



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

# **ORDER 41**

**Appeal 880131**

**Ministry of Tourism and Recreation**



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## O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) of the Act, a right to appeal any decision of a head to the Commissioner.

The facts of this case and the procedures employed in making this Order are as follows:

1. On March 23, 1988, the requester filed a written request to the Ministry of Tourism and Recreation (the "institution"), which administers the NOR\_DEV programme, for "a copy of the 1985/86 NORDEV funded St. Mary's Riverboat Study."
2. On April 19, 1988, the institution advised the requester in writing that:

"I regret that I am unable to provide you with a copy of the St. Mary's Riverboat Study.

The proponents of this study are actively pursuing the development of this project. In accordance with section 17(1) of the Freedom of Information and Protection of Privacy Act, disclosure of the study findings at this time 'would prejudice the developers' competitive position'."

3. By letter dated May 13, 1988, the requester appealed the head's decision to refuse access to the study.
4. During the mediation stage of the appeal, the institution indicated it was relying on subsections 17(1)(a)(b) and (c) and 18(1)(d) of the Act in denying the appellant access to the record.
5. On August 25, 1988, I wrote to the appellant, the institution and certain affected persons (the proponents of the study), advising them that I was conducting an inquiry to review the decision of the head. An Appeals Officer's Report accompanied this notice.
6. By letter dated September 7, 1988, I invited the parties and the affected persons to make written representations on the issues arising in the appeal.
7. Written representations were received from the appellant and the institution, but not from the affected persons. I have considered these representations in making my Order.

It should be noted, at the outset, that the purposes of the Act as set out in subsections 1 (a) and (b) are:

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
  - (i) information should be available to the public,
  - (ii) necessary exemptions from the right of access should be limited and specific, and,

...

- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Further, section 53 of the Act provides that the burden of proof that the record falls within one of the specified exemptions in this Act lies upon the head.

The issues arising in this appeal are as follows:

- A. Whether the record at issue in this appeal is in the custody or under the control of the institution as required by subsection 10(1) of the Act.
- B. If the answer to Issue A is in the affirmative, whether any parts of the record are exempt from release pursuant to subsections 17(1) (a) (b) or (c) of the Act.
- C. If the answer to Issue B is in the negative, whether the record is subject to the discretionary exemption provided by subsection 18(1)(d) of the Act.

**ISSUE A: Whether the record at issue in this appeal is in the custody or under the control of the institution as required by subsection 10(1) of the Act.**

Subsection 10(1) of the Act reads as follows:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless the record or the part of the

record falls within one of the exemptions under sections 12 to 22. (emphasis added)

NOR\_DEV is a program established by the Ministry of Northern Development and Mines. It consists of a Tourism Development Program which itself contains a Preliminary and Feasibility Studies Subprogram. The Ministry of Tourism and Recreation (the "institution") administers this Planning and Feasibility Studies Subprogram.

A government brochure provided to me by the institution identifies the purpose of the Subprogram as providing assistance for feasibility and planning studies which will stimulate

investment in tourism projects having potential regional significance. The brochure sets out that "...funding under the Subprogram will be in the form of financial contribution towards planning studies and the assessment of investment opportunities."

The institution submits that "...because of the joint financial contribution to the cost of the study and the agreement between the institution and third parties, the study was not a record within the custody or control of the Institution as anticipated by section 10(1) and the Act does not apply."

The aforementioned brochure sets out the status of studies such as the one that forms the record in this appeal. On page 21, the brochure states:

3. All reports produced by consultants shall become the property of the Province of Ontario. In those cases where the study produces information

of a confidential nature, the Ministry of Northern Development and Mines may hold back such confidentialities for such time as it deems appropriate.

On page 22 in dealing with the manner of payment, the brochure concludes as follows:

A holdback from the final payment shall be retained until the final study report of the consultant has been accepted by the Ministry of Northern Development and Mines.

As far as the St. Mary's Riverboat Study is concerned, I have reviewed the contents of an agreement, dated November 18, 1985, between one of the third party proponents and the Province of Ontario, which sets out the procedure for producing this study. Appendix "A" to this agreement lists supplementary terms and conditions including the following:

5. Simultaneously with the completion of the feasibility study and delivery to the Tourism Developer [the third party proponents], the Tourism Developer shall cause six (6) copies of the feasibility study to be delivered to Ontario.

Appendix "B" to this same agreement sets out "Standard Terms and Conditions". Among them, is a clause which provides:

that a program of public information with respect to any studies and assessments undertaken under this Agreement may be undertaken by Ontario and [the Tourism Developer] agrees that:

- (a) no public release of reports or information contained therein, related to such studies and assessments will take place without prior consultation and agreement with Ontario, and

- (b) any public announcement related to such studies and assessments shall be made by Ontario in a form satisfactory to Ontario.

In order to meet the requirements of subsection 10(1) of the Act, the record in question must be "...in the custody or under the control of an institution... (emphasis added). Only one of these criteria need be satisfied.

In this case, I am of the view that both criteria have been met. The institution has custody of several copies of the record; and, in my view, the terms of Preliminary and Feasibility Studies Subprogram and the agreement between the Tourism Developers and the institution clearly indicate that any study submitted under this program is under the control of the institution.

**ISSUE B: If the answer to Issue A is in the affirmative, whether any parts of the record are exempt from release pursuant to subsections 17(1)(a)(b) and (c) of the Act.**

Subsections 17(1)(a)(b) and (c) of the Act read as follows:

17. (1) 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,

- (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; or

- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

The institution submits that the record should be exempt from disclosure under section 17 because it qualifies as commercial or financial information; it was supplied to the institution in confidence; and disclosure of the record could reasonably be expected to have the results specified in subsections 17(1)(a) (b) and (c).

I considered the application of subsection 17(1) in my Order in Appeal Number 880031, released on June 21, 1988. At page 6 of that Order, I outlined the test to be applied in determining whether a record falls within the scope of the subsection 17(1) exemption:

In order to fall within the exemption claimed [in that case subsection 17(1)(a)], the portion of the record at issue must meet a three\_fold test. First, the record must contain information which falls within one of the specified categories of third party information. Second, the information must have been supplied in confidence, either implicitly or explicitly. And finally, it must be shown that disclosure of the information could reasonably be expected to cause the type of injury specified in the subsection.

The first test is whether the record contains information which fits within one of the categories of set out in the introductory portion of subsection 17(1). The record in this appeal is a market research study which investigates the economic feasibility of developing a particular commercial operation. The information in the record is of a commercial nature and as



such, I am satisfied the requirements of the first test have been met.

Next I must determine whether the record was supplied to the institution in confidence, implicitly or explicitly.

In reaching my decision, I have taken into account correspondence which took place between the institution and the appellant prior to the enactment of the Freedom of Information and Protection of Privacy Act, 1987.

1. On April 4, 1986, an Assistant Deputy Minister of the Ministry of Northern Development and Mines advised the appellant, who had requested copies of studies related to market analysis of tour boat operations in the Sault Ste. Marie area, that there was a study being undertaken under the NOR\_DEV program, but that the results of it "...will remain confidential for a one year period prior to being placed in open government files." The letter further indicated that this was the standard procedure for this type of project.
2. By letter dated October 28, 1987, a NOR\_DEV Program Co\_ordinator responded to a second letter on the same subject from the appellant to the Assistant Deputy Minister. The Co\_ordinator advised the appellant that the one year period of confidentiality was still in effect for the study and that, therefore, they were unable to release the study to the public at that time. He further advised that, "...[t]he results of the study will be placed on open government files in December, 1987."

3. On January 18, 1988, the appellant again requested a copy of the study, and on January 25, 1988, the NOR\_DEV Program Co\_ordinator responded that the proponent of the study had decided to proceed with the project and that "...the study is therefore the property of the proponent, unless he should subsequently abandon the project, at which time we could then make the report public."

In its submissions to me in this appeal, the institution appears to contradict its previous position regarding release of the record. Despite previous commitments made to the appellant in 1987, the institution now submits that "...a study would only become the property of the institution where a proponent had not exercised his option to develop the project (unable to get funding or no longer interested). A study would not be released where the proponent was proceeding with a project." The institution goes on to point out that the "...[t]hird parties have indicated that they have not abandoned the project and will be continuing to seek financing and that they do not want the study released."

The third parties, who declined to submit representations to me directly, indicated their views in a letter to the institution dated June 23, 1988, which was included by the institution in its submissions. In that letter they stated:

It is my understanding that there has been a request to release a copy of our study of the feasibility of the St. Mary's Riverboat project. It was also my understanding, from the beginning of the program, that the study would not be released until six months after the completion of the study. As we have not received our final payment from NOR\_DEV, I feel that the study should not be released until six months after receipt of final payment.

The institution submits that "...the Third Parties supplied the Study to the Institution on the basis that it would be treated as confidential until the project was commenced or abandoned".

In light of the assertion of the third parties themselves which were made in their June 23, 1988 letter to the institution, I cannot accept the institution's position regarding confidentiality of the Study. The brochure describing the program and the agreement signed by the parties both indicate that the question of confidentiality was to be left to the government's discretion. The June 23, 1988 letter confirms the understanding of the third parties that, to the extent the document was supplied in confidence to the government, confidentiality was of a distinctly time\_limited nature.

In my view, even if the study was supplied in confidence, which is not clear, the period of confidentiality was limited. The third party indicates in the June 23, 1988 letter that "...the study should not be released until six months after receipt of final payment." According to the institution, final payment was made on June 30, 1988, and any possible period of confidentiality would therefore expire on December 31, 1988.

I therefore find that the second test for exemption under subsection 17(1) has not been satisfied. Because the requirements of all three tests outlined in my Order in Appeal Number 880031 must be met in order to invoke the subsection 17(1) exemption, it is not necessary for me to consider the third test.

**ISSUE C: If the answer to Issue B is in the negative, whether the record is subject to the discretionary exemption provided by subsection 18(1)(d) of the Act.**

Subsection 18(1)(d) of the Act reads as follows:

18.(1) A head may refuse to disclose a record that contains,

...

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario.

The institution submits that "... (t)he consultants who prepared the Study have indicated that release of the Study would seriously threaten the viability of the Third Parties' project especially if the Study was released to a competitor, who would then have the opportunity to 'steal the initiative from them'." It further submits that the third parties rely on the institution to be their guardian of the right to have the record kept confidential.

The institution maintains that "...if the Study is released it may be sued by the Third Parties." If this happens, the institution submits that the Government of Ontario will suffer a loss equal to the amount of any resulting judgement against it, together with associated costs. In addition, the institution states that the record itself identifies the economic benefits that would flow from the riverboat project, and these would be lost. Finally, the institution contends that "...[i]n attempting to manage the economy of Ontario, the Institution has contributed to the Study in the hopes that this would assist the

Third Parties in their Project. Forced early release of the Study interferes with the ability of the Government of Ontario, through the Institution to so manage the economy."

On the evidence presented, I do not accept that release of the record could reasonably be expected to have the results specified in subsection 18(1)(d) of the Act.

With respect to the institution's belief that it may be sued, subsection 62(2) of the Act provides that:

No action or other proceeding lies against a head, or against a person acting on behalf or under the direction of the head, for damages resulting from the disclosure or non\_disclosure in good faith of a record or any part of a record under this Act...

With regard to the other concerns raised by the institution, in my view, the third parties have had the benefit of exclusive use of the St. Mary's Riverboat Study for longer than originally agreed upon when the project was initiated. No such government funded\_advantage should be maintained in perpetuity.

It would appear that the project, if it is proceeding at all, is certainly not meeting the timetable originally established by the third parties and the institution. In my view, it is now reasonable for other interested parties to be able to use the results of a study which their tax dollars contributed to creating.

The timing for release of the record was clearly never intended to be at the sole discretion of the third parties; the

institution retained control over its release, and, in my view, further delay cannot be defended.

I would like to commend the institution for its very able and complete submissions, particularly in light of the difficulty an institution must face when put in the position of trying to demonstrate potential harm to third parties who have chosen not to make submissions.

In conclusion, I order the institution to release the St. Mary's Riverboat Study to the appellant within twenty (20) days of the date of this Order. The institution is further ordered to advise me in writing, within five (5) days of the date of disclosure of the record, of the date on which disclosure was made.

Original signed by:  
\_\_\_\_\_  
Sidney B. Linden  
Commissioner

\_\_\_\_\_  
March 2, 1989  
Date