Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4571

Appeals PA21-00430, PA21-00501, PA22-00044, PA22-00045, PA22-00214, PA22-00513

Metrolinx

November 13, 2024

Summary: At issue in this appeal is whether the appellant's requests to Metrolinx for access to information are frivolous or vexatious under the *Freedom of Information and Protection of Privacy Act* (the *Act*). In this order the adjudicator finds that Metrolinx has not established that the appellant's requests are frivolous or vexatious within the meaning of section 10(1)(b) of the *Act*. The adjudicator does not uphold Metrolinx's denial of access on the basis of section 10(1)(b) of the *Act* and orders Metrolinx to issue access decisions in relation to all the appeals without the ability to claim the requests are frivolous or vexatious.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, R.S.O. 1990, c. F.31, as amended, sections 10(1)(b), 27.1 and 64(1); Regulation 460, section 5.1.

Orders Considered: Orders M-850, M-864, MO-1168-I, MO-1782, MO-1924, MO-3761 and PO-4193.

Cases Considered: *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20 (reversing 2007 CanLII 65610).

BACKGROUND:

[1] This order addresses appeals to the Information and Privacy Commissioner of Ontario (the IPC) under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*) arising from requests for access to information made by a corporation

involved in a construction dispute with Metrolinx.

[2] The appellant set out the requests in a single letter but divided the requests into requests to be processed first (Priority Requests) and those to be processed after (Additional Requests). It asked Metrolinx to process the Priority Requests before addressing the Additional Requests. Metrolinx assigned each of the requests a separate request file number and processed them individually. I set out in an appendix to this Order the appeal numbers assigned to the associated Priority or Additional Requests that are the subject of this order.

[3] Metrolinx initially processed five of the Priority Requests (being Priority Requests 2021-04, 2021-05, 2014-06, 2014-07 and 2014-08) and provided associated access decisions, withholding responsive records in part, or in full, based on the application of various exemptions under the *Act*. Priority Request 2021-03 does not appear to have been appealed by the appellant.

[4] The appellant appealed Metrolinx's access decisions regarding Priority Requests 2021-04, 2021-05, 2014-06, 2014-07 and 2014-08. At that stage Metrolinx had not issued access decisions with respect to the other Priority and Additional Requests.

[5] Before the appeals associated with the Priority Requests 2021-04, 2021-05, 2014-06, 2014-07 and 2014-08, were moved to adjudication, Metrolinx issued two more decision letters. In one of the letters, Metrolinx revised its position on the Priority Requests 2021-04, 2021-05, 2014-06, 2014-07 and 2014-08, now claiming that those requests were frivolous or vexatious under sections 10(1)(b) and 27.1 of the *Act* and section 5.1 of Regulation 460. In another decision letter, its first with respect to the Priority Requests 2021-09, 2021-10, 2021-11 and 2021-12 and the Additional Requests, Metrolinx took the same position, namely, that they were frivolous or vexatious under the *Act* and Regulation 460.

[6] Metrolinx's decision letter dated November 22, 2022 relating to Priority Requests 2021-09, 2021-10, 2021-11 and 2021-12 and the Additional Requests provided as follows:

> Metrolinx will not be processing the remaining 11 FOI requests on the basis of sections 10(1)(b) and 27.1 of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) and section 5.1 of Regulation 460 as Metrolinx considers the FOI requests made to be frivolous and vexatious. The FOI requests, which have been made in bad faith and for a purpose other than to obtain access, are part of a pattern of conduct which amounts to an abuse of the right of access and interferes with the operations of Metrolinx.
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> You made 17 requests on January 8, 2021 and then placed a further 3 requests on February 16, 2021 and 1 on March 11, 2021.
>
> Each of the outstanding 11 FOI requests (and most of the 21 FOI requests) relate to the Stouffville and Grade Separation Project (Stouffville Project)

> for which Metrolinx (and Infrastructure Ontario) has retained [the appellant] to construct the Stouffville Project. Of the 17 initial requests made, 10 requests were categorized by you as "Priority Requests", which you requested be processed before processing the other 7 "Additional Requests". Given the volume of requests made, Metrolinx processed 6 of the 10 priority requests in good faith. Metrolinx also processed the subsequent 4 requests you submitted.
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> However, it has become apparent to Metrolinx that all of the FOI requests made are frivolous and vexatious. The FOI requests are overly broad and excessively detailed at the same time and are overlapping in terms of the keywords identified, the people whose emails have been requested and the third parties with whom Metrolinx has dealt with in connection with the Stouffville Project. Processing these requests places an undue burden on Metrolinx's internal departments and resources.
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> The numerous parallel and burdensome FOI requests (and several other FOI requests made to Infrastructure Ontario and other third parties connected to the Stouffville Project) are clearly being made by [named law firm] on behalf of [the appellant] in connection with the ongoing dispute between Metrolinx and [the appellant] about the Stouffville Project.
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> Given the nature of the requests, there is reason to believe that they are intended by [the appellant] to substantially increase Metrolinx's costs in connection with the dispute over the Stouffville Project, with a view to impacting Metrolinx's strategy in connection with the [dispute resolution process]. These are reasons outside the scope of the *FIPPA* and further evidence that the FOI requests are frivolous and vexatious.
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> Further, the requests are evidently made by [named law firm] as a means to circumvent the disclosure process provided for in […]. The FOI requests are an abuse of the right of access, and appear to be designed to deliberately and improperly circumvent [the appellant's] contractual obligations under the Project Agreement […].
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> Additionally, Metrolinx is of the view that, through these FOI requests, [the appellant] seeks to publicize confidential information which [the appellant] is otherwise prohibited from disclosing to the public under the Project Agreement and which are not properly disclosable to the public.

[7] With respect to the five priority requests that the appellant had already appealed, Metrolinx's revised decision letter provided that:

> The above FOI requests are part of the series of 21 requests made between January and March, 2021 to Metrolinx. For the reasons outlined in our letter

> of November 4, 2022 pertaining to 11 requests that were part of the same series of requests (attached), Metrolinx considers the above FOI requests to also be frivolous and vexatious. As such, Metrolinx now relies on sections 10(1)(b) and 27.1 of *FIPPA* and section 5.1 of Regulation 460, to deny access to the Records.

[8] Ultimately all the Priority Requests and Additional Requests set out in the appendix to this Order were appealed. Mediation did not resolve the appeals and they were transferred to the adjudication stage of the appeals process where an adjudicator may decide to conduct an inquiry under the *Act*. I decided to conduct an inquiry to first determine whether the appellant's requests are frivolous or vexatious within the meaning of section 10(1)(b) of the *Act*. Representations were then exchanged between the parties.

[9] In this order, I find that Metrolinx has not established that the appellant's requests are frivolous or vexatious within the meaning of section 10(1)(b) of the *Act*. I do not uphold Metrolinx's denial of access on the basis of section 10(1)(b) of the *Act* and I order Metrolinx to issue access decisions in relation to all the appeals without the ability to claim the requests are frivolous or vexatious.

DISCUSSION:

[10] The sole issue before me to determine in this order is whether the appellant's requests are frivolous or vexatious under the *Act*.

[11] The frivolous or vexatious provisions in the *Act* provide institutions with a summary mechanism to deal with frivolous or vexatious requests. This power can have serious implications to a requester's ability to obtain information under the *Act*, and therefore it should not be exercised lightly.[1] Orders under the *Act* and its municipal equivalent, the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*), have also stated that an institution has the burden of proof to substantiate its decision that a request is frivolous or vexatious.[2]

[12] Section 10(1)(b) of the *Act* reads:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
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> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[13] Section 5.1 of Regulation 460 under the *Act* elaborates on the meaning of the

[1] Order M-850.
[2] See, for example, Order M-850.

phrase "frivolous or vexatious":

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
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> (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
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> (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[14] In other words, under the *Act*, the head of an institution is required to conclude that a request for access is frivolous or vexatious if they are of the opinion on reasonable grounds that it fits into one or more of the following categories:

- it is part of a pattern of conduct that,
    - amounts to an abuse of the right of access, or
    - would interfere with the operations of the institution, or
- it is made in bad faith, or
- it is made for a purpose other than to obtain access.

[15] Metrolinx claims that the appellant's requests are frivolous or vexatious under the *Act* because they are part of a pattern of conduct that amounts to an abuse of the right of access, processing the requests would interfere with Metrolinx's operations and they were made in bad faith or for a purpose other than to obtain access.

[16] In the discussion that follows, I explain why I find that the appellant's access requests are not frivolous or vexatious.

Metrolinx's representations

[17] Metrolinx asserts that the requests at issue were made for an improper collateral purpose or otherwise designed to circumvent a contractually negotiated dispute resolution process.

[18] Metrolinx states that the appellant has made twenty-seven requests for access to information within Metrolinx's custody or control or where its interests are affected. Metrolinx says that twenty-one of those requests (including the 16 at issue before me)

were made to it within a three-month time-span that relate to the construction dispute.[3] Metrolinx states that the appellant's requests comprise 13.2% of the total requests that Metrolinx received in 2021 and 2022.

[19] Metrolinx submits that the appellant's pattern of conduct and the overbreadth of its requests demonstrate that they were made to harass Metrolinx with needlessly burdensome requests and to gain leverage in the construction dispute. Metrolinx asserts that in previous construction disputes the appellant withdrew similar requests upon resolution of the dispute.

[20] Metrolinx submits that it has expended considerable resources in reviewing and responding to the appellant's requests itself and as a party to various other appeals filed with the IPC, that it says the appellant ultimately withdrew or abandoned. Metrolinx says that even with respect to those that were abandoned or withdrawn, it must still review tens of thousands of pages potentially responsive to the requests and then review those documents to ensure that they can be made public.

[21] Metrolinx states that its freedom of information department has only five employees, who manage the processing of all the access requests that Metrolinx receives. It submits that:

> It is not feasible for these [five] employees to review each of [the appellant's] 16 requests individually, identify responsive records and apply applicable exemptions. As is already evident from the requests that were previously processed, [the appellant's] requests tend to generate several hundred records, comprising thousands of pages. If Metrolinx is compelled to process each of the 16 requests individually, it will likely have to retain external counsel to do so, which will further add to Metrolinx's costs.
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> Moreover, given [the appellant's] history of selectively abandoning some of its requests, there is a strong possibility that Metrolinx will expend time, money, and effort preparing responses to requests that [the appellant] later abandons, particularly if the ongoing dispute between [the appellant] and Metrolinx is resolved.

[22] Metrolinx states that its staff have spent more than 100 hours to review the eight requests it processed. It adds that six of the processed priority requests generated an estimated 20,000 records, comprising estimated 100,000 pages. It submits that six other requests the appellant made to Infrastructure Ontario and the City of Toronto where Metrolinx is an interested third party, generated 80 records, comprising 3,570 pages.

[23] Metrolinx takes the position that there are twenty-seven requests (including the ones at issue before me) involving Metrolinx in some capacity which are all excessively

[3] With respect to four requests not referenced in the background above, Metrolinx says that one was withdrawn by the appellant and the appellant did not appeal its denial of access for the other three.

broad and unusually detailed at the same time. Metrolinx submits that:

a. twenty-six of the twenty-seven requests seek multiple emails, meeting invitations, minutes or agendas of meetings, agreements, contracts, memoranda, letters of intent, comfort letters, presentations, notes and settlement offers;

b. sixteen of the twenty-seven requests relate to the same 20 employees of Metrolinx and Infrastructure Ontario, although the sixteen requests differ in terms of either the time periods or the keywords that the records must contain or other persons named in the records or the types of records; and

c. The appellant further identifies about 150 overlapping and repetitive keywords that eleven of the twenty-seven records must contain.

[24] Metrolinx submits that in Order PO-4193, a requestor made 33 requests over a six-month period, relating to different individuals and different time frames, but all the requests sought emails among the institution's personnel who communicated about the appellant in relation to a specific topic. It submits that in finding that the requests formed part of a pattern of conduct that amounted to an abuse of the right of access, the adjudicator in Order PO-4193 held that the requests were "substantially similar or, at the very least, related" and that the cumulative effect of the appellant's requests in terms of nature and scope were excessively broad by reasonable standards. Metrolinx submits that it similarly reasonably determined that the appellant's requests at issue before me are excessive by reasonable standards, such that they form part of a conduct that amounts to an abuse of the right of access. Metrolinx also submits that as in Order MO-1782, the appellant's requests coincide with the construction dispute and the number, nature, scope and purpose of its requests demonstrates that they are frivolous or vexatious.

[25] Metrolinx submits that there is no genuine need for the appellant to make these requests because access to relevant documents is part of an agreed upon dispute resolution process that the appellant is contractually bound to follow. It says that the parties agreed to a staged escalation of disputes, which is intended to promote early and efficient dispute resolution. Metrolinx submits that processing the requests defeats the objectives of the dispute resolution process by allowing the appellant to obtain something tantamount to a civil discovery through the requests, far ahead of when such disclosure would be required under the dispute resolution process and without oversight or guideposts to constrain the scope of relevance.

[26] Metrolinx says that the requests circumvent this process and raise an inference that they are being made to obtain improper leverage in the construction dispute.

[27] Metrolinx submits that the appellant is motivated not by a desire to obtain access, but by some improper objective above and beyond a collateral intention to use the information in a legitimate manner. It says this motive is, at least in part, to increase Metrolinx's costs associated with the disputes and in part, to further exacerbate the

appellant's disputes with Metrolinx. Accordingly, it says that the requests are made for a purpose other than to obtain access, even if the primary purpose of the request may have been a legitimate one.

[28] Metrolinx adds that even if the appellant does not intend to burden Metrolinx and gain leverage in connection with the construction dispute, the effect of its conduct is to create an additional burden and cost on Metrolinx. In that regard, Metrolinx relies on Order MO-4257, where the adjudicator concluded that the requestor's requests were an abuse of the right of access because the impact of his pattern of conduct, culminating with his excessively broad and unusually detailed requests, had produced that outcome regardless of whether the requestor actually intended to burden the system.

[29] Metrolinx submits that there has been agreement regarding the scope of relevant documents in the construction dispute. It argues that if the requests generate responsive records that have a broader scope of relevancy than those agreed upon, the appellant is circumventing and defeating the intent of what it agreed upon both in the project agreement and in the dispute resolution process.

The appellant's representations

[30] The appellant submits that its requests for information about specific meetings and agreements are clear, focused, and reasonable.

[31] The appellant submits that it made twenty-one access requests to Metrolinx on three instances between January and March 2021 and has not made any further requests since. The appellant submits that the number of the requests are not excessive by any reasonable standards and do not establish a pattern of conduct or abuse of the right of access. It argues that Metrolinx improperly attempts to conflate other requests made to Infrastructure Ontario and the City of Toronto with the requests under appeal in this case. The appellant submits that the only requests relevant to this appeal are the requests it made to Metrolinx.

[32] Regarding Metrolinx's claim regarding the number of records generated by its requests, the appellant submits that:

> First, Metrolinx relies on these statistics but ignores that it denied five of the six prior requests and only produced 310 pages of responsive records in response to the sixth request, many of which were redacted. It is bewildering to learn that Metrolinx staff spent more than 100 hours, purportedly reviewing requests and documents, only to produce essentially nothing. If there is any pattern of conduct to be concerned about here, it is this blanket subterfuge.
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> Second, it is incumbent on Metrolinx to provide evidence to support its assertions. It is not enough to refer to previously-answered requests and make broad statements that the [access to information] Requests are

> "excessively broad and unusually detailed" [reference omitted] without even attempting to support that statement with the substance of the requests.
>
> Metrolinx does not provide any statistics for the requests before the IPC now and only refers vaguely to "tens of thousands of pages" and other requests that "tend to generate several hundred records, comprising thousands of pages" - without any detail or proof.
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> None [of the requests] are identical or even substantially similar. The requests here are targeted to identify only the relevant records, and it is simply not the law (and cannot be the law) that any request that results in a high number of responsive records is inherently overbroad.

[33] The appellant takes the position that each request is different and the common terms among them are keywords that identify the project at issue and/or particular work to which each request relates and, in some cases, the individuals who worked on the project at issue - all of which are essential to narrow the search. The appellant states that it is not surprising that some requests or records involve some of the same offices, staff members, municipalities, or utilities on the same long-term project at issue but that this does not mean the requests are similar or abusive, as each request seeks targeted and discrete records and there is no overlap in the requested records. In support of this submission the appellant provides the following examples of its requests:

> Emails by one employee in a limited time frame regarding the specific topic of land availability for the construction project (PA21-00430/Request 2021-04).
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> Records from different meetings during specific time frames (PA21-00501/Request 2021-08), (PA22-00044/Request 2021-05), (PA22-00045/Request 2021-06), (PA22-00214/Request 2021-07), (PA22-00513/Request 2010-09), (PA22-00513/Request 2021-13), (PA22-00513/Request 2021-14) and (PA22-00513/ Request 2021-15).
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> Seven different agreements during a specific time frame (PA22-00513/ Request 2021-10), (PA22-00513/ Request 2021-11), (PA22-00513/Request 2021-12), (PA22-00513/ Request 2021-16), (PA22-00513/ Request 2021-17), (PA22-00513/ Request 2021-18) and (PA22-00513/ Request 2021-19).

[34] The appellant asserts that the speculative allegations regarding its motivation are offensive and devoid of merit and that the suggestion that the appellant will continue to punish Metrolinx with overbroad requests is without foundation. The appellant states that it has no desire to increase anyone's costs, including its own.

[35] The appellant also submits that a high number of responsive records is not determinative if the search parameters are appropriate. It points to Order MO-3761,

which considered one request that generated over 40,000 pages of records. It submits that in that order, the adjudicator found that the nature and scope of the requests did not support a conclusion that the appellant's requests were part of a pattern of conduct that amounted to an abuse of the right of access since the appellant specified the parameters of his request.

[36] The appellant further asserts that Orders PO-4193 and MO-1782, referenced by Metrolinx in its representations, are distinguishable.

[37] The appellant submits that unlike the situation in the current appeals, in Order PO-4193 the appellant conceded that some of his requests were "broad" and that one "exact request" was repeated nine times. The appellant submits that the appellant in Order PO-4193 did not dispute that he had launched complaints and a social media campaign criticizing the hospital and others. The appellant says that in Order PO-4193 the adjudicator found that the requests were frivolous or vexatious because the cumulative effect of the requests was excessively broad due to the "sheer number of responsive records" and substantial overlap in emails mentioning the appellant in that appeal.

[38] The appellant asserts that unlike the requests in PO-4193, the requests at issue in this appeal are not identical in nature or even substantially similar to each other. The appellant asserts that they are specific and focused, identify with considerable precision the type of record requested, and are deliberately framed to avoid overlapping records.

[39] With respect to Order MO-1782, the appellant notes that the appellant in that appeal was clearly unwilling to be constructive, tending to "hinder rather than facilitate the access process", "personally burden certain representatives", and seek the "direction and manipulation of certain employees" while using "intemperate" language. The appellant submits that this indicated that the appellant in that appeal was pursuing a personal agenda apart from access and had "a careless disregard for the processes" of the *Act* and the IPC. The appellant submits that these considerations led the adjudicator to conclude in Order MO-1782 that the appeal had a secondary and significant "nuisance" purpose.

[40] The appellant submits that unlike the appellant in the appeal that led to Order MO-1782, it has been constructive and reasonable throughout. It says it proactively prioritized the requests and readily agreed to extensions and to narrow requests.[4]

[41] Furthermore, in response to Metrolinx's argument that the requests have interfered with Metrolinx's operations, the appellant states that Metrolinx has taken a phased approach and processed nine of the 21 requests between January 2021 and January 2022 and the appellant has readily granted lengthy extensions, agreed to prioritize time sensitive requests, and has withdrawn requests where access to the information is no longer required for one reason or another.

[4] The appellant provides Appeal PA22-00044 as an example of a narrowed request.

[42] The appellant further submits that although Metrolinx asserts that it is not feasible for the five employees in its FOI department to review and process the appellant's requests, Metrolinx has not demonstrated that to do so would interfere with its operations. The appellant submits that the IPC has consistently concluded that it takes more evidence of interference with the operations of a large provincial institution than it does for a small municipal body. It says that even if it is true that 13.2% of Metrolinx's requests over two years are from the appellant, this is not comparable to cases where requests were determined to interfere with the operations of institutions. The appellant adds that the number of pages alone is not a valid criterion for finding a pattern that interferes with the operations of an institution; if it were, then any requester with a request resulting in hundreds of documents would face a potential "interference" response.

[43] The appellant also points out that its contractual agreement with Metrolinx provides that Metrolinx is required to fully comply with the *Act* and states that it is not attempting to "circumvent" any contractual obligations under the agreement.

Metrolinx's reply

[44] Metrolinx acknowledges that there is a provision in the agreement with the appellant regarding the application of the *Act* but asserts that the provision it is not a "free pass" for the appellant to make frivolous or vexatious requests. Metrolinx also submits that the provision is part of a confidentiality section of the agreement and is to be reasonably understood as qualifying the appellant's expectation of confidentiality over the information it discloses to Metrolinx, given the possibility of compelled disclosure to third parties under the *Act*.

[45] To support its position that the requests were made in bad faith and for a purpose unrelated to access, Metrolinx argues that the appellant gains no legitimate advantage from disclosure through the *Act* as opposed to obtaining documentation through the dispute resolution process. It adds that disclosure under the *Act* is both more administratively burdensome to Metrolinx and potentially less useful to the appellant compared to production under the dispute resolution process. It points out that documents disclosed pursuant to a request under the *Act* become public records, and as such need to be extensively reviewed before their disclosure and affected third parties need to be given the opportunity to potentially oppose disclosure and seek redactions. Conversely, Metrolinx says, documents produced in the context of the dispute resolution process are subject to mutual confidentiality obligations and an implied undertaking, and can be produced more readily, with fewer redactions.

Analysis and finding on a pattern of conduct that amounts to an abuse of the right of access

[46] The *Act* imposes statutory obligations on institutions with respect to the disclosure of government-held information. It requires the institution to disclose information upon

request, where that information is not excluded from the *Act* or is not subject to exemption from disclosure. In *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*,[5] the Ontario Court of Appeal affirmed the strong public accountability purposes served by the *Act* and the need to "ensure that citizens have the information required to participate meaningfully in the democratic process." This is reflected in the purposes of the *Act* and in the fact that the Commissioner may make orders regarding disclosure of information that are binding on institutions.

[47] Section 5.1(a) of Regulation 460 under the *Act* sets out that one way that a request can be determined to be frivolous or vexatious is if the institution establishes reasonable grounds for concluding that the requests form part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with its operations. What constitutes "reasonable grounds" requires an examination of the specific facts of each case. [6]In that regard, I find that Orders PO-4193 and MO-1782, cited by Metrolinx in support of its position, are distinguishable on their facts.

"Pattern of conduct"

[48] A pattern of conduct must be found to exist, prior to determining whether that pattern of conduct amounts to either an abuse of the right of access or would interfere with the operations of the institution.

[49] Previous IPC orders have addressed the meaning of the phrase "pattern of conduct." For example, in Order M-850, former Assistant Commissioner Tom Mitchinson stated:

> [I]n my view, a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way).

[50] The reasoning in Order M-850 has been considered in many subsequent orders issued by the IPC, which have also established that the cumulative nature and effect of a requester's behaviour may be relevant in the determination of the existence of a "pattern of conduct".[7]

Findings on pattern of conduct

[51] In my view, the evidence demonstrates that the appellant has made recurring related requests pertaining to the construction dispute, and that the access requests before me form part of that pattern of conduct. Although the requests may not be identical, because they pertain to different information, individuals and/or different time frames, the type of information sought in the requests are related to the construction

[5] 2009 ONCA 20 (CanLII) (reversing 2007 CanLII 65610).
[6] Order MO-3292.
[7] See, for example Order MO-2390.

dispute. I am satisfied that Metrolinx has established a pattern of conduct for the purposes of section 5.1(a) of Regulation 460.

Pattern of conduct that amounts to "an abuse of the right of access"

[52] Once it has been established that a request forms part of a pattern of conduct, it must be determined whether that pattern of conduct amounts to "an abuse of the right of access." In making that determination, institutions may consider a number of factors, including the cumulative effect of the number, nature, scope, purpose and timing of the requests.[8]

[53] The determination of what constitutes "an abuse of the right of access" has been informed by both the jurisprudence of this office in addition to the case law dealing with that term. In the context of the *Act*, it has been associated with a high volume of requests, taken together with other factors. Generally, the following factors have been considered as relevant in determining whether a pattern of conduct amounts to an "abuse of the right of access"[9]:

- *The number of requests* – whether the number is excessive by reasonable standards;
- *the nature and scope of the requests* – whether they are excessively broad and varied in scope or unusually detailed, or, whether they are identical to or similar to previous requests;
- *the timing of the requests* – whether the timing of the requests is connected to the occurrence of some other related event, such as court proceedings; and
- *the purpose of the requests* – whether the requests are intended to accomplish some objective other than to gain access without reasonable or legitimate grounds. For example, are they made for "nuisance" value, or it is the requester's aim to harass the government or to break or burden the system.

[54] Other factors, particular to the case under consideration, can also be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access.[10] Previous orders have also stated that the focus should be on the cumulative nature and effect of a requester's behaviour because, in many cases, ascertaining a requester's purpose requires the drawing of inferences from his or her behaviour.[11]

[55] The IPC may also consider an institution's conduct when reviewing a "frivolous or vexatious" finding. However, an institution's misconduct does not necessarily mean that

[8] Orders M-618, M-850 and MO-1782.
[9] Orders M-618, M-850, MO-1782, MO-1810, MO-2289.
[10] Order MO-1782.
[11] Order MO-1782.

it was wrong in concluding that the request was "frivolous or vexatious."[12]

Finding on "an abuse of the right of access"

[56] As set out in the background above, this order addresses 16 requests. In my view, it is the number of the requests before this office that is germane. That said, the existence of other proceedings before other administrative bodies may be relevant in considering the factors relating to the timing and the purpose of the request, as well as whether the request was made in bad faith or for a purpose other than access.

[57] I accept that 16 requests, in certain circumstances, can amount to being excessive by reasonable standards. I also accept that they have been timed by the appellant to coincide with the contract dispute resolution process. However, in my view, the appellant provided sufficient evidence to demonstrate that it made a reasonable effort to take a targeted approach to the information sought and avoid the type of requests that have found to be an abuse of the rights of access. I am satisfied that the requests are carefully crafted to avoid being excessively broad and varied in scope and to not be identical to previous requests. I am also satisfied that they were made to obtain information related to the dispute and not for an improper purpose such as to alter its course.

[58] In my view, Metrolinx has failed to lead sufficient evidence to establish that the making of the requests at issue is intended to accomplish some objective other than to gain access without reasonable or legitimate grounds.

[59] On balance, I find that there is insufficient evidence to establish that the requests taken individually or cumulatively, amount to an abuse of the right of access.

Pattern of conduct that would interfere with Metrolinx's operations

[60] I also find that Metrolinx has failed to lead sufficient evidence to establish that the requests are frivolous or vexatious because the appellant's pattern of conduct would interfere with its operations.

[61] As set out in IPC jurisprudence, it takes more of a pattern of conduct to interfere with the operations of a large institution than a small one, like the town that was the subject of Order MO-4257, referenced by Metrolinx.[13] Unlike many small municipalities or institutions where the role of responding to access to information requests are done by an employee with other responsibilities, Metrolinx has a staff of five that appear to be dedicated exclusively to access to information requests. This makes sense because Metrolinx is involved in complex public construction projects, and sometimes disputes, that likely generate a great number of access to information requests. In my view, Metrolinx is unlike those small institutions, and has not provided sufficient evidence to establish that responding to the appellant's access to information requests would interfere

[12] Order MO-1782.
[13] See for example Orders M-850, MO-1505 and MO-2414.

with Metrolinx's operations so as to meet the threshold under section 5.1(a).

[62] A claim that a request is frivolous or vexatious because the requester's pattern of conduct would interfere with the operations of the institution should not be made just because an appellant is frustrating or because responding to the request is burdensome. There must be more. In my view, in the circumstances of this appeal and considering these legislative provisions "confer a significant discretionary power on institutions which can have serious implications on the ability of a requester to obtain information under the *Act;*"[14] and that this power should not be exercised lightly, the conduct of the appellant alleged by Metrolinx does not satisfy the requisite threshold.

[63] In summary, I find that Metrolinx has failed to establish reasonable grounds for concluding that the requests form part of a pattern of conduct that amounts to an abuse of the right of access.

Bad faith

[64] Under the "bad faith" portion of section 5.1(b), a request will qualify as "frivolous" or "vexatious" where the head of the institution is of the opinion, on reasonable grounds, that the request is made in bad faith. If bad faith is established, the institution need not demonstrate a "pattern of conduct".[15]

[65] "Bad faith" has been defined as:

> The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive "bad faith" is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.[16]

[66] In Order M-864, former Assistant Commissioner Glasberg found that, in the situation where the appellant used information to assist his wife with her legal proceeding against the institution, the access request was filed for legitimate reasons. Having found that the objects of the appellant's requests were genuine and that they were not designed to harass the Board, he concluded:

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[14] Order M-850.
[15] Order M-850.
[16] *Ibid.*

> I find that the appellant filed his access requests for a legitimate, as opposed to a dishonest, purpose and that he was not operating with an obvious secret design or ill will.

[67] In Order MO-1168-I, the adjudicator followed the reasoning set out by the former Assistant Commissioner in Order M-864 stating:

> … The *Act* provides a legislated scheme for the public to seek access to government held information. In doing so, the *Act* establishes the procedures by which a party may submit a request for access and the manner in which a party may seek review of a decision of the head. It is the responsibility of the head and then the Commissioner's office to apply the provisions of the *Act* in responding to issues relating to an access request. In my view, the fact that there is some history between the [institution] and the appellant, or that records may, after examination, be found to fall outside the ambit of the *Act*, or that the appellant may have obtained access to some confidential information outside of the access process, in and of itself is an insufficient basis for a finding that the appellant's request was made in bad faith. The question to ask is whether the appellant had some illegitimate objective in seeking access under the *Act*. I am not persuaded that because the appellant may not have "clean hands" in its dealings with the Board that its reasons for requesting access to the records are not genuine.

[68] The adjudicator also noted that:

> … [T]here is nothing in the *Act* which delineates what a requester can and cannot do with information once access has been granted to it …
>
> In my view, the fact that the appellant may decide to use the information obtained in a manner which is disadvantageous to the [institution] does not mean that its reasons in using the access scheme were not legitimate.

[69] In Order MO-1168-I, the adjudicator ultimately concluded that because the appellant was seeking the information for genuine reasons, even if those reasons might have been against the institution's interests, the request could not be said to have been made in bad faith.

[70] Similarly, the adjudicator stated in Order MO-1924 that "requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions."

[71] I found above that the requests considered in this order were made in relation to the construction dispute, but this timing, in my view, does not support a finding that the requests before me were made in bad faith. It may instead point to the appellant's

expressed intention to obtain information in relation to the dispute in which it is involved.

[72] In my view, the requests made by the appellant were made for a genuine purpose, namely, to seek information to assist it in the construction dispute. I cannot agree that the appellant's reasons for seeking access to the information or the uses to which the appellant puts any information it may receive are either illegitimate or dishonest.

[73] I also acknowledge that the appellant may choose to reveal whatever information that may be disclosed in a public forum. As stated by the adjudicator in Order MO-1168-I, "there is nothing in the *Act* which delineates what a requester can and cannot do with information once access has been granted to it." Similarly, as I noted above, the adjudicator stated in Order MO-1924 that "requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions." In my view, the fact that the appellant may publicly disclose the content of the records if it is granted access to them does not mean that its reasons for using the access scheme are not legitimate or are in "bad faith."

[74] I have also considered Metrolinx's argument that the appellant's recourse to the *Act* is somehow limited by a form of agreement. The *Act* imposes statutory obligations on institutions with respect to the disclosure of government-held information. As set out above, in *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, the Ontario Court of Appeal affirmed the strong public accountability purposes served by the *Act* and the need to "ensure that citizens have the information required to participate meaningfully in the democratic process."[17] This is reflected in the purposes of the *Act* and in the fact that the Commissioner may make orders regarding disclosure of information that are binding on institutions.

[75] The weight of judicial authority is to the effect that it is not possible to contract out of the *Act*.[18] For an institution to enter into an agreement that certain information in its custody or control that is subject to the *Act* would not be disclosed, thereby fettering the discretion of the head, would be to contract out of its obligations under the *Act*.[19] This would undermine the public policy of accountability and transparency that is the foundation of the access provisions of the *Act*.

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[17] 2009 ONCA 20 (reversing 2007 CanLII 65610) at paragraph 46.

[18] See, in this regard *St. Joseph Corp. v. Canada (Public Works and Government Services)*, [2002] F.C.J. No. 361 at paragraphs 51-55 (T.D.); *Brookfield LePage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, [2003] F.C.J. No. 348 at paragraphs 14 to 19 (T.D.); *Canadian Tobacco Manufacturers' Council v. Canada (Minister of National Revenue - M.N.R.)*, [2003] F.C.J. No. 1308 at paragraphs 122 to 124 (F.C.); *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 at paragraph 33 (Ont. Div. Ct.); affirmed (Ont. C.A.), [2005] O.J. No. 4047; application to Supreme Court of Canada for leave to appeal dismissed [2005] S.C.C.A. No. 563.

[19] *Ontario (Ministry of Community and Social Services) v. Doe*, 2014 ONSC 239 at paragraph 64 upheld in *Ontario (Community and Social Services) v. John Doe*, 2015 ONCA 107 at paragraph 37.

[76] Simply put, an appellant is not prevented from making an access request to obtain information relating to litigation or another dispute resolution mechanism. As set out in section 64(1), the *Act* does not impose any limitation on the information otherwise available by law to a party to litigation. The processes can operate in tandem rather than exclusively. In that regard, the fact that the appellant may also obtain access to records under an arrangement or agreement in relation to the construction dispute does not mean that it is foreclosed from requesting access to information under the *Act*.

[77] In conclusion then, there is insufficient evidence before me to suggest that, with respect to the access request before me, the appellant is acting with some dishonest or illegitimate purpose or goal. I am satisfied that it legitimately seeks access to the requested information, and I am unable to ascribe "furtive design or ill will" on the appellant's part. As a result, I find that Metrolinx has failed to establish that the requests were made by the appellant in bad faith for the purposes of section 5.1(b) of Regulation 823.

Purpose other than to obtain access

[78] A request is made for a purpose other than to obtain access if the requester is motivated not by a desire to obtain access, but by some other objective.[20] Previous orders have found that an intention by the requester to take issue with a decision made by an institution, or to take action against an institution, is not sufficient to support a finding that the request is "frivolous or vexatious."[21]

[79] In Order M-860, the adjudicator noted:

> … if the appellant's purpose in making requests under the *Act* is to obtain the information to assist him in subsequently filing a complaint against members of the Police, in my view this does not indicate that the request was for a purpose other than to obtain access; rather, the purpose would be to obtain access **and** use the information in connection with a complaint. [Emphasis in original]

[80] In Order MO-1924, the adjudicator provided extensive comments on when a request may be found to have a purpose other than to obtain access. In that case, the institution argued that the objective of obtaining information for use in litigation or to further a dispute between an appellant and an institution was not a legitimate exercise of the right of access. In rejecting that position, the adjudicator stated:

> This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above an abstract desire to obtain information. Clearly, such purposes are permissible. Access to information legislation exists to ensure government accountability and to facilitate

[20] *Ibid.*
[21] Orders MO-1168-I and MO-2390.

> democracy (see *Dagg* v. *Canada (Minister of Finance)*, [1997] 2 S.C.R. 403). This could lead to requests for information that would assist a journalist in writing an article or a student in writing an essay. The *Act* itself, by providing a right of access to one's own personal information (section 36(1)) and a right to request correction of inaccurate personal information (section 36(2)) indicates that requesting one's personal information to ensure its accuracy is a legitimate purpose. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.
>
> To find that these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have "a right of access to information about themselves". In order to qualify as a "purpose other than to obtain access", in my view, the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner.

[81] I adopt the approach set out by the adjudicators in orders M-860 and MO-1924 for the present appeal.

[82] I am not convinced that the appellant is attempting to unduly burden Metrolinx with these access requests or gain an unfair advantage in the dispute resolution process. In my view, it is simply attempting to obtain information relating to the construction dispute.

[83] Accordingly, in the circumstances of the current appeal, regardless of what the appellant chooses to do with the information that it seeks, should the appellant be granted access to it under the *Act*, I am satisfied that its purpose for making the requests is genuine and that it legitimately seeks access to the responsive records.

[84] Accordingly, I find that Metrolinx has not provided me with sufficient evidence to establish that the appellant's requests form part of a pattern of conduct that amounts to an abuse of the right of access, would interfere with the operations of Metrolinx or were made in bad faith or for a purpose other than to obtain access under sections 5.1(a) or (b) of Regulation 823. Therefore, I do not uphold its decision to deny the requests on that basis under section 10(1)(b) of the *Act*.

[85] Finally, to facilitate the processing of the requests at issue in this appeal, Metrolinx may wish to discuss with the appellant the order in which the requests are to be processed.

ORDER:

1. I do not uphold Metrolinx's decision to deny the access requests at issue in this appeal on the basis that they are frivolous or vexatious under section 10(1)(b) of the *Act*.

2. I order Metrolinx to issue revised access decisions with respect to the appellant's requests, in accordance with the requirements of the *Act*, and without claiming they are frivolous or vexatious, treating the date of this order as the date of the request for the purpose of the procedural requirements of the *Act*.

3. Metrolinx is to provide me with copies of the revised access decision letters it sends to the appellant in accordance with Order provision 2.

Original Signed by: November 13, 2024

Steven Faughnan
Adjudicator

APPENDIX

Priority Request 2021-04/Appeal PA21-00430

This request was for access to:

> … copies of all emails sent or received by [named individual] between January 1, 2017 to December 31, 2018 containing any one or more of the following words or phrases in the body of subject line of the email: [the appellant listed words, phrases, street names and location].
>
> This includes all emails where [named individual] is the sender, recipient, where he is copied (CC), or where he is blind copied (BCC).

Metrolinx subsequently contacted the requester, who clarified that this request was to include only records pertaining to Metrolinx's Regional Express Rail-Stouffville Corridor Project.

Priority Request 2021-05/Appeal PA22-00044

This request was for access to:

> … copies of any meeting invitations, meeting minutes, or meeting agendas, relating to internal meetings held or attended by Metrolinx and Infrastructure Ontario between the dates of February 1, 2018 and May 31, 2019 where any of the following people were present: [20 named individuals].
>
> Which meeting invitation, meeting minute, or meeting agenda contains any of the following words: [the appellant listed words, numbers, phrases abbreviations/acronyms and locations].

Metrolinx subsequently contacted the requester, who clarified that this request was to be for the following:

> Copies of any meeting invitations, meeting minutes, or meeting Agendas, with specified keywords, as they relate to the Regional Express Rail - Stouffville Corridor Project, relating to internal meetings held or attended by Metrolinx and Infrastructure Ontario between the dates of February 1, 2018 and May 31, 2019 where any of the following people were present: [11 named individuals].
>
> The keywords include: [the appellant listed words, numbers, phrases, abbreviations/acronyms and locations].

Priority Request 2021-06/Appeal PA22-00045

This request was for access to:

> … copies of all meeting minutes and/or agendas for meetings between (i) Infrastructure Ontario and/or Metrolinx, and (ii) the City of Toronto and/or the City of Markham, where representatives of [the appellant] were not present, and where the words [the appellant listed words, phrases, names, abbreviations/acronyms and locations] were used in the minutes or agendas.
>
> The timeframe for this request is February 21, 2018 to October 1, 2019.

Priority Request 2021-07/Appeal PA22-00214

This request was for access to:

> … copies of meeting invitations, minutes agendas and reports from the recurring GO expansion Steering Committee meeting referred to by [named individual] in his email correspondence from March 29, 2021 at 11:34 AM to [named individual], [named individual] and [named individual] with the subject line "RE: Agreements for Kipling and Steeles". A copy of [named individual]'s email [was attached to the appellant's access request].

Priority Request 2021-08/Appeal PA21-00501

This request was for access to:

> … a copy of the meeting minutes, agenda, meeting invitation and any meeting notes for the meeting held on March 21, 2019 between [2 named individuals]. This meeting is discussed in the email from [named individual] to [named individual] dated March 25, 2019 at 2:17:17 PM with the subject line "Stouffville-Steeles Avenue East", [a copy of the email was attached to the appellant's access request].

Priority Request 2021-09/Appeal PA22-00513

This request was for access to:

> … copies of meeting invitations, minutes, agendas, and reports from the recurring AFP Property update meeting referred to by [named individual] in his email correspondence from March 29, 2019 at 10:00 AM to [4 named individuals] with the subject line "Re: Agreements for Kipling and Steeles". A copy of [named individual]'s email [was attached to the appellant's access request].

Priority Request 2021-10/Appeal PA22-00513

This request was for access to:

> … copies of any agreement, contract, memorandum of understanding, letter of intent, comfort letter, or signed terms between (i) Metrolinx and/or Infrastructure Ontario, and (ii) the City of Toronto, entered into between February 1, 2018 and May 31, 2019, which pertains in any respect to the GO Expansion, Regional Express Rail, Metrolinx Corridor Improvements, or other nomenclature for the broad program of modifications to the GO Transit railway network, including any "Collaboration Master Agreement".

Priority Request 2021-11/Appeal PA22-00513

This request was for access to:

> … a copy of the agreement entered into between Metrolinx and Toronto Hydro-Electric System Limited regarding utility relocation work along Steeles Avenue, executed November 19, 2019.

Priority Request 2021-12/Appeal PA22-00513

This request was for access to:

> … a copy of the resources agreement entered into between (i) Infrastructure Ontario and/or Metrolinx, and (ii) City of Toronto, relating to the City of Toronto's design review costs relating to the Regional Express Rail - Stouffville Corridor project, which includes any agreements not specific to but affecting the Regional Express Rail - Stouffville Corridor project.

Additional Request 2021-13/Appeal PA22-00513

This request was for access to:

> … copies of any meeting invitations, meeting minutes, or meeting agendas relating to any meetings held with [named company] and any of the following people between the dates of February 1, 2018 and May 31, 2019: [20 named individuals]
>
> which meeting invitation, meeting minute or meeting agenda contains any of the following words: [the appellant listed words, phrases, names and abbreviations/acronyms]
>
> The appellant did not require records for meetings where an attendee with an email address ending in [specified email address ending] is present.

Additional Request 2021-14/Appeal PA22-00513

This request was for access to:

> … copies of any meeting invitations, meeting minutes, or meeting agendas relating to any meetings held with [named company] and any of the following people between the dates of February 1, 2018 and May 31, 2019: [20 named individuals]
>
> which meeting invitation, meeting minute or meeting agenda contains any of the following words: [the appellant listed words, names, abbreviations/acronyms and location].
>
> The appellant did not require records for meetings where an attendee with an email address ending in [specified email address ending] is present.

Additional Request 2021-15/Appeal PA22-00513

This request was for access to:

> … copies of any meeting invitations, meeting minutes, or meeting agendas relating to any meetings held with [named company] and any of the following people between the dates of February 1, 2018 and May 31, 2019: [20 named individuals]
>
> which meeting invitation, meeting minute or meeting agenda contains any of the following words: [the appellant listed words, names, abbreviation/acronym and location].
>
> The appellant did not require records for meetings where an attendee with an email address ending in [specified email address ending] is present.

Additional Request 2021-16/Appeal PA22-00513

This request was for access to:

> … a copy of any agreement, contract, memorandum of understanding, letter of intent, comfort letter, or signed terms between (i) Metrolinx and/or Infrastructure Ontario, and (ii) [Named company], entered into between February 1, 2018 and May 31, 2019, which pertains in any respect to the GO Expansion, Regional Express Rail, Metrolinx Corridor Improvements, or other nomenclature for the broad program of modifications to the GO Transit railway network.

Additional Request 2021-17/Appeal PA22-00513

This request was for access to:

> … copies of any agreement, contract, memorandum of understanding, letter of intent, comfort letter, or signed terms between (i) Metrolinx and/or Infrastructure Ontario, and (ii) [Named company], entered into between February 1, 2018 and May 31, 2019, which pertains in any respect to the in relation to the [stet] GO Expansion, Regional Express Rail, Metrolinx Corridor Improvements, or other nomenclature for the broad program of modifications to the GO Transit railway network.

Additional Request 2021-18/Appeal PA22-00513

This request was for access to:

> … copies of any agreement, contract, memorandum of understanding, letter of intent, comfort letter, or signed terms between (i) Metrolinx and/or Infrastructure Ontario, and ii) the City of Markham, entered into between February 1, 2018 and May 31, 2019, which pertains in any respect to the GO Expansion, Regional Express Rail, Metrolinx Corridor Improvements, or other nomenclature for the broad program of modifications to the GO Transit railway network.

Additional Request 2021-19/Appeal PA22-00513

This request was for access to:

> … copies of any agreement, contract, memorandum of understanding, letter of intent, comfort letter, or signed terms between (i) Metrolinx and/or Infrastructure Ontario, and (ii) The Regional Municipality of York, entered into between February 1, 2018 and May 31, 2019, which pertains in any respect to the GO Expansion, Regional Express Rail, Metrolinx Corridor Improvements, or other nomenclature for the broad program of modifications to the GO Transit railway network.