Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3827

Appeal MA17-519

Toronto Transit Commission

September 10, 2019

Summary: A requester made an access request to the TTC for its production review meeting minutes, contractual meeting minutes and the monthly progress reports with a named company in relation to its streetcar order. After notifying the named company, the TTC granted partial access to the responsive records. The named company appealed the TTC's decision on the basis that section 10(1) (third party information) applied to additional information. During the inquiry, the requester raised the applicability of the public interest override at section 16.

In this order, the adjudicator finds that some of the information at issue is exempt under section 10(1). She also finds that section 16 applies to some of the exempt information, and orders some of the exempt information disclosed to the requester.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 10(1) and 16.

Orders Considered: Orders PO-2020, PO-2043, PO-3617, PO-3710 and MO-3264.

Case Considered: Barker v. Ontario (Information and Privacy Commissioner), 2019 ONCA 275.

BACKGROUND:

[1] In 2009, the Toronto Transit Commission (the TTC) and a named company entered into a $1-billion contract for the manufacture of 204 streetcars. These new streetcars were to replace the TTC's aging fleet of streetcars. By late 2015, the named company had delivered 10 streetcars when it was supposed to have delivered 67

streetcars by that time. By September 2017, the named company had delivered 45 streetcars instead of the expected 150 streetcars.

[2] Due to the delayed delivery of the new streetcars, the TTC spent a large sum of money in repairing its old streetcars.

[3] In this context, a reporter made an access request, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), to the TTC for the following information:

1. Minutes of every a) production review meeting and b) commercial meeting the TTC has held with [a named company] regarding the agency's streetcar order.

2. Copies of monthly progress reports for the streetcar order.

[4] Following notification of the named company, the TTC granted partial access to the responsive records, and relied on sections 10(1) (third party information) and 12 (solicitor-client privilege) of the *Act* to withhold the remainder of the information.

[5] The named company, now the appellant, appealed the TTC's decision to this office.

[6] During mediation, the TTC disclosed portions of the responsive records to the requester, in accordance with its decision and the appellant's consent.

[7] After reviewing the severed records, the requester advised that he wished to pursue access to the information that was withheld due to the appellant's appeal. As he did not appeal the TTC's decision, section 12 is not at issue in this appeal, nor are the severances withheld under section 10(1) by the TTC.

[8] The appellant advised that it does not consent to the disclosure of any additional information contained within the records.

[9] As further mediation was not possible, this appeal was moved to the adjudication stage, where an adjudicator conducts a written inquiry under the *Act*.

[10] I sought and received representations from the parties. Non-confidential copies of the parties' representations were shared with the other parties in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*.[1]

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[1] Some portions of the appellant's representations were withheld as they met the criteria for withholding representations found in this office's *Practice Direction Number 7: Sharing of representations*. I also note that the appellant relies on the representations (dated October 19, 2017) it submitted on a related appeal (Appeal MA17-303) involving the same parties for this appeal. I have carefully reviewed those representations along with the representations dated April 4, 2018, June 14, 2018, and June 21, 2019.

[11] I then asked the appellant whether it wished to provide additional submissions on section 10(1)(a) in relation to the recent news that the parties had reached a settlement over the delayed streetcars. These submissions were shared with the requester, who was also given the opportunity to provide submissions in response.

[12] In this order, I find that some of the information at issue is exempt under section 10(1). However, I also find that section 16 applies to some of the exempt information, and order that information be disclosed along with the non-exempt information.

RECORDS:

[13] The records at issue in this appeal are the following:

- 7 monthly progress reports (MPR)
- 7 monthly contractual meeting minutes (MCMM)
- 7 production review meeting minutes (PRMM)

[14] At issue in this appeal is the information in these records that the TTC is prepared to disclose.

[15] During the inquiry, the requester confirmed that he is not interested in the names of the appellant's suppliers.[2] Accordingly, this information is no longer at issue in this appeal.

ISSUES:

Preliminary issue: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

A. Does the mandatory exemption at section 10(1) apply to the records?

B. Is there a compelling public interest in disclosure of the exempt information that clearly outweighs the purpose of the section 10(1) exemption?

[2] The requester's representations dated May 18, 2018.

DISCUSSION:

Preliminary Issue: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[16] The appellant argues that the information that the TTC is prepared to disclose is exempt under section 10(1). However, some of this information contains the names of individuals which the requester has not removed from the scope of his request.

[17] Section 14(1) of the *Act* prohibits an institution from releasing personal information of another individual other than the requester's unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[18] Section 2(1)(h) defines "personal information" as:

> "personal information" means recorded information about an identifiable individual, including,
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> > (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[19] Sections 2(2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
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> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[20] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[3]

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[3] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

[21] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[4]

[22] In this case, as mentioned above, the names of individuals appear in all the MPRs, one of the PRMMs, and almost all of the MCMMs. The appellant did not provide any submissions on why these individuals were mentioned in the records at issue. In my view, these individuals were mentioned in their professional context. I find that these individuals are either employees of the TTC or employees of the appellant. As they are mentioned in their professional capacity, the information about them is not personal information. As such, I will order these names to be disclosed unless they are contained in information that I find should be withheld under section 10(1).

Does the mandatory exemption at section 10(1) apply to the records?

[23] Section 10(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
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> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
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> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
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> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
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> > (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[24] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[5] Although one of the central purposes of the *Act* is to shed light on the operations of the

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[4] Orders P-1409, R-980015, PO-2225 and MO-2344.

[5] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[6]

[25] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

[26] The types of information listed in section 10(1) have been discussed in prior orders. Relevant to this appeal are the following:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[7]
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> *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

[6] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[7] Order PO-2010.

> prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[8]
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> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[9] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[10]
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> *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.[11]

[27] Under part 1 of the test, the appellant claims that all of the above types of information are contained in the records.

[28] With respect to commercial information, it submits that most of the information contained in the records qualifies as relating "solely to the buying, selling or exchange of merchandise or services" since the information stems from a commercial transaction, which is the sale of streetcars to the TTC. The appellant relies on the following statement from the *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*[12]: "[W]e believe the exemption should refer broadly to commercial information submitted by a business to the government."

[29] More specifically, the appellant submits that the PRMM and MPR contain technical information and commercial information as the minutes and reports detail the work the appellant performed on each vehicle at each station of the production line in its various plants. They also contain technical solution discussions.

[30] The appellant acknowledges that the records do not, largely, contain financial and trade secret information. However, it argues that some financial information can be found in the records, such as the information which discusses the financial impacts of proposals from it and/or the TTC. It also argues that trade secret information or information leading to trade secrets is present in the records, amongst the methods, techniques and/or processes used to produce the streetcars. The appellant argues that

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[8] Order PO-2010.
[9] Order PO-2010.
[10] Order P-1621.
[11] Order PO-2010.
[12] Vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report).

such information is proprietary to it and is part of its intellectual property. The appellant also argues that this information is not generally known in the rail vehicles market. The appellant argues that it has an economic value since it is part of its know how and expertise and is only shared on a confidential basis.

[31] In his representations, the requester submits that the records do not contain trade secret information. He submits that the information contained in the meeting minutes is already generally known.

[32] The TTC submits that the information contained in the records do not reveal trade secret or scientific, technical, commercial, financial or labour relations information.

[33] For the reasons stated below, I find that the records contain commercial information, financial information and technical information. In my view, all the records stem from one commercial transaction - the appellant's sale of and the TTC's purchase of streetcars. As such, I find that the records predominantly contain commercial information. I also find that they contain some technical information as the PRMM discusses briefly and generally the work at each station of the production line in the appellant's various facilities. Some of the MPRs contain information relating to pricing. As such, I find that there is some financial information in the records.

[34] However, on my review of the records, I do not find that they contain trade secret information. As stated above, the appellant argues that there is some trade secret information or information leading to trade secrets present in the records. It points out, as an example, that certain information relating to its assembly techniques is information leading to trade secrets. The appellant does not state specifically where this kind of information is found in the records and it is not clear to me. On the face of the records, I do not see such information. Moreover, I find that the appellant has not established that any of the information in the records meets the four part test for trade secret information. As such, I do not find that the records contain trade secret information or information from which it is possible to infer trade secrets.

[35] Accordingly, I find that the first part of the section 10(1) test is met. I will now consider the second part of the test.

Part 2: supplied in confidence

Supplied

[36] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[13]

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[13] Order MO-1706.

[37] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[14]

[38] The appellant submits that it "supplied" the information at issue in the records to the TTC. It submits that it prepared the meeting minutes and reports then supplied these documents to the TTC. It relies on Order PO-2020 for the proposition that this component of the second part of the test is satisfied when the records are prepared by the party resisting disclosure and provided to the institution. The appellant also submits that the information in the records clearly emanates from it or would reveal or permit the drawing of accurate inferences with respect to information supplied by it. It relies on Order PO-2043 for the following proposition:

> "Even though a record is created by Ministry staff, where its disclosure would 'reveal' the information that was supplied by a third party, that information also qualifies as 'supplied' within the meaning of this section."

[39] The TTC submits that the appellant supplied the information contained in the records to it as a written record of the meeting events.

[40] In response, the requester submits that a significant amount of information was not "supplied" by the appellant. He submits that the appellant wants to withhold comments or opinions expressed by TTC staff during the meetings referred in the records at issue.

[41] In the circumstances, I am satisfied that the appellant "supplied" the information to the TTC. I find that it prepared the meeting minutes and reports, which were then supplied to the TTC. Although some of the information at issue consists of statements made by TTC staff, I find that their statements emanated from information supplied by the appellant. I also agree with the reasoning in Orders PO-2020 and PO-2043, and adopt it in this appeal. Thus, I find that the "supplied" component of the second part of the test is met.

In confidence

[42] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[15]

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

[43] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently by the third party in a manner that indicates a concern for confidentiality;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.[16]

[44] The appellant submits that it met the "in confidence" component. It submits that, at the time of the request, the parties were (and still are) bound by the terms of the contract. Section GC 60 of the contract sets forth obligations of confidentiality for both parties relating to any information that might be acquired or discovered by the other party during the execution of the contract. In particular, section GC 60 does not permit disclosure of confidential information without the appellant's consent. The appellant submits that it did not consent to the disclosure of the information at issue. Thus, it argues that it supplied the information at issue with the explicit expectation of confidentiality and it was received in confidence by the TTC.

[45] In addition, the appellant submits that the circumstances indicate it had a reasonable expectation of confidentiality. It submits that the information was communicated to the TTC as part of the ongoing project with the explicit expectation of confidentiality, and was received in confidence by the TTC. It submits that the records are not available from sources accessible by the public and there was never any intention that the records would be disclosed publicly. The appellant also submits the information was clearly provided to the TTC on the explicit and implicit understanding that it would remain confidential and would not be disclosed. The appellant finally submits that the TTC has never, by conduct or otherwise, advised it that the TTC could not be relied upon to maintain confidentiality over the records submitted. Furthermore, it submits that the records were prepared to summarize the parties' discussions as to the progress of the work accomplished and the following steps to be taken. As such, the information was not prepared for a purpose which would entail disclosure to individuals outside of the parties.

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[16] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

[46] In response, the requester submits that the information was not supplied "in confidence." He submits that section GC 60 clearly spells out when a party may disclose confidential information – namely when it is "required by law." He also submits that while section GC 54 defines the parties' responsibilities regarding the minutes of the progress review meetings, it does not stipulate that the minutes of such meetings must be kept confidential.

[47] In addition, the requester submits that much of the information is already in the public domain. He explains that due to litigation between Metrolinx and the appellant, exhibits containing hundreds of pages of meeting minutes and technical reports that outlined in great details the scheduling, resource planning and technical issues relating to the appellant's production of light rail vehicles for the Canadian market is available to the public. The requester submits that the appellant's order for Metrolinx is very similar to the streetcars being produced for the TTC.

[48] In response, the appellant disagrees that simply because similar information was produced in court as part of a public hearing, any similar type information is now public information. It submits that the information produced in court was for a different client, to be used on a different infrastructure and issued as part of a different contract with different obligations.

[49] In addition, the appellant submits that although section GC 60 allows for the disclosure of confidential information, it is only confidential information that is not exempted under the *Act*. It submits that it believes the information at issue falls within section 10(1), and, therefore, such disclosure would not be required by law.

[50] Although the TTC provided representations, its representations did not address this component of the second part of the test.

[51] In the circumstances, I am satisfied that the "in confidence" component of the second part of the test is met. Section GC 60 of the contract between the appellant and the TTC states that the TTC cannot sell, assign, transfer, divulge, or use elsewhere or otherwise disclose any confidential information without the appellant's consent. As such, I find that the appellant had an explicit expectation that the information it provided to the TTC would be kept confidential. Although similar information for a similar project is now publicly available, this fact does not diminish the appellant's expectation of confidentiality. I note that the "in confidence" portion of the part two test requires that the appellant had a reasonable expectation of confidentiality *at the time* the information was provided to the TTC. Accordingly, I find that the appellant had a reasonable expectation that the information at issue would be treated confidentially by the TTC. Accordingly, I find that the information was supplied "in confidence".

Part 3: harms

[52] The appellant submits that disclosure of the information at issue in the records could reasonably be expected to result in the harms set out in sections 10(1)(a), (b) and (c).

Representations

[53] The TTC submits that the appellant will not suffer any harms from the information at issue being disclosed. It submits that the meeting minutes contain summarized project information, which is not unique to the appellant. The TTC submits that any vehicle manufacturing company would undergo similar processes and releasing this information would not reveal commercial or technically sensitive information. It also submits that the minutes are of a standard project management nature and include information previously addressed publicly. Finally, the TTC submits that the meeting minutes do not contain information, such as detail designs or work process maps, which it believes is confidential data whose disclosure would compromise the appellant. Therefore, it submits that the information at issue is not considered to be commercially harmful.

[54] As stated above, the appellant submits that disclosure of the information at issue could reasonably be expected to cause the harms noted in sections 10(1)(a), (b) and (c).

Section 10(1)(a)

[55] In its original representations, the appellant submitted that disclosure of the information at issue would significantly interfere with its settlement negotiation with the TTC. It explained that there are current claims and potential claims between itself and the TTC regarding delay in project execution, technical specification interpretation, welding, staff management, and financial considerations. These issues are covered in the records at issue. The appellant further explained that the parties are currently engaged in discussions about these claims with the objective of a final settlement. As such, it submitted that disclosure would significantly interfere with the ongoing claim settlement negotiations between it and the TTC. As well, the appellant submitted that disclosure of the information at issue would make it extremely difficult, if not impossible, for the parties to continue to negotiate in good faith, without any undue external pressure.

[56] In response, the requester submitted that the appellant failed to prove that disclosure would interfere with the settlement process. He pointed out that the TTC, the only other relevant party in the settlement process, is already in full possession of the information at issue. As such, the requester submitted that the appellant has not demonstrated how the public being provided with more information about the history of the TTC contract would make it "impossible" for the parties already in possession of the information to negotiate "in good faith".

[57] In addition, the requester pointed out that during the litigation between the appellant and Metrolinx, the minutes of their contract meetings were made public. He submitted that this disclosure did not render it impossible for the parties to negotiate an acceptable settlement to their dispute. As such, the requester submits that the appellant cannot claim it is inevitable or even probable that disclosure of the MCMM will prevent the appellant from reaching a settlement with the TTC.

[58] Recently, it was reported in the news that the parties had reached a settlement over the TTC's claim against the appellant for its delayed streetcar order. I sought representations from the appellant on whether it wished to provide additional representations on this issue.

[59] In its submissions, the appellant argues that although claims have been resolved by this particular settlement agreement, it does not mean that all contractual issues, disputes and potential claims have been resolved. It also argues that the wording of section 10(1)(a) does not specify any timeframe with respect to the contractual negotiations between the parties. The appellant states:

> During the course of a contract such as the one between the TTC and [it], which is in its 11th year of existence, extensive and constant negotiations occur between the parties, some of which reach the point of being submitted to a contractually available dispute resolution mechanism or to the judicial system, while others are easier to resolve and are settled without any such recourse to courts or other available dispute resolution mechanism. The disclosure of any contractual claims (formal or informal), disputes, issues would still result in significantly prejudicing the contractual negotiations that have and will inevitably be occurring between the parties, especially considering the multi-year dimension of this specific contract.

[60] Finally, the appellant argues that it would be impossible to separate the information relating to the claims that were settled from the rest of the information that it opposes the disclosure of. It also argues that section 10(1)(a) must be read as a whole, together with all the other harms that it would suffer as a result of the complete disclosure of the records, including the significant prejudice to its competitive position, undue financial loss and undue financial gain to its competitors.

[61] In response, the requester argues that there is a contradiction between the appellant's statement that not all contractual issues, disputes and potential claims have been resolved and the TTC spokesperson's statement (which was quoted in the Toronto Star's April 25, 2019 article) that the settlement "resolved all outstanding contractual claims" between the two parties. He argues that if the TTC spokesperson's statement is true then it negates the appellant's position that the records cannot be disclosed because doing so would affect ongoing negotiations.

[62] With respect to the appellant's argument that the parties are constantly negotiating, the requester argues that the appellant has not provided any evidence to show how disclosure of the information at issue would harm its negotiations with the TTC. He points out that the TTC is already in full possession of all information subject to this appeal, and disclosure could not be reasonably expected to materially harm the appellant's negotiating position vis à vis the TTC.

Section 10(1)(c)

[63] The appellant submits that its current market position is due to its proprietary information (such as processes, corporate competencies, skill sets, supplier footprint, technical know-how and competitive discriminators), which it developed and implemented. It submits that it will only be able to maintain its position if such information remains confidential.

[64] The appellant states:

> This type of information consequently has a substantial monetary value. It is easy to understand that [the appellant]'s competitors would benefit from understanding [its] methods, processes and practices therefore from [its] experience and expertise.

[65] It also submits that disclosure of the information at issue would allow a competitor to determine its build rate. The appellant submits that such production rate and time required to manufacture and deliver vehicle is often crucial in a bid as a fundamental element of the authorities' evaluation criteria.

[66] In addition, the appellant submits that disclosure of the information at issue would show its strength and weaknesses, what product and/or technical solution it could offer to its customers, and its weaknesses or the improvements it needed to address arising from the contract. Such information could be used by its competitors in future bids. As well, its loss would result in a direct financial gain to its competitors.

[67] The appellant states:

> Disclosure of [the appellant's] information illustrating [its] footprint would also create a competitive advantage for a competitor in the context of a bid for example since the competitor would know what exactly is the possible scope of each of its plant in Thunder Bay, Sahagan (Mexico), La Pocatiere (Quebec) and its European plants and could use such knowledge to establish a similar foot print or evaluate its possible response including delivering schedule and product to a bid from a transportation authority.

[68] Finally, the appellant submits that all of the information at issue when read together could allow its competitors to create its vehicle assembly line including the

scope of work per assembly stations, the time needed per assembly stations, the staff needed to perform a particular scope of work, the time required per assembly stations, etc. It submits:

> Such information would create a competitive advantage for a competitor in the context of a bid for example (where schedule is a winning factor), by evaluating how much time [the appellant] needs to manufacture and assemble the car considering its current practices, number of assembly stations and staff per station.

[69] In sum, the appellant submits that all this information is very useful to a competitor but harmful to it if disclosed.

[70] In response, the requester again submits that the appellant's proprietary information (such as manufacturing processes and competencies) has already been made public through the litigation between the appellant and Metrolinx. As such, he submits that the appellant has not suffered from any harm due to this disclosure, let alone the type of widespread damage to its global operations it claims would result from the disclosure of the MCMM and PRMM.

Section 10(1)(b)

[71] With respect to section 10(1)(b), the appellant submits that, since the vehicles are still in production, it could decide (going forward) to limit the amount of information it provides to the TTC if the information was disclosed. It also submits that other third parties may not supply similar information to the TTC if they knew that such information could be disclosed to the public. The appellant finally submits it is in the public interest that similar information continues to be supplied to institutions. It submits that a transparent relationship means that potential issues can be flagged early and addressed without delay, and, in this case, the TTC has a better understanding of its production process and will have a better understanding of the vehicles delivered.

[72] In addition, the appellant submits that institutions will incur additional costs if third parties do not directly supply the information to them as they will need to obtain such information on their own.

[73] In response, the requester submits that the appellant's argument about third parties no longer supplying similar information is entirely speculative. He submits that the appellant has not provided any proof in support of this argument. As well, the requester submits that as the TTC is not concerned about the detrimental impact on third parties resulting from disclosure of the information at issue, the appellant's argument should carry no weight.

Analysis and findings

[74] In the appellant's representations, it categorizes the information at issue into four broad categories but fails to identify which category the specific information falls into. As such, I find that the appellant's representations do not address how disclosure of the specific information at issue could reasonably be expected to prejudice significantly its contractual or other negotiations, or result in similar information no longer being supplied. The appellant's arguments on these alleged harms are vague and speculative.

[75] I am also not convinced that disclosure of all the information at issue could reasonably be expected to negatively impact the appellant's contractual or other negotiations as the TTC is already in possession of the information at issue. On my view of the records, the information at issue do not contain any ongoing claim settlement negotiations. As well, the appellant alludes to future claims between itself and the TTC but does not refer to the information at issue or provide evidence of ongoing or future negotiations.

[76] In addition, the appellant has not established that disclosure could reasonably be expected to result in similar information no longer being supplied to the TTC. I do not accept the appellant's argument that disclosure of any of the information could reasonably be expected to result in other manufacturers or companies refusing to either provide similar information or enter into contracts with the TTC because of the potential requirement to disclose information.[17]

[77] I accept, however, that the appellant has established the harms in sections 10(1)(a) and (c) for some of the information at issue. In particular, I find that disclosure of the production rates, number of employees (at the different facilities and in each specific department), number of specific tooling stations, type of work performed at each facility, unit pricing for contractual changes and technical options (and their quantities), previous years milestones,[18] an implementation strategy (the Datum Plan)[19] as well as the underlying reasons and issues for the delay could reasonably be expected to significantly prejudice the appellant's competitive position or result in undue loss to it.

[78] I accept that disclosure of the production rates would provide competitors with fairly specific information about the production time for the appellant to manufacture a vehicle and that this information could be used to the detriment of the appellant in future sales. Moreover, I also accept that the detailed information about the appellant's

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[17] For example, see Order MO-3264.
[18] Contained in appendices.
[19] Contained in MPR of June 17, 2017 – July 14, 2017.

employee numbers, the type of work performed at each facility, number of specific tooling stations, unit pricing for contractual changes and technical options (and their quantities), previous years milestones, and an implementation strategy (the Datum Plan) would provide its competitors with information that could reasonably be expected to cause undue loss to the appellant. Finally, I accept that disclosure of the information relating to the underlying issues or reasons behind the delay of the appellant's delivery of streetcars to the TTC could reasonably be expected to provide the appellant's competitors undue gain in future competitions for sales.

[79] However, I find that the remaining information at issue does not meet the third part of the test under sections 10(1)(a) and (c). As the TTC noted, the information contained in these records is summarized project information. The records do not contain detailed information, such as detail designs or work process maps. I do not accept the appellant's argument that competitors could use this information to create the appellant's vehicle assembly line.

[80] I note that the remaining information includes the meeting dates, administrative matters, human resource matters, references to contractual obligations, location of facilities, and dates of TTC's issuances of preliminary acceptance certificate (PAC) and final acceptance certificate (FAC). I am not convinced that the appellant's competitors could use this information to prejudice the appellant's competitive position or cause the appellant undue loss.

[81] Furthermore, the requester provided, along with his representations, voluminous minutes of senior management meetings and a bi-monthly progress report between Metrolinx and the appellant, which he obtained from the court. He argues that the meeting minutes and the bi-monthly progress report demonstrate that similar information to the information at issue has been disclosed to the public and such disclosure has not caused the appellant any harms. In response, the appellant argues that Metrolinx's order for light rail vehicles is different from the TTC's order. Regardless, some very similar information (such as assembling techniques used) to the information at issue has been publicly disclosed. While I give this argument little weight, I accept that similar information has been disclosed.

[82] The appellant argues that the information produced in court was for a different client, to be used on different infrastructure and issued as part of a different contract with different obligations. However, the fact remains that its assembling techniques and tools used for the Metrolinx's order are very similar to the ones it used for the TTC's order. The appellant has not identified this disclosure as evidence of the harm it could reasonably be expected to suffer in the present appeal.

[83] In sum, I find that some of the information (such as the production rates, number of employees (at the different facilities and in each specific department), number of specific tooling stations, type of work performed at each facility, unit pricing for contractual changes and technical options (and their quantities), previous years milestones, an implementation strategy (the Datum Plan) and the underlying issues or

reasons behind the delay) meet the third part of the test and it is exempt under section 10(1). I find the remainder of the information at issue does not, and will order it disclosed.

PUBLIC INTEREST OVERRIDE

Issue B: Is there a compelling public interest in disclosure of the exempt information that clearly outweighs the purpose of the section 10(1) exemption?

[84] Having found that section 10(1) applies to some of the information at issue, I will now consider whether section 16 of the *Act* would apply to override the exempt information.

[85] Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, **10**, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[86] For section 16 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.

[87] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of a requester who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by a requester. 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.[20]

Representations

[88] The requester submits that there is a compelling public interest in the information at issue. He submits that his request relates to a $1-billion public procurement that has a direct impact on millions of Ontarians. He states:

> Not only are citizens paying a significant sum for the [appellant's] vehicles, but the [appellant's] performance with respect to the order has

[20] Order P-244.

> had and will continue to have a significant impact on the Toronto transit system. It is in the overwhelming public interest that the TTC provide transparency into this purchase.

[89] The requester also states:

> [The appellant] has repeatedly made public claims about the status of TTC vehicle production and its ability to fulfill the TTC vehicle purchase. The public has the right to test those claims by examining internal records kept by the TTC, a public agency, about the order.

[90] In response, the appellant states that it understands the importance of promoting transparency and accountability in public procurement. However, it argues that these principles would be satisfied by disclosing the records as severed by the TTC. The appellant also argues:

> … neither the [requester], nor the TTC has demonstrated why withholding the very limited amount of information redacted by it is required in the public interest. This redacted information will not have a significant or widespread impact on the public. … There is a wide difference between what is merely interesting to the public and what is in the public interest. [The affected party] believes that it has not been demonstrated that the redacted information falls within the second category.

[91] In response, the requester submits:

> … [The appellant] has attempted to apply redactions so broadly that it has rendered much of the records indecipherable. … Any reader examining these documents would have difficulty drawing any significant meaning from them, and the proposed redactions don't meet any definition of transparency.

[92] He also states:

> Both the TTC and [appellant] have made public statements about the cause and nature of those delays and the public that is funding this purchase have the right to test those claims.

Analysis and findings

[93] I will first consider whether there is a compelling public interest in disclosure of the exempt information. 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.

[94] 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.[21] 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.[22]

[95] A public interest does not exist where the interests being advanced are essentially private in nature.[23] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[24]

[96] A public interest is not automatically established where the requester is a member of the media.[25]

[97] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[26]

[98] Any public interest in *non*-disclosure that may exist also must be considered.[27] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[28]

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

- the records relate to the economic impact of Quebec separation[29]
- the integrity of the criminal justice system has been called into question[30]
- public safety issues relating to the operation of nuclear facilities have been raised[31]

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[21] Orders P-984 and PO-2607.
[22] Orders P-984 and PO-2556.
[23] Orders P-12, P-347 and P-1439.
[24] Order MO-1564.
[25] Orders M-773 and M-1074.
[26] Order P-984.
[27] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.).
[28] Orders PO-2072-F, PO-2098-R and PO-3197.
[29] 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.).
[30] Order PO-1779.

- disclosure would shed light on the safe operation of petrochemical facilities[32] or the province's ability to prepare for a nuclear emergency[33]

- the records contain information about contributions to municipal election campaigns[34]

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

- another public process or forum has been established to address public interest considerations[35]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[36]

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[37]

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[38]

- the records do not respond to the applicable public interest raised by the appellant[39]

[101] Based on my review of the exempt information, I find that the information about the underlying issues or reasons causing the delays serves the purpose of informing or enlightening the citizenry about the activities of the government.[40] Disclosure of this information will inform the public about the reasons behind the delays.

[102] As stated earlier, the TTC's contract with the appellant involves a large expenditure of public funds. As such, there is no question that such a substantial expenditure of public funds relates to a public interest. Seen in that context, there is a clear relationship between the specific type of information (underlying issues or reasons

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[31] 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.), Order PO-1805.
[32] Order P-1175.
[33] Order P-901.
[34] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[35] Orders P-123/124, P-391 and M-539.
[36] Orders P-532, P-568, PO-2472, PO-2614, PO-2626.
[37] Orders M-249 and M-317.
[38] Order P-613.
[39] Orders MO-1994 and PO-2607.
[40] *Barker v. Ontario (Information and Privacy Commissioner)*, 2019 ONCA 275.

causing the delays) and the *Act*'s central purpose of shedding light on the operations and activities of the TTC.

[103] As the requester points out, this contract has huge implications for not only transit users and commuters in the Greater Toronto Area but also for all of Ontarians:

> … this $1-billion order is being funded by the governments of Toronto and Ontario. All residents of the province have a stake in its outcome.
>
> The order represents a once-in-a-generation vehicle purchase that is having and will continue to have impacts on Toronto residents that will last decades. The public interest is only heightened by the well-documented delays in the delivery of the new streetcars, which have had affected not only citizens who rely on public transit, but anyone who moves around Canada's largest city and pays taxes that fund the TTC.

[104] Moreover, the TTC believes there is a compelling public interest in the information at issue. It states:

> As a public institution the [TTC] is answerable to the taxpaying public. This project is a billion dollar investment and delivery delays from the [affected party] has cost tax payers money and ongoing problems on the streetcar routes. The lack of new streetcars compels the TTC to use the older models which are more prone to break down causing increased traffic jams, and buses have to work routes normally handled by streetcars. This project is causing significant issues for everyday commuters and their questions into the project should be addressed. I am arguing that there is a compelling public interest in these records which outweighs this exemption.

[105] Therefore, I find that there is a compelling public interest in disclosure of the exempt information that speaks to the underlying issues or reasons causing the delays.

[106] However, I do not find that there is a compelling public interest in the remaining exempt information as it does not inform or enlighten the public about the reasons behind the delays. The remaining information is about the appellant's production rates, number of employees (at the different facilities and in each specific department), number of specific tooling stations, type of work performed at each facility, unit pricing for contractual changes and technical options (and their quantities), previous years milestones (found in appendices), and an implementation strategy (the Datum Plan).

[107] As a final note, I have taken into account the fact that, as identified above, previous orders have indicated that a public interest is not automatically established where the requester is a member of the media.[41] My finding that there is a compelling public interest in disclosure of some of the information at issue in the records is not based on the fact that the requester is a member of the media.

[108] However, the existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specified circumstances.

[109] 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.[42]

[110] As stated above, the purpose of section 10 is to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Generally, it serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.

[111] Based on my review of all the circumstances, I find that the compelling public interest in disclosure of the information about the underlying issues or reasons causing the delays clearly outweighs the purpose of the section 10(1) exemption. In this circumstance, the public's right to know about the issues or reasons behind the delays outweighs the importance of protecting the appellant's informational assets under section 10(1). Accordingly, I find that section 16 applies to override the section 10(1) exemption for this information and, as such, I will order this information disclosed.

ORDER:

1. I uphold the TTC's decision, in part.

2. I order the TTC to disclose to the requester the information that is not exempt under section 10(1) and the information about the underlying issues or reasons causing the delays by **October 16, 2019** but not before **October 8, 2019** in accordance with the highlighted records I have enclosed with the TTC's copy of this order. To be clear, the information highlighted in orange should be disclosed to the requester. The information highlighted in yellow is the TTC's severances, which are not at issue in this appeal.

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[41] Orders M-773 and M-1074.
[42] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

3. In order to verify compliance with provision 2 of this order, I reserve the right to require the TTC to provide me with a copy of the records disclosed to the requester.

Original signed by | September 10, 2019

Lan An
Adjudicator