Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4604

Appeal PA17-391

Metrolinx

February 6, 2025

Summary: A real estate developer that owned land in Oshawa asked Metrolinx for records about the eastward expansion of GO Transit from Oshawa to Bowmanville, including those relating to recommended routing for the train line and Metrolinx's expropriation of land from private businesses to build stations and other infrastructure.

Metrolinx gave the developer some records but denied access to others under several exemptions in the *Freedom of Information and Protection of Privacy Act*: sections 12(1) (Cabinet records), 13(1) (advice and recommendations), 17(1) (third party information), 18(1) (economic and other interests), 19 (solicitor-client privilege) and 21(1) (personal privacy).

In this order, the adjudicator finds that most of the records are exempt from disclosure under the exemptions claimed by Metrolinx. However, he finds that some records are not and orders Metrolinx to give them to the developer.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 2(1) (definition of "personal information"), 2(3), 12(1), 13(1), 17(1), 18(1), 19 and 21(1); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, section 30.1.01.

Orders Considered: Orders PO-2554 and PO-2677.

Cases Considered: *Nikolakakos v Regional Municipality of York*, 2016 CanLII 1685 (ON LPAT).

OVERVIEW:

[1] Metrolinx is an agency of the Government of Ontario that was created to improve the coordination and integration of all modes of transportation in the Greater Toronto Area (GTA) and Hamilton.[1] It is responsible for the construction of numerous transit expansion projects costing billions of dollars, including the eastward extension of the commuter train, GO Transit, from Oshawa to Bowmanville (the "East Extension").[2]

[2] The appellant is a real estate developer that was denied municipal approval to develop a subdivision in Oshawa on land that it owned because Metrolinx identified a portion of that land as a future train station site for the East Extension. The appellant subsequently brought civil proceedings against Metrolinx.

[3] Prior to suing Metrolinx, the appellant had submitted an 11-part access request to Metrolinx under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information regarding the East Extension:

1. All records in the possession of Metrolinx that relate to the implementation of the recommended routing of the East Extension;

2. All records, including but not limited to studies, correspondence, reports, analyses and documents to and from Metrolinx, that relate to the land use regulations governing the potential route of the East Extension;

3. All correspondence, or other records and documents, either to Metrolinx, or originating from Metrolinx, that relate to the acquisition and/or preservation of property requirements, including the requirements for future transit stations, for the construction of the East Extension;

4. All records, including, but not limited to, correspondence and agreements, of any land acquisitions, attempts to acquire land and/or processes to acquire land (voluntary or involuntary) that have been carried out to date by Metrolinx for the purpose of acquiring lands for the East Extension, including acquisitions for future transit stations along the route;

5. Any records relating to the expropriations for the purposes of future transit stations along the route of the extension;

6. Any agreements entered into between Metrolinx and land owners for the acquisition of lands associated with East Extension. This request includes records in relation to such agreements for lands to construct future transit stations;

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[1] www.metrolinx.com/en/about-us

[2] www.metrolinx.com/en/projects-and-programs/lakeshore-east-line-go-expansion/what-were-building/bowmanville-extension

7. All records relating to the design and construction of the future Thornton Station along the East Extension;

8. All records relating to the acquisition, or planned acquisition, of lands for the purposes of constructing the future Thornton Station along the East Extension;

9. All records relating to the funding of the East Extension;

10. All records, including but not limited to any studies, reports or analyses of the impact of the construction of the East Extension on the local community;

11. All records, including but not limited to studies, reports or analyses, of the anticipated timing of the impacts of the construction of the East Extension on the local community.

[4] In response, Metrolinx located thousands of pages of records that are responsive to parts of the appellant's access request. Some of these records contain information about third parties. As a result, Metrolinx notified these third parties under section 28 of the *Act* and invited them to submit representations on whether the mandatory exemption in section 17(1) applies to the information about them in the records.

[5] Metrolinx received representations from some third parties but not others. It then issued four decision letters to the appellant and third parties that stated that the appellant was being provided with full access to some records and partial access to others. However, it denied access to many records, some in whole and others in part, under the following exemptions in the *Act*: sections 12(1) (Cabinet records), 13(1) (advice and recommendations), 15 (relations with other governments), 17(1) (third party information), 18(1) (economic and other interests), 19 (solicitor-client privilege) and 21(1) (personal privacy).

[6] Metrolinx also provided the appellant with indexes of records. These indexes indicated that no records exist that are responsive to parts 2, 3, 6, 7, 10 and 11 of the appellant's access request.

[7] The appellant appealed Metrolinx's access decisions to the Information and Privacy Commissioner of Ontario (IPC), which opened this appeal. None of the third parties appealed Metrolinx's access decisions.

[8] This appeal was assigned to a mediator, who attempted to resolve the issues in dispute between the parties. During mediation, the appellant agreed to remove some records from the scope of this appeal, and those records are no longer at issue. In addition, it stated that it was satisfied with an explanation provided by Metrolinx to show that no records exist that are responsive to parts 2, 3, 6, 7, 10 and 11 of its access request.

[9] This appeal was not resolved during mediation and was moved to adjudication

where an adjudicator may conduct an inquiry to review an institution's access decision. At the outset of adjudication, more than 17,000 pages of records remained at issue in this appeal, which is one of the largest amounts of records in an appeal file at adjudication since the establishment of the IPC in 1988.

[10] The adjudicator initially assigned to this appeal decided to conduct an inquiry and sought and received representations from Metrolinx on the issues to be resolved. In its representations, Metrolinx stated that it is no longer relying on the discretionary exemption in section 15 of the *Act* to withhold any records. Consequently, that exemption is no longer at issue in this appeal.

[11] This appeal was then transferred to a different adjudicator to continue the inquiry. That adjudicator sought and received representations from the appellant, and subsequently reply representations from Metrolinx and sur-reply representations from the appellant.

[12] The adjudicator also notified 35 affected parties whose information appears in the records and invited them to submit representations on whether such information is exempt from disclosure under the *Act*. Some of these affected parties supported Metrolinx's position that certain records are subject to solicitor-client and litigation privilege under section 19 of the *Act*. Other affected parties responded by stating that they did not object to the information about them being disclosed to the appellant. Finally, several affected parties did not respond at all. None of the affected parties submitted representations on whether the information in the records about them is exempt from disclosure under section 17(1).

[13] This appeal was then transferred to me to continue the inquiry. I advised the appellant and Metrolinx that to adjudicate the unusually voluminous number of records at issue in this appeal, I intended to review a representative sample of the records that are responsive to each of the five parts of the appellant's access request that remain at issue. Based on this review, I would make findings as to whether the exemptions claimed by Metrolinx apply to the withheld information in that representative sample and direct Metrolinx to apply those findings to the remainder of the records.

[14] However, upon further reflection, I decided to modify my sampling approach with respect to reviewing the records. To dispose of this appeal in a manner that promotes finality, I decided to review all of the more than 17,000 pages of records that are at issue to determine whether they fall within the exemptions claimed by Metrolinx. However, it is clearly not possible to discuss each individual record in my analysis in this order. As a result, in assessing each of Metrolinx's exemption claims, I will only discuss and analyze representative samples of the specific types of records withheld under a particular exemption (e.g., briefing materials withheld under section 12(1)) and apply my findings to the remaining records that are similar with respect to their contents (e.g., the remaining briefing materials).

[15] Finally, I also asked the appellant whether there are any additional records to which it is not seeking access because they are likely exempt from disclosure. In response, the appellant cited its representations, in which it stated that it is not seeking information about individuals' vacations, personal hobbies, sick time, or other strictly personal matters (information subject to a section 21(1) exemption claim). In addition, it is not seeking communications between Metrolinx and its external counsel for the purposes of seeking legal advice (records subject to a section 19 exemption claim).

[16] In this order, I find that most of the records and parts of records at issue are exempt from disclosure under sections 12(1), 13(1), 17(1), 18(1), 19 and 21(1). However, I find that some records are not, and I order Metrolinx to disclose them to the appellant.

RECORDS:

[17] There are more than 17,000 pages of records at issue in this appeal, which are partly listed in the indexes of records prepared by Metrolinx. These indexes list the records that Metrolinx withheld in full that are responsive to parts 1, 5, and 9 of the appellant's access request and the exemptions claimed. There are no indexes of records for those records that Metrolinx withheld in part that are responsive to parts 1, 4, 5, 8 and 9 of the appellant's access request.

ISSUES:

A. Does the mandatory exemption at section 12(1) relating to Cabinet deliberations apply to any records?

B. Does the discretionary exemption at section 18(1) for economic and other interests of the institution apply to any records?

C. Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to any records?

D. Does the mandatory exemption at section 17(1) for third party information apply to any records?

E. Does the discretionary solicitor-client privilege exemption at section 19 apply to any records?

F. Did Metrolinx exercise its discretion under sections 13(1), 18(1) and 19? If so, should the IPC uphold the exercise of discretion?

G. Does the mandatory personal privacy exemption at section 21(1) apply to any information in the records?

H. Are there any records or parts of records that are not exempt from disclosure under sections 12(1), 13(1), 17(1), 18(1), 19 or 21(1)?

DISCUSSION:

Issue A: Does the mandatory exemption at section 12(1) relating to Cabinet deliberations apply to the records?

[18] Metrolinx has withheld a large number of records and parts of records relating to the East Extension under the mandatory exemption in section 12(1) of the *Act*.

[19] Section 12(1) protects certain records relating to meetings of Executive Council or its committees. The Executive Council, which is more commonly known as Cabinet, is a council of ministers of the Crown and is chaired by the Premier of Ontario.

[20] Section 12(1) reads:

> A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
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> (a) an agenda, minute or other record of the deliberations or decisions of the Executive Council or its committees;
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> (b) a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees;
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> (c) a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented;
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> (d) a record used for or reflecting consultation among ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;
>
> (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy; and
>
> (f) draft legislation or regulations.

[21] Any record that would reveal the substance of deliberations of the Executive Council (Cabinet) or its committees qualifies for exemption under section 12(1), not just the types of records listed in paragraphs (a) to (f).[3]

[22] A record never placed before Cabinet or its committees may also qualify for exemption, if its disclosure would reveal the substance of deliberations of Cabinet or its committees, or would permit the drawing of accurate inferences about the deliberations.[4]

[23] The institution must provide sufficient evidence to show a link between the content of the record and the actual substance of Cabinet deliberations.[5]

[24] The Supreme Court of Canada in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*[6] (*Mandate Letters Decision*) recognized three underlying rationales for Cabinet secrecy: candour, solidarity and efficiency. It described these underlying rationales as follows:

> … Collective ministerial responsibility requires that ministers be able to speak freely when deliberating without fear that what they say might be subject to public scrutiny […]. This is necessary so ministers do not censor themselves in policy debate, and so ministers can stand together in public, and be held responsible as a whole, once a policy decision has been made and announced. These purposes are referred to by scholars as the "candour" and "solidarity" rationales for Cabinet confidentiality […]. At base, Cabinet confidentiality promotes executive accountability by permitting private disagreement and candour in ministerial deliberations, despite public solidarity […].
>
> Scholars also refer to a third rationale for the convention of Cabinet confidentiality: it promotes the efficiency of the collective decision-making process […]. Thus, Cabinet secrecy promotes candour, solidarity, and efficiency, all in aid of effective government. …[7]

Summary of parties' representations

Metrolinx's initial/supplementary representations

[25] Metrolinx states that the records subject to a section 12(1) exemption claim include briefing notes, reports, backgrounders, status updates, outlines of next steps, summaries of objectives and strategies, business cases, cost projections and other analyses, budget submissions, operating costs, information on stakeholder engagement and negotiations,

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[3] Orders P-22, P-1570 and PO-2320.
[4] Orders P-361, PO-2320, PO-2554, PO-2666, PO-2707 and PO-2725.
[5] Order PO-2320.
[6] 2024 SCC 4 (CanLII).
[7] *Mandate Letters Decision* at paras. 29-30.

communications with the Ministry of Transportation, study reviews and project evaluations, and information on ridership and performance. The records also include a list of potential issues for the Priorities and Planning Committee's (P & P's) direction and agendas and committee minutes for that committee and Cabinet.

[26] Metrolinx states that these records were prepared for the consideration of or reflect decisions of Treasury Board or one of its committees. It submits that the IPC has previously determined, in Order PO-3977, that Treasury Board is a Cabinet committee.

[27] It claims that the East Extension project is a complex and significant infrastructure project of the Ontario government, and as such, many of the decisions regarding its planning and cost need to go to Treasury Board for direction or approval. It submits that the above records are the types of records covered by sections 12(1)(a), (b), (c) and (e) of the *Act*.

[28] Metrolinx points out that many records have been directly marked as "Confidential Advice to Cabinet." Final versions of these records would have been provided to Treasury Board for discussion and eventual approval. It submits that although it received approval from Treasury Board in June 2016, outside the date range of the appellant's access request, the IPC found in Order PO-3977 that disclosing records that have been provided to a Cabinet committee would reveal the deliberations of that committee, even if approval has already been received.

[29] Metrolinx further asserts that the records at issue are the same type of records as those that were at issue in Order PO-3977. It submits that disclosing material that was presented to and reviewed by Treasury Board would reveal its deliberations and considerations because it could not have ultimately approved the project without discussing, considering and questioning the material directly in front of it.

[30] In addition, Metrolinx states that there are records covered by the section 12(1) exemption which were not presented directly to Treasury Board, but that discuss the substance of the material that was presented to it. It cites Order P-22, in which the IPC concluded that a record which has never been placed before Cabinet or its committees may still qualify for exemption under section 12(1), if it can be established that its disclosure would reveal the deliberations of Cabinet or its committees.

[31] By way of example, Metrolinx claims that some of the records consist of draft versions of a presentation entitled "Moving Ontario Forward," the final version of which was and is marked "Confidential Advice to Cabinet." It claims that drafts of this presentation either contain references to specific details reported to Cabinet as the project progresses, or summarize approvals received from Cabinet. It submits that disclosing any versions of this record, even versions which were not presented to Treasury Board, would reveal its deliberations, including elements of the project that Treasury Board believed required follow up.

[32] Metrolinx also states that the records contain draft versions of a Treasury Board/Management Board of Cabinet submission. These records were drafted with the intention of being presented to Treasury Board for its review and approval. It submits that if the drafts of this report were disclosed, one could draw inferences about Treasury Board's deliberations on various issues.

[33] Finally, Metrolinx submits that the records subject to a section 12(1) exemption claim include email correspondence outlining which material is to be presented to Treasury Board, when that material is to be presented, and a summary of the results of its discussions. It submits that reading these emails would allow an individual to construct a timeline about when material was presented to Treasury Board, whether it was accepted or rejected, whether any additional information was requested at a later date, and the results of this secondary review by Treasury Board.

Appellant's representations

[34] The appellant states that Metrolinx bears the burden of demonstrating that the section 12(1) exemption applies to the withheld records. It submits that with respect to those records, Metrolinx must present sufficient evidence to establish a linkage between the content of the withheld record and the substance of actual Cabinet deliberations.[8]

[35] The appellant asserts that Metrolinx has not met that burden in the circumstances of this appeal. It claims that Metrolinx has not provided sufficient evidence to demonstrate the necessary linkage between the contents of the records at issue and the actual substance of Cabinet discussions. It submits that on that basis alone they should be ordered disclosed.

[36] The appellant also cites Order PO-1725, which found that any record describing the subject matter of items considered, or to be considered, by Cabinet should be disclosed.

[37] The appellant further states that many of the records withheld by Metrolinx appear to concern background explanations or analyses of problems. It cites Order PO-2554 and submits that under section 12(1)(c), such records are only exempt from disclosure on a "prospective" basis. In other words, they are exempt before decisions are made or implemented on the matters at issue. Once those decisions have been made then they are no longer exempt from disclosure.[9] It further asserts that to the extent that these background analyses or explanations relate to decisions already made and implemented, they should be ordered disclosed.

[38] Finally, the appellant submits that records used for consultations among civil servants, but not ministers, are not exempt from disclosure.[10] It submits that to the extent

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[8] *Supra* note 5.
[9] Orders PO-2554 and PO-2677.
[10] Orders P-920 and PO-2554.

that any such records have been withheld under this category, they should be ordered disclosed.

Metrolinx's reply representations

[39] Metrolinx states that it disputes the appellant's assertion that, in accordance with Order PO-1725, any record describing the subject matter of items considered, or to be considered, by Cabinet should be disclosed. It submits that this order does not apply to the records at issue in this appeal because they contain more than a stand-alone description of items to be considered by Cabinet or its committees. In particular, the records contain the presentations and submissions that were presented directly to the Treasury Board and the P & P Committee of Cabinet. It claims that examples of this type of information can be found on pages 402 to 419, 816 to 853 and 2520 to 2538 of Part 1 of the Records Withheld in Full.

[40] Metrolinx further submits that the records contain email correspondence finalizing the material to be presented to Treasury Board and the P & P Committee, including which portions should be emphasized. An example of this type of information is pages 2076 and 2077 of Part 1 of the Records Withheld in Full.

[41] Metrolinx states that because it is an agency, its Cabinet submissions are submitted through the Ministry of Transportation (MTO). It submits that in this case, correspondence between Metrolinx and MTO, including the Minister's Office, discloses the substance of Cabinet deliberations. Examples of this type of information can be found on pages 320 and 529 to 531 in Part 1 of the Records Withheld in Full and pages 42 to 45 and 153 to 156 of Part 9 of the Records Withheld in Full. Metrolinx claims that MTO was consulted on these records and it confirmed they contain information that formed the Cabinet submission.

[42] Metrolinx challenges the appellant's argument that in Order PO-2554, records concerning background explanations or analyses of problems are only exempt from disclosure on a "prospective" basis. It submits that this order discusses this principle with regards to section 12(1)(e), which protects a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy.

[43] Metrolinx states that the records at issue in this appeal have been withheld under section 12(1)(b), which protects a record containing policy options or recommendations submitted, or prepared for submission, to the Executive Council or its committees. It submits that there is no time constraint with respect to records redacted under section 12(1)(b) and it is therefore irrelevant whether the material has already been presented to Treasury Board or the P & P Committee.

Appellant's sur-reply reps

[44] The appellant submits that Metrolinx's reliance on a distinction between paragraphs 12(1)(b) and 12(1)(e) of the *Act* is misplaced. It asserts that the argument by Metrolinx that there is a time constraint under one paragraph, and not the other, is unfounded and has no basis in the statute and ought to be disregarded in its entirety.

Analysis and findings

[45] I have reviewed the numerous records and parts of records that Metrolinx has withheld under the mandatory exemption in section 12(1) of the *Act*. For the reasons that follow, I find that the vast majority of them are exempt under section 12(1) because disclosing them would reveal the substance of deliberations of the P & P committee of Cabinet or Treasury Board or would permit the drawing of accurate inferences about the substance of deliberations of these bodies.

[46] Metrolinx has withheld many records in full under section 12(1) that are responsive to part 1 of the appellant's access request, which was for "All records in the possession of Metrolinx that relate to the implementation of the recommended routing of the East Extension."[11] It has also withheld many records in full that are responsive to part 9 of the appellant's access request, which was for "All records relating to the funding of the East Extension."[12]

[47] The records at issue subject to a section 12(1) exemption claim relate to the planning that took place over several years at Metrolinx with respect to the East Extension, which included building and expanding stations, bridges and rail lines. Public transit projects are a high priority of the Government of Ontario and involve the expenditure of billions of dollars in public funds. For these reasons, Cabinet and its committees require regular updates from Metrolinx about the progress of these projects, and they may also provide Metrolinx with direction and approval for key steps in the process.

[48] The types of records that Metrolinx withheld under section 12(1) are summarized in its representations but are typically briefing materials about the East Extension. In many cases, it is evident from the contents of the records themselves that they are exempt from disclosure under section 12(1).

[49] There is writing on many of the records that shows that Metrolinx prepared them for the purpose of briefing the P & P committee of Cabinet. For example, the opening page of a slide deck entitled, "Moving Ontario Forward" says that it was prepared for a meeting of the P & P committee of Cabinet, and it is also marked with the words, "Confidential Advice to Cabinet."[13] Similarly, the cover pages of numerous other drafts of

[11] See the 2,738 pages of records summarized in Part 1 (Records Withheld in Full) in the Index of Records.
[12] See the 663 pages of records summarized in Part 9 (Records Withheld in Full) in the Index of Records.
[13] E.g., pages 290-319 of Part 1 (Records Withheld in Full).

this same slide deck say that they were prepared for a meeting of the P & P committee of Cabinet.[14] I find that these records and similar ones are all exempt from disclosure under section 12(1) of the *Act*, because disclosing them would reveal the substance of deliberations of the P & P committee of Cabinet with respect to the East Extension.[15]

[50] Metrolinx has also withheld many records under section 12(1) that were prepared for the purpose of briefing and seeking direction and approval from Treasury Board about the East Extension. Under section 1.0.1 of the *Financial Administration Act*,[16] Treasury Board is a committee of Cabinet. This provision states:

> The committee of the Executive Council known in English as the Treasury Board and in French as Conseil du Trésor is continued.

[51] As with the records prepared for the P & P committee of Cabinet identified above, there is often writing on the records themselves that shows that they were prepared for Treasury Board. For example, the opening page of various drafts of a briefing document entitled, "Weekday Go Train Service from Oshawa to Bowmanville" specifically states that it is a "Treasury Board/Management Board of Cabinet Submission."[17] I find that these records and similar ones are all exempt from disclosure under section 12(1) of the *Act*, because disclosing them would reveal the substance of deliberations of a committee of Cabinet (Treasury Board) with respect to the East Extension.

[52] There are hundreds of pages of email chains that precede the drafts of the briefing materials that Metrolinx prepared for the P & P committee of Cabinet and Treasury Board.[18] In many of these emails, staff from both Metrolinx and MTO discuss various issues covered in these materials and suggest changes. Although these emails do not constitute records that were put before Cabinet or its committees, they discuss the contents of the briefing materials relating to the East Extension that were submitted to the P & P committee of Cabinet and Treasury Board. I find, therefore, that most of these emails are exempt from disclosure under section 12(1) because disclosing them would permit the drawing of accurate inferences about the substance of deliberations of these two Cabinet committees.

[53] As noted above, the appellant cites Orders PO-2554 and PO-2677 and argues that any records containing "background analyses or explanations" that have been withheld by Metrolinx should be ordered disclosed, because such records can only be withheld on a "prospective" basis. This appears to be a reference to section 12(1)(c), which states

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[14] E.g., pages 591-675, 686-727, 816-853, 860-897 and 936-973 of Part 1 (Records Withheld in Full) and pages 225-267 of Part 9 (Records Withheld in Full).
[15] These records fall within the opening wording of section 12(1) but also contain information that falls within section 12(1)(b).
[16] R.S.O. 1990, c. F.12.
[17] E.g., pages 2382-2399 and 2402-2419 of Part 1 (Records Withheld in Full) and pages 571-588, 591-608, and 612-631 of Part 9 (Records Withheld in Full).
[18] E.g., pp. 857-859 and 898-935, 974-987 of Part 1 (Records Withheld in Full).

that a record is exempt from disclosure if it "does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems submitted, or prepared for submission, to the Executive Council or its committees for their consideration in making decisions, before those decisions are made and implemented." I do not find this argument persuasive with respect to the specific records at issue in this appeal for two reasons.

[54] First, none of these records can be characterized as "a record that does not contain policy options or recommendations referred to in clause (b) and that does contain background explanations or analyses of problems," as required by the wording of section 12(1)(c). Although each of the records, such as the slide decks submitted to the P & P committee of Cabinet and Treasury Board, contain some "background explanation or analyses of problems" relating to the East Extension, they largely contain policy options or recommendations. Consequently, none of the records at issue fall within the description of the types of records covered by section 12(1)(c).

[55] Second, in Order PO-2554, the adjudicator cited the opening wording of section 12(1) and found that, "whether or not the various subsections [of section 12(1)] . . . apply, if the disclosure of a record would reveal the substance of deliberations of the Executive Council or its committees, the record is exempt under the introductory wording of section 12(1)." In the circumstances of this appeal, I have found that most of the records that Metrolinx has withheld under section 12(1) are exempt from disclosure under the opening wording of this exemption, because disclosing them would reveal the substance of deliberations of the P & P committee of Cabinet or Treasury Board or would permit the drawing of accurate inferences about the substance of deliberations of these bodies.

[56] Finally, with respect to the appellant's argument that records used for consultations among civil servants, but not ministers, are not exempt from disclosure from 12(1), I do not see any records withheld under that exemption that would fit into that category. There is a briefing note that were prepared by Metrolinx's chief planning officer for its president and CEO about the East Extension.[19] However, the emails preceding this briefing note state that it came about because of a question in a meeting from the Minister of Transportation and deals with a topic that would be included in an upcoming slide deck that would be submitted to the P & P committee of Cabinet.[20] In these circumstances, I find that this briefing note and similar records are exempt from disclosure under section 12(1) because disclosing them would permit the drawing of accurate inferences about the substance of deliberations of the P & P committee of Cabinet.

[57] In summary, I find that the vast majority of the records and parts of records that Metrolinx has withheld under section 12(1) of the *Act* are exempt from disclosure under

[19] Pages 735-744 of Part 1 (Records Withheld in Full).
[20] Pages 732-733 of Part 1 (Records Withheld in Full).

that provision. However, there are a limited number of records and parts of records that are not exempt from disclosure under section 12(1) or any of the other exemptions claimed by Metrolinx, which will be identified under Issue H below.

Issue B: Does the discretionary exemption at section 18(1) for economic and other interests of the institution apply to any records?

[58] In its decision letters to the appellant, Metrolinx denied access to a large number of records and parts of records relating to the East Extension under the discretionary exemption in section 18(1) of the *Act*, which includes subsections 18(1)(a) to (j). However, in its representations, it appears to narrow its section 18(1) exemption claim to subsections 18(1)(a), (c), (d) and (g). These provisions state:

> A head may refuse to disclose a record that contains,
>
> > (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
> >
> > . . .
> >
> > (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
> >
> > (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
> >
> > . . .
> >
> > (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

[59] The purpose of section 18 is to protect certain economic and other interests of institutions. It also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental organizations.[21]

[60] An institution resisting disclosure of a record on the basis of sections 18(1)(b), (c), (d), (g) or (h) cannot simply assert that the harms mentioned in those sections are

[21] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

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.*[22]

[61] The institution must show that the risk of harm is real and not just a possibility.[23] 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.[24]

Summary of parties' representations

Metrolinx's initial/supplementary representations

[62] Metrolinx submits that the records contain financial, commercial and technical information belonging to the Government of Ontario and/or Metrolinx that has monetary value or potential monetary value, which is a reference to the exemption in section 18(1)(a) of the *Act*. It also claims that there is an inherent monetary value in information relating to the timing of various stages of the project as well as information about routes, stations and other aspects of its infrastructure.

[63] It further states that the records include information about the prices Metrolinx paid for property, information about the intended location of stations, and information about engineering issues and decisions, including the staging of various components of the project. It submits that this information is exempt from disclosure under sections 18(1)(c) and (d) because its premature disclosure could reasonably be expected to prejudice the economic interests of and be injurious to the financial interests of the Government of Ontario in that it would permit third parties to delay or otherwise increase the cost of the project.

[64] Metrolinx states that many of the withheld records deal with various property acquisitions related to the East Extension that have not yet been finalized. It cites Order PO-1894, in which the adjudicator concluded that records containing information about the possible uses or value of the property for which a sale has not yet closed qualify for exemption under section 18(1)(d). It further submits that it does not disclose the price for purchased properties even after the sale is finalized, because the information is commercial and may affect its ability to negotiate future property acquisitions.

[65] Metrolinx states that it has also withheld general information related to the East

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[22] Orders MO-2363 and PO-2435.
[23] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[24] *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.

Extension under section 18(1)(g). It claims that a project of this scope, complexity and cost requires negotiations with many third parties and the services of many third parties. The records contain plans, procedures, criteria and instructions to be applied to negotiations to be carried on by or on behalf of the Government of Ontario. Metrolinx submits that disclosing proposed plans in some records could reasonably be expected to result in premature disclosure of a pending policy decision and undue financial benefit to some parties and loss to others.

[66] Metrolinx further states that in Order P-772, the IPC concluded that information related to a proposed project (a "planned undertaking") which has not yet been completed meets the requirements of section 18(1)(g). It submits that its intention to extend train service east beyond Oshawa to Bowmanville is a planned undertaking, the details of which have not been finalized because the project is still in the planning stages. It submits that the records relate to an ongoing planned undertaking and are therefore exempt from disclosure under section 18(1)(g).

Appellant's representations

[67] The appellant submits that the records that Metrolinx has withheld under section 18(1) should be disclosed, because Metrolinx has failed to provide the detailed and convincing evidence required to show that harms contemplated by that exemption could reasonably be expected to occur, nor can it be inferred from the surrounding circumstances that such harms could arise.

[68] The appellant claims that Metrolinx's position is that the information withheld is "foundational information" relating to property acquisitions for the East Extension. It submits that the IPC has expressly held that disclosing information that may subject a party to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests within the meaning of section 18(1).[25] It submits that the situation described by Metrolinx is analogous; simply because disclosing the requested information may make the negotiations between Metrolinx and property owners more competitive does not render it exempt from disclosure under section 18(1).

[69] The appellant states that when acquiring property for its projects, Metrolinx is obligated to acquire such properties for fair market value.[26] It submits that if Metrolinx has information reflecting the fair market value of the property it is seeking to acquire, it should disclose it. The appellant further submits that disclosure would not prejudice Metrolinx's position, which is to acquire land for fair market value, and would not harm its economic interests. It would simply ensure that the price paid for the land it seeks to acquire is in accordance with the fair market value of that land. The appellant submits that making those negotiations more competitive does not justify an exemption pursuant

[25] Orders MO-2363 and PO-2758.
[26] *Expropriations Act*, R.S.O. 1990, c. E-26 at sections 13 and 14.

to section 18(1) of the *Act*.

[70] The appellant further submits that Metrolinx's reliance on Order P-772 is misplaced. It states that the question is not solely whether the GO Transit East Extension constitutes a planned undertaking. In order to qualify for exemption under section 18(1)(g), it must also "reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person." The appellant asserts that there is no suggestion that disclosing the records will have any impact on pending policy decisions or unduly influence the financial impacts of a person. As described by Metrolinx in its representations they are documents generated at the "operational" level. The appellant submits that these records do not fall within the section 18(1)(g) exemption and should be disclosed.

[71] Finally, the appellant asserts that Metrolinx should not be permitted an opportunity to provide reply representations on the section 18(1) exemption. It submits that this issue should have been addressed in Metrolinx's initial representations and supplementary representations, and that any further representations would not fall within the bounds of proper reply and should be disregarded.

Metrolinx's reply representations

[72] Metrolinx disputes the appellant's argument that it has failed to provide detailed and convincing evidence about the potential for harm arising from disclosing the information it withheld under section 18(1) of the *Act*.

[73] Metrolinx states that the withheld information in the records relates to details of its "land banking acquisition strategy." It explains that it finalized the initial business case (IBC) for the GO expansion east to Bowmanville in February 2020. The IBC is a preliminary step that must be completed during the planning of the expansion project.

[74] Metrolinx further states that it needs to undertake numerous design, procurement, and construction steps before the East Extension will be in service. Train service for the extension east to Bowmanville is therefore expected to take years to achieve, and during that time Metrolinx will need to negotiate with many parties for the construction of the station and acquisition of properties along the rail line. It adds that the cost estimate and projections are likely to shift and be updated as the project progresses and are therefore highly confidential as they will impact current and future negotiations and procurements as Metrolinx progresses with the expansion.

[75] Metrolinx then cites Order PO-3311, in which the adjudicator concluded that disclosure of information that provides specific details about the costing, calculation, incentives, disincentives, and allocations that will be applicable to the execution phase of the contract could reasonably be expected to prejudice an institution's position in the ongoing and future negotiations in which it must engage to bring the execution phase of a project to fruition. It submits that the information at issue in this appeal is similar to

that in Order PO-3311 and the same principle applies with respect to the adverse economic impacts of disclosure.

[76] Metrolinx further states that it withheld information in the records related to ongoing negotiations under section 18(1) of the *Act*. It submits that disclosing these records would provide insight into Metrolinx's negotiation strategy, not only for this project, but for any future expansion and development projects. It states that examples of this type of information can be found on pages 1057 to 1060 in Part 1 of the Records Withheld in Full and pages 60 to 63 of 2,753 in Part 5 of the Records Withheld in Full. It adds that the records also contain various assessments paid for by Metrolinx with respect to a specific property over which a settlement agreement is currently being discussed, including procurement information and accepted proposals for these assessments.

[77] Metrolinx states that the information in the records over which it claimed section 18(1) in in response to parts 4 and 5 of the appellant's access request provides details and insight into a commercial real estate transaction that is ongoing between a property owner and Metrolinx. It submits that this information is highly confidential and disclosing it will cause financial harm to Metrolinx in its dealings with this property owner, and potentially others, if the terms and considerations within these records were exploited by other property owners during future negotiations.

[78] Metrolinx then addresses the appellant's assertion that when acquiring property for its projects, Metrolinx is obligated to acquire such properties for fair market value. It submits that many of the records over which it claimed section 18(1) contain discussions with a property owner about what constitutes fair market value. Both parties commissioned third party appraisals. These appraisals resulted in different values for the property which then had to be negotiated. Metrolinx states that the East Extension project requires property acquisitions for multiple properties within a similar geographical area and each one requires its own negotiation to determine fair market value. It submits that disclosing the details of each negotiation may impact Metrolinx's economic position and result in higher real estate costs overall.

Appellant's sur-reply representations

[79] The appellant submits that Metrolinx has failed to meet its burden to provide detailed and convincing evidence of the potential harm arising from the disclosure of records under section 18(1). It submits that the risks identified by Metrolinx are mere speculation, and that no inference of harm is supported or possible.

Analysis and findings

[80] I have reviewed the numerous records and parts of records that Metrolinx has withheld under the discretionary exemption in section 18(1) of the *Act*. For the reasons that follow, I find that the vast majority of them are exempt from disclosure under sections 18(1)(c) and (d) because they contain information where the disclosure could

reasonably be expected to prejudice the economic interests of Metrolinx and be injurious to the financial interests of the Government of Ontario.

Preliminary findings

[81] At the outset, I would make the following findings with respect to three issues relating to the records, the parties' representations, and Metrolinx's section 18(1) exemption claim.

[82] First, Metrolinx claimed that many records are exempt from disclosure under multiple exemptions, including sections 12(1) and 18(1). Under Issue A above, I found that a large number of these records are exempt from disclosure in full under section 12(1). As a result, these records are no longer at issue, and it is not necessary to determine whether they are also exempt under section 18(1).

[83] Second, I am not persuaded by the appellant's objection to Metrolinx being given the opportunity to submit reply representations. Fair procedure requires that Metrolinx be given the opportunity to respond to the appellant's representations, and I am satisfied that its reply representations provide relevant evidence that should be considered in determining whether the records and parts of records at issue are exempt from disclosure under section 18(1).

[84] Third, I find that Metrolinx has not provided sufficient evidence to show that the sections 18(1)(a) and (g) exemptions apply to the records at issue.

[85] Under section 18(1)(a), an institution may refuse to disclose a record that contains trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value. The purpose of this section is to permit an institution to refuse to disclose information where its disclosure would deprive government or the institution of its monetary value.[27]

[86] As noted above, Metrolinx submits that the records contain financial, commercial and technical information belonging to the Government of Ontario and/or Metrolinx that has monetary value or potential monetary value. It also claims that there is an inherent monetary value in information relating to the timing of various stages of the project as well as information about routes, stations and other aspects of its infrastructure.

[87] In my view, Metrolinx's submissions on section 18(1)(a) are vague and overly broad and do not link the requirements of this exemption to any specific records or parts of records. It does not clearly explain where such information appears in the records, why it qualifies as "trade secrets or financial, commercial, scientific or technical information," or why such information would have monetary or potential monetary value. For example, it does not explain why there is monetary or potential monetary value in

[27] Orders M-654 and PO-2226.

the timing of various stages of the project or information about routes, stations and other aspects of its infrastructure. I find, therefore, that Metrolinx has failed to provide sufficient evidence to show that the section 18(1)(a) exemption applies to any of the withheld records or parts of records.

[88] In order for section 18(1)(g) to apply, the institution must show that:

1. the record contains information including proposed plans, policies or projects of an institution, and

2. disclosure of the record could reasonably be expected to result in

   i. premature disclosure of a pending policy decision, or

   ii. undue financial benefit or loss to a person.[28]

[89] The term "pending policy decision" refers to a situation where a policy decision has been reached, but has not yet been announced.[29]

[90] As noted above, Metrolinx claims that the records contain plans, procedures, criteria and instructions to be applied to negotiations to be carried on by or on behalf of the Government of Ontario. It submits that disclosing proposed plans in some records could reasonably be expected to result in premature disclosure of a pending policy decision and undue financial benefit to some persons and loss to others. It also cites Order P-772 and submits that its intention to extend train service east beyond Oshawa to Bowmanville is a "planned undertaking," the details of which have not been finalized, and the records are therefore exempt from disclosure under section 18(1)(g).

[91] As with its submissions on section 18(1)(a), Metrolinx's submissions on section 18(1)(g) are vague and overly broad and do not link the requirements of this exemption to any specific records or parts of records. It does not explain in sufficient detail which specific "pending policy decisions" could reasonably be expected to be prematurely disclosed if "proposed plans, policies or projects" in the records relating to the East Extension are disclosed, or which specific "persons" could reasonably be expected to receive an "undue financial benefit or loss" if such information in the records is disclosed. I find, therefore, that Metrolinx has failed to provide sufficient evidence to show that the section 18(1)(g) exemption applies to any of the withheld records or parts of records.

Sections 18(1)(c) and (d)

[92] In my view, the key issue to be determined here is whether disclosing the records and parts of records withheld by Metrolinx could reasonably be expected to prejudice the

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[28] Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).
[29] Order P-726.

economic interests of Metrolinx, as required by section 18(1)(c), or be injurious to the financial interests of the Government of Ontario, as required by section 18(1)(d).

[93] Many of the records that Metrolinx has withheld under section 18(1) relate to the agency's efforts to acquire private property for the East Extension that would be used to expand or build new stations and for other purposes, such as parking. Metrolinx has withheld many records in full and some in part that are responsive to part 5 of the appellant's access request, which was for "Any records relating to the expropriations for the purposes of future transit stations along the route of the extension."[30]

[94] In particular, there are a large number of records that relate specifically to Metrolinx's efforts to expropriate a property at 500 Howard Street in Oshawa, which was previously a foundry and then a Knob Hills Farms grocery outlet. Metrolinx expropriated this property in 2014 from the property owner. The records include 5,358 pages of emails, letters and other records that document the lengthy expropriation negotiations between Metrolinx and the owner of 500 Howard Street.[31]

[95] These records include, for example, emails between and Metrolinx's CEO and the owner of 500 Howard Street about the expropriation.[32] They also include emails and letters between Metrolinx and legal counsel for the owner of 500 Howard Street, and internal emails between Metrolinx staff discussing the expropriation.[33]

[96] The records also include an exchange of correspondence after the property owner complained about Metrolinx's conduct and discussions between the parties about compensation.[34] Other records include an appraisal done for the property for Metrolinx to determine the amount of compensation to be provided to the property owner[35] and a formal offer of compensation.[36]

[97] Metrolinx also withheld parts of many records that are responsive to part 8 of the appellant's access request, which was for "All records relating to the acquisition, or planned acquisition, of lands for the purposes of constructing the future Thornton Station along the East Extension."[37] Many of the records relate to discussions that took place between the appellant and Metrolinx about whether Metrolinx is willing to purchase its property, which would be used for a future GO station on Thornton Road in Oshawa.

[98] Metrolinx disclosed many of these latter records to the appellant but withheld some

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[30] E.g., see the two categories of records (2,605 pages and 2,753 pages) summarized in Part 5 (Records Withheld in Full) in the Index of Records.
[31] *Ibid*.
[32] Pages 1-11 in Part 5 (Records Withheld in Full – 2,605 pages).
[33] Pages 13-26 in Part 5 (Records Withheld in Full – 2,753 pages).
[34] Pages 2158-2161 in Part 5 (Records Withheld in Full – 2,753 pages).
[35] Pages 1982-2049 in Part 5 (Records Withheld in Full – 2,753 pages).
[36] Pages 1973-1976 in Part 5 (Records Withheld in Full – 2,753 pages).
[37] Metrolinx withheld parts of 336 pages of records in response to Part 8 of the appellant's access request but did not prepare an index of records for them.

parts of them under section 18(1). The withheld information in these parts of the records contain internal discussions at Metrolinx about how to negotiate with the appellant.

[99] Metrolinx uses public funds that it has received from the Government of Ontario to acquire properties for transit projects, either through expropriation or a willing buyer, willing seller process. Because Metrolinx uses taxpayer dollars to fund these land acquisitions and any related costs, it has an obligation to minimize its costs in acquiring property for transit projects. If Metrolinx incurs unnecessarily high costs, this can adversely affect its own economic interests, as the manager of public funds for these large-scale transit projects, and can also adversely affect the financial interests of the Government of Ontario, which provides this funding.

[100] For the most part, I agree with Metrolinx's submissions, which I find are detailed and establish the harms contemplated by sections 18(1)(c) and (d). In particular, I accept Metrolinx's argument that disclosing these records would provide detailed insight into its land acquisition negotiation strategy, which is applicable not only to the East Extension, but to other ongoing or prospective transit projects in the GTA and Hamilton. I find that if property owners are aware of Metrolinx's negotiation strategy for acquiring land and determining a purchase price, a compensation amount or other costs, they can use this information to extract further concessions from Metrolinx. Disclosing such information could therefore reasonably be expected to prejudice the economic interests of Metrolinx and be injurious to the financial interests of the Government of Ontario, which funds transit projects.

[101] I am not persuaded by the appellant's argument that simply because disclosing the requested information may make the negotiations between Metrolinx and property owners more competitive does not render it exempt from disclosure under section 18(1). In my view, disclosing the information about Metrolinx's land acquisition negotiation strategy would go beyond making such negotiations more competitive and provide property owners with insightful information that could provide them with an undue financial advantage in negotiations with Metrolinx, which could reasonably be expected to prejudice the economic interests of Metrolinx and be injurious to the financial interests of the Government of Ontario.

[102] I am also not persuaded by the appellant's argument that because Metrolinx is required to provide fair market value to property owners, disclosing the withheld information in the records, including its negotiation strategy, would not harm its economic interests. Even if Metrolinx is obligated to pay fair market value to property owners in cases involving expropriation, there can still be negotiation involved because Metrolinx and the property owner may engage different appraisers who produce reports that do not necessarily agree as to the fair market value of a property. In addition, there are other costs that that the property owner has incurred in giving up the property that may be subject to negotiation for possible compensation, such as legal and appraisal fees.

[103] I find, therefore, that the vast majority of the records and parts of records withheld

by Metrolinx under section 18(1) are exempt from disclosure under sections 18(1)(c) and (d) because they contain information where the disclosure could reasonably be expected to prejudice the economic interests of Metrolinx and be injurious to the financial interests of the Government of Ontario. However, there are a limited number of records and parts of records that are not exempt from disclosure under section 18(1) or any of the other exemptions claimed by Metrolinx, which will be identified under Issue H below.

Issue C: Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to any records?

[104] Section 13(1) of the *Act* 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.

[105] This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[38]

[106] "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.

[107] "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.[39]

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

[109] Section 13(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself 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.[40]

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[38] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[39] *Ibid.*, at paras. 26 and 47.
[40] 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, 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.

[110] Sections 13(2) and (3) create a list of mandatory exceptions to the section 13(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 13(1).

Summary of parties' representations

Metrolinx's initial/supplementary representations

[111] Metrolinx states that given the nature of the request and the expertise required to address the types of issues that arise in the course of an undertaking such as the East Extension, many of the records contain advice or recommendations of Metrolinx staff or external consultants. It adds that the advice and recommendations are included in briefing notes, reports, business cases, analyses, appraisals, study reviews, and project evaluations.

[112] Metrolinx further submits that it has claimed section 13(1) for records containing advice or recommendations related to the attempted acquisition of a property required for the East Extension, including discussing options related to expropriation if necessary. It submits that disclosing the advice and recommendations in these records may adversely affect future Metrolinx land acquisitions and negotiations by disclosing to other parties how Metrolinx approaches these situations and what considerations are made.

Appellant's representations

[113] The appellant states that Metrolinx's representations indicate that many of the records withheld under section 13(1) consist of records related to the attempted acquisition of property for the East Extension. It submits that such information does not constitute advice or recommendations that would bring it within section 13(1).

[114] The appellant further submits that the information that Metrolinx has withheld under section 13(1) can appropriately be characterized as "factual or background information." It submits that such information is not exempt from disclosure under section 13(1) because it does not constitute advice or recommendations.

Analysis and findings

[115] Metrolinx denied access to many records and parts of records under several exemptions, particularly sections 12(1), 13(1) and 18(1). I have already found under Issues A and B above that most of these records and parts of records are exempt from disclosure under section 12(1) or 18(1). As a result, it is not necessary to determine whether they are also exempt from disclosure under section 13(1).

[116] However, there are parts of other records that are not exempt from disclosure under sections 12(1) or 18(1) but are exempt under section 13(1) because disclosing them would reveal advice or recommendations of a public servant or another person

employed in the service of Metrolinx.[41] I discuss these records more fully under Issue H below, where I determine whether any records or parts of records are not exempt from disclosure under section 13(1) or any of the other exemptions claimed by Metrolinx.

Issue D: Does the mandatory exemption at section 17(1) for third party information apply to any records?

[117] Metrolinx has withheld a number of records and parts of records under section 17(1) of the *Act* because they contain information about a number of third parties, particularly private businesses other than the appellant. These private businesses include property owners who negotiated with Metrolinx with respect to the expropriation and/or sale of their land because it was earmarked for use for the East Extension.

[118] The purpose of the section 17(1) exemption is to protect certain confidential information that businesses or other organizations provide to government institutions,[42] where specific harms can reasonably be expected to result from its disclosure.[43]

[119] Section 17(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
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> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

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[41] E.g., page 1 of Part 1 (Records Withheld in Full); pages 3509, 3513 and 3683 of Part 1 (Records Withheld in Part); page 2188 and parts of the report on pages 2650-2701 of Part 5 (Records Withheld in Full – 2,753 pages). None of the exceptions to the section 13(1) exemption in sections 13(2) or (3) apply to this information.

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

[43] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[120] For section 17(1) to apply, the party arguing against disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Summary of parties' representations

Metrolinx's initial/supplementary representations

[121] Metrolinx states that it gave notice under section 28(a) of the *Act* to 35 third parties. It submits that the information to which it has applied the mandatory exemption in section 17(1) is the technical, commercial or financial information of these third parties.

[122] It states that the third parties are property owners, business owners and service providers that compete with other businesses. It submits that disclosing their proprietary, confidential technical, commercial and financial information could reasonably be expected to result in undue loss to these affected third parties and undue gain to their competitors.

[123] Metrolinx further submits that:

- Some of the third parties are property owners and the information they supplied to Metrolinx, including confidential expert reports they had prepared at their own expense and information about their property and property taxes, was provided in the course of negotiations with Metrolinx or in the course of expropriation proceedings.

- The disclosure of such information including property valuations, would allow competitors to free ride on the investment of the affected third parties to obtain the information, or to otherwise use confidential information of the affected third parties for the competitors' benefit and to the affected third parties' detriment.

- Disclosing confidential information about a property, including information about any disparity between the owner's valuation of the property and Metrolinx's valuation of the property could prejudice the competitive position of the property owners. Perceptions of the financial health of a third party could be affected, justly or unjustly, by the disclosure of such information.

- Some third parties are experts in fields such as engineering and their records consist of their professional opinions and accounts indicating unit prices as well as the total cost to Metrolinx of their services. It submits that disclosing this information would unfairly give competitors insight into the cost structure, strategy and business operations of the affected third party service providers.

- Disclosing the fees for specific services of an affected third party, of the number of hours the third party took to provide a service, and Metrolinx's acceptance or rejection of an invoice, could reasonably be expected to affect the ability of an affected third party service provider to negotiate contracts with other clients.

Appellant's representations

[124] The appellant submits that in order to meet the requirements of the section 17(1) exemption, the records at issue must have been supplied in confidence. This is a two-part test. Both branches must be satisfied to justify withholding the records at issue.

[125] It submits that Metrolinx has focused its representations on the first branch of the test, maintaining that the records at issue were supplied by third parties. It claims that Metrolinx has largely ignored the second branch of the test and has failed to demonstrate that it is met.

[126] The appellant states that in order to satisfy the requirement that the third party records were supplied "in confidence," Metrolinx must demonstrate that the third party had a reasonable expectation of confidentiality at the time this information was provided. The standard is an objective one.[44]

[127] It submits that Metrolinx bases its submission on the records being supplied in confidence on grounds which are vague and speculative. It asserts that Metrolinx relies on a general description of the records and asserts that they were provided on the "implied understanding" that they would remain confidential.

[128] The appellant submits that this is not an objective or reasonable basis for asserting that the records at issue were supplied in confidence. It amounts only to a subjective expectation. It submits that no evidence was provided to demonstrate that the records were supplied in confidence, and no attempt was made to connect or address any of the four factors demonstrating an expectation of confidentiality.[45]

[129] The appellant states that Metrolinx took a similar approach to the harms that would allegedly arise from disclosing the records at issue. It claims that Metrolinx provided a general outline of some harms it believes could arise, with no evidence to substantiate those allegations.

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[44] Order PO-2020.
[45] *Canadian Medical Protective Association v Loukidelis* (2008), 298 DLR (4th) 134

[130] It submits that detailed evidence is required to meet the threshold of establishing harm under section 17(1). This is especially so with respect to government contracts and the expenditure of public funds.[46]

Metrolinx's reply representations

[131] Metrolinx commences its response to the appellant's representations by addressing its claim that Metrolinx failed to demonstrate that the affected parties had a reasonable expectation of confidentiality at the time this information was provided. It cites Order P-561, in which the adjudicator stated that in determining whether an expectation of confidentiality is reasonable and objective, it is necessary to consider all the circumstances of the case including whether the information was:

a. communicated to the institution on the basis that it was confidential and that it was to kept confidential;

b. treated consistently on the basis that it was confidential and that it was to be kept confidential;

c. not otherwise disclosed or available from sources to which the public has access; and

d. prepared for a purpose which would not entail disclosure.

[132] Metrolinx claims that much of the information that it has withheld under section 17(1) relates to property negotiations with respect to the East Extension. These records include property valuations commissioned by the affected parties, as well as email communications outlining financial matters with regards to their own business interests.

[133] Metrolinx submits that these records, which were supplied by the affected parties, have consistently been treated by Metrolinx and the affected parties as confidential. They have not previously been disclosed to the public or been made available from sources to which the public has access and were not prepared for the purpose that would entail disclosure.

[134] Metrolinx further states that for the most part these records were prepared to facilitate confidential negotiations between property owners and Metrolinx regarding Metrolinx's acquisition of properties for the East Extension. It submits that given the above, it is reasonable for the affected parties to expect that the information contained within the records at issue in this appeal, which they supplied, would remain confidential. It claims that the IPC has concluded in numerous orders that records can have been supplied in confidence, even if the expectation was only ever implicit.

[135] Metrolinx then addresses the appellant's argument that Metrolinx provided a

[46] Order PO-2435.

general outline of some of the harms it believes could arise, with no evidence to substantiate those allegations.

[136] Metrolinx submits that the information withheld under section 17(1) includes discussions and negotiations with property owners about acquiring their properties. Specifically, these records include discussions around arbitrators' fees, compensation and floor pricing and current market values of property, including assessments from both Metrolinx and the property owner. It states that examples of this type of information can be found at pages 847 to 849, 911 to 922 and 1386 to 1388 of 2506 in Part 5 of the Records Withheld in Full. It adds that this information relates to very specific and ongoing commercial transactions between Metrolinx and other property owners.

[137] Metrolinx further states that within these records the property owners provide confidential information about their current finances and expenses with respect to the upkeep for the property. A large portion of such records contain confidential discussions with the owner of a specific property that would be used for the East Extension. The appellant does not have any association with this particular property.

[138] Metrolinx submits that disclosing this type of information will harm the business interests of that property owner and affect their competitive position with respect to future property negotiations.

Appellant's sur-reply representations

[139] The appellant submits that Metrolinx's attempts to justify the withholding of records under section 17(1) ring hollow. It claims that Metrolinx's failure to meet its burden remains – it has produced no evidence to meet the requisite standards.

[140] Finally, the appellant submits that the fact that the records at issue relate to negotiations with third party property owners is not a bar to their disclosure. It claims that in *Nikolakakos v Regional Municipality of York*,[47] the Ontario Municipal Board (OMB) (now the Ontario Land Tribunal) ordered production of documents and information with respect to negotiations with neighbouring property owners and the value of those properties, including settlement values. It submits that this production of documents was ordered even over the traditional legal privilege protecting such information.

Analysis and findings

[141] I have reviewed the numerous records and parts of records that Metrolinx has withheld under the mandatory exemption in section 17(1) of the *Act*. For the reasons that follow, I find that the most of them are exempt from disclosure under sections 17(1)(a) and (c) because disclosing the commercial, financial and technical information of private businesses in these records, which was supplied in confidence, could reasonably be expected to prejudice significantly their competitive position or result in an undue loss for

[47] 2016 CanLII 1685 (ON LPAT) at para. 13.

them and an undue gain for their competitors.

[142] Metrolinx has withheld many records in full and some in part under section 17(1) that are responsive to part 5 of the appellant's access request, which was for "Any records relating to the expropriations for the purposes of future transit stations along the route of the extension."[48] Many of these records relate to the agency's negotiations with private businesses (particularly the owner of 500 Howard Street) to acquire their property for the East Extension that would be used to expand or build new stations and for other purposes, such as parking. Other records include reports prepared by property appraisers, environmental consultants and engineers that these private businesses previously paid for and submitted to Metrolinx during negotiations.[49]

[143] I have already found under Issue B above that many of these records and parts of records are exempt from disclosure under sections 18(1)(c) and (d) because they contain information where the disclosure could reasonably be expected to prejudice the economic interests of Metrolinx and be injurious to the financial interests of the Government of Ontario. However, even if many of these records or parts of them were not exempt from disclosure under section 18(1), they would nevertheless qualify for exemption under sections 17(1)(a) and (c), because they also contain commercial, financial and technical information about these private businesses, and disclosing such information could reasonably be expected to prejudice significantly their competitive position or result in an undue loss for them or an undue gain for their competitors.

[144] The appellant is a developer and is seeking access to a vast array of records, including those that document Metrolinx's negotiations and interactions with other private businesses. These private businesses have no connection to the appellant, other than the fact that like the appellant, they own private land that Metrolinx has expropriated or is interested in obtaining to use for GO train stations or for other related purposes.

[145] As noted above under Issue B, there are a large number of records that relate specifically to Metrolinx's efforts to expropriate a property at 500 Howard Street in Oshawa. These records include 5,358 pages of emails, letters and other records that document the lengthy expropriation negotiations between Metrolinx and the owner of 500 Howard Street.[50]

[146] These records include, for example, emails between the owner of 500 Howard Street and Metrolinx's CEO about the expropriation.[51] They also include emails and letters between Metrolinx and legal counsel for the owner of 500 Howard Street, and internal

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[48] E.g., see the 5,358 total pages of records (2,605 + 2,753 pages) summarized in Part 5 (Records Withheld in Full) in the Index of Records.
[49] E.g., Phase II Ground Water Migration Assessment, commissioned by the owner of 500 Howard Street, at pages 703-760 in Part 5 (Records Withheld in Full – 2,605 pages) and at pages 182-239 in Part 5 (Records Withheld in Full – 2,653 pages).
[50] *Supra* note 48.
[51] Pages 1-11 in Part 5 (Records Withheld in Full – 2,605 pages).

emails between Metrolinx staff discussing the expropriation.[52]

[147] The records also include an exchange of correspondence after the property owner complained about Metrolinx's conduct and discussions between the parties about compensation.[53] Other records include correspondence between the property owner and another private business who wished to lease its property[54] and a formal offer of compensation.[55]

[148] Metrolinx has also withheld parts of records under section 17(1) that are responsive to part 8 of the appellant's access request, which was for "All records relating to the acquisition, or planned acquisition, of lands for the purposes of constructing the future Thornton Station along the East Extension."[56]

[149] Many of these records relate to discussions that took place between the appellant and Metrolinx about whether Metrolinx is willing to purchase its property, which would be used for a future GO station on Thornton Road in Oshawa. Metrolinx disclosed many of these latter records to the appellant but withheld some parts of them under section 17(1). These withheld parts contain references to the negotiating position of other private companies who were in discussions with Metrolinx about the acquisition of their property, including a possible land swap.[57]

[150] I do not have evidence before me from the former property owner of 500 Howard Street or any other property owners about whether the information relating to them in the withheld records and parts of records is exempt from disclosure under section 17(1). However, I am satisfied that Metrolinx's representations and the contents of the records themselves provide sufficient evidence to determine whether they are exempt from disclosure under this mandatory exemption.

[151] As set out above, for section 17(1) to apply, the party arguing against disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

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[52] Pages 13-26 in Part 5 (Records Withheld in Full – 2,753 pages).
[53] Pages 2158-2161 in Part 5 (Records Withheld in Full – 2,753 pages).
[54] Pages 2146-2154 in Part 5 (Records Withheld in Full – 2,753 pages).
[55] Pages 1973-1976 in Part 5 (Records Withheld in Full – 2,753 pages).
[56] Metrolinx withheld parts of 336 pages of records in response to Part 8 of the appellant's access request but did not prepare an index of records for them.
[57] E.g., the withheld parts of the emails on page 1 in Part 8 (Records Withheld in Part).

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

[152] With respect to part 1 of the section 17(1) test, the IPC has found in previous orders that "commercial information" is information that relates only to the buying, selling or exchange of merchandise or services.[58] "Financial information" is information relating to money and its use or distribution. The record must contain or refer to specific data.[59] "Technical information" is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. It usually involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.[60]

[153] Many of the records and parts of records that Metrolinx has withheld under section 17(1) relate to the buying and selling of private property, which means that they contain "commercial information." They also contain specific data, such as the estimated value of these properties in dollar amounts, which means that they contain "financial information." The reports that these private businesses paid for and submitted to Metrolinx were prepared by third party experts, including environmental consultants and engineers, and they clearly contain "technical information" about the private businesses' lands and properties.

[154] I find, therefore, that the information in the records and parts of records withheld by Metrolinx meets part 1 of the section 17(1) test because it includes commercial, financial and technical information.

[155] With respect to part 2 of the section 17(1) test, the requirement that the information have been "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[61] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[62] The party arguing against disclosure must show that the party supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances.[63]

[156] I am satisfied that the private businesses who negotiated with Metrolinx supplied commercial, financial and technical information about themselves and their land in confidence to Metrolinx. In my view, they would have had, at a minimum, an implicit understanding that Metrolinx would only share this information with public bodies or

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[58] Order P-1621.
[59] Order PO-2010.
[60] *Ibid*.
[61] Order MO-1706.
[62] Orders PO-2020 and PO-2043.
[63] Order PO-2020.

private actors involved in the expropriation or sale of their property. It would be reasonable for them to expect that Metrolinx would not share this information with outside parties who have no connection to the expropriation or sale, such as other private businesses. I find, therefore, that this information meets part 2 of the section 17(1) test because it was supplied in confidence, implicitly or explicitly.

[157] With respect to part 3 of the section 17(1) test, the parties resisting disclosure of a record cannot simply assert that the harms under section 17(1) are obvious based on the record. They 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, parties should not assume that the harms under section 17(1) are self-evident and can be proven simply by repeating the description of harms in the *Act.*[64]

[158] The parties resisting disclosure must show that the risk of harm is real and not just a possibility.[65] However, they do 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.[66]

[159] I am satisfied that Metrolinx has provided detailed evidence to show that the harms contemplated by sections 17(1)(a) and (c) could reasonably be expected to occur if the records and parts of records at issue are disclosed. In addition, I find that such harms can be inferred from the contents of the records themselves.

[160] Private businesses who own land or property, including developers, operate in a free market environment and are in competition with each other as they attempt to extract as much revenue as possible from their land or property, whether through its sale, rental or development. It is evident from my review of the records at issue that these private businesses typically own more than one piece of land or property.

[161] The records at issue document these private businesses' negotations and discussions with Metrolinx about the expropriation or sale of their land and include expert reports that they had previously commissioned at their own expense that were submitted to Metrolinx during expropriation negotiations.[67] All of these records and parts of records contain detailed commercial, financial and technical information about these private businesses and their properties.

[162] If a competitor gained access to this information, including the negotiation

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[64] Orders MO-2363 and PO-2435.
[65] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[66] *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.
[67] *Supra* note 49.

strategies of the private business whose land is being expropriated or bought by Metrolinx, it could use this information to its own advantage in the real estate and land development marketplace. I agree with Metrolinx that disclosing such information would allow a private business's competitors to use such information for their own benefit and to the detriment of that private business.

[163] In short, I find that disclosing the records and parts of records that contain commercial, financial and technical information relating to private businesses' land and properties, including their negotiation strategies in dealing with Metrolinx, could reasonably be expected to prejudice significantly their competitive position, as stipulated in section 17(1)(a) or result in an undue loss for them and an undue gain for their competitors, as stipulated in section 17(1)(c).

[164] I am not persuaded by the appellant's claim that I should follow the findings in *Nikolakakos v Regional Municipality of York*,[68] where the OMB (now the Ontario Land Tribunal) ordered production of documents and information with respect to negotiations with neighbouring property owners and the value of those properties, including settlement values. The appellant submits that this production of documents was ordered even over the traditional legal privilege protecting such information.

[165] I have reviewed this OMB decision and find that it is not applicable in the circumstances of this appeal. In that case, the Regional Municipality of York (the region) had expropriated a portion of the claimants' property to widen a road for its bus system. The claimants brought a notice of arbitration and statement of claim against the region, seeking compensation for the expropriation. During the course of these proceedings, they filed a motion with the OMB for an order to compel the region to "answer outstanding undertakings, questions taken under advisement, and refusals that arose from an examination for discovery."

[166] A key issue was whether the region should be required to answer questions related to market value and rental rates that the region applied to other properties in the vicinity that had been expropriated for the same purpose as the claimants' property. In its decision, the OMB applied Rule 31.06 of the *Rules of Civil Procedure*[69], which provides that a person examined for discovery shall answer any proper question relevant to any matter in issue in the action.

[167] The OMB found that the information sought would enable the claimants to know the case they have to meet and ordered the region to "answer all its outstanding undertakings, questions taken under advisement, and questions refused at the examination for discovery." It also stated that it "does not assume that privilege attaches to the information but nevertheless, the Claimants have agreed to abide by the deemed undertaking rule."

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[68] *Supra* note 47.
[69] R.R.O. 1990, Reg. 194.

[168] In my view, the findings in this OMB decision do not apply to any similar information about private businesses in the appeal before me because they were made under an entirely different process with different legal rules and considerations. In particular, I find that this case is distinguishable for two reasons.

[169] First, the OMB applied the *Rules of Civil Procedure* and was required to consider any "privilege" claim with respect to information about the market value and rental rates of other properties in the vicinity of the claimants' property.[70] However, there is no evidence that the OMB was required to consider a third party information provision similar to the mandatory exemption in section 17(1) of the *Act*, which is designed to protect certain confidential information that businesses or other organizations provide to government institutions,[71] where specific harms can reasonably be expected to result from its disclosure.[72]

[170] Second, the claimants in the above case agreed to abide by "the deemed undertaking rule." This is a reference to section 30.1.01 of the *Rules of Civil Procedure*, which states that, "All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained." By contrast, there is no deemed undertaking rule in the access-to-information and appeal processes in the *Act*. An institution's decision to disclose information or an IPC order to disclose information under the *Act* is deemed to be disclosure to the world[73] and no restrictions can be placed on the requester/appellant with respect to what they want to do with such information.

[171] In short, I find that *Nikolakakos v Regional Municipality of York* is not applicable in determining whether the records and parts of records that Metrolinx withheld under section 17(1) are exempt from disclosure. If anything, this case is evidence that the proper process for attempting to obtain certain types of information about the properties of other private businesses is through discovery in civil litigation that is governed by a deemed undertaking rule under the *Rules of Civil Procedure*. A requester certainly has the right to seek access to information about third parties under the *Act*, but that information might be exempt from disclosure under the mandatory exemption in section 17(1), and there is no deemed undertaking rule in the *Act* that could facilitate the disclosure of such information by limiting the receiving party from using or disclosing it for other purposes.

[172] In summary, I find that most of the records and parts of records that Metrolinx withheld under section 17(1) are exempt from disclosure under that provision. However, there are a limited number of records and parts of records that are not exempt from disclosure under section 17(1) or any of the other exemptions claimed by Metrolinx, which

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[70] Although it does not appear that the region claimed privilege over any of this information.
[71] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[72] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[73] See, for example, Orders P-1537, PO-2461, MO-2986 and MO-3255.

will be identified under Issue H below.

Issue E: Does the discretionary solicitor-client privilege exemption at section 19 apply to any records?

[173] Metrolinx has withheld a relatively small number of records under section 19 of the *Act*, which states, in part:

> A head may refuse to disclose a record,
>
> (a) that is subject to solicitor-client privilege,
>
> (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation,
>
> . . .

[174] Section 19 contains different exemptions, which the IPC has referred in previous decisions as making up two "branches." The first branch, found in section 19(a), ("subject to solicitor-client privilege") is based on common law. At common law, solicitor-client privilege encompasses two types of privilege: solicitor-client communication privilege and litigation privilege.

[175] The second branch, found in sections 19(b), ("prepared by or for Crown counsel") contains statutory privileges created by the *Act*. As with the common law, these statutory privileges include solicitor-client communication privilege and litigation privilege.

[176] The common law and statutory privileges, although not identical, exist for similar reasons.

[177] The institution must establish that at least one of the two branches in section 19 applies.

Summary of parties' representations

Metrolinx's initial/supplementary representations

[178] Metrolinx states that many of the records over which it has claimed section 19 are emails between itself and its legal counsel in which it is requesting or receiving legal advice in connection with matters that include negotiations for property purchases and expropriations. It submits that the IPC has found that "solicitor-client communications privilege protects communications of a confidential nature between a solicitor and client, their agents or employees, made for the purpose of obtaining professional legal advice."[74] It claims that correspondence between Metrolinx employees and in-house counsel or external counsel where legal advice is being sought or given are therefore covered under

[74] Order P-1551.

section 19(a).

[179] Metrolinx further submits that the IPC has found that documents passing between employees can still be privileged as long as they are connected to the legal advice which was sought or to the pending litigation.[75] It submits that correspondence between its employees may still therefore be privileged even if in-house or external counsel was not copied, so long as the correspondence relates to legal advice that was being requested or had already been provided, or if it related to the litigation issues outlined below.

[180] Finally, Metrolinx claims that the IPC has found that in order for litigation privilege to apply, the dominant purpose of the creation of the records must have been contemplation of pending litigation.[76] It claims that there are records that meet both requirements for litigation privilege; namely they were created after litigation had been contemplated and their dominant reason for this creation was to be used in the contemplated litigation.

[181] Much of Metrolinx's supplementary representations were not shared with the appellant in accordance with the IPC's *Code of Procedure* and the confidentiality criteria in *Practice Direction #7*.[77] However, the gist of these confidential representations is that litigation privilege attaches to some records. Metrolinx indicates that it will be in a position to disclose further records to the appellant once certain events relating to that litigation take place.[78]

Affected parties' representations

[182] Three of the affected parties who were notified by the IPC and invited to submit representations stated that they support Metrolinx's position that certain records are subject to solicitor-client and litigation privilege under section 19 of the *Act*.

Appellant's representations

[183] The appellant states that it does not take issue with Metrolinx's assertion of solicitor-client privilege over communications with its external counsel for the purposes of seeking or receiving legal advice. However, it takes issue with what it describes as the "breadth" of Metrolinx's submission with respect to Order M-1112. It submits that this order does not, as Metrolinx states, apply to extend solicitor-client privilege over documents passing between employees as long as they are connected to the legal advice which was sought or to the pending litigation. It submits that such an interpretation would be an unprecedented extension of solicitor-client privilege with no basis in law.

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[75] Order M-1112.
[76] Orders M-685 and P-236.
[77] 2024-code-e.pdf, section 8.16 and Practice Direction #7 - Sharing of Representations | Information and Privacy Commissioner of Ontario, sections 6 and 7.
[78] Para. 34 of Metrolinx's supplementary representations.

[184] The appellant cites a court decision relied on in Order MO-1112[79] and submits that the extension of solicitor-client privilege as claimed by Metrolinx is much narrower than what it represents. It asserts that solicitor-client privilege does not extend to documents passing between employees merely because they are connected or relate to the legal advice at issue. It is only where those employees are acting as a "conduit" for privileged communications, or are commenting on or transmitting privileged communications, that solicitor-client privilege will apply. It submits that the records falling within this category claimed by Metrolinx must be ordered disclosed.

[185] The appellant states that it is precluded from providing detailed comment on the issue of litigation privilege because parts of Metrolinx's representations on that issue were withheld. However, it submits that if the records are subject to litigation privilege, it does not seek their disclosure. It asks that the records subject to a claim for solicitor-client or litigation privilege be carefully reviewed by the adjudicator to ensure they meet the requirements of those categories of privilege. It submits that those that do not should be disclosed.

Metrolinx's reply representations

[186] In response to the appellant's representations, Metrolinx states that it reviewed the records over which it claimed section 19 again and, with the exception of one record, they all contain direct correspondence between in-house counsel and external counsel where advice is being sought or provided.

[187] It further submits that it will remove the section 19 claim over one record that contains correspondence between its external counsel and a property owner's external counsel. However, it is still claiming the sections 17(1) and 18(1) exemptions for the information in this record because it discusses payment details with respect to property taxes in accordance with an agreement between both parties.

Appellant's sur-reply representations

[188] The appellant states that to the extent that the records represent communications between Metrolinx's external legal counsel and its in-house legal counsel, it concedes that those records are properly the subject of solicitor-client privilege.

Analysis and findings

[189] Metrolinx has withheld a relatively small number of records under section 19 of the *Act*. They appear to be found in the group of records responsive to part 5 of the appellant's access request, which was for "Any records relating to the expropriations for the purposes of future transit stations along the route of the extension." These records relate to the agency's negotiations with private businesses, including the owner of 500

[79] *Canadian Pacific v Canada (Competition Act, Director of Investigations)*, [1995] OJ No 67.

Howard Street, to acquire or expropriate their property for the East Extension.

[190] In their representations, Metrolinx and the appellant disagree about Metrolinx's claim that that any correspondence between its employees may be privileged under section 19 even if in-house or external counsel was not copied, so long as the correspondence relates to legal advice that was being requested or had already been provided, or if it relates to litigation issues. I have reviewed the records at issue and see no such records that would fall within that category of records. In its reply representations, Metrolinx clarifies that with the exception of one record, all of the records subject to a solicitor-client privilege claim are direct correspondence between its in-house counsel and external counsel where advice is being sought or provided.

[191] As noted above, the appellant states that it is not seeking communications between Metrolinx and its external counsel for the purposes of seeking legal advice, nor any communications between Metrolinx's external legal counsel and its in-house legal counsel. It further states that if the records are subject to litigation privilege, it does not seek their disclosure. However, it asks that the records subject to a claim for solicitor-client or litigation privilege be carefully reviewed by the adjudicator to ensure they meet the requirements of those categories of privilege.

[192] The records that Metrolinx has withheld under section 19 include, for example, an email thread between Metrolinx's external legal counsel, Metrolinx staff and an agent engaged by Metrolinx that discusses the property at 500 Howard Street, which was designated for expropriation.[80] Other examples include emails and other records relating to a briefing that Metrolinx's external legal counsel provided to Metrolinx's CEO about the expropriation of the property at 500 Howard Street.[81] I note that many of these records are not listed in the index of records.

[193] The common law solicitor-client privilege in section 19(a) includes solicitor-client communication privilege. The rationale for this privilege is to ensure that a client may freely confide in their lawyer on a legal matter.[82] This privilege protects direct communications of a confidential nature between lawyer and client, or their agents or employees, made for the purpose of obtaining or giving legal advice.[83] The privilege covers not only the legal advice itself and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[84] A similar statutory privilege exists in section 19(b).

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[80] Pages 581-587 in Part 5 (Records Withheld in Full – 2,753 pages). It does not appear that section 19 was listed on the index of records for these particular pages but this exemption claim is marked on the records themselves.
[81] Pages 2162-2170 in Part 5 (Records Withheld in Full – 2,753 pages).
[82] Orders PO-2441, MO-2166 and MO-1925.
[83] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[84] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.

[194] I am satisfied that the above records constitute confidential communications between Metrolinx's external legal counsel and Metrolinx's CEO, employees and its agents aimed at keeping all informed so that advice can be sought and given. I find, therefore, that these records are exempt from disclosure under section 19, because they fall within the solicitor client communication privilege component found in both sections 19(a) and (b).

[195] Metrolinx claims that other records are subject to litigation privilege under section 19, which means that they could fall under either the common-law privilege in section 19(a) or the statutory privilege in section 19(b). It is not entirely clear to me which records Metrolinx is referring to, because it does not identify them by page number in its supplementary representations, which set out its claim of litigation privilege. I also do not see these records listed in the indexes of records.[85]

[196] However, in its supplementary representations, Metrolinx indicates that it may be able to disclose further records to the appellant if certain events relating to that litigation take place.[86] Given the time frame identified in Metrolinx's supplementary representations, I am satisfied that these events relating to that litigation have occurred. Consequently, in accordance with the undertaking made by Metrolinx in its supplementary representations, I will order it to issue a new access decision to the appellant with respect to any records that it withheld under a claim of litigation privilege.

Issue F: Did Metrolinx exercise its discretion under sections 13(1), 18(1) and 19? If so, should the IPC uphold the exercise of discretion?

[197] The sections 13(1), 18(1) and 19 exemptions are discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[198] In addition, the IPC may find that 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
- it fails to take into account relevant considerations.

[199] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[87] The IPC cannot, however, substitute its

[85] Based on my review of the records, it appears that these records might include, for example, those found at pages 1-12 in Part 5 (Records Withheld in Full – 2,753 pages)
[86] *Supra* note 78.
[87] Order MO-1573.

own discretion for that of the institution.[88]

Summary of parties' representations

Metrolinx's initial/supplementary representations

[200] Metrolinx states that it exercised its discretion in regard to the application of the exemptions, including sections 13(1), 18(1) and 19, in good faith and for proper purposes, taking into account considerations relevant to the application of those exemptions.

[201] Metrolinx claims that the appellant's access request is for technical, financial and commercial information, solicitor-client advice and staff recommendations relating to a major project of the Government of Ontario. It submits that the appellant has a commercial interest, rather than a sympathetic or compelling need, in receiving the requested information.

[202] Metrolinx further submits that the appellant is an organization engaged in civil litigation against Metrolinx regarding matters related to the East Extension. It submits that this project is ongoing and disclosing many of the requested records at this stage is reasonably likely to advance the interests of some third parties to the prejudice of others. It submits that disclosing the records will not advance the principles underlying the *Act* because this access request concerns commercial interests of a particular business rather than the public interest.

Appellant's representations

[203] The appellant claims that Metrolinx relies heavily on the fact that the appellant is engaged in litigation with Metrolinx and is motivated solely by a "commercial interest" in pursuing its access request. It submits that this fact clearly informed Metrolinx's exercise of discretion to withhold records under the *Act* and is not a consideration that is relevant to the exercise of Metrolinx's discretion and should not have been considered.

[204] The appellant submits that there is no evidence to indicate that it is motivated by a commercial interest in pursuing its access request. Nor is there any indication that the access request is related in any way to the litigation. It points out that its access request predates the litigation by several years.

[205] It further submits that it is important to ensure that the public's right to access information under the *Act* is as broad as possible. It asserts that allowing the reliance on such irrelevant considerations as the guiding factor in an institution's exercise of its discretion would defeat this overarching goal and unduly broaden the discretion provided under the *Act*.

[206] The appellant submits that Metrolinx's submissions on its exercise of its discretion

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[88] Section 54(2).

are improper and prejudicial to the appellant. It claims that Metrolinx took into account wholly improper considerations when exercising that discretion. The whole exercise is invalid as a result.

[207] Finally, the appellant submits that it is not possible to cure the impact of Metrolinx's improper approach by merely sending the matter back to it for a reconsideration of its exercise of discretion. Instead, the records withheld by Metrolinx should be ordered disclosed in full.

Analysis and findings

[208] For the reasons that follow, I find that Metrolinx exercised its discretion and did so properly in deciding to withhold a number of records and parts of records relating to the East Extension under sections 13(1), 18(1) and 19 of the *Act*.

[209] These exemptions are discretionary, which means that Metrolinx could exercise its discretion to disclose the records and parts of withheld under those provisions, even though such disclosure would reveal the advice and recommendations of a public servant or a person employed in the service of Metrolinx, could reasonably be expected to prejudice Metrolinx's economic interests and be injurious to the financial interests of the Government of Ontario, or would pierce solicitor-client privilege and litigation privilege.

[210] In my view, given the nature of the harms to Metrolinx that could reasonably be expected to flow from disclosure of these types of records and the central importance that the Supreme Court of Canada has ascribed to solicitor-client privilege,[89] it is not surprising that Metrolinx decided, after exercising its discretion under sections 13(1), 18(1) and 19, not to disclose any records or parts of records withheld under those exemptions. However, Metrolinx must demonstrate that it exercised its discretion in applying these exemptions and in doing so, considered relevant factors and no irrelevant ones.

[211] I am satisfied that Metrolinx took into account relevant factors and no irrelevant ones in exercising its discretion under sections 13(1), 18(1) and 19. I am not persuaded by the appellant's argument that Metrolinx took irrelevant considerations into account, such as the fact that the appellant is engaged in litigation with Metrolinx and that it is motivated by a "commercial interest" in pursuing access to these records and parts of records.

[212] Given that the appellant is a developer that makes money from its property holdings and has also sued Metrolinx, I find that it was reasonable for Metrolinx, in exercising its discretion under sections 13(1), 18(1) and 19, to conclude that disclosing

[89] The Supreme Court has found that solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance, and that it is in the public interest that the free flow of legal advice be encouraged. See *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII), [2008] 2 SCR 574 at para. 9.

the records will not advance the principles underlying the *Act*, because the appellant's access request concerns commercial interests of its own business rather than the public interest.

[213] In short, I find that Metrolinx exercised its discretion and did so properly in withholding a number of records and parts of records relating to the East Extension under sections 13(1), 18(1) and 19 of the *Act*.

Issue G: Does the mandatory personal privacy exemption at section 21(1) apply to any information in the records?

[214] Metrolinx has withheld parts of some records under the mandatory exemption in section 21(1) of the *Act*.

[215] For section 21(1) to apply, the parts of the records withheld by Metrolinx must contain the "personal information" of individuals other than the requester. Section 2(1) of the *Act* defines "personal information" as "recorded information about an identifiable individual" and provides a list of examples of personal information in subsections (a) to (h).

[216] Information is "about" the individual when it refers to them in their personal capacity, which means that it reveals something of a personal nature about the individual. Generally, information about an individual in their professional, official or business capacity is not considered to be "about" the individual.[90]

[217] Section 21(1) creates a general rule that an institution cannot disclose "personal information" about another individual to a requester. This general rule is subject to a number of exceptions.

[218] The section 21(1)(a) to (e) exceptions are relatively straightforward. If any of the five exceptions covered in sections 21(1)(a) to (e) exist, the institution must disclose the information.

[219] The section 21(1)(f) exception is more complicated. It requires the institution to disclose another individual's personal information to a requester only if this would not be an "unjustified invasion of personal privacy."

[220] Other parts of section 21, including sections 21(2), (3) and (4) must be looked at to decide whether disclosure of the other individual's personal information would be an unjustified invasion of personal privacy.

[90] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

Summary of parties' representations

Metrolinx's initial/supplementary representations

[221] Metrolinx claims that there is personal information in the records subject to the section 21(1) mandatory exemption, including home addresses of members of the public who signed a petition, information about the family vacations and other personal matters of Metrolinx employees and third party service providers, the names and contact information of members of the public (who self-identified as a local residents or concerned citizens), and information about employment and educational history of consultants to Metrolinx.

[222] Metrolinx states that there are also opinions about an individual's character, the disclosure of which would constitute an unjustified invasion of the personal privacy of the affected individual.

[223] Metrolinx further submits that:

- In Orders PO-3153 and PO-3396, the IPC concluded that the home address of individuals is their personal information and is exempt from disclosure.
- In Order PO-3285 the IPC concluded that an employee's references to their vacation time or other personal matters would reveal something of a personal nature about them and therefore qualifies as their personal information within the meaning of the *Act*.
- In Order P-749, the IPC concluded that disclosure of employment history, personal recommendations and evaluations, character references and personnel evaluations is considered to be an unjustified invasion of personal privacy under the presumptions in section 21(3).
- Disclosing an opinion about an individual's character or abilities must also be withheld as an unjustified invasion of personal privacy under section 21(3). The information at issue in this appeal allows for inferences about an individual's employment experience, ability to complete assigned work and other personal characteristics that were not meant to be disclosed other than to the recipient of the information. Information in these records is also subject to section 21(2)(i) because disclosure of negative comments, reviews or appraisals may unfairly damage an individual's reputation.

Appellant's representations

[224] The appellant states that it does not seek the disclosure of information about vacations or personal matters. It adds that it does not seek personal information about members of the public.

[225] The appellant further states that it is extremely concerned by the suggestion in Metrolinx's representations that the records contain opinions about an individual's character or abilities. It submits that Metrolinx's representations indicate that these views relate to the individual's employment experience and abilities. It submits that this is factual information within a professional context of the type ordered disclosed in the past.[91]

[226] Finally, the appellant submits that Metrolinx also withheld information under section 21(1) that is about the employment and educational history of consultants to Metrolinx. It submits that this is professional, rather than personal, information and section 21(1) cannot apply to it.

Metrolinx's reply representations

[227] Metrolinx responds to the appellant's assertion that the information it withheld under section 21(1) about the employment and educational history of consultants is professional, rather than personal, and should therefore be disclosed. It cites Order PO-3115, in which the adjudicator concluded that start and end dates of employment, employment history and academic qualification fall within the scope of section 21(3)(d) and that disclosing this type of information would constitute a presumed unjustified invasion of privacy.

[228] Metrolinx submits that the records at issue contain a description of the experience of consultants including a summary of their work history and qualifications. It submits that this is the exact type of information at issue in order PO-3115 and it is therefore exempt from disclosure.

[229] Metrolinx then responds to the appellant's citing of Order MO-3311 as evidence that records containing opinions about an individual's character or abilities are not exempt under section 21(1), because the information relates to factual information within a professional context. Metrolinx submits that the information at issue in this appeal is not factual or professional; it is personal opinions about individual's nature. It claims that disclosing this type of information would constitute an unjustified invasion of personal privacy under section 21(1).

Appellant's sur-reply representations

[230] The appellant states that it is not seeking the disclosure of emails discussing vacation schedules, personal hobbies, or sick time.

[231] The appellant submits that Metrolinx's reliance on Order PO-3115 is misplaced, and that the principles in Order MO-3311 ought to be preferred and applied. The information sought arises within a professional context, and that any expectation of privacy or confidentiality must be viewed through that lens. It submits that when

[91] Order MO-3311, para. 16.

communications of the type at issue are made in the professional context, their disclosure does not represent an unjustified invasion of personal privacy under section 21(1).

Analysis and findings

[232] Metrolinx has withheld parts of some records under the mandatory personal privacy exemption in section 21(1) of the *Act*.

[233] As noted above, the appellant states that it is not seeking personal information, such as individuals' vacation schedules, personal hobbies, sick time or other "personal matters." It adds that it does not seek personal information about members of the public, such as their names and contact information. This removes a wide swath of "personal information" from the scope of this appeal and it is not necessary to determine whether it is exempt from disclosure under section 21(1) of the *Act*.

[234] However, Metrolinx has withheld other types of information about various individuals under section 21(1), including, for example, information about consultants, opinions about an individual's character, and the name and phone number of a local historian. For the reasons that follow, I find that most of this information is the "personal information" of these individuals, and it is exempt from disclosure under section 21(1).

Information about consultants

[235] Metrolinx has withheld information about its consultants. For example, there is information about several "project personnel" who are listed in a draft Cultural Heritage Evaluation Report that a consulting firm prepared about the property at 500 Howard Street.[92] Metrolinx has withheld most of the information about these individuals under section 21(1).

[236] As noted above, the appellant submits that a consultant's employment history is that individual's professional, rather than personal, information and section 21(1) cannot apply to it.

[237] Section 2(3) of the *Act* removes certain types of information from the definition of "personal information" in section 2(1). It states:

> Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[238] In accordance with section 2(3), I find that the consultants' names and job titles are not their personal information. Because the personal privacy exemption in section 21(1) only applies to "personal information," this information cannot be exempt from

[92] Pages 2682-2683 of Part 5 (Records Withheld in Full – 2,753 pages).

disclosure under that provision and must be disclosed to the appellant.

[239] However, under paragraph (b) of section 2(1), "personal information" is defined to include an individual's "education or . . . employment history." I find, therefore, that the consultants' education or employment history constitutes their "personal information." Section 21(1) prohibits Metrolinx from disclosing this information to the appellant unless the exception in paragraph (f) applies.[93] This provision states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

[240] Other parts of section 21, including sections 21(2), (3) and (4) must be looked at to decide whether disclosure of the other individual's personal information would be an unjustified invasion of personal privacy.

[241] In my view, the presumption in section 21(3)(e) applies to the consultant's employment and educational history. This provision states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > relates to employment or educational history;

[242] I find that disclosing the consultants' employment and educational history to the appellant is presumed to constitute an unjustified invasion of their personal privacy. There is no evidence before me to show that any of the factors in section 21(2) or the circumstances in 21(4) would apply and weigh in favour of disclosing this personal information. As a result, I find that the exception in paragraph (f) of section 21(1) is not made out, and this personal information is therefore exempt from disclosure under section 21(1) because disclosing it to the appellant would constitute an unjustified invasion of the consultants' personal privacy.

Opinions about individual's character

[243] Metrolinx also states that it has withheld opinions in the records about an individual's character, the disclosure of which constitute an unjustified invasion of personal privacy of the affected individual, who appears to be an employee. The appellant disputes this and argues that these views relate to the individual's employment experience and abilities. It submits that this is factual information within a professional

[93] In my view, none of the exception in paragraphs (a) to (e) apply to this personal information.

context of the type ordered disclosed in the past.[94]

[244] It is not clear to me where such information is located in the records because Metrolinx does not identify the specific page numbers of the records in which such information is found. However, I am satisfied, based on Metrolinx's description, that such information would fall within paragraph (g) of the definition of "personal information" in section 2(1), which states that it includes "the views or opinions of another individual about the individual."

[245] I am not persuaded by the appellant's argument that these opinions about the individual's character should be viewed as professional rather than personal information. In my view, comments about an individual's character, even in an employment context, are inherently personal in nature and qualify as that individual's personal information.

[246] In assessing whether disclosing the opinions about the individual's character would constitute an unjustified invasion of that individual's personal privacy under section 21(1), I find that none of the presumptions in section 21(3) apply to this personal information. In addition, there is no evidence before me to show that the factors in section 21(2) or the circumstances in section 21(4) weighing in favour of disclosure would apply to this personal information. In these circumstances, I find that the exception in paragraph (f) of section 21(1) is not made out, and this personal information is therefore exempt from disclosure under section 21(1) because disclosing it to the appellant would constitute an unjustified invasion of the individual's personal privacy.

Name and phone number of local historian

[247] Metrolinx has withheld the name and personal phone number of a local historian that appears in some records.[95] I find that this information is that individual's "personal information" under paragraph (c) of the definition of "personal information" in section 2(1), which includes in this definition "any identifying number, symbol or other particular assigned to the individual," and under paragraph (h), which includes in this definition "the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual."

[248] In my view, none of the presumptions in section 21(3) apply to this personal information. In addition, there is no evidence before me to show that any of the factors in section 21(2) or the circumstances in section 21(4) weighing in favour of disclosure would apply to this personal information. In these circumstances, I find that the exception in paragraph (f) of section 21(1) is not made out, and this personal information is therefore exempt from disclosure under section 21(1), because disclosing it to the appellant would constitute an unjustified invasion of the local historian's personal privacy.

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[94] *Supra* note 91.
[95] Pages 2190-2203, 2205-2210, 2680 and 2686 of Part 5 (Records Withheld in Full – 2,753 pages).

[249] In summary, I find that the information in the parts of the records remaining at issue that Metrolinx withheld under section 21(1) are exempt from disclosure under that provision.

Issue H: Are there any records or parts of records that are not exempt from disclosure under sections 12(1), 13(1), 17(1), 18(1), 19 or 21(1)?

[250] I have found that the vast majority of the records and parts of records at issue in this appeal are exempt from disclosure under sections 12(1), 13(1), 17(1), 18(1), 19 and 21(1) of the *Act*. However, there are a small number of records and parts of records that are not exempt from disclosure under these provisions and will be ordered disclosed to the appellant.

Part 1 (Records Withheld in Full)

Pages 1-3

[251] These records are emails that discuss routing for the East Extension, including references to feasibility studies on Canadian National (CN) railway vs. Canadian Pacific (CP) railway routing options. Metrolinx withheld the emails under sections 12(1), 13(1) and 18(1).

[252] I find that these emails about routing do not contain information that would trigger the application of the section 18(1) exemption. In particular, I find that disclosing them could not reasonably be expected to lead to the harms set out in section 18(1), such as prejudicing the economic interests of Metrolinx, as required by section 18(1)(c), or being injurious to the financial interests of the Government of Ontario, as required by section 18(1)(d).

[253] In addition, Metrolinx's representations do not provide sufficient evidence to establish a linkage between the content of these specific records and the substance of actual Cabinet deliberations. I find, therefore, that there is no information in them that would reveal the substance of deliberations of Cabinet or its committees under section 12(1).

[254] However, in accordance with my finding under Issue C above, parts of these emails are exempt from disclosure under section 13(1), because disclosing them would reveal advice or recommendations of a public servant or another person employed in the service of Metrolinx.

Pages 19, 36, 51, 63, 155, 1000, 1065, 1070, 1090, 1137, 1372, 1413, 1625, 1651, 1677, 1737, 1847-1849, 1988, 2136, 2232, 2302, and 2539.

[255] These records are emails that Metrolinx withheld under sections 12(1) and 13(1) and, in some cases, also under section 18(1) of the *Act*. These emails often precede briefing materials such as slide decks that I have found are exempt from disclosure under

section 12(1). Under Issue A above, I found that many of the emails preceding such briefing materials are also exempt from disclosure under section 12(1) because they contain information that would permit the drawing of accurate inferences about the substance of deliberations of two Cabinet committees.

[256] However, there are several emails that do not contain information that would reveal the substance of deliberations of Cabinet or its committees under section 12(1), nor permit the drawing of accurate inferences about the substance of deliberations of those bodies. Consequently, I will order Metrolinx to disclose those emails to the appellant. However, I will order Metrolinx to sever some limited and specific information in those emails that I have found to be exempt from disclosure under section 12(1). Metrolinx may also sever information that is not responsive to the appellant's access request.

[257] I also find that these emails would not reveal advice or recommendations of a public servant, any other person employed in the service of Metrolinx or a consultant retained by Metrolinx under section 13(1). Finally, I find that disclosing these emails could not reasonably be expected to lead to the harms set out in section 18(1), such as prejudicing the economic interests of Metrolinx, as required by section 18(1)(c), or being injurious to the financial interests of the Government of Ontario, as required by section 18(1)(d).

Part 1 (Records Withheld in Part)

Pages 3505-3514

[258] These records contain emails between Metrolinx staff and its CEO about questions from an MPP about the East Extension. Metrolinx has withheld parts of these emails under sections 12(1), 13(1) and 18(1) of the *Act*.

[259] The parts of the emails withheld under section 18(1) contain factual information about two land/property acquisitions by Metrolinx and routing alignment for the East Extension. In my view, these parts do not provide detailed insight into Metrolinx's land acquisition negotiation strategy or other information that would fall within section 18(1). I find that disclosing these records could not reasonably be expected to lead to the harms set out in section 18(1), such as prejudicing the economic interests of Metrolinx, as required by section 18(1)(c), or being injurious to the financial interests of the Government of Ontario, as required by section 18(1)(d).

[260] Metrolinx has withheld other parts of these emails under section 12(1), which contain information about routing alignment and other information relating to the East Extension. Metrolinx's representations do not provide sufficient evidence to establish a linkage between the content of these specific records and the substance of actual Cabinet deliberations. I find, therefore, that there is no information in them that would reveal the substance of deliberations of Cabinet or its committees under section 12(1).

[261] However, in accordance with my finding under Issue C above, parts of these emails are exempt from disclosure under section 13(1) because disclosing them would reveal advice or recommendations of a public servant or another person employed in the service of Metrolinx.

Page 3678

[262] This record contains emails between Metrolinx staff about matters relating to the East Extension.

[263] Metrolinx has withheld a part of one email under section 13(1) of the *Act*. I find that this withheld part does not qualify for exemption under section 13(1) because it is a question posed by Metrolinx staff, not advice or recommendations of a public servant, any other person employed in the service of Metrolinx or a consultant retained by Metrolinx.

[264] Metrolinx has withheld a part of another email under section 12(1) that refers generally to some meetings and analysis done by Metrolinx staff relating to the CP corridor alternative for the East Extension. Metrolinx's representations do not provide sufficient evidence to establish a linkage between the content of these specific records and the substance of actual Cabinet deliberations. I find, therefore, that there is no information in them that would reveal the substance of deliberations of Cabinet or its committees under section 12(1).

Pages 3683-3685

[265] These records are emails between Metrolinx staff that were triggered by a letter from a local chamber of commerce about the East Extension. The IPC notified this chamber of commerce and invited it to submit representations but did not receive a response.

[266] Metrolinx has withheld parts of these emails under section 13(1) of the *Act*. In accordance with my finding under Issue C above, I find that the withheld part in one email is exempt from disclosure under section 13(1). However, the remaining part withheld under section 13(1) contains factual information cited by a Metrolinx employee that Metrolinx provides to stakeholders and other interested parties about the East Extension. I find that this information does not qualify for exemption under section 13(1) because it does not reveal advice or recommendations of a public servant, any other person employed in the service of Metrolinx or a consultant retained by Metrolinx.

[267] Metrolinx has also withheld a part of these emails under section 12(1) of the *Act*. Metrolinx's representations do not provide sufficient evidence to establish a linkage between the content of these specific records and the substance of actual Cabinet deliberations. I find, therefore, that there is no information in them that would reveal the substance of deliberations of Cabinet or its committees under section 12(1).

Part 5 (Records Withheld in Full – 2753 pages)

Pages 27-29

[268] These records are more emails between Metrolinx staff that were triggered by the same letter from a local chamber of commerce about the East Extension. As noted above, the IPC notified this chamber of commerce and invited it to submit representations but did not receive a response.

[269] Metrolinx has withheld these emails in full under sections 17(1) and 18(1) of the *Act*. I find that these emails are not exempt from disclosure under section 17(1), because unlike many of the other records at issue in this appeal, they do not contain commercial, financial and technical information that was supplied in confidence and could reasonably be expected to lead to the harms set out in this exemption, such as significant prejudice to the competitive position of a third party or an undue loss for that third party and an undue gain for its competitors.

[270] In addition, these emails include factual information that Metrolinx provides to stakeholders and other interested parties about the East Extension. I find that disclosing such information could not reasonably be expected to lead to the harms set out in section 18(1), such as prejudicing the economic interests of Metrolinx, as required by section 18(1)(c), or being injurious to the financial interests of the Government of Ontario, as required by section 18(1)(d).

Pages 2187-2189, 2190-2203, 2205-2210 and 2648-2701

[271] Under Issues B and D above, I found that the information in many of the records and parts of records at issue relating to the property at 500 Howard Street was exempt from disclosure under sections 18(1) and 17(1). These records were all created during the time period in which a private business owned 500 Howard Street and Metrolinx was engaged in discussions and negotiations with this private business to expropriate its property.

[272] However, after expropriating 500 Howard Street, Metrolinx became the title holder of this property and eventually took full possession on July 25, 2014. In my view, some records created after that date cannot be exempt from disclosure under the third party information exemption in section 17(1), because the private business no longer owns or has possession of the property. Accordingly, these records cannot be considered to have information that was supplied in confidence by a third party as Metrolinx is the owner of the property. In addition, I find that the section 18(1) exemption does not apply to some of these records either.

<u>Pages 2187-2189</u>

[273] These records are emails between a property manager engaged by Metrolinx and Metrolinx staff about some damage and theft at the property at 500 Howard Street.

Metrolinx has withheld the information in these emails under sections 13(1), 17(1) and 18(1).

[274] I find that these emails cannot be exempt from disclosure under section 17(1) because Metrolinx was the property owner at that time, not the private business that previously owned it. In addition, I am not convinced that disclosing the information in these emails could reasonably be expected to lead to the harms set out in section 18(1), such as prejudicing the economic interests of Metrolinx, as required by section 18(1)(c), or being injurious to the financial interests of the Government of Ontario, as required by section 18(1)(d). In short, I find that these emails are not exempt from disclosure under sections 17(1) or 18(1).

[275] However, in accordance with my finding under Issue C above, a part of the email on page 2188 contains recommendations from the property manager for remedying the damage and theft issues. This part of the email is exempt from disclosure under section 13(1) because it would reveal the recommendations of a person employed in the service of Metrolinx.

Pages 2190-2203 & 2205-2210

[276] These records are emails between Metrolinx staff and also a local historian who wished to speak to Metrolinx about the heritage status of the property at 500 Howard Street. Metrolinx withheld the information in these records under sections 13(1), 17(1), 18(1) and 21(1).

[277] In my view, there is no information in these records that falls within the exemptions in sections 13(1), 17(1) and 18(1). However, in accordance with my finding under Issue G above, the local historian's name and personal phone number are his personal information and are exempt from disclosure under section 21(1), because disclosing this information would constitute an unjustified invasion of his personal privacy.

Pages 2648-2701

[278] These records are emails and a draft Cultural Heritage Evaluation Report that a consulting firm prepared about the property at 500 Howard Street. Metrolinx withheld these records under sections 13(1), 17(1), 18(1) and 21(1). The IPC notified the consulting firm and invited it to submit representations on section 17(1) but did not receive a response.

[279] I find that Metrolinx has not provided sufficient evidence to show that the emails and this specific report fall within the sections 17(1) and 18(1) exemptions. With respect to section 17(1), although the report likely contains some technical information, there is insufficient evidence to show that this information was supplied in confidence and its disclosure could reasonably be expected to lead to the harms set out in this exemption, such as significant prejudice to the competitive position of a third party or an undue loss for that third party and an undue gain for its competitors.

[280] In addition, I am not convinced that disclosing the information in the emails or report could reasonably be expected to lead to the harms set out in section 18(1), such as prejudicing the economic interests of Metrolinx, as required by section 18(1)(c), or being injurious to the financial interests of the Government of Ontario, as required by section 18(1)(d).

[281] However, the emails and report contain the personal information of some individuals. In accordance with my finding under Issue G above, a local historian's name is exempt from disclosure under section 21(1). In addition, the report contains information about several "project personnel," including their names, job titles, and employment and educational history.[96] Under Issue G, I found that these individuals' employment and educational history is their personal information, and this information is exempt from disclosure under section 21(1). However, I found that their names and job titles fall within section 2(3) and is not their personal information. As a result, this latter information cannot be exempt from disclosure under section 21(1).

[282] Finally, because this is a draft document, there are comments written on the report itself that were made by a Metrolinx project coordinator. In accordance with my finding under Issue C above, I find that these comments are exempt from disclosure under section 13(1) because they would reveal the advice and recommendations of a public servant or a person employed in the service of Metrolinx.

ORDER:

1. I uphold Metrolinx's decision to withhold the records and parts of records at issue, except for the following:

    a. Part 1 (Records Withheld in Full) – pages 1-3, 19, 36, 51, 63, 155, 1000, 1065, 1070, 1090, 1137, 1372, 1413, 1625, 1651, 1677, 1737, 1847-1849, 1988, 2136, 2232, 2302, and 2539.

    b. Part 1 (Records Withheld in Part) – pages 3505-3514, 3678, and 3683-3685.

    c. Part 5 (Records Withheld in Full – 2,753 pages) – pages 27-29, 2187-2189, 2190-2203, 2205-2210, and 2648-2701.

2. I order Metrolinx to sever the specific information from the records ordered disclosed under order provision 1 that I have found is exempt from disclosure under sections 12(1), 13(1) or 21(1) of the *Act* or that is not responsive to the appellant's access request.

3. I am providing Metrolinx with a PDF copy of the records ordered disclosed under order provisions 1(a), (b) and (c) and have highlighted in yellow the information

[96] Pages 2682-2683.

that must be severed. To be clear, Metrolinx must only withhold the information highlighted in yellow.

4. I order Metrolinx to disclose the records identified in order provisions 1(a), (b) and (c) to the appellant by **March 17, 2025** but not before **March 10, 2025**.

5. I order Metrolinx to issue a new access decision to the appellant within the same time frame as order provision 4 with respect to any records that it withheld under a claim of litigation privilege (section 19 of the *Act*), in accordance with the undertaking made in paragraph 34 of its supplementary representations.

6. I reserve the right to require Metrolinx to provide me with a copy of the records that it discloses to the appellant.

Original Signed by: February 6, 2025

Colin Bhattacharjee
Adjudicator