyer, which I find represents a different position in terms of bargaining strategy and leverage.

[79] Finally, although Metrolinx claims that the information at issue is sensitive and ought not be disclosed, Metrolinx does not dispute that it has publicly discussed the content of both records, including by comparing the penalties (in broad terms) under each and publicly revealing the quantum of liquidated damages payable to or by Metrolinx (to a consortium) in the event of the affected party's late delivery of vehicles.

[80] Overall, I find Metrolinx's submissions to be broad and speculative. I find that Metrolinx did not provide sufficient evidence to demonstrate how disclosure of the penalty and liquidated damages provisions in record 1 could reasonably be expected to prejudice its economic interests or competitive position, or to harm the financial interests of the province. I therefore find that neither section 18(1)(c) nor (d) applies to exempt the information at issue in record 1 from disclosure.

[81] In summary, I find that the penalty and liquidated damages provisions in record 1 are not exempt and must be disclosed to the appellant.

Issue C: Should Metrolinx's search for responsive records be upheld?

[82] The appellant has also challenged the reasonableness of Metrolinx's search for responsive records. Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24.[25] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[83] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records;[26]

[25] Orders P-85, P-221 and PO-1954-I.
[26] Orders P-624 and PO-2559.

that is, records that are "reasonably related" to the request.[27]

[84] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[28] A further search will be ordered if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[29]

[85] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[30]

[86] The appellant's concerns also touch on whether Metrolinx properly interpreted the scope of the request. As noted above, to be considered responsive to a request, records must "reasonably relate" to it.[31]

Representations

Metrolinx's representations

[87] Metrolinx submits that the request was precisely focused on the portions of the "[affected party] contract" that respond to the penalties and liquidated damages levied on the affected party for non-delivery and non-performance.

[88] Metrolinx says that there is currently only one contract in existence between it and the affected party with respect to the supply of LRVs, and that penalties and liquidated damages are only addressed in records 1 and 2, which are portions of the overall contract. Accordingly, Metrolinx says there are no further records which could possibly respond to the request, so that its search for responsive records was reasonable.

The appellant's representations

[89] The appellant submits that Metrolinx has either failed to identify as responsive multiple aspects of the contract with the affected party, or has failed to disclose as much of the records as can reasonably be severed. The appellant says that, because portions of Metrolinx's representations were not shared (for confidentiality reasons pursuant to IPC's *Practice Direction 7* on the sharing of representations), it cannot determine the precise step in the process at which this failure would have occurred.

[90] The appellant says that there is no indication, implicit or explicit, in Metrolinx's

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[27] Order PO-2554.
[28] Orders M-909, PO-2469 and PO-2592.
[29] Order MO-2185.
[30] Order MO-2246.
[31] Orders P-880 and PO-2661.

submissions that it has conducted the required assessment to determine whether any part of the records may be disclosed, but that, throughout its representations, Metrolinx refers to contractual provisions contained in record 1 that have been superseded by record 2. The appellant submits that, contrary to Metrolinx's submissions, other contractual provisions remain highly responsive to the request as they relate directly to portions of the contract that respond to penalties and liquidated damages levied on the affected party for non-delivery and non-performance. The appellant also submits that there is no temporal limitation in the access request that would render these provisions non-responsive.

[91] As I understand it, the appellant is skeptical that Metrolinx has properly identified as responsive all portions of the parties' contract that pertain to liquidated damages.

Analysis and findings

[92] Although the appellant has not specifically alleged that there are other responsive records, I have considered this. I have also considered the appellant's view that there are other portions of either record 1 or record 2 that have not been identified as responsive. These questions require me to consider whether Metrolinx conducted a reasonable search and properly interpreted the scope of the request.

[93] For the reasons that follow, I find that Metrolinx has conducted a reasonable search for records responsive to the appellant's request. I also find that Metrolinx has accurately identified the portions of its contract with the affected party that are responsive to the appellant's request.

[94] With its representations, Metrolinx provided an affidavit sworn by a senior legal counsel involved in the drafting and negotiation of Metrolinx's contracts with its contractors and suppliers. According to his affidavit, this lawyer has been involved in various dispute resolution processes related to disputes between Metrolinx and contractors and suppliers, including the negotiation of record 1 and the dispute resolution process that resulted in the creation of record 2.

[95] I accept Metrolinx's explanation that, given the narrow scope of the request (which asked for portions of "the contract" that respond to penalties and liquidated damages levied on the affected party for non-delivery and non-performance) there is no reasonable basis to conclude that there are other records or other portions of the parties' contract that are responsive.

[96] In other words, I accept that the only provisions in the "[affected party] contract" that respond to "the penalties, liquidated damages levied on [the affected party] for non- performance" are found in the records identified as records 1 and 2 in this appeal, and that, where there may be other contractual amendments that supersede other provisions in the parties' overall contract, not all will necessarily contain liquidated damages provisions. I have considered that there are certainly other

amendments between Metrolinx and the affected party, however I accept Metrolinx's evidence and context provided in an affidavit that these amendments do not contain provisions that reasonably relate to penalties or liquidated damages.[32] I am satisfied that the affiant is an experienced employee with direct knowledge of the records at issue, and I accept the explanation that these amendments do not contain provisions that reasonably relate to penalties or liquidated damages.

[97] Although, as noted, a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding such records exist. The appellant's representations do not state that other responsive records may exist but that have not been disclosed, and I find no basis on the material before me to conclude that this is the case, or that other contracts exist that provide for liquidated damages or penalties.

[98] In these circumstances, I am not persuaded that additional records exist that respond to this request, but that have not been located by Metrolinx. I therefore uphold Metrolinx's search for responsive records as reasonable.

ORDER:

1. I order Metrolinx to disclose the penalty and liquidated damages provisions in record 1 to the appellant by **May 8, 2023** but not before **May 3, 2023.**

2. In order to verify compliance with order provision 1, I reserve the right to request a copy of the record disclosed to the appellant.

3. I uphold Metrolinx's decision to deny access to the information at issue in record 2, titled "Contract Amendment," pursuant to section 19(b) of the *Act*.

Original Signed by: March 30, 2023

Jessica Kowalski
Adjudicator

[32] In accordance with IPC's *Practice Direction 7* on the sharing of representations, Metrolinx's affidavit was not shared with the appellant because it contains information that would reveal the content of record 2.