

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4653

Appeal PA22-00120

Infrastructure Ontario

May 7, 2025

Summary: Infrastructure Ontario (IO) received a request under the *Freedom of Information and Protection of Privacy Act* for land survey records related to the proposed Eastern Ontario Correctional Complex. IO located a survey and withheld it under the section 18(1)(a) exemption for an institution's economic interests. The requester appealed the decision and raised the application of the section 23 public interest override.

In this order, the adjudicator upholds IO's decision, finding that the record is exempt under section 18(1)(a) and that the public interest override does not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 18(1) and 23.

Orders Considered: Orders MO-2081, MO-3660, and PO-2435.

Cases Considered: *Keatley Surveying Ltd. v. Teranet Inc.*, 2019 SCC 43.

OVERVIEW:

[1] Infrastructure Ontario (IO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records regarding the proposed Eastern Ontario Correctional Complex in Kemptville. Specifically, the request was for:

...all records held by Infrastructure Ontario related to the "Land Survey/Topographic Plan" that have been completed at the proposed site

for the Eastern Ontario Correctional Complex in Kemptville/North Grenville from 2020-09-01 to 2022-01-10.

[2] IO identified a land survey as responsive to the request and notified an affected party to obtain its views regarding disclosure of the record. IO then issued a decision to the appellant denying access to the record under sections 17(1) (third-party information) and 18(1) (economic or other interests) of the *Act*.

[3] The requester (now the appellant) appealed IO's decision to the Information and Privacy Commissioner of Ontario (IPC). During mediation, the appellant raised the application of section 23 of the *Act*, stating that there was a public interest in the disclosure of the record. IO also stated that it was no longer relying on section 17, but continued to rely on section 18(1), specifically sections 18(1)(a), (c), (d), (e), and (g).

[4] No further mediation was possible, and the file was moved to the adjudication stage of the appeals process. The adjudicator originally assigned to the appeal sought and received representations from IO and the appellant. The appeal was then assigned to me to complete the inquiry. I reviewed the representations of the parties and determined that I did not need to seek additional representations.¹

[5] For the reasons that follow, I uphold IO's decision and dismiss the appeal.

RECORDS:

[6] A survey consisting of topographical drawings is at issue in the appeal.

ISSUES:

- A. Does the discretionary exemption at section 18(1)(a) for economic and other interests of the institution apply to the record?
- B. Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the section 18(1)(a) exemption?

DISCUSSION:

Issue A: Does the discretionary exemption at section 18(1)(a) for economic and other interests of the institution apply to the record?

[7] 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

¹ While I reviewed the entirety of each party's representations, I have only reproduced those relevant to the specific issues in the appeal below.

should be protected to the same extent as that of non-governmental organizations.² IO claimed the application of section 18(1)(a), which 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.

[8] The purpose of section 18(1)(a) is to permit an institution to refuse to disclose information where its disclosure would deprive government or the institution of its monetary value.³ For section 18(1)(a) to apply, the institution must show that the information:

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

Representations, analysis, and finding

Part 1: type of information

[9] IO submits that the record contains technical and commercial information. Technical information is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering, or electronics. Technical information usually involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment, or thing.⁴

[10] It submits that the survey, consisting of topographical drawings, was prepared by a licensed surveyor and set out technical information for a specific parcel of land, which will be used for the construction and development of facilities under the project. It references Orders MO-2081 and MO-3660, where a site plan was found to be technical information under section 10(1) of the municipal equivalent of the *Act* (which relates to third-party information, but for which the IPC has interpreted similarly in relation to the types of information).

[11] The appellant did not dispute that the record contains technical information within the meaning of section 18(1)(a).

² *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.

³ Orders M-654 and PO-2226.

⁴ Order PO-2010.

[12] IO is correct that site plans have previously been found to be technical information within the meaning of the *Act*. I find the survey at issue to be similar and I make the same finding here. As IO submits, the survey was prepared by a professional in an applied sciences field and relate to the construction of the project underlying the request. Having found that the survey contains technical information, the first part of the test is satisfied, and I do not need to determine if it also contains commercial information.

Part 2: belongs to

[13] For information to “belong to” an institution, the institution must have some proprietary interest in it.

[14] The type of information “belonging” to an institution is information that has monetary value to the institution because it has spent money, skill, or effort to develop it. IO submits that the record was prepared by a licensed surveyor and purchased by IO. It further notes that the record is protected by copyright, although it did not claim that the copyright belongs to IO or the Ontario Government.⁵ IO also submits that the project that the record relates to has yet to start public procurement, and the record is sensitive and confidential. It states that disclosure of the information could adversely affect the fairness of the upcoming procurement process.

[15] The appellant submits that part two of the test is not met, stating that the Crown owns the copyright and as such it should not be used in a way to prohibit the release of the record. He references *Keatley Surveying Ltd. v. Teranet Inc.*,⁶ where the Supreme Court of Canada considered the application of Crown copyright claims in the context of the *Copyright Act*.⁷ He submits that the case “forces the consideration of an overexpansive application of the copyright claim” and challenges IO’s intellectual property and proprietary interest in the record. He also submits that the existence of copyright on the pages does not trigger intellectual property considerations and does not give IO a proprietary interest.

[16] I agree with the appellant’s general submission that the fact that the record is subject to copyright does not necessarily mean that part two of the section 18(1)(a) test is met. However, the fact that the record is copyrighted, while potentially a relevant consideration, is not determinative of whether part two of the test is met. Regardless of the scope of the copyright claim, it is not disputed that IO, by purchasing the survey from the surveyor, expended money in the development of the survey and therefore has a proprietary interest in it that would be lost if the record was disclosed.

Part 3: monetary value

[17] To have “monetary value,” the information itself must have an intrinsic value. The

⁵ IO notes that each page of the record is copyrighted, but the copyright on the pages refers to the surveyor.

⁶ 2019 SCC 43

⁷ R.S.C. 1985, c. C-42, s. 12.

mere fact that the institution spent money to create the record does not mean it has monetary value for the purposes of this section.⁸ Nor does the fact, on its own, that the institution has kept the information confidential.⁹

[18] IO submits that the survey was created through the expenditure of government funds and the application of skill and effort of a licensed specialist. IO further states that, due to the ongoing procurement process, disclosing the survey could adversely affect government economic and financial interests, further confirming its monetary value.

[19] The appellant submits that the survey does not have any monetary or intrinsic value. He states that the fact that IO spent money to have the survey prepared does not mean that it has monetary value.

[20] Considering the record at issue and its associated context, I find that it has monetary value, satisfying part three of the test. IO states that it expended money to create the record and that disclosure of the record would harm the procurement process and submits that this confirms the record's monetary value. Regardless of the potential effects of disclosure on the procurement process, I find that the survey, being technical information related to the land that the project will be built on, has intrinsic monetary value. For example, if another organization were to undertake a similar project the technical information in this record, related to the land itself, would reasonably be expected to be of value to that organization. While the effects of disclosure on the procurement process may be relevant to other section 18(1) exemptions,¹⁰ the survey has monetary value due to its required use for the project underlying the request. I accept that in the circumstances before me the value of the survey would be lost if it was to be disclosed.

[21] With all three parts of the test met, I find that the survey is exempt from disclosure under section 18(1)(a), and I accordingly do not need to consider if it is exempt under the other claimed section 18(1) exemptions, or section 14(1). Additionally, neither party claimed, and I find, that the section 18(2) exception to the exemption does not apply to the survey. I uphold IO's decision, subject to my review of the section 23 public interest override and IO's exercise of discretion, discussed below.

Issue B: Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the section 18(1) exemption?

[22] Having found that the survey is exempt under section 18(1)(a), I will now consider if there is a compelling public interest in its disclosure. Section 23 of the *Act*, the "public interest override," provides for the disclosure of records that would otherwise be exempt

⁸ Orders P-1281 and PO-2166.

⁹ Order PO-2724.

¹⁰ As discussed above, IO also claimed sections 18(1)(c), (d), (e), and (g), but I have not addressed these claims in this order.

under another section of the *Act*.

[23] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records, and second, this interest must clearly outweigh the purpose of the exemption – in this case, the economic interest exemption at section 18(1)(a). In previous orders, the IPC has stated that in order to find a compelling public interest in disclosure that outweighs the exemption, 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.¹¹ The IPC has defined the word “compelling” as “rousing strong interest or attention.”¹²

Representations

[24] IO submits that the information in the survey will not contribute in any meaningful way to the public’s understanding of the activities of the government, and even if a compelling public interest in disclosure exists, it does not outweigh the purpose of section 18(1) of the *Act*. It submits that disclosure of the survey would be against the public interest, stating that it could prejudice the fairness of the procurement process, and adversely impact the economic and financial interests of the province.¹³

[25] The appellant, referencing Order PO-2435, emphasized the importance of transparency and government accountability in the context of access-to-information legislation. He submits that without access to details related to the Eastern Ontario Correctional Complex in Kemptville, there would be no meaningful way to subject the operations of the project to effective public scrutiny. He provided information on the expected cost of the project, emphasizing that it was a significant project with limited data available on the actual cost.¹⁴

[26] The appellant submits that “compelling” within the meaning of section 23 is “when records will help the citizenry assess and understand the activities of their government and reveal information to the public as to make effective use of the means of expressing public opinion or to make political choices.” He submits that there is strong community interest and attention in this capital project. He submits that there was a lack of consultation, transparency, and public engagement on various environmental, Indigenous, historical, social, local, and fiscal considerations. He also notes that it is an expensive project that will transform and result in the loss of historically significant lands.

¹¹ Orders P-984 and PO-2556.

¹² Order P-984.

¹³ In its representations about section 23, IO referenced the possibility that the record could be exempt under section 14 (law enforcement). IO did not change or amend its access decision and that is why this claim is not addressed in this order.

¹⁴ The appellant provided these representations regarding the application of section 18(1), but I have reproduced them here as they relate to the public interest in accessing the record.

He also notes that there has been a limited amount of information released about the project. With respect to IO's claim that disclosure would have adverse impacts on the procurement process, he submits that it could have the opposite effect, with more information leading to improved cost outcomes.

Analysis and finding

[27] I have considered the parties' submissions on the public interest in disclosing the record, and I find that the public interest override does not apply. While I understand the appellant's concerns about the scale and scope of the Eastern Ontario Correctional Complex, I do not agree that these concerns rise to the level of "compelling" within the meaning of section 23. A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation;¹⁵
- the integrity of the criminal justice system is in question;¹⁶ and
- there are public safety issues relating to the operation of nuclear facilities.¹⁷

[28] Here, the appellant's concerns relate to the costs of a large project and the land the project will be located on. While public scrutiny of such projects is important, if the appellant's definition of compelling were to be adopted, the public interest override would apply to most large government infrastructure projects. All of these projects involve the economic interests of the Province to some degree, and broadly applying the public interest override in these situations would defeat the purpose of the section 18(1) exemption. Even if I were to accept that this is a compelling public interest, I do not agree that it is sufficient to outweigh the purpose of the section 18(1)(a) exemption, which contemplates limited, specific exemptions from the right of access for certain types of information.

[29] Additionally, even if I were to find that the general purpose for accessing the records related to the project is compelling, the appellant has not demonstrated how this would apply to the specific record at issue. The survey, comprised of topographical drawings, provides minimal, if any insight, into the underlying financing or decision-making processes related to the project. Accordingly, I find that the section 23 public interest override does not apply. I uphold IO's decision, subject to my review of its exercise of discretion, below.

¹⁵ 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.).

¹⁶ Order PO-1779.

¹⁷ 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.

Exercise of discretion

[30] The section 18(1)(a) exemption is discretionary, meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[31] In addition, the IPC may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, or it fails to take into account relevant considerations. In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁸ The IPC cannot, however, substitute its own discretion for that of the institution.¹⁹

[32] Reviewing IO's decision and overall representations, I find that its decision to not disclose the records at issue was not based on any improper purpose and instead focused on consideration of the interests sought to be protected by the exemption. As is clear from IO's consideration of the public interest override discussed above, it considered if the information should be released despite the section 18(1) exemption, and determined that it should not be. Accordingly, I uphold its exercise of discretion in denying access to the record.

ORDER:

I dismiss the appeal.

Original Signed by: _____

Chris Anzenberger
Adjudicator

May 7, 2025

¹⁸ Order MO-1573.

¹⁹ Section 54(2).