

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-4395

Appeal PA20-00267

Metrolinx

May 23, 2023

**Summary:** Metrolinx received an access request under the *Act* for records related to budgets approved by the Treasury Board for a number of Light Rail Transit (LRT) projects across the Greater Toronto Area. Metrolinx denied access to the responsive information, applying the mandatory exemption for Cabinet records in section 12(1). In this order, the adjudicator upholds Metrolinx's decision to withhold the records under section 12(1) and dismisses the appeal.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 12(1).

**Orders Considered:** Orders PO-3973 and PO-3977.

### OVERVIEW:

[1] Metrolinx is responsible for developing a number of different Light Rail Transit (LRT) projects across the Greater Toronto Area (GTA). This order addresses whether certain budget information pertaining to these projects is exempt from disclosure because its disclosure would reveal the substance of deliberations of Cabinet or one of its committees.

[2] An individual submitted a request to Metrolinx under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the following records:

A copy of the most recent “all-in” Treasury Board-approved budgets for the Eglinton Crosstown LRT, Hamilton LRT (prior to cancellation), Hurontario LRT and Finch West LRT projects – including construction, vehicles, financing costs, lifecycle costs, maintenance and operating costs, concession term costs, contingencies, enabling works, professional services, properties and post-contract contingencies, as applicable.

[3] Metrolinx clarified the request with the appellant before conducting a search in which it located four responsive records. Metrolinx issued a decision denying access to the responsive records in full, claiming they are exempt under the mandatory exemption at section 12(1) of the *Act* which relates to Cabinet records.

[4] The requester, now the appellant, appealed Metrolinx’s decision to the Information and Privacy Commissioner of Ontario (the IPC). A mediator was assigned to the appeal to assist the parties in attempting to reach a mediated resolution. No resolution was reached and the appeal was transferred to the adjudication where an adjudicator may conduct a written inquiry.

[5] The adjudicator originally assigned to this appeal decided to conduct an inquiry and sought and received representations from both Metrolinx and the appellant. The parties’ representations were shared between them in accordance with the confidentiality criteria in *Practice Direction 7* of the IPC’s *Code of Procedure*. Portions of Metrolinx’s representations met the confidentiality criteria and were not shared with the appellant; I will not directly reference those portions in this order but I have considered them in reaching my findings.

[6] The appeal was then transferred to me to complete the inquiry. I reviewed the file, including all of the representations submitted by the parties, and determined that I had the information required to close the inquiry and to issue an order.

[7] In this order, I uphold Metrolinx’s decision and find that the records at issue are exempt from disclosure under the Cabinet records exemption at section 12(1) of the *Act*. I dismiss the appeal.

## **RECORDS:**

[8] There are four records at issue: a Cabinet submission relating to the Metrolinx-Eglinton Crosstown LRT project (32-pages), and assessment notes relating to the Finch West Light Rail Transit Project (eight pages), the Hamilton Light Rail Transit project (15 pages), and the Hurontario LRT (15 pages).

## **DISCUSSION:**

### **Preliminary Issue: Scope of the request**

[9] In his representations, the appellant suggests for the first time in the appeal that the records identified by Metrolinx as being responsive to his request are not the records to which he sought access. The scope of the request was not identified as an issue at the close of mediation. For the reasons that follow, I find that appellant cannot, at this late stage in the appeal process, expand the scope of his request or further clarify the types of records to which he sought access.

[10] The appellant now states that, although his request was for "Treasury Board-approved budgets" he is not interested in records that would reveal the substance of any deliberations of Cabinet or the Treasury Board. He states that he is "simply requesting the budget information for the listed transit projects, as authorized by the Treasury Board." Later in his representations, he states that he seeks access to "the final approved budget information for the projects."

[11] In representations replying to the appellant's position, Metrolinx submits that the appellant's description of the records to which he seeks access is a "shift" from what he originally requested. Metrolinx submits that following receipt of the request, it initiated a telephone conversation with the appellant to confirm the meaning of the phrase "Treasury Board-approved budgets" used in the request. Metrolinx submits that in that conversation the appellant indicated that he was "interested in the approval documents Metrolinx would have received from the Treasury Board outlining the budget for its projects, including specific items such as, for example, operation costs, concession term costs, contingencies, to name a few." Metrolinx explains that the four records at issue in this appeal can be described as the "approval documents" as they are the documents showing the "all-in" budget approved by Treasury Board for the four LRT projects identified in the request. Metrolinx takes the position that these records are the records that best reflect the appellant's request and clarification provided.

[12] In his sur-reply representations, the appellant describes the telephone conversation with Metrolinx as "frustrating," submitting that he offered various iterations of his interpretation of the phrase "Treasury Board-authorized budget." He submits that he does not recall using the term "approval documents" but does recall explaining that he was only interested in the budget information and not details of the deliberations of Treasury Board.

[13] There appears to have been some miscommunication between the parties about the nature of the information sought by the appellant. However, in my view, Metrolinx did its due diligence in seeking clarification from the appellant with respect to what he meant by the language of his request. I also find that Metrolinx's interpretation of the types of records the appellant sought access to through his request was reasonable in the circumstances and that the records that they identified can reasonably be said to be

responsive to both the language of the request and Metrolinx's understanding of that language based on the clarification sought and received from the appellant.

[14] In my view, although the appellant would not have had specific knowledge of the types of records held by Metrolinx, the appellant bears some responsibility to raise concerns or questions about the records identified as being responsive to his request either in his appeal form or during the mediation process.

[15] I note that during mediation, the mediator attempted to contact the appellant several times to discuss the appeal, specifically noting that the language of his request was for "Treasury Board-approved budgets," asking him to clarify whether the records he sought access to are records that would have gone before Treasury Board for deliberations. It does not appear that the appellant engaged in a discussion with the mediator on this issue, advising only that he wanted the file moved to adjudication for an adjudicator to decide whether section 12(1) properly applies to the records identified by Metrolinx as responsive to his request. At no time during mediation stage of the appeal process did the appellant indicate that he questioned Metrolinx's interpretation of the scope of the request or responsive records. He also did not question the reasonableness of Metrolinx's search for records or indicate that he believed that additional records responsive to his request should have been identified.

[16] I further note that the Mediator's Report, which summarizes the facts and issues remaining in the appeal at the conclusion of mediation, did not identify either the reasonableness of Metrolinx's search for records or the scope of the request as an issue to be considered at adjudication. Despite being given the opportunity to identify any errors or omissions in that Mediator's Report, the appellant did not raise the possible application of these or any other issues.

[17] Therefore, what is before me to determine is whether the four records identified by Metrolinx as responsive to the appellant's request, referenced in both its access request and in the Mediator's Report, are exempt from disclosure under section 12(1), the mandatory exemption for records placed before Cabinet or its committees.

**Does the mandatory exemption for Cabinet records at section 12(1) apply to the records?**

[18] Section 12(1) is a mandatory exemption that protects certain records relating to meetings of Cabinet or its committees. Metrolinx takes the position that all four of the records at issue are exempt from disclosure under the introductory wording of section 12(1), which reads:

A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council<sup>1</sup> or its committees, including [...]<sup>2</sup>

[19] The use of the term “including” in the introductory wording of section 12(1) means that any record which would reveal the substance of deliberations of Executive Council (Cabinet) or its committees [not just the types of records enumerated in the various subparagraphs of section 12(1)], qualifies for exemption.<sup>3</sup>

[20] In order to meet the requirements of the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.<sup>4</sup>

[21] The information sought by the appellant is budget information for various LRT projects approved by Treasury Board, which is a committee of Cabinet.<sup>5</sup> As will be explained in more detail below, I find that the records at issue are all exempt under the introductory wording of section 12(1) because their disclosure would reveal the substance of deliberations of the Treasury Board/Management Board of Cabinet.

## ***Representations***

### *Metrolinx’s representations*

[22] Metrolinx explains that, as an Agency of the Government of Ontario, it must secure additional operating and capital funding from the Minister of Transportation through the appropriate Treasury Board/Management Board of Cabinet (TB/MBC) approval process. It explains that this is set out in section 13.2(e) of the *Memorandum of Understanding between the Minister of Transportation and CHAIR on behalf of Metrolinx* of September 2020.<sup>6</sup>

[23] Metrolinx submits that all four of the records at issue were prepared for the consideration of Treasury Board so that Metrolinx could obtain budgetary approval to continue with the planning and construction of the identified LRT projects. It submits that it cannot proceed with the LRT projects without TB/MBC approval. Metrolinx submits that all four records were placed before Treasury Board, a Cabinet committee, for consideration and deliberation in order to subsequently grant approvals required by

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<sup>1</sup> The Executive Council referred to in section 12(1) is more commonly known as Cabinet, and is a council of ministers of the Crown chaired by the Premier of Ontario.

<sup>2</sup> Subsections (a) through (f) are examples of specific types of records that are subject to exemption under section 12(1); none of them are relevant in this appeal.

<sup>3</sup> Orders P-22, P-1570 and PO-2320.

<sup>4</sup> Order PO-2320.

<sup>5</sup> See *Financial Administration Act*, R.S.O. 1990, c. F.12 and *Management Board of Cabinet Act*, R.S.O. 1990, c. M.1.

<sup>6</sup> [http://www.metrolinx.com/en/aboutus/board/MOUdocuments/Signed-MOU-\(Ministry-MX\)-Final-\(2020\)-website.pdf](http://www.metrolinx.com/en/aboutus/board/MOUdocuments/Signed-MOU-(Ministry-MX)-Final-(2020)-website.pdf).

Metrolinx to proceed with next steps for each project. It submits that the LRT projects could not be approved unless TB/MBC reviewed and deliberated on the submissions in the records. It submits that accordingly, disclosure of these records, prepared for and presented to TB/MBC for budgetary approval will disclose the deliberations of that Cabinet committee.

[24] Metrolinx submits that, in Order PO-3977, the IPC concluded that where Cabinet approval is required for an expenditure, disclosure of the submission seeking approval will provide insight into Cabinet deliberations and permit the drawing of accurate inferences with respect to those deliberations. It submits that, in Order PO-3977, the adjudicator distinguished between information that was already in the public realm and the information contained within the Cabinet record concluding that:

[D]isclosure of the analysis and recommendations put before Treasury Board would allow the appellant to infer whether the recommendations were accepted, rejected or accepted with modifications by Treasury Board and the substance of the deliberations leading to those decisions.

[25] Metrolinx submits that disclosure of the responsive records will provide similar insight and permit the drawing of accurate inference with respect to deliberations of Treasury Board/Management Board of Cabinet about the budgets for the identified LRT projects.

[26] Metrolinx submits that the projects to which the records relate (with the exception of the Hamilton project, which was cancelled), are all at various stages of completion. It submits that it shares details and updates with the public in regard to these projects, including certain budget information. It submits, however, that the records at issue contain project information that specifically and clearly falls within the context of the deliberations of a Cabinet committee. It submits that, as articulated by the adjudicator in Order PO-3977, while knowledge of Treasury Board approval might be public, this does not lessen the confidentiality of the substance of the deliberations themselves which are protected by the section 12(1) exemption.

[27] Metrolinx submits that disclosure of the records at issue in this appeal would reveal Treasury Board discussions and deliberations and notes that the records also contain information from previous discussions of the TB/MBC. In portions of its representations that I have accepted fall within the IPC's confidentiality criteria, it points to specific portions of the record to support its position.

[28] Metrolinx states that it did not request consent from Cabinet to disclose the records at issue. It submits that given that submissions placed directly before Cabinet for consideration and deliberation, as were these records, have historically fallen under the mandatory exemption at section 12(1), it considered whether there were any factors surrounding these records which might lend them to be disclosed and as no such factors were identified, it did not request consent from Cabinet.

*Appellant's representations*

[29] The appellant submits that Metrolinx has not met its burden of proof that disclosure of the responsive records would reveal the substance of Cabinet deliberations. He submits that the budgets of democratic governments are public documents and that the Government of Ontario publishes its annual budget documents together with Expenditure Estimates detailing planned expenditure at the program, subprogram and item level. He submits that the government's values and priorities can be revealed through public scrutiny of the budget details and such public accountability is a core principle of democracy.

[30] The appellant notes that budgets for publicly-funded transit projects are normally public documents. As an example, he points to a construction budget for the Toronto-York Spadina Subway Extension (TYSSE), publicly available on the Toronto Transit Commission's website. The appellant further submits that the TYSSE project receive provincial funding approved by Treasury Board, which would have reviewed this same budget information before giving its funding approval. The appellant argues that "[n]o one would suggest that the disclosure of this information reveals the substance of Cabinet deliberations that resulted in the approval of provincial funding."

[31] The appellant argues that because the funding for every major government project must be approved by Treasury Board, Metrolinx's claim that the government cannot disclose the budget information for any major project without violating Cabinet confidentiality is not only contrary to common sense and past practice, but also in conflict with one of the central purposes of the *Act*, which is that "information should be available to the public."

[32] The appellant submits that "when it comes to information relevant to the public in a democracy, the approved budgets or publicly-funded projects are near or at the top of the list." He submits that despite this, "neither the government nor Metrolinx have published the Treasury Board-approved budgets showing how much the public will pay for the [various LRT projects identified in the request]."

[33] The appellant refers to Order PO-3973<sup>7</sup> to support his position that "[t]he mere fact that a transit project was approved Cabinet does not constitute evidence of any linkage to the substance of Cabinet deliberations." He submits that in Order PO-3973, the IPC found that disclosure of records that arguably have a stronger linkage to a Cabinet proceeding than the records at issue in this case, would not reveal the substance of Cabinet deliberations.

[34] The appellant concludes his representations by stating that even if it is

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<sup>7</sup> Order PO-3973, upheld by the Divisional Court in *Attorney General for Ontario v. Information and Privacy Commissioner*, 2020 ONC 5085 (CanLII); Decision upheld by the Ontario Court of Appeal in 22 ONCA 74 (CanLII); Leave to appeal to the Supreme Court of Canada granted in 2022 CanLII 40784 (SCC).

determined that some parts of the records at issue are exempt under section 12, subsection 10(2) of the *Act* requires the disclosure of as much of the record “as can reasonably be severed without disclosing the information that falls under one of the exemptions.”

[35] The appellant submits that he is not interested in analysis or recommendations about the budgets and states that he seeks access to the final approved budget information for the projects. He submits that disclosure of the approved budget information considered in the records at issue in this appeal, would not reveal, or allow someone to infer, what Cabinet discussed regarding the budget. He submits that the budget information for the LRT projects listed in his request can be severed and disclosed.

*Metrolinx’s reply representations*

[36] Metrolinx submits that its access decision, and representations submitted in this appeal, relate only to the four records at issue, the documents that reflect the Treasury Board-approved budgets for the identified projects. Metrolinx submits that it does not place a blanket Cabinet exemption over all financial and/or budgetary information, as suggested by the appellant. It submits that requests under the *Act* for other types of records containing budgetary information or other types of public disclosures would be assessed on their own merit. Metrolinx also submits that it routinely reports on the capital budgets for the specified LRT projects, including costs incurred to date, at its public Board of Directors meetings. It notes that those materials can be found on Metrolinx’s website.

[37] Additionally, Metrolinx disagrees with the appellant’s position that the records can be severed pursuant to section 10(2). It submits that it would be impossible to sever the records because they are subject to Cabinet privilege in their totality.

***Analysis and findings***

[38] As indicated above, Metrolinx relies on the introductory wording of section 12(1) to deny access to the records at issue. In order to be exempt under the introductory wording of section 12(1), the institution must provide sufficient evidence to establish a linkage between the content of the record and the actual substance of Cabinet deliberations.<sup>8</sup>

[39] Previous orders of the IPC have found, when considering the introductory wording of section 12(1):

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<sup>8</sup> Order PO-2320.



- “deliberations” refer to discussions conducted with a view towards making a decision;<sup>9</sup> and
- “substance” generally means more than just the subject of the meeting.<sup>10</sup>

[40] I find that Metrolinx has provided sufficient evidence to establish a link between the information at issue in the records and the actual substance of Cabinet committee deliberations, here the deliberations of Treasury Board/Management Board of Cabinet, and as a result, all four of the records are exempt from disclosure pursuant to the exemption set out in the introductory wording of section 12(1) of the *Act*. My decision is based on my review of the parties’ representations, in their entirety, and my consideration of the records themselves.

[41] The evidence before me reveals that the records at issue were placed directly before Treasury Board/Management Board of Cabinet, which are committees of Cabinet. Considering Metrolinx’s representations, I agree that the records qualify for exemption because their disclosure would reveal the substance of deliberations of Treasury Board/Management Board of Cabinet, or would permit the drawing of accurate inferences about the deliberations.<sup>11</sup> While I cannot describe the contents of the records at issue, I find that they support Metrolinx’s assertions in this regard.

[42] I acknowledge the appellant’s argument that budget details of government projects are generally (and, in a democratic system, should be) made public for the purposes of public accountability. However, I do not accept that it stands to reason that all documents that address or contain such budgetary information are not eligible for the Cabinet records exemption in the *Act*. In this case, the specific records sought by the appellant do not simply set out budgetary information about the identified LRT projects. They are records that were put directly before the Treasury Board/Management Board of Cabinet for consideration, deliberation and committee approval. As a result, they fall within section 12(1), which is one of the limited and specific exemptions set out in the *Act* deemed by the Legislature to be a necessary limitation on the public’s general right of access to government information.

[43] I also do not accept the appellant’s suggestion that Metrolinx’s position, and accordingly my finding that the section 12(1) applies to the records, establishes that there is a blanket exemption for budgetary information that requires approval from Treasury Board/Management Board of Cabinet. It is certainly not the case that all government budget records are exempt under section 12(1). My finding on the application of the exemption here is based on the context of this appeal and the specific nature and content of the records before me.

[44] I acknowledge the appellant’s submission that the records should be severed

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<sup>9</sup> Order M-184.

<sup>10</sup> Orders M-703 and MO-1344.

<sup>11</sup> Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707, and PO-2725.

pursuant to section 10(2) of the *Act*. This section requires an institution to disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions under sections 12 to 22. In this case, having considered the records themselves in addition to the representations, I agree with Metrolinx that disclosure of any part of the records would reveal the substance of Cabinet committee deliberations. The records were all placed directly before the Treasury Board/Management Board of Cabinet for consideration of and deliberation on their content. I find that the records at issue are, in their totality, subject to the mandatory exemption in section 12(1) of the *Act*.

[45] Finally, I am satisfied that although Metrolinx did not request consent from Cabinet for the disclosure of the records it met its obligations under the *Act* in that respect by turning its mind to the issue of consent.

[46] Section 12(2) sets out two exceptions to section 12(1). Only section 12(2)(b) is relevant here.<sup>12</sup> It reads, in part:

Despite subsection [12(1)], a head shall not refuse under subsection [12(1)] to disclose a record where,

(b) the Executive Council for which, or in respect of which, the record has been prepared consents to access being given.

[47] Section 12(2)(b) does not impose a requirement on the head of an institution to seek the consent of Cabinet to release the relevant record. What the section requires, at a minimum, is that the head turn his or her mind to this issue.<sup>13</sup>

[48] Metrolinx's representations are clear in this regard. Metrolinx turned its mind to the issue and based on relevant factors, specifically, that the records appeared to fall squarely within the introductory wording of the section 12(1) exemption, ultimately decided not to seek the consent of Cabinet for their disclosure.

[49] In summary, I find that the mandatory exemption for Cabinet records at section 12(1) applies to the records at issue and I uphold Metrolinx's decision not to disclose them.

## **ORDER:**

I uphold Metrolinx's decision. I dismiss the appeal.

Original signed by: \_\_\_\_\_

\_\_\_\_\_ May 23, 2023

<sup>12</sup> Section 12(2)(a), which does not apply in this case, provides an exception for records that are more than twenty years old.

<sup>13</sup> See Orders P-771, P-1146 and PO-2554.

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Catherine Corban  
Adjudicator