The Joys and Pains of Open Data

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Lou Milrad's article, *The Cost of Open Data*, (*Ontario Professional Surveyor*, Summer 2012) raises important issues about open data and the potential implications of a California decision on the open data movement in Canada. At this stage, the open data movement is alive and well in Canada and we would like to see government-produced data freely available to the public. However, we see risks to land surveyors and GIS professionals when the discussion about open data ignores important legal concepts and economic impacts.

We agree with Lou Milrad that the public benefits when government-created data is made available to members of the public. After all, the public has already paid the costs of creating the data through taxes. We shouldn't have to pay for it again.

We also agree with the points attributed to Jury Konga on the benefits of free access to government information. There are many good reasons why government-created data should be made available to members of the public on a no-cost basis, or a low-cost basis. The commercialization model used by some government entities – selling data to raise money – is, in our view, the wrong way to go.

We will examine the California case in the Canadian context to see what effect it will have on the open data movement in this country.

Sierra Club vs County of Orange

The case referred to by Lou Milrad, Sierra Club vs County of Orange, dealt with the interpretation of wording specific to the Public Records Act of California ("PRA"). The aim of the PRA is to make public 'data' available to the public, which we agree is a good idea. However, the PRA set out a number of exceptions. It specifically exempted proprietary software from disclosure, on the theory that 'data' and 'software' are two different things.

The issue before the court was whether the Orange County Land base in GIS format was a public record (which should be disclosed), or whether it fell within an exception (in which case it would not be disclosed). In his decision, the judge noted that the PRA "plainly states that computer software is not a public record…" and that "computer software includes computer mapping systems." The judge also noted that the request for the Orange County Land base in GIS format could not be accomplished without execution of the computer mapping system software. In other words, the data and software were scrambled together and it was impossible to give the whites without giving the yolk. The judge found that the Orange County Land base in GIS format fell within a defined exception. The Sierra Club had no right to have it disclosed (although the Sierra Club could have purchased a license to the land base for $375,000 a year).

In our view, this decision makes sense based on the wording of the PRA in California. It also makes sense as a matter of policy. Why should the Sierra Club (or anyone else) be entitled to free *software*, just because the thrust of the PRA is to disclose public *data*?

The Canadian context

How will this decision affect the law in Canada? Will it have a chilling effect on the open data movement? The Canadian context is very different from the California context, and the distinction may insulate us from any fallout from the Sierra Club vs County of Orange case.

We do not have a PRA that requires public data to be disclosed, as they have in California (subject to the defined exceptions). We do have various *Freedom of Information Acts* at the different levels of government in Canada, and in Ontario we have the *Municipal Freedom of Information and Protection of Privacy Act ("MFIPPA")*. While these statutes establish a right of access to public records, each act has a defined procedure for requesting government information. In particular, *MFIPPA* permits municipalities to make copies of certain documents held by the municipalities *without infringing copyright* in the documents, *provided* that the procedural safeguards set out in that legislation are followed.

The procedure set out in s. 17 of *MFIPPA* requires that a person seeking access to a "record" (defined in s. 2 to include "a plan, a map, a drawing") makes a request in writing to the institution that the person believes has custody or control of the record, provides information adequate to identify the document, and, at the time of making the request, pays a fee. *MFIPPA* does not mandate the free-wheeling distribution of every document in the municipality's possession.

Governments in Canada are not permitted to charge a 'fee' that is in fact a 'tax', unless, of course, they pass legislation to make it a proper, above-board tax. Charging a licensing 'fee' of $375,000 for access to the Orange County Land base data, as was done in Orange County, might well be illegal in Canada. Again, that practice is part of the commercialization of government-produced data that we feel is the wrong way to go.

Another critical difference between the two countries is their treatment of government copyright. In Canada we are burdened with the ancient doctrine of Crown copyright. The Canadian *Copyright Act* gives the Crown certain rights to

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works "prepared or published by or under the direction and control of Her Majesty or any government department". The republic to the south does not recognize the Crown. Works prepared by an officer or employee of the U.S. government as part of that person's official duties are not entitled to domestic copyright. Individual states have different rules for state copyright. The California Appeals Court has ruled that the state government cannot claim copyright in public records.

By contrast, if the Ontario government prepared software for a GIS system, the Crown would own it outright, as well as all intellectual property rights associated with it. That was the result in a 1996 case (1996 CanLII 7705 Ont IPC) where a request was made under the *Freedom of Information and Protection of Privacy Act* ("FOI") for the business entity database and software produced by the Ontario government – essentially a list of all Ontario businesses, organized by the software – which the government did not want to give up. The FOI states that "information should be available to the public", (similar to the PRA) but it carved out an exception for records that contain technical information that belongs to the government that has potential monetary value.

The FOI Assistant Commissioner sided with the government and found that the database compiled and organized by the government fell within the exception. The database was protected by Crown copyright. The Assistant Commissioner also found that the software produced by the government was protected by Crown copyright. In the end, the result was similar to the California case, but for very different reasons. The interplay between copyright and Freedom of Information – or making public data available to the public – is quite different in the two neighbouring countries.

Fortunately for Canadian land surveyors and GIS professionals, our governments are moving in the direction of disclosing the data that they produce. There are already vast quantities of government-produced data available online and the amount is increasing exponentially. This is evidenced by the Gov 2.0 movement that Lou Milrad refers to in his article. Government practice – if not government legislation – leans towards disclosure of government-produced data.

What can members of the profession do?

It is important to note that the Orange County case was about *government-produced* data. Different criteria apply when the 'data' is privately produced and ends up in the hands of government. This is even more important when the 'data' has been reduced to an image or a document. At that stage it is no longer 'data'. It is an image that may well have intellectual property rights attached to it. The private rights of the creator of the document should not be sacrificed in the name of open data, as has been done in the past. The *Freedom of Information* legislation was not designed to circumvent intellectual property rights by providing low-cost access to valuable privately-produced documents.

Surveyors have long been the authors of documents that are filed with government agencies in a variety of forms on behalf of their clients. These documents are often sought by other users – a secondary market for land surveyors and GIS professionals. If these documents become freely available, the secondary market will disappear, with potentially significant economic and liability consequences to authors of the documents.

The discussion of open data should continue with a view to exploring the Canadian context more fully. We, as citizens and taxpayers, need to talk about the costs and benefits of making government-produced data available to the public. We all need to encourage our representatives to adopt policies that open up government-produced data to the public. Members of the profession need to stress the distinction between government-produced 'data' and privately-produced documents (whether in hard copy or digital format) and ensure that the open data movement does not trample on the rights of private land surveyors and GIS professionals.

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