



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

## **ORDER P-290**

Appeal P-910748

Ministry of Natural Resources



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## ORDER

### BACKGROUND:

The Ministry of Natural Resources (the "institution") received a request under the Freedom of Information and Protection of Privacy Act (the "Act") for access to "a copy of the plan of survey prepared by R.D. Tomlinson, O.L.S. of Lot 8, and 9, Concession 11, in the Township of Lake".

The record is a plan of survey which was commissioned and paid for by a private citizen (the "affected person") respecting a proposed road to be built over Crown land to individual properties owned by the affected person and other landowners. According to the institution, the record was not registered so as not to make it publicly available under the Surveys Act. However, a copy of the record was provided to the institution with instructions from the affected person that it be kept confidential and not shared with other landowners.

Following receipt of representations from the affected person, the institution informed the requester that:

"...representations have been received from the third party. Access to the records is refused based on Section 17 of the Act, specifically that the party maintains that the document was supplied at his own expense to the Ministry in confidence".

The requester appealed the institution's decision.

During the course of mediation, the Appeals Officer sought the affected person's consent to disclose the record, but consent was not given.

Further attempts to mediate this appeal were not successful. Accordingly, notice that an inquiry was being conducted to review the decision of the head was sent to the appellant, the affected person and the institution. Enclosed with each notice was a report prepared by the Appeals Officer, intended to assist the parties in making representations concerning the subject matter of the appeal.

Representations were received from the institution and the appellant, but not the affected person. In its representations the institution claimed that section 18(1)(a) of the Act also applied to the record. The appellant was notified of this new claim, and submitted additional representations which addressed the application of this section. I have considered all representations in reaching my decision.

**ISSUES:**

The issues arising in this appeal are as follows:

- A. Whether the mandatory exemption provided by section 17(1) of the Act applies to the record.
- B. Whether the discretionary exemption provided by section 18(1)(a) of the Act applies to the record.

**SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the mandatory exemption provided by section 17(1) of the Act applies to the record.**

The institution submits that sections 17(1)(b) and (c) of the Act apply to the record.

Sections 17(1)(b) and (c) of the Act state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (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;

In Order 36, dated December 28, 1988, former Commissioner Sidney B. Linden established a three part test, each part of which must be satisfied in order for a record to be exempt under sections 17(1)(a), (b) or (c). Subsequent to the issuance of Order 36, section 17(1) was amended to include a new section, 17(1)(d). This new section is not covered by the test established in Order 36, and is also not relevant in the circumstances of this appeal. The test for exemption under sections 17(1)(a), (b) or (c) is as follows:

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 types of harms specified in (a), (b) or (c) of subsection 17(1) will occur.

Turning to the third part of the test, it has been established in a number of previous Orders that the burden of proving the applicability of the section 17 exemption lies both with the institution and the affected party who has resisted disclosure. (See Orders 80, 101, 166, 204, P-228, P-249 and P-270). The institution and/or the affected party must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed. (See Orders 36, 47, 48, 68 and P-270).

In its representations, the institution submits that if a record such as this must be disclosed, there will be a tendency for people not to supply such records in the future [section 17(1)(b)]. The rationale being that the institution could not provide assurances that such records would not be disclosed prematurely.

With respect to section 17(1)(c), the institution submits:

If the appellant is successful and the Ministry is ordered to disclose the survey, [the appellant] will obtain at minimal cost a document which cost another a significant amount of money to have prepared.... It is the Ministry's submission that where a private citizen

has spent a significant amount of money to produce a plan of survey, that releasing that survey to the appellant would result in undue gain.

In my view, these submissions are not sufficient to discharge the burden of proving a reasonable expectation of harm to the affected person if the records were disclosed. This type of record is normally registered under the Surveys Act and, thereby made publicly available. Accordingly, I cannot accept that it could reasonably be expected that this type of information would no longer be supplied, simply because in the circumstances of this particular case the person who commissioned the survey chose not to

register it. In addition, I have not been convinced that disclosure of the record would result in undue gain to any person, again given that the record is one that is normally publicly available.

As indicated above, failure to satisfy any one of the three requirements renders section 17 inapplicable to the record. Because the requirements of part three of the section 17(1) test have not been satisfied, I find that the record does not qualify for exemption under section 17 of the Act.

**ISSUE B: Whether the discretionary exemption provided by section 18(1)(a) of the Act applies to the record.**

The institution submits that section 18(1)(a) of the Act applies to the record.

Section 18(1)(a) of the Act states:

A head may refuse to disclose a record that contains,

trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

In Order 87, dated August 24, 1989, former Commissioner Linden set out the test which must be met in order for a record to qualify for exemption under section 18(1)(a):

In order to qualify for exemption under subsection 18(1)(a), the head must establish that the information:

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

With respect to the third part of the test, whether the information has monetary value or potential monetary value, the institution submits:

... the record in question does have such value ... it is the product of an application of a surveyor's professional skills. Surveyors are retained daily throughout Ontario to produce such surveys for such fees. It would have a value to present or future owners of, and those with an interest in the properties covered by the survey ... [it is estimated] that the cost of such a survey in 1992 would be between four and five thousand dollars ...

In Order 219, at page 16, Commissioner Tom Wright stated:

In my view, the use of the term "monetary value" in subsection 18(1)(a) requires that the information itself have an intrinsic value. As I see it the purpose of subsection 18(1)(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information.

In this case, while I agree that there are fees chargeable for the preparation of a plan of survey, I am not satisfied that the information itself has monetary value for the institution. In addition, the institution has not provided evidence which would indicate that there was ever any intention to provide the record in any way that would result in some form of monetary gain by the institution. Therefore, it is my view that section 18(1)(a) does not apply to the record.

**ORDER:**

1. I order the head to disclose the record to the appellant.
2. I order that the institution not disclose the record until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the record is actually disclosed. Provided notice of an application for judicial review has not been served on the Information and Privacy Commissioner/Ontario and/or the institution within this thirty (30) day period, I order that the record be



disclosed within thirty-five (35) days of the date of this Order.

3. In order to verify compliance with the provisions of this Order, I order the head to provide me with a copy of the records which are disclosed to the appellant pursuant to provision 1, upon my request.
  
4. The institution is further ordered to advise me in writing within five (5) days of the date of disclosure, of the date on which disclosure was made. This notice should be forwarded to my attention, c/o Information and Privacy Commissioner/ Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: \_\_\_\_\_  
Tom Mitchinson  
Assistant Commissioner

\_\_\_\_\_ April 21, 1992