Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4681

Appeal PA22-00165

Infrastructure Ontario

July 23, 2025

Summary: Infrastructure Ontario (IO) received a request under the *Freedom of Information and Protection of Privacy Act* for a draft natural heritage assessment report for a proposed correctional centre. After notifying the affected party that prepared the draft report, IO denied access to it in full, relying on the exemptions for third party information (section 17(1)) and for information that would affect the economic and other interests of IO or the Government of Ontario (section 18(1)).

In this order, the adjudicator finds that the draft report is not exempt under sections 17(1) and 18(1) and orders IO to disclose it to the appellant. She also upholds IO's search for records as reasonable.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 17(1), 18(1)(a), (c), (d), (e) and (g).

Orders Considered: Orders PO-2064, and PO-4656.

OVERVIEW:

[1] Infrastructure Ontario (IO) received an access request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for a draft natural heritage assessment report for a proposed correctional centre (the draft report). The request sought:

> … all records held by Infrastructure Ontario related to the "Natural Heritage Survey" fieldwork that has been completed at the proposed site [the site] for the Eastern Ontario Correctional Complex[1] in Kemptville/ North Grenville [the project].

[2] Under section 28(1) of the *Act*, IO notified an affected party, the engineering company that prepared the draft report, to obtain its views regarding disclosure. The affected party objected to the disclosure of the draft report. IO then issued a decision letter to the requester denying access to the draft report pursuant to sections 17(1) (third party information) and 18(1) (economic and other interests) of the *Act.*

[3] The requester, now the appellant, appealed IO's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During mediation, the appellant advised that she believes that the public interest override in section 23 of the *Act* should apply to the draft report. She also claimed that additional records responsive to her request should exist beyond the draft report. Accordingly, section 23 and the reasonableness of IO's search for responsive records were added as issues in this appeal.

[5] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process in which an adjudicator may conduct an inquiry under the *Act*. The adjudicator formerly assigned to this appeal began an inquiry by seeking and obtaining the representations of IO and the affected party.[2] The file was then assigned to me to complete the inquiry.

[6] In this order, I find that the report is not exempt under sections 17(1) or 18(1). I order IO to disclose it to the appellant. I also uphold IO's search for records responsive to the request as reasonable.

RECORD:

[7] The record at issue is a 2021 draft report titled "Eastern Ontario Correctional Centre – Phase II Development Feasibility Assessment – Natural Heritage Assessment". The draft report was prepared by the affected party, an engineering consulting company, for IO. The draft report assesses the natural conditions at or near the proposed project site and contains information about the feasibility of developing the site based on those conditions.

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[1] Also referred to as the Eastern Ontario Correctional Centre.

[2] The affected party was asked to provide representations on whether the mandatory section 17(1) third party information exemption applied to the record and, if so, whether the public interest override applied.

ISSUES:

A. Does the mandatory exemption at section 17(1) for third party information apply to the draft report?

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

C. Did IO conduct a reasonable search for records?

DISCUSSION:

Issue A: Does the mandatory exemption at section 17(1) for third party information apply to the draft report?

[8] Both IO and the affected party rely on sections 17(1)(a) and (c) to deny access to the draft report. IO also relies on section 17(1)(b).

[9] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[3] where specific harms can reasonably be expected to result from its disclosure.[4]

[10] The relevant portions of section 17(1) state:

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

[11] For section 17(1) to apply, the party arguing against disclosure must satisfy each

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[3] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[4] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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) and/or (c) of section 17(1) will occur.

Part 1 of the section 17(1) test: type of information

Representations on part 1

[12] IO submits that the draft report contains scientific, technical, and commercial information prepared by qualified experts of the affected party.

[13] IO submits that the draft report contains scientific information as its content represents, among other things, draft materials prepared by qualified specialists in biology, who have appropriate education, extensive experience, and expertise in the field.

[14] IO submits that the draft report contains technical information, as parts of the record, in particular Appendices A and B, contain maps and plans of the site that were prepared by qualified specialists in the field and set out detailed plans and structures for the project development.

[15] Finally, IO submits that the draft report contains commercial information, as the affected party conducted a natural heritage assessment and provided its recommendations on the conditions of the site and the development feasibility. It submits that the draft report was prepared as a direct result of the commercial relationship between the affected party and IO, pursuant to commercial contracts between them.

[16] Neither the affected party nor the appellant address part 1 of the test in their representations.

Analysis and findings on part 1

[17] The IPC has described the types of information claimed by IO to be contained in the draft report as follows:

> Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. For information to be characterized as "scientific," it must relate to the

> observation and testing of a specific hypothesis or conclusion by an expert in the field.[5]
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> Technical information is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. Technical information usually involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.[6]
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> Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.[7]

[18] Based on my review of the draft report and IO's representations, I agree that the draft report contains scientific, technical, and commercial information. The draft report contains technical information about the site specifications, and scientific information about the condition of the land and the species of animals on the site, as well as commercial information about the development of the land into a correctional centre. All this information in the draft report was prepared by the affected party's experts that include engineers and environmental scientists. Therefore, I find that part 1 of the test under section 17(1) has been met.

Part 2: supplied in confidence

Supplied

[19] 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.[8] 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.[9]

In confidence

[20] The party arguing against disclosure, in this case IO and the affected party, must show that both the individual supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.[10]

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[5] Order PO-2010.
[6] Order PO-2010.
[7] Order PO-2010.
[8] Order MO-1706.
[9] Orders PO-2020 and PO-2043.
[10] Order PO-2020.

[21] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.[11]

Representations on part 2

[22] IO states that it retained the affected party to conduct preliminary research of the site for the project development and provide its recommendations. As result, IO submits that the draft report was prepared by the affected party and supplied to IO in fulfillment of the contractual terms. It states that the information in the draft report was not negotiated.

[23] IO submits that the information contained in the draft report was supplied in confidence. It submits that the parties had a reasonably held expectation that the information in the draft report would be held in confidence based on the totality of the surrounding circumstances, as well as the affected party's stated intention that IO treat the information as confidential.

[24] IO submits that the affected party had a reasonable expectation of confidentiality with respect to the information contained in the draft report as it was prepared specifically for IO's use and that reliance on the draft report by any third party is strictly prohibited. IO submits that this demonstrates an explicit expectation of confidentiality on the part of the affected party that, at a minimum, sensitive scientific, technical and commercial information that it supplied to IO would be kept in strict confidence.

[25] IO notes that the existence of the note in the draft report that "Any reliance on this document by any third party is strictly prohibited" supports its position that the information contained in the draft report was supplied to IO by the affected party with an explicit expectation of confidentiality and that this expectation was reasonably held.

[26] IO also submits that the draft report was treated in a manner that indicates the concern for protecting the confidential and sensitive information that it contains from being disclosed. Therefore, it submits that the draft report was also implicitly supplied in

[11] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

confidence. Furthermore, IO submits that the draft report was not otherwise disclosed or available from sources to which the public has access, and was not prepared for a purpose that would entail disclosure.

[27] The affected party submits that it supplied the draft report to IO to review until it issued the final version of the report. It states it had a reasonable expectation of confidentiality at the time the draft report was provided to IO with the assumption and expectation that the information that it contains would remain confidential.

[28] The affected party submits that the information in the draft report was not otherwise disclosed or available from sources to which the public has access, as the purpose of supplying the draft report to IO was for feedback and review. It states that the draft report was never subject to consultation with the public and at no time did it expect the information to be disclosed, as it prepared the draft report for a purpose that would not entail disclosure.

[29] The appellant submits that the analysis of the natural heritage and related content does not mean that the report was supplied in confidence. She argues that neither IO nor the affected party have demonstrated that a reasonable expectation of confidentiality existed in that they both expected the draft report to be treated confidentially, and that their expectation was reasonable in the circumstances.[12] She asserts that maintaining the confidential nature of the draft report in a large-scale capital project is not reasonable.

[30] The appellant further submits that the use of consultants, such as the affected party, to undertake analysis is common in the public and private sectors. She argues that when consultants use their expertise to analyze, assess, and report on things like the feasibility of the project and its natural heritage, it is neither reasonable nor necessary to treat it as confidential. She submits that consultants must be prepared to have their contractual arrangements scrutinized by the public. She submits that, by implication, the prospect of having work scrutinized by the public applies to the products, drafts, deliverables, or reports produced by consultants engaged for public projects.

Findings on part 2

[31] Although the appellant submits that the report was not supplied in confidence and part 2 of the test is not met, I disagree. From my review of the parties' representations and the information in the draft report itself, I am satisfied that the draft report is third party information that was supplied in confidence to IO by the affected party. The draft report was prepared specifically for IO's use and communicated by the affected party to IO on the basis that it was confidential and that it was to be kept confidential; this is clear from the proviso on the draft report that reliance on the report by any third party was strictly prohibited. I accept IO's and the affected party's submissions that they consistently treated the draft report in a manner that indicates a concern for

[12] The appellant relies on Order PO-2020, referenced above.

confidentiality. There are no suggestions that the draft report was disclosed or made publicly available. The evidence before me is that the affected party prepared the draft report for a purpose that would not entail disclosure and supplied the draft report to IO for feedback and review.

[32] Accordingly, I find that the affected party and IO have established that the report was supplied with a reasonable expectation of confidentiality, and part 2 of the section 17(1) test is met

Part 3: harms

[33] 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.*[13]

[34] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[14] 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.[15]

Representations re part 3

[35] IO submits that if the draft report is disclosed, it could reasonably be expected to significantly prejudice the competitive position of the affected party or interfere significantly with the contractual negotiations of the affected party (section 17(1)(a)). IO also submits that disclosure could reasonably be expected to result in undue loss to the affected party (section 17(1)(c)).

[36] Regarding sections 17(1)(a) and (c), IO submits that given the competitive climate in the project management consulting and construction industries, the release of the draft report would significantly prejudice the affected party's competitive position, on-going and future negotiations, and commercial interests. It states that the affected party has developed numerous methodologies specific to their own operations that are not known to their competitors, and that the affected party's clients select them over their competitors partly because of their creative methodologies, plans and strategies. IO submits that if the affected party's processes and techniques are copied by competitors,

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[13] Orders MO-2363 and PO-2435.
[14] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[15] *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.

the result will be a loss of revenue.

[37] IO submits that the affected party's competitors could make use of the affected party's creative and unique methodologies, analysis and recommendations outlined in the draft report and tailor their own work to those of the affected party. It further submits that disclosure of the draft report could reasonably be expected to give competitors a "significant competitive advantage in seeking future consulting work" and the affected party's ability to pursue such work would be "substantially impaired."

[38] Regarding section 17(1)(b), IO submits that disclosure of the draft report could reasonably be expected to result in similar information no longer being supplied to IO or similar institutions. IO submits that, if the draft report is disclosed, vendors will become hesitant to provide services to IO fearing that their reports will be made available to the public. As a result, IO submits, consultants may therefore not submit proposals to IO with respect to future business opportunities, knowing that it may be accessible to the public.

[39] IO submits that it is in the public interest to keep reports generated from such consultations confidential, to ensure that they are continually supplied to IO and other institutions. IO submits that the disclosure of the draft report at issue in this appeal could result in the inability of IO and similar institutions to attract high-quality and competitive consultants in the future.

[40] The affected party also submits that disclosure of the draft report could reasonably be expected to result in the harms set out in sections 17(1)(a) and (c). The affected party submits that the draft report has not been subject to its review process and contains information that can be considered unverified, inaccurate, incorrect, incomplete or unclarified. It submits that additional information related to the project is required from IO to finalize this draft report.

[41] The affected party submits that disclosure of the draft report would be improper and unwarranted, as the draft version is not the final work product. It further submits that disclosure of the draft report could result in loss of reputation as its clients and potential clients may erroneously conclude that its work product is deficient. It submits that this, in turn, could reasonably be expected to prejudice significantly its competitive position in the future and result in the affected party experiencing undue loss as contemplated by sections 17(1)(a) and (c).

[42] The appellant submits that there is no reasonable expectation of harm in the disclosure of the draft report. She submits that the harms raised by IO and the affected party are, at best, very general and speculative. The appellant submits that disclosure could not reasonably be expected to harm the affected party's competitive position as IO and the affected party have ignored a fundamental fact of the marketplace. Specifically, she submits that if disclosure of the information in the draft report could increase costs, it could also decrease costs by bringing more precision to projects and bidding processes and avoiding cost overruns. Further, the appellant submits that the disclosure of the draft

report would be a key element of good-faith project management, development, and delivery.

[43] The appellant submits that marking a report as a draft is not a shield protecting it from disclosure and a draft is not a proxy for harms. The appellant submits that if IO is willing to accept a draft report, the public should have access to those drafts. The appellant submits that, moreover, readers of draft reports are able to understand the meaning of a draft and interpret reports, processes, and analyses in this context. She submits that draft reports are also paid for out of public funds and the mere fact that something is labeled draft does not create unique or new harms.

Analysis and findings on part 3

[44] For the reasons set out below, I find that neither IO nor the affected party have provided sufficient evidence to demonstrate that disclosure of the draft report could reasonably be expected to result in any of the harms in sections 17(1)(a), (b), or (c).

Sections 17(1)(a) and (c) prejudice significantly the competitive position and/or result in undue loss

[45] Sections 17(1)(a) and (c) seek to protect information that could reasonably be expected to be exploited in the marketplace.[16]

[46] From its representations, it is clear IO is concerned with disclosure of the affected party's methodologies that are specific to its operations and not known to their competitors. The affected party, however, appears to be concerned that disclosure of the draft version of the report could reasonably be expected to result in damage to its reputation because the draft report has not been subject to its review process and contains information that can be considered as unverified, inaccurate, incorrect, incomplete or unclarified.

[47] I find that disclosure of the draft report could not reasonably be expected to prejudice significantly the affected party's competitive position in the future and result in the affected party experiencing undue loss as contemplated by sections 17(1)(a) and (c).

[48] In determining that the report at issue in this appeal is not exempt under section 17(1), as part 3 of the test has not been met, I agree with and adopt the findings in Order PO-4656. In that order, both IO and the affected party provided similar arguments as in this appeal with respect to similar records, draft reports. The adjudicator found that IO did not provide sufficient evidence to demonstrate how disclosure of the records in that appeal, draft reports prepared by the same affected party as in this appeal for the same project, the Eastern Ontario Correctional Complex, could reasonably be expected to result in the harms contemplated by sections 17(1)(a) and (c).

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

[49] As was the case in Order PO-4656, IO in this appeal raised the anticipated harm of disclosure of confidential methodologies and processes, but did not specify what these methodologies and processes were, how the record at issue contained them, how they have been kept confidential, or what the specific impact of disclosure would be. The adjudicator agreed that disclosure of confidential methodologies or processes could potentially engage sections 17(1)(a) and (c) in some circumstances but stated that this cannot simply be asserted; some degree of evidence of the harm must still be provided.

[50] In Order PO-4656, the adjudicator also did not accept the affected party's argument that harm will occur because the report is not a final version, disclosure of which could reasonably be expected to lead to reputational harm on the part of the affected party. The adjudicator noted that the draft reports were clearly labeled as drafts and found that any parties receiving these records would be aware that they are drafts, mitigating any potential reputational harm following disclosure. In any case, he found that the affected party did not provide any evidence of how this harm would occur, or what specifically in its records would lead to such harm. The adjudicator stated that accepting the affected party's argument could result in any draft document supplied to the government being exempt from disclosure, even without detailed evidence of the potential for the harms set out in section 17(1), thereby undermining purpose of the *Act*.

[51] As was the case in Order PO-4656, in this appeal, any party receiving a copy of the report would be aware that it is a draft, mitigating any potential reputational harm following disclosure. In this appeal, as was the case in Order PO-4656, the affected party did not provide any evidence of how harm could reasonably be expected to occur from disclosure of the report in draft form, or what specifically in it would lead to such harm. I agree with the adjudicator in Order PO-4656 that accepting this argument would result in any draft document supplied to the government being exempt from disclosure, even without detailed evidence of the potential for the harms set out in section 17(1).

[52] Specifically, I do not accept that disclosure of the draft version of the report could result in undue loss to the affected party by resulting in a loss of its reputation because clients and potential clients erroneously conclude that its work product is deficient in some way. As each page of the report is clearly marked "DRAFT", it is clear that the record is a draft, not a final, report.

[53] Therefore, I do not accept that disclosure of the draft report could reasonably be expected to prejudice significantly the affected party's competitive position and result in the affected party experiencing undue loss as contemplated by sections 17(1)(a) and (c).

Section 17(1)(b) – similar information no longer being supplied

[54] IO also submits that disclosure of the draft report could reasonably be expected to result in similar information no longer being supplied to IO or similar institutions because vendors will become hesitant to provide services to IO fearing that their reports will be made available to the public as contemplated by section 17(1)(b).

[55] The adjudicator in Order PO-4656 also considered whether disclosure of the draft reports in that appeal could reasonably be expected to result in similar information no longer being supplied to IO. In finding that neither IO nor the affected party provided sufficient evidence to establish that the harm in section 17(1)(b) could reasonably be expected to occur from disclosure of the draft reports, the adjudicator stated that it was not unreasonable to expect that parties dealing with the government understand that their submissions to the government may be made public. In support of his statement, he referenced IO's website which he noted provides that documents are routinely published and are otherwise subject to the *Act*.[17]

[56] I agree with the reasoning of the adjudicator in Order PO-4656 and adopt it for the purposes of this appeal.

[57] In this appeal, I note that although section 17(1)(b) was claimed by IO, the affected party did not make any representations on the application of that section in its representations. Other than similarly stating that disclosure of the draft report could reasonably be expected to result in similar information no longer being supplied to IO, IO does not provide any evidence to support its position. In the absence of sufficient evidence to demonstrate the reasonable expectation of harm resulting from similar information not being supplied, I find that the harm contemplated by section 17(1)(b) has not been established. Moreover, as stated by the adjudicator in Order PO-4656, I also find that it is not unreasonable to expect that parties dealing with the government understand that their submissions to the government may be made public.

[58] Therefore, I find that neither IO nor the affected party have provided sufficient evidence to demonstrate that the harms under sections 17(1)(a), (b) or (c), could reasonably be expected to occur were the draft report disclosed. Accordingly, part 3 of the test under section 17(1) has not been established. As all three parts of the test must be met for section 17(1) to apply, the report is not exempt under section 17(1).

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

[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.[18] IO has claimed that sections 18(1)(a), (c), (d), (e) and (g) apply to the draft report. These sections read:

> A head may refuse to disclose a record that contains,

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[17] See https://www.infrastructureontario.ca/en/what-we-do/major-projects/our-p3-model/approach-to-transparency/

[18] *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.

> (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;
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> …
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> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
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> (d) information whose 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;
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> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government 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;
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> …[.]

[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 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.*[19]

[61] The institution must show that the risk of harm is real and not just a possibility.[20] 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.[21]

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[19] Orders MO-2363 and PO-2435.
[20] *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[21] *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.

[62] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.[22]

Section 18(1)(a): information with monetary value that belongs to government or an institution

[63] 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.[23]

[64] For section 18(1)(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;
2. belongs to the Ontario Government or an institution; and
3. has monetary value or potential monetary value.

Part 1: type of information

[65] The types of information listed in section 18(1)(a) have been discussed in prior orders as referenced above regarding section 17(1).

Representations of IO on part 1 of the section 18(1)(a) test

[66] In support of its position that section 18(1)(a) applies to the draft report, IO relies on the same representations it submitted in support of its claim that section 17(1) applies. IO submits that the information contained in the draft report is scientific, technical and commercial in nature, and thus meets the first part of the test.

Findings on part 1 of the section 18(1)(a) test

[67] As set out above, based on my review of the draft report and IO's representations, I agree that the draft report contains scientific, technical, and commercial information. The draft report contains technical information about the site specifications, and scientific information about the condition of the land and the species of animals on the site, as well as commercial information about the development of the land into a correctional centre. All this information in the draft report was prepared by the affected party's experts that include engineers and environmental scientists. Therefore, I find that part 1 of the test under section 18(1)(a) has been met.

[22] Orders MO-2363 and PO-2758.
[23] Orders M-654 and PO-2226.

Part 2: belongs to

[68] For information to "belong to" an institution for the purpose of the section 18(1)(a) test, the institution must have some proprietary interest in it, either:

- "intellectual property" in the information, such as copyright, trade mark, patent or industrial design, or
- another type of proprietary interest that the law says could be damaged if another party were to misappropriate the information.

[69] The type of information "belonging" to an institution is information that has monetary value to the institution because it has spent money, skill or effort to develop it. Some examples are trade secrets, business-to-business mailing lists,[24] customer or supplier lists, price lists, or other types of confidential business information. If this information is consistently treated in a confidential manner, and its value to the institution comes from it not being generally known, the information will be protected from misappropriation by others.[25]

Representations on part 2 of the section 18(1)(a) test

[70] IO submits that the information contained in the report belongs to it. As an agent for the Ontario Government in this project, IO submits that it has a proprietary interest in the report as it retained qualified specialists to complete the natural heritage assessment of the site for the project and provide a report. IO states that the project has yet to start the public procurement process, and thus the content of the report at issue is very sensitive and confidential. It submits that the disclosure of this information to the public would adversely affect the fairness of the upcoming procurement process and provide an unfair advantage to those who have early access to the record. Consequently, it submits that its proprietary interest in the draft report could be damaged if it were to be misappropriated.

[71] The appellant submits that the draft report has not consistently been treated in a confidential manner, and there is little to no value from it not being known.[26] She submits that IO has not provided convincing evidence to support its position that the information about the natural heritage assessment in the draft report could reasonably be expected to be misappropriated by others. She submits that contractors and experts involved in the large capital project to which the report relates would need to know this type of information as part of project management and good-faith procurement.

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[24] Order P-636.
[25] Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.
[26] The appellant relies on Order PO-1736.

Analysis and findings on part 2 of the section 18(1)(a) test

[72] In my view, IO has failed to adduce sufficient evidence to establish that the information in the draft report "belongs" to it for the purposes of part 2 of the section 18(1)(a) test. Though there is no dispute that IO retained the affected party to prepare the report, IO's representations fall short of demonstrating that its interest in the report is one that the law would recognize as a proprietary or substantial interest. The IPC has found that simply spending money to have the report prepared is not sufficient.[27]

[73] I find that the draft report does not "belong to" IO as contemplated by section 18(1)(a). Instead, the draft report is merely an assessment of the natural heritage conditions at the site, and I do not accept that IO has established that it has value to IO from it not being generally known. As such, I do not accept that IO has a type of proprietary interest in the draft report that could be damaged if another party were to misappropriate the information in this record.

[74] As all three parts of the test must be met for section 18(1)(a) to apply, I find that the information at issue does not qualify for exemption under section 18(1)(a) of the *Act*.

[75] As I have found part 2 of the test under section 18(1)(a) has not been met, it is not necessary for me to decide whether part 3 of the test is met and I decline to do so.

Sections 18(1)(c) and (d): prejudice to economic interests or competitive position and injury to financial interests

[76] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. It recognizes that institutions may have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse to disclose information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[28] Section 18(1)(c) requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[29]

[77] Similarly, section 18(1)(d) applies if the information in the records 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.

Representations

[78] IO submits that, as contemplated by section 18(1)(c), it would be directly and severely prejudiced if the draft report were disclosed given that it contains sensitive information that relates directly to the project, which has yet to commence a procurement

[27] See Orders M-862 and MO-3545
[28] Orders P-1190 and MO-2233.
[29] Orders PO-2014-I, MO-2233, MO-2363, PO-2632, and PO-2758.

process. It submits that disclosure of the draft report would allow parties, including potential bidder(s), unfair insight into sensitive commercial, technical, and scientific information. IO submits that this information, if disclosed, could provide an unfair competitive advantage to other potential bidders, and consequently lead to an unfair procurement process.

[79] IO submits that if the draft report is disclosed, its ability to negotiate with prospective business partners in a competitive manner would be adversely impacted. In addition, it submits that disclosure of the draft report could impact pricing from suppliers materially and jeopardize the fair procurement process.

[80] IO submits that disclosure of the draft report could reasonably be expected to be injurious to the financial interests of the Government of Ontario as contemplated by section 18(1)(d). It submits that if the report is disclosed, the Government of Ontario could reasonably be expected to be adversely affected in terms of its purchasing power facing high purchasing prices imposed by suppliers.

[81] IO submits that the content of the report directly relates to anticipated contract negotiations because disclosure of the detailed heritage and feasibility assessment of the site could reasonably be expected to result in a competitive disadvantage to the Government of Ontario. IO submits that the disclosure of this information would prejudice the Government of Ontario's ability to enter the marketplace as making the information publicly available would weaken the Government of Ontario's competitive position.

[82] IO further submits that, due to its draft nature, the draft report contains information that is subject to further change. It submits therefore, that disclosure of the report could provide the public with misleading information about the project and lead to unfavourable and unpredicted outcomes, which could be detrimental to the economic interest of the Government of Ontario.

[83] The appellant submits that IO's representations on the harms identified in sections 18(1)(c) and (d) are speculative. She submits that disclosure of the report would not provide parties other than the Government of Ontario with an unfair competitive advantage or have consequences for the procurement process. She submits that the disclosure of the report would not negatively impact the Government's competitive position or lead to more costs for the Government. On the possibility of higher purchase pricing, the appellant submits that a fundamental fact of the marketplace is ignored, that if information in the report is disclosed and could result in increased costs, it could also decrease costs by bringing more precision to projects and bidding processes and avoiding cost overruns.

Analysis and Findings on sections 18(1)(c) and (d)

[84] I find that IO's representations submitted in the context of this appeal are speculative and find that IO has not provided sufficient evidence to establish that

disclosure of the report could result in the harms contemplated by sections 18(1)(c) and (d). In its representations, IO makes no reference to the actual information in the record, specifically how disclosure of any information in the natural heritage assessment in the report could impact contract negotiations.

[85] IO also does not provide sufficient evidence to establish how the Government of Ontario's ability to reasonably enter the marketplace would be prejudiced or that its purchasing power would be weakened. It does not explain what marketplace IO is trying to enter or what items the Government of Ontario is trying to purchase such that disclosure of the specific information in the report would weaken the Government of Ontario's competitive position or harm IO's or the Government of Ontario's financial or economic interests.

[86] In Order PO-4656, IO provided similar submissions as it did in this appeal regarding the draft records about the project. In that order, the adjudicator agreed with the appellant's position that IO has not provided detailed evidence of harms following disclosure. He stated:

> IO's general position is that additional information could adversely impact the procurement process and lead to higher costs to IO and the Ontario Government. While this could be a theoretical possibility for any kind of information, for it to be more than a speculative assertion there must be some evidence provided, or at the very least an argument, that links the harm to the nature of the records.
>
> IO has not provided this, and reviewing the records, it is not clear what specific information in them would adversely affect the procurement process or otherwise harm the economic or financial interests of the province. IO's representations, if accepted, would mean that any record that provides information about a project that has not yet commenced procurement could be exempt under section 18(1)(c) or (d). Considering the lack of evidence of harm, or even specific arguments that address the nature of the records, I find that sections 18(1)(c) and (d) do not apply.

[87] I agree with and adopt the findings of the adjudicator in Order PO-4656. As set out in Order PO-4656, if I were to accept IO's argument, it would mean that information about a project that has not yet commenced procurement could be exempt under sections 18(1)(c) or (d) by the mere fact that procurement has not commenced. I do not accept that the fact that procurement has not commenced establishes the harms contemplated by sections 18(1)(c) and (d).

[88] For the reasons set out above, I find that IO has not established that disclosure of the report could reasonably be expected to prejudice the economic interests or competitive position of IO under section 18(1)(c). I also find that IO has not established that disclosure of the report 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 under section 18(1)(d).

Section 18(1)(e): positions, plans etc. to be applied to negotiations

[89] Section 18(1)(e) is designed to protect the Ontario Government or an institution's position in negotiations. For it to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution or the Government of Ontario.[30]

[90] The IPC has defined "plan" as a "formulated and especially detailed method by which a thing is to be done; a design or scheme."[31] In fact, all of the terms "positions, plans, procedures, criteria or instructions" suggest a pre-determined course of action with an organized structure or definition.[32]

[91] The information must relate to a strategy or approach to negotiations. It is not enough for the information to simply reflect mandatory steps to follow in a negotiation.[33]

[92] Section 18(1)(e) applies to financial, commercial, labour, international or similar negotiations.

Representations on section 18(1)(e)

[93] IO submits that section 18(1)(e) applies to the draft report because it contains detailed analyses of the land for the project, feasibility of the land development, heritage assessment and recommendations, and drawings of the project lands. IO submits the report clearly outlines a plan, a position, and criteria for the project's construction and development. Therefore, it submits that the first part of the section 18(1)(e) test has been met.

[94] IO submits that the second part of the section 18(1)(e) test has also been met given that the plans, positions, and criteria set out in the draft report are intended to be applied directly to negotiations between IO and prospective business partners. It submits

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[30] Order PO-2064.
[31] Orders P-348 and PO-2536.
[32] Orders PO-2034 and PO-2598.
[33] Orders PO-2034 and PO-2598.

that since the project is in the early stages and has yet to commence the procurement process, the information in the draft report provides crucial insight into IO's strategy or approach to be applied in negotiations with parties regarding the subject matter.

[95] IO submits that the last two parts of the test are also met. IO submits that the draft report is to be used in upcoming negotiations that will be carried out upon commencement of procurement for the project, and also, that these negotiations will be conducted by and on behalf of the Government of Ontario and IO.

[96] The appellant submits that that the draft report does not fully meet the criteria of being a plan, position, procedure, criteria, or instruction, rather it is better characterised as a study, assessment, analysis, or report that presents facts, analysis, and perhaps in some instances options, related to natural heritage. She submits that the report is not a pre-determined course of action or a detailed method through which to get things done for the project.

[97] The appellant disputes IO's submission that the information in the report is not intended to apply to negotiations. She relies on Order PO-2064, in which the adjudicator noted the distinction between non-negotiations from negotiations, stating:

> "[non-negotiations are when] the government is merely seeking comments from interested and knowledgeable parties, to assist it in developing legislation that will accomplish its goal and meet with broad acceptance from such parties and the general public. This is to be contrasted with true "negotiations", in which the government and the third party seek to arrive at a legally binding agreement or contract (see, for example, Orders P-454, P-809, P-1437 (native land claims), P-1238 (settlement of litigation), P-1593 (allocation of forest resources), R-98007 (consulting services)."

Analysis and findings on section 18(1)(e)

[98] In this appeal, the report is a natural heritage assessment of the land for the project. I agree with the appellant that the report does not contain positions, plans, procedures, criteria, or instructions that are intended to be applied to negotiations. Instead, from my review, the report is an assessment of the natural conditions at the site with information about the feasibility of developing the site based on those conditions.

[99] Furthermore, IO has not provided information as to what information in the report could be used in negotiations. It has also not provided details about what procurement process is to be undertaken and how the information in the report could be used in that process.

[100] The representations provided by the parties in this appeal are similar to those provided in Order PO-4656. In that order, the adjudicator determined that while the draft records could be said to satisfy part 1 of the above test, he did not agree that they can be classified as "positions, plans, procedures, criteria, or instructions" that are intended

to be applied to negotiations. The adjudicator stated:

> The fact that the procurement process for the project has not yet been initiated does not mean that any records relating to the project are therefore related to negotiations. The records at issue are documents that provide technical information about the nature of the project, but they do not contain information related to any future or ongoing negotiations. While this may provide background information for positions taken in future negotiations (although, even then IO has not specified how the information would inform these positions), this is not sufficient to qualify for exemption under section 18(1)(e).[34]

[101] I agree with and adopt the findings in Order PO-4656 that while the information in the report may provide background information for positions taken in future negotiations, this is not sufficient to qualify for exemption under section 18(1)(e) as the report provides technical information about the nature of the project but does not contain information related to any future or ongoing negotiations. As set out above, for section 18(1)(e) to apply, the information must relate to a strategy or approach to negotiations. It is not enough for the information to simply reflect mandatory steps to follow in a negotiation.[35]

[102] As set out in Order PO-2064, relied on by the appellant, in commissioning the report IO is merely seeking comments from an interested and knowledgeable party, the affected party, on the natural heritage conditions of the site for the project. IO and the affected party are not seeking to arrive at a legally binding agreement or contract.

[103] Therefore, as the report does not contain positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on, or to be carried on, by or on behalf of IO, part 2 of the test under section 18(1)(e) has not been met. Therefore, I find that the report is not exempt under section 18(1)(e).

Section 18(1)(g): premature disclosure of proposed plans, policies or projects

[104] 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

[34] See, for example, Order M-862 where background information was found to not qualify for exemption under the municipal equivalent of the *Act*.
[35] Orders PO-2034 and PO-2598.

ii. undue financial benefit or loss to a person.[36]

[105] The term "pending policy decision" refers to a situation where a policy decision has been reached but has not yet been announced.[37]

Representations on section 18(1)(g)

[106] IO submits that part 1 of the test has been met as at the preliminary stage of the proposed development of the project, the Government of Ontario ordered a natural heritage assessment to be prepared. It submits that the draft report contains information in draft form, and it would be premature to disclose such information to the public.

[107] IO further submits that part 2 of the test is also met, considering that the report is a draft, the disclosure of its content would be premature at this stage prior to procurement. It submits that it is more than reasonable to conclude that disclosure would have adverse financial consequences on the Government of Ontario and IO. IO submits that the report is not final and remains open for further revision and modification by the parties at any time and in no event should be disclosed and relied on by the public. Thus, IO submits that its final access decision should be upheld by the IPC.

[108] The appellant submits that the substantive policy decision on the construction of the Eastern Ontario Correctional Complex has been reached and announced.[38] She acknowledges that while the pending policy decision is a key part of the test, pending procurement is distinct from a pending policy decision and, as a result, part 2 of the test for section 18(1)(g) has not been met.

[109] The appellant submits that the consequences of disclosing the draft report are not pertinent to the analysis under section 18(1)(g) and submits that if IO was willing to accept drafts, the public should be able to review those drafts. She submits that draft reports are paid for by public funds and the mere fact that something is labeled draft does not create unique or new harms. She submits that when assessing the draft status and harms, the public and experts alike are capable of understanding that reports may be produced in draft before they become final. She submits that the mere fact that responsive report is in draft form does not preclude its release and does not mean that it falls clearly with the section 18(1)(g) analysis.

Analysis and findings on section 18(1)(g)

[110] In Order PO-4656, the adjudicator determined that part 1, but not part 2, of the test had been met. For part 1, he found that the records relate to the proposed project.

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[36] 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.).
[37] Order P-726.
[38] The appellant relies on Order P-726.

[111] I also find that part 1 of the test has been met as the record contains information about a proposed project of IO, the Eastern Ontario Correctional Centre.

[112] Regarding part 2 of the test, I find that IO has not established, as claimed, that disclosure of the record could reasonably be expected to result in disclosure of a premature policy decision.

[113] In Order PO-4656, the adjudicator found that the records provide some insight into how the project will be executed, they do not reveal any additional proposed plans, policies, and projects of an institution. Rather, they provided information about how already proposed plans, policies, and projects will be achieved.

[114] In this appeal, IO has also not provided representations that demonstrate that the report contains a pending policy decision, nor is the same apparent from my review. As well, as was the case in Order PO-4656, IO has not specified how the report would impact the procurement process in any meaningful way.

[115] IO claims that disclosure of the report could reasonably be expected to result in undue loss to it and the Government of Ontario given that it is in draft form and prepared prior to the procurement process. It is not sufficient for IO to merely assert that the harm set out in section 18(1)(g) would reasonably be expected to occur. For the exemption to apply, there must be detailed evidence of the harm, and in my view, IO has not provided any in this appeal.

[116] Accordingly, I find that disclosure of the report could not reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to IO or the Government of Ontario.

[117] As part 2 of the test under section 18(1)(g) has not been met, I find the draft report is not exempt under that exemption.

Conclusion

[118] As I have found the report is not exempt from disclosure under any of the claimed exemptions in this appeal, there is no need for me to consider the application of the public interest override in section 23. Accordingly, I will order IO to disclose the draft report to the appellant.

Issue C: Did IO conduct a reasonable search for records?

[119] During mediation, the appellant advised that she believes that IO should have located additional records responsive to her request.

[120] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for

records as required by section 24 of the *Act*.[39] If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, it may order the institution to conduct another search for records.

[121] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.[40]

[122] The *Act* does not require the institution to prove with certainty that further records do not exist. However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;[41] that is, records that are "reasonably related" to the request.[42]

[123] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.[43] The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[44]

Representations

[124] In its representations, IO sets out the appellant's request in full, which reads:

> During a public engagement session concerning the proposed Eastern Ontario Correctional Complex in Kemptville held on 17 November 2021, officials from the Ministry of Solicitor General and Infrastructure Ontario provided details about the timeline for the project. Their presentation included a slide entitled "Due Diligence Activity Timelines" that included "The following site works are required to inform the design of the facility on the property". Tasks noted on the slide included "Planning / Site Servicing / Transportation Reporting" ("field investigations are complete"), "Land Survey
>
> Topographic Plan" ("plans complete"),"Geotechnical / Environmental Drilling" ("fieldwork is complete"), "Designated Substance Surveys" ("fieldwork is complete"), "Archaeological Investigation" ("stage 3 investigation is ongoing"), "Natural Heritage Survey" ("fieldwork is complete"), and "Class Environmental Assessment (EA)" (6 months).

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[39] Orders P-85, P-221 and PO-1954-I.
[40] Order MO-2246.
[41] Orders P-624 and PO-2559.
[42] Order PO-2554.
[43] Orders M-909, PO-2469 and PO-2592.
[44] Order MO-2185.

> I am requesting all records held by Infrastructure Ontario related to the "Natural Heritage Survey" fieldwork that has been completed at the proposed site for the Eastern Ontario Correctional Complex in Kemptville/North Grenville.
>
> Timeframe 2020-03-01 to 2022-01-15.

[125] IO submits that because the request was very detailed and specific it determined that there was no reason to request further clarification from the appellant. IO submits that based on the wording of the request it had sufficient information to search for responsive records in its custody and control and that it did not in any way limit the scope of the search.

[126] IO submits that it ran a comprehensive record search to identify any responsive records. It submits that on receipt of the request, the *FIPPA* Specialist, who has the extensive experience and knowledge required for handling IO's freedom of information requests, reached out to the relevant departments and requested that they run full searches of all records, including archived records. IO submits that each record was then reviewed to see whether it fit the criteria of the request and whether any exemptions or exclusions applied to it.

[127] In support of its representations, IO submitted an affidavit of the employee at IO, a law clerk, who supported the record search processes. The affidavit confirms that the law clerk's responsibilities include assisting a senior legal counsel with processing access to information requests, including this one.

[128] The law clerk attests that in response to the request, she sent an email to IO's business unit requesting that it conduct a search for any responsive records. The law clerk attests that the business unit informed them that after a thorough search of all records that were in IO's custody and control, it located only one responsive record, the draft report.

[129] The appellant did not specifically address the search issue in her representations. However, she advised that she continues to challenge the fact that only one document was found in response to her request.

Analysis and findings

[130] As noted above, IO provided both detailed representations and an affidavit of the law clerk, an experienced employee knowledgeable in the subject matter of the request, in support of its search efforts seeking to locate responsive records.

[131] I find that IO has provided sufficient evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.

[132] The appellant did not provide any representations on the issue of the reasonableness of IO's search, and has not identified any records that she believes that may exist other than the one located by IO, the report at issue in this appeal. Her only concern was that only one responsive record was located by IO but she did not provide any information as to what other records should have been located.

[133] As mentioned above, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist. In this appeal, the appellant has not provided a reasonable basis that additional records exist.

[134] I find that IO has made a reasonable effort to locate records that are reasonably related to the request and it has complied with its obligations under section 24 the *Act*. I uphold its search as reasonable.

ORDER:

1. I order IO to disclose the report to the appellant by **August 27, 2025**, but not before **August 22, 2025**.

2. In order to verify compliance with order provision 1, I reserve the right to require IO to provide me with a copy of the report disclosed to the appellant.

3. I uphold IO's search for records as reasonable.

Original Signed by: July 23, 2025

Diane Smith
Adjudicator