Information and Privacy
Commissioner of Ontario
Commissaire à l'information et à la
protection de la vie privée de l'Ontario

VIA ELECTRONIC MAIL & ONLINE SUBMISSION

November 18, 2024

Laurie Scott
Chair of the Standing Committee on Heritage, Infrastructure and Cultural Policy
Legislative Assembly of Ontario
99 Wellesley Street West
Room 1405, Whitney Block
Queen's Park
Toronto, ON M7A 1A2

Dear Chair Scott,

RE: Written Submission on Schedule 2 of Bill 212: *Reducing Gridlock, Saving You Time Act, 2024*

I am writing to express my significant concerns about Schedule 2 of Bill 212, the *Building Highways Faster Act, 2024*. Schedule 2 proposes to expedite the construction of "priority highway projects" by providing the Minister of Transportation with new authorities to collect "information concerning infrastructure" from persons that own or operate infrastructure potentially affected by priority highway projects.

"Priority highway projects" include Highway 413 and the Bradford Bypass: projects which have been the subject of ongoing media attention.[1] Despite the significant public interest in these projects, sections 8(5) and 8(6) of Schedule 2 would allow third party records received by the Minister, and in turn, records shared by the Minister with other institutions, to be insulated from access to information.

As an independent officer of the Legislature, the Information and Privacy Commissioner of Ontario (IPC) has a statutory mandate to protect and promote the access and privacy rights of Ontarians. As part of that mandate, I offer comment on the implications of proposed legislative schemes such as Bill 212, with the goal of strengthening the privacy protections and access rights afforded to Ontarians under the law.

An open and accountable government enables its citizens to participate in, and remain informed about, its activities and decision-making processes. This fosters trust and confidence in public institutions, which is critical to a healthy democracy. Ontario's *Freedom of Information and Protection of Privacy Act* (FIPPA) enshrines the public's right of access to information in accordance with three fundamental principles set out in its purpose statement at section 2:

[1] See: https://globalnews.ca/news/8874758/ford-government-controversial-highway-bradford-bypass/
https://www.cbc.ca/news/canada/toronto/413-indigenous-consultation-1.7378223

(i) information should be available to the public,
(ii) necessary exemptions from the right of access should be limited and specific, and
(iii) decisions on the disclosure of government information should be reviewed independently of government.

In short, sections 8(5) and 8(6) of Schedule 2 of Bill 212 fly directly in the face of these long-held democratic principles and dangerously erode Ontarians' right to information within the custody or control of public institutions.

As proposed, sections 8(5) and 8(6) would allow the government to *deem* information received under the *Act* to have been supplied in confidence and that, if disclosed, "...could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency." Essentially, these provisions would gut the long and well-established test of the "third-party information" exemption at section 17(1) of FIPPA.

Section 17(1) of FIPPA is intended to protect from disclosure certain confidential records that third parties, such as commercial businesses, provide to government institutions. For institutions to validly claim the exemption at section 17(1), they must demonstrate that the information being withheld meets all parts of the seminal three-part test set out by the Supreme Court of Canada, and consistently followed by the IPC through decades of jurisprudence[2]:

1. The record must contain certain specific types of business information.
2. The information must have been supplied in confidence to the government.
3. There must be a reasonable expectation of harm if the information were to be disclosed.

Under current law, records that legitimately meet these criteria are already protected from disclosure. What Bill 212 purports to do is protect records that *do not* meet these criteria.

By *deeming* information related to infrastructure or priority highway projects to have been supplied in confidence, and that, if disclosed, could reasonably be expected to cause harm, Bill 212 would permit institutions to baldly assert – *without any longer having to satisfy* – the second and third parts of the three-part test of section 17(1) of FIPPA. If a member of the public wished to challenge the government's decision to withhold these records by appealing to the IPC's tribunal, Bill 212 would effectively foreclose my office from independently verifying whether these criteria were in fact met, with the likely result of categorically shielding these records from public scrutiny.

Furthermore, section 2 of Schedule 2 of the Bill defines "information concerning infrastructure" to include "…any other information the Minister considers necessary for the purposes of this Act." This definition significantly broadens the scope of information that could potentially be shielded from disclosure under sections 8(5) and 8(6).

[2] Most recently, in IPC Order PO-4552.

In sum, sections 8(5) and 8(6) of Schedule 2 run directly counter to the three fundamental principles set out in the very purpose clause of Ontario's FIPPA by: 1) deeming "information concerning infrastructure" to be unavailable to the public by default, 2) expanding the current scope of the section 17(1) exemption to an absurdly broad result, and 3) effectively shielding the government's claims from any independent review.

RECOMMENDATION

I urge the Legislature to remove sections 8(5) and 8(6) from Schedule 2 of Bill 212 in their entirety.

As currently worded, these provisions undermine Ontarians' transparency and access rights, and risk eroding Ontarians' trust in government. The language and sentiment of these proposed provisions would serve to unjustifiably remove Ontarians' ability to legitimately access records of government projects, including records that are clearly the subject of significant public interest. The proposed provisions would also effectively prevent the IPC's tribunal from meaningfully adjudicating whether Ontarians' access rights have been upheld in these cases.

Moreover, sections 8(5) and 8(6) dangerously chip away at Ontarians' right of access to information under FIPPA by creating *ad hoc* statutory override provisions under parallel laws that are not apparent or transparent to the average person.

Sustaining public sector transparency, a long-held staple of Ontario law, is crucial to maintaining public trust, upholding democratic ideals and combatting mis- and disinformation. More than ever, truth and transparency hang in the balance of this brave new world of social media and digital technologies. Governments should seek to reduce barriers to accessing information, rather than create new barriers such as those proposed under Schedule 2 of this bill.

My office stands ready to answer any questions or provide any further clarification as necessary to assist the legislative process.

In the spirit of openness and transparency, this letter will be posted on the IPC's website in both English and French.

Sincerely,

Patricia Kosseim, Commissioner