

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4133

Appeal PA17-182-2

Metrolinx

March 30, 2021

Summary: The appellant made a request for access to all information concerning the acquisition by Metrolinx of a specific property. Metrolinx located hundreds of pages of responsive records and granted the appellant partial access to them. Metrolinx, which was in negotiations to acquire the property when it received the access request, relied on the discretionary exemptions at sections 13(1) (advice or recommendations), 18(1) (economic and other interests) and 19 (solicitor-client privilege), and the mandatory exemption in section 21(1) (personal privacy) to withhold various records in whole or in part. Metrolinx also withheld parts of the records on the basis that they were not responsive to the request.

In this order, the adjudicator upholds Metrolinx's decision to withhold the records at issue under the exemptions at sections 18(1) and 21(1). She also upholds Metrolinx's decision to withhold information that is not responsive, with the exception of one paragraph that she finds is responsive to the appellant's request. She orders Metrolinx to issue an access decision in respect of this responsive paragraph.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, sections 2(1) (definition of "personal information"), 18(1)(c) and 21(1).

Orders and Investigation Reports Considered: Orders MO-2352 and MO-3545.

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

OVERVIEW:

[1] This order addresses a request for hundreds of pages of records related to a

specific property (the Property) and its potential acquisition by Metrolinx. The appellant submitted a request to Metrolinx under *the Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

1. Any and all communications or other documents concerning the acquisition of [the Property], including but not limited to communications with consultants, neighbouring property owners, legal counsel, the City of Toronto and internal reporting;
2. Any and all communications and documents concerning the design for [the Road] underpass and for grading associated therewith between [the Property] and [specified property #1], including but not limited to all design plans, all design alternatives, all memorandums or other communications concerning the implementation consideration of the design; [*sic*]
3. Any calendar entries, minutes of meetings or notes from any meeting involving [the Property], including but not limited to meetings with the City of Toronto, meetings concerning the acquisition of the property and meetings with consultants; and
4. Any and all communications regarding the development application for [the Property] submitted by the current owners, including but not limited to communications with internal staff, consultants and any representatives of the City of Toronto *Timeframe for the records is January 1, 2015 – October 25, 2016.

[2] Almost eight months later, following time extensions for Metrolinx's access decision pending notification of a number of third parties, Metrolinx issued a decision granting the appellant partial access to the responsive records. In its decision letter, Metrolinx relied on the discretionary exemptions in sections 13(1) (advice or recommendations), 18(1) (economic and other interests) and 19 (solicitor-client privilege), and the mandatory exemption in section 21(1) (personal privacy) to withhold information in the records. Metrolinx subsequently disclosed the records that it decided should not be withheld.

[3] The appellant was dissatisfied with Metrolinx's decision and appealed it to the Information and Privacy Commissioner (IPC). The IPC attempted to mediate the appeal. During mediation, Metrolinx issued a revised decision granting partial access to some previously withheld information in the records. It also advised that in addition to withholding records under the sections 13(1), 18(1), 19 and 21(1) exemptions, it was withholding some information in the records on the basis that it is not responsive to the request. Also during mediation, the appellant confirmed that he wishes to pursue access to all of the information withheld by Metrolinx, including the information Metrolinx deemed non-responsive. At the conclusion of mediation, approximately 350 pages of records remained at issue.

[4] The appeal was then moved to the adjudication stage. An IPC adjudicator commenced an inquiry and received representations from the parties. During the inquiry at the adjudication stage, Metrolinx disclosed 45 full pages of records¹ and additional information from 31 pages of records.² The appeal was then transferred to me to complete the inquiry.

[5] In this order, I uphold Metrolinx's decision with respect to all of the records at issue, except for the withheld information in page 468, which I find is responsive to the appellant's request. I order Metrolinx to issue an access decision for this responsive information in page 468.

RECORDS:

[6] There are 304 pages of records at issue. Almost all of the records at issue are email correspondence, often with attachments, including an appraisal report, draft correspondence, draft memoranda, meeting minutes, drawings, design criteria, letters and a presentation. Some of the email communications are email chains with overlapping content. The records withheld in full are pages 183, 185, 189, 195-197, 199, 202, 203, 230-267, 270-306, 321, 322, 327, 328, 336-387, 390, 391, 399-448, 451, 452, 464, 552-555, 560, 561, 590, 670, 724, 780-783, 813, 814 and 860-862.

[7] The records withheld in part are pages 16, 25, 31, 57-59, 79, 81-83, 91, 101, 102, 111, 119, 123, 134, 155, 157, 158, 163, 165, 166, 168-176, 177, 178, 184, 186, 188, 190, 193, 211, 212, 215, 226, 268, 307, 317, 329, 331, 392, 394, 453, 455, 458, 462, 463, 467, 468, 556, 558, 562, 563, 565-569, 574, 575, 581, 587, 588, 592, 597-606, 608, 610, 612, 613, 616, 617, 618, 619, 627-655, 663, 672, 673, 677, 684, 685, 708, 720, 721, 734, 748, 784-794, 809-812, 842-845, 850 and 851.

ISSUES:

- A. Does the mandatory personal privacy exemption at section 21(1) apply to the information withheld under that section?
- B. Does the discretionary exemption at section 18(1) apply to the information and records withheld under that section?

¹ Pages 37, 38, 100, 179, 180, 181, 182, 187, 191, 192, 194, 200, 201, 204, 227, 228, 229, 269, 323, 324, 330, 332, 333, 334, 335, 388, 393, 395, 396, 397, 398, 449, 450, 454, 456, 457, 459, 460, 461, 480, 557, 559, 671, 707 and 815.

² Pages 101, 111, 177, 178, 184, 186, 188, 190, 193, 226, 268, 307, 329, 331, 389, 392, 394, 453, 455, 458, 462, 463, 556, 558, 562, 563, 613, 670, 684, 685 and 708.

C. Did Metrolinx exercise its discretion under section 18(1)(c) appropriately?

D. Are the parts of the records withheld as non-responsive, responsive to the appellant's request?

DISCUSSION:

A. Does the mandatory personal privacy exemption at section 21(1) apply to the information withheld under that section?

[8] Metrolinx has withheld parts of pages 16, 25, 102, 119, 123, 211, 212, 215, 565-568, 581, 587, 588, 734, 748 and 851 of the records, claiming that they contain personal information that is exempt from disclosure under section 21(1) of the *Act*. Section 21(1) of the *Act*, the mandatory personal privacy exemption, prohibits Metrolinx from releasing the personal information of an individual to another individual unless one of the exceptions in paragraphs (a) to (f) of section 21(1) applies.

Personal information

[9] Section 21(1) can only apply to "personal information," which is defined in section 2(1) of the *Act* as "recorded information about an identifiable individual" including information that fits within the non-exhaustive list at paragraphs (a) to (h) of the definition. Paragraphs (a), (d) and (h) of the definition of "personal information" are relevant in this appeal because they concern the following types of information that has been withheld by Metrolinx:

(a) information relating to the marital status of the individual

(d) the address, or telephone number of the individual

(h) the individual's name where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual.

[10] Metrolinx states that the personal information it has withheld under section 21(1), in order to protect the personal privacy of individuals, consists of details of employee illness and vacation, personal email addresses, and the identities of community members. In response to Metrolinx's representations, the appellant confirms that it does not seek the disclosure of personal information.

The information withheld under section 21(1) is exempt personal information

[11] I have reviewed the parts of the records withheld under section 21(1). These withheld parts consist of individuals' telephone numbers, addresses, personal email addresses, marital status, and names where the names appear with other information

about the individuals or where disclosure of the names would reveal other personal information about the individuals. I find that these withheld parts contain “personal information” within the meaning of paragraphs (a), (d) or (h) of the definition of that term in section 2(1) of the *Act*.

[12] The appellant does not seek access to personal information, and there is no suggestion that any of the exceptions to the mandatory personal privacy exemption applies to the personal information. From my review of the withheld personal information, none of the exceptions in paragraphs (a) to (f) of section 21(1) applies. I find that the withheld personal information in the records is exempt from disclosure under the mandatory personal privacy exemption in section 21(1) and I uphold Metrolinx’s decision to withhold it in pages 16, 25, 102, 119, 123, 211, 212, 215, 565-568, 581, 587, 588, 734, 748 and 851 of the records.

B. Does the discretionary exemption at section 18(1) apply to the information and records withheld under that section?

[13] Metrolinx relies on section 18(1) to withhold the records at pages 177, 178, 183-186, 188-190, 193, 195-199, 202, 203, 226, 230-268, 270-306, 321, 322, 327, 328, 336-387, 390, 391, 399-448, 451, 452, 464, 552-555, 560, 561, 590, 673, 780-783, 813, 814, and 860-862, and parts of the records at pages 59, 101, 111, 165, 307, 317, 329, 331, 392, 394, 453, 455, 458, 462-463, 467, 556, 558, 562, 563, 613, 617, 670, 673, 684, 685, 708, 724, 842-845 and 850.

General principles

[14] In its representations, Metrolinx specifies that it relies on sections 18(1)(c), (d) and (e) to withhold the relevant records and information. These sections state:

A head may refuse to disclose a record that contains,

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

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario[.]

[15] 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*.³

[16] For sections 18(1)(c) or (d) to apply, Metrolinx 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.⁴

[17] The failure to provide detailed evidence will not necessarily defeat Metrolinx'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*.⁵

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

[18] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.⁶

[19] This exemption is broad and does not require Metrolinx to establish that the information in the record belongs to it, 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 Metrolinx's economic interests or competitive position.⁷ Because I find below that section 18(1)(c) applies to all of the records and information withheld under section 18(1), I will not address sections 18(1)(d) and (e) of the *Act*.

Metrolinx's representations

[20] In its representations, Metrolinx provides background information on the Property and the issues surrounding its acquisition that are addressed in the records. It explains that, as part of its Regional Express Rail expansion project, a grade separation

³ *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.

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

⁵ Order MO-2363.

⁶ Orders P-1190 and MO-2233.

⁷ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

was identified for the Road, and Metrolinx was proposing an underpass for the Road to extend below the railway tracks. Metrolinx further explains that this grade separation would affect access from the Road to the Property, which is owned by the appellant. Metrolinx states that because the identified grade separation would affect access to the Property, it approached the appellant to negotiate the purchase of the Property. Metrolinx adds that it has been involved in ongoing negotiations with the appellant regarding the acquisition of the Property, but the property transaction has not yet been completed.

[21] Regarding its claim of section 18(1) Metrolinx states that, in order to inform and guide its negotiation strategy, including the determination of its purchase offer, it commissioned a property appraisal of the Property; many of the pages at issue contain copies of the appraisal report and/or discussions concerning the results of the appraisal. Metrolinx submits that sections 18(1)(c) and 18(1)(d) apply to these pages because the information in them is still relevant and valuable to its negotiation strategy. In support of its position, Metrolinx argues that, in general, when appraisal information is disclosed, it becomes difficult for the purchaser to negotiate a favourable value. In further support of its position, Metrolinx relies on a passage from paragraph 31 of Order MO-3545, in which Adjudicator Steven Faughnan wrote:

In the case of an appraisal or valuation of property that is subject to a pending sale or negotiation that has not been completed, typically there is a finding that the information is subject to exemption.

[22] Metrolinx explains that the remaining pages contain its negotiating positions, plans and instructions that form its property negotiation strategy. It states that these records specify how it intends to approach this land deal and they contain opinions, evaluations and decisions regarding which acquisition scenarios are optimal and which are not feasible or desirable. It states that it has withheld these records under sections 18(1)(c) and 18(1)(e). Metrolinx also relies on paragraph 90 of Order PO-3150, where Adjudicator Cathy Hamilton quoted the following commentary from page 321 of The Williams Commission Report on the reasoning behind the exemption at section 18(1)(e):

[I]t is clearly in the public interest that the government should be able to effectively negotiate with respect to contractual or other matters with individuals, corporations or other governments.

[23] Metrolinx argues that disclosure of the appraisal information and other records that formulate its negotiation strategy prior to the completion of the property acquisition could reasonably be expected to prejudice its economic interests and be injurious to its financial interests by weakening its ability to negotiate the most favourable outcome for the benefit of Ontario taxpayers. It concludes by stating that it re-reviewed its redactions of the relevant records and decided to disclose additional information from these records. Metrolinx disclosed the additional information during the inquiry.

The appellant's representations

[24] The appellant argues that Metrolinx has not provided the kind of detailed and convincing evidence required to establish the application of section 18(1) to the relevant records. It also argues that the harms in section 18(1) cannot be inferred as arising from the surrounding circumstances.

[25] The appellant challenges Metrolinx's position that the information withheld under section 18(1), including the appraisal of the Property and other related information, is foundational information relating to Metrolinx's negotiating position for the purchase of the Property. The appellant notes that an appraisal would be exempt from being withheld from disclosure by way of the exception to an exemption⁸ found at section 13(2)(c) of the *Act*. It also asserts that Orders MO-2363 and PO-2758 have expressly held that disclosure of information that may subject a party to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests within the meaning of section 18(1). It argues that the position of Metrolinx is analogous; the fact that disclosure of the requested information may make the negotiations between Metrolinx and itself more competitive does not make the records exempt from disclosure under section 18(1).

[26] The appellant then goes on to address Metrolinx's reference to protecting its negotiating strategy in order to obtain the "most favourable outcome for the benefit of Ontario taxpayers." It argues that this submission from Metrolinx is misplaced and does not reflect Metrolinx's obligations with respect to acquiring properties for projects. The appellant asserts that sections 13 and 14 of the *Expropriations Act*⁹ obligate Metrolinx to acquire property for its projects at fair market value, whether it acquires property through negotiation or the expropriation process. The appellant continues that while Metrolinx's concerns may apply to negotiations between private individuals, the "imaginary haggling over the price to be paid for land in a deal between two private individuals"¹⁰ does not apply to Metrolinx's process of public acquisition of private land of the type that underlies the records at issue in this appeal. The appellant asserts that Metrolinx's focus and obligation is to acquire the land it needs for fair market value, not at the most favourable value that it is able to negotiate.

[27] The appellant concludes by stating that if Metrolinx has information reflecting the fair market value of the Property, that reflects the value of neighbouring properties it believes Metrolinx has already acquired, Metrolinx should disclose that information, which should assist in the negotiation process. The appellant argues that disclosure

⁸ The appellant refers to it as an "exemption to an exemption" but section 13(2) lists exceptions to the section 13(1) exemption.

⁹ RSO 1990, c E-26.

¹⁰ The appellant attributes this quote to "*Diggon-Hibben Ltd v R*, [1949] SCR 712 at para 8."

would not prejudice Metrolinx's position or economic interests; it would simply ensure that the price paid for the Property is in accordance with fair market value.

All of the records and information withheld by Metrolinx under section 18(1)(c) qualify for exemption

[28] Based on my review of the records and information that Metrolinx has withheld under section 18(1), and the parties' representations, I am satisfied that Metrolinx has established the application of the section 18(1)(c) exemption to all of the relevant withheld records and information.

[29] Section 18(1)(c) requires Metrolinx to demonstrate that disclosure could reasonably be expected to prejudice its economic interests, and that the risk of such prejudice is well beyond the merely possible or speculative. In arguing that section 18(1)(c) applies, Metrolinx submits that disclosing the records that contain its negotiation strategy for acquiring the Property when its negotiations to acquire the Property are ongoing, could reasonably be expected to prejudice its economic interests by weakening its ability to negotiate the most favourable outcome. I accept Metrolinx's argument.

[30] The withheld records at pages records at pages 177, 178, 183-186, 188-190, 193, 195-199, 202, 203, 226, 230-268, 270-306, 321, 322, 327, 328, 336-387, 390, 391, 399-448, 451, 452, 464, 552-555, 560, 561, 590, 673, 780-783, 813, 814, and 860-862, and parts of the records at pages 59, 101, 111, 165, 307, 317, 329, 331, 392, 394, 453, 455, 458, 462-463, 467, 556, 558, 562, 563, 613, 617, 670, 673, 684, 685, 708, 724, 842-845 and 850, consist of Metrolinx's internal and external communications regarding its possible acquisition of the Property. The records include an appraisal report of the Property prepared for Metrolinx, and communications among Metrolinx staff—including legal counsel—about its position, plans, procedures, criteria and instructions regarding negotiations with the appellant about its acquisition of the Property. Put simply, the withheld records and information contain Metrolinx's negotiation strategy when its negotiations to acquire the Property were ongoing. The parties confirm that the negotiation process remained ongoing at the time of the inquiry, and that the acquisition of the Property, either through purchase or expropriation, had not yet occurred.

[31] As noted by Metrolinx, previous IPC Orders have found that an appraisal of a property that is subject to a negotiation that has not been completed qualifies for exemption under section 18(1)(c) and/or (d) or its municipal counterpart. Examples include Order MO-3545, relied on by Metrolinx, in which Adjudicator Faughnan found that disclosure of the appraised values of properties that had yet to be sold could reasonably be expected to prejudice the institution's economic interests or be injurious to its financial interests. In Order MO-3545, Adjudicator Faughnan upheld the application of the municipal equivalents to the section 18(1)(c) and (d) exemptions—sections 11(c) and (d) of the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*—to the appraisal information.

[32] Similarly, in Order MO-2352, Adjudicator Daphne Loukidelis upheld the application of section 11(c) of *MFIPPA* to appraisal information relating to the purchase of land where the transaction had not yet closed. In doing so, Adjudicator Loukidelis canvassed past IPC Orders MO-1392 and MO-2247, which also upheld the application of the exemption due to harm with respect to future negotiations. She also agreed with the conclusion in these previous orders that the appraisal information—and how it is used by the institution that has obtained it—is an aspect of the institution’s negotiation strategy that qualifies for exemption under section 11(c) of the *Act*.

[33] I adopt the reasoning of Adjudicators Faughnan and Loukidelis in this appeal. I find that disclosure of the appraisal report could reasonably be expected to prejudice Metrolinx’s economic interests and I find the report exempt from disclosure under section 18(1)(c) of the *Act*. I reject the appellant’s submission that “the appraisal would be exempt from being withheld from disclosure” under the exception in section 13(2)(c) to the section 13(1) exemption; this is irrelevant to my determination of whether the appraisal is exempt from disclosure under section 18(1)(c) of the *Act*.

[34] It is also reasonable to expect that Metrolinx’s economic interests in acquiring the Property could be prejudiced by disclosing the remaining records withheld under section 18(1). These records—communications among Metrolinx staff and with Metrolinx’s internal and external legal counsel and appraisers, describing its position, plans, procedures and instructions concerning its negotiations with the appellant about the Property acquisition—would reveal Metrolinx’s negotiation strategy and position when the negotiation remained ongoing. I also find that disclosure of any of the records and information withheld by Metrolinx under section 18(1) could reasonably be expected to prejudice its economic interests in its ongoing negotiations with the appellant regarding the acquisition of the Property. The contents of the relevant records themselves, and the fact that the appellant seeks access to Metrolinx’s internal communications on the negotiation of its acquisition of the Property during the ongoing negotiations, are sufficient for me to infer that Metrolinx’s economic interests could reasonably be expected to be prejudiced if it were ordered to disclose the records that form its negotiation strategy to the party with which it is negotiating.

[35] I disagree with the appellant’s submission that disclosure of the records is analogous to the findings in Orders MO-2363 and PO-2758. Orders MO-2363 and PO-2758 do not address records like those before me in this appeal. In both Orders MO-2368 and PO-2758, the records at issue were contracts between an institution and a third party, and the adjudicators found that the information in those concluded contracts for services could not reasonably be expected to bring about the section 18(1) harms. Those orders are factually dissimilar to this appeal.

[36] Additionally, I reject the appellant’s argument that the fact that disclosure of the records may make its negotiations with Metrolinx “more competitive” does not mean the records should be withheld under section 18(1). Disclosure of Metrolinx’s negotiation strategy while Metrolinx is attempting to acquire the Property from the

appellant would not make the negotiations “more competitive.” Rather, it could more likely be expected to make them a one-sided negotiation with the advantage accruing to the appellant. Disclosure of one party’s negotiation strategy to the party with which it is negotiating, during the ongoing negotiations, is inherently prejudicial to the economic interests of the party whose negotiation strategy has been revealed. I similarly reject the appellant’s assertion that Metrolinx is not entitled to obtain a favourable outcome in its negotiations because it is obligated to acquire land for fair market value. As for the appellant’s reliance on the Supreme Court of Canada’s decision in *Diggon-Hibben Ltd.* to argue against Metrolinx’s concerns, that decision does not appear, on my review of it, to contain the phrase the appellant attributes to it. Moreover, the *Diggon-Hibben Ltd.* case concerns an expropriation; that is not the issue before me.

[37] For the above reasons, I find that all of the withheld records at pages 177, 178, 183-186, 188-190, 193, 195-199, 202, 203, 226, 230-268, 270-306, 321, 322, 327, 328, 336-387, 390, 391, 399-448, 451, 452, 464, 552-555, 560, 561, 590, 673, 780-783, 813, 814, and 860-862, and parts of the records at pages 59, 101, 111, 165, 307, 317, 329, 331, 392, 394, 453, 455, 458, 462-463, 467, 556, 558, 562, 563, 613, 617, 670, 673, 684, 685, 708, 724, 842-845 and 850, are exempt from disclosure under section 18(1)(c), subject to my review of Metrolinx’s exercise of discretion below.

C. Did Metrolinx exercise its discretion under section 18(1)(c) appropriately?

[38] The section 18(1)(c) exemption is discretionary and permits Metrolinx to disclose information, despite the fact that it could withhold it. Metrolinx must exercise its discretion, having regard to the principles of the *Act* and considerations that are relevant in this appeal. For example, the principles that information should be available to the public and exemptions from the right of access should be limited and specific. Relevant considerations include the wording of the exemption and the interests it seeks to protect, the nature of the information and the extent to which it is significant and/or sensitive to the institution or the requester, and the relationship between the institution and the requester. My authority on this issue is limited to deciding whether Metrolinx failed to exercise its discretion or if it erred in exercising its discretion where, for example, it took into account irrelevant considerations, or it failed to take into account relevant considerations.

The parties’ representations

[39] Metrolinx submits that it reviewed the records “line-by-line” in order to determine whether the exemption applies and it disclosed as much of the records as possible. It explains that it redacted only the information necessary to maintain its negotiating position concerning the acquisition of the Property. Metrolinx adds that it re-reviewed the redacted information and records, during the course of the appeal, and decided to disclose additional information in the spirit of transparency.

[40] In response to Metrolinx’s representations, the appellant submits that there does not appear to be a principled basis for the further disclosures Metrolinx provided with its

representations and why Metrolinx disclosed these records and not others. The appellant argues that Metrolinx's desire to maintain its negotiation position is not a relevant consideration that should have guided Metrolinx's exercise of discretion under section 18(1) of the *Act*. The appellant asserts that the purpose and provisions of the *Act* are not to protect a particular party's negotiating position, but to ensure transparency and protect public access to government information.

[41] The appellant contends that it is important to ensure that the public's right to access information under the *Act* is as broad as possible. The appellant concludes by stating, "Allowing the reliance on such irrelevant considerations as the guiding factor in an institution's exercise of discretion pursuant to the Act would defeat this overarching goal and unduly broaden the discretion provided for pursuant to the Act."

Metrolinx appropriately exercised its discretion under section 18(1)(c)

[42] In deciding to withhold information and records under section 18(1)(c), but to disclose parts of certain records to the appellant, Metrolinx exercised its discretion under section 18(1)(c) of the *Act*. Although the appellant argues that Metrolinx exercised its discretion based on irrelevant considerations and disclosed parts of the records apparently without taking relevant considerations into account, I disagree.

[43] It is evident, from the records and information it chose to disclose, that Metrolinx had regard to the principles of the *Act* that information should be available to the public and that exemptions from the right of access should be limited and specific. Metrolinx applied the section 18(1) exemption in a limited and specific way, granting the appellant access to information that it could have withheld and withholding only the information necessary to protect its economic interests in its ongoing negotiations. It is also evident that Metrolinx considered the nature and significance of the information in the circumstances of its ongoing negotiations with the appellant to acquire the Property. Finally, Metrolinx appears to have considered the public interest in government institutions being able to protect their economic interests and effectively negotiate with individuals and corporations—the interests that the section 18(1) exemption seeks to protect. These are relevant considerations.

[44] There is no evidence before me that Metrolinx exercised its discretion in bad faith or for an improper purpose, or that it took irrelevant considerations into account. Also, I have upheld Metrolinx's decision that the section 18(1)(c) exemption applies to the records as claimed. For the foregoing reasons, I uphold Metrolinx's exercise of discretion under section 18(1)(c) of the *Act*.

D. Are the parts of the records withheld as non-responsive, responsive to the appellant's request?

[45] Metrolinx submits that the remaining information that it has withheld from pages 31, 79, 81-83, 91, 111, 155, 157, 163, 166, 168-176, 468, 569, 597-606, 608, 612, 616, 618, 619, 627-655, 672, 677, 720, 721, 784-794 and 809-812, is not responsive to

the appellant's request because it does not relate to the Property. Metrolinx explains that this information concerns general clauses to be added into future Metrolinx agreements, personal travel plans, and information about other grade separation locations (contained in correspondence, slides and meeting minutes and materials). It also states that it re-reviewed the information it withheld as not responsive to the request and decided to disclose additional information to the appellant.

[46] The appellant responds that it does not seek access to information about personal travel plans, but it does seek access to the remaining information withheld as not responsive. The appellant argues that the withheld information reasonably relates to its access request, which, it argues, must be interpreted liberally. It submits that information regarding general clauses is responsive even if it does not relate to the Property because it is likely that such general clauses would be required or requested in any agreement for the acquisition of the Property. It further argues that information concerning other grade separation locations also reasonably relates to its access request because it will likely demonstrate Metrolinx's treatment of other properties affected by similar grade separations. The appellant states that it requested information on the design for the underpass relating to the grade separation, and it asserts that information regarding grade separations at other locations will likely contain information relevant to the design of grade separations generally, and is therefore related to its request.

Except for the responsive information in page 468, the remaining withheld information is not responsive to the request

[47] IPC orders have consistently held that to be considered responsive to the request, records must "reasonably relate" to the request.¹¹ To determine what reasonably relates to the request, I consider below the wording of the appellant's long and detailed access request.

[48] All four parts of the appellant's access request seek records related to the Property. However, parts 1 and 2 of the request state that the appellant seeks records beyond those that concern the Property. Part 1 specifies that the appellant seeks access to Metrolinx's communications with "neighbouring property owners." Part 2 specifies that the appellant seeks access to "all communications and documents concerning the design for the [Road] underpass and for the grading associated therewith between the Property and [specified property #1]" including all design plans. The scope of the request therefore includes Metrolinx's communications with the appellant's property owner neighbours and all records regarding designs for the underpass and grading associated with specified property #1.

¹¹ Orders P-880 and PO-2661.

[49] Having carefully reviewed the information withheld as non-responsive, I find that page 468 contains withheld information that falls within the scope of part 2 of the appellant's request for all records concerning the design for the Road underpass and the associated grading. However, none of the remaining withheld parts of the records contain information that fits within the scope of part 2. Similarly, the remaining information does not fall within the scope of part 1 of the appellant's request for all records of communications with neighbouring property owners. Nor does the remaining information fall within the scope of parts 3 and 4 of the appellant's request.

[50] I disagree with the appellant that general clauses to be added into future Metrolinx agreements and information about other grade separation locations (contained in correspondence, slides and meeting minutes and materials) reasonably relate to the appellant's access request. Based on the detailed and unambiguous language of the request, records regarding locations and agreement clauses that do not relate to the Property cannot reasonably be considered to relate to the request.

[51] I uphold Metrolinx's decision to withhold the information in pages that it has withheld as non-responsive to the request, except for the withheld information in page 468 that I have found to be responsive to the request. Since Metrolinx has not claimed any exemption to withhold this part of page 468, as an alternative to claiming it is not responsive, I will order Metrolinx to issue an access decision for it.

ORDER:

1. I uphold Metrolinx's decision that the personal information in pages 16, 25, 102, 119, 123, 211, 212, 215, 565-568, 581, 587, 588, 734, 748 and 851 of the records is exempt from disclosure under section 21(1).
2. I uphold Metrolinx's decision that the withheld records at pages 177, 178, 183-186, 188-190, 193, 195-199, 202, 203, 226, 230-268, 270-306, 321, 322, 327, 328, 336-387, 390, 391, 399-448, 451, 452, 464, 552-555, 560, 561, 590, 673, 780-783, 813, 814, and 860-862, and parts of the records at pages 59, 101, 111, 165, 307, 317, 329, 331, 392, 394, 453, 455, 458, 462-463, 467, 556, 558, 562, 563, 613, 617, 670, 673, 684, 685, 708, 724, 842-845 and 850 are exempt from disclosure under section 18(1)(c).
3. I uphold Metrolinx's decision that the information that it has withheld from pages 31, 79, 81-83, 91, 111, 155, 157, 163, 166, 168-176, 569, 597-606, 608, 612, 616, 618, 619, 627-655, 672, 677, 720, 721, 784-794 and 809-812 is not responsive to the appellant's request.
4. I do not uphold Metrolinx's decision that the withheld information in page 468 is not responsive and I order Metrolinx to issue an access decision for it to the appellant in accordance with the relevant access provisions of the *Act*.

Original signed by: _____
Stella Ball
Adjudicator

_____ March 30, 2021