Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-3392

Appeals PA12-414-2 and PA12-475

Metrolinx

September 12, 2014

Summary: This order disposes of the issues raised as a result of an access request made under the *Freedom of Information and Protection of Privacy Act* to Metrolinx for copies of records which form part of, or relate to, the PRESTO Master Supply and Services Agreement between the Ministry of Transportation and a third party. Metrolinx granted access to the responsive records, in part. Both the requester and the third party appealed Metrolinx's access decision to this office, resulting in two appeal files being opened. In this order, the adjudicator upholds Metrolinx's decision in appeal PA12-414-2 and dismisses the appellant's appeal, finding that section 17(1) applies to exempt portions of the third party appellant's proposal, final design review and project blueprint. With respect to appeal PA12-475, the adjudicator dismisses the third party appellant's appeal and orders Metrolinx to disclose some records, in whole and others, in part. Lastly, in both appeals, she finds that the public interest override in section 23 does not apply to the information exempt under section 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1) and 23.

Orders Considered: Orders MO-1706 and MO-3058-F.

Cases Considered: *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario*, 2013 ONSC 6776 (CanLII).

OVERVIEW:

[1] This order disposes of the issues raised as a result of an access request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to Metrolinx for copies of records which form part of, or relate to, the PRESTO Master Supply and Services Agreement between the Ministry of Transportation and a third party.

[2] Upon receiving the request, Metrolinx provided notification to nine third parties, one of which made submissions to Metrolinx. Metrolinx then issued a decision to the third party advising that, of the records pertaining to it, partial access to some records would be granted to the requester, and full access would be granted to other records.

[3] Metrolinx subsequently issued a decision to the requester, advising him that partial access would be provided to the records. Metrolinx denied access to other records or portions thereof, claiming the application of the mandatory exemption in section 17(1) (third party information) of the *Act*.

[4] The third party (now the third party appellant) appealed Metrolinx's decision to provide partial access to some of the records, and full access to others. As a result, appeal file PA12-475 was opened. The requester (now the appellant) appealed Metrolinx's decision to deny access to parts of the records. As a result, appeal file PA12-414-2 was opened.

[5] During the mediation of the appeals, the third party appellant provided consent to disclose further records to the appellant. As a result, Metrolinx disclosed those records to the appellant. The appellant raised the possible application of the public interest override provision in section 23 of the *Act*. Accordingly, the application of this provision was added as an issue in both appeals.

[6] The appeals were then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from Metrolinx, the appellant and the third party appellant, which were shared in accordance with this office's *Practice Direction 7*. In its representations, the third party appellant states that it does not object to the disclosure of the software escrow agreement. As consent has been provided by the third party appellant to disclose the software escrow agreement(s), Metrolinx should disclose these to the appellant, if it has not already done so.

[7] For the reasons that follow, in appeal PA12-414-2, I uphold Metrolinx's decision and dismiss the appellant's appeal. In appeal PA12-475, I uphold Metrolinx's decision, in part and dismiss the third party appellant's appeal. I do not find that the public interest override in section 23 applies to the withheld information. I order Metrolinx to disclose certain records to the appellant, as set out in the order provisions.

RECORDS:

PA12-414-2

[8] The records at issue relate to the PRESTO Master Supply and Services Agreement and consist of the third party appellant's proposal, the final design review and the project blueprint. These records were disclosed to the appellant, in part.

PA12-475

[9] The records at issue relate to the PRESTO Master Supply and Services Agreement and consist of change notices, detailed feasibility notices, change order agreements and attachments.

ISSUES:

A: Does the mandatory exemption at section 17(1) apply to the records?

B: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17(1) exemption?

DISCUSSION:

Background

[10] In 2002, the Ministry of Transportation, in conjunction with GO Transit and the Greater Toronto and Hamilton Area (the GTHA) municipalities, began researching the development of a regional farecard, now called PRESTO. In 2006, the Ministry of Transportation signed a 10-year contract with a vendor (the third party appellant) to design, develop and operate PRESTO for the GTHA. Metrolinx was then established as an agency of the Ontario government to provide leadership in the coordination, planning, financing and development of an integrated transportation network in the GTHA. In 2009, Metrolinx assumed carriage of the PRESTO contract with the third party appellant.

[11] In 2007, the City of Ottawa approved the implementation of PRESTO on its transit system based on agreed functionality to be provided by PRESTO. In 2009, the Toronto Transit Commission (TTC) also conditionally approved the adoption of PRESTO, subject to the satisfactory resolution of some key issues. As a result, a new system called PRESTO Next Generation (PRESTO NG) was developed. The third party appellant provides and controls the central system and other infrastructure for PRESTO's

operation. Changes are made through change orders to the existing contract, which are agreed to by the parties to the agreement.[1]

Issue A: Does the mandatory exemption at section 17(1) apply to the records?

PA12-414-2

[12] Metrolinx is claiming the application of section 17(1) to deny the appellant access to portions of:

- The third party appellant's proposal;
- The final design review; and
- The project blueprint.

[13] The third party appellant states that it fully supports Metrolinx's access decision and representations made with respect to these records.

PA12-475

[14] The third party appellant filed an appeal of Metrolinx's decision to disclose the following records to the appellant:

- The change notice documents, in whole;
- The schedule, in/out scope, assumptions, risks, service level agreement impact, and contract or other references in the detailed feasibility notices;
- The total price in the detailed feasibility notices; and
- The total price in the change order agreements.

[15] The third party appellant has agreed to release the date, change description and approval signatures in the change notices and change order agreements.

[16] In both appeals, section 17(1) is claimed by Metrolinx and the third party appellant respectively, and the appellant seeks access to all of the records at issue. Section 17(1) states, in part:

> 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, where the disclosure could reasonably be expected to,

[1] The background information was obtained from the 2012 Annual Report of the Office of the Auditor General of Ontario.

> (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

[17] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[3]

[18] For section 17(1) to apply, the institution and/or the third party 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; and
>
> 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: type of information

[19] The relevant types of information listed in section 17(1) have been discussed in prior orders:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or

---

[2] *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.).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

information contained or embodied in a product, device or mechanism which

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[4]

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[5]

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[6] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[7]

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[8]

Representations in PA12-414-2

[20] Metrolinx submits that the third party appellant's proposal contains commercial, financial and technical information. In particular, Metrolinx describes the proposal as containing:

---

[4] Order PO-2010.
[5] *Ibid*.
[6] *Ibid*.
[7] Order P-1621.
[8] See note 3.

- Commercial information, as it relates solely to the buying/selling of services. The proposal outlines the services offered by the third party appellant for the design, build and operation of the PRESTO e-fare system;
- Financial information, including a "financial proposal" consisting of financial data, proposed capital and operating costs, summary of costs and a breakdown of costs by activity; and
- Technical information, as the proposal outlines the proposed technical solutions to be adopted for the design, build and operation of the PRESTO e-fare system.

[21] Metrolinx also submits that the final design review contains technical information, as this record was developed in response to the technical specifications and functions requirements in the RFP, and reveals information pertaining to the design, operation and maintenance of the PRESTO electronic fare system.

[22] With respect to the project blueprint, Metrolinx states that this record was in response to the fare system technical specifications in the RFP, and that it contains technical and financial information. Specifically, the record contains the plan, schedule and technical specifications for the PRESTO electronic fare system, as well as the costs of the project delivery plan.

[23] The appellant concedes that the proposal may contain some commercial or financial information, but that proposals do not typically contain scientific or technical information because the terms and specifications set out in RFP's are largely dictated by the government agency issuing the RFP. The appellant also submits that the final design review may contain technical information, but it is not clear that this information is proprietary to the third party appellant. With respect to the project blueprint, the appellant states that it is not clear that it contains technical information that is proprietary to the third party appellant, as it was intended to be developed as a collaborative effort between Metrolinx and the third party appellant, based on the requirements in the RFP. The appellant further states:

> Given that the Project Blueprint as not developed until after the [third party appellant's] Proposal was accepted as the winning bid and after the Agreement was entered into, any costing details contained therein should not be considered financial information proprietary to [the third party appellant] for the purposes of section 17(1), as they would not likely disclose cost accounting methods, pricing practices, profit and loss data, or overhead and operating costs.

Representations in PA12-475

[24] As previously stated, the third party appellant filed an appeal of Metrolinx's decision to disclose the following records to the appellant:

- The change notice documents, in whole;
- The schedule, in/out scope, assumptions, risks, service level agreement impact, and contract or other references in the detailed feasibility notices;
- The total price in the detailed feasibility notices; and
- The total price in the change order agreements.

[25] Metrolinx has agreed to withhold the following information from the above records:

- The solution description and required equipment and materials in the detailed feasibility notice;
- The pricing summary and payment terms in the detailed feasibility notice – finance;
- The unit prices in the change order agreement; and
- Attachments containing fee schedules, presentations and payment frameworks.

[26] Metrolinx submits that the information it proposes to withhold includes technical data that is proprietary to the third party appellant, and its contractors, such as various technical solutions to be implemented. There is also financial information in some of the records, outlining the costs associated with implementing proposed changes, unit pricing, fee schedules and payment frameworks.

[27] The third party appellant describes the records as follows:

- The change notices are created to initiate the change of project scope of the main agreement or work orders;
- The detailed feasibility notices are responses to the change notices and contain a detailed description of the particular solution to be provided by the third party appellant;
- The detailed feasibility notices – finance contain a breakdown of the total fees to implement the changes outlined in the detailed feasibility notices. This information is outside the boundaries of the financial information contained in the main agreement; and
- The change order agreement is an agreement drafted by the third party appellant to cover additional work orders that were not covered by the main agreement.

[28] The third party appellant argues that the change notices and detailed feasibility notices contain both trade secrets and technical information, as they describe the internal processes and methodology of delivering an electronic ticket system solution, as well as each step of the process, which are identified and described in detail. The detailed feasibility notices – finance and the change order agreements, the third party appellant submits, contain both commercial and financial information, as they provide the list of deliverables with a payment milestone for each, and also contain pricing information in relation to the solutions designed by it. The third party appellant states:

> Although this information is described in the [detailed feasibility records – finance] as "Total Fees", the information constitutes a breakdown of unit prices for each corresponding solution designed, rather than the global amounts expended on the PRESTO project.

[29] The appellant submits that it is unlikely that the change notices and detailed feasibility notices contain trade secrets, given that they are intended to be foundational documents which effectively amend the agreement to establish new performance terms. However, the appellant concedes that the change notices, detailed feasibility notices and change order agreements would likely contain some commercial and financial information, although it is not clear that such information would be of a proprietary nature.

Findings

[30] I have reviewed the voluminous records at issue and find that the withheld information in both appeals contains commercial, financial and/or technical information. The commercial information that relates solely to the buying or selling of merchandise or services includes product information, subcontractor agreements, unit pricing and pricing lists, client lists and other information about other clients, inventory, implementation plans, business rules and options for users of the card. The financial information in the records consist of budget estimates, actual expenditures, capital and operating costs, and pricing methodology. Lastly, the technical information includes, among other things, technical methodologies, solutions, technical support issues, information about hardware, software, servers, networking devices, platforms, specifications, functional architecture and design, website design, data privacy, security and risk management.

[31] Consequently, I am satisfied that the withheld information in both appeals contains either commercial, financial and/or technical information and I find that the first part of the test in section 17(1) has been met. It is, therefore, not necessary for me to determine whether the records contain trade secrets.

Part 2: supplied in confidence

[32] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[9]

[33] 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.[10]

[34] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*.[11]

[35] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[12]

[36] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[13]

[37] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;

---

[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.
[11] See note 1. See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).
[12] Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. John Doe* (cited above).
[13] Order PO-2020.

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;

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

- prepared for a purpose that would not entail disclosure.[14]

Representations in PA12-4-4-2

[38] Metrolinx submits that the records at issue were supplied by the third party appellant to the Ministry of Transportation. The information in these records, Metrolinx states, has never been made available to the public and has been treated as confidential by all parties to date. The proposal was provided to the Ministry of Transportation by the third party appellant in response to an RFP issued by it. The front cover of the proposal states that it is proprietary and confidential to the third party appellant, with the expectation that it will be kept confidential. With respect to the final design review and project blueprint, the agreement states that the third party appellant shall be ultimately responsible for developing them, which it did and submitted the records to the Ministry of Transportation. In addition, Metrolinx argues that there is a confidentiality clause in the agreement, setting out the type of information that the parties agreed to treat as confidential. Some examples of the type of information defined as "confidential" in the agreement include designs, flowcharts, electronic data, new information, specifications and templates.

[39] The appellant submits that all of the records form part of the agreement and were, therefore, not "supplied" by the third party appellant, but rather negotiated between the parties. The appellant goes on to argue that the third party appellant's proposal was incorporated into the agreement by reference, and presumably many of the specific details and terms of the proposal were directly incorporated into other sections of the agreement. The appellant goes on to state that previous orders of this office have found that a bid proposal which is accepted and incorporated into a government contract does not meet the test of being "supplied in confidence."

[40] The appellant also submits that the final design review and the project blueprint were not supplied by the third party appellant because they were the product of negotiation or collaboration between the parties to the agreement, pursuant to the terms of the agreement. The appellant further submits that as all of the records form part of the final agreement, one would expect that very little of it can be considered "immutable" or not subject to change.

[14] Orders PO-2043, PO-2371 and PO-2497.

[41] With respect to whether information is confidential, the appellant submits that the agreement specifically states that all of the records relating to the agreement are subject to and governed by the *Act*, and that previous orders and court decisions have consistently found that the existence of a contractual provision notifying the parties of the possibility of disclosure under the *Act* is important evidence in determining whether the "in confidence" portion of the test is met. The appellant states:

> There is no basis upon which to conclude that the confidentiality of records was assured or even that [the third party appellant] had a reasonable expectation of confidentiality.

Representations in PA12-475

[42] Metrolinx submits that those portions of the records at issue that it has agreed to withhold contain information that was provided by the third party appellant in response to a change order request, or contain unit pricing that was inherently provided by the third party appellant. In contrast, Metrolinx submits that the information it has determined should be disclosed to the appellant was either not supplied by the third party appellant[15] or they operate to explain and describe changes to the negotiated contract, including changes to the total price of the contract.[16]

[43] The third party appellant argues that the information contained in the records was authored or compiled by it, was not the product of negotiation, and was, therefore, "supplied" to Metrolinx by it. The third party appellant also argues that although the change notice templates were created by PRESTO rather than by it, most of the content was provided by it to explain how a particular solution will "approximate the information contained" in a change notice. In addition, the third party appellant states that it provided content for both types of the detailed feasibility notices, and drafted and provided the covering agreements for the change order agreements. Further, the third party appellant submits that even if the records were not "supplied" by it to Metrolinx, the inferred disclosure and immutability exceptions apply. Specifically, the third party appellant argues that the inferred disclosure exception applies because the disclosure of the financial information in the detailed feasibility notices – finance, in particular the unit pricing agreed to between Metrolinx and it, would permit certain accurate inferences with respect to the underlying non-negotiated information supplied. These unit prices, when viewed together, would provide a competitor with a very accurate picture of the solution provided as part of the change notices and detailed feasibility notices.

[15] The change notices.
[16] The detailed feasibility notices and the change order agreements.

[44] With respect to the immutability exception, the third party appellant argues that the structure of the solutions and pricing as part of the agreement is not confined to the agreement as such. The third party appellant states:

> This information represents a particular model of doing business globally and pricing practices, which are not otherwise available to the competitors of [it] or to the public.

[45] The third party appellant goes on to argue that the records were supplied "in confidence" relying upon the confidentiality provisions of the agreement, were and are treated consistently in a confidential manner, and are not commonly available to the public or from public sources. The third party appellant also advises that each page of the records is labelled with a footer that states "Confidential," and concludes that it had a reasonable expectation that such information would not be disclosed.

[46] The appellant argues that the change order records were not supplied by the third party to Metrolinx, but are the product of negotiation or collaboration between the parties to the agreement, pursuant to the terms of the agreement. In particular, the appellant submits that the change order agreements are contracts that were considered and accepted by Metrolinx, regardless of who authored the initial draft. Similarly, the appellant states, the change notices and detailed feasibility notices would have required some level of input from Metrolinx. Further, the appellant submits that the third party appellant has made "vague expressions of concern" about the disclosure of information it is of the view meets the immutability and inferred disclosure exceptions, but has not supported its position with sufficient particularity.

[47] Lastly, the appellant argues that the fact that records have a footer stating "confidential" is not determinative of the issue of confidentiality and suggests that the third party appellant overreached in attempting to assert confidentiality. The appellant states:

> It is extremely unlikely (and if true, highly inappropriate) that every word on every page of the records in question was intended to be shielded from public consumption.

[48] In reply, the third party appellant states that in 2006, following a multi-year procurement process, the Ontario government entered into a ten-year master service and supply agreement with it, which expressly contemplates the impact of new technologies and that the project could be scaled up or down. The third party appellant states:

> Schedule B of the agreement sets out how the Ontario government and [the third party appellant] would negotiate these changes to the technology and scale of the system. Pursuant to section 2 of Schedule B,

> the Ministry would give [the third party appellant] a "change notice" setting out what exactly it wished to change about the agreement, and [the third party appellant] would in turn provide a feasibility notice, confirming that the change is feasible and specifying in detail the manner in which the change can be implemented.

[49] The third party appellant goes on to state that Metrolinx identified new features that it wished to incorporate into the PRESTO system. Following negotiations with the Toronto Transit Commission and OC Transpo (the service provider for the City of Ottawa), Metrolinx also expanded the scope of PRESTO to include these service providers. The third party appellant then states that pursuant to the terms of the agreement, Metrolinx negotiated with it to implement these changes in features and scales.

[50] The third party appellant argues that this office has consistently concluded that even if a record reflects negotiations between parties, third party protection can still attach if the records permit an accurate inference to be drawn about underlying, non-negotiated confidential information.[17] The third party appellant then submits that the details of its implementation of a regional farecard system represent non-negotiated confidential information belonging to it. The third party appellant states:

> The records in this case, even though they may include agreements between [it] and the Ministry of Transport and/or Metrolinx, reflect these types of information – i.e. how to implement a regional farecard system. This is not information the Ontario government or Metrolinx possessed beforehand (That was the reason to put out an RFP for an outside firm like [it] to develop and implement a regional farecard system). But the records contain this information. Thus, it can only have been supplied by [it].

[51] Lastly, the third party appellant submits that it is aware that the records are subject to the *Act*, but that the exemption in section 17(1) exists to protect proprietary third party information supplied in confidence.

[52] In sur-reply, the appellant states that the third party appellant's claim that the change notices were supplied in confidence is "preposterous" as they were prepared by Metrolinx and submitted to the third party appellant. They are, the appellant submits, essentially revisions to the original RFP. The appellant states that there is no basis for refusing to disclose the change notices, which Metrolinx agrees should be disclosed, or the portions of the other records that Metrolinx wishes to disclose.

---

[17] Reconsideration Order PO-3072-R and Order MO-2494.

Analysis and findings

[53] I have reviewed the records at issue in order to determine if they were supplied in confidence by the third party appellant to Metrolinx.

The proposal

[54] In Order MO-3058-F, Senior Adjudicator Sherry Liang considered whether a proposal was considered to be supplied to an institution. In making her finding, she undertook a thorough examination of this office's historical approach on this issue. She stated:

> Record 1, the winning RFP submission, was also "supplied" to the town within the meaning of section 10(1). My conclusion with respect to this record is consistent with many previous orders of this office that have considered the application of section 10(1) or its provincial equivalent to RFP proposals.[18] As this office stated, in Order MO-1706, in discussing a winning proposal:
>
> > ...it is clear that the information contained in the Proposal was supplied by the affected party to the Board in response to the Board's solicitation of proposals from the affected party and a competitor for the delivery of vending services. This information was not the product of any negotiation and remains in the form originally provided by the affected party to the Board. This finding is consistent with previous decisions of this office involving information delivered in a proposal by a third party to an institution... [page 9]
>
> I am aware that in some orders, adjudicators have found the contents of a winning proposal to have been "mutually generated" rather than "supplied", where the terms of the proposal were incorporated into the contract between a third party and an institution. In this appeal, it may well be that some of the terms proposed by the winning bidder were included in the town's contract with that party. But the possible subsequent incorporation of those terms does not serve to transform the proposal, in its original form, from information "supplied" to the town into a "mutually generated" contract. In the appeal before me, the appellant seeks access to the winning proposal, and that is the record at issue.
>
> I distinguish the circumstances before me from those where a winning proposal becomes, on acceptance, the basis of the commercial

[18] See, for example, Orders MO-2151, MO-2176, MO-2435, MO-2856 and PO-3202.

> arrangement between the parties, and no separate contract between the parties is created. In Order MO-2093, for instance, this office found that where a winning proposal governed the commercial relationship between a city and a proponent, and there was no separate written agreement, the terms of the winning proposal were mutually generated and not "supplied" for the purpose of section 10(1). In such a case, it is reasonable to view the winning proposal as no longer the "informational asset" of the proponent alone but as belonging equally to both sides of the transaction.

[55] I adopt Senior Adjudicator Liang's approach for the purpose of this appeal. In this case, the proposal is not a final agreement between the third party appellant and the Ministry of Transporation; rather, it is the proposal containing the contractual terms proposed solely by the third party appellant. The proposal was not the product of negotiation and, consequently, was not mutually generated by the Ministry of Transportation and the third party appellant. Therefore, I am satisfied that the third party appellant supplied the information at issue contained in the proposal.

The Final Design Review and the Project Blueprint

[56] The contract between the Ministry of Transportation and the third party appellant provides that the third party appellant shall develop, with the assistance and collaboration of the Ministry of Transportation, the final design review and the project blueprint respectively. In my view, as part of the negotiated contract, the parties agreed that the third party appellant would develop these two records, albeit with input from the Ministry of Transportation. Based on my review of these records and taking the parties' representations into account, I do not agree with the appellant that these records were negotiated between the Ministry of Transportation and the third party appellant. I am satisfied that these records were supplied by the third party appellant to the Ministry of Transportation (or Metrolinx as the case may be) after the contract was entered into, as part of its contractual obligations.

The Change Notices

[57] Conversely, I agree with the appellant and Metrolinx that the change notices were not supplied by the third party appellant to Metrolinx. In fact, Metrolinx provided these records to the third party appellant for the purpose of making changes to the existing contract. In addition, I find that there is no information in these records which qualifies for the immutability or inferred disclosure exceptions. As these records were not "supplied" for the purposes of section 17(1), and as no other exemptions have been claimed with respect to these records, I order Metrolinx to disclose the change notices to the appellant.

The Detailed Feasibility Notices and Attachments

[58] I am satisfied that the detailed feasibility notices and the attachments[19] were supplied by the third party appellant to Metrolinx in response to the change notices issued by Metrolinx.

The Change Order Agreements

[59] In my view, in the circumstances of this appeal, the change order agreements are the product of negotiations between Metrolinx and the third party appellant. In essence, they represent ongoing revisions to the original contract between the two parties. The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1).

[60] Even if information in the change order agreements reflects information that originated from the third party appellant, I find that it has not been supplied within the meaning of that term in section 17(1).[20] This information is not subject to either the immutability or inferred disclosure exceptions. Rather, it is information about how the third party appellant and Metrolinx will fulfill the contract, setting out contractual obligations. I find that all of this information could have been subject to negotiation.

[61] In Order MO-1706, Adjudicator Bernard Morrow dealt with the issue of whether the information contained in a contract was "supplied" for purposes of the municipal equivalent of section 17(1). In doing so, he stated:

> ... the fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1) [the municipal equivalent to section 17(1)]. The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion (see Order P-1545).[21]

[62] Consequently, I find that agreed-upon essential terms of a contract are generally considered to be the product of a negotiation process and are not "supplied," even if the "negotiation" amounts to acceptance of the terms proposed by a third party.[22]

---

[19] Examples of the attachments are workplans, design options and payment framework, among other records.

[20] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

[21] Order MO-1706. This approach was approved in *Boeing*.

[22] Orders PO-2384 and PO-2497.

Assuming that the change order agreements are based on the information in the detailed feasibility notices supplied to Metrolinx by the third party appellant, the acceptance of the terms of the agreement by Metrolinx, including pricing information, amounts to negotiation of the agreement.

[63] Further, I am not satisfied that the third party appellant has established that the change order agreements are distinguishable from contracts, or the other circumstances in which both this office and the Courts have found that the content of a negotiated contract is not supplied.[23]

[64] Therefore, I find that the information in the change order agreements does not meet the second part of the test under section 17(1), as it was not "supplied" for the purposes of section 17(1). As no other exemptions have been claimed with respect to these records, I order Metrolinx to disclose the change order agreements to the appellant.

[65] Lastly, I am satisfied that all of the information at issue that I have found to have been supplied by the third party appellant to Metrolinx was done with a reasonably held expectation of confidentiality at the time it was supplied. Consequently, other than the change notices and the change order agreements, I find the remaining information was "supplied in confidence" by the third party appellant to Metrolinx for the purposes of section 17(1), thus meeting the second part of the test.

Part 3: harms

[66] The remaining information at issue consists of the withheld portions of the third party appellant's proposal, final design review and project blue print, as well as the detailed feasibility notices and attachments.

[67] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[24]

[68] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[25]

---

[23] *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario*, 2013 ONSC 6776 (CanLII).
[24] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[25] Order PO-2020.

[69] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1).[26] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[27]

Appeals PA12-414-2 and PA12-475

[70] Metrolinx submits that disclosure of the withheld portions of the proposal, the final design review, the project blue print, the detailed feasibility notices (with attachments) would reasonably be expected to cause significant harm to the third party appellant. In particular, disclosure of the information at issue could significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or an organization.

[71] If the information in the records is disclosed, Metrolinx argues, the third party appellant's competitors would benefit from the receipt of financial, technical and commercial information and intelligence, which is not otherwise available. The third party would not have access to these competitors' information, placing it at a competitive disadvantage. In addition, Metrolinx submits that the records include sensitive technical data belonging to the third party appellant's subcontractor, which, if disclosed, would negatively impact the relationship between the third party appellant and the subcontractor, and would also provide substantial commercial value to a competitor.

[72] Also, according to Metrolinx, the third party appellant is continually negotiating contracts with its clients, potential clients, suppliers and potential suppliers. The records, Metrolinx advises, include contract terms that deviate from the third party appellant's standard contracting practices and from industry standards. Metrolinx argues that if a competitor had these terms, that would prejudice the third party appellant's competitive position, causing it undue loss and causing the competitor undue gain.

[73] Lastly, Metrolinx states:

> In addition, there will be future competitive procurement opportunities for PRESTO, since the TTC and Metrolinx have recently signed a master agreement to implement the PRESTO fare card system across the TTC transit system. Disclosure of these records to [the third party appellant's] competitors, for example, will put [the third party appellant] at a

[26] Order PO-2435.
[27] *Ibid*.

> competitive disadvantage for upcoming procurement competitions related to PRESTO.

[74] The third party appellant submits that disclosure of the records will result in the harms set out in sections 17(1)(a), (b) and (c). Portions of the third party appellant's representations will not be reproduced in this order, as they meet this office's confidentiality criteria. However, I did take them into consideration.

[75] The third party appellant states:

> The PRESTO card system represents an integrated fare management system at the forefront of technology that has not been developed by any of [its] competitors to date. The building of the PRESTO card system started in 2006, and the system is now being marketed in many major cities around the world.
>
> The information in the records describes [its] innovative approach to this integrated fare management system. As part of [its] ongoing business in this area, it is continually negotiating contracts with its clients, potential clients, suppliers and potential suppliers. . .

[76] With respect to section 17(1)(a), the third party appellant argues that disclosure of the records will significantly prejudice its competitive position, as the information, which is not otherwise available, could be used by competitors to bid on other Government of Ontario projects for the provision of services covered by the contract, or similar or analogous services in other competitive contexts. The third party appellant goes on to argue that the technical information in the change notices and detailed feasibility notices would provide a competitor with a very accurate picture of the pricing structure of the solutions in the detailed feasibility notices – finance. Similarly, the third party appellant submits, the financial and commercial information contained in the detailed feasibility notices – finance and the change order agreements would allow a competitor to understand the corresponding solution described in the change notices and detailed feasibility notices.

[77] Concerning section 17(1)(b), the third party appellant submits that it would be reluctant to contract with the government, and to depart from its standard contractual practices, knowing that its trade secrets, and sensitive technical, commercial and financial information supplied in the process could become public.

[78] With respect to section 17(1)(c), the third party appellant argues that disclosure of the information will allow competitors to use it to their advantage in bidding on government services and negotiating contracts in similar contexts, impairing the third party appellant's ability to remain competitive and resulting in tangible financial losses. In particular, the third party appellant states, the technical details will allow a

competitor to understand how its integrated fare management system works and its associated risks.

[79] The appellant submits that Metrolinx and the third party appellant have not provided sufficiently detailed and convincing evidence which demonstrates a reasonable expectation of harm if the records at issue are disclosed.[28] Instead, the appellant argues, they have simply repeated the language of section 17(1) and provided vague assertions, as well as general and speculative evidence about alleged future competitive disadvantage and undue loss. Further, the appellant submits that the thrust of Metrolinx's argument is that the third party appellant's willingness to accept contract terms that deviate from its standard practices would prejudice it in future procurements. The appellant goes on to state that implicit in this argument is an acknowledgement that the terms Metrolinx seeks to protect were negotiated with the third party appellant and, therefore, not supplied. In any event, the appellant argues that Metrolinx has not established a clear link between the disclosure of contract terms and disadvantage in future competitive bids. Further, the appellant states that the argument that disclosure of pricing information could jeopardize relationships with future or existing clients, or provide competitors with an advantage has been rejected by this office on the basis that such information has no inherent value, particularly where the information is dated and the market is changing,[29] as is the case here given the rapid technological advances over the past seven years.

[80] The appellant also states that it is ironic that the third party appellant, which has been awarded a sole-source government contract worth nearly one billion dollars, is complaining about suffering undue loss and a loss of competitiveness if the details of that contract are revealed, given that it is not competing with anyone to maintain this agreement. Lastly, the appellant argues that Metrolinx has no credibility when it suggests that there will be future competitive procurement opportunities for PRESTO given that it decided to implement PRESTO NG through open-ended sole-source change orders, rather than provide competitive procurement opportunities.

[81] The appellant states:

> In this case, the competitive process has long since concluded, as Metrolinx has effectively awarded the PRESTO NG contract to [the third party appellant] through a sole-source, uncompetitive process. Therefore, what [the third party appellant] is actually seeking to suppress by exempting the records is its ability to achieve a favourable deal through exclusivity of negotiation. Surely this does not represent a harm that section 17(1) of the *Act* is seeking to prevent.

---

[28] Relying on Order PO-2435, as well as *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)* (1998) 164 D.L.R. (4th) 129 (Ont. C.A.) and *Ontario (Ministry of Transportation) v. Cropley* (2005), 43 C.P.R. (4th) 1 (Ont. C.A.).
[29] MO-1706.

[82] In reply, the third party appellant states that the sharing of its expertise to competitors in relation to fare-card systems is particularly significant at the moment, as many large transit service providers world-wide are moving to adopt open payment systems akin to PRESTO NG. The third party appellant goes on to argue that the fact that Metrolinx and it negotiated the future use of the confidential information arising from the PRESTO project reflects that this information has value to it. In particular, the third party appellant states that it negotiated with Metrolinx for the rights to re-use the information on other projects precisely because of its value, the disclosure of which would "wipe out this value."

[83] In sur-reply, the appellant argues that the third party appellant is overreaching in asserting that disclosing the records would significantly reduce the value of its expertise. As an example, the appellant states:

> [T]here is no justification provided as to how [the third party appellant] would be prejudiced by the disclosure of information regarding their past experience in the farecard industry, or the list of subcontractors proposed to be engaged for the project and their respective history and experience in the farecard industry. Surely the public is entitled to know which companies are providing the goods and services being purchased by our government, and to understand the credentials each company brings to the task.

[84] Lastly, the appellant submits that there is no merit to the third party appellant's claim that disclosure of the records will result in government contractors insisting on following the limited terms of the original agreement rather than being willing to adapt an agreement through change orders. The appellant goes on to state that the third party appellant was able to achieve a 700 million dollar increase in contract value through exclusive negotiations, without having to go through a competitive process; to suggest that it would have refused to engage in such negotiations and insisted on maintaining its original contract terms, had it known that portions of the contract would be made public, is "truly astounding."

Analysis and Findings

PA12-414-2

[85] As previously stated, the information at issue in this appeal consists of the withheld portions of the third party appellant's proposal, the final design review and the project blueprint. Based on my review of the parties' representations and the records themselves, I am satisfied that they contain detailed commercial, financial and technical information which, if disclosed, could reasonably be expected to prejudice significantly the competitive position of the third party appellant. The records provide specific

templates, detailed information about its services, pricing breakdowns and extremely detailed technical information about the PRESTO project and past projects, which could be exploited by competitors in the marketplace. Accordingly, I am satisfied that these portions of the records qualify for exemption under section 17(1)(a). The appellant has raised the possible application of the public interest override in section 23 to these records, which I will consider below.

PA12-475

[86] The remaining records at issue are the detailed feasibility notices and the attachments. Metrolinx's decision was to disclose these records, in part. The third party appellant objects to this decision to disclose the records, with the exception of the date, change description and approval signatures.

[87] I find that the information that Metrolinx proposes to withhold consists of detailed financial, commercial and technical information, which could reasonably be expected to prejudice significantly the competitive position of the third party appellant, if disclosed, as this information could be used by a competitor to undermine the third party appellant. Therefore, I find that this information is exempt from disclosure under section 17(1)(a). The appellant has raised the possible application of the public interest override in section 23 to these records as well, which I will consider below.

[88] However, I also find that the portions of the detailed feasibility notices and attachments that Metrolinx proposes to disclose consist of information that is general in nature or that reveals the total cost of a given change to the contract. I am not satisfied that disclosure of this information could reasonably be expected to result in any of the harms set out in sections 17(1)(a), (b) or (c), nor have I been provided with sufficient evidence to support such a finding. Consequently, I find that this information does not qualify for exemption under section 17(1). I uphold Metrolinx's decision with respect to the detailed feasibility notices and attachments and order it to disclose them to the appellant, as set out in Metrolinx's indices of records. In making this finding, I dismiss the third party appellant's appeal.

Issue B: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17(1) exemption?

[89] The appellant has raised the possible application of the public interest override in section 23 to the information I have found to be exempt under section 17(1). Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[90] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[91] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[30]

[92] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[31] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[32]

[93] A public interest does not exist where the interests being advanced are essentially private in nature.[33] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[34] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[35]

[94] Any public interest in *non*-disclosure that may exist also must be considered.[36] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[37]

[95] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation;[38]

---

[30] Order P-244.
[31] Orders P-984 and PO-2607.
[32] Orders P-984 and PO-2556.
[33] Orders P-12, P-347 and P-1439.
[34] Order MO-1564.
[35] Order P-984.
[36] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[37] Orders PO-2072-F, PO-2098-R and PO-3197.
[38] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

- the integrity of the criminal justice system has been called into question;[39] or
- public safety issues relating to the operation of nuclear facilities have been raised.[40]

[96] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations;[41]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[42]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;[43] or
- the records do not respond to the applicable public interest raised by appellant.[44]
- The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[97] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[45]

Representations

[98] The appellant submits that the agreement entered into between the third party appellant and the Ministry of Transportation has evolved into a sole-source contract for the development and delivery of an entirely new and distinct open fare payment system, using completely different technology known as PRESTO NG, which was not contemplated at the time of the original RFP. The appellant goes on to state that in its 2012 Annual Report, the Office of the Auditor General noted that the PRESTO and PRESTO NG is one of the most expensive farecard systems in the world and that tendering, as opposed to the open-ended change orders, would have informed Metrolinx of potential new developers and possibly of more cost effective technology

---

[39] Order PO-1779.
[40] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[41] Orders P-123/124, P-391 and M-539.
[42] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[43] Order P-613.
[44] Orders MO-1994 and PO-2607.
[45] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner* [1999] O.J. No. 488 (C.A.).

solutions. The appellant quotes extensively from the Auditor General's Annual Report and argues that it disclosed many concerns in relation to Metrolinx's management of the PRESTO fare project, including the financial cost of the project. This demonstrates, the appellant argues, an extremely compelling public interest in the disclosure of the underlying contractual arrangements that were entered into by the provincial government and on behalf of several municipalities and transit agencies.

[99] The appellant also submits that there is a relationship between the records and the *Act*'s central purpose of shedding light on the operations of government, because the proper expenditure of hundreds of millions of dollars out of the public purse for a system that the third party appellant has not yet demonstrated it has the ability to deliver is an issue which rouses strong interest and attention, and is worthy of informed public debate. In particular, the appellant is concerned about the privately negotiated change orders, which he states cost over $550 million dollars.

[100] Metrolinx submits that while there may be an interest in the information in the records for business purposes, the records do not reveal information that would be of a compelling public interest. For example, Metrolinx states, the records do not reveal information that relates to public health or safety. Metrolinx also argues that growth of the PRESTO project and the need to accommodate this growth was always contemplated in the original procurement. Metrolinx states:

> As technology advanced and transit partners' specific needs and parameters changed, so has PRESTO.

[101] Metrolinx goes on to state that it engaged a risk management, business advisory and accounting firm to evaluate whether PRESTO achieved the greatest benefit to taxpayers for the money invested, compared to other global e-fare systems, and that this firm concluded that Metrolinx's decision to continue under a single procurement over the evolution of PRESTO was in the best interests of Ontario taxpayers. Metrolinx further advises that it also commissioned former Supreme Court Justice Coulter A. Osborne to review its contract with the third party appellant. This review, Metrolinx states, found that no fairness related procurement problems existed.

[102] With respect to the Auditor General's Annual Report, Metrolinx submits that investment in and the expansion of PRESTO has been necessary in order to extend the system to new regions and deliver new services to its customers, and that it has been open and transparent about project costs, which can be found on the Metrolinx website.

[103] The third party appellant states that there is a general public interest in how government funds are expended, which has been fully served as the total dollar amounts spent on the PRESTO card system are already in the public domain. However,

it also argues that the technical, or "nuts and bolts"[46] information in the records is not responsive to the public interest. Likewise, the third party appellant submits, the unit prices in the financial information in the detailed feasibility notices cannot inform the public on the total cost of the project. The third party appellant states:

> Even if there exists a great deal of public interest in the delay issues experienced by PRESTO, the records do not disclose any information responsive to this interest.

[104] Furthermore, the third party appellant submits that a considerable amount of information has already been disclosed, and that this is adequate to address any public interest considerations. It lists a number of documents that have been made public. Examples cited by the third party appellant are:

- The RFP;
- The Master Supply and Services Agreement, in part;
- Significant portions of its proposal, the project blueprint and the final design review;
- Significant portions of the change notices for which it has provided consent to disclose;
- Most of the intellectual property agreement between it and Metrolinx;
- The reports of the accounting firm;
- The opinions of former Supreme Court Justice Osborne; and
- The minutes and agendas of Metrolinx's board meetings since June 2010.

[105] In reviewing the information in these documents, the third party appellant argues, the public would be able to: debate the cost-effectiveness and propriety of the change order process; discuss the quality of the PRESTO system; and understand the strategic decisions made by Metrolinx's board.

[106] In addition, the third party appellant submits that another public process or forum has been established to address the public interest considerations through the three sets of independent expert reports,[47] and that in light of the multiple mechanisms of oversight and accountability, harming it through the disclosure of its proprietary information would add little to the public debate about Metrolinx's decisions to enhance the technology and scale of the PRESTO system.

[107] Lastly, the third party appellant argues that there is a public interest in the non-disclosure of the records. Disclosing the records will, in the long term, harm the public interest because firms in a similar position would be less likely to bid on such contracts,

---

[46] Order PO-2031.

[47] Namely, the Annual Report of the Auditor General, the accounting firm's reports and the opinion of former Supreme Court Justice Osborne.

less likely to collaborate with a client such as Metrolinx to adapt an agreement to changing circumstances, and would insist on following the strict and limited terms of the original agreement. The third party appellant goes on to state that this type of situation could cause a multiplicity of tender processes, thereby raising costs for public authorities and delaying the implementation of important public infrastructure projects.

[108] In reply, the appellant argues that the third party appellant is attempting to attribute concerns about the PRESTO system to it, when in fact all of the concerns raised were taken directly from the Auditor General's Annual Report. The appellant reiterates that there is a compelling public interest in the disclosure of the change notices and change order documents, as to date, no documentation relating to the change notices has been disclosed. It also argues that the information that the third party appellant consented to disclose is inadequate, and will not shed light on the decision to procure PRESTO NG through change orders instead of a competitive process.

[109] Further, the appellant states that the fact that three other entities have reviewed the PRESTO contractual arrangements and published their findings does not support the conclusion that an alternative public process or forum has been established. A public process, the appellant submits, means that members of the public have an opportunity to access the underlying details and to contribute to the analysis or make their views known prior to any determinations being made, and not to simply read the published findings of others after their investigation is complete. The appellant also submits that there is no merit to the third party appellant's claim that it would have refused to engage in negotiations through change orders and insisted on maintaining its original contract terms, had it known that some of the contract details would be made public.

[110] Lastly, the appellant states:

> Ontario taxpayers are entitled to understand the extent of the contractual obligations and financial commitments made by Metrolinx to [the third party appellant], in relation to the Original PRESTO System and especially to PRESTO NG, including all amendments to the original Agreement secured through change orders and their impact on pricing, penalties for non-performance, and early termination fees. Surely the overarching principle of promoting government transparency and accountability must prevail on these appeals.

Analysis and findings

[111] In order for me to find that section 23 of the *Act* applies to override the exemption of the information that I have found qualifies for exemption under section 17(1), I must be satisfied that there is a *compelling* public interest in the disclosure *of that particular information* that *clearly outweighs* the purpose of the third party

information exemption. The information at issue consists of portions of the third party appellant's proposal, the project blueprint, the final design review, detailed feasibility notices and attachments.

[112] The appellant's position is that there is a compelling public interest in the disclosure of this information:

- Because there is a relationship between the records and the *Act*'s central purpose of shedding light on the operations of government, including Metrolinx's rationale for not issuing new RFP's in connection with PRESTO NG; and

- Because members of the public should have an opportunity to access the underlying details to contribute to the analysis, and not simply read the published findings of others.

[113] I find that there is insufficient evidence before me that the exempt portions of the records contain specific information which identifies why Metrolinx chose to vary the contract by way of change orders, as opposed to issuing new RFP's in connection with PRESTO NG. Accordingly, in my view, there is insufficient evidence demonstrating a clear connection between the information contained in the records and the issues identified by the appellant.

[114] In addition, while I agree that there is a public interest in the cost of the PRESTO NG project, the inquiry does not end with this conclusion because I must also be satisfied that the public interest is a *compelling* one. As stated previously, while the *Act* is silent as to who bears the burden of proof under section 23, it has been acknowledged that it would be unfair to impose the full onus on an appellant who obviously cannot review the withheld information prior to providing representations in support of the application of section 23. This means that I must look to the appellant's representations *and* the information that has been withheld to answer this "compelling question." Having done so, I conclude that sufficient evidence to demonstrate that the public interest is compelling in the circumstances of this appeal has not been provided by the appellant; nor is it evident upon consideration of the withheld third party information itself. Consequently, I do not find that there is a compelling public interest in the information that I have found to be exempt, which is third party technical, commercial and financial information. Disclosure of this information, in my view, would not shed light on the operations of government.

[115] Further, in addition to all of the information that is publicly available regarding PRESTO and PRESTO NG on Metrolinx's website, the appellant will be receiving more information about the project, namely the change notices, the change order agreements and portions of the detailed feasibility notices and attachments, as a result of this order. In my view, meaningful scrutiny of the ongoing contractual terms

between Metrolinx and the third party appellant is possible, based on what is publicly available, what has been disclosed, and what will be disclosed. As the evidence provided does not satisfy me that there is a compelling public interest in the disclosure of the withheld information, I find that the first part of the test under section 23 is not met.

[116] Since both components of the first part of the test for the application of the public interest override are not met, it is unnecessary for me to review the second part of the test. Accordingly, I find that section 23 does not apply in the circumstances of this appeal.

[117] In sum, I uphold Metrolinx's decision in appeal PA12-414-2 and dismiss the appellant's appeal, finding that section 17(1) applies to exempt portions of the third party appellant's proposal, final design review and project blueprint. With respect to appeal PA12-475, I dismiss the third party appellant's appeal and I order Metrolinx to disclose the change notices and change order agreements in their entirety to the appellant. I also order Metrolinx to disclose portions of the detailed feasibility notices and attachments as set out in its indices of records. Lastly, in both appeals, I find that the public interest override in section 23 does not apply.

ORDER:

1. I order Metrolinx to disclose the change notices and change order agreements, in full, to the appellant by **October 20, 2014** but not before **October 15, 2014**.

2. I order Metrolinx to disclose the detailed feasibility notices and attachments, in part, as set out in its indices of records, by **October 20, 2014** but not before **October 15, 2014**.

3. I reserve the right to require Metrolinx to provide me with copies of the records I have ordered to be disclosed to the appellant.

Original signed by: September 12, 2014
Cathy Hamilton
Adjudicator