



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario_ 1 -**

ORDER P-627

Appeal P-9200547

Ontario Northland Transportation Commission



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Ontario Northland Transportation Commission (the ONTC) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to copies of minutes of all the ONTC's meetings for the previous year as well as any related documentation.

The ONTC denied access to this information under sections 12, 13, 15, 17, 18 and 21 of the Act. The requester appealed the denial of access.

Notice that an inquiry was being conducted to review the ONTC's decision was sent to the ONTC, the appellant and 17 affected persons. Representations were received from the appellant, the ONTC and several affected persons. During the inquiry, the ONTC disclosed a portion of the Minutes to the requester, and these records and section 21 of the Act are no longer at issue.

The records remaining at issue in this appeal are portions of President's Reports relating to rail operations and labour relations for April and May 1991; July - October 1991; December 1991; and January - April 1992. These records relate to seven affected persons. Representations were received from four of these affected persons.

In its representations, the ONTC removed the section 13(1) exemption it applied to information in the President's Reports under the headings Financial Results and Commercial Operations. As it claimed no other exemptions for this information and, in my view, no mandatory exemptions apply, I order its disclosure, and will consider below only the remaining portions of the records.

ISSUES:

The issues in this appeal are:

- A. Whether the discretionary exemption provided by section 18 of the Act applies.
- B. Whether the discretionary exemption provided by section 13(1) of the Act applies.
- C. Whether the mandatory exemption provided by section 12 of the Act applies.
- D. Whether the discretionary exemption provided by section 15(b) of the Act applies to one part of the records.
- E. Whether the mandatory exemption provided by section 17(1) of the Act applies.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 18 of the Act applies.

The ONTC submits that sections 18(1)(a), (c) and (d) apply to information contained under the headings "Carload Freight" and "Freight Marketing" (including two graphs attached to the April 1991 report). It also submits that sections 18(1)(a), (e) and (g) apply to information under the heading "Passenger Trains".

These sections read:

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 where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (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;
- (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 where 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;

Carload Freight/Freight Marketing

The ONTC explains the highly confidential nature of contracts made between railways and shippers in today's market. The Carload Freight information in the records reveals freight rates, revenues and freight movements which result from confidential contracts the ONTC enters into

with major freight customers. The ONTC emphasizes the importance of keeping this information confidential.

To establish a valid exemption under section 18(1)(c), the ONTC must successfully demonstrate a reasonable expectation of prejudice to the economic interests or competitive position of a government institution arising from disclosure of the information. The test under section 18(1)(c) is one of a reasonable expectation of prejudice to economic or competitive interests. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged (Orders P-557 and M-202).

The ONTC states that the Carload Freight portions of the records reveal the ONTC's freight volumes, revenues and traffic data. The ONTC submits that disclosure of the Carload Freight information would detrimentally affect the ONTC by providing competitors, especially highway carriers, with market data and other critical information. ONTC submits that the disclosure of this confidential information would place competitors:

... in a preferential position to rail carriers regarding submission of transportation proposals to the customers and this unfair advantage would dilute Ontario Northland's revenues and adversely impact on its economic interests.

The ONTC emphasizes that the disclosure of this information could reasonably be expected to result in the loss of rail revenue to competitors, thereby causing prejudice to its economic interests and its competitive position. Having reviewed the information contained under the headings Carload Freight and Freight Marketing (including the two graphs attached to the April 1991 report), I am of the view that these portions of the records qualify for exemption under section 18(1)(c) of the Act.

The ONTC also claimed sections 18(1)(d), 13 and 17 to exempt the Carload Freight information. As I have concluded that the Carload Freight information is properly exempt under section 18(1)(c) of the Act, it is not necessary for me to consider the additional exemptions which the ONTC applied to this part of the records.

Passenger Trains

The ONTC has applied section 18(1)(a) to exempt the information contained in this portion of the President's Reports. The ONTC submits that this information would disclose commercial and financial information belonging to the Government of Ontario which has monetary value.

The Passenger Train portions of the President's Reports contain information relating to the operation of passenger train service in northern Ontario. Some of the information contains certain updates in relation to this service; other information relates to financing efforts.

As I see it, the purpose of section 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 (Order P-219). In this case, the ONTC has

no intention of publishing or disseminating the requested information in a way that would result in some form of monetary payment to the ONTC, and I am not satisfied that the information itself has monetary value. Accordingly, section 18(1)(a) does not apply.

ONTC has also claimed sections 18(1)(e) and (g) to exempt Passenger Train information. With respect to section 18(1)(e), ONTC submits that the Passenger Train information includes proposed plans and projects where the disclosure could reasonably be expected to result in premature disclosure of a policy decision. No explanation was provided in relation to the application of section 18(1)(g) of the Act. Without detailed and convincing evidence to show how these exemptions apply, I find that the Passenger Train information does not qualify for exemption under sections 18(1)(e) or (g) of the Act.

ISSUE B: Whether the discretionary exemption provided by section 13(1) of the Act applies.

Section 13(1) of the Act provides:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

"Advice" for the purposes of section 13(1) of the Act must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Order 118).

The ONTC has applied section 13(1) to all portions of the President's Reports. As I have already disposed of Carload Freight, I will consider the application of this exemption to the information under the headings Passenger Train, Cochrane West and Labour Relations.

I have reviewed the information contained under these headings and in my opinion, the information consists of summaries and status updates of various activities relevant to the subject matter of each heading. In my view none of the information contains suggested courses of action. Although the July 1991 Report mentions the presentation of a recommendation relating to manpower reduction, the substance of this recommendation is not contained in the Report. Having reviewed the information contained under these headings, it is my opinion that none of it can be considered "advice" or "recommendations" within the context of section 13(1) of the Act, and this section does not apply.

ISSUE C: Whether the mandatory exemption provided by section 12 of the Act applies.

Prior to the inquiry stage of this appeal, the ONTC indicated that section 12 of the Act applied to exempt the records from disclosure. Although the ONTC did not address section 12 in its representations, I have considered its application to the records as it is a mandatory exemption.

Section 12 of the Act protects information that has been submitted to Cabinet, or that would reveal the substance of Cabinet deliberations. The ONTC states that orders-in-council were required at the provincial and federal levels to complete the process of acquiring the Cochrane West line. In my opinion, the Cochrane West information primarily relates to procedural matters pertaining to the ONTC's attempts to obtain final Cabinet approval, and does not reveal the substance of Cabinet deliberations. Accordingly, I find that section 12 does not apply.

ISSUE D: Whether the discretionary exemption provided by section 15(b) of the Act applies to one part of the records.

The ONTC has claimed that section 15(b) applies to the information contained under the heading Cochrane West. This section reads:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

reveal information received in confidence from another government or its agencies by an institution;

and shall not disclose any such record without the prior approval of the Executive Council.

For a record to qualify for exemption under section 15(b), the ONTC must establish that:

1. the records reveal information received from another government or its agencies; **and**
2. the information was received by an institution; **and**
3. the information was received in confidence.

[Order 210]

The ONTC submits that section 15(b) applies to this information as the process involved an exchange of confidential information between governments.

The ONTC states that this designation in the President's Reports refers to the ONTC's attempts to acquire a line of railway. Having reviewed these parts of the records, and in the absence of further detail, it is not apparent what information was supplied by another government or its agencies to the ONTC in confidence. In my opinion, section 15(b) does not apply to the Cochrane West information.

ISSUE E: Whether the mandatory exemption provided by section 17(1) of the Act applies.

The ONTC has applied section 17(1) to exempt portions of information contained under the Labour Relations headings in each report. This section reads:

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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

For a record to qualify for exemption under section 17(1), the ONTC and/or the affected parties 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 outcomes specified in (a), (b), (c) or (d) of section 17(1) will occur.

[Order 36]

The ONTC states that section 17(1) of the Act applies to exempt the labour relations information because certain unions are identified.

I am satisfied that these parts of the President's Reports contain labour relations information thereby satisfying the first part of the section 17(1) test. In the absence of further evidence, and from my review of the records and the representations, it is not clear what information was supplied to the ONTC, from whom it was supplied, and whether it was supplied in confidence. Although the records may mention other third parties, these brief references are not sufficient to trigger the application of section 17(1). Accordingly, I find that the second part of the section 17(1) test has not been satisfied, and section 17(1) does not apply.

ORDER:

1. I order the ONTC to disclose the records, with the exception of the information under the headings "Carload Freight" and "Freight Marketing" (including the two graphs attached to the April 1991 report) to the appellant within 35 days of the date of this order, and not before the thirtieth (30th) day following the date of this order.
2. In order to verify compliance with this order, I order the ONTC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon request.

Original signed by: _____
Holly Big Canoe
Inquiry Officer

February 10, 1994