

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4507

Appeal PA23-00293

Metrolinx

April 11, 2024

Summary: Metrolinx received a request for records related to its claims management policies in public-private partnership projects. It identified five responsive records and denied access in full, citing sections 18(1)(c) and (e) (economic and other interests) of the *Act*. In this order, the adjudicator finds that the records are exempt from disclosure under section 18(1)(c) and dismisses the appeal.

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

OVERVIEW:

[1] Metrolinx received the following request for information under the *Freedom of Information and Protection of Privacy Act* (the *Act*):

Any internal policies, procedures, guidelines, PowerPoints or other internal documents regarding Metrolinx's general process, strategy or approach for receiving, processing, managing, and approving or rejecting claims for variations, compensation events, delay events, and/or Schedule 27 disputes, on P3 projects in Ontario.

[2] Metrolinx located responsive records and issued a decision denying access to them in full under sections 18(1)(c) and (e) (economic and other interests) of the *Act*. The requester, now the appellant, appealed the decision to the Information and Privacy

Commissioner of Ontario (IPC). During mediation, Metrolinx provided an index of records to the appellant and confirmed its decision. The appellant confirmed that he continued to seek access to the records.

[3] The file moved to the adjudication stage and I conducted an inquiry, where I sought and received representations from Metrolinx and the appellant. Representations were shared in accordance with the IPC's *Code of Procedure*.

[4] For the reasons that follow, I uphold the decision of Metrolinx and dismiss the appeal.

RECORDS:

[5] There are 5 records at issue consisting of 147 pages, all relating to Metrolinx's Capital Projects Group practices and procedures. They are titled as follows:

1. Capital Projects Group Claims Management Best Practice Guide
2. Capital Projects Group P3 Claims Management Procedure
3. Capital Projects Group Claims Management Process – Quick Reference Guide
4. Capital Projects Group Quick Guide to Best Practice in Claims Management
5. Capital Projects Group AFP/P3 Variations Procedure

ISSUES:

- A. Does the discretionary exemption at section 18(1)(c) for economic interests of the institution apply to the records?
- B. Did Metrolinx exercise its discretion under section 18(1)(c)? If so, should the IPC uphold the exercise of discretion?

DISCUSSION:

Issue A: Does the discretionary exemption at section 18(1)(c) for economic interests of the institution apply to the records?

[6] 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 Metrolinx claimed the application of sections 18(1)(c), which states:

A head may refuse to disclose a record that contains,

information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution

[7] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. It recognizes that institutions may have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse to disclose information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.²

Representations

Metrolinx Representations

[8] Metrolinx submits that section 18(1), in general, allows an institution to withhold records that could compromise the various economic interests of government institutions. It states that the purpose of the exemption is to ensure that commercially valuable information is protected from disclosure to the same extent that similar information of non-governmental organizations is protected under the *Act*. It refers to page 321 of the Williams Commission Report, which states:

It is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations, or other government. Disclosure of bargaining strategy in the form of instructions given to public officials who are conducting the negotiations could significantly weaken the government's ability to bargain effectively.

[9] Referencing sections 18(1)(c) and (e) together, Metrolinx submits that it has an integral role in ensuring claims (referring to contractual requests by parties for financial compensation or relief, and/or an extension to a contract period for various reasons related to transit development projects) submitted by contractors are not overstated and spurious. It states that claims negotiations are conducted by Metrolinx on behalf of the Government of Ontario, and are therefore, for its benefit. It states that the information in the records at issue, if disclosed, would impede Metrolinx's ability to assess claims and negotiate with third parties, and that project companies and contractors would gain a

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 P-1190 and MO-2233.

unilateral advantage during claim negotiations, hurting Metrolinx's competitive position.

[10] Metrolinx states that the records contain procedural guidelines it established that inform its personnel on the management of public-private partnership (P3) claims, providing information on various procurement models, methodologies used to calculate costs, how Metrolinx conducts its analysis of contractor entitlement, and how to negotiate a claim. It submits that disclosure of these records could reasonably be expected to influence parties on how to prepare, develop, and submit claims to effectively conceal any commercial failings on the claimant's side of the process. It states that this would adversely affect Metrolinx's ability to negotiate claims and would affect the cost-efficiency of projects, prejudicing the economic interest and competitive position of the province.

[11] Referring to Order P-1190, Metrolinx submits that the IPC has recognized that there is an inherent public interest in maintaining institutions' abilities to negotiate the best possible terms in partnership or contractual negotiations. It states that the release of the records at issue would result in increased costs to Metrolinx through impacted project budgets and increased expenditure of tax-payer dollars. It explains that the framework in the records is highly confidential within Metrolinx, with restricted access provided only to members of the Capital Projects Group, and notes that negotiations regarding various claims are actively being carried out.

Appellant Representations

[12] The appellant submits that Metrolinx has not met its burden to establish the exemption at section 18(1)(c).³ He states that previous orders have consistently interpreted the "focal point" of section 18(1)(c) to be the protection of institutions' profitability. He cited the following passage found in Order PO-3577 and other orders addressing section 18(1)(c):

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. It recognizes that institutions may have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse to disclose information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.⁴

[13] Citing Order PO-3577, the appellant argues that the scope of economic harms captured by section 18(1)(c) is narrower than those in section 18(1)(d). He states that Metrolinx is a Crown agency, and its mandate relates to the coordination, planning, financing, development, and implementation of an integrated transit network in a regional transportation area. He submits that while Metrolinx's ability to "earn money in the market-place" may be impacted by the competitiveness of other transit options, it is not impacted by contractors' claims for financial compensation or extensions to contract

³ The appellant referenced Order PO-3146.

⁴ The appellant referenced Orders P-1190 and PO-3577 for this paragraph.

periods. He submits that Metrolinx is competing with other methods of transportation, such as cars, but not with contractors.

[14] He further submits that Metrolinx's claim that contractors will "gain a unilateral advantage during claims negotiations" is untenable, because the requested records and information contained within them are already within Metrolinx's possession. He states that any advantage gained by contractors would not be unilateral and would, at best, help remedy an information asymmetry that he says is present in the claims negotiations process. Lastly, he submits that disclosure of the records will result in greater transparency in the claims negotiation process, and would likely decrease, rather than increase public spending by making claims negotiations more efficient.

Analysis and Finding

[15] In order for the section 18(1)(c) exemption to apply to the records, it must be shown that disclosure of the information could reasonably be expected to prejudice Metrolinx's economic interests or competitive position.⁵ The burden is on Metrolinx to provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records or the surrounding circumstances, institutions should not assume that the harms are self-evident.⁶ Metrolinx must show that the risk of harm is real and not just a possibility, but it does not have to prove that disclosure will in fact result in harm.⁷ The evidence that is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.⁸

[16] Metrolinx submits that disclosure of the records, which broadly speaking relate to how it settles claims that arise during public transportation infrastructure projects, would adversely affect its ability to negotiate these claims, resulting in increased costs for the projects, ultimately injuring the economic interests and competitive position of Metrolinx, and in turn the province. The appellant submits that while the ability of Metrolinx to earn money in the marketplace could be impacted by other transit options, it would not be impacted by increases in contractors' claims for financial compensation.

[17] Although the economic interests of the province are only engaged by the section 18(1)(e) exemption (which Metrolinx also submitted applies) previous IPC decisions have found that the section 18(1)(c) exemption is engaged when disclosure of the information would undermine an institution's ability to negotiate in business ventures.⁹ I agree with Metrolinx's submission that providing parties with specific information about how

⁵ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

⁶ Orders MO-2363 and PO-2435.

⁷ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

⁸ *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.

⁹ See, for example, Order PO-2569.

Metrolinx negotiates and settles claims in capital projects, as is present in the records, would undermine its ability to negotiate during the claims process, ultimately increasing the costs of claims. While Metrolinx's representations generally relate to the economic position of the province, considering Metrolinx's role in developing and maintaining transportation infrastructure, it is clear that an increase in the cost of doing this would also impact the ability of Metrolinx to make money, engaging section 18(1)(c).

[18] The appellant appears to draw a distinction between reduced income from other transportation methods, such as cars, and an increased cost of projects for Metrolinx. I do not agree that this distinction exists. I accept that Metrolinx is not "competing" with contractors in the same way it competes with other transportation methods, but its ability to earn money is clearly affected by its expenses. If the expenses involved in developing transit infrastructure increase, the net income of Metrolinx will consequently decrease, impacting its economic interests.

[19] I do not agree with the appellant that disclosing the records would not result in a unilateral advantage to contractors when negotiating with Metrolinx. The records reveal the negotiating strategies of Metrolinx. If these were to be disclosed to contractors negotiating against Metrolinx, the strategies of Metrolinx would be revealed to the contractors, while Metrolinx would not have the same insight into the strategies of the contractors, resulting in a unilateral advantage for the contractors.

[20] While I accept the possibility that, as the appellant submits, disclosure of the records could result in more efficient claims negotiations, I do not agree that this potential increase, if it exists, is sufficient to negate the clear disadvantage that the disclosure of Metrolinx's strategies would cause. As such, I find that the section 18(1)(c) exemption applies to the records. Furthermore, although the appellant did not argue that the records be severed, I have reviewed the records and I find that there are no portions that can be disclosed without engaging the section 18(1)(c) exemption while providing meaningful disclosure.

[21] Having found that the records are exempt from disclosure under section 18(1)(c), I do not need to determine if they are also exempt under section 18(1)(e). I uphold the decision of Metrolinx, subject to my review of their exercise of discretion, below.

Issue B: Did Metrolinx exercise its discretion under section 18(1)(c)? If so, should the IPC uphold the exercise of discretion?

[22] The section 18(1)(c) exemption is discretionary, meaning that the 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 if the institution failed to do so.

[23] In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[24] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁰ The IPC cannot, however, substitute its own discretion for that of the institution.¹¹

Representations, Analysis, and Finding

[25] Metrolinx submits that it properly relied on the discretionary exemption to deny access to the appellant. It states that it did not exercise its discretion in bad faith or for any improper purpose, and that it did not rely on any irrelevant factors in arriving at its decision. It states that it considered the following factors when deciding to deny access:

- the purpose of the *Act* to promote the publication of information, subject to the exemptions it relied on in the appeal,
- the wording of section 18 and the interests it attempts to protect,
- the sensitive nature of the records, and the extent to which it is important for future and ongoing negotiations/discussions during the claims management process and,
- that the IPC has withheld similar records in past orders.¹²

[26] The appellant submits that disclosure of the records at issue will increase public confidence in the operation of Metrolinx and states that a November 2022 Mandate Letter to the Chair of the Board of Directors of Metrolinx from the Minister of Transportation states that Metrolinx is expected to act in the best interests of the people of Ontario and ensure that it provides value for money to taxpayers. He submits that Metrolinx's lack of transparency regarding its claims management process results in increased expenditure of taxpayer funds due to protracted negotiations, and that both overly stringent and lax claims evaluation processes can lead to inefficient use of public resources.

[27] Considering the circumstances of the appeal and the parties' representations, I am satisfied that Metrolinx properly exercised its discretion under section 18(1)(c) to withhold the records at issue. I find that Metrolinx considered relevant factors and the purpose of the section 18(1) exemption, and did not take irrelevant considerations into account. While I understand that it is the appellant's position that a more transparent claims

¹⁰ Order MO-1573.

¹¹ Section 54(2).

¹² Metrolinx also referenced factors that it requested remain confidential. I have not reproduced them here or considered them in my analysis of their exercise of discretion.

process would be beneficial to Metrolinx and the public, it is clear that Metrolinx considered the nature of the claims process and the consequences of disclosing the records when exercising its discretion.

ORDER:

I uphold the decision of Metrolinx and dismiss the appeal.

Original Signed by: _____
Chris Anzenberger
Adjudicator

_____ April 11, 2024