Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4656

Appeal PA22-00197

Infrastructure Ontario

May 14, 2025

Summary: Infrastructure Ontario (IO) received a request under the *Freedom of Information and Protection of Privacy Act* for planning and design records about the proposed Eastern Ontario Correctional Complex. IO identified three responsive records (a traffic impact study, a development feasibility student, and a functional service report), and withheld them because it says their disclosure would economically harm a third party (section 17(1)) and the Ontario Government (section 18(1)).

In this order, the adjudicator finds that IO has not established that any of the harms contemplated by sections 17(1) or 18(1) could reasonably be expected to occur if the records are released, and he orders them disclosed.

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

OVERVIEW:

[1] Infrastructure Ontario (IO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records regarding the proposed Eastern Ontario Correctional Complex in Kemptville. Specifically, the request was for:

> … all records held by Infrastructure Ontario related to the "Planning/Site Servicing/Transportation Reporting" that have been completed at the

proposed site for the Eastern Ontario Correctional Complex in Kemptville (North Grenville) from 2020-03-01 to 2022-01-31.

[2] IO identified three records responsive to the request, a traffic impact study, a development feasibility study, and a functional service report. IO notified affected parties to obtain their views regarding disclosure of the records and then issued a decision denying access to the records, claiming that sections 17(1) and 18(1) of the *Act* exempted them from disclosure in their entirety.

[3] The requester (now the appellant) appealed IO's decision to the Information and Privacy Commissioner of Ontario (IPC). During mediation, the appellant raised the application of the public interest override in section 23. IO confirmed that it continued to rely on section 17(1) and sections 18(1)(c), (d), (e) and (g) to withhold access to the records in their entirety.

[4] No further mediation was possible and the appeal was transferred to the adjudication stage of the appeals process. The adjudicator originally assigned to the appeal conducted an inquiry where she sought and received representations from IO, two affected parties (an engineering consulting company and an urban design company that drafted the records), and the appellant. The appeal was then assigned to me to complete the inquiry. I reviewed the representations of the parties and determined that I did not need to seek additional representations.

[5] For the reasons that follow, I allow the appeal and order IO to disclose the three records to the appellant in their entirety.

RECORDS:

[6] The three records at issue are a traffic impact study by the engineering consulting company (74 pages), a development feasibility study by the urban design company (38 pages), and a functional service report (962 pages) by the engineering consulting company.

ISSUES:

A. Do the discretionary exemptions at sections 18(1)(c), (d), (e), and (g) for economic and other interests of the institution apply to the records?

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

DISCUSSION:

Issue A: Do the discretionary exemptions at sections 18(1)(c), (d), (e), and (g) for economic and other interests of the institution apply to the records?

[7] 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.[1]

[8] IO has claimed sections 18(1)(c), (d), (e), and (g) for the entirety of the records at issue, which state:

> 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;
> >
> > (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;
> >
> > (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;

[9] An institution resisting disclosure of a record on the basis of sections 18(1)(c), (d), (e) or (g) 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 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.*[2]

[10] The institution must show that the risk of harm is real and not just a possibility.[3]

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[1] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.
[2] Orders MO-2363 and PO-2435.
[3] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.

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.[4]

Sections 18(1)(c) and (d): prejudice to economic interests or competitive position and injury to financial interests

[11] 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.[5]

[12] 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.[6]Similarly, section 18(1)(d) applies if the information in the records 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.

Representations, analysis, and finding

[13] For section 18(1)(c), IO submits that the economic and competitive position of the Ontario Government would be "severely and materially" prejudiced if the information was disclosed. It states that the records contain sensitive information related to the Kemptville jail project, which has yet to announce a procurement process. It explains that disclosure of the records would allow potential bidders and other parties undue insight into sensitive commercial and technical information, including recommendations provided by the affected parties. IO submits that this information, if disclosed, could provide an unfair competitive advantage, and consequently lead to an unfair procurement process.

[14] IO further states that having the predictions, analysis, and recommendations of the affected parties released could impact pricing materially and jeopardize the fair procurement process. It submits that the information in the records includes information about draft plans for potential redevelopment as well as the feasibility of the project. It submits that disclosure of this information would weaken the Government's competitive position.

[15] Similarly, for 18(1)(d), IO submits that disclosure would adversely affect the Government's purchasing power with suppliers, and be required to face higher purchasing

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[4] *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.
[5] Orders P-1190 and MO-2233.
[6] Orders PO-2014-I, MO-2233, MO-2363, PO-2632, and PO-2758.

prices.

[16] In response, the appellant states that IO has not provided sufficient evidence to support its claim. She submits that any claims of cost increases following the release of information are speculative, as the information could also lead to cost reductions through more efficient bidding processes.

[17] I agree with the appellant's position that IO has not provided detailed evidence of harms following disclosure. IO's general position is that additional information could adversely impact the procurement process and lead to higher costs to IO and the Ontario Government. While this could be a theoretical possibility for any kind of information, for it to be more than a speculative assertion there must be some evidence provided, or at the very least an argument, that links the harm to the nature of the records.

[18] IO has not provided this, and reviewing the records, it is not clear what specific information in them would adversely affect the procurement process or otherwise harm the economic or financial interests of the province. IO's representations, if accepted, would mean that any record that provides information about a project that has not yet commenced procurement could be exempt under section 18(1)(c) or (d). Considering the lack of evidence of harm, or even specific arguments that address the nature of the records, I find that sections 18(1)(c) and (d) do not apply.

Section 18(1)(e): positions, plans etc. to be applied to negotiations

[19] Section 18(1)(e) is designed to protect the Ontario Government or an institution's position in negotiations. For it to apply, IO must show that:

1. the record contains positions, plans, procedures, criteria or instructions,
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution or the Government of Ontario.[7]

[20] The IPC has defined "plan" as a "formulated and especially detailed method by which a thing is to be done; a design or scheme."[8] In fact, all of the terms "positions, plans, procedures, criteria or instructions" suggest a pre-determined course of action with an organized structure or definition.[9]

[7] Order PO-2064.
[8] Orders P-348 and PO-2536.
[9] Orders PO-2034 and PO-2598.

[21] The information must relate to a strategy or approach to negotiations. It is not enough for the information to simply reflect mandatory steps to follow in a negotiation.[10] Section 18(1)(e) applies to financial, commercial, labour, international or similar negotiations. It does not apply to government policy that is being developed with a view to introducing new legislation.[11]

Representations, analysis, and finding

[22] IO submits that the records "outline the various ways to proceed to operationalize the course of action in the Project development, in other words, they outline positions and recommendations," satisfying part one of the test above. It also states that the records contain criteria. It submits that these plans, positions, and criteria are intended to be applied directly to negotiations between IO and prospective business partners, and withholding the records allows IO to participate in fair negotiations with prospective business partners while maintaining an advantageous negotiation position for the Government and IO. It states that since the project has yet to commence procurement, the information in the records provides "crucial insight into IO's strategy or approach to be applied in negotiations with parties regarding the subject matter."

[23] The appellant submits that the four-part test outlined above has not been met. Referring to Order PO-2064, she submits that records that relate to negotiations have been clearly distinguished from records that do not. She submits that records not related to negotiations are when the government is merely seeking comments from interested and knowledgeable parties, contrasted in which the government and a third party seek to arrive at a legally binding agreement. She states that in the present appeal, the records do not relate to negotiations, but are rather comments and analysis from knowledgeable parties.

[24] Reviewing the records, I agree with the appellant's position. While the records can be said to satisfy part one of the above test, I do not agree that they can be classified as "positions, plans, procedures, criteria, or instructions" that are intended to be applied to negotiations. The fact that the procurement process for the project has not yet been initiated does not mean that any records relating to the project are therefore related to negotiations. The records at issue are documents that provide technical information about the nature of the project, but they do not contain information related to any future or ongoing negotiations. While this may provide background information for positions taken in future negotiations (although, even then IO has not specified how the information would inform these positions), this is not sufficient to qualify for exemption under section 18(1)(e).[12]

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[10] Orders PO-2034 and PO-2598.
[11] Orders PO-2064 and PO-2536.
[12] See, for example, Order M-862 where background information was found to not qualify for exemption under the municipal equivalent of the *Act*.

Section 18(1)(g): premature disclosure of proposed plans, policies or projects

[25] In order for section 18(1)(g) to apply, the institution 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.[13]

[26] The term "pending policy decision" refers to a situation where a policy decision has been reached, but has not yet been announced.[14]

Representations, analysis, and finding

[27] For part one of the test, IO explains that it is working with the Ministry of the Solicitor General to design and build the correctional complex, and the records relate to this proposed project. For part two, it submits that disclosure of the content of the record would be premature given the stage of the project, and it is "more than reasonable" to conclude that there would be adverse financial consequences for IO and the Government.

[28] The appellant submits that the substantive policy decision on the correctional complex has already been reached and announced, referencing Order P-726 to state that this disqualifies it as a "pending policy decision." She submits that the decision was announced as part of the "Eastern Region Strategy" in August 2020, and notes that planned spending for the project was detailed in IO's Market Updates report in March 2023.[15] The appellant also submits that a "pending procurement" is distinct from a pending policy decision.

[29] With respect to an undue benefit or loss, the appellant again submits that the harms to finances are merely speculative and IO has not established that there is a reasonable expectation of harm. She submits that concerns about financial consequences are merely speculative and ignore that additional information being provided to bidding parties could bring more precision to the planned activities, reducing overall costs.

[30] Considering the information provided by the parties and the records at issue, I am not satisfied that section 18(1)(g) applies to withhold the information. I agree that part

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[13] 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.).
[14] Order P-726.
[15] The appellant provided a link to IO's website to support this: https://www.infrastructureontario.ca/contentassets/5861065c0c004154adcbd6f5c87ad839/market20update20-20march202023.pdf (Accessed April 15, 2025)

one of the test has been met, but IO has not established that the release of the records would result in disclosure of a premature policy decision. As the appellant states, the project that the records relate to has already been announced, and the records, while they provide some insight into how the project will be executed, do not reveal any additional proposed plans, policies, and projects of an institution. Rather, they provide information about how already proposed plans, policies, and projects will be achieved.

[31] With respect to the potential for undue financial loss, I agree with the appellant's submission that the evidence provided by IO is insufficient for this claim. The records at issue are technical in nature, and it is far from "more than reasonable" to expect that disclosure would result in undue financial benefit or harm to a person. As discussed above, IO has not specified how the records would impact the procurement process in any meaningful way, and as the appellant submits, it is possible that disclosure would be a net benefit. In any case, it is not sufficient to merely assert that such harm will occur. For the exemption to apply, there must be detailed evidence of the harm, and IO has not provided any.

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

[32] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[16] where specific harms can reasonably be expected to result from its disclosure.[17] In addition to section 18(1), discussed above, IO has claimed section 17(1) for the entirety of the records at issue.

[33] In their representations, IO and the affected parties have relied on or discussed sections 17(1)(a), (b), and (c). These sections state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

[16] *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.*).
[17] Orders PO-1805, PO-2018, PO-2184, and MO-1706.

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

[34] 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.

[35] For the reasons that follow, I find that section 17(1) does not apply because part three of the test has not been satisfied: neither IO or the affected parties have demonstrated that the harms in sections 17(1)(a), (b), or (c) will occur following disclosure.

[36] As with section 18(1), 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.*[18]

[37] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[19] 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.[20]

[38] Sections 17(1)(a) and (c) seek to protect information that could be exploited in the marketplace, while section 17(1)(b) applies where disclosure could reasonably be expected to result in similar information no longer being supplied to the institution.[21]

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[18] Orders MO-2363 and PO-2435.
[19] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[20] *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.
[21] Orders PO-1805, PO-2018, PO-2184, and MO-1706.

Representations

IO Representations

[39] IO submits that a "reasonable expectation of probable harm is clearly evident in this matter." With respect to sections 17(1)(a) and (c), it submits that disclosure of the records would significantly prejudice the competitive position of the affected parties or significantly interfere with the affected parties' contractual negotiations. Referencing Order PO-2774, it submits that that the competitive nature of the industry indicates that disclosure would reasonably be expected to result in significant prejudice to affected parties. It states that there is a competitive climate in the affected parties' industries, and the release of records would therefore significantly prejudice the affected parties' competitive position, on-going and future negotiations, and commercial interests.

[40] IO states that the affected parties have developed numerous methodologies that are specific to their operations and not known by their competitors, and disclosing these processes would result in a loss of revenue as competitors would make use of these unique processes. It submits that information developed over a number of years and is unique to an organization satisfies part three of the test.[22] IO also references Order MO-1706, where the IPC found that disclosure of confidential information of third parties that could be exploited by a competitor and should be limited by section 17(1).

[41] For section 17(1)(b), IO submits that disclosure of the information could reasonably be expected to result in similar information no longer being supplied to IO or similar institutions, as vendors would fear that the reports would be made public. It states that consultants may therefore not submit proposals to IO with respect to future business opportunities, and IO and similar institutions would not be able to attract high-quality and competitive consultants in the future.

Affected parties' representations

[42] Both affected parties provided representations on the potential harms following disclosure. The urban design company submits that its study is in draft form and has not been subject to a proper review and finalization process, and there is therefore the potential for harm to the company's reputation if any of the information is inaccurate, out-of-date, or ambiguous. The engineering consulting company provided similar representations, stating that the two reports are not final versions. It submits that disclosure could result in their clients and potential clients erroneously concluding that their work is deficient in some way, leading to the harms contemplated by sections 17(1)(a) and (c).

Appellant representations

[43] The appellant submits that there is no reasonable expectation of harm, and any

[22] IO cites P-750.

specified harms are at best very general and speculative. She references Order PO-2435, where the adjudicator outlined the importance of providing detailed evidence when claiming that harm will occur following disclosure.

Analysis and finding

[44] I have considered the representations of the parties and the records at issue, and I find that it has not been established that either of the harms listed in section 17(1)(a), (b), or (c) will occur if the records are disclosed.

[45] With respect to section 17(1)(a) and (c), I find that neither IO nor the affected parties have provided sufficiently detailed evidence about how disclosure could reasonably be expected to "prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization" or "result in undue loss or gain to any person, group, committee or financial institution or agency." With reference to the statutory language, IO generally submits that these harms will occur, but in doing so did not explain how disclosure could reasonably be expected to cause the stated harms. It submits that disclosure of the records would mean the release of confidential methodologies and processes, but did not specify what these processes were, how the records at issue contained them, how they have been kept confidential, or what the specific impact of disclosure would be. I agree that the disclosure of confidential processes or other information can potentially engage sections 17(1)(a) and (c), but this cannot simply be asserted; some degree of evidence of the harm must still be provided.

[46] The affected parties both state that harm will occur because the records are not final versions, and their disclosure could lead to reputational harm. I note that both of the records written by the engineering consulting company are clearly labeled as drafts. Any parties receiving these records would be aware that they are drafts, mitigating any potential reputational harm following disclosure. In any case, neither affected party provided any evidence of how this harm would occur, or what specifically in the records would lead to such harm. Accepting this argument would result in any draft document supplied to the government being exempt from disclosure, even without detailed evidence of the potential for the harms set out in section 17(1). In my view, this would undermine the purpose of the *Act*.

[47] For section 17(1)(b), IO submits that disclosure would result in the affected parties and similar organizations not providing this information in the future. It did not provide any specific references to the records to substantiate this claim. Considering the nature of the records, which are reports commissioned by Infrastructure Ontario, I do not agree that disclosure could reasonably be expected to cause this harm. First, I note that neither of the affected parties claimed this in their representations. Second, it is not unreasonable to expect that parties dealing with the government understand that their submissions to the government may be made public. Indeed, Infrastructure Ontario's website notes that

documents are routinely published, and are otherwise subject to the *Act*.[23] Absent further evidence, I do not agree that the harms contemplated by section 17(1)(b) have been established simply because the records at issue are draft versions.

[48] All three parts of the test must be satisfied for section 17(1) to apply. Having found that part three of the test has not been met, I do not need to consider if parts one and two have been met, and I will order the information disclosed.

ORDER:

1. I order IO to disclose the three records at issue to the appellant by **June 18, 2025**, but not before **June 13, 2025**.

2. In order to verify compliance with Order provision 1, I reserve the right to require IO to provide me with a copy of the records disclosed to the appellant.

Original Signed by: May 14, 2025

Chris Anzenberger
Adjudicator

[23] See https://www.infrastructureontario.ca/en/what-we-do/major-projects/our-p3-model/approach-to-transparency/ (Accessed May 14, 2025).