

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4030

Appeal PA19-00425

Metrolinx

February 19, 2020

Summary: A media requester submitted a request to Metrolinx under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to data showing the use of Child PRESTO cards on the Toronto Transit Commission subway system. Metrolinx denied access to the responsive record, citing the application of the discretionary economic and other interests exemption in section 18(1).

In this order, the adjudicator finds the record is not exempt under section 18(1) and orders disclosure of the record.

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

OVERVIEW:

[1] A request was submitted by a member of the media to Metrolinx under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for access to the following information:

I request a sortable electronic document showing all uses of PRESTO¹ child passes on the TTC² subway system going back to the earliest date available, including:

- the station the person entered at,
- the time and date of the entry.

I am open to some redactions of this data for privacy reasons, such as changing times to the nearest hour, (i.e. 09:15 becomes 09.)

[2] After conducting third party notification to the TTC, which did not object to disclosure of the record, Metrolinx issued a decision denying access to the responsive record pursuant to the discretionary economic and other interests exemption in section 18(1) of the *Act*.

[3] The requester (now the appellant) appealed Metrolinx's decision.

[4] During mediation, Metrolinx confirmed its decision and clarified that it is relying on sections 18(1)(a), (c) and (d) of the *Act* to deny access to the responsive record.

[5] The appellant advised the mediator that he would like to pursue the appeal at adjudication, where an adjudicator conducts an inquiry.

[6] I sought the representations of Metrolinx and the appellant on the section 18(1) exemption. In his representations, the appellant raised the application of the public interest override at section 23 of the *Act*. As a result, I sought representations from the parties on this issue too. Representations were exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[7] In this order, I find that the record is not exempt under section 18(1) and I order disclosure of the record.

RECORD:

[8] Metrolinx describes the record as containing over one million lines of text in an Excel spreadsheet³ about the use of PRESTO cards that have been assigned a child concession by the TTC (also known as Child PRESTO cards).

¹ According to Metrolinx's website, PRESTO is an electronic fare payment system. In this order, passes are also referred to cards.

² Toronto Transit Commission (the TTC).

³ Metrolinx provided the IPC with a copy of the record on a USB memory stick. If printed, the record would consist of over 22,000 pages.

The record contains data categorized under the following headings:

- Location,
- Date/Time,
- Number of Occurrences.

[9] The record does not contain any identifying information identifying the individual who used the Child PRESTO card.

DISCUSSION:

Do the discretionary economic and other interests exemptions at sections 18(1)(a), (c) or (d) apply to the record?

[10] Metrolinx relies on sections 18(1)(a), (c) and (d), which 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;
- b. information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- c. 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;

[11] 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*.⁴

[12] For sections 18(1)(c) or (d) to apply, the institution must provide detailed 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

⁴ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980* (The Williams Commission Report), Toronto: Queen's Printer, 1980.

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.⁵

[13] The failure to provide detailed evidence will not necessarily 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*.⁶

[14] 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.⁷

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

Representations

[15] Metrolinx states that the record consists of information detailing the date, time and number of occurrences of Child PRESTO card "taps" at each TTC Subway station dating back to 2015, when the TTC implemented free fares for children 12 years of age and under. It states that Child PRESTO cards are "tapped" at TTC subway stations to enable free entry to TTC subway stations for children 12 years of age and under through turnstiles and other gated entry points.

[16] Metrolinx believes the record falls within the definition of a trade secret established by past orders of the IPC, since:

⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁶ Order MO-2363.

⁷ See Orders MO-2363 and PO-2758.

- i. the patterns contained in the record (revealing the frequency of use of child concession cards by TTC station by date and time) can be used in data sets that can "be used in business,"
 - a. to make recommendations and decisions around routes and modes of transport;
 - b. to be marketed and sold directly as data sets to corporate partners for the purposes of Metrolinx's non-fare revenue strategies, including strategic, promotional, and advertising partnerships and services; and
 - c. to provide data analytics to transit agencies.
- ii. the patterns (particularly as they relate to a particular concession type and frequencies over specified dates and times) are not generally known to the public;
- iii. the fact that the usage patterns are not generally known is what gives them economic value as data sets (in other words, if the patterns were generally known, partners would have no need to pay for the data); and
- iv. are contained in PRESTO's Business Intelligence system, which can only be accessed by approved personnel and in accordance with non-disclosure agreements.

[17] Metrolinx states that aggregate representations of similar data have been provided to potential strategic, promotional, and advertising partners under non-disclosure agreements for the purposes of co-promotional and advertising opportunities.

[18] In addition and in the alternative, it states that the data contained in the record should be considered commercial information as it relates directly to the payment (or non-payment, given that children 12 and under ride free on the TTC) of fares.

[19] The appellant did not address the type of information under part 1 of section 18(1)(a) in his representations.

Analysis/Findings re part 1

[20] The types of information referred to by Metrolinx as listed in section 18(1)(a) have been discussed in prior orders:

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

- i. is, or may be used in a trade or business,

- ii. is not generally known in that trade or business,
- iii. has economic value from not being generally known, and
- iv. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁸

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

[21] I do not agree with Metrolinx that the record contain a pattern that comprises a trade secret. It is merely a listing of the date, time and place a Child PRESTO card was used on the TTC subway system over the time period set out in the request. I cannot find that this type of information is not generally known in the public transportation trade or business that Metrolinx is in.

[22] Therefore, I do not find that this type of information is information that comes within the definition of a trade secret for the purpose of section 18(1)(a) of the *Act*.

[23] I do agree with Metrolinx, and I find, that the record contains commercial information regarding the selling of its services. Metrolinx describes itself as being:

...charged with planning and delivering a multi-modal, integrated regional public transit network. In furtherance of such purpose, Metrolinx, through its PRESTO division, carries on the business of providing a centralized provincial electronic fare collection system based on smartcard technology, providing fare collection, settlement services and information management services to all participating Transit Agencies, including GO Transit and the TTC.

[24] I accept that Metrolinx has sold other aggregated data, similar to that contained in the record, for commercial purposes to "... potential strategic, promotional, and advertising partners." As well, the data in the record relates to the providing of TTC services to children, albeit at no charge.

[25] Therefore, given my conclusion that the record contains commercial information,

⁸ Order PO-2010.

⁹ Order PO-2010.

¹⁰ Order P-1621.

I find that part 1 of the test under section 18(1)(a) has been met.

Part 2: belongs to

Representations

[26] Metrolinx states that it created the record from data stored in PRESTO's Business Intelligence platform, pursuant to the Metrolinx and TTC Master E-Fare Collection Outsourcing Agreement. It submits that although the data contained in the record pertains to the use of Child PRESTO cards at TTC subway stations, that information is collected by PRESTO and belongs to Metrolinx.

[27] Metrolinx states that under the Agreement, it retains ownership of various kinds of data and grants the TTC a non-exclusive license to use "TTC Data" collected through the PRESTO system, which includes ridership, sales and transit-related data. It states that the definition of "TTC Data" explicitly includes "tap" information, such as the data contained in the record.

[28] The appellant does not dispute that the information in the record belongs to Metrolinx.

Analysis/Findings

[29] 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.

[30] Examples of information belonging to an institution are trade secrets, business-to-business mailing lists,¹¹ customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent 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.¹²

[31] Based on my review of the record and Metrolinx's representations, I find that the

¹¹ Order P-636.

¹² 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.

information in the record belongs to Metrolinx. The information in the record lists when and where a specific type of PRESTO card was used by a customer on the TTC. This is similar to a customer list as it purports to demonstrate the usage by a specific type of customer of Metrolinx's fare system on the TTC system.

[32] Therefore, I find that part 2 of the test under section 18(1)(a) has been met.

Part 3: monetary value

Representations

[33] Metrolinx states that as a Crown Corporation, it is subsidized in part by the Government of Ontario. In accordance with the *Metrolinx Act*,¹³ the Metrolinx Board of Directors must adopt a business plan for each fiscal year. It states:

One of the goals of the business plan is to reduce reliance on such subsidies in favour of more economically self-sustaining business models. Working with Metrolinx's Marketing division, PRESTO has been given a mission to leverage PRESTO data for the purposes of identifying and engaging in opportunities to deliver monetary value from the direct and indirect use of ridership data, including customer segmentation, time of day preferences, etc...

Metrolinx is exploring various new non-fare related revenue streams to meet the targets set by the Ministry [of Transportation],¹⁴ the Metrolinx Board and the Metrolinx CEO, including the commercialization of aggregated, anonymized PRESTO data. Corporate and Transit Agency partners have been interested in such data sets for a variety of reasons. Aggregate data derived from such data sets is currently being utilized for the purposes of finding partners for Metrolinx's Station Naming Expression of Interest.

Other additional uses are being actively explored. With respect to PRESTO child concession card data, for example, a children's retailer may want to understand which stations are accessed most often by children in order to determine where to open a new location or where and when to target certain advertising campaigns including pop-up shops, kiosks or other special events. [The] record in question (or a similar data set) could be sold to such a retailer, provided only if the information is not already publicly available. Similarly, Metrolinx is exploring the development of

¹³ *Metrolinx Act, 2006*, S.O. 2006, c. 16.

¹⁴ The Ministry of Transportation is affiliated with Metrolinx see <https://www.ontario.ca/page/ministry-transportation>

Data Analytics services for Transit Agencies to help them better understand their service offering and plan for service optimization. Metrolinx would use data such as that contained in the record as the basis for such services. Data sets like those contained in the record therefore have direct monetary value or potential monetary value to Metrolinx.

As described above, although Metrolinx is still identifying and developing specific business models for monetizing the data, early exploration of corporate partner interest in this kind of data can be seen in the call for expressions of interest posted to the Metrolinx website titled Metrolinx Partnership and Sponsorship Opportunities.¹⁵

[34] The appellant states that Metrolinx's argument that, although it does not now sell data like the requested data, it might do so in the future, could be used by any public agency to deny any data. He submits that asserting that a plan might involve doing something in the future is not a high standard. He states:

Due to a series of related policy failures by different agencies, children's PRESTO passes are widely used by adults, who can be issued them with essentially no scrutiny. Child passes are attractive to the unscrupulous, since they offer potentially years of free transit.

In February [2019], [the appellant's media organization] documented a widespread illicit market in PRESTO child passes on Kijiji¹⁶ and similar sites, made far easier by lack of oversight.¹⁷

That same week, the City of Toronto's Auditor General published a report in which she warned that "...it is likely that a large percentage of the Child PRESTO taps are fraudulent and the annual revenue leak for the TTC could be in the millions."

The integrity and fairness of Toronto's transit fare system is a reasonable subject of public interest reporting, and Metrolinx's data would be a valuable tool in creating it.

[35] In reply, Metrolinx states that the record contains raw data relating to the "taps" made at TTC subway stations using PRESTO cards that have been assigned a child concession by the TTC. It states that any conclusions drawn by the appellant or the public from this record about the integrity or fairness of such "taps" would be speculative since the data on its own cannot validate the veracity of the information

¹⁵ Metrolinx provided links to the call for expressions on its website.

¹⁶ According to its website, Kijiji is Canada's largest classified ads site.

¹⁷ The appellant provided a copy of the news article documenting this investigation.

captured.

Analysis/Findings re part 3

[36] 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.¹⁸

[37] 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.¹⁹ Nor does the fact, on its own, that the information has been kept confidential.²⁰

[38] The record shows the frequency of and time of use at specific TTC subway stations of Child PRESTO cards.

[39] Children 12 and under are allowed to ride TTC vehicles for free. Child PRESTO cards enable entry for children 12 years of age and under through turnstiles and other gated entry points, although no fee is charged. Therefore, a Child PRESTO card can be used for an unlimited number of free rides.

[40] Both parties refer to a report dated February 2019 by the City of Toronto’s Auditor General (the report) entitled:

- Auditor General’s Report - Review of Toronto Transit Commission’s Revenue Operations: Phase One - Fare Evasion and Fare Inspection.²¹

[41] As well, the appellant refers to a news article (the article), also dated February 2019, that discusses the issue of fare evasion resulting from the misuse of Child PRESTO cards.

[42] Both the article and the report list serious concerns about the illegal sale, and the fraudulent use, of Child PRESTO cards.

[43] The article details the widespread illicit market in Child PRESTO cards.

[44] The report details the illegal use of these cards. Specifically, the report states that, although Child PRESTO cards were used at TTC subway stations, the Fare

¹⁸ Orders M-654 and PO-2226.

¹⁹ Orders P-1281 and PO-2166.

²⁰ Order PO-2724.

²¹ See report at

[https://www.ttc.ca/About the TTC/Commission reports and information/Commission meetings/2019/February 27/Reports/3 AG Report Review of TTC%27s Revenue Operations.pdf](https://www.ttc.ca/About%20the%20TTC/Commission%20reports%20and%20information/Commission%20meetings/2019/February%2027/Reports/3%20AG%20Report%20Review%20of%20TTC%27s%20Revenue%20Operations.pdf) (the report).

Inspectors did not come across any actual children aged 12 and under who were using the Child PRESTO cards during the six-week November and December 2018 audit observation period. The report also states that TTC Fare Inspectors identified 56 subway riders and 22 bus riders who were fraudulently using a Child PRESTO card during this six-week period.

[45] The report includes the following recommendations to the TTC about Child PRESTO cards:

- to reassess whether there is a critical need to issue Child PRESTO cards, balancing provision of good customer service with the risk of fraudulent use of the Child Cards.
- to NOT distribute the Toronto Transit Commission's promotional Child PRESTO cards until appropriate controls are in place.
- to explore ways to provide a Child PRESTO card that is visually different from an Adult PRESTO card, including further negotiation with Metrolinx to issue visually different PRESTO cards for adults and children aged 12 and under.
- to make the necessary changes to the Child PRESTO cards so that bus and streetcar operators can spot inappropriate use of PRESTO concession cards.
- to ensure adequate controls are in place and consistently applied in the issuance of Child PRESTO cards by Distributors.
- to find ways with Metrolinx to either seize or obtain confirmation of deactivation for Child PRESTO cards found to be fraudulently used.

[46] The report states that there is significant risk of fraudulent use of the Child PRESTO card and also that the TTC is estimated to have lost \$61 million in passenger revenue in 2018 due to fare evasion.

[47] Based on my review of the report and the article, as well as the parties' submissions, it is clear that the misuse of Child PRESTO cards on the TTC results in a significant loss of revenue to Metrolinx, the TTC and the City of Toronto.

[48] Although the data in the record dates back to 2015, Metrolinx has not argued that it has sold this data, nor has it provided any indication as to the potential monetary value of the specific information in the record.

[49] As well, given the documented misuse of Child PRESTO cards, I find that the data in the record is unreliable due to the lack of certainty about the actual frequency children aged 12 and under are using these PRESTO cards at TTC subway stations. Concerns about the integrity of the data would, in my view, nullify its monetary value to Metrolinx.

[50] Therefore, due to the potential unreliability of the information in the record, I find that I do not have sufficient evidence to find that there exists a potential monetary value of the record to a third party seeking to purchase it.

[51] Specifically, I do not accept that the information in the record could be sold by Metrolinx to an outside party to provide information to them about the use of Child PRESTO cards. I do not agree that this data, which shows how often a Child PRESTO card is used at particular TTC subway stations, could be useful to a children's retailer as described above by Metrolinx. Due to the misuse of the Child PRESTO card, the record does not accurately reflect the use of Child PRESTO cards by children 12 years of age or under.

[52] Therefore, I find that the third part of the test under section 18(1)(a) has not been met as the record, in my opinion, does not have monetary value or potential monetary value. The record is not exempt under section 18(1)(a).

Section 18(1)(c): prejudice to economic interests

Representations

[53] Metrolinx states that it is actively engaged in and seeking opportunities to commercialize data sets such as the one contained in the record. It submits that disclosure of this data set could reasonably be expected to lead to disclosure of other similar data sets, effectively eliminating Metrolinx's ability to monetize the raw data. It submits that if a corporate partner were able to obtain the same information through a freedom of information request, there would be no need for them to pay for the data.

[54] Metrolinx states that disclosure of the record can therefore reasonably be expected to prejudice its ability to monetize the data, harming the economic interests of PRESTO, Metrolinx and ultimately the Government of Ontario.

[55] The appellant provided the same arguments for section 18(1)(c) as he did for section 18(1)(a).

Analysis/Findings

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

positions.²²

[57] This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.²³

[58] As set out above for section 18(1)(a), I do not agree with Metrolinx that disclosure of the information in the record could reasonably be expected to prejudice its economic interests.

[59] Due to the unreliability of the information in the record, namely, that it does not accurately depict the actual occurrences when a child 12 years of age or under used a Child PRESTO card, I do not accept Metrolinx's submission that the information in the record has potential monetary value to it. Therefore, I do not accept that disclosure of the record without compensation could result in economic loss to Metrolinx.

[60] Accordingly, I find that the record is not exempt under section 18(1)(c).

Section 18(1)(d): injury to financial interests

Representations

[61] Metrolinx states that it is actively seeking opportunities and developing business plans to increase non-fare related revenue streams in order to reduce the subsidies required from the Government of Ontario to operate and expand Metrolinx's transportation system. It states:

Furthermore, PRESTO's revenue from Transit Agencies is based on a commission calculated on the fares collected. Fare evasion therefore has a direct impact on Metrolinx's commissions earned. The record includes data on specific concession usage at various times, which can be used to validate fare compliance. Protecting the requested data allows Metrolinx to develop more robust and effective fare enforcement strategies and policies, such as determining where and when to deploy additional fare enforcement efforts in order to be most effective. Conversely, disclosing data such as that contained in the record to the public could have the undesired effect of providing individuals with the tools to avoid fare enforcement. Metrolinx (and through it, the Government of Ontario) has

²² Orders P-1190 and MO-2233.

²³ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

an interest in keeping data such as that contained in the record confidential in order to enable the organization to access a full range of fare enforcement strategies to protect the revenue that comes to Metrolinx and the Province through the TTC and other Transit Agencies.

[62] The appellant states that Metrolinx does not describe how the data-driven plan for fare evasion would actually work, and questions how a fare evader could plan a strategy for somewhat reducing the chance of fare evasion detection by analyzing a million-line spreadsheet.

[63] Metrolinx did not directly reply to the appellant's representations. However, it did discuss the issue of fare evasion in its representations on section 23. There, it states that:

[T]he record will not inform public discourse about the 'integrity and fairness' of the transit system as it does not actually disclose any specific instances of fare evasion. It simply sets the date, time and location of "taps" using PRESTO cards assigned a child concession by the TTC. Any conclusions drawn by the appellant or the public from this record about the integrity or fairness of such "taps" would be speculative since the data on its own cannot validate the veracity of the information captured.

Analysis/Findings

[64] Section 18(1)(d) is intended to protect the broader economic interests of Ontarians.²⁴

[65] Metrolinx's initial representations under section 18(1)(d) discuss financial loss due to fare evasion as a result of disclosure of the record, yet in its reply representations it indicates that the record does not disclose instances of fare evasion.

[66] The record indicates the time and date when a Child PRESTO card was used to enter a specific TTC subway station. I cannot ascertain from my review of Metrolinx's representations and the record how the information in the record could be used to enable someone to evade paying TTC fares.

[67] I find that I do not have sufficient evidence to conclude that disclosure of the information in the record 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 as claimed by Metrolinx. Therefore, I find that section

²⁴ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 O.A.C. 108, [1999] O.J. No. 484 (C.A.), leave to appeal to Supreme Court of Canada refused (January 20, 2000), Doc. 27191 (S.C.C.); see also Order MO-2233.

18(1)(d) does not apply to exempt the information in the record.

Conclusion

[68] I have found that the record is not exempt under the claimed sections 18(1)(a), 18(1)(c), or 18(1)(d) exemptions and I will order it disclosed.

ORDER:

I order Metrolinx to disclose the record on a USB memory stick to the appellant by **March 25, 2020** but not before **March 20, 2020**

Original signed by _____

Diane Smith
Adjudicator

February 19, 2020 _____