Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3289

Appeal PA13-72

Infrastructure Ontario

December 24, 2013

Summary: Infrastructure Ontario (IO) received a request for a copy of the Request for Proposal (RFP) documents that were sent to prospective purchasers of Ontera. IO denied access to the records in part, citing the discretionary economic and other interests exemptions in sections 18(1)(c) and (d). IO also raised two additional discretionary exemptions late to the names in the records, citing the discretionary exemptions in sections 14)(1)(e) (endanger the life or physical safety) or 20 (threat to health or safety). This order allows the late raising of the two additional discretionary exemptions. This order does not uphold the application of the exemptions and orders disclosure of all of the information at issue in the records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 18(1)(c), 18(1)(d), 14(1)(e), 20.

Orders and Investigation Reports Considered: MO-1474, MO-1681, MO-2496-I, PO-1894, and PO-3146.

OVERVIEW:

[1] Infrastructure Ontario (IO or the institution) received a request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for a copy of

the Request for Proposal (RFP) documents that were sent to prospective purchasers of Ontera.[1]

[2] IO issued a decision denying access to the five records described in its decision and found to be responsive, pursuant to section 18(1) (economic and other interests) of the *Act.*

[3] The requester (now the appellant) appealed the institution's decision to deny access to the responsive records.

[4] During mediation, IO issued a revised decision denying access to parts of Records 1 to 4 and all of Record 5 pursuant to section 18(1) of the *Act*. The institution explained that it had revised its decision as part of the sales process had been completed and the related parts of the records could now be disclosed to the appellant. The institution indicated that other sales processes were ongoing and access continued to be denied to records related to these processes.

[5] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to IO seeking its representations initially. I received representations from IO and provided a copy of IO's representations to the appellant, who did not provide representations in response.

[6] In its representations, IO claimed the application of the discretionary exemptions in sections 14(1)(e) (life or physical safety) and 20 (threat to safety or health) to the references that were made to individuals identified in the records. As such, these exemptions have been added to this appeal, as well as the issue of whether IO ought to be able to raise these discretionary exemptions late in the process.

[7] In this order, I do not uphold IO's decision and order disclosure of the information at issue in the records.

RECORDS:

[8] The records remaining at issue consist of Records 1 to 4, withheld in part, and Record 5, fully withheld, more particularly described as:

[1] Ontera is a telecommunication company and is wholly owned subsidiary of the Ontario Northland Transportation Commission (ONTC), which is an operational agency of the Province of Ontario. See http://www.ontera.ca/index.php/en/about-ontera/history

Record #	Description
1	Ontario RFP issued December 12, 2012
2	Ontario RFP Addendum No. 1 issued December 21, 2012
3	Ontario RFP Questions & Answers No. 1 issued January 7, 2013
4	Ontario RFP Addendum No. 2 issued January 11, 2013
5	Ontario RFP Share Purchase Agreement

ISSUES:

A. Does the economic and other interests discretionary exemption at section 18(1)(c) and (d) apply to the records?

B. Late Raising of Discretionary Exemptions

C. Does the discretionary law enforcement exemption at section 14(1)(e) or the threat to safety or health discretionary exemption at section 20 apply to the records?

DISCUSSION:

A. Does the economic and other interests discretionary exemption at section 18(1)(c) and (d) apply to the records?

[9] Section 18(1) states in part:

> A head may refuse to disclose a record that contains,
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the 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;

[10] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[11] For sections 18(1)(c) and (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[2]

[12] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 18.[3]

[13] Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[4]

[14] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests.[5]

Representations of IO

[15] By way of background, IO provided the following information:

> In March 2012 …the Ontario government approved the following mandate for the Ministry of Northern Development and Mines (MNDM) and the Ontario Northland Transportation Commission (ONTC) to:
>
> > (a) divest ONTC's assets and business units subject to the approval of the Province of Ontario;
> >
> > (b) wind up and liquidate any assets and obligations which cannot be so divested; and

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[2] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[3] Orders MO-1947 and MO-2363.
[4] Order MO-2363.
[5] See Orders MO-2363 and PO-2758.

> (c) until the completion of the divestiture process, to continue to provide efficient, safe and reliable services in Northern Ontario as directed…
>
> Ontera provides connectivity of voice, video, data and internet to a large number of communities in Northeast Ontario through its tower and fiber network. Ontera also provides local telephone service in addition to data and internet services to five communities. The Ontera network extends across much of North-eastern Ontario…
>
> Based on this mandate and the Ontario government's direction, IO began the Ontera sales process. The sales process of Ontera began with the release of a request for qualifications (RFQ) on October 2, 2012, which invited interested buyers to submit their qualifications to purchase, manage, and operate Ontera.
>
> All interested buyers submitted their responses to the RFQ on October 25, 2012. RFQ submissions were evaluated, and potential buyers were prequalified based on their respective technical experience transaction expertise, and financial capacity to purchase, manage, and operate Ontera.
>
> Only potential buyers prequalified through the RFQ process were invited to respond to a request for proposals (RFP) issued to each of them on December 17, 2012.

[16] IO submits that the records contain information about the form and structure of the Ontera divestiture, which is currently under negotiation in a competitive sales process. It states that the records have only been provided to certain prequalified potential buyers under the terms and conditions of confidentiality agreements, which have been executed to ensure the sales process remains highly confidential. According to IO, this step was taken in order to facilitate competitive negotiations and a favourable outcome for the Province. It states that the requirement for confidentiality is important to IO in order to allow it to negotiate the sale of Ontera in a favourable form which generates optimal revenue and addresses a number of other policy considerations related to sustained employment, service continuity and investment concerns in Northern Ontario. Obtaining the best outcome for the Ontario taxpayer is dependent upon IO being able to maintain the confidentiality of certain sensitive information, until a time where negotiations have concluded.

[17] IO states that the information contained in the redacted portions of the responsive records have not been provided to anyone other than prequalified potential purchasers.

[18] IO states that it is concerned that premature disclosure of the information requested could lead to the perception by any potential buyers that IO is not acting in good faith, resulting in unnecessary delays and costs further causing harm to IO and the Government of Ontario's economic, competitive and financial interests. In addition, should the Ontera sale not proceed, IO would be required to seek alternative buyers which would likely be difficult due to the specialized nature of Ontera's business, namely, telecommunication services to communities in Northeastern Ontario.

[19] IO submits that until the sale of Ontera concludes and is completed with a formal share purchase agreement, it is possible for any and all potential buyers to withdraw from participation in negotiations. If potential buyers withdraw from the sales process, it would prove very difficult to attract alternative buyers while continuing to preserve and seek to obtain the best value for the sale of Ontera.

[20] IO states that the confidential and competitive nature of the sales process is a necessary component of ensuring that negotiations continue between IO and prequalified potential buyers. Maintaining confidentiality while negotiations are ongoing ultimately provides IO with the ability to obtain the best value for money for Ontarians from the sale. IO states that disclosure at this time would put IO and the Government of Ontario's financial interests at risk and would also be detrimental to IO's ability to negotiate the best competitive deal possible. Concerning the specific exemptions, IO states that:

> In regards to section 18(1)(c) of *FIPPA*, the matter of the Ontera sale is similar to the situation faced by Hydro One, in Order P-1210. In that case, disclosure of the requested records could reasonably be expected to prejudice the economic interests and/or the competitive position of the Government of Ontario by negatively impacting sale revenues. The sale of Ontera is one vehicle by which Ontario is attempting to raise funds and avoid costs in tough economic times; therefore, it follows that securing the best value for the sale and the most favourable offer is the intended objective of this divestiture.
>
> Additionally, Order MO-1474 is relevant because the share purchase agreement for which disclosure was being sought in that fact scenario related to an in progress transaction where negotiations were ongoing. Accordingly, Adjudicator Nipp found that disclosing the records prior to the completion of the transaction could prejudice the City of Toronto such that disclosure could result in the transaction terminating.
>
> In regards to section 18(1)(d) of *FIPPA*, Order MO-1681, it was held that in situations where an "institution has entered into an arrangement to create a profitable business venture, disclosure of information giving Ontario a competitive advantage may reasonably injure the financial

interests of Ontario." This decision turned on the fact that the sale was not complete and therefore disclosure could be disadvantageous to the Township of Oro-Medonte because it would reveal the proposals of the parties, the terms of the sale, and the value place on the land.

Order MO-1681 is analogous to the matter at hand because the Ontera divestiture is an arrangement to create a profitable business venture and the direction to sell this business line came from the provincial budget which attempted to raise provincial revenues in difficult economic times. Therefore, the success of this sale is closely tied to the government's ability to manage the economy.

Since the sale of Ontera is not yet complete, disclosure of the documents in question could reasonably be expected to be injurious to the government of Ontario because the competitive bidding process is intended to enable the government to sell the asset in accordance with the best offer tendered. It is possible that a bidder might offer Ontario more money than what Ontario has assessed the value of Ontera to be, but this becomes less likely if information is prematurely or inappropriately disclosed. Ontario's competitive advantage lies in the fact that there are multiple bidders who wish to purchase Ontera. It is in Ontario's financial interest to have the bidders bid against each other with the intent of securing the highest possible price, the most favourable terms and the best value for the asset.

In applying section 18(1)(d) of *FIPPA*, Order PO-3146 is analogous to the current situation because the disclosure of the records, and in particular the share purchase agreement, would reveal the terms that IO is seeking in this transaction. Disclosure would be injurious because it could impact future stages of the competitive sales process by allowing potential buyers to structure their proposals according to what was disclosed as opposed to what the potential buyers is willing to pay. This is a concern because the RFP process is designed to be a competitive process that enables the government of Ontario to receive the most value for the asset in question. The above points are magnified by the fact that the sale of Ontera is the first transaction in the ONTC divestiture, and the four subsequent transactions will likely involve a similar RFP process.

Analysis/Findings

[21] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a

reasonable expectation of prejudice to these economic interests or competitive positions.[6] The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[7]

[22] Given that one of the harms sought to be avoided by section 18(1)(d) is injury to the "ability of the Government of Ontario to manage the economy of Ontario", section 18(1)(d), in particular, is intended to protect the broader economic interests of Ontarians.[8]

[23] I will now consider the information at issue in each record:

Record 1 - Ontario RFP issued December 12, 2012

[24] IO has severed the following information from the RFP (Record 1):

- Names and contact information for the IO representative
- The delivery address to deliver the proposals
- The contact information for the corporate representative that schedules site visits
- Corporate name of the Fairness Monitor[9]
- The location of Ontera's network operations
- One aspect of the evaluation of the proceeds of sale component (refers to information in Form 4)
- One aspect under "Sustained Employment" (refers to information in Form 5)
- Appendix A - Form of Agreement
- Form 1 - Proposal Submission Form

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[6] Orders P-1190 and MO-2233.
[7] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[8] Order P-1398 upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.
[9] In Order MO-2496-I, a fairness monitor is described as an entity that ensures that the process evaluating proposals made in response to an RFP is conducted fairly and impartially. In that order, the name of the fairness monitor was not at issue.

- Form 2 - Proposal Requirement Checklist
- Form 3 - Labour Plan Submission
- Form 4 - Proceeds of Sale Submission
- Form 5 - Sustained Employment Submission
- Form 6 - Service Improvement and Investment Submission
- Form 7 - Sources of Financing and Purchase Terms Submission
- Form 8 - Mailing Label

[25] I have carefully reviewed the information at issue in this and the other records. I note that IO has not provided representations on the specific information at issue which is contained in this or any of the other records.

[26] I find that the information at issue in Record 1 is general information, such as contact information, or questions that are included in forms for the potential purchasers of Ontera to respond to. I find that IO has not provided "detailed and convincing" evidence to establish a "reasonable expectation of harm" should this information be disclosed.

[27] None of the information at issue in Record 1 reveals the assessed value of Ontera, nor does it reveal any details of the amount of money that IO is seeking in its sale of Ontera.

[28] As the information at issue does not reveal the expected purchase price or the assessed value of Ontera, I find that disclosure of the information at issue in Record 1 could not reasonably be expected to cause potential purchasers to structure their proposals according to what was disclosed, as opposed to what they are willing to pay.

[29] I also do not find that disclosure of any of the information at issue in this record could reasonably be expected to lead to the perception that IO is not acting in good faith or cause potential buyers to withdraw from the sales process. Parties that provide proposals in response to RFPs issued by institutions are competing for the institutions' business, not the other way around.[10] In Order MO-2496-I, Adjudicator Bernard Morrow found that it was unreasonable to suggest that disclosure of tendering information would put a chill on third parties participating in the tender process.

[10] See Orders MO-1706 and MO-2070, for example.

Accordingly, he found that section 11(c) of *MFIPPA*[11] did not apply to information provided in the RFP process.

[30] The purpose of an RFP is to inform proponents as to the type of information an institution requires in order for the institution to decide which party to award a contract to. As stated in Record 1, the RFP:[12]

> The purpose of this RFP is to identify the Preferred Potential Purchasers [of Ontera] to enter into the Negotiations Process in an open, fair and competitive process.

Record 2 - Ontario RFP Addendum No. 1 issued December 21, 2012

[31] IO has severed the form of the draft Share Purchase Agreement (the agreement)[13] that comprises Appendix A to this record. This agreement is the attachment to Appendix A of the RFP (Record 1). The name and contact information of the purchaser, the date of execution of the agreements, and the purchase and other monetary figures have not been completed in this agreement.

[32] As the agreement does not reveal the expected purchase price of Ontera or any other monetary values, I find that disclosure of the information at issue in Record 2 could not reasonably be expected to cause potential purchasers to structure their proposals according to what was disclosed as opposed to what they are willing to pay. Nor do I find that disclosure of any of the information at issue in this record could reasonably be expected to lead to the perception that IO is not acting in good faith or cause potential buyers to withdraw from the sales process.

[33] In making this finding, I have considered Order MO-1474, which was referred to by IO in its representations. In Order MO-1474, the records related to the City of Toronto's purchase of a property to establish a shelter, which was to be operated by a community organization. Record 1 in that order was the Agreement of Purchase and Sale, which set out the terms and conditions under which the city had agreed to purchase the property.

[34] In Order MO-1474, the adjudicator stated:

> …as a general rule, information that relates to the terms of an offer to purchase property, which has not yet closed, qualifies for exemption under section 11(c) and/or (d).

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[11] Sections 11(c) and (d) of the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*), the equivalent to sections 18(1)(c) and (d) of *FIPPA*.
[12] Record 1, Section 2.3 Purpose.
[13] The RFP states in paragraph 4.4 that Record 2 is a draft agreement.

In Order PO-1894, Senior Adjudicator David Goodis considered the provincial equivalent of the exemption at section 11 with respect to records concerning property located in Etobicoke. The records at issue in that order included Agreements of Purchase and Sale (drafts and the executed conditional agreement) and documents related to the sale of the property including correspondence on its use or value. He concluded:

> Having reviewed the records, I am satisfied that information which relates to the terms of the conditional agreement of purchase and sale, which has not yet closed, qualifies for exemption under section 18(1)(d) of the *Act*. I am also satisfied that records containing information about the possible uses or value of the property also qualify for exemption under this section. I accept that until the purchase and sale of the property has been finalized, it is possible that the sale will not take place, and that the ORC may have to find a new purchaser for the property. If that were to occur, disclosure of the terms negotiated between the ORC and the current prospective purchaser could place the ORC in a disadvantageous position with future potential purchasers. Furthermore, disclosure of prospective uses and the value placed on the property by various parties could similarly be disadvantageous...

This reasoning is consistent with previous orders and I accept that it is applicable here (see, for example, Orders MO-1228, MO-1258). I acknowledge that the institution in this situation is the *purchaser*, rather than the *vendor*. However, having considered the particular circumstances of this appeal, I accept that the City's position, as purchaser, can be similarly disadvantaged. Until the purchase and sale of the named property has been finalized, it is possible that the sale will not take place, in which case, the City would have to locate another property. If that were to occur, release of undisclosed terms currently being negotiated with the vendor could place the City in a disadvantaged position with the vendor, or a prospective competitive purchaser for the property or, in the event that these negotiations are not successful, in future negotiations in its efforts to locate property for establishing this shelter.

I also note that record 1 contains several clauses that are found in standard contracts for the purchase and sale of property. In Order P-251, former Commissioner Tom Wright questioned the types of harms that could result from the disclosure of standard clauses of an Agreement of Purchase and Sale. In so doing, he suggested that an institution ought to look carefully at the information it is refusing to disclose particularly when

> the property at issue concerns publicly-owned lands. I agree and raise the same question in this appeal.
>
> From my reading of clauses 11, 12, 13, 14, 15 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 of record 1, it is clear that they constitute clauses which are standard in this type of contract. I have no evidence before me indicating that the disclosure of these standard clauses would result in the types of consequences identified in section 11(c) or (d). In the absence of such evidence, I cannot find that disclosure of the information contained in these standard clauses qualifies for exemption under section 11(c) and (d), and they should be disclosed to the appellant... [Emphasis added by me].

[35] Based on my review of Record 2 in this appeal, I find that most of the clauses are standard contract clauses. Similar to the findings in Order MO-1474, I have no evidence that disclosure of these standard clauses could reasonably be expected to result in the types of harms identified in sections 18(1)(c) or (d).

[36] Record 2 is not an agreement for purchase and sale, but a share purchase agreement which was an attachment to an RFP. Record 2 does not contain information about the possible uses or value of a property. Nor does it contain specific terms that have been negotiated between IO and a prospective purchase. Even if the sale of Ontera does not take place, I have not been provided detailed and convincing evidence that any of the information in the non-standard clauses could place IO in a disadvantageous position with respect to future potential purchasers. Accordingly, I find that disclosure of the non-standard clauses in Record 2 could not reasonably be expected to result in the types of harms identified in sections 18(1)(c) or (d).

Record 3 - Ontario RFP Questions & Answers No. 1 issued January 7, 2013

[37] Severed from Record 3 are all or parts of IO's answers to certain questions about the sale. The answers are short and clarify certain information in the RFP (Record 1), to assist the potential proponents completing their proposals. In my discussion above, I have ordered the information remaining at issue in the RFP disclosed.

[38] Also severed from Record 3 are all or parts of certain questions. IO did not provide an explanation as why only certain questions or answers were partially or fully severed in this record. This record also does not contain any monetary values.

[39] I find that disclosure of the information at issue in Record 3 could not reasonably be expected to cause potential purchasers to structure their proposals according to what was disclosed as opposed to what they are willing to pay. Nor do I find that disclosure of any of the information at issue in this record could reasonably be expected

to lead to the perception that IO is not acting in good faith or cause potential buyers to withdraw from the sales process.

Record 4 - Ontario RFP Addendum No. 2 issued January 11, 2013

[40] This record contains amendments to the RFP. Severed from this record is the following information, which was also severed from Record 1:

- Corporate name of the local representative
- The location of Ontera's network operations

[41] Relying on my findings for Record 1, I find that this information could not reasonably be expected to cause the harms set out in sections 18(1)(c) and (d).

Record 5 - Ontario RFP Share Purchase Agreement

[42] Record 5 has been withheld in its entirety. This record appears identical to Record 2, except for certain formatting related errors.

[43] Relying on my findings for Record 2, I find that this information could not reasonably be expected to cause the harms set out in sections 18(1)(c) and (d).

Conclusion

[44] Based on my review of the information at issue in the records, I find that the records do not contain detailed financial terms or assessments of value of the assets being sold nor that disclosure could reasonably be expected to lead to the perception that IO is not acting in good faith or cause potential buyers to withdraw from the sales process. I find that none of the information at issue is subject to either of the exemptions in sections 18(1)(c) or (d). In making this finding, I have considered the findings in the orders cited by IO in its representations. I find that the records at issue in this appeal are different from those in the Orders P-1210, MO-1474, MO-1681 and PO-3146 cited by IO.

[45] In Order P-1210, there were two records at issue. The first record was described by Hydro as consisting of a balance sheet, income statement, and cash flow projections for Hydro's business units covering a ten-year period and dealt with various estimates of market values based on different assumptions for the electricity industry structure and the privatization of all or parts of Hydro.

[46] Hydro described the second record in Order P-1210 as a financial critique of the various earning assumptions and valuations made by the Financial Restructuring Group report. According to Hydro, this critique makes observations and comments on the

impact of the various assumptions and valuations contained in the Financial Restructuring Group report, relative to its various ownership scenarios.

[47] Unlike the records at issue in this appeal, the records in Order P-1210 contained detailed financial information that revealed the institution's assessment on the value of its assets, as well as detailed cost projections.

[48] I have already discussed Order MO-1474 above. This order dealt with documents related to a pending purchase of land by the institution. IO relied on this order to seek the exemption of the share purchase agreement (Records 2 and 5). I found above that the findings in Order MO-1474 did not apply to exempt the information in Records 2 and 5.

[49] In Order MO-1681, the records contained an appraisal of the land being sold by the institution. In this appeal, the monetary value of Ontera is not contained in the information at issue.

[50] In Order PO-3146, Adjudicator Laurel Cropley found that sections 18(1)(c) and (d) applied only to specific detailed information about how the institution scored proposals, disclosure of which could impact future RFP processes. That type of information is not at issue in this appeal. I cannot ascertain from my review of the information at issue in the records in this appeal how disclosure would reveal information about IO's deliberative process.

[51] IO has cited Order PO-3146 as relevant to disclosure of the records, especially the draft share purchase agreement (Records 2 and 5). Relying on this order, it states that disclosure would allow potential buyers to structure their proposals according to what was disclosed as opposed to what the potential buyers were willing to pay. I have dismissed this argument as I found above the records do not reveal the assessed value of Ontera.

[52] I find that disclosure of the information at issue in the records could not reasonably be expected to prejudice the economic interests or competitive position of IO under section 18(1)(c) or be injurious to the financial interests of the Government of Ontario under section 18(1)(d). Accordingly, I will order disclosure of the information at issue in the records, except for the names of individuals. I will consider below whether the names of the individuals in this and other records should be considered exempt by reason of the application of the discretionary exemptions in sections 14(1)(e) and 20.

B. Late Raising of Discretionary Exemptions

[53] The Code of Procedure (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses

circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[54] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[14]

[55] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.[15] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[16]

[56] IO has raised the application of the discretionary exemptions at sections 14(1)(e) and 20 to the names in the records and the organizations that these individuals are affiliated with. Only Records 1, 2 and 5 contain names of individuals.

[57] In the Notice of Inquiry, the appellant was asked if he had been prejudiced in any way by the late raising of a discretionary exemption or exemptions. He was also asked whether by allowing the institution to claim additional discretionary exemptions, would the integrity of the appeals process been compromised in any way. The appellant did not respond to these questions.

[58] As there is very limited information remaining at issue in the records and because the appellant has declined the opportunity to provide representations on the late raising of discretionary exemptions and on the exemptions themselves, I will allow IO to raise the discretionary exemptions in sections 14(1)(e) and 20.

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[14] *Ontario (Ministry of Consumer and Correctional Services v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[15] Order PO-1832.
[16] Orders PO-2113 and PO-2331.

C. Does the discretionary law enforcement exemption at section 14(1)(e) or the threat to safety or health discretionary exemption at section 20 apply to the names of the individuals and the organizations they are employed with?

14(1)(e): life or physical safety

[59] Sections 14(1)(e) states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > (e) endanger the life or physical safety of a law enforcement officer or any other person;

[60] Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context.[17]

[61] In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.[18]

[62] It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfilment of the requirements of the exemption.[19]

[63] A person's subjective fear, while relevant, may not be sufficient to establish the application of the exemption.[20]

[64] The term "person" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.[21]

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[17] *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.).
[18] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).
[19] Order PO-2040; *Ontario (Attorney General) v. Fineberg*.
[20] Order PO-2003.
[21] Order PO-1817-R.

Section 20: threat to safety or health

[65] Section 20 states:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[66] For this exemption to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated.[22]

[67] An individual's subjective fear, while relevant, may not be sufficient to establish the application of the exemption.[23]

[68] The term "individual" is not necessarily confined to a particular identified individual, and may include any member of an identifiable group or organization.[24]

Representations

[69] IO states that since issuing its access decision, it has been made aware of the issuance of threats to physical safety where anonymous individuals have sent serious threats to Government of Ontario staff that have been publically identified as associated with the Ontera sales process. The recipients of these threats are staff members at the Ministry of Northern Development and Mines, as well as one former IO staff member named as the public point of contact for this sale transaction. As a result, to avoid publicly exposing the names of additional individuals who are working on this sale, and in an attempt to minimize and mitigate receiving future threats, IO has denied access specifically to names of individuals and the organizations they are employed with in the responsive records pursuant to sections 14(1)(e) and 20 of *FIPPA*.

[70] IO further states that in the context of the Ontera sales process, the decision to divest the ONTC has been the subject of media scrutiny and has resulted in public outrage. The result has been that threats to physical safety have been received by certain individuals who have been publically associated with the sale of Ontera.

[71] IO refers to one newspaper article to support its argument that there has been public outrage about the sale of Ontera. This article is a letter to the editor of the

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[22] *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 46 O.R. (3d) 395 (C.A.).
[23] Order PO-2003.
[24] Order PO-1817-R.

Sudbury Star, titled "Ontario Shouldn't Pay for South's Vanity Project," and is dated June 14, 2013. This article is signed by an individual who identifies himself as a resident of Sudbury and states:

> The dismantling of Ontario Northland has been a difficult pill to swallow for many Northerners who depend on the services for reliable transport through the region.
>
> We've heard the Dalton McGuinty and Kathleen Wynne governments defend the financial reasons behind the sale of Northland, and were told that economic conditions hastened the sale of Northland's rail assets. But the old dichotomy between north and south hasn't died just yet, and we are now hearing the recommended digging in our pockets to pay off the Metrolinx plan to create an advanced rail network exclusively for the GTA and Hamilton areas.
>
> Members of the board of Metrolinx, which operates GO Transit, have proposed $50 billion in new taxes, the effect of which will be felt province wide. Included in these suggestions is a 1% increase in the HST, as well as a new five-cent surtax on gasoline and fuel sales. The National Post reports that Minister Glen Murray and the premier are reviewing this suggestion with a grain of salt. As of yet, they have not produced a full endorsement of the taxation strategy, while not yet dismissing it.
>
> The fact of the matter is that for all of the tepid remarks the government makes on the funding of the new GTHA transportation plan, it still has not come up with its own funding model. Yet when it does, it will still not make up for the other fact that the favouritism will be omnipresent.
>
> The Ontario government will fail to provide a basic transportation provider to Northern Ontario, while Halton, Peel, and York regions will be the beneficiaries of a multibillion-dollar network expansion.
>
> To put that into perspective, the Ontario Northland Transportation Commission's sale would generate only $500 million for the province -- 1% of the funding Metrolinx is requesting.
>
> We shouldn't have to foot the bill for what amounts to a vanity project that will scratch at the surface of transportation needs in the Golden Horseshoe. Most of the regions being served by the expansion plan are areas serviced heavily by 400-series highways and other freeways, and commuters seem to want just that -- the ability to take their own vehicles to where they need to go.

> The same can't be said for the City of Toronto proper, which does indeed need expanded rapid transit service, but the rest seems almost pointless. You can build the rails, but it doesn't mean that the commuters will use it.
>
> Liberal MPPs stood with McGuinty on the sale of Northland due to the perceived financial burden being placed on the province as a whole. Will they do the same for Northern Ontario under these circumstances?
>
> Or will they impose a heavier burden on the cost of living for all Ontarians for the benefit of only the centre of the universe?

Analysis/Findings

[72] IO is objecting to disclosure of the names of the individuals in the records and the organizations they are employed with.

[73] At issue in Record 1, at issue is:

- The name of the IO contact person
- The contact information for the corporate representative that schedules site visits

- The name and title of the IO employee to mail the proposals to.

[74] At issue in Records 2 and 5 is:

- The name of the Ontario Northland Transportation Commission (ONTC) representative and the ONTC lawyer who should be provided notices under the terms of the draft share purchase agreement

[75] Based on my review of IO's representations and the information at issue, I find that IO has not provided evidence to establish a reasonable basis for believing that endangerment will result from disclosure under section 14(1)(e).

[76] I also do not find that disclosure of the information at issue in the records could reasonably be expected to seriously threaten the safety or health of an individual under section 20.

[77] Other than general allegations in its representations, IO has not provided any specific particulars of endangerment or threats to any individuals as a result of the potential sale of Ontera. The one newspaper article that IO relies upon makes no mention of the potential sale of Ontera. Nor does this single article demonstrate that there has been public outrage. Nor is there any reference in this article to any threats being made to any individuals.

[78] IO has not demonstrated that the reasons for resisting disclosure under both exemptions are not frivolous or exaggerated. Accordingly, I find that the names of the individuals in the records and the organizations they are employed with are not exempt by reason of sections 14(1)(e) and 20 and I will order this information disclosed.

ORDER:

1. I order IO to disclose the information at issue in the records to the appellant by **January 17, 2014.**

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

Original Signed By: December 24, 2013
Diane Smith
Adjudicator