Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4480

Appeal PA22-00402

Metrolinx

February 06, 2024

Summary: Metrolinx received a request under the *Act* for a track audit report that they received from a private company. Metrolinx denied access to the report under sections 17(1) (third party information) and 18(1) (economic and other interests) of the *Act*. The appellant appealed the decision to the IPC and raised the application of section 23 (public interest override). In this order, the adjudicator finds that the report is exempt from disclosure under section 17(1) and that the public interest override does not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 17(1) and 23.

Orders Considered: Orders M-668, MO-2755 and PO-2607.

OVERVIEW:

[1] Metrolinx[1] received a request under the *Act* for access to the following record:

[1] The request was initially submitted to Ontario Northland which sought clarification from the requester prior to transferring the request to Metrolinx. Metrolinx acknowledged the transfer of the request by letter to the requester, and it subsequently issued a letter to the requester advising that an 8-week time extension was required for consultations with affected parties.

> Track audit report dated November 16, 2021, conducted by an external consultant, about the infrastructure along the North Bay – Toronto corridor to Metrolinx.

[2] Following the notification of three affected parties, Metrolinx issued a decision denying access to the responsive record, in its entirety, under the exemptions at sections 13(1) (advice and recommendations), 17(1) (third party information) and 18(1) (economic and other interests) of the *Act*.

[3] The appellant appealed Metrolinx's decision to the Information and Privacy Commissioner of Ontario (IPC). During mediation, the parties confirmed their positions, with the appellant clarifying that he was not seeking access to portions related to expanded GO service in the Richmond Hill area. Accordingly, these portions of the report are not at issue. In addition, the appellant raised the possible application of the public interest override at section 23 of the *Act*, and it was added as an issue to the appeal.

[4] The adjudicator initially assigned to the appeal decided to conduct an inquiry and sought and received representations from Metrolinx, the appellant, and two affected parties (affected party 1 is another provincial government transportation organization, while affected party 2 is a private transportation organization). Another affected party, the company that wrote the report (affected party 3) did not provide representations. During the inquiry, Metrolinx explained that they were no longer relying on the section 13(1) exemption but continued to rely on sections 17(1) and 18(1). Representations were shared in accordance with the IPC's *Code of Procedure*. The appeal was then assigned to me to complete the inquiry. I reviewed the parties' representations and determined that I did not need to seek further representations.

[5] For the reasons that follow, I uphold Metrolinx's decision that the report is exempt under section 17(1). I further find that the public interest override does not apply in the circumstances of this appeal.

RECORDS:

[6] The sole record at issue is a report dated November 16, 2021 (the report). It is described as a "track audit report" and has been withheld in its entirety. The appellant indicated during mediation that he was not seeking access to portions related to expanded GO service in the Richmond Hill area, and these sections are identified as non-responsive in the report.

ISSUES:

A. Does the mandatory exemption at section 17(1) for third party information apply to the report?

B. Is there a compelling public interest in disclosure of the report that clearly outweighs the purpose of the section 17(1) exemption?

DISCUSSION:

Issue A: Does the mandatory exemption at section 17(1) for third party information apply to the report?

[7] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[2] where specific harms can reasonably be expected to result from its disclosure.[3]

[8] Metrolinx and the affected parties have relied on sections 17(1)(a), (b), and (c), which 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

[4] For section 17(1) to apply, the party arguing against disclosure 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

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[2] *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.*).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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), (c) and/or (d) of section 17(1) will occur.

Part 1: Type of information

[9] As noted above, to satisfy part one of the section 17(1) test, the parties opposing disclosure must show that the report contains information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

Representations, analysis and finding

[10] Metrolinx submits that the report examines the impact of additional passenger train service on the operations of freight services provided by affected party 2. They state that this information is not only related to affected party 2's operations and ability to ship goods across the country, but it is also related to Metrolinx and affected party 1's ability to expand service, increasing passenger numbers. They submit that this information is therefore related to the exchange of goods and services and is therefore commercial information. Affected party 2 submits that information in the report allows inferences to be made about how various changes will affect their ability to sell and provide services to their clients, and therefore contains commercial information.

[11] Neither the appellant nor affected party 1 provided representations on the type of information in the report.

[12] Commercial information has been defined as information that relates to the buying, selling, or exchange of merchandise or services.[4] Based on my review of the report, it is clear that the report relates to the abilities of Metrolinx and the two affected parties to offer and expand transportation services, and provides detailed information about the logistics of potential expansions. As such, I find that it contains commercial information, satisfying the first part of the test.

[13] Additionally, although a finding that the report contains commercial information is sufficient to satisfy the first part of the test, Metrolinx and affected party 2 also submit that the record contains technical and financial information. For the purposes of the harms part of the section 17(1) test, I will discuss whether the report contains these types of information below.

[14] With respect to technical information, Metrolinx states that the report contains analysis and diagrams outlining current service levels for passenger and freight operations, and that it maps out potential additional services to track where vehicles may overlap and crossings may occur. Affected party 2 makes similar arguments about the report containing technical information, stating that the report discusses mitigation measures related to proposed changes, and the effects of these measures. For financial

[4] Order P-1621.

information, Metrolinx and affected party 2 state that the report outlines the expected costs related to recommended infrastructure improvements, constituting financial information.

[15] Technical information has been defined as information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Technical information usually involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.[5] Financial information has been defined as information relating to money and its use or distribution. Based on my review of the report, I find that it also contains technical and financial information.

Part 2: supplied in confidence

[16] Part two of the three-part test itself has two parts: the affected party must have "supplied" the information to the institution, and must have done so "in confidence", either implicitly or explicitly. The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[6]

[17] 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.[7]

[18] In order to satisfy the "in confidence" component of part two, the party resisting disclosure must establish that, as the supplier of the information, it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[8]

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- treated consistently by the third party in a manner that indicates a concern for confidentiality,
- not otherwise disclosed or available from sources to which the public has access, and

[5] Order PO-2010.
[6] Order PO-2010.
[7] Orders PO-2020 and PO-2043.
[8] Order PO-2020.

- prepared for a purpose that would not entail disclosure.[9]

Representations, analysis and finding

[20] Metrolinx submits that the report was developed for affected party 2 by another company (affected party 3) and contains proprietary information related to affected party 2's property and operations. They state that the report was shared with Metrolinx and affected party 1 with an expectation of confidence in order to facilitate discussions, deliberation, and the resolution of issues. They submit that proprietary information belonging to affected party 2 would not ordinarily be shared with Metrolinx, except for this purpose.

[21] They state that Metrolinx and affected party 2 have two long term master agreements that govern their relationship, which outline how the two parties will work together in the long term and contain confidentiality provisions regarding the sharing of confidential commercial information. Metrolinx states that it is therefore reasonable that affected party 2 would have shared the report with an expectation that the confidentiality provisions in the agreements would govern the information in the report. They submit that this is an implicit expectation of confidentiality, and the expectation was reasonable.

[22] Affected party 2 reiterated that there is a reasonable expectation of confidentiality with respect to the report. They submit that the report contains information that has been used to develop and inform operating and infrastructure decisions, including those related to capital expenditure investments. They submit that the report is not otherwise available from sources to which the public has access, and they have consistently treated this record in a manner that indicates concern for its confidentiality, such as only distributing it to external parties with contractual confidentiality obligations to them, on a need-to-know basis.

[23] Neither the appellant nor affected party 1 provided representations on whether the report was supplied in confidence.

[24] Based on my review of the report and the parties' representations, I agree that the report was supplied by affected party 2 to Metrolinx. Accordingly, I find that the information was supplied for the purposes of section 17(1).

[25] With respect to the expectation of confidentiality, I agree with the submissions of Metrolinx and the affected party that there was a reasonable expectation of confidentiality regarding the report. I accept Metrolinx's submission that the confidentiality provisions in their master agreements with affected party 2 would relate to the information in the report, and that the report was consistently treated as confidential by both parties. As such, I find that the report was supplied by affected party 2 to Metrolinx with a reasonable

[9] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

expectation of confidentiality.

Part 3: harms

[26] Having found that parts one and two of the test have been met, I must determine if there is a reasonable expectation that one of the harms specified in paragraphs (a), (b) or (c) of section 17(1) will occur. Parties resisting disclosure of a record cannot simply assert that the harms under section 17(1) are obvious based on the record. They 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, parties should not assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act.*[10]

[27] Sections 17(1)(a) and (c) seek to protect information that could be exploited in the marketplace.[11] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[12] However, they do 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.[13]

Representations

[28] Neither the appellant nor affected party 1 provided representations on part three of the test.

Metrolinx's Representations

[29] Metrolinx submits that the report contains detailed analysis regarding the anticipated impacts of freight delays to affected party 2's operations with the addition of added passenger train service along the rail portions owned by affected party 2. They state that section 17(1)(b) has been found to apply to situations in which affected parties might choose, because of the prospect of disclosure, to decline to provide an institution with similar information in the future.[14] They state that affected party 2 commissioned the study and provided it to Metrolinx on a voluntary basis, in the interest of working together to resolve identified issues, and that this type of deliberation requires that both parties be comfortable with sharing information with one another. They submit that release of the record could negatively impact this collaborative approach.

[30] They further submit that sharing reports like the one at issue ensures

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[10] Orders MO-2363 and PO-2435.
[11] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[12] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.
[13] *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.
[14] Metrolinx cites Order M-333.

accountability between all affected parties because by supplying a copy of the report to Metrolinx, affected party 2 is providing additional assurances that any requirements for new or modified infrastructure have been properly evaluated by independent professionals. They state that if affected party 2 chooses to no longer provide this type of information to Metrolinx, the trust and confidence required for these types of joint projects may be eroded, and it is in the interest of all affected parties, the government, and the public at large that these discussions and the sharing of analysis continue.

Affected party 2 representations

[31] Affected party 2 submits that the harms described in sections 17(1)(a), (b), and (c) are reasonably expected to occur if the report is disclosed, and that the risks of the harms transpiring is beyond that of mere possibility. With respect to sections 17(1)(a) and (c), they submit that if the report were disclosed they would suffer the following undue losses:

- Their ability to compete in the marketplace would be undermined by providing direct competitors with valuable information about their operations, business strategies, and finances. They cite Order PO-2569 as an example of a similar finding of these types of harms.

- Their future bargaining position would be affected by revealing business opportunities that they already considered and exposing the factors, impacts, and recommendations that they deemed most relevant in assessing those opportunities. They cite Order MO-2755 as an example of when it was accepted that disclosing information about strategies and positions could be reasonably expected to significantly prejudice an affected party's competitive position.

- Their ability to attract and retain customers would be reduced.

- Their competitors would be provided access to technical data, commissioned by affected party 2, that could be used to compete against affected party 2.

- Their competitors would gain access to professionals' methodologies, conclusions, and recommendations that were independently commissioned and paid for by affected party 2, despite not having to incur any expense themselves. They cite Order M-668 as an example of when a report commissioned by an affected party "at some cost" could reasonably be expected to result in undue gain to the appellant, who would be able to rely on the contents of the report without having incurred any of the expense.

[32] With respect to section 17(1)(b), their arguments were consistent with what Metrolinx submits: if the report were disclosed, they would refrain from voluntarily providing similar information to Metrolinx in the future, and would instead, for example, only provide high level summaries of information and advice received from external consultants.

Analysis and finding

[33] I am satisfied that the disclosure of the report could reasonably be expected to result in the harms contemplated by sections 17(1)(a), (b), and (c). Although it is only necessary for the harms in one of these paragraphs to be reasonably expected to occur, for the purposes of the section 23 public interest override analysis, below, I will address all of the harms claimed by Metrolinx and affected party 2.

[34] I agree with affected party 2's submissions that the harms contemplated by sections 17(1)(a) and (c) can be expected to occur if the report is disclosed. As discussed above, the report contains technical, commercial, and financial information related to the operation of railway tracks and the effects of proposed infrastructure improvements. Consistent with the analysis in Order M-668, the report here was commissioned by affected party 2, and if disclosed, other parties (even if not necessarily the appellant) would be gain access to the methodologies, conclusions, and recommendations contained in the report, at the expense of affected party 2.

[35] Additionally, throughout the report are the factors, impacts, and recommendations that affected party 2 relied on in assessing business opportunities. I accept and adopt the analysis in Order MO-2755 and find that disclosing this information could reasonably be expected to result in undue loss to affected party 2, as well as undue gain to their competitors.

[36] For section 17(1)(b), it is clear from the representations of Metrolinx and affected party 2 that this report was supplied to affected party 2 as part of a collaborative effort. While it would also have been possible for affected party 2 to instead provide a high-level summary of the report, rather than the complete report, Metrolinx benefitted from receiving the complete report. I accept the submission of affected party 2 that, if this report were to be disclosed in this appeal, similar reports would not be provided to Metrolinx in the future. Accordingly, I find that the harms contemplated by section 17(1)(b) could be reasonably expected to occur if the report were to be disclosed.

Severances

[37] In his representations on the public interest override, discussed below, the appellant stated that there should be certain portions of the report that can be disclosed while protecting the interests of the affected parties. Considering the nature of the harms that disclosing the report could lead to, I find that the report cannot be severed in a manner that would prevent the harms from occurring while resulting in any meaningful disclosure. Aside from affected party 2's concerns about the section 17(1)(b) harms applying to the entire report, the portions that, if disclosed, would lead to the harms contemplated by section 17(1)(a) and (c) are present throughout the report, and as such I find that the report is exempt from disclosure in its entirety.

[38] With the report exempt under section 17(1), I do not need to consider if it is also

exempt if it is exempt under section 18(1). However, my findings are subject to the section 23 public interest override, discussed below.

Issue B: Is there a compelling public interest in disclosure of the report that clearly outweighs the purpose of the section 17(1) exemption?

[39] Having found that the report is exempt under section 17(1), I will now consider if there is a compelling public interest in its disclosure. Section 23 of the *Act*, the "public interest override," provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

> An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[40] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records, and second, this interest must clearly outweigh the purpose of the exemption.

[41] In previous orders, the IPC has stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[15] The word "compelling" as "rousing strong interest or attention."[16]

[42] The IPC must also consider any public interest in not disclosing the record.[17] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling."[18]

[43] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation;[19]
- the integrity of the criminal justice system is in question;[20]

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[15] Orders P-984 and PO-2556.
[16] Order P-984.
[17] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.).
[18] Orders PO-2072-F, PO-2098-R and PO-3197.
[19] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[20] Order PO-1779.

- there are public safety issues relating to the operation of nuclear facilities;[21]
- disclosure would shed light on the safe operation of petrochemical facilities[22] or the province's ability to prepare for a nuclear emergency;[23]
- A compelling public interest has been found not to exist where, for example:
- another public process or forum has been established to address public interest considerations;[24]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[25]
- the records do not respond to the applicable public interest raised by appellant.[26]

Representations

[44] The appellant first provided representations on this issue, and reply representations were sought from Metrolinx and the affected parties. Sur-reply representations were then sought from the appellant.

Appellant representations

[45] The appellant's representations relevant to the public interest override are summarized below. He submits that he received a redacted track audit report from affected party 1, for the northern portion of a proposed route, and he also received a document from affected party 1 outlining transit times during a test run conducted in 2021. He states that if the requested information remains hidden from public analysis or scrutiny, Metrolinx cannot claim to demonstrate that best value was achieved and that the interests of travellers to Northern Ontario were maximized. He states that sensitive information related to costs could be redacted from the report.

[46] He states that Metrolinx is taxpayer funded, accountable to the citizens of Ontario, and requires approval from the Ministry of Transportation for their decisions. He submits that without the requested information, there is no way to know what needs to be done to mitigate concerns about infrastructure, and that if the province is willing to pay for infrastructure, what is required and where needs to be understood. He states that a general figure and a general list of what infrastructure is needed, and where, would be

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[21] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[22] Order P-1175.
[23] Order P-901.
[24] Orders P-123/124, P-391 and M-539.
[25] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[26] Orders MO-1994 and PO-2607.

sufficient to allow taxpayers to understand how money is being spent while protecting the interests of Metrolinx and the affected parties.

Metrolinx and affected parties' reply representations

[47] Metrolinx and the two affected parties provided representations, stating that the public interest override does not apply.

[48] Metrolinx submits that the issues raised by the appellant are not a compelling public interest, but rather an interest affecting transit users in northern Ontario. They submit that the appellant's concern is that without reviewing the records, he cannot confirm that the interests of travellers to Northern Ontario were maximised. They submit that this represents a certain segment of the population, and state that the IPC has previously determined that issues affecting only a small group of individuals are not of public interest.[27]

[49] They further state that the IPC has determined that even if there may be a public interest in the information, there is not a compelling public interest when the concerns raised by the appellant have been satisfied by the significant amount of disclosure that has already taken place.[28] They submit, along with affected party 1, that a significant amount of records similar to the report have already been disclosed to the public, providing information about the introduction of rail service in Northern Ontario, including discussions about track alignment, terminus options, and parallel bus service. They submit the disclosed records also include discussion about capital costs of rail service in Northern Ontario, including the cost of potential track updates, fleet procurement, and construction of terminal facilities.

[50] They submit that, even if a compelling public interest were established, it does not outweigh the purpose of the section 17(1) exemption, as disclosure of the records could harm the interests of affected party 2 and the relationship between Metrolinx and the two affected parties. They state that Metrolinx, as a Crown Agency of the Government of Ontario, has to strive to achieve the best value when expanding or constructing new transit infrastructure, and this ability may be hindered if proprietary information and financial estimates belonging to, or produced in conjunction with, external partners like affected party 2, cannot be protected. They state that the infrastructure analysis requested by the appellant can be found in already-public documents, and therefore there would be no additional value gained from disclosing the records, and there is instead a compelling public interest in not disclosing the records to protect the cooperative relationship between Metrolinx and the affected parties.

[51] Affected party 1 reiterated the representations of Metrolinx, stating that a significant amount of information about the reintroduction of the Northeastern Passenger Rail has already been disclosed, which is adequate to address public interest

[27] Metrolinx cites Order P-1511.
[28] Metrolinx cites Order P-532.

considerations, and that there is a public interest in withholding the records.

[52] Affected party 2 made similar arguments, stating that there is no compelling public interest in disclosure of the report. They submit that the record primarily relates to private interests, specifically how affected party 2 will be impacted by, and respond to, the actions of a public sector institution. They state that the report deals with their own operations, and any information related to Metrolinx or affected party 1 has already been provided to the public via affected party 1's own announcements.

[53] They submit that, even if a public interest does exist, it is not "compelling" within the meaning of section 23. They state that the report does not provide the information the appellant states that he is seeking, such as information about Metrolinx's expenditure of funds or government decision-making processes. They reference Order PO-2607, where it was found that the public interest override did not apply to records describing specific aspects of a third-party corporation's operations, because disclosure of the information in the records would not have revealed or shed light on government decision-making.

[54] Last, affected party 2 submits that even if there were a compelling public interest, such public interest is not clearly outweighed by the purpose of the section 17(1) exemption. They submit that the purpose of the section 17(1) exemption is to protect against harms that can be reasonably expected to occur if confidential information that a business has provided to an institution is disclosed in response to an access request. They submit that the section 17 exemption is being served because disclosure of the report would be reasonably expected to prejudice affected party 2's competitive position. They state that, as was the case in Order PO-2607, disclosure of the report would contribute little to government accountability and transparency and would not outweigh the purpose of the section 17 exemption.

Appellant sur-reply representations

[55] In response to the representations of Metrolinx and the affected parties, the appellant submits that the demonstration of "best value, best endeavour, and best practice" are clearly areas of compelling public interest. He submits that the issues related to travelling in northern Ontario are very much of public interest, and there were people who live in the Greater Toronto Area who responded to public consultation about the issue and used the trains when they did go to northern Ontario. He raised general issues about the adequacy of transportation services in northern Ontario and stated that without the report there was no way to address any deficiencies in a cost-effective manner.

[56] He further takes issue with the amount of disclosure he has already received about the topic, stating that "significant" is a subjective term, and in any case the amount disclosed fell far short of explaining how "best value, best endeavour, and best practice are being met in this specific situation." He also took issue with one of the records that he received being over a year and a half old at the time he submitted his representations.

Lastly, he states that the people of Ontario understanding what is being proposed, why, and at what cost is not a commercial threat to affected party 2, and that a compelling public interest in disclosure exists.

Analysis and finding

[57] I agree with Metrolinx's submission that issues affecting only a small number of individuals are not generally seen as giving rise to a compelling public interest. However, in this particular case, it is clear that issues affecting transportation to northern Ontario, impacting not only the residents of northern Ontario but anyone travelling to the area, potentially give rise to a compelling public interest. Furthermore, I agree with the appellant's submissions that the public has an interest in ensuring that government transportation projects are completed efficiently and that there should be accountability with respect to how government funds are spent.

[58] That said, I also agree with submissions of Metrolinx and the affected parties that to the extent any compelling public interest exists, it would not be served by disclosure of the report. As they submitted, the report primarily deals with the interests of affected party 2, a private organization, and how they will be impacted by the proposed actions of government institutions. I agree that this situation is similar to that in Order PO-2607, where disclosure of the records at issue would not have provided information on government decision-making. Additionally, I accept their submissions that the issues the appellant is raising are better served by documents that have already been released by Metrolinx and affected party 1.

[59] Based on the this, I am not persuaded that there is a compelling public interest that would be served by the release of the report. However, even if I were to find that there is a compelling public interest in the report's disclosure, the existence of one is not enough to trigger disclosure under section 23. The interest must also clearly outweigh the purpose of the exemption in the specific circumstances, and any public interest in non-disclosure must also be considered.

[60] A principle of the *Act*, as outlined in section 1, is that information under the control of government institutions should be available to the public, subject to limited and specific exemptions. The purpose of the section 17(1) exemption, as discussed above, is to protect the informational assets of parties who provide information to government organizations. While accountability to the public is clearly important, the section 17(1) analysis already considers the importance of government institutions being accountable to the public and strives to balance this with the need to protect the informational assets of third parties. Considering this, I do not find that a general need for accountability in the use of public funds outweighs the purpose of the section 17(1) exemption.

[61] Additionally, as discussed in the section 17(1) analysis, the report was provided to Metrolinx by affected party 2 on a voluntary basis, and it is clear that the relationship between Metrolinx and affected party 2 would be adversely affected if affected party 2

were unable to trust that information supplied with a reasonable expectation of confidentiality would not be disclosed. A relationship where the parties are able to provide information to each other with some confidence is clearly valuable, and this value would be impacted if the report were to be disclosed, showing a public interest in non-disclosure of the information. Considering all of these factors, I find that the section 23 public interest override does not apply.

ORDER:

I uphold the decision of Metrolinx and dismiss the appeal.

Original signed by: February 06, 2024

Chris Anzenberger
Adjudicator