Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4573

Appeal PA23-00212

Infrastructure Ontario

November 15, 2024

Summary: An individual asked Infrastructure Ontario (IO) for records related to a major Ontario development project. IO located several records, releasing some but not others. The individual appealed the decision to the IPC. During the appeal IO released additional records, but refused to release three records for certain reasons (exemptions) in the *Freedom of Information and Protection of Privacy Act*: sections 17(1) (third party information), 18(1) (economic and other interests), and 19 (solicitor-client privilege).

Following the inquiry, the Ontario government released one of the records (a lease) to the public, and it was no longer at issue in the appeal. The adjudicator finds that one of the two remaining records (an amendment to the lease) should not be disclosed because of section 19, but orders that IO disclose the other one (a draft report).

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

Order Considered: Order M-182.

OVERVIEW:

[1] An individual made an access request to Infrastructure Ontario (IO) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain information. The requested information was later clarified as follows:

1. The lease agreement between [a specified company and the Province of Ontario] for the long-term lease of [a specified property].

2. Any agreements ancillary to the lease agreement with [the specified company], including, but not limited to any agreements with respect to site modification, development preparation and servicing and provision of additions supports including additional parking.

3. The following documents referenced in the appendices to [a specified draft plan commissioned by IO]:

- [record A]

- [record B]

- [record C]

4. The following documents, reports, information referenced in [a specified report]:

- The full list of Avian and fish species protected under the Endangered Species Act and their habitat that have been identified on [the specified property and which are stated to be on file].

[2] IO located seven records responsive to the request and granted access to one record ("record 3"). IO denied access to the remaining six records, claiming the mandatory exemption in section 17(1) (third party information), and the discretionary exemptions in sections 18(1)(a), (c), (d) (economic and other interests), 18(1)(g) (proposed plans, projects, or policies of an institution), and 21.1(c) (species at risk) of the *Act*. The index of records also noted that IO denied access to two of the records under the discretionary exemption in section 19 (solicitor-client privilege) of the *Act*.

[3] The requester (now the appellant) appealed IO's decision to the Information and Privacy Commissioner of Ontario (the IPC). During mediation, the appellant confirmed that she continued to seek full access to the records and raised the application of the public interest override in section 23 of the *Act*. The appellant also noted that IO's decision did not address her request for access to one of the records ("record B").

[4] IO confirmed its decision to withhold records 1, 2, 4 and 5, including its application of section 19. Regarding record B, IO explained that it intended to transfer the request to a different institution, but the transfer did not occur due to a clerical error. IO initiated the transfer during mediation. The appellant advised the mediator that she continued to pursue access to records 1, 2, 4, 5 and record B at adjudication, and that records 6 and 7 are no longer at issue. With records 6 and 7 no longer at issue, the section 21.1 exemption is not an issue in this appeal.

[5] No further mediation was possible, and the appeal was transferred to the

adjudication stage of the appeal process, where an adjudicator may conduct an inquiry. The adjudicator initially assigned to the appeal sought and received representations from IO, the appellant, and brief representations from two affected parties (described as affected party 1 and affected party 2 throughout this order). Reply and sur-reply representations were also received from IO and the appellant. Representations were shared in accordance with the IPC's *Code of Procedure*.

[6] During the inquiry, IO clarified that record 3, which it agreed to disclose as part of its access decision, is the same as record B. IO also stated that it had agreed during mediation to disclose record 4, and this record was provided to the appellant during the inquiry. As such, the only records remaining at issue were records 1, 2, and 5.

[7] The file was then transferred from the original adjudicator to me to complete the inquiry. I reviewed the representations of the parties and determined that I did not need to seek further representations before making my decision. It also came to my attention that record 1, a lease between the Ontario government and affected party 1, was released to the public by the Ontario government after the inquiry had been completed. After seeking submissions from the appellant, I decided that because it had been disclosed, there was no useful purpose in adjudicating the exemptions claimed over record 1. Accordingly, only records 2 and 5 remain at issue in this appeal.

[8] For the reasons that follow, I partially uphold the ministry's decision. I find that the draft amendment to the lease (record 5) is exempt from disclosure under section 19 of the *Act*, but I find the report (record 2) is not exempt from disclosure under any of the claimed exemptions and order it disclosed.

RECORDS:

[9] The records remaining at issue are records 2 and 5. Record 2 (pages 298-408) is described as a draft report regarding a "Strategic Conservation Plan" (the report) and record 5 (pages 500-513) is a draft amendment to a lease (the draft amendment).

ISSUES:

A. Does the discretionary solicitor-client privilege exemption at section 19 of the *Act* apply to the draft amendment?

B. Do the mandatory exemptions at sections 17(1)(a) or (c) for third party information apply to the report?

C. Do the discretionary exemptions at sections 18(1)(c) or (g) for economic and other interests of the institution apply to the report?

DISCUSSION:

Issue A: Does the discretionary solicitor-client privilege exemption at section 19 of the *Act* apply to the draft amendment?

[10] IO has claimed section 19 for the draft amendment. 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:

> 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 …

[11] Section 19 contains three different exemptions, which the IPC has referred in previous decisions as making up two "branches." The first branch, found in section 19(a), ("subject to solicitor-client privilege") is based on common law. The second branch, found in sections 19(b) and (c), ("prepared by or for Crown counsel" and "prepared by or for counsel employed or retained by an educational institution or hospital") contains statutory privileges created by the *Act*.

[12] The institution must establish that at least one branch applies.

Representations

[13] IO claims that section 19 applies to the draft amendment, and provided general representations in support of this. It provided an overview of how the IPC has treated section 19 in the past, referencing the exemptions and branches discussed above and stating that sections 19(a) and (b) applied to the draft amendment.

[14] In explaining how section 19(a) applies to the draft amendment, IO highlights the importance of institutions being able to speak confidentially with counsel, referencing *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 in support of this. It submits that solicitor-client privilege, while not absolute, is to be regarded "as close to absolute as possible."[1] It also references *Solosky v. The Queen*, [1980] 1 SCR 821, where the Supreme Court of Canada established three criteria that must be met for legal privilege to apply. It submits that to be covered by the "legal advice" privilege, a communication must be:

- between a lawyer and a client;

[1] IO references *Goodis v. Ontario* (Ministry of Correctional Services, 2006 SCC 31, *Descôteaux et al. v. Mierzwinski*, [1982] 1 SCR 860, *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, and *R. v. McClure*, 2001 SCC 14 in support of this.

- entail the seeking or giving of legal advice; and
- intended to be kept confidential by the parties.

[15] IO submits that the draft amendment is a working paper of IO lawyers and falls within the "continuum of communications" between solicitor and client. It submits that the parties never intended to release these records to the public and communicated in strict confidence. It further states that the scope of privilege is broad, protecting communications between counsel and client, and may even extend to communications between non-legal staff in some circumstances.

[16] IO submits that section 19(b) also applies because the draft amendment was prepared in confidence by IO counsel in cooperation with IO staff, the client. For both section 19(a) and (b) IO submits that there has been no waiver by the client.

[17] In response, the appellant notes that draft lease language prepared by government legal counsel that was never shared with the other party could potentially be privileged. Representations on the lease itself not being exempt were also provided, but I have not reproduced them here.

[18] Neither of the affected parties provided detailed representations, but affected party 1 commented on the application of section 19 to the draft amendment, stating that the document was clearly privileged and confidential, and should not be disclosed.

Analysis and finding

[19] Considering the nature of the records and the representations of the parties, I find that the draft amendment is protected from disclosure under section 19. In her representations, the appellant did not dispute that draft lease language would be protected by privilege. The draft amendment relates to a lease for the property underlying the request. On its face, the draft amendment, consisting of draft language for a contract between the government and a third party, prepared by IO's legal counsel for IO's consideration, is legally privileged and exempt from disclosure under section 19. I accept IO's representations that the record was not intended to be released to the public, that it forms part of the continuum of communications between IO legal counsel and IO staff regarding the issues underlying the request, and that this privilege has not been lost through waiver by the client (IO). As such, I uphold IO's decision to withhold it, subject to my analysis of its exercise of discretion.

Exercise of discretion and public interest override

[20] As stated above, section 19 is a discretionary exemption, meaning that IO could decide to disclose information even if it qualifies as exempt. I have, therefore, also reviewed IO's exercise of discretion to withhold the draft amendment.

[21] IO submits that it properly exercised its discretion to withhold the draft

amendment. Referring to its decision to withhold all of the records at issue, it states that it acted in good faith, considered all relevant factors while searching, reviewing the responsive records, and deciding not to disclose them. It further submits that the records at issue contain highly sensitive and confidential information and should not be disclosed to the public.

[22] The appellant and affected parties did not provide representations on IO's exercise of discretion.

[23] Considering IO's representations and the nature of the draft amendment, I agree that IO properly exercised its discretion. The draft amendment was withheld under solicitor-client privilege, and as IO submits in its representations on section 19 generally, there are clear reasons for records exempt from disclosure under section 19 to not be disclosed to the public. Based on its representations, it is clear that IO considered the purposes of the *Act* and sought to balance the appellant's general right of access to information with the limited exemptions to access in the *Act*.

[24] I find that IO did not exercise its discretion to withhold the information for any improper purpose or in bad faith, and that there is no evidence that it failed to take relevant factors into account or that it considered irrelevant factors. Accordingly, I uphold IO's exercise of discretion in denying access to the draft amendment. The appellant also provided representations in support of the public's interest in disclosure of the record, engaging the section 23 public interest override. However, as the public interest override does not apply to records withheld under section 19, I will not address these arguments.

Issue B: Do the mandatory exemptions at section 17(1)(a) or (c) for third party information apply to the report?

[25] As I have found that the draft amendment is exempt from disclosure under section 19, I will not discuss it further in the context of the claimed exemptions. IO has also claimed section 17(1) for the report (a draft report prepared by affected party 2). 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]

[26] In its representations, IO relies on sections 17(1)(a) and (c). Sections 17(1)(a) and (c) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information,

[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.

> 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;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

[27] 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

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

[28] As noted above, to satisfy part one of the section 17(1) test, IO or the affected party (affected party 2 for the report) must show that the record contains information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

Representations, analysis and finding

[29] IO submits that the report, a draft "strategic conservation plan" contains technical and commercial information, which the appellant did not dispute in her representations.

[30] The IPC has previously defined technical information as information belonging to an organized field of knowledge in the applied sciences or mechanical arts.[4] IO submits that the report contains specific methodologies and processes developed by professionals in project management, planning, engineering, archaeology, and architecture. Reviewing the record and considering the submissions of the parties, I agree that the report contains technical information within the meaning of section 17(1).

[31] Commercial information is information that relates to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit

[4] Order PO-2010.

organizations.[5] I agree that the report, containing details about how the project will be implemented, also contains commercial information, satisfying the first part of the test.

Part 2: supplied in confidence

[32] Part two of the three-part test itself has two parts: the affected party must have "supplied" the information to IO, and must have done so "in confidence", either implicitly or explicitly. Where information was not supplied (or would not permit the accurate inference of information supplied) to IO by the affected party, section 17(1) does not apply, and there is no need for me to decide whether the "in confidence" element of part two of the test is met.

[33] 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] 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] The contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). Contractual provisions are generally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.[8]

Representations

[34] IO submits that the report was supplied to IO by affected party 2 as part of a contractual relationship, and that there was no other way for IO to receive the information contained in the record other than getting it from affected party 2. It submits that the IPC has previously found that information provided by third parties to an institution under an agreement would likely qualify as "supplied," and states that the report should be treated the same.[9]

[35] With respect to the report being supplied "in confidence," IO, referring to the records generally, states that there was a reasonable expectation of confidence from the "totality of the surrounding circumstances, as well as specific evidence" regarding the parties' intentions for the information to be treated as confidential. It submits that the report was expressly marked as a "draft," indicating an inherent expectation of confidentiality by affected party 2. It also states that the report contains the comments

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[5] Order PO-2010.
[6] Order PO-2010.
[7] Orders PO-2020 and PO-2043.
[8] This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[9] IO references Order PO-2043 in support of this.

of specialists, which indicates its status as a work-in progress, rather than a finalized document. It also generally states that even if there is no express indication of confidentiality, an implied expectation of confidentiality can also satisfy the second part of the test.[10] It submits that the records at issue were treated in a manner that indicates concern for protecting the confidential and sensitive information in them, supporting this implied expectation.

[36] The appellant does not dispute that the report was supplied to IO by affected party 2, but submits that it was not done so in confidence. She provided an overview of the nature of the document, stating that it was created as part of a mandatory process under the *Ontario Heritage Act*[11] to provide guidance on conserving, maintaining, using, and disposing of provincial heritage properties under the control of provincial ministries or agencies. She submits that an important aspect of the development of these plans is community consultation, which allows stakeholders to play an active role in the management of community heritage resources.

[37] She provided evidence that the organization she is a part of is one of these stakeholders and was consulted in the development of the record. She provided numerous examples of times that IO invited different organizations, including hers, to comment on the development of the record, culminating in a final version of the plan being approved and released to stakeholders. Based on the consultation that was involved in the record, and the fact that the record was created to be shared with other parties as part of the consultation process, she submits that the record was not supplied in confidence.

Analysis and finding

[38] The appellant does not dispute that the report was supplied to IO by affected party 2, and I agree with IO's submissions that it was. However, the appellant disputes that this was done in confidence by affected party 2. IO's main submission is that the record is marked as a "draft," providing an inherent expectation of confidentiality. It also generally states that it was treated in a manner that implies an expectation of confidentiality but, aside from general statements, it did not provide evidence in support of this assertion. Indeed, the core of the appellant's arguments on this part of the test are that the nature of the report is such that it was created to be shared with parties, including the organization that she is a part of, as part of a consultation process.

[39] I accept the appellant's evidence that multiple parties were consulted as part of the creation of the report. It is also not disputed that a final version of the report, containing at least some of the information in this record, was ultimately released to the public.[12] That said, I do not agree that the existence of these consultations processes is sufficient to rebut the fact that the report is expressly marked as a draft, and having

[10] IO references Order PO-3937 in support of this.
[11] R.S.O. 1990, c. O.18.
[12] This was confirmed by IO as part of its reply representations on other exemptions.

reviewed it, it is clear that it is not a completed document. Even if versions of the record were shared with various parties throughout the consultation process, I do not agree that this means that there was not an expectation of confidentiality when the affected party provided this specific version of the record to IO.

[40] Considering the nature of the report, the fact that it is clearly marked as a draft, and IO's submissions on the matter, I am not satisfied that the appellant's evidence shows that the report was not supplied in confidence. However, for the reasons that follow I find that, even if the report was supplied in confidence, IO has not met part three of the section 17(1) test, discussed below.

Part 3: harms

[41] 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 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.*[13]

[42] As discussed above, IO has relied on the harms in sections 17(1)(a) and (c). Sections 17(1)(a) and (c) seek to protect information that could be exploited in the marketplace.[14] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[15] 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.[16]

Representations

[43] IO provided general representations for all of the records at issue, stating that if they were disclosed, it could reasonably be expected to significantly prejudice the competitive position of affected third parties, or interfere with the negotiations of third parties. It states that the competitive nature of the industry indicates that there would be significant prejudice to the affected party.[17] It states that the affected parties have developed numerous methodologies specific to their own operations that are not known to their competitors, and the affected parties' clients select them over their competitors partly because of their creative methodologies, plans and strategies, which if copied by

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[13] Orders MO-2363 and PO-2435.
[14] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[15] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[16] *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.
[17] IO cites PO-2774 in support of its claim.

competitors, would result in a loss of revenue.

[44] IO submits that the disclosure of methodologies outlined in the record, including the description of how the work will be done, could reasonably be expected to result in prejudice to the competitive position of the affected third parties. It states that the harm of releasing the records at issue would be to allow any number of such competitors to appropriate the affected third parties' proprietary, strategic approaches and to take advantage of any competitive opportunities, otherwise not known, that the records reflect. It refers to Order MO-1706, stating that the adjudicator there found that disclosure of confidential information of third parties that could be exploited by a competitor can, and should, be limited by section 17(1) of the *Act*. In its reply representations, IO reiterated that the records at issue contain highly sensitive commercial, technical, and financial information that was supplied to IO in confidence, and that if such records are released it would result in undue loss to the affected parties.

[45] In response, the appellant submits that there could be no expectation of harm to affected party 2 from the disclosure of a draft that was created for review by stakeholders, that would ultimately result in a publicly available strategic conservation plan. She states that it would be inappropriate for a draft strategic conservation plan to contain confidential details of the commercial relationship between the affected party and IO, and submits that IO has not provided any details to the contrary. She further submits that, as a document intended for public review, the affected party would be expected to include a full description of its approach to project implementation and development.

[46] In its reply representations IO reiterated that the records contain highly sensitive information that could cause undue loss to the affected parties if released. While discussing the application of the section 18 exemption (addressed later in this decision), IO confirmed that the report is a draft report for discussion with highlights and commentary throughout the record. It submits that the report was never completed and it did not receive any approvals required for a strategic conservation plan. It confirmed the history of the report, explaining that the original company (affected party 2) did not finish the report, and another company was brought in to complete the plan, which was later finalized, approved by the relevant minister, and is now available online. IO acknowledges that there are references to the report in the completed report, but states that this was done to avoid duplicating efforts and to give credit to affected party 2 for their work on the report.

Analysis and finding

[47] For the following reasons, I find that IO has not established that the harms contemplated by sections 17(1)(a) or (c) will occur if the report is disclosed and accordingly, I find that the report is not exempt under section 17(1) of the *Act*. In support of its position, IO only provided general submissions about all of the records at issue, despite the report being substantially different from the lease and the draft amendment. While I agree with its general argument that the disclosure of specific proprietary

approaches can potentially engage the harms in sections 17(1)(a) and (c), IO has not demonstrated that this applies to the report specifically.

[48] As the appellant submits, the report is a draft version of a document that, although it was later revised, was ultimately published. While, as discussed in part 2 of the test, above, the record is not the final version and underwent several changes as part of its development (including a changing of the company that drafted the document), the nature of the record is such that it would be made available to the public at some point and, as the appellant submits, was disclosed to various parties during the consultation process. This does not necessarily mean that the harms referred to by IO (broadly described as economic harm due to the disclosure of proprietary processes and procedures) could not occur if the record was disclosed, but it does suggest that the potential for such harms needs to be clearly demonstrated.

[49] In its representations, IO has not provided evidence of, for example, what specific proprietary information is in the draft that is not in the published document. Furthermore, aside from general statements that did not distinguish between the report and any of the other records -- and could apply to almost any record -- IO has not explained how disclosure of this unreleased information, to the extent that it exists, would lead to the harms contemplated by sections 17(1)(a) or (c).

[50] Based on my review of the contents of the report, it is not clear that these harms can be reasonably expected to occur following disclosure. For example, when discussing the application of section 18, they state that the report's release would confuse the public, but, even if this is true, this does not establish any of the section 17(1) harms. As such, I find that part three of the test has not been met, and the report is not exempt from disclosure under sections 17(1)(a) or (c).

Issue C: Do the discretionary exemptions at section 18(1)(c) or (g) for economic and other interests of the institution apply to the report?

[51] Having found that the report is not exempt under section 17(1) of the *Act*, I will next consider if it is exempt under section 18(1), which IO also claimed. The purpose of section 18 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.[18]

[52] IO has claimed that sections 18(1)(c) and (g) apply to the report. The claimed sections of section 18(1) are outlined below:

> A head may refuse to disclose a record that contains,

[18] *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.

> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

Sections 18(1)(c) – prejudice to economic interests

Representations

[53] Referring to the records at issue generally, IO submits that it would be "directly and severely prejudiced" by disclosure because the records contain sensitive information. It states that disclosure of the records would allow prospective business partners undue insight into the sensitive commercial, technical, and financial information contained in the records, and that disclosure would adversely impact IO's ability to negotiate with prospective business partners in a competitive manner. It also submits that disclosure of the records could impact pricing from suppliers and jeopardize the fair procurement process.

[54] IO submits that section 18(1)(c) often arises in situations involving market research, property sales and assessments, contractual negotiations, client and contract information, plans, forecasts and profit and revenue generation information. It explains that the records directly relate to this, and disclosure of this information will result in a competitive disadvantage to the government, as well as prejudice its ability to reasonably enter the marketplace due to a weakened competitive position.

[55] Referring to the report specifically, IO submits that it contains draft materials and commentary, subject to further change. It submits that if the record is released, the public could be mislead, leading to "unfavourable and unpredictable outcomes, which could be detrimental to the economic interest of the Ontario government."

[56] Referring to the records generally, the appellant submits that IO's arguments in support of its position are vague and non-specific. For the report specifically, she submits that the contents of the report were intended to be made public in accordance with the government's obligations under the *Ontario Heritage Act*. She states that it does not contain information that would be prejudicial to IO or the government's economic interests within the meaning of section 18(1)(c). She submits that it contains information related to public heritage attributes and strategies for conservation and management of the property in question. She submits that the record was intended to be a draft for discussion purposes as part of a public review process. She states that the purpose is clear, and as the draft was superseded by a completed report, it cannot be reasonably argued that release would mislead the public, cause economic harm to IO or Ontario.

Analysis and finding

[57] 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.[19]

[58] Section 18(1)(c) is broader than section 18(1)(a) and requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[20]

[59] An institution resisting disclosure of a record on the basis of sections 18(1)(c) (or (g), discussed later) cannot simply assert that the harms mentioned in those sections are obvious based on the record. It must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves 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.*[21] As with section 17(1), an institution claiming section 18(1)(c) must show that the risk of harm is real and not just a possibility.[22] However, the institution does not have to prove that disclosure will in fact result in harm.

[60] I have considered the representations of the parties and the nature of the record at issue, and I find that IO has not established that the harm contemplated by section 18(1)(c) can be reasonably expected to occur if the report is disclosed. Considering the content of the report, it is far from self-evident that the disclosure of this information would adversely affect the the competitive position of the Ontario government, or that it would injure it's financial interests.

[61] I agree with the appellant's submission (referring to the records generally) that IO's arguments in support of its position are vague and non-specific. The fact that the withheld records contain commercial and financial information does not automatically mean that disclosure of this information would impact the commercial and financial interests of the province: evidence of the potential harm must still be provided. The disclosure of the records may provide insight into the terms of this specific project (which as the appellant notes, relates to unique land being used in the context of a unique project of the Ontario government), but IO has not provided any evidence or arguments, aside from general statements, supporting its claims that this would impact IO or the Ontario government's ability to earn money in the marketplace.

[62] For the report specifically, a draft related to the heritage status of the property in

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[19] Orders P-1190 and MO-2233.
[20] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[21] Orders MO-2363 and PO-2435.
[22] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.

question, the core of IO's argument is that the record is a draft, and that it's disclosure would therefore impact the Ontario government's economic position due to entirely unspecified "unfavourable and unpredictable outcomes." It is not clear from IO's representations what these outcomes would relate to, or how they would lead, to any degree, to the harms contemplated by section 18(1)(c).

Section 18(1)(g)

[63] In order for section 18(1)(g) to apply, IO must show that:

1. the record contains information including proposed plans, policies or projects of an institution, and

2. disclosure of the record could reasonably be expected to result in

    i. premature disclosure of a pending policy decision, or

    ii. undue financial benefit or loss to a person.[23]

[64] The term "pending policy decision" refers to a situation where a policy decision has been reached, but has not yet been announced.[24]

Representations, analysis, and finding

[65] IO submits that the report contains draft materials, which may be subject to further changes, and as such it would be premature to disclose information that cannot be relied on by the public. It submits that this satisfies the first part of the test. For the second part of the test, IO submits that disclosure of the content of the report would be premature, and it is "more than reasonable" to conclude that it would have adverse financial consequences.

[66] The appellant submits that IO has not established that the exemption applies to the report. Referring to the records generally, she submits that the only "policy decision" would be the decision to develop the property the records are related to, which is at this point well known. She also submits disclosure would not result in any undue financial benefit or loss, relying on her arguments above.

[67] For the report specifically, she relies on her arguments for sections 18(1)(c), also stating that it cannot reasonably be argued that disclosure of the record would result in the premature disclosure of conservation plans.

[68] I agree that the first part of the test is met for the report as it discusses various proposed plans for the underlying project. However, I find that it fails the second part of

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[23] Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).
[24] Order P-726.

the test. As discussed above, IO has only provided general arguments in support of the economic costs of disclosure and, while it submits that it is reasonable to conclude that it would have adverse financial consequences, it has not established what these would actually be, or provided any evidence in support of these assertions.

[69] Additionally, IO has not established what pending policy decision would be prematurely disclosed, and considering the context of the records, this is not clear. As described in Order M-182, section 18(1)(g) contemplates a situation where a decision has been reached, but not yet implemented. Although the report clearly contains draft materials, IO has provided no evidence of what pending policy decision would be prematurely disclosed by the release of the record. IO generally claims that the release of the information would be confusing to the public, but the IPC has previously found that the potential for harm must be the result of the disclosure itself, rather than the result of information in the record being misused when disclosed.[25] In the absence of any evidence, and particularly considering the final version of the report has already been released, I find that section 18(1)(g) does not apply.

ORDER:

1. I uphold IO's decision to withhold the draft amendment.

2. I order IO to disclose the report to the appellant by **December 23, 2024** but not before **December 16, 2024**.

3. In order to verify compliance with Order provision 2, I reserve the right to require IO to provide me with a copy of the record disclosed to the appellant.

Original Signed by: November 15, 2024
Chris Anzenberger
Adjudicator

[25] Order 154.