Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4635

Appeal PA23-00667

Cabinet Office

April 2, 2025

Summary: Under the *Freedom of Information and Protection of Privacy Act,* a member of the media requested, from Cabinet Office, communications between Metrolinx and the Chief of Staff of the Premier of Ontario related to two transit projects.

Cabinet Office denied access to two responsive emails and their attachments, relying on the exemptions for advice recommendations (section 13(1)), third party information (section 17(1)) and information that might affect an institution's economic and other interests if disclosed (section 18(1)).

In this order, the adjudicator upholds Cabinet Office's decision to withhold one email, because it contains advice or recommendations but finds that its attachment does not qualify under any of the claimed exemptions. She does not uphold Cabinet Office's decision to apply any of the exemptions to the second email and its attachments. The adjudicator orders Cabinet Office to disclose one of the emails and all attachments to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 13(1), 17(1)(a) to (c), and 18(1)(c) and (d).

Orders Considered: Orders PO-2174.

OVERVIEW:

[1] A member of the media made a request to Cabinet Office[1] under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for communications between Metrolinx and the Office of the Chief of Staff to the Premier of Ontario related to two transit projects: the Ontario Line and the Eglington Crosstown Light Rail Transit (ECLRT). Specifically, his request was for:

> …all email, text and Microsoft Teams communication between [the President and CEO[2] of Metrolinx] and [the Principal Secretary, Deputy Chief of Staff Office of the Premier of Ontario].
>
> Timeframe: 2023/01/01 – 2023/07/28

[2] Cabinet Office granted partial access to the requested records, denying access to some information pursuant to a number of exemptions including, sections 13(1) (advice or recommendations), 17(1) (third party information), and 18(1) (economic and other interests) of the *Act.*[3]

[3] The requester, now the appellant, appealed Cabinet Office's decision to the Information and Privacy Commissioner of Ontario (IPC).

[4] During mediation, the appellant confirmed that he is only seeking access to the information Cabinet Office withheld under the exemptions at sections 13(1), 17(1), and 18(1).[4] The appellant also raised the possible application of the public interest override, at section 23 of the *Act* and it was added as an issue in the appeal.

[5] As mediation did not resolve the appeal it moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry.

[6] I decided to conduct an inquiry and sought and received representations from:

- Cabinet Office,
- Metrolinx (the crown agency responsible for delivering priority transit projects in Ontario, including the Ontario Line and the ECLRT projects),

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[1] Cabinet Office, also known as the Office of the Premier, provides the Premier and their Cabinet with advice and analysis to help the government achieve its priorities.
See https://www.ontario.ca/page/ministries.
[2] Chief Executive Officer.
[3] Cabinet Office also claimed the exemptions at sections 12(1) (cabinet records), 15.1 (relations with Aboriginal communities) and 19 (solicitor client privilege). The appellant confirmed at mediation that he was not appealing the information withheld under these exemptions.
[4] At mediation, the appellant raised the issue of Cabinet Office's search for responsive records. However, this issue was resolved at adjudication and is no longer at issue in this appeal.

- Crosslinx Transit Solutions (CTS) (the consortium contracted by Metrolinx to construct the ECLRT),[5] and
- the appellant.[6]

[7] In this order, I uphold Cabinet Office's decision to withhold an email about the ECLRT under section 13(1). I do not uphold Cabinet Office's decision to apply the exemptions at sections 13(1), 17(1), and 18(1) to the schedule attached to this email. I also do not uphold Cabinet Office's decision to apply section 18(1) to the other record at issue in this appeal, an email with attachments about the Ontario Line. Accordingly, I order Cabinet Office to disclose to the appellant the information that I have not found to be exempt.

RECORDS:

[8] Two records are at issue. Both are emails from 2023 sent from the President and CEO of Metrolinx (the CEO) to Cabinet Office and the Premier's Chief of Staff (the Chief of Staff) as well as to other Metrolinx and/or Government of Ontario officials.

[9] Record 1 is an email regarding the ECLRT project (page 69), with an attached schedule in the form of a chart (page 70). The chart at page 70 sets out CTS's proposed schedule or timeline for the completion of the ECLRT.

[10] Record 2 is an email regarding the Ontario Line project (page 71), attaching four photographs, three of which contain diagrams superimposed upon the photographs (pages 72 to 75).

ISSUES:

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

B. Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to record 1?

C. Does the discretionary exemption at section 18(1) for economic and other interests of the institution apply to page 70 of record 1 and to all of record 2?

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[5] Metrolinx and CTS are also referred to as the "affected parties" in this order.

[6] The parties' representations were exchanged between them in accordance with the IPC's *Practice Direction 7*. Portions of Cabinet Office's and Metrolinx's representations were confidential. I will consider these confidential portions in rendering my decision in this order, however, I will not be referring to the confidential portions in this order.

D. Did Cabinet Office exercise its discretion under section 13(1) in withholding page 69 of record 1? If so, should the IPC uphold the exercise of discretion?

E. Does the public interest override at section 23 apply to the information exempted under section 13(1)?

DISCUSSION:

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

[11] Both Cabinet Office and Metrolinx claim that record 1 is exempt from disclosure under the mandatory exemption for third party information at section 17(1) of the *Act*.

[12] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[7] where specific harms can reasonably be expected to result from its disclosure.[8]

[13] The relevant portions of section 17(1) 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 continues to be so supplied;
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> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency.[9]

[14] For section 17(1) to apply, the party arguing against disclosure must satisfy each part of the following three-part test:

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[7] *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.*).
[8] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[9] None of the parties have argued that section 17(1)(d) could apply.

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.

Background information about record 1

[15] By way of background, Metrolinx explains that in 2015, Metrolinx and Infrastructure Ontario announced that CTS had signed a contract to complete the ECLRT. The contract included work required to design, construct, and finance an integrated transit system with 25 stations/stops, track work, signaling, communications and other required infrastructure, as well as a commitment to maintain the system for 30 years, including lifecycle repair and renewal of building and system components. Metrolinx states that the contract was valued at $9.1 billion.

[16] Metrolinx states that since the contract was negotiated, CTS has initiated a number of legal claims against Metrolinx, including a claim for not successfully retaining an operator for the project, alleging this failure led to delays in the delivery of the project. Metrolinx explains that in the email that is record 1, its CEO is providing an update regarding the progress of the ECLRT by communicating CTS' proposed construction timelines to the Premier's Office as well as to officials at the Ministry of Transportation (MTO).

Part 1: type of information

Representations on type of information

[17] Cabinet Office submits that record 1 contains commercial information because the information in the CEO's email and the attached schedule relates to the services provided and intended to be provided for the completion of the ECLRT project.

[18] Metrolinx also submits that record 1 contains commercial information because it relates to a commercial transaction between itself and CTS.

[19] CTS explains that it provided the schedule at page 70 to Metrolinx, which is a summary chart that sets out the timelines for CTS' construction services for the ECLRT project. It submits that the information contained in the chart is technical information as it was prepared by a group of professionals in their respective fields and reveals a sensitive pattern, formula, compilation, programme, method and technique or process.

[20] CTS also submits that the information it provided in page 70 is commercial

information because it contains a timeline setting out the delivery of the services it was to provide to complete the project, specifically work that it was to perform in exchange for payment.

[21] The appellant did not directly address part 1 of the test under section 17(1).

Findings on type of information

[22] I agree with Cabinet Office and the affected parties that the information in record 1 is commercial information as required by part 1 of the section 17(1) test.

[23] The IPC has described commercial information as follows:

> Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.[10] The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.[11]

[24] Record 1 reveals information about the proposed schedule of CTS's construction services regarding the ECLRT project. This type of information is contained in both the CEO's email at page 69 (which derives its information from page 70) and the attached chart at page 70 setting out the schedule for completion of the LRT project. I accept that this information is commercial information as it relates to the buying and selling of construction services related to the construction of the ECLRT project by Metrolinx and CTS.

[25] I also agree with CTS that record 1 contains technical information as record 1 reveals information describing the construction of the ECLRT. The IPC has described technical information as follows:

> Technical information is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. 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.[12]

[26] As record 1 contains both commercial and technical information, I find that part 1 of the test under section 17(1) has been met.

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[10] Order PO-2010.
[11] Order P-1621.
[12] Order PO-2010.

Part 2: supplied in confidence

Representations on supplied in confidence

[27] Cabinet Office submits that record 1 contains information that was supplied in confidence by CTS to Metrolinx (the schedule), and then by Metrolinx to Cabinet Office via the email, for the purposes of managing the ECLRT project. Cabinet Office states that record 1 contains details about the ECLRT project that is intended to be confidential as the project progresses through its phases.

[28] Metrolinx submits that the attachment to the email (page 70 of record 1) was supplied to Metrolinx by CTS and that CTS had a reasonable expectation that the timeline information in that schedule would be kept in confidence and not shared externally with those not involved in the completion of the ECLRT. Metrolinx states that although the email at page 69 was not supplied directly by CTS, its disclosure would reveal the substance of communications between Metrolinx and CTS about the chart at page 70. It submits that page 69, therefore, contains information that was supplied to Metrolinx from CTS, and then subsequently supplied to MTO by Metrolinx.

[29] Metrolinx states that it supplied the information in record 1 to Cabinet Office with the expectation that it would remain confidential due to the issues between it and CTS discussed in this record.

[30] CTS submits that it prepared the schedule at page 70 of record 1 and supplied it to Metrolinx, in confidence, as part of its working relationship with Metrolinx and MTO for the completion and management of the project.

[31] The appellant states that while CTS may have supplied information to Metrolinx in confidence, the CEO of Metrolinx and the provincial government decided to break any confidence agreement they had with CTS by copying other parties on the email. As well, the appellant submits that this confidence was broken at a news conference in the spring of 2023 where the CEO announced a list of issues with the ECLRT, including track problems and signalling issues. The appellant also states that information relating to the delivery of the ECLRT has already been voluntarily disclosed by the government when it was politically convenient.

[32] Therefore, the appellant submits that any agreement to maintain information in confidence about the ECLRT project, written or implied, has already been broken as it has previously shared similar information with the public at times when it was useful to them.

[33] Cabinet Office disagrees with the appellant's position that it has breached any agreement to keep the information confidential, stating that the announcement made by the CEO of Metrolinx at the news conference regarding issues with the ECLRT are separate and apart from the content of record 1.

[34] Metrolinx states that although it has, in recent years, tried to be more forthcoming in sharing updates on the progress of ECLRT project with the public, this does not negate the confidentiality that exists over the records at issue in this appeal. Metrolinx states that it considers many factors before deciding to disclose information to the public through press conferences, technical briefings, or other means, including any confidentiality provisions or expectations to which the information is subject.

[35] Like Cabinet Office, Metrolinx states that the information that it has chosen to share with the public is separate and distinct from the record 1 and therefore, one has no bearing on the other. Metrolinx points out that the schedule on page 70 of record 1 was "supplied without prejudice" and submits therefore, that CTS continues to have a reasonable expectation that the information in the schedule, together with the information in the email which discusses the schedule will remain confidential.

Findings on supplied in confidence

[36] Based on my review of record 1 and the parties' representations, I find that it was supplied in confidence.

Supplied

[37] The requirement that the information have been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[13]

[38] 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.[14]

[39] In light of the representations of the parties and my review of the record itself, I find that the information in record 1 was supplied. The email was supplied by Metrolinx to Cabinet Office directly. Although the information in the schedule was prepared by CTS, it also was supplied to Cabinet Office directly by Metrolinx.

In confidence

[40] The party arguing against disclosure must show that both the individual supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.[15]

[41] In deciding whether an expectation of confidentiality is based on reasonable and

[13] Order MO-1706.
[14] Orders PO-2020 and PO-2043.
[15] Order PO-2020.

objective grounds, I have considered the factors set out in previous IPC orders and upheld by the court.[16]

[42] Based on these factors and my review of record 1, I agree with Cabinet Office and the two affected parties that record 1 was:

- communicated to Cabinet Office on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by Cabinet Office and the affected parties in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.

[43] I find that record 1 was supplied in confidence. The email at page 69 contains a clause that it was intended only for the recipient. The schedule on page 70 is marked without prejudice.

[44] In making this finding, I have considered the appellant's argument that Metrolinx has publicly disclosed much information about the scheduling of the ECLRT. However, based on my review of record 1 and the parties' representations, I have no evidence that the actual information in record 1 has been made publicly available. Conversely, I have been provided with sufficient evidence to conclude that it was supplied, in confidence, by Metrolinx to Cabinet Office.

[45] Accordingly, I find that part 2 of the test under section 17(1) has been met, as Metrolinx supplied record 1 to Cabinet Office with a reasonable expectation that the information would be treated confidentially.

Part 3: harms

Representations on harms

[46] Cabinet Office submits, under section 17(1)(a), that disclosure of record 1 would significantly interfere with the government's ability to effectively negotiate contracts with respect to transportation projects. It submits that disclosure could allow other third parties that are competing for such contracts to use the information to assess the extent to which the government might take certain positions on a project, and that could impact the way in which the third party prepares a proposal.

[47] Metrolinx only provided representations regarding the harms under section

[16] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

17(1)(a). It states that, under section 17(1)(a), disclosure of record 1 would interfere with the government's ability to effectively negotiate contracts with respect to future transportation projects. It submits that disclosure could negatively impact future construction opportunities for the private consortium of four transportation infrastructure companies that comprise CTS.

[48] Metrolinx states that each of these companies has their own interest in trying to contract new business opportunities for themselves, at times outside the public sector, where they will be competing against businesses whose previous projects have not been scrutinized to the level that the ECLRT project has. It submits that the competitive nature of an industry is an important consideration in assessing the reasonableness of the expectation of harm.[17]

[49] Cabinet Office submits, under section 17(1)(b), that disclosure of record 1 could reasonably be expected to result in similar types of information not being supplied to government by third parties in the future. It submits that it is in the interest of the government and the public that similar types of information as that found in record 1 continue to be supplied to the government by third parties. It states that if similar information were no longer supplied it could harm government's ability to receive the necessary updates it needs to make informed decisions about the management of a project.

[50] CTS submits that if record 1 were disclosed, there is a reasonable expectation that the harms in sections 17(1)(a) and (b) would occur because it would result in significant prejudice of its competitive position or interfere significantly with its contractual or other negotiations.

[51] CTS also submits that, under sections 17(1)(a) and 17(1)(c), disclosure of this record will likely prejudice CTS and its partners' competitive position and result in undue loss, as it will also affect its negotiations position with respect to future contracts/projects.

[52] The appellant submits that Cabinet Office's argument that disclosing this information could be expected to lead to future harm, specifically for third parties competing for Metrolinx projects, is irrelevant. He points out that on September 28, 2023, the Minister of Transportation in the Legislature said the ECLRT contract was a "bad contract," implying the government would not enter into a similar agreement again.[18] He submits that disclosing details of that contract therefore would not and cannot cause Metrolinx future harm as it would surely not plan to agree to another "bad contract" to build transit infrastructure and will therefore likely be pursuing a new format for deals to build subways, light rail and other infrastructure in Ontario going forward.

[53] In reply, Cabinet Office states that regardless of whether the government enters

[17] Metrolinx relies on Order PO-2774.

[18] https://www.ola.org/en/legislative-business/house-documents/parliament-43/session-1/2023-09-28/hansard#para457.

into a similar agreement again, disclosure of record 1 would reveal the steps being taken to resolve the ongoing issue between Metrolinx and CTS with respect to project delivery.

[54] Metrolinx submits that even though the contract with CTS has been termed a "bad contract", this is irrelevant to the disclosure of the records at issue in this appeal as this argument fails to take into consideration the harms disclosure of the records will have on the various parties to the current contract, or the complexities involved in future negotiations.

[55] Metrolinx states that the concern with the disclosure of this type of information is that it may lead to detailed updates no longer being supplied to Metrolinx which would impact Metrolinx's ability to make informed decisions about the management of the project and the resolution of disputes that may arise throughout the course of the project. It submits that these issues are independent from the terms of a contract and arise out of the implementation of a project rather than the initial terms negotiated between the parties. It submits that the appellant's argument regarding "bad contracts" does not take these issues into consideration.

[56] In sur-reply, the appellant submits that disclosing record 1, that contains CTS' 2023 proposed schedule for completion of the ECLRT, would not impact the government's public release of the opening date of the ECLRT, as Metrolinx will announce this opening date three months before the ECLRT is complete.

[57] Metrolinx responds that its intention to announce the opening of the ECLRT three months before its opening does not take into account that proposed schedules and timelines, like the one on page 70, are vital in calculating the future opening date announcements of the ECLRT. It states that pages 69 and 70 are therefore not separate from any proposed opening date but are rather vital to these discussions.

Findings on harms

[58] 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.*[19]

[59] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[20] 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

[19] Orders MO-2363 and PO-2435.
[20] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.

information.[21]

[60] In applying section 17(1) to government contracts, the need for accountability in how public funds are spent is an important reason behind the need for detailed evidence to support the harms outlined in section 17(1).[22]

[61] The email on page 69 contains Metrolinx's CEO's comments about the format of the attached schedule at page 70, which is a summary chart that sets out the timelines for CTS' construction services for the ECLRT project

[62] It is clear from the parties' representations that the schedule for the ECLRT construction and completion is a contentious issue. As indicated above, CTS has initiated a number of legal claims against Metrolinx, including a claim for not successfully retaining an operator for the project, alleging this failure led to delays in the delivery of the project. In record 1, Metrolinx is providing an update regarding the progress of the ECLRT by communicating CTS' proposed timelines to officials at the MTO and the Premier's Office.

[63] I acknowledge that there are contentious relations between Metrolinx and CTS about the ECLRT and especially about the proposed timeline for completion of the ECLRT. However, I do not agree with Cabinet Office, Metrolinx and CTS that the harms in sections 17(1)(a), (b), or (c) would reasonably be expected to occur if record 1 were disclosed.

[64] I do not accept that disclosure of record 1, the proposed timeline schedule and covering email discussing the format of this schedule, could reasonably be expected to prejudice significantly the competitive position of Cabinet Office or the affected parties as contemplated by section 17(1)(a).

[65] It is clear from the parties' representations that any proposed schedule for the ECLRT have not been complied with. As stated by the appellant, "[t]here is no opening date for the project, which is already multiple years behind schedule."[23] Although there has been litigation involving the completion of the ECLRT between Metrolinx and CTS,[24] I do not agree that disclosure of record 1 could reasonably be expected to interfere significantly with any litigation related negotiations. Both Metrolinx and CTS are parties to the litigation. In my view, neither have provided sufficient evidence as to how the disclosure of the content of either page of record 1 could reasonably be expected to prejudice significantly any negotiations related to this litigation.

[66] As well, I also do not accept that disclosure of record 1, the proposed schedule

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[21] *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.
[22] Order PO-2435.
[23] The appellant refers to https://toronto.citynews.ca/2024/03/25/eglinton-crosstown-west-construction-update.
[24] The appellant refers to https://www.cbc.ca/news/canada/toronto/eglinton-crosstown-crosslinx-sue-ttc-delays-1.6844693.

and email discussing that document, could reasonably be expected to 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 as contemplated by section 17(1)(b).

[67] I do not find it reasonable that third parties that enter into contracts to construct transit lines would refuse to provide the Government of Ontario with their proposed schedule for the completion of these transit lines if the proposed schedule on page 70 is disclosed. I find Cabinet Office's submission in this respect to be speculative and not supported by the evidence before me. In my view, any third party that enters into a contract with the Government of Ontario for a transit project would be expected to provide updates as to the completion schedule.

[68] Finally, I do not accept that disclosure of record 1 could reasonably be expected to result in undue loss or gain to Cabinet Office, Metrolinx or CTS as contemplated by section 17(1)(c). Cabinet Office, Metrolinx and CTS all express concern that disclosure of record 1 could interfere with each of them obtaining future transportation contracts. The delays in the opening of the ECLRT are well known to the public. Even if it could be said that record 1 reveals that the schedule therein has not been complied with, I do not see how disclosure of the record, in light of the public information already available about the delay in the ECLRT, could reasonably be expected to interfere with any future contractual negotiations of Cabinet Office, Metrolinx or CTS. For these reasons, I find that disclosure of record 1 could not reasonably be expected to result in undue loss or gain to Cabinet Office, Metrolinx, or CTS

[69] Therefore, I find that the harms in sections 17(1)(a), (b), and (c) have not been established and part 3 of the test has not been met for record 1. As all three parts of the test under section 17(1) must be met for the exemption to apply, record 1 is not exempt under section 17(1).

Issue B: Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to record 1?

[70] Cabinet Office claims that the exemption at section 13(1) applies to record 1.

[71] Section 13(1) of the *Act* exempts records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policymaking.[25]

[72] Section 13(1) states:

[25] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[73] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

[74] "Advice" has a broader meaning than "recommendations." It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.[26]

[75] "Advice" involves an evaluative analysis of information. Neither "advice" nor "recommendations" include "objective information" or factual material.

[76] Section 13(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[27]

[77] The relevant time for assessing the application of section 13(1) is the point when the public servant or consultant prepared the advice or recommendations. The institution does not have to prove that the public servant or consultant actually communicated the advice or recommendations. Section 13(1) can also apply if there is no evidence of an intention to communicate, since that intention is inherent to the job of policy development, whether by a public servant or consultant.[28]

[78] The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).[29] This is the case even if the content of the draft is not included in the final version.

Parties' representations

[79] Cabinet Office submits section 13(1) applies to record 1 because the email from the CEO of Metrolinx provides Cabinet Office and government officials in various ministries with advice and recommendations regarding the ECLRT project. It submits that disclosure

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[26] See above at paras. 26 and 47.
[27] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.
[28] *John Doe v. Ontario (Finance)*, cited above, at para. 51.
[29] *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

of record 1 would result in accurate inferences being made as to the advice provided to the Government of Ontario with respect to the ECLRT.

[80] The appellant submits that as an email between Metrolinx's CEO and the Premier's Chief of Staff (an unelected staff member) record 1 is a communication from the head of an arms-length agency to a public servant. He submits that because it is not a communication to either the Minister of Transportation or the premier himself, record 1 should be disclosed.

[81] The appellant further submits that because the CEO of Metrolinx does not report directly to the Chief of Staff, their communications should not be considered highly secret or involve any direct decision-making. He submits that the Chief of Staff does not make final decisions on matters and Metrolinx should not be providing him with advice on which decisions to make.

[82] In reply, Cabinet Office submits that the application of section 13(1) does not hinge on whether the individuals involved in the communication of advice are able to make final decisions. Cabinet Office submits that the Chief of Staff at the Premier's Office, and the CEO of Metrolinx, are in the best position to provide advice for decision makers with respect to the ECLRT.

[83] Furthermore, Cabinet Office submits that the communications between individuals from two institutions would qualify as advice under the exemption in section 13(1) because the purpose of the exemption is to protect the free flow of advice from one institution to another, irrespective of whether the individuals can make a final decision or not. Cabinet Office submits that disclosure of the email would result in accurate inferences as to the advice the CEO provided to government officials with respect to the ECLRT project.

[84] For its part, Metrolinx disagrees with the appellant that section 13(1) cannot apply to record 1 as the CEO does not report to the Chief of Staff, and also that the Chief of Staff is not responsible for final decisions. It states that this reasoning ignores the findings in Order PO-2174, where the adjudicator concluded that the phrase "any other person employed in the service of an institution" contained in section 13(1) can be interpreted broadly to also include intergovernmental advice and recommendations that flows from one institution to another.

[85] Metrolinx submits that the approach taken in Order PO-2174 is consistent with the notion that all government institutions fall under the umbrella of "the Crown" for the purposes of the *Act*. Metrolinx states that in the email portion of record 1 (page 69), its CEO provides government officials with information regarding the ECLRT project timeline. Metrolinx submits that the way in which the email is drafted communicates the inferred advice from the CEO to government officials, as well as advice he received from Metrolinx staff.

Findings

[86] Based on my review of the email at page 69 and the schedule at page 70, I find that only the email contains advice or recommendations within the meaning of section 13(1).

[87] In making this determination, I agree with Cabinet Office and Metrolinx that the advice contemplated by section 13(1) includes intergovernmental advice. This is in keeping with Order PO-2174 referred to by Metrolinx, in which the adjudicator states:

> The phrase "any other person employed in the service of an institution" contained in section 13(1) should be interpreted broadly to include intergovernmental advice or recommendations that flows from one institution to another. This approach is consistent with the notion that all government institutions fall under the umbrella of "the Crown" for the purposes of the *Act*. Accordingly, the fact that in this case the recommendations are flowing from public servants employed by the Ministry [of the Environment] to public servants employed by MNR [Ministry of Natural Resources] does not preclude the application of section 13(1).

[88] In the email at page 69 of record 1, Metrolinx's CEO provides an evaluative analysis of the information set out in the schedule found on page 70 of record 1. I accept that this evaluative analysis is intergovernmental advice provided by Metrolinx's CEO to other Government of Ontario Officials and its disclosure would reveal the advice of a public servant, the CEO of Metrolinx. Metrolinx is a Crown agency, and through its CEO, is providing advice to other Government of Ontario officials.

[89] Accordingly, I find that the exemption at section 13(1) applies to the email at page 69 of record 1 as it contains advice within the meaning of that section. None of the mandatory exceptions to section 13(1) in section 13(2) apply to page 69 of record 1.

[90] I find, however, that disclosure of the schedule to the email at page 70 of record 1 would not reveal the advice provided in the email at page 69 of record 1. The advice being provided by Metrolinx's CEO at page 69 concerns Metrolinx's analysis of the format, not the substance, of the information provided on page 70. The email is a separate document prepared by Metrolinx providing Metrolinx's advice to Cabinet Office and other government entities, whereas the schedule was separately prepared by CTS and does not contain advice.

[91] Therefore, I find that disclosure of the schedule at page 70 would not reveal the advice provided on page 69 of record 1 and page 70 is not exempt by reason of section 13(1).

Issue C: Does the discretionary exemption at section 18(1) for economic and other interests of the institution apply to page 70 of record 1 and to all of record 2?

[92] Cabinet Office claims that sections 18(1)(c) and (d) apply to exempt both record 1 and record 2 from disclosure. As I have already found that the email portion of record 1 (page 69) is exempt under section 13(1), I will consider whether section 18(1) applies to the schedule attached to record 1, page 70 and record 2, in its entirety, pages 71 to 75.

[93] 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.[30]

[94] Sections 18(1)(c) and (d) read:

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

[95] Section 18(1)(c) protects 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.[31] Section 18(1)(c) requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[32]

[96] The purpose of section 18(1)(d) of the *Act* is to protect the financial interests of the Government of Ontario and the ability of the Government of Ontario to manage the economy of the province and to protect the broader economic interests of Ontarians.[33]

[97] An institution resisting disclosure of a record on the basis of sections 18(1)(c) and (d) cannot simply assert that the harms mentioned in those sections are obvious based

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[30] *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.
[31] Orders P-1190 and MO-2233.
[32] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[33] Order PO-4277.

on the record. It must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, the institution should not assume that the harms are self-evident and can be proven simply by repeating the description of harms in the *Act.*[34]

[98] The institution must show that the risk of harm is real and not just a possibility.[35] However, it does not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[36]

[99] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.[37]

Representations of the parties

[100] Cabinet Office's representations on the harms under sections 18(1)(c) and (d) address each record as a whole. Cabinet Office states that the email and schedule attached to record 1 consists of communications from Metrolinx to the Premier's Chief of Staff and officials in other ministries concerning the ECLRT. Cabinet Office states that record 2 relates to demolition work at a specific subway station for the Ontario Line, being a preliminary project undertaken prior to the main construction of the Ontario Line.

[101] Cabinet Office submits that Metrolinx has expressed concern that disclosure of the information in the attached schedule in record 1 and record 2, in its entirety, will negatively affect Metrolinx's commercial interests, potentially increasing projects costs or delays, negatively impacting Ontario taxpayers.

[102] Metrolinx agrees with Cabinet Office that the disclosure of record 1, which contains information from CTS about the timeline for the ECLRT, would increase project costs and therefore negatively impact Ontario taxpayers. In that regard, it submits that other entities competing for similar contracts in the future may use the information in record 1 to assess the extent to which the Government of Ontario might take certain actions, which would impact the way these parties prepare proposals and complete contractual requirements.

[103] Metrolinx submits that disclosure of record 2 would negatively affect Metrolinx's commercial interests, potentially increasing project costs or delays, thus negatively

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[34] Orders MO-2363 and PO-2435.
[35] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[36] *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.
[37] Orders MO-2363 and PO-2758.

impacting Ontario taxpayers.

[104] Metrolinx also addresses any potential public interest in the records stating:

> …the information at issue in the records will not provide more detailed insight about the current delays to the ECLRT project, or an updated opening date, or insight into the relationship between Metrolinx and the Premier's Office…

[105] The appellant submits that sections 18(1)(c) and (d) do not apply to either record 1 or record 2. He states that the Government of Ontario and Metrolinx have been taken to court multiple times by CTS, the builders of the ECLRT. As a result, he submits that any damage to the reputation of these parties has already occurred. He states:

> In 2021, a settlement over COVID-19 delays was reached, with Metrolinx inaccurately predicting the line would be finished by the end of 2022. The builders also took the province and Metrolinx to court over its decision to disclose the 260 issues with the route. There is no opening date for the project, which is already multiple years behind schedule. Put simply, the reputation of the ECLRT project is badly damaged publicly, hurting both CTS and the Ontario government. Opposition politicians will also push for a public inquiry when the line eventually opens. With all that in mind, I submit the reputations of the parties involved are already damaged, additional payments have already exchanged hands and parts of the agreements between the two, and issues, have been made public. Those that have not, are likely to be published in the event of an inquiry. Therefore, I submit that there cannot be any details in emails between [the CEO of Metrolinx] and [the Chief of Staff] that would do the province any more economic harm than the publicly available information and management of this project has not already done.

[106] In reply, Cabinet Office submits that sections 18(1)(c) and (d) are harms-based exemptions. As such, part of the test is determining whether the disclosure of the records at issue could reasonably be expected to result in harm to the institution and does not involve an exercise of comparing existing reputational harm. Cabinet Office submits that disclosure of the records at issue would negatively affect Metrolinx's commercial interests, potentially increasing projects costs or delays, thus negatively impacting Ontario taxpayers.

[107] In reply, Metrolinx states that because CTS has initiated a number of legal claims against it, including a claim that failure to retain an operator for the project led to delays in the delivery of the project, disclosure of record 1 would affect the litigation and would increase project costs, negatively impacting Ontario taxpayers.

[108] The appellant responds that disclosure would not impact sensitive economic

information about the opening date of the ECLRT since, as announced by the Government of Ontario, the opening date will now be based on a three-month timeline, not the more general internal estimates by Metrolinx or CTS as set out in the records at issue in this appeal.

[109] He submits that disclosure of record 1 that contains information about the proposed timelines for the completion of the ECLRT would not impact the government's public release schedule for the ECLRT

[110] The appellant further submits that Metrolinx's admission that disclosure of the records would not provide more detailed insight into the current delays to the ECLRT project supports his contention that the requisite harms test under section 18(1) has not been met.

[111] Metrolinx states that record 1 is not separate from any proposed opening date, as suggested by the appellant, but are rather vital to these discussions. Metrolinx submits that disclosure of record 1, therefore, had the potential to be commercially harmful to the Government of Ontario when Cabinet Office issued its access decision and continues to have the same commercial value and importance.

Findings on sections 18(1)(c) and 18(1)(d)

[112] Neither Cabinet Office nor Metrolinx have provided evidence on the individual statements in the email at page 71 of record 2. Nor have these parties provided evidence about the individual timeline components in the attached schedule to record 1 at page 70, or the components of the attached photographs at pages 72 to 75 of record 2.

[113] As noted above, page 70 of record 1 is from 2023 and is a summary chart setting out a proposed schedule for the substantial completion of constructions services for the ECLRT prepared by CTS. Record 2, also dated 2023, contains information about the construction of the Ontario Line. This record is an email with four photographs from Metrolinx's CEO to various Government of Ontario officials about a preconstruction issue with the Ontario Line.

[114] I disagree that disclosure of either page 70 of record 1 or any portion of record 2 would prejudice the economic interests of Cabinet Office under section 18(1)(c) or the Government of Ontario (which Metrolinx as a Crown agency is a part of) under section 18(1)(d).

Page 70 of Record 1

[115] Concerning page 70 of record 1, it is clear from the parties' representations that the ECLRT's opening has been delayed, and it is still not open. The proposed CTS schedule on page 70 of record 1 was provided to Metrolinx by CTS in 2023, and from my review, is not a current schedule for completion of the ECLRT. In that regard, I note that Metrolinx has stated that page 70 of record 1 does not provide updated information regarding when

the ECLRT will open or provide other more current updates, for example when drivers will begin training on the route, because this record is from 2023.

[116] In my view, the information in the schedule on page 70 is not relevant to any future proposed or actual opening date. Therefore, I find that disclosure of page 70 of record 1 could not reasonably be expected to prejudice the economic interests or competitive position of Cabinet Office as contemplated by section 18(1)(c).

[117] In making this finding, I also find that disclosure of this proposed schedule at page 70 of record 1 would not interfere with Cabinet Office's competitive position in obtaining future similar contracts. I note that the proposed schedule at page 70 of record 1 is from 2023 and it has been well known for many years that the ECLRT opening is behind schedule. I have no evidence that the publicly available information about the delayed opening of the ECLRT has hindered Cabinet Office or Metrolinx in their ability to enter contracts for other transit projects.

[118] Accordingly, I find disclosure of the information in page 70 of record 1 could not reasonably be expected to prejudice the economic interests or competitive position of Cabinet Office under section 18(1)(c).

[119] Further, from my review of record 1 and the parties' representations, I cannot ascertain how disclosure of page 70 of record 1 could reasonably be expected to increase project costs or incur additional costs to the Government of Ontario.

[120] Specifically, I cannot ascertain how disclosure of page 70 of record 1 would be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario. Both parties to the litigation, Metrolinx and CTS, have had a copy of page 70 of record since 2023. As well, the information in the schedule is not current or accurate, as it relates to the completion schedule in 2023, whereas it is clear that this schedule has not been adhered to as regards to the completion date of the ECLRT. The ECLRT is still not open.

[121] Accordingly, I do not accept that a schedule about completion of the ECLRT from 2023 that has not been complied with could now reasonably be expected to bring about the harms contemplated by section 18(1)(d).

Record 2

[122] By not providing specific representations linking the actual information in record 2 to the harms set out in section 18(1)(c), neither Cabinet Office nor Metrolinx have provided sufficient evidence to show how the actual information in the email in record 2 or the specific details in the attached photographs, which concern a preconstruction issue for the Ontario Line, could reasonably be expected to result in prejudice to their economic interests or competitive positions. Accordingly, I find disclosure of the information in record 2 could not reasonably be expected to prejudice the economic interests or competitive position of Cabinet Office under section 18(1)(c).

[123] For similar reasons as outlined above, I find that I do not have sufficient evidence to establish that disclosure of the information in the records reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario under section 18(1)(d).

[124] From my review of record 2, I do not agree with Cabinet Office and Metrolinx that disclosure will negatively affect Metrolinx's commercial interests, potentially increasing projects costs or delays, negatively impacting Ontario taxpayers.

[125] Furthermore, by not providing specific representations on how disclosure of the actual information in record 2 would result in the harms set out in section 18(1)(d), neither Cabinet Office nor Metrolinx have provided sufficient evidence to show how the actual information in the email in record 2 or the specific details in the attached photographs, which deal with a preconstruction issue from 2023 regarding the Ontario Line, could reasonably be expected be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario.

Conclusion

[126] I have found that neither of the exemptions at section 18(1)(c) nor section 18(1)(d) apply to page 70 of record 1 or record 2 because I have insufficient evidence to conclude that disclosure of this information in those records could reasonably expected cause prejudice to Cabinet Office's economic interests or injury to its or the Government of Ontario's financial interests or the ability of the Government of Ontario to manage the economy of Ontario. In making this finding I have considered whether any of the exceptions in section 18(2) apply and find that they do not.[38]

Issue D: Did Cabinet Office exercise its discretion under section 13(1) in withholding page 69 of record 1? If so, should the IPC uphold the exercise of discretion?

[127] Of the two records at issue, I have found that only the email at page 69 of record 1 is subject to an exemption. Specifically, I found that this email contains advice and is exempt from disclosure under section 13(1).

[128] The section 13(1) exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal,

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[38] Section 18(2) reads:

> A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless,
>
> (a) the testing was done as a service to a person, a group of persons or an organization other than an institution and for a fee; or
>
> (b) the testing was conducted as preliminary or experimental tests for the purpose of developing methods of testing.

the IPC may determine whether the institution failed to do so.

[129] 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.

[130] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[39] The IPC cannot, however, substitute its own discretion for that of the institution.[40]

Representations of the parties

[131] Cabinet Office submits that it exercised its discretion not to disclose page 69 of record 1 in a reasonable manner and for purposes that are consistent with the intent of the *Act* and the stated exemptions. Cabinet Office submits that disclosure of page 69 of record 1 would undermine the confidential and iterative free flow of communications between Metrolinx, CTS, and the government.[41]

[132] The appellant submits that Cabinet Office did not exercise its discretion in a reasonable manner in deciding to withhold information under section 13(1). He states that the *Act* is clear that officials must carefully weigh whether to apply the exemptions under the *Act* that are discretionary in nature and be stringent in their use. He submits that had Cabinet Office been significantly more restrained in withholding information from the records he would not have filed an appeal.

Findings

[133] On considering the parties' representations, and on my review of page 69 of record 1, I find Cabinet Office exercised its discretion in a proper manner in withholding this page of the records.

[134] I find in exercising its discretion to withhold page 69 of record 1, Cabinet Office considered relevant factors, including:

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[39] Order MO-1573.
[40] Section 54(2).
[41] Metrolinx also provided submissions on its exercise of discretion, however, as it is not the institution whose decision is under appeal and subject to this order, its exercise of discretion is not relevant in this appeal.

- whether disclosure would increase public confidence in the Government of Ontario, including Cabinet Office, and its involvement in the financing and construction of the ECLRT and the Ontario Line, and

- the nature of the information, including its age, and the extent to which it is significant information.

[135] With respect to these considerations, although the appellant has provided extensive representations as to why, given the significant delay in the opening of the ECLRT, it is important that information related to the proposed schedule for the completion of the ECLRT is disclosed to the public, the email at page 69 of record 1 does not address the delay in the opening of the ECLRT. Instead, this email at page 69 is merely a discussion of the format of the schedule at page 70 of record 1, which I have ordered disclosed.

[136] Accordingly, I uphold Cabinet Office's exercise of discretion under section 13(1) and find that page 69 of record 1 is exempt under section 13(1).

E. Does the public interest override at section 23 apply to the information exempted under section 13(1)?

[137] I have considered the appellant's argument that the public interest override at section 23 of the *Act* should apply to records at issue in this appeal. This section provides that:

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

[138] However, the appellant's arguments on public interest override pertain to the timelines at page 70 of record 1, which I have already found is not exempt and should be released. Therefore, I need not consider the appellant's public interest override argument any further.

ORDER:

1. I do not uphold the application of sections 13(1), 17(1), and 18(1) to page 70 of record 1 and all of record 2.

2. I order Cabinet Office to disclose page 70 of record 1 and all of record 2 to the appellant by May 12, 2025, but not before May 5, 2025**.**

3. I uphold Cabinet Office's finding that page 69 of record 1 is exempt by reason of section 13(1).

4. In order to verify compliance with order provision 2, I reserve the right to require Cabinet Office to provide me with a copy of the records provided to the appellant in accordance with order provision 2.

Original Signed by: April 2, 2025

Diane Smith
Adjudicator