

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4251

Appeal PA20-00212

Ontario Northland Transportation Commission

April 7, 2022

Summary: The appellant seeks access to a draft Initial Business Case concerning the Ontario government's plans relating to rail service in Northern Ontario. The commission denied the appellant access to the record, citing the discretionary exemptions in sections 13(1) (advice or recommendations) and 18(1)(c) (economic or other interests of the institution) of the *Act*. The appellant appealed the commission's decision and raised the possible application of the public interest override in section 23. In this order, the adjudicator upholds the commission's decision in part. The adjudicator finds that section 13(1) applies to portions of the record and upholds the commission's exercise of discretion. She also finds the public interest override does not apply to the information exempt from disclosure. However, she finds the remainder of the record does not qualify for exemption under either sections 13(1) or 18(1)(c) and orders the commission to disclose it to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 13(1), 18(1)(c) and 23. IPC's *Code of Procedure*, section 11.01.

Orders and Investigation Reports Considered: Order MO-2070.

OVERVIEW:

[1] The Ontario Northland Transportation Commission (the commission) is an agency of the government of Ontario. As of April 1, 2020, the commission reports to the legislature through the Ministry of Transportation (the ministry).

[2] According to the commission, in the 2018 election, the Progressive Conservative Party, under the leadership of now Premier Doug Ford, promised the return of

passenger rail service to Northeastern Ontario. In 2018, the commission and its sister transportation agency, Metrolinx, were commissioned by the government to develop an Initial Business Case for the return of passenger rail service to Northeastern Ontario, which was confirmed by the ministry in its draft Northern Ontario Transportation Plan.¹

[3] The appellant filed an access request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) with the commission for "The Ontario Comprehensive Business Plan for Passenger Rail Revival between Toronto, North Bay and Cochrane."

[4] The commission identified one responsive record, the draft Initial Business Case, and issued a decision denying the appellant access to the record. The commission claimed the application of the mandatory exemption in section 12(1)(e) (cabinet records) of the *Act* to withhold the record from disclosure.

[5] The appellant appealed the commission's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[6] During mediation, the commission consulted with the Ministry of Transportation (the ministry) and Metrolinx as third parties. The commission then issued a revised access decision, adding the discretionary exemptions in sections 13(1) (advice or recommendations) and 18(1)(c) (economic or other interests of the institution) to deny access to the record. I note the commission raised the application of these exemptions past the 35-day deadline for doing so.

[7] The appellant confirmed his interest in pursuing access to the record. The appellant also raised the possible application of the public interest override in section 23 of the *Act* to the record.

[8] No further mediation was possible and the appeal transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I am the adjudicator in this appeal and began my inquiry by inviting the commission, the ministry and Metrolinx to make representations in response to a Notice of Inquiry, which summarizes the facts and issues under appeal. The commission and the ministry submitted representations; Metrolinx did not submit representations.

[9] I then invited the appellant to submit representations in response to the Notice of Inquiry and the commission and the ministry's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations. I then sought and received further representations in reply from the ministry and the commission in response to the appellant's representations.

[10] After the inquiry closed, the commission advised the IPC that it was no longer relying on section 12(1)(e) to withhold the record because the final version of the Initial

¹ "Connecting the North: a draft transportation plan for Northern Ontario", Online available at: <https://files.ontario.ca/mtonorthern-ontario-transportation-plan-en-2020-12-10.pdf> at p. 26.

Business Case is now publicly available.² Accordingly, section 12(1)(e) is no longer at issue and I will not consider it in this order.

[11] In the discussion that follows, I uphold the commission's decision in part. I find that some of the information in the draft Initial Business Case is exempt under section 13(1) of the *Act* and uphold the commission's exercise of discretion to withhold it. I also find that the public interest override does not apply to this information. However, I find that section 18(1)(c) does not apply to the remainder of the record and order the commission to disclose it to the appellant.

RECORD:

[12] The record at issue is a 64-page draft Initial Business Case (the IBC) regarding the Northern Rail Program.

ISSUES:

- A. Should the commission be permitted to raise the discretionary exemptions in sections 13(1) and 18(1) late?
- B. Does the discretionary exemption at section 13(1) (advice or recommendations) apply to the record?
- C. Does the discretionary exemption at section 18(1)(c) (economic interests of the institution) apply to the record?
- D. Did the commission exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?
- E. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption?

DISCUSSION:

Issue A: Should the commission be permitted to raise the discretionary exemptions in sections 13(1) and 18(1) late?

[13] As stated above, during mediation, the commission raised the application of the discretionary exemptions at sections 13(1) (advice or recommendations) and 18(1)(c) (economic interests of the institution) to the record for the first time. Previously, the commission claimed the record was exempt from disclosure under section 12(1)(e) only.

² Online available at: <https://www.ontarionorthland.ca/sites/default/files/corporate-document-files/Northeastern-Passenger-Rail-Service-Initial-Business-Case.pdf>

[14] The IPC's *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal.

[15] Section 11.01 states,

In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.³

[16] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must balance the relative prejudice to the institution and to the appellant.⁴ The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.⁵

[17] The commission states that it received a Notice of Mediation from the IPC on September 28, 2020, which indicated that the commission had 35 days from the date of the notice to raise any new discretionary exemptions not originally claimed. At that time, the commission did not claim any additional exemptions.

[18] On October 1, 2020, during the course of mediation, the commission advised the mediator it was considering raising additional discretionary exemptions. The commission believes that this intention was raised with the appellant. On November 27, 2020, the commission issued its revised access decision in which it applied sections 13(1) and 18(1)(c) to continue to withhold access to the record.

[19] The commission states it never intended to disclose the record, either in whole or in part. As such, it has not wavered from its initial position; rather, it has altered the basis for withholding the record by invoking new exemptions to further defend its decision to deny the appellant access to the IBC.

³ *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

⁴ Order PO-1832.

⁵ Orders PO-2113 and PO-2331.

[20] The commission also states the decision to raise the two discretionary exemptions was made at the mediation stage and the appellant was fully apprised of the changes at the time. The commission submits there has been no additional delay to the process due to its revised decision. Therefore, there was no resulting prejudice to the appellant, nor has the integrity of the appeal process been compromised.

[21] The appellant did not address the commission's late raising of sections 13(1) and 18(1)(c) in his representations.

[22] Based on my review of the circumstances, I allow the commission to claim the discretionary exemptions in sections 13(1) and 18(1)(c) of the *Act* to withhold the record at issue. In Order MO-2070, the adjudicator explained the purpose of the IPC's policy on the late raising of discretionary exemptions, stating,

The object of this policy is to provide government institutions with a window of opportunity to raise new discretionary exemptions, but not at a stage of the appeal where the integrity of the process is compromised or the interests of the appellant in the release of the information prejudiced. This approach was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg*.⁶

[23] While the commission issued its revised access decision outside of the 35-day period, the timing of the claim alone is not determinative of whether a discretionary exemption is permitted.⁷ As noted above, in determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must consider the impact of the new discretionary exemption claim on the integrity of the appeals process and any extenuating circumstances. The adjudicator must also balance the relative prejudice to the institution and to the appellant.⁸ The specific circumstances of each appeal must be considered in determining whether a discretionary exemption can be raised after the 35-day period.⁹

[24] In this particular appeal, the only record at issue was claimed to be exempt, in full, under section 12(1)(e) of the *Act*. The discretionary exemptions in sections 13(1) and 18(1)(c) were raised during mediation, which gave the appellant the opportunity to consider their application to the record with the mediator and address it in the representations that he submitted during the inquiry. As a result, I find the appellant was provided with sufficient time and opportunity, both in mediation and in adjudication, to respond to the commission's claim that sections 13(1) and 18(1)(c) applied to the records. I am also satisfied that no additional delay was incurred due to the late exemption claim. I also note the appellant has not identified any prejudice that may have resulted from the discretionary exemption claims. As a result, I find that any prejudice that may have been incurred by the appellant has been minimal.

⁶ (21 December 1995) Toronto Docket 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

⁷ See, for example, Order MO-4031-I.

⁸ Orders MO-2070 and PO-1832.

⁹ Orders PO-2113 and PO-2331.

[25] Given these circumstances, I am satisfied the overall integrity of the appeal process has not been compromised. I am also satisfied that any prejudice to the appellant in allowing the commission to claim the application of sections 13(1) and 18(1)(c) to the record outside of the 35-day policy for the raising of additional discretionary exemptions has been minimal. Therefore, I allow the commission to claim sections 13(1) and 18(1)(c) and I will consider whether they apply to the record below.

Issue B: Does the discretionary exemption at section 13(1) (advice or recommendations) apply to the record?

[26] Section 13(1) of the *Act* exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by the institution are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.¹⁰

[27] Section 13(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

[28] *Advice* and *recommendations* have distinct meanings. *Recommendations* refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

[29] *Advice* has a broader meaning than *recommendations*. It includes *policy options*, which are the public servant or consultant's identification of alternative possible courses of action. *Advice* includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.¹¹

[30] *Advice* involves an evaluative analysis of information. Neither *advice* nor *recommendations* include *objective information* or factual material.

[31] Section 13(1) applies if disclosure would *reveal* advice or recommendations either because the information it self consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.¹²

¹⁰ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

¹¹ See above at paras. 26 and 47.

¹² Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993,

[32] The relevant time for assessing the application of section 13(1) is the point when the public servant or consultant prepared the advice or recommendations. The institution does not have to prove that the public servant or consultant actually communicated the advice or recommendations. Section 13(1) can also apply if there is no evidence of an intention to communicate, since that intention is inherent to the job of policy development, whether by a public servant or consultant.¹³

[33] The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 13(1).¹⁴ This is the case even if the content of the draft is not included in the final version.

[34] Examples of the types of information that have been found *not* to qualify as advice or recommendations include: factual or background information,¹⁵ a supervisor's direction to staff on how to conduct an investigation,¹⁶ and information prepared for public dissemination.¹⁷

Parties' representations

[35] The commission submits the record clearly qualifies for exemption under section 13(1). The commission submits the record reveals a suggested course of action that will ultimately be accepted or rejected by a decision maker, whether it be the ministry, Treasury Board/Management Board of Cabinet or Cabinet itself. Specifically, the record outlines three service pattern options, each of which has two sub options, and very clearly provides advice and recommendations as to the preferred course of action in the circumstances.

[36] The ministry submits the record contains information that clearly falls under the section 13(1) exemption. Specifically, the ministry states the record contains information relating to the three options under consideration constitutes *advice* within the meaning of section 13(1). The ministry submits that the following information contains either advice itself or would reveal the substance of the advice being given with respect to the three options:

- One portion of the Table of Contents;
- A portion of the Executive Summary
- One sentence on page 3
- One sentence on page 8

upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563.

¹³ *John Doe v. Ontario (Finance)*, cited above at note 10, at para. 51.

¹⁴ *Ibid.*, at paras. 50-51.

¹⁵ Order PO-3315.

¹⁶ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

¹⁷ Order PO-2677.

- The last sentence on page 11
- A specific sentence on page 12
- All of section 3 following the introductory paragraph
- Table 8 in section 4
- The second to last sentence on page 24
- Third row in Table 9 and three paragraphs following it on page 25
- Two portions of page 26
- Two portions of page 27
- Two sentences on page 28
- Half of page 28 and all of page 29
- One sentence on page 32
- Four sentences and Table 13 on page 33
- Table 14 and the last sentence on page 34
- All of pages 35 and 36
- Table 18 and two paragraphs on page 39
- All of pages 40 to 42
- Page 45 in full, with the exception of the heading and one sentence
- All of pages 46 and 47
- Four paragraphs on page 48
- Specific portions of page 49
- All of page 52
- A portion of page 52
- All of pages 53 and 54

In the confidential portion of its representations, the ministry also submits that the reference to a specific location should also be withheld under section 13(1) as it would disclose advice relating to the geographic area of service.

[37] The appellant did not address the application of section 13(1) to the record.

Findings and Analysis

[38] I have reviewed the information identified by the ministry as containing advice or recommendations and am satisfied the majority of it contains advice or recommendations within the meaning of section 13(1). Specifically, I find the following information to contain advice, recommendations or policy options or information that would allow one to accurately infer the advice or recommendations:

- The portion of the Table of Contents that identifies the three options under consideration;
- A portion of the Executive Summary
- The last sentence on page 11
- A specific sentence on page 12
- All of section 3 following the introductory paragraph
- Table 8 in section 4
- The second to last sentence on page 24
- Three paragraphs following Table 9 on page 25
- Two portions of page 26
- Two portions of page 27
- Two sentences on page 28
- Half of page 28 and all of page 29
- One sentence on page 32
- Four sentences and Table 13 on page 33
- Table 14 and the last sentence on page 34
- All of pages 35 and 36
- Table 18 and two paragraphs on page 39
- All of pages 40 to 42
- Page 45 in full, with the exception of a heading and one sentence

- All of pages 46 and 47
- Two paragraphs under the third heading on page 48
- Specific portions of page 49
- All of page 50
- A portion of page 52
- All of pages 53 and 54

Based on my review, I find that these portions of the IBC contain advice or recommendations. Specifically, all of these portions contain detailed descriptions and explanations of the policy options that were being offered to the ministry regarding the plans for the rail service in Northern Ontario. I find that the information on these pages represents part of the deliberative process leading to a final decision on the plans for the rail service. Moreover, some of the information contained on these pages clearly contain recommendations regarding the options discussed. Therefore, I find that the portions identified above contain advice or recommendations within the meaning of section 13(1) and qualify for exemption.

[39] I have reviewed the exceptions to the section 13(1) exemption enumerated in section 13(2) and find none apply. While there are discrete portions of the information listed above that contain factual information, I find it is inextricably intertwined with the advice or recommendations that I found to qualify for exemption.

[40] However, I find specific portions identified by the ministry as containing advice or recommendations do not qualify for exemption under section 13(1). Specifically, I find the first portion of the Table of Contents identified by the ministry contains general topic headings for the section in the IBC and not any information that would reveal the advice or recommendations contained in the actual section it relates to. I also find the sentence withheld on page 3 to contain factual background information that does not contain advice or recommendations and could not, if disclosed, accurately infer the advice or recommendations. Similarly, I find the information withheld from page 8 to contain general background information. The ministry takes the position that the disclosure of a specific location contained in the record would reveal advice; however, I find that the information contained on page 8 to comprise of general background information relating to a rail corridor and would not reveal any advice or recommendations or allow for the accurate inference of advice or recommendations. I also find the information withheld from the third row of Table 9 on page 25 to not contain advice or recommendations or information that could accurately infer advice or recommendations. The information in this table provides general travel times relating to specific locations and routes. It is unclear, and neither the commission or the ministry have demonstrated, how the disclosure of the third row of Table 9 could reveal advice or recommendations. In addition, I find that the two paragraphs under the second heading on page 48 to contain general background and factual information relating to

the responsibilities of certain organizations involved with the project. None of the information contained in these two paragraphs appears to contain advice or recommendations or could accurately permit the inference of advice or recommendations if revealed.

[41] With regard to the remainder of the record, I find it does not contain advice or recommendations within the meaning of section 13(1). The information that remains at issue consists of general background or factual information, which would require disclosure under the exception to the exemption in section 13(2)(a). I also note section 10(2) of the *Act* obliges an institution, in this case, the commission, to disclose as much of a responsive record as can be reasonably severed without disclosing exempt material. An institution will not be required to sever a record and disclose portions where to do so would reveal only *disconnected snippets* or *worthless* or *meaningless* information. However, I find that the information that does not qualify for exemption under section 13(1) contains meaningful background, contextual or factual information regarding the plans for the development of rail service in Northern Ontario.

[42] Finally, I find that the remaining mentions of a specific geographic location that the ministry refers to in the confidential portions of its representations do not contain advice and/or recommendations within the meaning of section 13(1). I note that I have found all of the more detailed explanations regarding the rationale of this location as a possible option to be exempt under section 13(1) above. Based on my review, I find that the instances in which this geographic location and any travel related information (i.e. travel time/distance to/from another location) do not appear to reveal any particular advice or recommendations or a recommended course of action by the commission.

[43] In conclusion, I find that the portions of the record identified in paragraph 38 above are exempt from disclosure under section 13(1) of the *Act*, subject to my review of the commission's exercise of discretion below under Issue D.

Issue C: Does the discretionary exemption at section 18(1)(c) (economic interests of the institution) apply to the record?

[44] The commission and the ministry claim the record qualifies for exemption under section 18(1)(c) of the *Act*. I note that I will only consider whether the remainder of the record is exempt from disclosure because I have already found that portions of the record are exempt under section 13(1). Section 18(1)(c) states,

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.

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. It recognizes that institutions may have economic interests and

compete for business with other public or private sector entities, and it provides discretion to refuse to disclose information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.¹⁸ Section 18(1)(c) only requires that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.¹⁹

[45] An institution resisting disclosure on the basis of section 18(1)(c) cannot simply assert that the harm described in that section is obvious based on the record. It must provide *detailed* evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, the institution should not assume that the harms are self-evident and can be proven simply by repeating the description of harms in the *Act*.²⁰

[46] The institution must show that the risk of harm is real and not just a possibility.²¹ However, it does not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.²²

[47] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.²³

[48] The commission submits the IBC contains information that qualifies for exemption under section 18(1)(c) of the *Act*. The commission states the IBC assumes the use of a third party's asset and rail corridor. As such, the commission submits that future negotiations with that party needs protection. Similarly, the commission submits that all of the options identified in the IBC will require negotiations with property owners and other stakeholders to either reinstate former stations or construct new shelters or stations at the proposed locations. The commission submits that disclosing the prospective locations at this point could cause upset amongst owners/stakeholders that are being considered and those in areas who are not considered.

[49] In addition, the commission submits that the disclosure of the IBC could negatively impact its economic interests because one of the prospective locations is currently being leased to one of its existing rail customers. The commission submits that the disclosure of the prospective station locations could cause "unnecessary concern and hinder [the commission's] relationships with its current customers." The commission goes further to submit it is "therefore reasonable to infer that the

¹⁸ Orders P-1190 and MO-2233.

¹⁹ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

²⁰ Orders MO-2363 and PO-2435.

²¹ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

²² *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

²³ Orders MO-2363 and PO-2758.

premature disclosure of the IBC would seriously compromise [its] existing positive working relationships as well as future negotiations with third party stakeholders that would prejudice [the commission's] economic interests and competitive position."

[50] Finally, the commission submits that the disclosure of the costing breakdowns could "compromise the effectiveness of any future procurement process by disclosing the estimated budgets for certain works which is information that is not disclosed to potential respondents to competitive procurements in accordance with best practices in public sector procurement." The commission submits that the disclosure of this information could reasonably be expected to affect its economic interests and competitive position.

[51] The ministry submits that disclosure of some of the information in the record could reasonably weaken the commission's position in entering into negotiations for track access for the options under consideration. Specifically, the ministry submits that Table 13, Table 16 and all of the information found exempt in Section 6 of the IBC qualify for exemption under section 18(1)(c). The ministry submits that the commission should not be required to disclose this costing information prior to entering into negotiations.

[52] The appellant did not address the application of section 18(1)(c) to the record in his representations.

[53] I have reviewed the record and note that I have already found Table 13, Table 16 and the majority of the information in Section 6 of the IBC exempt from disclosure under section 13(1). As such, I will not consider whether these portions of the IBC are also exempt under section 18(1)(c) of the *Act*.

[54] As identified above, the final version of the IBC is now publicly available.²⁴ The final version of the IBC includes the options under consideration for the rail service and there is some overlap in information between it and the draft IBC at issue in this appeal. Given these circumstances, it appears less likely that the harms contemplated in section 18(1)(c) of the *Act* could reasonably be expected to occur for information that is already available to the public.

[55] In any case, I have reviewed the information that remains at issue in the draft IBC, i.e. the information I found to not be exempt under section 13(1), and am not satisfied the commission or the ministry provided me with sufficient evidence to demonstrate that it qualifies for exemption under section 18(1)(c). In its representations on the application of section 18(1)(c), the commission focusses on the harms that could reasonably be expected to result if two types of information are disclosed. These two types of information are the prospective locations of rail stations and costing breakdowns. However, the commission did not identify the portions of the records that contain this type of information. Regardless, I have reviewed the draft IBC

²⁴ Online available at: <https://www.ontarionorthland.ca/sites/default/files/corporate-document-files/Northeastern-Passenger-Rail-Service-Initial-Business-Case.pdf>

and find that the portions remaining at issue do not provide any details regarding the prospective locations of future rail stations. Further, I have already found the costing breakdown information identified by the ministry to be exempt under section 13(1).

[56] The information that remains at issue in the draft IBC is predominately background, summary, or factual information, and is not detailed information regarding the policy options under consideration that could responsibly be expected to impact future negotiations with external parties. The record also contains information regarding the modelling analyses and assumptions the commission adopted in preparing the information in the records. Based on my review, this type of modelling information appears general and at a high level. It does not contain details that could reasonably be expected to prejudice the economic interests or competitive position of the commission, if it were to be disclosed. In any case, I have reviewed the parties' representations and find neither the commission nor the ministry have provided sufficient evidence to demonstrate how the disclosure of the information that remains at issue could reasonably be expected to result in the harm contemplated by section 18(1)(c) of the *Act*.

[57] Therefore, I find that the information that remains at issue does not qualify for exemption under section 18(1)(c) of the *Act*. I will order the commission to disclose it to the appellant.

Issue D: Did the commission exercise its discretion under section 13(1)? If so, should this office uphold the exercise of discretion?

[58] The exemption in section 13(1) is discretionary and permits an institution to disclose the information subject to this exemption despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. The IPC may find the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations or fails to take into account relevant considerations. In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁵ However, the IPC may not substitute its own discretion for that of the institution.²⁶

[59] The commission submits it exercised its discretion under section 13(1) properly. Specifically, the commission submits it considered the following factors in exercising its discretion to withhold the record:

- The principle that information should be made available to the public unless there is a legitimate reason to withhold that information under the *Act*,
- The purpose of the exemption in section 13(1) and the interests it seeks to protect,

²⁵ Order MO-1573.

²⁶ Section 43(2) of the *Act*.

- The fact that the disclosure of the draft IBC will not provide the appellant with the information he is looking for,
- The interests of others affected by the request, including the ministry and other third-party stakeholders, and
- The disclosure may decrease public confidence in the commission's operations.

The commission submits it did not act in bad faith or for an improper purpose, but to protect the independence of its public servants. The commission submits it considered all the relevant factors and did not take into account any irrelevant factors.

[60] The ministry and the appellant did not make submissions on the commission's exercise of discretion.

[61] I have reviewed the commission's representations and the information I found to qualify for exemption under section 13(1). Based on this review, I am satisfied the commission considered relevant factors in exercising its discretion and did not take into account irrelevant factors. I note the commission states it considered the fact that the disclosure of the record will not provide the appellant with the information he is looking for. The commission did not elaborate or explain this statement; however, it is clear the commission considered the purpose of the appellant's request and that is a relevant factor to consider.

[62] I am also satisfied the commission considered the nature of the information at issue, the purpose of the exemption in section 13(1) to ensure that public servants feel able to freely and frankly advise and make recommendations, and the fact that information should be made available to the public. There is no evidence before me to suggest the commission took into account irrelevant considerations or that it exercised its discretion in bad faith or for an improper purpose.

[63] Accordingly, I am satisfied the commission did not err in exercising its discretion to withhold information exempt under section 13(1) and I will not interfere with it on appeal.

Issue E: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 13(1) exemption?

[64] The appellant claims that the public interest override applies in the circumstances of this appeal. Section 23 of the *Act* states,

An exemption from disclosure of a record under section 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption.

[65] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested record before making submission in support of his or her contention that section 23 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.²⁷

[66] In considering whether there is a *public interest* in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.²⁸ 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.²⁹

[67] The word *compelling* has been defined in previous orders as "rousing strong interest or attention."³⁰ A compelling public interest has been found to exist where, for example: the records relate to the economic impact of Quebec separation,³¹ the integrity of the criminal justice system has been called into question,³² public safety issues related to the operation of nuclear facilities have been raised,³³ and records containing information relating to contributions to municipal elections campaigns.³⁴

[68] The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. The interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[69] 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.³⁵

Representations

[70] The commission submits that the information that remains at issue would not

²⁷ Order P-244.

²⁸ Orders P-984 and PO-2607.

²⁹ Orders P-984 and PO-2556.

³⁰ Order P-984.

³¹ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

³² Order PO-1779.

³³ Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.

³⁴ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

³⁵ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, cited above.

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. The commission submits this is particularly true because the final IBC has been made public.

[71] The commission acknowledges there is a public interest in improving public transportation throughout northeastern Ontario. To that end, the commission states that the ministry released a public survey to better understand the unique transportation needs of the public along the rail corridor between Toronto, North Bay and Cochrane/Timmins. The commission states the ministry has released the results of the survey³⁶ and submits that the information disclosed by the province in relation to the return of passenger rail service in northeastern Ontario is adequate to address any public interest considerations.

[72] The commission states the appellant is a journalist, rail enthusiast, and advocate for the return of passenger rail. The commission notes the appellant is the founder of an advocacy group dedicated to restoring the Northlander passenger train and improving other rail and intercity bus services across northeastern Ontario. The commission submits the appellant's interest in the IBC is more appropriately characterized as a private interest rather than a public one. In addition, the commission refers to the appellant's opinion piece in a local paper that confirms he seeks access to when the passenger train will be reinstated. However, the commission states this information is not contained in the record.

[73] In any case, even if there were a compelling public interest in the record, the commission submits it does not clearly outweigh the purpose of the exemption in section 13(1). The commission states the purpose of section 13(1) is to protect the free flow of advice or recommendations within the deliberative process to ensure that public servants do not feel constrained by outside pressure. The commission submits the IBC has significantly evolved over time and the disclosure of the language in this draft "could cause more harm than good as it would be misleading to the public and would undermine the public's confidence" in the commission.

[74] The ministry submits that the purpose of the exemption in section 13(1) outweighs the public interest in disclosure. The ministry submits that northern rail transportation is an area in which the government must make difficult decisions and balance a number of competing interests in the process of deliberations. Given these conditions, the ministry submits that government should be able to get advice and recommendations from its staff unimpeded by fears of it being subject to pressure from any particular sector of society. The ministry acknowledges there is a public interest in the matters considered in the IBC; however, that interest does not clearly outweigh the purpose of allowing the government to receive full and frank advice on the issues under consideration.

³⁶ See [Consultation: Transportation opportunities along the northeastern Ontario rail corridor | ontario.ca](https://www.ontario.ca)

[75] The appellant submits the IBC should not be exempt from any public analysis or scrutiny. The appellant also states that he would like to compare the IBC with the options put forward in the final version of the IBC. The appellant submits that, as a transit user, customer of the commission, taxpayer and resident of Ontario, he wants to ensure that the government, the commission and the ministry do not "repeat the mistakes they made in the past that led to the Northlander train being removed from service." The appellant submits that the public should be provided with the information that would show how its decisions are being made and the interests considered. The appellant also takes issue with the fact that none of the draft IBC is being made subject to public discussion and scrutiny and raises a concern about the lack of transparency from the commission and the ministry.

[76] In its reply representations, the commission submits the appellant failed to demonstrate there is a compelling public interest in the IBC. The commission notes that a significant amount of information has already been disclosed relating to the return of passenger rail service that is adequate to address any public interest considerations. The commission also confirms that the public disclosure of the final IBC should be more than adequate to address public interest considerations. The commission submits that the final IBC provides the appellant with the most up-to-date information regarding the project and upon which the government relied to make its funding decision. As such, the appellant would have the ability to review the decision and raise any concerns he has on the most current information. The commission confirms the record at issue does not contain the most current information relating to the return of passenger rail service in northeastern Ontario.

[77] The commission further reiterates that it appears the appellant's interest in the information at issue is personal in nature. The commission also states that even if there was a public interest in the disclosure of the records, any interest would not clearly outweigh the purpose of the section 13(1) exemption.

[78] The ministry states that the final version of the IBC was released in May 2021. The ministry confirms that the next stage of the process will entail planning and design work for the recommended service option, in conjunction with further public engagement sessions. The ministry states that the public engagement will inform the contents of the Updated Business Case, which is scheduled for completion in 2022.

[79] The ministry submits that, absent highly unusual circumstances, section 23 of the *Act* does not require that access be given to a draft version of a record, where the final version of the record will be available for public scrutiny. In this case, the ministry submits there is no compelling public interest in granting access to the detailed contents of advice that was not ultimately provided to government, where the final version of that advice, in the form of the final IBC, has been made available to the public.

Analysis and Findings

[80] After reviewing the parties' representations, I find that the public interest

override in section 23 does not apply to the information that is exempt under section 13(1) in the circumstances of this appeal.

[81] The information at issue is the information that I have found the commission properly withheld on the basis that it would reveal the advice or recommendations of a public servant with respect to the government's plans regarding passenger rail service in northeastern Ontario.

[82] As stated above, there are two requirements for section 23 to apply. The first is that there must be a compelling public interest in disclosure of the records and the second is that this interest must clearly outweigh the purpose of the section 13(1) exemption. I accept the appellant's argument that there is a public interest in the revival of passenger rail service in northeastern Ontario. However, I must consider whether the public interest in the information at issue is a compelling one, that is, whether it is the subject of "rousing strong interest or attention."³⁷ I have considered the amount of information that I will order to be released to the appellant in the draft IBC, the fact that the final IBC has been publicly disclosed, and the public engagement that has or will take place in relation to the revival of passenger rail service. Given these circumstances, I find that it has not been established that this interest is a compelling one under section 23. Based on the content of the information I found exempt under section 13(1), the information that is already publicly available, and the public engagements that have or will take place in relation to this initiative, I am not convinced that disclosure of the exempt information would help the public to express its opinion or to make political choices in a more meaningful manner. Similarly, I am not persuaded that its disclosure would increase public confidence in the operations of the commission.

[83] As the appellant has not established a compelling public interest in the disclosure of the portions of the record I have found exempt under section 13(1), I find that the first part of the test for section 23 to apply has not been met. Accordingly, I find that section 23 does not apply, and I uphold the commission's decision to withhold the portions of the record that I have found to be exempt under section 13(1).

ORDER:

1. I uphold the commission's decision to withhold the following information under section 13(1) of the *Act*:
 - The portion of the Table of Contents that identifies the three options under consideration;
 - A portion of the Executive Summary
 - The last sentence on page 11

³⁷ Order P-984.

- A specific sentence on page 12
 - All of section 3 following the introductory paragraph
 - Table 8 in section 4
 - The second to last sentence on page 24
 - Three paragraphs following Table 9 on page 25
 - Two portions of page 26
 - Two portions of page 27
 - Two sentences on page 28
 - Half of page 28 and all of page 29
 - One sentence on page 32
 - Four sentences and Table 13 on page 33
 - Table 14 and the last sentence on page 34
 - All of pages 35 and 36
 - Table 18 and two paragraphs on page 39
 - All of pages 40 to 42
 - Page 45 in full, with the exception of a heading and one sentence
 - All of pages 46 and 47
 - Two paragraphs under the third heading on page 48
 - Specific portions of page 49
 - All of page 50
 - A portion of page 52
 - All of pages 53 and 54
2. I order the commission to disclose the remainder of the record to the appellant by **May 12, 2022** but not before **May 7, 2022**. For clarity, I will be providing the commission with a highlighted copy of the record with the information I have found exempt highlighted. To be clear, the information highlighted in the record should not be disclosed to the appellant.

3. In order to verify compliance with Order provision 2, I reserve the right to require the commission to provide me with a copy of the records disclosed to the appellant.

Original Signed by: _____

Justine Wai
Adjudicator

_____ April 7, 2022