

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4059

Appeal MA18-476

Toronto Transit Commission

May 31, 2021

Summary: The appellant, a media requester, made an access request to the TTC for copies of reports and emails related to the fleet life extension for Line 3 Scarborough, as outlined in a TTC board report. After notifying a third party, the TTC issued an access decision granting partial access to the records it located and citing the mandatory exemption at section 10(1) (third party information) to withhold the remainder of the information. The appellant appealed and raised the issue of the public interest override to the withheld information. In this order, the adjudicator upholds the TTC's decision finding that the withheld information is exempt under section 10(1) and that there is no compelling public interest in disclosure of the information.

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

Orders and Investigation Reports Considered: Orders P-561 and PO-1688.

OVERVIEW:

[1] Following a public Toronto Transit Commission Board report that referenced reports on the "fleet life extension" concerning the Scarborough RT Line 3 (the SRT), a media requester submitted an access request to the Toronto Transit Commission (the TTC) for access to the reports and any communications from the vendor of the SRT vehicles and two named consultants referenced by the TTC board. The access request was submitted to the TTC under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

Copies of the [named vendor] [and two named consultants] reports and any related email communication from those vendors/consultants to the TTC concerning the fleet life extension for Line 3, as outlined in the May 8 board report "Fleet Life Extension - Line 3 Scarborough".

[2] Prior to issuing its access decision, the TTC notified the named vendor (the affected party), pursuant to section 21(1)(a) of the *Act*, to seek its views regarding disclosure of the records. Following receipt of the affected party's submissions, the TTC issued an access decision granting partial access to the records. It disclosed the records identified as "[one of the consultant] report and related communication," but withheld the records listed on its index as "[the affected party's] reports and related communication" and "[another consultant] reports and related communication," in their entirety, citing the section 10(1) exemption (third party information).

[3] The requester, now the appellant, appealed the TTC's access decision to the Information and Privacy Commissioner of Ontario (IPC). During mediation, the TTC provided a more detailed index of responsive records to the appellant,¹ who then indicated which records she wished to access in this appeal (identified below). The affected party also consented to partial disclosure, which resulted in the TTC issuing several revised access decisions.

[4] In one of its subsequent revised decisions, the TTC granted partial access to the second named consultant's report that it had withheld in full. The appellant indicated that she is not pursuing further access to this report. Therefore, neither of the consultant's reports is any longer at issue.

[5] In the final revised decision, the TTC granted partial access to the affected party's reports. In addition, after the reply stage in the inquiry, further disclosure of the withheld reports was made.²

[6] The appellant asserts a public interest in disclosure of the withheld portions of the affected party's reports, thereby raising the possible application of the public interest override in section 16.

[7] As mediation did not resolve the appeal, it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*. The IPC adjudicator originally assigned to the appeal sought and received representations from the TTC, the affected party and the appellant. These representations were shared in accordance with the IPC's *Code of Procedure* (the *Code*). The appeal was then assigned to me to continue with the adjudication of the appeal.

[8] In this order, I uphold the decision of the TTC and dismiss the appeal.

¹ The date of this index is September 28, 2018.

² The records along with the pages no longer in dispute are set out below.

RECORDS:

[9] The following records remain at issue. They are all reports prepared by the affected party concerning its IA100 vehicle utilized on the SRT:

Record 1 - Scarborough Rapid Transit (SRT) Life Extension – Integrity Assessment for Life Extension/Continued Operations (Truck) Revision 01 – April 27, 2016 – (Identity Number 26158-V00-BRA-0300004) - 282 page report

Pages 1, 2 and 11 were disclosed to the appellant (pages 1 and 11 with severances) and the appellant confirmed that she was not seeking access to the severed information on pages 1 and 11 and that she is not seeking access to any figures that may be contained in the conclusion.

After the reply stage of the inquiry, the TTC disclosed "2.0 Introduction" and part of "3.0 Overview."

Record 2 - Scarborough Rapid Transit Technical Advisory Services (IA100 Vehicle) – Integrity Assessment for Life Extension/Continued Operations (Part 1) Revision 01– February 18, 2016 (Identity Number 26158-V00-BRA-0300002) - 160 page report

Pages 1-20 were disclosed to the appellant (pages 1 and 17 with severances) and the appellant confirmed that she does not seek access to the severed information on pages 1 and 17 and that she is not seeking access to any tables or figures that may be contained in the report's conclusions, but does pursue access to sections 3, 4, 5 to 17.8, with the exception of sections 4.3 and 4.4.

After reply, the TTC disclosed the first two paragraphs of "4.1 Overview."

Record 3 - Scarborough Rapid Transit Technical Advisory Services (IA100 Vehicle) Integrity Assessment for Life Extension/Continued Operations (Vehicle) Revision 00 – March 14, 2016 (Identity Number 26158-V00-BRA-0300005) – 75 page report

Pages 1-11 were disclosed to the appellant in part (pages 1, 5, 9-11 with severances) and the appellant confirmed that she does not seek access to the severed information on pages 1, 5, 9-11, or any tables or figures that may be contained in the report's conclusions, but does pursue access to sections 3, 4, 5 to 11, with the exception of sections 4.3 and 4.4.

After reply, the TTC disclosed the first two paragraphs of "4.1 Overview."

ISSUES:

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

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

DISCUSSION:

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

[10] Section 10(1) states, in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[11] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.³ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.⁴

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

³ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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

Part 1: type of information

[13] The types of information listed in section 10(1) 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.⁵

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.⁶

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.⁷ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁸

⁵ Order PO-2010.

⁶ Order PO-2010.

⁷ Order PO-2010.

⁸ Order P-1621.

Representations

The affected party's representations

[14] The affected party, who is the vendor and manufacturer of the IA100 vehicles used on the SRT, claims that the redacted portions of the records are mechanical and electrical engineering analyses and accompanying recommendations supplied to the TTC concerning the Scarborough Rapid Transit line (SRT). It submits that this information qualifies as trade secrets, highly sensitive commercial and technical information regarding its products, know-how and processes. The affected party submits that the records contain, amongst other things, finite element analyses, overhaul solutions, resource planning, problem solving, action plans and quality assurance processes, and as such, the records contain intellectual property proprietary to it.

[15] The affected party submits that the information contained in the redacted portions of the records is an acquired body of knowledge, experience and skill, developed by it over decades. It submits that the information amounts to a "learning curve" which embodies elements of methods, compilations or processes contained in IA100 vehicles.

[16] The affected party refers to Order P-561 where the adjudicator examined records similar to those in this appeal and found that the information represented an acquired body of knowledge, experience and skill that amounted to a "learning curve" unique to the construction, and found that they qualified as trade secret information. The affected party submits that the adjudicator in Order P-561 noted that courts will protect the proprietary interests of a specified party in the information relating to the development of a product where the specified party "has used his or her skill and knowledge base to produce a result which another party could only obtain independently through the investment of comparable time and effort."

[17] The affected party submits that following the same reasoning, the records in this appeal are analogous to the information considered in Order P-561 which were found to constitute a trade secret. It submits that the records at issue reveal electrical and mechanical engineering analyses and recommendations in respect of the design, performance, life expectancy, fatigue, and potential mitigation and overhaul solutions to extend the service life of systems and subsystems integrated in the third party's IA100 vehicles. It submits that the records also indirectly reveal technical proprietary information in respect of the affected party's new generation vehicles' systems and subsystems in which it has implemented the same technology. The affected party submits that the records further reveal the methodology and processes that it relies upon to assess the performance of systems and subsystems integrated in the IA100 vehicles. The affected party submits that the redacted information satisfies the five criteria of trade secret information under the *Act* and should be treated as such in the context of this appeal.

[18] The affected party submits that the withheld information in the records is also

considered technical information for the purposes of the *Act*. It submits that IPC orders have found that information amounted to "technical information" where it was sufficiently particularized and specific, for instance where records included or consisted of:

- Drawings, sketches and written descriptions of specifications, including site plans⁹
- Structural plans containing details of construction design of structures and including information such as load conditions and related engineering matters.¹⁰

[19] The affected party submits that the records at issue fit squarely within, and reach the level of particularization and specificity required by, the definition of "technical information" under the *Act*. It submits that they are three engineering reports pertaining to the operation and maintenance of IA100 vehicles and contain photographs, engineering drawings, written descriptions, tables, graph, and technical data used to evaluate the performance of the IA100 vehicles' systems and subsystems, with the aim of making recommendations to extend their service life.

[20] Finally, the affected party submits that all of the information in the records also qualifies as "commercial information," as the records relate directly to the provision of advisory services by it to the TTC, and the manner in which these services are provided. The affected party also submits that the records are also commercial in nature as they form the basis on which future services were, or could be delivered, by it to the TTC, in respect of the Scarborough Rapid Transit line (SRT).

[21] The TTC relies on the affected party's representations with regard to the first part of the test, that the records contain technical, trade secret and commercial information.

The appellant's representations

[22] The appellant submits that not all of the withheld information can be considered a trade secret and/or technical and commercial in nature.

[23] The appellant refers to one of the withheld records (Record 3), and questions if all of the information under the sections "Project Overview," "Introduction," "Overview," "Objectives and Scope," and "Evaluation for 20-year Operation and Recommendations," is technical or commercial information or trade secrets as defined by the *Act*.

[24] The appellant agrees that if any of these sections describe the methodology employed by the affected party, that may involve technical information or trade secrets

⁹ Order MO-2262.

¹⁰ Order MO-1057.

as defined by the *Act* and could be redacted, but submits that other aspects of those pages, including the conclusions reached or the recommendations for 20-year operations may not be covered by section 10(1).

Finding

[25] For the reasons that follow, I find that the withheld information in the three records at issue, qualifies as trade secret and technical information.

[26] After my review of the three reports, I find that they contain electrical and mechanical engineering analyses (including in the form of photographs, engineering drawings, written descriptions, tables, and graphs) and recommendations in respect of the design, performance, life expectancy, fatigue, and potential mitigation and overhaul solutions to extend the service life of systems and subsystems integrated in the third party's IA100 vehicles. The records further reveal the methodology and processes that the affected party relies upon to assess the performance of systems and subsystems integrated in the IA100 vehicles.

[27] I agree with the affected party that the records at issue in this appeal are similar to those that were at issue in Order P-561 (relating to the testing performed by a named company, on the steel that was used in the construction of the retractable roof of SkyDome). In P-561, the adjudicator found that the withheld information qualified as trade secret because:

- The information represented an "acquired body of knowledge, experience and skill relating to the development of certain techniques, methods and processes unique to the construction of the SkyDome structure", that could be described as a "learning curve,"
- That learning curve embodied "elements of a method, compilation or process which are contained in a device, product or mechanism", sufficient to satisfy the first aspect of the definition of a trade secret,
- The information "which collectively makes up this learning curve may be used in architectural, engineering or construction trades and is not generally known in these trades", thus satisfying the next two components of the definition,
- The information, if disclosed, "would provide competitors with a knowledge base which the builders of SkyDome took many years to develop", which "could be used by such competitors to the detriment of the original construction group", such that the information had "economic value from not being generally known", thereby satisfying the penultimate portion of the definition, and
- That an express provision of confidentiality could satisfy the last criterion of the definition.

[28] I agree with the reasoning in Order P-561 and, as stated, I accept the affected

party's submission and find that information at issue in the records in this appeal is analogous to the information considered in Order P-561.

[29] After a review of the records and applying the reasoning in Order P-561, I find the information at issue amounts to an acquired body of knowledge, experience and skill relating to the development of certain techniques, methods and processes unique to the affected party's IA100 vehicles and could be described as a learning curve. I agree with the affected party that the technical details of the vehicles, the process for analysis, and any correlative recommendations made are the direct result of the affected party's learning curve in not only having designed the vehicles, but also providing operation, maintenance and advisory services during the life of the vehicles. The first aspect of the definition of a trade secret, set out above, is therefore satisfied.

[30] I also find that it is reasonable to conclude that this "learning curve" is not generally known in the trade or business because it was organically developed by the affected party. Finally, I find that the express provision of confidentiality throughout each of the reports (discussed in more detail below) satisfies the last criterion of the definition especially considering the affected party's submission that the economic value of the information is commensurate with the efforts it takes to ensure that the information contained in the records is maintained in secrecy.

[31] I conclude, therefore, that much of the information at issue in all three records qualifies as "trade secrets."

[32] I also find that some of the withheld information in the records is technical information. In my review of the records, I find that the three engineering reports contain photographs, engineering drawings, written descriptions, tables, graphs, and technical data used to evaluate the performance of the IA100 vehicles' systems and subsystems, with the aim of making recommendations to extend their service life.

[33] Accordingly, I find that the first part of the section 10(1) test is met.

Part 2: supplied in confidence

Supplied

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

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

[36] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no

negotiation or where the final agreement reflects information that originated from a single party.

In confidence

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

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

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

Representations

The affected party's representations

[39] The affected party explains that it supplied the three engineering reports at issue to the TTC in the context of a specified technical advisory services contract. It submits that the records were supplied in confidence by it to the TTC, since they were produced entirely by the affected party and were directly supplied by it to the TTC.

[40] The affected party submits that it does not provide information of this nature without a robust confidentiality undertaking first being entered into by its clients and partners. In that respect, the affected party refers to section 21 of its technical advisory services contract with the TTC which provides that:

- Confidential information received from the other party shall be used solely for performance of the services under the contract (subsection 21.1)
- The receiving party shall use the same level of diligence the receiving party uses to protect its own business, trade, and technical secrets (subsection 21.3)
- The receiving party shall not make such information available to third parties (subsection 21.3)

- Upon termination of the Contract, confidential information shall promptly be returned to the disclosing party or destroyed (subsection 21.4)
- At the request of owner of the confidential information, the receiving party shall certify the destruction thereof (subsection 21.5)
- No license to any intellectual property is granted by this Contract or by any discussion or confidential business data and/or proprietary data or information supplied thereunder (subsection 21.6).

[41] The affected party submits that on the first page of each of the three records and on each page throughout the records, it has noted that the information is confidential and proprietary.

The TTC's representations

[42] The TTC submits that the affected party provided the records to the TTC after it conducted a comprehensive technical analysis assessment of the SRT. The TTC submits that it and the affected party recognized from the outset of the contract that the information the affected party shared in relation to the project would have to be protected by the confidentiality clause within the contract agreement. The TTC submits that the confidentiality clause explicitly states that all information provided before and after the agreement was signed is subject to a strict confidentiality clause. The TTC submits that it and the affected party have full knowledge of their legal obligations to protect the content of the records, and the expectation that all information shared with each other regarding this project has been done so in the strictest confidence.

[43] The TTC submits that after it received the reports from the affected party, it hired an outside consultant to review the documentation and provide a report on the affected party's findings. Working with the affected party, the TTC submits that it ensured the integrity of the affected party's information by establishing a non-disclosure agreement that the consulting firm agreed to prior to being provided with the affected party's information.

[44] The appellant does not address this part of the test.

Finding

[45] After a review of the records and the representations of the affected party and the TTC, I find that the affected party supplied the records to the TTC and that the affected party had an expectation of confidentiality which was explicit. In my review of the records, I find that each report has a confidentiality clause on the first page and "confidential and proprietary" is also noted on each subsequent page.

[46] Further, as submitted, the contract between the affected party and the TTC provided for ongoing confidentiality for all information provided before and after the agreement was signed. It is also apparent that the affected party treated the

information in the records in a manner that indicates a concern for confidentiality when it worked with the TTC on establishing a non-disclosure agreement with a consulting firm before it was provided with this information.

[47] Accordingly, I find that the second part of the section 10(1) test has been met.

Part 3: harms

[48] The party resisting disclosure 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.¹¹

[49] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹²

Representations

The affected party's representations

[50] Referring to its "learning curve" reflected in the records, the affected party submits that whether the information concerns the technical details of IA100 vehicles, the way analyses are conducted thereon (for example, where the stress points are to be found), or the correlative recommendations made, the elements of that "learning curve" are the direct result of the company having not only designed and manufactured the vehicles, but also providing operation, maintenance, and advisory services to transit authorities during the lifecycle of these vehicles, including in the performance of the contract. The affected party submits that this is unique to its company.

[51] The affected party submits that it uses its "learning curve" to participate effectively in the rolling stock business. The affected party submits that this constitutes the essence of its competitive advantage in providing operation, maintenance, and advisory services to:

- i. the TTC in respect of the SRT,

¹¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹² Order PO-2435.

- ii. other transit authorities currently operating IA100 vehicles or other similar products produced by the company in which the same systems and subsystems are integrated, and
- iii. other clients using disparate systems who can benefit from the processes and procedures developed by the affected party in the context of its contract with the TTC.

[52] The affected party submits that the information making up its "learning curve" is not generally known in the industry and could easily be used by its competitors to undercut its market position. It submits that disclosing this information would make it possible, for example, for the affected party's competitors to approach its clients with mitigation or overhaul solutions without having to replicate the investment of time, effort, and resources made by the affected party in developing them, including without having to perform the same analyses. As such, the affected party submits that the information contained in the records has "tremendous" economic value.

[53] The affected party submits that disclosing the withheld information would prejudice its competitive position. It submits that the records must be considered in light of the highly competitive nature of the industry in which it operates. It submits that the rolling stock market is global and considering the high amounts of capital and investment required for the development, production, sales, purchase, operation and maintenance of rolling stock, it is further characterized by a relatively small number of manufacturers.

[54] The affected party submits that rolling stock products are tailor-made to the specific requirements of transit authorities operating in unique, diverse contexts. It submits that challenges posed by issues such as interoperability, often embed transit authorities with manufacturers that they retained previously; the unique knowledge of manufacturers likewise makes them the preferred operation and maintenance service providers in respect of their own products.

[55] The affected party submits that manufacturers and service providers not only gain economic value, but also invaluable incremental expertise from every project they are awarded, which provide them with opportunities to refine and publicly showcase their products and know-how. It submits that this, in turn, translates into reputational momentum that is central to success in subsequent bids and in that context, rolling stock manufacturers and service providers jealously guard their technical knowledge and expertise, know-how, trade secrets, and processes, as well as their commercial and financial information.

[56] The affected party argues that operation and maintenance of the rolling stock sector is particularly sensitive, considering its increasing strategic importance for

manufacturers. It refers to an article from McKinsey & Company¹³ that suggests that business is shifting away from largely product-only business towards a lifecycle business, including servicing and maintaining products over their full lifecycle.

[57] The affected party submits that disclosing its “learning curve” would make it possible for its competitors to approach current clients with mitigation or overhaul solutions without incurring similar cost in developing them; it would also provide them with an opportunity to differentiate their own product in the context of future requests for proposals, and to structure their bids accordingly, by factoring in otherwise unknown technical and performance data related to the third party’s products.

[58] Considering the winner-take-all dynamic in the market, and the relatively small number of competitors and projects, the affected party argues that the loss of its competitive advantage would result in immediate and direct undue financial losses for itself, and corresponding undue gain for its competitors.

The TTC’s representations

[59] The TTC repeats and relies on the representations of the affected party with regard to part three of the test. The TTC submits that it recognizes the need to protect the economic interests of an organization, based on reasonable expectations of injury to competitive position and the potential for financial harm.

[60] The TTC submits that if these documents were released, it could also be injurious to its own interests. It submits that disclosure could reasonably be seen to damage the TTC’s reputation and business relationship not only with the affected party, but also with other future interested organizations who would become concerned about the potential disclosure of proprietary information provided to the TTC in confidence. The TTC submits that it relies on the complete transparency of specialized contractors/consultants when engaged in procurement projects where external independent companies participate in public bidding processes for large contracts. It submits that without this transparency, it could not ensure the integrity of the bidding process, or the successful procurement of fiscally responsible contract awards, which would prejudice the TTC’s competitive position when engaging in contract negotiations.

The appellant’s representations

[61] The appellant submits that it is not clear that release of more of the withheld information could reasonably be expected to cause any of the harms contemplated by section 10(1).

[62] The appellant submits that a more thorough review of the records is required to

¹³ Huge Value Pool Shifts Ahead: *How rolling stock manufacturers can lay track for profitable growth*, September 20, 2016 McKinsey Insights, www.mckinsey.com.

determine if the section 10(1) exemption applies to all of the information that has been redacted from the records. She specifically refers to the various sections under the heading "Project Overview" as an example of more information that might be released.

The affected party's reply representations

[63] The affected party submits that with regard to Record 3, it has already consented to the disclosure of the section titled "Project Overview" during mediation. The affected party maintains that the others sections referred to by the appellant, including the conclusions reached or the recommendations for 20-year operations, are either covered by section 10(1), or the information they contain was already made public and disclosed to the appellant during mediation.

[64] With regard to the remaining withheld information, the affected party submits that the information goes to the core of the section 10(1) exemption, as it constitutes the know-how sold by it in the marketplace.

The appellant's sur-reply

[65] The appellant confirms that she has received the "Project Overview" sections of the reports in full. However, she maintains that some of all of the remaining pages could be disclosed without harming any legitimate section 10(1) interests. The appellant submits that if some or all of the information has been disclosed publicly, it should be disclosed to her now in this appeal.

[66] The appellant submits that the affected party claims that the conclusions reached and recommendations made in the reports go to the core of the section 10(1) exemption, but it also claims that it has consented to some disclosure of the conclusions and recommendations. The appellant submits that both cannot be true. She submits that a review of the information she has received shows that the reports' conclusions and recommendations have not been substantially disclosed to her by the TTC.

Analysis and finding

[67] In its representations, the affected party submits that disclosure of the withheld information could reasonably be expected to prejudice its competitive position (section 10(1)(a)) and result in undue loss to it or undue gain to a competitor (section 10(1)(c)). For the following reasons, I find that the affected party has demonstrated a risk of harm that is well beyond the merely possible or speculative if the withheld information is disclosed.

Section 10(1)(a) and (c) (prejudice to competitive position and undue loss or gain)

[68] As mentioned, at issue in this appeal are three engineering reports that the affected party supplied to the TTC pursuant to a technical advisory services contract between the parties. The TTC, with the consent of the affected party, disclosed portions

of each report to the appellant.

[69] As noted, I find that the undisclosed portions of the records are mechanical and electrical engineering analyses and recommendations supplied to the TTC and which constitute trade secrets and highly sensitive technical information regarding the affected party's products, know-how and processes.

[70] I found above that the withheld information constitutes a learning curve developed by the affected party in respect of the specified vehicles, and which is not generally known in the rolling stock business. As submitted by the affected party, it is reasonable to conclude that the learning curve contained in the withheld information and developed by the affected party about the specified vehicles and other products, making use of similar technologies, is the basis of the affected party's competitive advantage and capacity to maintain and improve its market position. Therefore, I find that disclosure of this information could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the affected party and that the section 10(1)(a) exemption applies to this information.

[71] I also find that disclosure of this same information could reasonably be expected to result in undue loss to the affected party under section 10(1)(c). I find that disclosing the withheld information would make it possible for the affected party's competitors to approach its clients with mitigation or overhaul solutions without actually developing them. I also accept that disclosing the withheld information would allow competitors of the affected party to differentiate their own products in the context of future requests for proposals, and to structure their bids accordingly, by factoring in otherwise unknown technical and performance data related to the affected party's products.

[72] The appellant submits that disclosure of the withheld information, or some of it cannot reasonably be expected to lead to harms or to the affected party. She specifically refers to certain sections in the report that she was able to identify by the disclosed index, and submits that they cannot possibly contain information that if disclosed would lead to harm (for example, Record 3 "project overview," "introduction," "overview," "objectives and scope," and "evaluations for 20-year operation and recommendations"). However, from my review of the withheld information, including those specific sections that appear in Record 3 and similarly titled sections in the other two reports, I agree with the redactions that were made. Although by the title of these headings it may appear that the information that follows would be summary information, I have reviewed the information under these headings and it is precisely the type of information that the affected party is attempting to protect and that I have found to qualify for the section 10(1) exemption. For example, the appellant refers to the heading "evaluations for 20 year operation and recommendations," which is a heading that appears in each section of the report and contains the exact recommendation being made for each system or part. In my view, this information constitutes a good example of the learning curve that the affected party is seeking to protect and which I have found qualifies for exemption under section 10(1).

[73] Therefore, I find that the withheld information in the records meets the third part of the test and thus the records at issue are exempt under section 10(1).

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

[74] Having found that section 10(1) applies to the withheld information in the records, I will now consider whether section 16 of the *Act* would apply to override the exemption.

[75] Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 9.1, 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.

[76] 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.

[77] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.¹⁴

Representations

The TTC's representations

[78] In its representations, the TTC submits that the withheld information in the records is entirely technical and specific to products made by the affected party for the TTC. It submits that the section 10(1) exemption allows for companies to be protected from having to disclose information that could damage their commercial viability, leak trade secrets and provide similar competing companies with privileged information that could give them a better competitive edge. The TTC submits that the withheld information is essentially the intellectual property of the affected party and as such there is no compelling public interest in disclosure that outweighs the purpose of the exemption.

[79] The TTC submits that it has been transparent with the public about its purchase

¹⁴ Order P-244.

of the affected party's products and their costs. The TTC submits that this illustrates that it is aware of a public interest in the technical advisory services contract it has with the affected party and how details of the contract are important to its stakeholders.

[80] The TTC submits that the specific sections identified by the appellant do not qualify to be disclosed under the public interest override. It submits that the information is technical in nature and the recommendations/evaluation provided by the affected party are proprietary information that if disclosed would only be understood by individuals working in the same engineering field and/or competitor businesses. It also submits that the TTC as a public organization has already provided the public with detailed information regarding the deficits, costs and recommendations regarding the next steps for the SRT. The TTC submits that it engages in numerous public meetings, consultation sessions and issues various public reports about this project. The TTC submits that any public interest in the project should be addressed by it in relation to steps being taken and costs of the project and that the kind of proprietary information in the records would not be subject to the public interest override, as they are not final decisions, but consultations by technical experts from specified fields.

[81] The TTC submits that the purpose of the section 10(1) exemption is to ensure that third party organizations can provide information to institutions such as the TTC without causing unnecessary harm to an organization's competitive or financial position. It submits that when the affected party entered into its advisory contract with the TTC, both parties acknowledged that the public disclosure of the information that would be exchanged between them could potentially harm either organization's position. As such, the confidentiality clause was added to the contract in order to ensure the security of both organizations' positions within the marketplace. The TTC submits that requiring the release of this information would go against the purpose of the exemption within the *Act* and therefore the public interest does not outweigh the purpose of the exemption.

The affected party's representations

[82] The affected party cites the principles that an important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.¹⁵

[83] The third party also refers to Order PO-1688 where the adjudicator, citing the *Williams Commission Report*, described the purpose of exemption relating to commercial activities as follows:

¹⁵ It refers to Order P-1398 which was upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*.¹⁵

The purposes of section 17(1) of the *Act* [the provincial equivalent to section 10(1)] were articulated in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2* (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

... The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government request for information (p. 313).

Clearly, the purposes of the section 17(1) exemption are serious and are intended to protect the public interest in the manner expressed in the Williams Commission.

[84] Therefore, the affected party submits that there is a clear public interest in allowing a firm to protect its trade secrets and technical information. It points to Orders PO-1697, P-408, M-288 and M-511 as instances where the IPC has upheld the application of the third party commercial information exemption where the information in the records would enable a competitor to gain an advantage on the affected party by adjusting their bid in future business contracts. The affected party repeats that there is a significant likelihood of such a risk materializing in the context of the rolling stock market.

[85] The affected party, referring to its "learning curve," repeats that the withheld information consists of "analyses and recommendations of a commercial nature" with a view of prolonging the service life of the IA100 vehicles, and does not speak to any decision-making process by the TTC, whether in awarding the contract or in implementing the recommendations made. The affected party submits that the withheld information does not express any meaningful opinion about passenger safety, and would not assist in public scrutiny of public funds.

[86] The affected party submits that it has already consented to the disclosure of the summaries for each of the reports, which provide a high-level overview of the analyses performed and of the recommendations made to the TTC in respect of the various systems and subsystems found in the specified vehicles. The affected party submits that what was disclosed was sufficient for the appellant to address any public interest concern that may have existed.

The appellant's representations

[87] The appellant submits that given that the reports are concerned with the safe operation of an active public transit line, which is at the heart of a debate over the future of transit in Scarborough, questions remain about the longevity of the line amid political pressure for a subway to be built. The appellant submits that a consultant's recommendation about ensuring the safe operation of the line for public transit users as well as what they concluded about the potential for extending the life of the line is clearly in the public's interest.¹⁶ The appellant included newspaper articles with her representations, two of which she authored which concerned the SRT, one addressing the reports that were withheld. The appellant also included another newspaper article by another journalist concerning transit delays addressing the Scarborough link being in jeopardy.

[88] The appellant submits that she carefully tried to avoid further pursuing anything that would clearly be technical information under the *Act*, for example removing technical sketches, drawings and figures identified in the indexes of the records. The appellant submits that she relies on me to review the withheld information to ensure that only exempt information is withheld.

The affected party's reply

[89] In its reply representations, the affected party submits that the appellant has merely stated that a public interest exists without providing any explanation or rationale as to whether the public interest rises to the level of "compelling," and that it clearly outweighs the purpose of the section 10(1) exemption.

[90] The affected party refers to Order MO-2070 and submits that this and other orders have recognized that in order to determine if there is a compelling public interest that clearly outweighs the purpose of the section 10(1) exemption, one must consider the nature of the information withheld pursuant to the exemption and the degree of disclosure that was already granted. It submits that further disclosure should not be ordered where the information disclosed is adequate to address the public interest considerations.

[91] The affected party submits that the summaries of each report, which it disclosed to the appellant, provide the appellant with a high-level overview of the analysis performed and recommendations made to the TTC. The affected party submits that the summaries not only describe the process, but also the results of observations and tests, as well as the main conclusions reached, and recommendations made, by it. Therefore, the affected party submits that there is no compelling public interest in disclosing the

¹⁶ The appellant referred to a consultant report, although the reports at issue in the appeal were completed by the affected party/vendor, not a consultant.

withheld information, as additional disclosure is very unlikely to further address the concerns put forward by the appellant, but it does guarantee that its legitimate business interests, which are protected under the *Act*, will be infringed upon.

The appellant's sur-reply

[92] The appellant submits that the information already disclosed does not satisfy public interest considerations, which relate to the safe operation of an active public transit line. She submits that little in that regard has been disclosed and repeats her claim that the sections labeled "recommendations" should be made public subject to any legitimate partial section 10(1) exemption.

Analysis and finding

[93] 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.¹⁷ 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.¹⁸

[94] As noted by the affected party, the records are three engineering reports that it supplied in the context of a technical advisory services contract. The relevant portion of this contract states that the third party was to:

analyze [its IA100 vehicles] which run as part of the Scarborough Rapid Transit System ... and the related operation and maintenance system of the [TTC] and provide suggestions to facilitate the continued operation of the Vehicles, if possible, which are operating post-design life and to increase the effectiveness of the [TTC's] operation and maintenance program, if possible.

[95] The appellant suggests that the reports are concerned with the safe operation of an active public transit line which is at the heart of a debate over the future of transit in Scarborough and what a consultant recommended about ensuring the safe operation of the line. She submits that their conclusions, as well as their conclusions about the potential for extending the life of the line, are clearly in the public interest.

[96] I agree that there is a public interest concerning the safe operation of an active public transit line. However, in this appeal I am tasked with determining if there is a

¹⁷ Orders P-984 and PO-2607.

¹⁸ Orders P-984 and PO-2556.

compelling public interest that would override the section 10(1) exemption with regard to withheld information in the three reports in dispute. After reviewing the reports, including the information in them that was disclosed to the appellant, I am not convinced that there exists a compelling public interest that would override the exemption for the withheld information for the following reasons.

[97] Although the affected party relies on Order PO-1688 to illustrate the importance of the third party information exemption, I note that the adjudicator found that the public interest override applied to the information, despite the seriousness of the section 17(1) exemption (the provincial equivalent to section 10(1)) because the information dealt with environmental protection and public health and safety. However, the withheld information before me consists of analyses and recommendations of a commercial and technical nature. The records do not contain any meaningful opinion about passenger safety that would go beyond what was already highlighted in the information from the reports that the TTC has disclosed to the appellant.

[98] As noted above, the summaries for each report were provided to the appellant and include a high level overview of the analyses performed and of the recommendations made to the TTC. In comparing these summaries with the withheld information, I find that the withheld information in the records is a long-form, more technical version of the summaries of the analysis performed, and of the recommendations made. This information is largely summarized in the summaries that have been provided to the appellant, and I find that there is no additional information that might further address the public interest in the safe operation of an active public transit line. I agree with the affected party that the information already disclosed is sufficient to address any public interest concerns that may have existed in the records.

[99] As a result, I find that there is no compelling public interest in the disclosure of the withheld information that I have found exempt under section 10(1).

ORDER:

The appeal is dismissed.

Original Signed by: _____
Alec Fadel
Adjudicator

_____ May 31, 2021