Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3710

Appeal PA15-200

Infrastructure Ontario

March 21, 2017

Summary: The appellant sought access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to copies of the value-for-money reports produced in order to determine the procurement method for the Eglinton-Crosstown Light Rail Transit (the LRT). Infrastructure Ontario (IO) denied access to these records. This order finds that the records are not exempt under the mandatory exemption in section 12(1) (Cabinet records) but does find the information exempt under the discretionary exemption in section 18(1)(a) (information that belongs to government). This order also finds that the public interest override in section 23 does not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 12(1), 12 (1)(b), 18(1)(a), 23.

Orders and Investigation Reports Considered: Order MO-2866.

OVERVIEW:

[1] Under section 25(2) of the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*), Metrolinx transferred to Infrastructure Ontario (IO) part two of a multipart request. Part two of the request sought the following information:

> …a searchable, PDF copy of all value-for-money reports produced in order to determine the procurement method for the Eglinton-Crosstown [Light Rail Transit (the LRT)].

[2] Prior to issuing its decision, IO notified one affected party of this request, seeking its views with regards to the disclosure of information in one of the records that affect its interests. The affected party responded that it did not consent to disclosure of the record. IO subsequently issued a decision to deny access to three records under sections 17(1) (third party information) and 18(1) (economic and other interests) of the *Act*.

[3] The requester, now the appellant, appealed IO's access decision.

[4] During mediation, IO issued a revised decision to add section 13(1) (advice or recommendations) in addition to sections 17(1) and 18(1) of the *Act* to deny access to the records. IO subsequently issued a second revised decision granting partial access to the records. The remaining portions were denied under sections 13(1), 17(1) and 18(1) of the *Act*. IO did not release the records for 30 days to allow the affected party the opportunity to appeal the revised decision. The affected party did not appeal the decision and the records were released in part to the appellant.

[5] Upon receipt of the partially disclosed records, the appellant advised the mediator that he continued to take issue with the severances that were applied and that he was of the view that additional records should exist that were responsive to his request.

[6] The parties had a teleconference to discuss the issue of whether additional records in relation to the appellant's request exist. Subsequent to the teleconference, IO disclosed in full to the appellant additional records consisting of a copy of a slide deck that explains the value for money (VFM) process and an identified transit report.

[7] Upon review of these records, the appellant advised IO that he continued to seek additional records in relation to his request.

[8] IO subsequently identified two additional records responsive to the request, a VFM analysis and a risk matrix and issued a supplementary decision to deny access to them under sections 12(1) (Cabinet records), 13(1) and 18(1) of the *Act*. The appellant confirmed he is no longer seeking access to the records that were partially disclosed to him, but that he takes issue with the supplementary access decision on these two records. The appellant advised the mediator that he is raising the public interest override in section 23 of the *Act* as an issue in this appeal, as he believes that such records are matters of public interest.

[9] The appellant also sought access to some additional records. IO subsequently disclosed to the appellant an appendix to an identified transit report in full and advised the appellant that for any additional records that "precede value for money reports, then IO takes the position that this is not within the scope of your current request." The appellant subsequently advised the mediator that he does not take issue with this position and is also not taking issue with the reasonableness of IO's search for records.

[10] IO confirmed during mediation that the subsections of 18(1) it is relying on for the two remaining records at issue are 18(1)(a), (c), (d) and (e).

[11] No further mediation could take place and the appellant confirmed that he wished to proceed to adjudication. Accordingly, the file was referred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry.

[12] Representations were sought and exchanged between IO and the appellant in accordance with section 7 of the IPC's[1] *Code of Procedure* and *Practice Direction 7*.

[13] In its representations, IO indicated that it was no longer relying on section 18(1)(e).

[14] In this order, I uphold IO's decision under section 18(1)(a) and do not find that the public interest override in section 23 applies.

RECORDS:

[15] At issue are the VFM analysis and the Risk Matrix to supplement the VFM Analysis in relation to the LRT.

ISSUES:

A. Does the mandatory Cabinet records exemption at section 12(1) apply to the records?

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

C. Did the institution exercise its discretion under section 18(1)? If so, should this office uphold the exercise of discretion?

D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 18(1) exemption?

DISCUSSION:

BACKGROUND

[16] In its representations, IO provided background information about its mandate and the creation of the records.

---

[1] The Information and Privacy Commissioner, Ontario, Canada.

[17] IO states that it partners with public sector agencies, including provincial ministries, Crown corporations, municipalities and not-for-profit organizations to renew infrastructure across Ontario. For the LRT project, it partnered with Metrolinx, an agency of the Ministry of Transportation (MTO), on this major public infrastructure project.

[18] IO states that it delivers public infrastructure projects using a project delivery model called Alternative Financing and Procurement (AFP), which brings together private and public sector expertise in a unique structure that transfers to the private sector partner the risk of project cost increases and scheduling delays typically associated with traditional project delivery.

[19] IO states that all projects with a cost greater than $100 million are screened for their suitability in being delivered as an AFP project. It states that the decision to proceed with the AFP delivery model is based on both qualitative considerations (e.g., size and complexity of the project) and a quantitative assessment. IO states:

> The quantitative assessment, called Value for Money (VFM), is used to assess whether the AFP delivery model will achieve greater value to the public compared to a traditional public sector delivery model. VFM compares the estimated total project costs of delivering public infrastructure using AFP relative to the traditional delivery model…
>
> Value for money in AFP projects is demonstrated when the benefits of transferring risks via AFP models are greater than the costs of not doing so… The risks are further detailed in the Risk Matrix record…
>
> The VFM assessment compares the total risk-adjusted cost borne by the public sector of delivering a project via AFP to a traditional public sector delivery model (i.e. design, bid, and build process). At its core, VFM compares the higher financing and transaction costs inherent in the AFP model to the benefits of transferring risks to the private sector combined with the innovation that comes from an integrated, performance based approach to the project…
>
> The delivery of large complex public projects includes significant risks for owners, designers, and builders… A comprehensive review (termed "risk analysis") of these types of risks and the resulting additional costs needs to be factored into the VFM analysis in advance of the project (note: the record at issue described as the "Risk Matrix" consists of the risk analysis prepared for Treasury Board) ...
>
> [T]he VFM assessment is comprised of phases and the analysis is performed at three separate stages of the procurement process, during which inputs and assumptions are refined to reflect the most current

> information and data available. In addition, on new sectors and mandates, such as the Eglinton Crosstown LRT project, a VFM analysis is performed at the Treasury Board stage as well (adding an additional stage of analysis to the VFM assessment).
>
> …The records at issue are those prepared employing Infrastructure Ontario's VFM methodology at the pre-assignment and pre-RFQ stage for Treasury Board… MTO, on behalf of their agency, Metrolinx, were provided the records at issue to submit to Treasury Board for approval of proceeding with the Eglinton Crosstown LRT using the AFP model.

[20] I will first consider whether the mandatory Cabinet records exemption in section 12(1) applies. If it does not apply, I will then consider whether any of the claimed discretionary exemptions in section 13(1) or 18(1) apply.

A. Does the mandatory Cabinet records exemption at section 12(1) apply to the records?

[21] IO relies on the introductory wording to section 12(1) and also on section 12(1)(b), which read:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> > (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;

[22] Under the introductory wording of section 12(1), the IO states that disclosure would reveal the substance of Treasury Board's deliberations. It describes Treasury Board as a committee of Cabinet which, among other things, considers and approves the method of procurement for major infrastructure projects, which includes considering whether a traditional delivery or AFP delivery model is employed.

[23] It states that in the case of the LRT, the sponsoring ministry, MTO, determined the infrastructure need for transit expansion and the former Ministry of Economic Development, Employment and Infrastructure reviewed MTO's plans and instructed IO to assess AFP suitability for the project. It states that IO then conducted an AFP analysis, comprised of the records at issue, and MTO subsequently used the content of the AFP analysis and risk matrix to prepare their Treasury Board submissions.

[24] Specifically, IO states that the MTO Treasury Board submission[2] consists of extractions from the VFM analysis and risk matrix to facilitate Treasury Board's understanding of the issues and to provide considerations to weigh in determining whether to choose traditional delivery model versus AFP model for funding in the LRT project.

[25] IO states that, if disclosed, the records would permit the drawing of accurate inferences regarding the substance of Treasury Board's deliberations, as the information at issue in the records were directly incorporated into the Treasury Board submission.

[26] Concerning section 12(1)(b), IO states that the purpose of the VFM assessment is to compare the delivery options available for major infrastructure projects in Ontario and to provide detailed analysis on the risks retained by the Province or transferred to the private sector, with a quantum applied to each risk. It states that the analysis, compares the risks of traditional delivery and AFP delivery and quantifies the cost of each option in a detailed way. The end result is data in support of one delivery model over another with an itemization of risks identified for Treasury Board to consider when approving funding requests and determining delivery methods.

[27] Concerning section 12(2)(b),[3] which allows the head to consider seeking the consent of Cabinet for the release of a record, IO states that it considered, but did not to seek the consent of Cabinet to disclose the records. It states that the records are not widely distributed and the analysis is undertaken as part of a rigorous review and assessment conducted by internal experts and, at times, through the retention of external consultants. It states:

> Throughout the VFM assessment all participants understand the commercial sensitivities associated with the exercise and are expected to maintain confidentiality. Further, the VFM analysis performed for Treasury Board is the starting point of a larger process; the VFM assessment is finessed and refined over time, as detailed in four stages of the VFM process …; only once this process is finalized is the final VFM assessment made public. Premature disclosure of the records at issue, would disclose IO's VFM methodology and could also jeopardize ongoing procurement processes. In the future, disclosure also has the ability to jeopardize the province's ability to effectively negotiate future transit projects.

---

[2] IO provided me with a confidential copy of the MTO Treasury Board submission to demonstrate what materials were presented to Cabinet's committee for their consideration.

[3] Section 12(2)(b) reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where,
>
> > the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

[28] The appellant describes the records as a VFM document that compares traditional public procurement to procurement via public-private partnership (P3), and a risk matrix that was used to generate the risk-adjusted cost estimates from base cost estimates.

[29] The appellant states that MTO requested the records, which are background documents, and that Cabinet approved the LRT project without reviewing the records, therefore, it is hard to see how their disclosure would reveal anything substantial about Cabinet deliberations.

[30] The appellant argues that disclosure of the record must meet both of the following two criteria:

1. reveal: The disclosure must be revelatory, as opposed to simply showing Cabinet deliberations whose substance or outcome is already known, and

2. substance: The disclosure must be substantive, as opposed to trivial. The disclosure must reveal Cabinet deliberations that are substantive enough to warrant an exemption that is consistent with the purposes of the *Act* and its meaning when read as a whole.

[31] The appellant argues that the word, "including," in the section 12 introductory text means that the records that are listed in the subsequent paragraphs are meant to be examples of records that may meet the test of revealing the substance of deliberations of the Executive Council or its committees.

[32] The appellant states that under the government's relatively new Program Review, Renewal and Transformation program, nearly all major government expenditures are now subject to review by the Treasury Board. As a result, he states that nearly all background documents prepared by a ministry or agency with respect to a major project could potentially be considered as "prepared for submission" to the Treasury Board, and thus be subject to the mandatory exemption from disclosure under section 12. He submits that this includes background documents disclosure of which was clearly intended by the *Act's* drafters by their inclusion under the advice or recommendations exemption exception for factual material in section 13(2).

[33] The appellant states that Ontario's Financial Accountability Officer has recently warned that the government has misused the "Cabinet records" exemption. The appellant refers to a May 31, 2016 statement from the Financial Accountability Officer where he stated that ministries have invoked the Cabinet records exemption in section 12(1) in relation to too wide a range of information.

[34] The appellant states that the section 12(1) exemption quite rightly extends to records of the deliberations of Cabinet, as well as the policy options and recommendations presented by ministers, and briefings concerning those options and recommendations received by individual ministers. He submits, however, that once a

Cabinet decision has been made and publicly announced, the background explanations and analyses provided to Cabinet in support of that decision no longer need as much protection against disclosure because the outcome of those deliberations has already been made public.

[35] The appellant refers to the exception in section 12(2)(b) and states that the government has declared "its goal of becoming the most open and transparent government in Canada" (Press statement, Office of the Premier, January 11, 2016), which he submits seems to indicate Cabinet's strong willingness to consent to disclosure. He states that IO should have sought such consent.

[36] The appellant also states that even if there were elements in the records that did indeed reveal some actual substance of Cabinet deliberations, it may be unnecessary to withhold the entire document in order to apply the mandatory exemption under section 12.

[37] In reply, IO reiterates its initial representations and emphasizes that the records were synthesized and incorporated in the documents ultimately provided to Treasury Board and that records never placed before Cabinet or its committees can still qualify for exemption under the introductory wording of section 12.[4]

[38] In sur-reply, the appellant reiterates his initial submissions and emphasizes that the section 12(1) introductory wording should not be considered separately from the section 12(1)(b) exemption, as the word "including" in the introductory wording implies that the documents described in the subsections are intended to be examples of documents that meet the test of the introductory wording. He finds the reasoning in Order P-22, and states that:

> it is clear that the adjudicator felt he was indeed protecting the substance of Cabinet deliberations, and not trying to make a case for additional exemptions where the substance of Cabinet deliberations would not be revealed. Read in context, the adjudicator's statement that a record might be exempted "regardless of whether they meet the definition found in the introductory text of subsection 12(1)" seems incoherent, and does not contribute to the actual decision he reached.
>
> Finally, I note that the adjudicator himself expresses "reservations in seeing the broader application of subsection 12(1) as a different exemption." If the adjudicator had reservations in 1988, these reservations are even more warranted today. It is no small thing for an independent Officer of the Legislature to imply that the government may be in contempt of parliamentary privilege due to its misuse of Cabinet confidence…

[4] IO relies on Orders P-361, P-604, P-901. P-1678, PO-1725.

[39] The appellant submits that the initial base cost estimates provided for the actual VFM document prepared for the Treasury Board do not reveal anything substantive about Cabinet deliberations that are not already known to all.

Analysis/Findings

[40] As stated above, IO relies on both the introductory wording of section 12(1), submitting that disclosure of the records would reveal the substance of Treasury Board's deliberations, and subsection 12(1)(b), submitting that the records contain policy options or recommendations submitted to Treasury Board.

[41] Concerning the introductory wording of section 12(1), the term "including" means that any record which would reveal the substance of deliberations of an Executive Council (Cabinet) or its committees [not just the types of records enumerated in the various subparagraphs of section 12(1)], qualifies for exemption under section 12(1).[5]

[42] A record that has never been placed before Cabinet or its committees may qualify for exemption under the introductory wording of section 12(1), where disclosure of the record would reveal the substance of deliberations of Cabinet or its committees, or where disclosure would permit the drawing of accurate inferences with respect to these deliberations.[6]

[43] In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.[7] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;[8] and

- "substance" generally means more than just the subject of the meeting.[9]

[44] IO submits that the Treasury Board submission contains portions of the information and recommendations in the records, as well as the VFM assessment from the records.

[45] IO submits that the submission is evidence as to the substance of the Treasury Board's deliberations. IO did not provide representations on the actual information in the records and how and where it was incorporated specifically into the submission.

---

[5] Orders P-22, P-1570 and PO-2320.
[6] Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.
[7] Order PO-2320.
[8] Order M-184.
[9] Orders M-703 and MO-1344.

[46] The submission contains 30 pages of information, primarily text, with some of the pages containing some monetary figures and charts. In contrast, the records consist of many hundreds of pages, which are all numerical charts.[10] Based on my review of the records and the submission, I cannot ascertain how the submission contains information that was directly incorporated into the Treasury Board submission as submitted by IO.

[47] I find that IO has not provided sufficient evidence to establish a linkage between the content of the records and the actual substance of Cabinet deliberations. Therefore, I find that I do not have sufficient evidence that disclosure of the records would reveal the substance of deliberations of the Treasury Board, a committee of Cabinet. Accordingly, I find that the introductory wording of section 12(1) does not apply and the records are not exempt under this section.

[48] IO has also claimed the application of section 12(1)(b). To qualify for exemption under section 12(1)(b), a record must contain policy options or recommendations, and must have been either submitted to Cabinet or at least prepared for that purpose. Such records are exempt and remain exempt after a decision is made.[11]

[49] As stated above, the records are numerical charts. From my review of the records, I cannot ascertain where specific policy options or recommendations are contained in the records. The records contain financial calculations. As referred to above, IO did not specifically refer me to where in the records policy options or recommendations are contained.

[50] The only specific reference to the actual information in the records is the following IO submission, which is not detailed enough to result in a finding that the section 12(1) exemption applies:

> Such risks[12] are detailed in the Value for Money Analysis record under the 'Project Budget' column with the headings (1) Policy/Strategic, and (2) Project Agreement; and under the 'Design, Tender and Construction' column with the headings (3) Design & Tender and (4) Site Conditions/Environmental. The risks are further detailed in the Risk Matrix record.

[51] Furthermore, it is not clear from my review of the records that they contain policy options, recommendations, or data in support of one delivery model over another, as submitted by IO. As such, I find that I do not have sufficient evidence to determine that section 12(1)(b) applies.

---

[10] Other than one page, entitled "Notice and Disclaimer".
[11] Order PO-2320, PO-2554, PO-2677 and PO-2725.
[12] Of the AFP model.

[52] As I have found that the claimed exemptions in section 12(1), the introductory wording and section 12(1)(b), do not apply, the records are not exempt under these exemptions. As such, it is not necessary for me to consider the application of the exception in section 12(2)(b), nor the appellant's argument that the introductory wording of section 12(1) should not be considered as a separate exemption from the enumerated items in the subsections of section 12(1).

[53] I will now consider whether the section 13(1) or 18(1) exemptions apply to the record.

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

IO relies on sections 18(1)(a), (c) and (d). These sections read:

> A head may refuse to disclose a record that contains,
>
> > (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
> >
> > (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;

[54] The purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[13]

[55] For sections 18(1)(c) or (d) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[14]

[56] The failure to provide detailed and convincing evidence will not necessarily

---

[13] Toronto: Queen's Printer, 1980.

[14] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[15].

[57] 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.[16]

[58] I will first consider the application of section 18(1)(a).

Section 18(1)(a): information that belongs to government

For section 18(1)(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information,
2. belongs to the Government of Ontario or an institution, and
3. has monetary value or potential monetary value.

Part 1: type of information

[59] IO states that the records contain financial and technical information and that the records were only created once the input of financial experts, engineers and others was provided.

[60] IO relies on the following definitions of these types of information listed in section 18(1)(a), as discussed in prior orders:

> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[17]
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information

---

[15] Order MO-2363.
[16] See Orders MO-2363 and PO-2758.
[17] Order PO-2010.

> prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[18]

[61] Concerning "financial information", IO states that the information relates to the monetary value of various risks associated with a major transit infrastructure project, and assigns monetary values to risks in an effort to quantify the financial costs associated with different project delivery options.

[62] Concerning "technical information", IO states that the records are essentially technical assessments of the risks associated with a major infrastructure transit project, built upon specialized and professional understanding of the technical risks and project-specific concerns.

[63] The appellant did not provide specific representations on section 18(1), instead focusing his representations on the importance of transparency in the public procurement process.

Analysis/Findings re: part 1

[64] I agree with IO that the records contain financial information as the records refer to money and its use or distribution and contain specific data including profit and loss data.

[65] I also agree with IO that the records contain technical information in a precise fashion, as they were generated with input from engineering and financial consultants and include technical and financial risk assessments associated with the construction of the LRT.

As the records contain financial and technical information, part 1 of the test under section 18(1)(a) has been met.

Part 2: belongs to

[66] For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[67] Examples of information belonging to an institution are trade secrets, business-to-business mailing lists,[19] customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent

---

[18] Order PO-2010.
[19] Order P-636.

monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the confidential business information will be protected from misappropriation by others.[20]

[68] IO states that the VFM process involves the comingling of information from external consultants as well as internal public service expertise. It states that the risks associated with a major infrastructure transit project are presented as a series of logical items, and the use of expertise is employed to assess each risk item identified.

[69] IO states that it does not share nor widely distribute VFM assessment records created in the preliminary stages of a procurement process and it has a consistent practice of providing these records solely to the sponsoring ministry for the purposes of a Treasury Board submission.

[70] IO states that confidentiality of the records is maintained in order to effectively ensure that the best price is received from the market for a given major infrastructure project. To effectively contract for major infrastructure projects, and obtain the best outcome from the private sector for the benefit of the province, IO states:

> To elaborate, the experts involved in the VFM assessment are privy to certain internal Government information and have the technical expertise to quantify risks. It is in the interest of the Province to ensure that this information be confidential, and to have external parties' under-value these risks in order to generate lower cost associated with completing a major infrastructure project.
>
> This manner in which the private sector incorrectly values risks that the Province is able to more accurately value is the very point at which lower costs are generated. The private sector is then held to the cost estimated in their bid. It is in the interest of the Government of Ontario to ensure a certain element of nondisclosure exists between the Government and the private sector.

Analysis/Findings re: part 2

[71] The records at issue in this appeal are similar to the record at issue in Order MO-2866. In that order, the record contained information related to the VFM to be obtained through the various procurement approaches available to the City of Greater Sudbury (the city) for a Biosolids Plant project. That information was, as in this appeal, prepared

---

[20] Order PO-1763, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.

with the expertise of engineering and financial consultants.

[72] In Order MO-2866, I found that part 2 of the test[21] was met and stated:

> Based on my review of the city's representations and the record, I agree with the city that the information at issue in the record belongs to the city within the meaning of part 2 of the test under section 11(a). The city expended money in paying the consultant to develop the information for the city. As well, city staff applied skill and effort to assist in the development of the information.
>
> Furthermore, … the information was consistently treated in a confidential manner by the city and the consultant. In addition, the information also derives value to the city from not being generally known. The financing information in the record is valuable to the city in the decision-making process to award the contract for the construction of the Biosolids Plant.

[73] I rely on my analysis in Order MO-2866 and find that in this appeal, the information in the records was prepared by Ontario Government staff in conjunction with external consultants. The records contain financial and technical information that details the risks of the traditional delivery of the LRT project versus the AFP or the alternative financing and procurement method of delivery of a project using both public and private funds.

[74] I find that there is a monetary value in the information in the records to IO resulting from the application of skill and effort to develop the information. As well, it is clear that the information has been consistently treated in a confidential manner and it derives its value to the organization from not being generally known. Accordingly, I find that the information "belongs to" IO and part 2 of the test under section 18(1)(a) has been met.

Part 3: monetary value

[75] To have "monetary value", the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.[22]

[76] The mere fact that the institution incurred a cost to create the record does not mean it has monetary value for the purposes of this section.[23] Nor does the fact, on its

---

[21] Part 2 of the test under section 11(a) of the *Municipal Freedom of Information and Protection of Privacy Act*, the municipal *Act*, the equivalent to section 18(1)(a) of *FIPPA*.
[22] Orders M-654 and PO-2226.
[23] Orders P-1281 and PO-2166.

own, that the information has been kept confidential.[24]

[77] IO states that it generates the responsive records through a workshop process which is confined and consists of only those professionals required to complete the VFM assessment. It states that the Province of Ontario derives a benefit from not generally sharing the responsive records.

[78] IO states that disclosure of the records would affect the economic interests of the Province of Ontario with respect to future major transit procurements, as the VFM analysis and risk matrix would disclose to the market the risk tolerance levels of the Province at first instance. In addition, it states that disclosure would allow the private sector bidders to glean information to which only the Government would be privy to (i.e. the Province of Ontario is in a better position to assess certain risks enumerated, which the private sector would have limited information relating to).

[79] IO states that it derives a direct monetary value from the level of uncertainty a bidder has around IO's perceived risks associated with a procurement contract. IO submits that the treatment of the information at issue, given that it is prepared for Treasury Board and not widely disseminated, demonstrates that the information has an inherent monetary value.

Analysis/Findings re: part 3

[80] In Order MO-2866, the record contained information about cost estimates and risk valuations associated with the Biosolids Plant project. In that order, I found that part 3 of the test applied and that information at issue in the record had monetary value to the city. I found that there would be a direct cost to the city if the information was disclosed while the city was in negotiation with the consortia to obtain the best price to construct the Biosolids Plant. I found that, if disclosed, prospective proponents of the Biosolids Plant would be able to ascertain the particulars of the cost estimates, risk valuations and risk exposures, thereby giving the bidders on the project an unfair advantage in developing their proposals.

[81] Although IO is no longer in negotiation for the LRT, it is concerned about disclosure of the risk tolerance levels in the records and its effect on its ability to negotiate future major transit projects.

[82] In Order MO-2866, I did not have evidence that future Biosolids Plant projects were to be negotiated. In this appeal, I have evidence that future major transit projects are to be negotiated. The records, which contain detailed financial calculations comparing the higher financing and transaction costs inherent in the AFP model to the benefits of transferring risks to the private sector, reveal the risk tolerance levels of the Ontario government with respect to future major transit projects.

---

[24] Order PO-2724.

[83] I agree with IO that the records, which are a Value for Money Analysis and a Risk Matrix, have monetary value and that disclosure would allow private sector bidders to glean information to which only the Government would be privy to.

[84] IO derives a direct monetary value from the level of uncertainty a bidder has around IO's perceived risks associated with a procurement contract.

[85] As stated by IO, it is in the interest of the Province to ensure that this risk tolerance information be confidential, and to have external parties under-value these risks, in order to generate lower cost associated with completing a major infrastructure project.

[86] Accordingly, I find that part 3 of the test under section 18(1)(a) has been met and, subject to my review of the IO's exercise of discretion and the public interest override, the records are exempt under this exemption.

[87] As I have found the records subject to section 18(1)(a), it is not necessary for me to also consider whether they are subject to sections 18(1)(c) and (d) or 13(1).

C. Did the institution exercise its discretion under section 18(1)? If so, should this office uphold the exercise of discretion?

[88] The section 18(1) exemption is discretionary and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[89] In addition, the Commissioner 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
- it fails to take into account relevant considerations.

[90] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[25] This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

[91] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be

[25] Order MO-1573.

relevant:[26]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[92] IO states that in exercising its discretion under section 18(1) to withhold the records in full, it took into account the purpose of *FIPPA* and the manner in which disclosure would be permissible. It states that it applied the exemption in a specific and limited manner and considered whether partial disclosure of the records would be appropriate, but decided that it would not be appropriate, given that disclosure of the records in part would allow for inferences to be made about other information.

[93] IO states that it also took into account the purpose of the section 18 and the interests the exemption seeks to protect and the nature of the information requested and the extent to which disclosure would adversely affect it and the Province of Ontario.

---

[26] Orders P-344 and MO-1573.

[94] The appellant refers to the Auditor General's recommendation that "Infrastructure Ontario should ensure that all proposed changes to its VFM assessment methodology ... can be and are fully supported and can sustain scrutiny." He submits that since IO has accepted the principle that its VFM processes should be able to withstand scrutiny, and that such scrutiny would serve the interests of the Government of Ontario, it makes no sense for IO to then claim the necessity of opposing the very transparency that would make such scrutiny possible.

Analysis/Findings

[95] Based on my review of the parties' representations and the records, I find that IO has taken into account the appellant's submission about public scrutiny of its processes. However, considering the particular information at issue, which reveals the Ontario government's financial risk tolerance in entering into public-private partnerships for major transit projects and based on the information provided by IO, I find that IO exercised its discretion in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations.

[96] Accordingly, subject to my review of the public interest override, I find that the records are exempt under section 18(1)(a).

D. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 18(1) exemptions

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 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.

[97] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[98] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[27]

[99] IO submits that the purpose of section 18(1)(a) is to permit an institution to not

---

[27] Order P-244.

disclose a record where disclosure would deprive the institution of the monetary value of the institution and that, considering the purpose of the exemption, there is no compelling interest in public disclosure of the records at issue.

[100] IO states that the VFM analysis and risk matrix are comprised of the Ontario government's risk assessments in relation to an infrastructure project in the transit sector and that disclosure of this information could result in adverse impacts on the Ontario government's ability to effectively engage the private sector on major infrastructure projects. It states that disclosure at this point in time would impact future AFP transit projects given that disclosure would make public the Ontario government's risk tolerance levels; which would result in prejudicing IO's ability to effectively negotiate transit projects.

[101] The appellant states that the P3 contract for the Eglinton-Crosstown is the largest contract in IO's history, and the largest transportation contract in Ontario's history, with a value of roughly $9.1 billion. He states that it is also the single largest expenditure in the government's signature infrastructure program.

[102] The appellant states that the awarding of the Eglinton-Crosstown contract made headlines in major newspapers across Ontario and the country and that nearly every milestone in this project's procurement process attracted mainstream press coverage.

[103] The appellant states that there are no publicly-accessible documents that detail the $5.3 billion cost estimate for the capital component of the Eglinton-Crosstown P3 contract and that the details of these base cost estimates exist only in the VFM document at issue.

[104] The appellant states that disclosure could answer questions of a compelling public interest, such as:

- why did the project's estimated capital costs jump in a matter of months from $4.5 billion (2011 dollars, including capital items such as tunneling) to $5.3 billion (2010 dollars, not including capital items such as tunneling)?

- what were the estimated 30-year maintenance costs in the VFM document, how were these estimates determined, and how do they compare in cost and scope to what was contracted?

- what were the assessed risks of various components of the contract, and what were the bases for these assessments?

- Did this document provide elected decision-makers with a fair, objective and complete assessment of the value-for-money of P3 procurement as compared to traditional delivery?

[105] The appellant states that:

> IO's VFM processes were subject to a major audit by the Auditor-General of Ontario [the A-G]. This 2014 audit revealed that Infrastructure Ontario could not provide any objective basis to justify spending an extra $8 billion to procure 74 infrastructure projects via P3. This expenditure may indeed have been justified, but there were no factual data that could show this. There was only anecdote and educated guesswork, including the opinions of industry insiders that stood to benefit from P3 procurement.
>
> This audit made headlines in major newspapers across the province and the country, and continues to be referred to when discussing P3 procurement.
>
> Following the audit, IO accepted the A-G's recommendations, and committed to implementing all of them, including a recommendation that IO's VFM assessments should be "fully supported and can sustain scrutiny."
>
> In its responses to the A-G, Infrastructure Ontario itself acknowledged the importance of independent scrutiny of its VFM methodology and assessments. And yet it seems to have ignored its own transparency commitments to the Auditor-General and the Legislative Assembly as it exercised its discretion…

[106] In reply and sur-reply, the parties relied on their initial submissions.

Analysis/Findings

[107] I will first consider whether there is a compelling public interest in disclosure of the records. If I find that there is a compelling public interest, I will then also consider whether this interest clearly outweighs the purpose of the established exemption claim in the specific circumstances.

[108] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[28] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[29]

---

[28] Orders P-984 and PO-2607.
[29] Orders P-984 and PO-2556.

[109] A public interest does not exist where the interests being advanced are essentially private in nature.[30] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[31]

[110] A public interest is not automatically established where the requester is a member of the media.[32]

[111] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[33]

[112] Any public interest in *non*-disclosure that may exist also must be considered.[34] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[35]

[113] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[36]
- the integrity of the criminal justice system has been called into question[37]
- public safety issues relating to the operation of nuclear facilities have been raised[38]
- disclosure would shed light on the safe operation of petrochemical facilities[39] or the province's ability to prepare for a nuclear emergency[40]
- the records contain information about contributions to municipal election campaigns[41]

[114] A compelling public interest has been found *not* to exist where, for example:

---

[30] Orders P-12, P-347 and P-1439.
[31] Order MO-1564.
[32] Orders M-773 and M-1074.
[33] Order P-984.
[34] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[35] Orders PO-2072-F, PO-2098-R and PO-3197.
[36] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[37] Order PO-1779.
[38] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.
[39] Order P-1175.
[40] Order P-901.
[41] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

- another public process or forum has been established to address public interest considerations[42]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[43]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[44]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[45]

- the records do not respond to the applicable public interest raised by appellant[46]

[115] Based on my review of the records, I find that they serve the purpose of informing or enlightening the citizenry about the activities of the government. The records contain information that compares the total risk-adjusted cost borne by the public sector of delivering the LRT project via the AFP model to a traditional public sector delivery model.

[116] The LRT project involves the expenditure of a massive amount of money. The following representations of the appellant on the amount of money involved in the project and the interest in the project was not dispute by IO:

> The P3 contract for the Eglinton-Crosstown is the largest contract in Infrastructure Ontario's history, and the largest transportation contract in Ontario's history, with a value of roughly $9.1 billion. It is also the single largest expenditure in the government's signature infrastructure program.
>
> The awarding of the Eglinton-Crosstown contract made headlines in major newspapers across Ontario and the country. In fact, nearly every milestone in this project's procurement process attracted mainstream press coverage.
>
> Clearly, there is a compelling public interest in disclosing information about the procurement of this vitally important project.

[117] Therefore, I find that there is a compelling public interest in disclosure of the records.

---

[42] Orders P-123/124, P-391 and M-539.
[43] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[44] Orders M-249 and M-317.
[45] Order P-613.
[46] Orders MO-1994 and PO-2607.

[118] However, the existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[119] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[47]

[120] As stated above, the purpose of section 18 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.

[121] The records contain information about the assessed risks of various components of the contract and reveal the Ontario government's financial risk tolerance in entering into public-private partnerships for major transit projects.

[122] I find that denying access to the information is consistent with the purpose of this exemption.[48] Disclosure of the risk tolerance levels of the government in the records would deprive it of the potential monetary value of the information in the negotiation of future major transit projects.

[123] Based on my review of all the circumstances, including the specific information contained in the records and the fact that disclosure would impact the government's economic interests in future major transit projects, I find that the compelling public interest in disclosure of the records does not clearly outweigh the purpose of the section 18(1)(a) exemption. Accordingly, I find that section 23 does not apply to override the section 18(1)(a) exemption and the records are exempt under this exemption.

ORDER:

I uphold IO's decision and dismiss the appeal.

Original Signed by: March 21, 2017
Diane Smith
Adjudicator

[47] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.
[48] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.