

Information and Privacy Commissioner,  
Ontario, Canada



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

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## **ORDER MO-3965**

Appeal MA18-338

Toronto Transit Commission

October 21, 2020

**Summary:** The appellant submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto Transit Commission (TTC) for a cost estimate record for the Line 2 East Expansion project, which is also known as the Scarborough subway extension. The TTC disclosed parts of this cost estimate record to the appellant, but withheld other information under the discretionary exemptions in sections 11(a), and (d) (economic and other interests) of the *Act*. The appellant appealed the TTC's decision to deny her access to parts of the record. During the appeal process, the appellant indicated that she is only seeking access to the estimated total cost for each item that needs to be constructed or provided for the project. In this order, the adjudicator finds that this information is exempt from disclosure under sections 11(c) and (d) of the *Act*, because disclosing it could reasonably be expected to prejudice the TTC's economic interests and be injurious to its financial interests. In addition, he upholds the TTC's exercise of discretion in applying these exemptions and finds that the public interest override in section 16 of the *Act* does not apply to this information. He upholds the TTC's access decision and dismisses the appeal.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 11(c), 11(d) and 16.

**Orders Considered:** Orders MO-1228, MO-1258, MO-1450, MO-2617-I and MO-3193-F.

### **OVERVIEW:**

[1] The appellant is a journalist who submitted an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto Transit

Commission (TTC) for the following record relating to the Line 2 East Extension project, which is also known as the Scarborough subway extension:

The detailed order of magnitude cost estimate for the concept of the Scarborough subway extension approved by council in March 2017, comparable to the 2016 estimate of the "footlong" concept.

[2] In response, the TTC located a 23-page record relating to the Line 2 East Extension project entitled, "TTC Engineering Constr. Expansion, Capital Program – Estimating." It sent the appellant a decision letter which stated that it was providing her with partial access to this record. The information in the record that it disclosed to her included the estimated global costs for parts of the project and the description of each item that needs to be constructed or provided for the project (e.g., station and entrances, escalators, bus platforms, tunnelling, track work materials, partitions and doors, etc.). It denied access to other parts of this record under the discretionary exemptions in sections 11(a), (c) and (economic and other interests) of the *Act*. In particular, it stated:

Detailed financial information will compromise the integrity of the bidding process, especially because the financial information contains the unit rates and contingency amounts. The concern is that if the detailed financial information is publicly released, including contingency, it could drive the bidding costs higher which would be injurious to the TTC's financial interests.

[3] The appellant appealed the TTC's decision to deny her access to parts of the record to the Information and Privacy Commissioner of Ontario (IPC).

[4] This appeal was assigned to a mediator, who attempted to resolve the issues in dispute between the parties. During mediation, the appellant stated that she is only interested in certain "total costs" set out in the record. She provided both the TTC and the mediator with a marked-up copy of the record which identified the columns containing the redacted information she is seeking. This information is the estimated total cost for each item that needs to be constructed or provided for the Line 2 East Extension project. She also claimed that there is a compelling public interest in disclosing this information, which means that the public interest override in section 16 of the *Act* is at issue.

[5] This appeal was not resolved during mediation and was moved to adjudication. I decided to conduct an inquiry and sought and received representations from both the TTC and the appellant on the issues to be resolved.

[6] In this order, I find that the specific information sought by the appellant is exempt from disclosure under sections 11(c) and (d) of the *Act*, because disclosing it could reasonably be expected to prejudice the TTC's economic interests and be injurious to its financial interests. In addition, I uphold the TTC's exercise of discretion in applying these exemptions and find that the public interest override in section 16 of the *Act* does not apply to this information. I uphold the TTC's access decision and dismiss the appeal.

**RECORD:**

[7] The information that the TTC refused to disclose to the appellant is found in a record relating to the Scarborough subway extension entitled, "TTC Engineering Constr. Expansion, Capital Program – Estimating." The specific information sought by the appellant is found on the following pages of the redacted record:

<b>Page number</b>	<b>Location of redacted information<sup>1</sup></b>	<b>TTC's decision</b>	<b>Exemptions claimed</b>
3	Column entitled "2015\$"	Withheld	Sections 11(a), (c) and (d)
4	Column entitled "2015\$"	Withheld	Sections 11(a), (c) and (d)
5	Column entitled "Element Total"	Withheld	Sections 11(a), (c) and (d)
6	Column entitled "Total"	Withheld	Sections 11(a), (c) and (d)
7	Untitled column - second column from the right	Withheld	Sections 11(a), (c) and (d)
8	Column entitled "Element Total"	Withheld	Sections 11(a), (c) and (d)
9	Column entitled "Total"	Withheld	Sections 11(a), (c) and (d)
10	Column entitled "Total"	Withheld	Sections 11(a), (c) and (d)
11	Column entitled "Amount"	Withheld	Sections 11(a), (c) and (d)
13	Column entitled "Total Cost"	Withheld	Sections 11(a), (c) and (d)
14	Column entitled "Total Cost"	Withheld	Sections 11(a), (c) and (d)
16	Column entitled "Total Cost"	Withheld	Sections 11(a), (c) and (d)

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<sup>1</sup> As mentioned above, the redacted information is the estimated total cost for each item that needs to be constructed or provided for the project (e.g., station and entrances, escalators, bus platforms, tunnelling, track work materials, partitions and doors, etc.).

	"Amount"		
17	Column entitled "Item Cost"	Withheld	Sections 11(a), (c) and (d)
18	Column entitled "Item Cost"	Withheld	Sections 11(a), (c) and (d)
19	Column entitled "Item Cost"	Withheld	Sections 11(a), (c) and (d)
20	Column entitled "Item Cost"	Withheld	Sections 11(a), (c) and (d)
21	Column entitled "Item Cost"	Withheld	Sections 11(a), (c) and (d)
23	Column entitled "Amount"	Withheld	Sections 11(a), (c) and (d)

**ISSUES:**

- A. Do the discretionary exemptions at sections 11(a), (c) or (d) apply to the withheld information in the record?
- B. Did the TTC exercise its discretion under sections 11(c) and (d)? If so, should the IPC uphold the exercise of discretion?
- C. Is there a compelling public interest in disclosing the information at issue in the record that clearly outweighs the purpose of the sections 11(c) and (d) exemptions?

**DISCUSSION:**

**A. Do the discretionary exemptions at sections 11(a), (c) or (d) apply to the withheld information in the record?**

[8] The TTC states that it redacted the information at issue in the record, because disclosing it could reasonably be expected to lead to the harms set out in sections 11(a), and (d) of the *Act*. These provisions state:

A head may refuse to disclose a record that contains,

(a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;

...

(c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

[9] The purpose of section 11 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*.<sup>2</sup>

[10] For sections 11(c) and/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 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.<sup>3</sup>

[11] 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 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.<sup>4</sup>

[12] I have decided to start my analysis by determining whether the information at issue in this appeal is exempt from disclosure under sections 11(c) and/or (d) of the *Act*.

### ***Summary of the TTC's representations***

#### *Section 11(c): prejudice to economic interests*

[13] Section 11(c) gives the TTC the discretion to refuse to disclose information where disclosure could reasonably be expected to prejudice its economic interests or competitive position.

[14] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic

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<sup>2</sup> *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

<sup>3</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>4</sup> Order MO-2363.

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.<sup>5</sup>

[15] The TTC states that the record is a cost estimate document that outlines the overall funding that is required for the Line 2 East Extension Project to begin. It further states that the estimated budget includes information about unit prices (amounts allocated for any activity of work), as well as contingency funds (funds allocated for unforeseen additional costs).

[16] It further states that because the planning and development of the Line 2 East Expansion project is still ongoing, its economic interests in relation to the project are to get the best possible prices for construction contracts that will ensure a successful project timeline and budget.

[17] It cites the Ontario government's *Freedom of Information and Protection of Privacy Manual*, which states that "economic interests" refer to the production, distribution and consumption of goods and services.<sup>6</sup> It submits that if it can be reasonably expected, for instance, that disclosure of certain information would cause an institution to pay a higher price for goods and services, that information may be exempt under section 11(c).

[18] In particular, it claims that if the appellant uses the information at issue in a news story, it will provide interested bidders access to the TTC's budgetary breakdown of unit prices and contingency amounts, which would compromise the integrity of the bidding process. In a public bidding process, interested parties (companies) are asked to submit proposals for goods and services, and provide cost breakdowns for the services they would provide on a construction project. It submits that providing the TTC's "maximum budget prices" would allow for those bidding parties to present higher product costs based on the TTC's budget information.

[19] The TTC also submits that disclosing the pricing information in the cost estimate record could reasonably be seen to contribute to bid rigging or collusive bidding. It cites the City of Toronto Auditor General's Report of March 17, 2017, in which the topic of bid collusion is discussed in relation to road construction contracts. The report states:

Bid rigging provides an opportunity for the winner to artificially inflate prices of goods and/or services by eliminating real competition. This according to studies, can raise the price of a product or service between 15 and 30 per cent above fair market prices. In addition, contractors may no longer have the incentive to perform quality work on time if they know they will likely

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<sup>5</sup> Orders P-1190 and MO-2233.

<sup>6</sup> [https://files.ontario.ca/books/foi\\_privacy\\_manual\\_-\\_final-v02-2018-03-08-en-accessible.pdf](https://files.ontario.ca/books/foi_privacy_manual_-_final-v02-2018-03-08-en-accessible.pdf), 71.

win the next contract through the same colluding scheme with other bidders."<sup>7</sup>

[20] The TTC asserts that if the information at issue is disclosed, it would allow bidding companies to carry out actions such as those outlined in this report, which could reasonably be expected to prejudice the TTC's economic interests, as set out in section 11(c).

*Section 11(d): injury to financial interests*

[21] Section 11(d) gives the TTC the discretion to refuse to disclose information where disclosure could reasonably be expected to be injurious to its financial interests.

[22] The TTC claims that under the *Act*, "financial interests" refer to an institution's financial position, its ability to generate revenue, and its ability to protect its own interests in financial transactions with third parties including other governments. It submits that its financial interests with the Line 2 East Expansion project are to be able to conduct a fair competitive bidding competition, which it relies upon to secure labour, materials, and specialized technical expertise to complete the project.

[23] It further submits that the standard of practice in the transit and construction industry is to never disclose information regarding unit pricing and contingency amounts before or after a bidding process has been completed, as it provides inside knowledge about how an organization prices its current and future projects.

[24] To support its position, the TTC refers to the Charbonneau Commission Report, which investigated corruption in the bidding and contract awarding processes in the construction industry in Québec. In Volume 3 of this report, Justice Charbonneau stated the following with respect to disclosing certain pricing information about proposed projects before receiving bids:

Experts noted that the release of certain information by public contracting authorities could make them vulnerable to collusion schemes. While transparency is one of the principles advocated by the OECD to enhance the integrity of government procurement, the release of strategic information can encourage perpetual cartels. Cases reported to the Commission revealed that public contracting authorities released information that may have been used for purposes of collusion and corruption.<sup>8</sup>

[25] The TTC claims that the Charbonneau Commission Report determined that the release of cost estimates for work to be carried out by the City of Montréal in specific cases facilitated collusion agreements by companies bidding for the work, because it

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<sup>7</sup> Romeo-Beehler, B. Auditor General's Report: *Detection of Warning Signs for Potential Big Rigging Should be Strengthened*, (City of Toronto, 2017), 10.

<sup>8</sup> Charbonneau, F. and Renaud, L. *Of the Report of the Commission of Inquiry on the Awarding and Management of Public Contracts in the Construction Industry: Volume 3 - Schemes, Causes, Consequences and Recommendations*. (Québec, 2015), 28.

provided strategic information about unit prices (i.e., the amount that the City expected to pay for the projects).<sup>9</sup>

[26] The TTC further submits that the report also revealed that the release of contingency prices caused significant financial damage to the awarding party, as it allowed for corrupt agreements to be formed between companies and city officials. In particular, Justice Charbonneau stated:

Public contracting authorities also disclosed the budget percentage they were willing to spend on contingencies or unforeseen work. At the City of Montréal, this amount generally represented 10% of the value of contracts. The Commission learned that contractors, with the complicity of site supervisors, established corrupt pacts to exploit these contingency funds by claiming for false extras. Entrepreneurs thus increased their profits in exchange for bribes to municipal officials.<sup>10</sup>

[27] The TTC submits that while this is an extreme example of the harms that may result from publicly disclosing pricing and contingency amounts, it clearly shows that the harms that it has raised in this appeal are real and reasonable in relation to ongoing procurement projects and maintaining the integrity of a public bidding process.

[28] Finally, the TTC cites Interim Order MO-2617-I, which it submits found that confidential financial information should be kept private when dealing with ongoing procurement for active projects, because the protection of this information is needed to secure the financial interests of a public body in a competitive marketplace.

### ***Summary of appellant's representations***

[29] The appellant states that during the mediation stage of the appeal process, she made it clear that she is only seeking the redacted portions of the record which show "total costs" or "cost summaries" for each item under the project. She is not seeking "unit prices" or "contingency amounts." She marked up a copy of the record which identifies the columns containing the redacted information she is seeking and provided it to the IPC and the TTC.

[30] She further states that despite identifying these redacted "total costs" or "costs summaries" in the records, the TTC's arguments appear solely focused on "unit costs" and "contingency amounts," which are not at issue in this appeal. She states:

The TTC has not, in their representations, identified how the release of total costs for each element are protected under s.11 and I believe are obscuring what's at issue in a bad faith attempt to further block me from this information that should be rightly public.

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*



As such, I have little by way of reply to the TTC's detailed arguments about unit costs and contingency amounts. As they know from the mediation, I am now not asking for that level of detail.

As the onus is on the institution to explain how releasing the information I am seeking could be injurious to or would prejudice their economic interests or how it would deprive them of monetary value, I am unable to make further comment.

### ***Summary of TTC's reply representations***

[31] In its reply representations, the TTC does not directly address the appellant's submissions but simply states that it is relying upon the evidence that it provided in its original representations.

### ***Analysis and findings***

[32] The record before me in this appeal is entitled, "TTC Engineering Constr. Expansion, Capital Program – Estimating." This record is a cost estimate summary that was created by the TTC to determine the overall projected budget for a proposed subway extension project known as the Line 2 East Extension project (also known as the Scarborough subway extension). The project would extend Line 2 (Bloor-Danforth) of Toronto's subway system from the existing Kennedy station to a new station at Scarborough Centre.

[33] After all representations were submitted in this appeal, neither the TTC nor the appellant notified me of any changed factual circumstances with respect to this project, nor asked to make any supplementary representations. Consequently, I will be basing my decision in this matter solely on my review of the record at issue and the evidence provided by the parties in their representations.

[34] In response to the appellant's access request, the TTC provided the appellant with a redacted version of the record. The appellant has emphasized throughout the appeal process that she is not seeking access to "unit costs" or "contingency amounts" in the record and is only interested in certain "total costs" and "cost summaries." During the mediation stage of the appeal process, she provided both the TTC and the IPC with a marked-up copy of the record which identifies the columns containing the redacted information she is seeking. This is the only information at issue in this appeal.

[35] The TTC has withheld the information sought by the appellant under the discretionary exemptions in sections 11(a), (c) and (d) of the *Act*. As noted above, I have decided to start my analysis by determining whether this information is exempt from disclosure under sections 11(c) and/or (d), which give the TTC the discretion to refuse to disclose information where disclosure could reasonably be expected to prejudice its economic interests or be injurious to its financial interests. For the reasons that follow, I find that such information is exempt from disclosure under both provisions.

[36] In my view, an important starting point in assessing whether disclosing the specific

information sought by the appellant could reasonably be expected to lead to the harms set out in sections 11(c) and/or (d) is to examine the record as a whole. As noted above, this record is a cost estimate summary that was created by the TTC to determine the overall projected budget for the proposed Line 2 East Extension project. The contents of this record vary from page to page but generally include charts containing information that falls under the following headings:

- "Item Description," which is a description of each product or service that will need to be constructed or provided;
- "Quantity," which is the estimated quantity of each item that will be required;
- "Unit Price," "Unit Rate," "Unit Cost," which all represent the estimated price for a single unit of each item;
- "2015\$," "Element Total," "Total," "Amount," "Total Cost," "Item Cost," "Amount," which all represent the estimated total cost for each item and is calculated by multiplying the estimated unit price for each item that will need to be constructed or provided by the estimated quantity required.

[37] The TTC disclosed the description of each item to the appellant but redacted the estimated quantity, unit price and total cost for each individual item. The appellant is only seeking access to the estimated total cost for each individual item.

[38] For example, on one page, the item listed in the "Item Description" column is "Escalators" and the subsequent columns to the right of it list the estimated quantity of this item required, the unit price for this particular item, and the estimated total cost for this item. The TTC disclosed the "Item Description" to the appellant but not the estimated quantity, unit price or total cost. The appellant is only seeking access to the estimated total cost for "Escalators," not the estimated quantity and unit price for this item.

[39] For sections 11(c) and/or (d) to apply, the TTC 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 will in fact result in such harm.<sup>11</sup> 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.<sup>12</sup>

[40] The TTC's submissions with respect to disclosing the estimated unit prices are consistent with previous IPC orders that have found that disclosing detailed pricing information before a bidding, selling or negotiation process takes place could reasonably be expected to prejudice an institution's economic interests under section 11(c) or be

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<sup>11</sup> *Supra* note 3.

<sup>12</sup> *Supra* note 4.

injurious to its financial interests under section 11(d).<sup>13</sup>

[41] However, in her representations, the appellant emphasizes that she is only seeking the redacted portions of the record which show "total costs" or "cost summaries" for each item under the project and that she is not seeking "unit costs." She questions why the TTC's arguments appear to be solely focused on "unit costs" and "contingency amount," which are not at issue in this appeal.

[42] While the TTC's representations focus on the harms that could reasonably be expected to occur if the "unit prices" and "contingency amounts" in the record are disclosed, its representations also refer to the harms that it claims would result from disclosing the "maximum budget prices" for the Line 2 East Expansion project. In my view, these "maximum budget prices" include the estimated total cost for each item listed in the record. In addition, I have concluded that it can be inferred from the surrounding circumstances that disclosing the estimated total cost for each item would raise the same reasonable prospect of harm to the TTC's economic and financial interests under section 11(c) and (d) as disclosing the unit price.

[43] The cost estimate record is a core financial document that was prepared by the TTC before opening up any potential bidding process that would provide private companies with the opportunity to offer bids for constructing the Line 2 East Extension project. In its bid, any potential bidder would be required to specify how much it would charge the TTC to construct or provide the specific items required.

[44] To protect its economic and financial interests, the TTC would aim to select a bidder (or bidders) for the Line 2 East Extension project that offers the lowest prices for constructing or providing specific items, such as a station and its entrances, escalators, bus platforms, tunnelling, track work materials, partitions and doors, and numerous other items listed in the cost estimate record. If potential bidders do not know the estimated total cost that the TTC has set for each item, they are more apt to submit a bid that prices these items as low as possible.

[45] Publically disclosing the TTC's estimated total cost for each item before the bidding process has taken place would reveal the ceiling amounts that the TTC has set for particular items. I accept that there is a real risk that this would have the effect of driving up the prices that bidders submit for particular items in their bids, which would increase the costs of the project for the TTC.

[46] The TTC has also cited two highly persuasive independent reports, the City of Toronto Auditor General's Report of March 17, 2017 and the Charbonneau Commission Report from Québec, that found that if a municipal government or a public body discloses how much it is willing to pay for specific items in a project before the bidding process takes place, this can lead to corrupt practices, such as bid rigging or collusion agreements between companies that are bidding for the work.<sup>14</sup> This has the effect of driving up the

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<sup>13</sup> E.g., Orders MO-1228, MO-1258, MO-1450, MO-2617-I and MO-3193-F.

<sup>14</sup> *Supra* notes 7 and 8.

total costs of the project, which is clearly harmful to the economic and financial interests of the municipal government or public body that is overseeing the project.

[47] In short, I find that disclosing the estimated total cost for each item in the record for the Line 2 East Extension project before any bidding process takes place could reasonably be expected to prejudice the TTC's economic interests and be injurious to its financial interests. As a result, this information is exempt from disclosure under sections 11(c) and (d) of the *Act*.

[48] In its representations, the TTC also submits that the contingency amounts (funds allocated for unforeseen additional costs) in the cost estimate record are exempt from disclosure under sections 11(c) and (d). It does not specifically identify where this information is located in the record or whether the estimated total cost for each item reveals these amounts. However, given that I have found the estimated total cost for each item, which is the only information at issue in this appeal, is exempt from disclosure under sections 11(c) and (d), it is not necessary for me to determine whether any contingency amounts found in the record are also exempt from disclosure under those provisions.

[49] In addition, because I have found that the estimated total cost for each item in the record is exempt from disclosure under sections 11(c) and (d), I find that it is not necessary to determine whether this information is also exempt from disclosure under section 11(a) of the *Act*.

**B. Did the TTC exercise its discretion under sections 11(c) and (d)? If so, should the IPC uphold the exercise of discretion?**

[50] The sections 11(c) and (d) exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[51] In addition, the IPC 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; or
- it fails to take into account relevant considerations.

[52] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>15</sup> The IPC may not, however, substitute its own discretion for that of the institution.<sup>16</sup>

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<sup>15</sup> Order MO-1573.

<sup>16</sup> Section 43(2).

### ***Summary of TTC's representations***

[53] The TTC asserts that it exercised its discretion under sections 11(c) and (d) of the *Act* in a proper manner, and that its refusal to disclose detailed financial information in the record was undertaken in good faith, for proper purposes and based on proper and relevant evidence.

[54] It states that it is aware of the significance of the record to the public, and reviewed several relevant considerations before exercising its discretion to withhold specific information under sections 11(c) and (d). These considerations included:

- the purposes of the *Act*, including the principle that information should be available to the public;
- the wording of the sections 11(c) and (d) exemptions and the interests they seek to protect;
- whether disclosure will increase public confidence in the operation of the TTC;
- the nature of the information and the extent to which it is significant and/or sensitive to the TTC, the requester or any affected person; and
- the historic practice of the TTC with respect to similar information.

[55] The TTC further states that it recognizes that there is a public interest in the transit projects that it undertakes, and more specifically the cost of those projects. As such, it also recognizes that public disclosure of documentation regarding these projects, including spending, should be made available to the public. It states that it endeavors to make as much as possible of the project development process transparent for the public. This is done by holding public meetings and consultation sessions regarding the development of new transit infrastructure.

[56] With respect to the cost estimate record for the Line 2 East Expansion project, the TTC submits that it exercised its discretion in good faith by releasing the estimated global costs for the project. In addition, it disclosed the item descriptions, which is a list of products and services that are required for this large-scale project. It submits that its decision to disclose such information but not the detailed financial information for specific items, shows that it recognizes the importance of transparency with the public about large-scale transit projects, while ensuring the integrity of the bidding process.

### ***Summary of appellant's representations***

[57] The appellant submits that the IPC should not uphold the TTC's exercise of discretion in applying the sections 11(c) and (d) exemptions to the information that it redacted from the cost estimate record that it provided to her. She states that the TTC understands that she is not seeking the unit cost breakdowns, which appear to be listed under different columns in the record than the total cost for each item that she is seeking access to. She submits that by submitting lengthy representations that do not speak to

that issue and instead ignoring it, the TTC is not, in good faith, using its discretion in this instance, and did not give consideration to the fact that the sections 11(c) and (d) exemptions should be limited and specific.

### ***Analysis and findings***

[58] I agree with the appellant that the TTC's representations in this appeal focus on "unit costs" (and "contingency amounts"). However, under Issue A above, I noted that the TTC's representations also refer to the harms that it claims would result from disclosing the "maximum budget prices" for the Line 2 East Expansion project, which, in my view, include the estimated total cost for each item listed in the record. In addition, I concluded that it can be inferred from the surrounding circumstances that disclosing the estimated total cost for each item would raise the same reasonable prospect of harm to the TTC's economic and financial interests under section 11(c) and (d) as disclosing the unit price.

[59] In these circumstances, I am satisfied that the TTC's evidence on how it exercised its discretion under sections 11(c) and (d) applies to the estimated total cost for each item in the record. I find that the TTC exercised its discretion in denying access to this information under sections 11(c) and (d) and did so appropriately by considering a number of relevant factors and no irrelevant factors. I am not convinced that it exercised its discretion in bad faith or for an improper purpose. In short, I uphold the TTC's exercise of discretion under sections 11(c) and (d) of the *Act*.

### **C. Is there a compelling public interest in disclosing the information at issue in the record that clearly outweighs the purpose of the sections 11(c) and (d) exemptions?**

[60] The appellant submits that even if the information she is seeking is exempt from disclosure under any of the section 11 exemptions, there is a public compelling interest in disclosing this information that clearly outweighs the purpose of those exemptions.

[61] The public interest override in the *Act* is found in section 16, which 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.

[62] 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.

### ***Summary of TTC's representations***

[63] The TTC states that it is a public transport agency that is accountable not only to its board of directors and customers, but also to the taxpaying citizens of Toronto and Ontario. It submits that although there may be generally a public interest in accessing detailed records involving the planning estimates for major transportation expansion

projects, there is a greater compelling public interest in withholding the specific information at issue in this appeal.

[64] The TTC cites Order MO-2866, in which the adjudicator found that the public interest in not disclosing records must also be taken into consideration when discussing the relevance of a public interest argument. It submits that the purpose in applying the section 11 exemption to redact the information at issue was to protect not only the financial and economic interests of the TTC, but also taxpaying citizens, who have a vested interest in the construction of new transit systems.

[65] The TTC further submits that the information in the record that it disclosed to the appellant, which includes the estimated global costs for the Line 2 East Expansion project and a description of each of the items that will be need to be provided, adequately meets any public interest requirements.

### ***Summary of appellant's representations***

[66] To support her position that the public interest override in section 16 of the *Act* applies to the information at issue, the appellant submits that there is no reason why the TTC should not provide a list of costs that make up one of the most expensive transit projects on the city's books and in the city's history.

### ***Analysis and findings***

[67] In considering whether there is a "public interest" in disclosing a 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.<sup>17</sup> 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.<sup>18</sup>

[68] The Line 2 East Expansion project is one of a series of large-scale transit projects that are in the works in the Greater Toronto Area and in other regions of the province. These projects involve the investment of billions of dollars in public funds. In my view, given this huge prospective expenditure of public funds, there is generally a public interest in disclosing the cost estimate records that transit authorities have prepared, because doing so would inform and enlighten citizens about the prospective use of public funds for these projects and enable them to participate more effectively in public debates.

[69] I am not convinced, however, that the public interest in disclosing the specific information at issue in this appeal is "compelling." The word "compelling" has been

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<sup>17</sup> Orders P-984 and PO-2607.

<sup>18</sup> Orders P-984 and PO-2556.

defined in previous orders as “rousing strong interest or attention”.<sup>19</sup> Any public interest in non-disclosure that may exist also must be considered.<sup>20</sup> A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling”.<sup>21</sup>

[70] The specific information at issue in this appeal is the estimated total cost for each item listed in the cost estimate record for the Line 2 East Expansion project. I accept that this type of cost estimate information might rouse “strong interest and attention” among members of the public because of the large amount of public funds that would be expended on this project. However, in my analysis under Issue A above, I found that publically disclosing such information before the bidding process has taken place would reveal the ceiling amounts that the TTC has set for particular items. I concluded that there is a real risk that this would have the effect of driving up the prices that bidders submit for particular items in their bids, which would increase the costs of the project for the TTC. This could reasonably be expected to prejudice the TTC’s economic interests under section 11(c) and be injurious to its financial interests under section 11(d).

[71] In addition, the TTC submitted two persuasive independent reports that found that if a municipal government or a public body discloses how much it is willing to pay for specific items in a project before the bidding process takes place, this can lead to corrupt practices, such as bid rigging or collusion agreements between companies that are bidding for the work.<sup>22</sup>

[72] In my view, all of this evidence constitutes a public interest in the non-disclosure of the estimated total cost for each item listed in the record and brings the public interest in its disclosure below the threshold of “compelling.” In other words, I find that the public interest that exists in disclosing such information is not “compelling.”

[73] In summary, I find that the public interest override in section 16 of the *Act* does not apply to the information at issue.

**ORDER:**

I uphold the TTC’s decision to deny access to the information at issue in the cost estimate record for the Line 2 East Expansion project.

Original signed by: \_\_\_\_\_  
Colin Bhattacharjee  
Adjudicator

October 21, 2020 \_\_\_\_\_

<sup>19</sup> Order P-984.

<sup>20</sup> *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

<sup>21</sup> Orders PO-2072-F, PO-2098-R and PO-3197.

<sup>22</sup> *Supra* notes 7 and 8.