Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4427

Appeal PA22-00153

Infrastructure Ontario

August 15, 2023

Summary: Infrastructure Ontario (IO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records related to a type of study completed at a specific location. IO denied access to one responsive record, a survey, pursuant to section 18(1) (economic and other interests) of the *Act.* In this order, the adjudicator finds that the survey contains the results of environmental testing and that as a result, the mandatory exception to the discretionary 18(1) exemption at section 18(2) of the *Act* applies. The adjudicator orders IO to provide the appellant with a portion of the survey.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 18(1) and 18(2).

OVERVIEW:

[1] Infrastructure Ontario (IO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following records:

> …all records held by Infrastructure Ontario related to the "Designated Substance Surveys" that have been completed at the proposed site for the Eastern Ontario Correctional Complex in Kemptville/North Grenville from 2020-03-01 to 2022-01-20.

[2] IO identified one record that was responsive to the request (the Survey) and notified an affected party under section 28(1) of the *Act* to obtain their views about the

disclosure of the record. IO then issued a decision to the requester denying access to the responsive record pursuant to the mandatory exemption for third party information in section 17(1) and the discretionary exemption in section 18(1) (economic and other interests) of the *Act.* The requester, now the appellant, appealed IO's decision.

[3] During the course of mediation, the mediator had discussions with both the appellant and IO. The appellant advised the mediator that they believe the public interest override at section 23 of the *Act* should apply to the withheld record and as such, this section was added as an issue in the appeal.

[4] IO advised the mediator that it was no longer relying on section 17(1) of the *Act* to deny access to the record. However, IO confirmed that it maintained its decision to deny access to the record in its entirety under section 18(1) of the *Act,* with specific reference to subsections 18(1)(a), (c), (d), (e) and (g). Further mediation of the matters was not possible and the appeal was moved to the adjudication stage of the appeals process where an adjudicator may conduct a written inquiry pursuant to the *Act.*

[5] I commenced an inquiry by seeking representations from IO on the matters set out in a Notice of Inquiry. In the Notice of Inquiry, I asked that IO address the potential application of section 18(2) of the *Act*. Section 18(2) is a mandatory exception to the section 18(1) discretionary exemption that provides for the disclosure of the results of product or environmental testing, with some limited exceptions.

[6] IO provided representations, which I shared with the appellant, who provided representations in response. After reviewing the parties' representations, I determined that further information was not necessary. In this order, I find that section 18(2) applies to the Survey as it contains the results of environmental testing carried out for an institution and I order IO to provide the appellant with a copy. Given my finding, it was not necessary for me to also consider whether the public interest override at section 23 of the *Act* also applied.

RECORD AT ISSUE:

[7] The Survey at issue is a 1500-page report with various appendices called a "Designated Substances and Hazardous Materials Survey." The Survey was completed by a third party who consented to its disclosure.[1] The survey portion conducted by the third party is 36 pages long, with an additional 60 pages of figures and tables. The remaining 1404 pages of the Survey are comprised of three appendices:

- A report from 2002 conducted by a different third party totaling 1,175 pages;

[1] A consent form dated March 9, 2022 was provided to the IPC. The consent form indicates that the third party consents to the release of all of the information in the Survey.

- A report from 2006 conducted by another different third party totaling 166 pages;
- Two lab reports from another different third party from 2021 totaling 59 pages.

[8] After reviewing the three appendices referred to above, I determined that various additional affected parties whose interests may be affected by the disclosure of the appendices must be notified before the inquiry could continue so that they could have an opportunity to make representations on the potential disclosure of the information in the appendices.

[9] Prior to notifying the affected parties, the Adjudication Review Officer assigned to this appeal contacted the appellant to determine whether he intended to seek access to the appendices, in addition to the content of the actual survey conducted by the third who had already been notified.

[10] The appellant confirmed with the Adjudication Review Officer that they only sought access to the survey completed by the third party that consented to disclosure and was not interested in pursuing access to the additional appendices set out above. As a result, only the first 96 pages of the Survey remain at issue in this appeal.[2]

DISCUSSION:

[11] The sole issue in this appeal is whether the discretionary exemption at section 18(1) (economic and other interests) applies to the first 96 pages of the Survey such that IO may exercise its discretion to refuse to disclose it to the appellant. As noted above, IO submits the following subsections of section 18(1) of the *Act* apply to the Survey:

> A head may refuse to disclose a record that contains,
>
> > (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value; …
> >
> > (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
> >
> > (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the

[2] In this decision, when I refer to the Survey I am referring to the 96 pages references above and not the remaining 1404 pages of appendices, which are no longer at issue in this appeal.

> ability of the Government of Ontario to manage the economy of Ontario;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario; …
>
> (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person; …

[12] The purpose of section 18(1) is to protect certain economic and other interests of institutions. It also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental organizations.[3]

[13] However, as outlined in the Notice of Inquiries provided to the parties at the beginning of this inquiry, section 18(2) of the *Act* provides for the disclosure of the results of product or environmental testing, with some exceptions. Section 18(2) states:

> A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless,
>
> (a) the testing was done as a service to a person, a group of persons or an organization other than an institution and for a fee; or
>
> (b) the testing was conducted as preliminary or experimental tests for the purpose of developing methods of testing.

[14] As previous IPC orders have noted, section 18(2) is unusual in the context of the *Act*, in that it constitutes a mandatory exception to the application of an exemption for discrete types of records, namely results of product or environmental testing.[4] Therefore, even if IO were able to establish that disclosure of the Survey could reasonably be expected to result in the harms contemplated by sections 18(1)(a), (c), (d), (e), and/or (g), it would be required to disclose the entire record if it falls under section 18(2) and the circumstances outlined under paragraphs (a) or (b) of that section are not present.[5]

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[3] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.
[4] Order P-1562.
[5] Order P-1562.

IO's Representations

[15] To begin, I confirm that I have reviewed all of IO's representations but will refer only to those portions most relevant to this decision.

[16] By way of background, IO explained that it is a Crown corporation wholly owned by the Province of Ontario that provides a wide range of services to support the Province's "initiatives to modernize and maximize the value of public infrastructure and realty." IO says that it partners with public sector agencies, including provincial ministries, Crown corporations, municipalities, and not-for-profit organizations to renew infrastructure across Ontario.

[17] IO says that it is working with the Ministry of the Solicitor General to deliver a new Eastern Ontario Correctional Complex in Kemptville (the "Project"), to alleviate overcrowding the Ottawa-Carleton Detention Centre. It says that the Project supports the Ministry of the Solicitor General's strategy of replacing aging institutions to address health, safety, and security issues, including efficiencies of design, technology, and space and will result in development of a 235-bed, multi-purpose correctional facility.

[18] IO submits that the record at issue (referred to above as the Survey) is a draft of the Designated Substances and Hazardous Materials Survey. It says that the content of the Survey represents, among other things, draft materials prepared specialists in engineering retained by the Government of Ontario to research and analyze the specific buildings on the parcel of land and to provide a report on the buildings' condition and designated substances and hazardous materials located in the buildings, if any were discovered.

[19] Specifically, IO says that the third party's specialists collected information and examined the buildings on the property for hazardous materials and provided IO with the draft summary and recommendations.

[20] IO denies that section 18(2) applies to the Survey. First, IO says that the record contains draft material prepared by the third party. It points out that each page of the record is marked with the following notation:

> This document is in draft form. The contents, including any opinions, conclusions or recommendations contained in, or which may be implied from, this draft document must not be relied upon. [The third party] reserves the right, at any time, without notice, to modify or retract any part or all of the draft document. To the maximum extent permitted by law, [the third party] disclaims any responsibility or liability arising from or in connection with this draft document.

[21] As a result, IO says that the information in the Survey must not be relied on and should not be disclosed to the public. It says that the disclosure of the record could mislead the public and could lead to unpredictable and irreversible consequences and

that this may have a negative effect on the Project development. IO argues that the Survey is not final and remains open for further revision and modification by the parties at any time and in no event should be disclosed and relied on by the public.

[22] Additionally, IO says that its role in the Project is as the agent of the Ontario Government. IO says it is working collaboratively with the Ministry of the Solicitor General, and not on its own, to deliver this Project. IO says it is not an owner of the lands that are to be used for the Project development, neither is it a sole owner of the record. IO says that the Ministry of the Solicitor General also has proprietary rights to the record. Thus, IO asserts that the record was prepared for the benefit of the parties involved in the Project, in particular the Ministry of the Solicitor General who initiated and authorized this Project.

[23] IO submits that the record was prepared for a fee, which was covered by the Ontario government funds. Consequently, IO claims that section 18(2)(a) applies because "the testing was done as a service to a person, a group of persons or an organization other than an institution for a fee" and thus the 18(2) exception does not apply to the record at issue.

Appellant's representations

[24] The appellant says that Survey contains the results of environmental testing (and/or product testing) and must be disclosed. The appellant denies that subsections 18(2)(a) or (b) apply.

[25] In response to IO's claim that 18(2)(a) applies, the appellant submits that IO is making an artificial distinction between Infrastructure Ontario and the Ministry of the Solicitor General to obscure the fact that it is the Province had the Survey completed.

[26] Furthermore, the appellant says that the draft status of a report is irrelevant because the report contains results and there is no evidence that the testing is "conducted as preliminary or experimental tests for the purpose of developing methods of testing" as required by section 18(2)(b).

[27] The appellant refers me to Order P-1562, which they say explains that "results of product or environmental testing" includes raw data that may need to be further reviewed, analyzed, interpreted, and reported." The appellant argues that even in draft form, the Survey contains environmental and/or product "results." As such, the appellant denies that IO's claims about "draft reports" cannot be used to limit the release of the Survey.

Findings and analysis

[28] For the reasons that follow, I find that the mandatory provision of section 18(2) applies, that neither 18(2)(a) nor (b) apply, and that as a result, IO is precluded from relying on the provisions of sections 18(1)(a), (c), (d), (e) and/or (g) as the basis for

denying access to the Survey.

[29] Section 18(2) is not commonly applied. However, two previous IPC orders concluded that it applied to the following types of information:

- emission test results contained in the "Drive Clean" database (Order PO-1980); and
- the results of testing to identify tritium levels at a specific location (Order P-1562).

[30] In my view, the information at issue in the Survey is similar in nature to that in the orders noted above. As explained by IO, the objective of the Survey was to identify the existence and/or quantity of various hazardous substances in specific designated areas. The Survey describes the areas tested and specifies what substances were, or were not, identified in those areas. While I cannot reveal the specific contents of the Survey, it identifies the locations of various substances and provides approximate magnitudes/quantities of the substances. In my view, the Survey clearly contains the results of environmental testing. Evidence in support of this finding can be found on page two of the introduction to the Survey. Here, the third party explains in detail why, and how, the Survey is being conducted and, in my view, this evidence directly supports a finding that the Survey contains the results of environmental testing, as contemplated by section 18(2) of the *Act.*

[31] Having found that the Survey contains the results of environmental testing, the next step is to determine whether either of the exception in section 18(2)(a) or (b) apply.

[32] IO says that section 18(2)(a) applies. Specifically, it submits that the Survey was prepared for a fee, which was covered by Ontario government funds and that "consequently" the testing done as a service to a person, a group of persons or an organization other than an institution and for a fee. I am not persuaded by this argument because I find that the testing was done as a service to IO. The "Executive Summary" of the Survey clearly indicates that the third party that produced the report was retained by IO.[6] As such, I am unable to conclude that the testing was done as a service to "a person, a group of persons, or an organization other than an institution" since it is clear that the testing was done for IO, which is an institution under the *Act.*[7]

[33] I also find that section 18(2)(b) does not apply. IO does not argue that the testing in the Survey was conducted as preliminary or experimental testing for the purpose of developing methods of testing and I see no evidence from the Survey itself

[6] As noted earlier in this decision, I cannot reveal the specific content of the Survey. However, under "Executive Summary" on page "i" the details of how the Survey was commissioned and it is clear to me from this evidence that IO retained and instructed the third party to conduct the Survey.
[7] See the Schedule to R.R.O. 1990, Regulation 460.

that this was the case.

[34] However, IO does make some additional arguments in its representations, which I will address now.

[35] IO submits the Ministry of the Solicitor General (the ministry) has proprietary rights to the Survey and that IO was acting only as its agent. The ministry was provided a Notice of Inquiry and invited to provide representations on the matters at issue. The ministry responded to a Notice of Inquiry and informed the IPC that it would not be participating in this inquiry. As a result, I find that IO's assertion that the ministry has proprietary rights to the record is of no consequence for the purposes of this inquiry.

[36] IO also argues that the Survey contains "unreliable draft material" prepared by the third party that should not be disclosed to the public. I am not persuaded that the fact that the Survey at issue is a draft prepared by a third party is relevant to the determination of whether section 18(2) applies. Section 18(2) does not specify that the results of the environmental testing must be reliable, nor does it say that environmental testing results in draft form may be withheld. Furthermore, I note that the third party that prepared the Survey consented to its disclosure.[8] Given the foregoing, I see no reason to consider these arguments further.

[37] In summary, for the reasons set out above, I find that the mandatory provisions of section 18(2) have been established, and that none of the exceptions provided by paragraphs (a) and (b) are present. As a result, I find that IO is precluded from relying on the provisions of sections 18(1)(a), (c), (d), (e) and/or (g) of the *Act* as the basis for denying the appellant access to the Survey. To be clear, my finding in this regard should not be interpreted as meaning that the information in the Survey would necessarily qualify for exemption under any of the provisions of sections 18(1); only that such a finding is irrelevant given the application of section 18(2) of the *Act*.[9]

ORDER:

1. I find that section 18(2) applies to the Survey, and that IO cannot rely on the section 18(1) exemption claim to deny access to the Survey.

2. I order IO to disclose a copy of pages 1 to 96 of the Survey to the appellant by September 19, 2023.

3. In order to verify compliance with the provisions of this order, I reserve the right to require IO to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 2.

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[8] As mentioned in footnote 1, a consent form dated March 9, 2022 was provided to the IPC indicating that the affected party consented to the disclosure of all of the information at issue in the Survey.
[9] See, for example, Orders PO-1980 and P-1562.

Original Signed by: August 15, 2023

Meganne Cameron
Adjudicator