



Information and Privacy
Commissioner/Ontario

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

ORDER P-906

Appeal P-9400571

Ministry of Finance



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NATURE OF THE APPEAL:

The appellant represents a company which is currently appealing the 1993 and 1994 tax assessments on one of its properties (the Subject Property). The appellant submitted a request to the Ministry of Finance (the Ministry) pursuant to the Freedom of Information and Protection of Privacy Act (the Act) seeking access to four categories of records related to the assessments. The Ministry issued a decision granting access to all records responsive to parts (A) and (D) of the request. The appellant has confirmed that he is satisfied with this response. Accordingly, I will not address parts (A) and (D) in this order.

As the wording of parts (B) and (C) of the request is germane to the disposition of this appeal, I will quote it verbatim:

- (B) All records in the possession of the Commissioner [Regional Assessment Commissioner, Region 10], wherever located, which relate generally to the valuation of similar real properties to the Subject Property located within the same municipality, including all policies, procedures, or statements of assessment practice, all files, memoranda, notes, calculations or any other material including computer data or software relating generally to the valuation of such facilities for assessment purposes or the preparation of any policies, procedures or practices relating to the valuation of such facilities.

- (C) All records in the possession of the Commissioner with respect to the valuation for assessment purposes of any properties which are similar real property to the Subject Property within the meaning of section 60(1) of the Assessment Act, R.S.O. 1990 c.A.31.

The Ministry denied access to the records responsive to part (B) of the request on the basis that they are publicly available (section 22(a) of the Act). It advised that all responsive records in existence are available in the Ministry's reading room in Oshawa, and that "... the documents are generally available for review by contacting your local regional assessment office".

With respect to part (C) of the request, the Ministry responded that it could not proceed as the appellant had failed to identify "the specific properties you deem to be similar". The Ministry stated that section 24 of the Act places the onus on the requester to identify the specific records sought. Even if specific comparable properties had been identified, the Ministry indicated that it would have denied access to the records on the basis of the confidentiality provision in section 67 of the Act. In effect, the Ministry is saying that "no responsive records exist".

The appellant appealed the Ministry's response to parts (B) and (C) of the request.

A Notice of Inquiry was sent to the Ministry and the appellant. Representations were received from both parties.

The issues to be determined in this order are (1) whether the records responsive to part (B) of the request are publicly available such that the exemption in section 22(a) of the Act applies, and (2) whether there exist records responsive to part (C) of the request.

DISCUSSION:

PUBLICLY AVAILABLE INFORMATION

In his letter of appeal, the appellant stated his understanding that the information responsive to part (B) of the request was not available at the Ministry's reading room. He argued that, even if it was, it could not be said to be "publicly available" for taxpayers in all regions of the province. The appellant also questioned the Ministry's assertion that "the documents are generally available for review by contacting your local regional assessment office". He indicated that, in his experience the practices of disclosure of information vary significantly from office to office, assessor to assessor and even from file to file in the hands of a particular assessor.

Under section 22(a) of the Act, an institution may refuse to disclose a record where the document, or the information contained in the document, has been published or is currently available to the public in another form. Where an institution relies on this provision, it must inform the requester of the specific location of the documentation and identify or provide the requester with a description of the records or information in question.

The Ministry states that the only records responsive to part (B) of the request consist of policy and procedural manuals. In its submissions, the Ministry reiterates that these documents are available at its reading room in its Oshawa offices. As part of its representations, the Ministry has provided photographs taken of its Freedom of Information collection housed at this location. The photographs show a number of bound volumes of guides to the Assessment Act, as well as such things as Court Case summaries, Valuation Tools and other policy and procedures manuals which, in my view, are the records responsive to part (B) of the request. The Ministry has also indicated that these materials are available in assessment offices around the province.

Moreover, the Ministry has identified and described the records that are available to the public in the Directory of Records.

The appellant has provided no submissions on this issue.

Based on the information provided by the Ministry in its representations, I am satisfied that the records responsive to part (B) of the request are currently available to the public such that section 22(a) of the Act applies. However, in its decision letter, the Ministry should have advised the appellant of the specific materials which are so available either by referring him to the listing in the Directory of Records or by providing the list as part of its decision.

The appellant's comments in his letter of appeal, to the effect that practices of disclosure of information vary significantly from office to office, assessor to assessor and even from file to file in the hands of a particular assessor, are more appropriately dealt with in the discussion which follows. That is because they appear to relate to information on specific properties rather than valuation policies and procedures.

EXISTENCE OF RECORDS

In the general case, where an institution claims that no records exist which are responsive to a request, the issue to be determined is the adequacy of the institution's search for the records. In this appeal, the issue is somewhat different as the Ministry's position is that any records responsive to part (C) of the request have yet to be created.

As I have previously indicated, in its decision letter the Ministry stated that section 24 of the Act places the onus on the requester to identify the specific records sought.

Section 24 of the Act states:

A person seeking access to a record shall make a request therefor in writing to the institution that the person believes has custody or control of the record and shall provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record.

The appellant maintains that there is no provision in section 24 which requires the requester to identify which properties are similar real properties. Even if section 24 were to apply, the appellant contends that the Ministry has not offered him assistance in reformulating the request as it is required to do pursuant to section 24(2) of the Act. In his submissions, the appellant claims that, as the request was phrased in such a way so as to encompass any property **which the Regional Assessment Commissioner has viewed or might view as "similar real property" in the vicinity**, the Ministry's decision does not respond to the request.

The appellant also maintains that:

With respect to the records of the Ministry and Regional Assessment Commissioner touching on the question of "similar real property in the vicinity", there is no question that such records exist within the possession and control of said Ministry and Commissioner. The Commissioner must create these records in order to have the assessment roll returned annually. We are unaware of any steps that have been taken on the part of the Ministry or the Commissioner to search for records which may, in the opinion of the Commissioner, constitute "similar real property in the vicinity", in the context of our request for information.

In this case, the appellant has indicated that his client has appealed its assessment on the Subject Property

and that "assessment appeals are currently pending before the appropriate administrative tribunals". The Ministry indicates that the appeal has been adjourned and is "awaiting a hearing".

In order to more fully understand the position of the parties it is necessary to provide some background information on the assessment appeal process.

Pursuant to section 60(1) of the Assessment Act, when a property assessment is appealed, the appeal body, which could be the Assessment Review Board, the Ontario Municipal Board or any court, must have reference to "similar real property in the vicinity" when determining whether the assessment being appealed is equitable. The Ministry states that the issue of whether or not a property is "similar" is a question of mixed fact and law based on a number of factors related to the property. Based on the caselaw provided by the Ministry, this also appears to be the most controversial issue in assessment cases on valuation. Moreover, again based on this caselaw, it is the Board or court which makes the decision as to what properties are "similar" to the property under appeal.

In its submissions, the Ministry indicates that at most assessment appeal hearings there are two charts of "comparables" presented, one prepared by the Ministry and one submitted by the party appealing the assessment. The term "comparables" is used to describe the properties submitted by the Ministry and the property owner to the Board or court as those which the appeal body should use in making its determination as to which properties constitute "similar real property in the vicinity" for the purposes of section 60(1) of the Assessment Act.

The Ministry states that property owners may choose their comparable properties by driving through the vicinity and then checking the assessments on the assessment rolls. Apart from that information which appears on the assessment rolls, property owners are not entitled to the records of any real property other than their own. However, section 53(3) of the Assessment Act provides an assessor with the discretion to disclose sufficient such information to satisfy the principles of fairness in the appeal process. The Ministry indicates that usually this means that the assessor will prepare a chart for the property owner on his or her comparables, including such information as the age of the building, square footage and certain other information.

The Ministry will prepare a chart with the same information for its own list of comparables. The Ministry states that if more information is needed at the hearing, the assessor provides it through the discovery process appropriate to the body hearing the appeal.

I will now consider the particular facts of this appeal.

Part (C) of the request, as reproduced on page 1 of the order, refers to "All records in the possession of the Commissioner with respect to the valuation for assessment purposes of any properties which are **similar real property** to the subject property **within the meaning of Section 60(1) of the Assessment Act**,

R.S.O. 1990 c.A.31. Based on the wording of the request and the submissions of the Ministry, it appears that the request may be interpreted in a number of ways.

The first interpretation is based on a strict, literal reading of the request. That is, a reference to the finding of the body which is hearing an assessment appeal according to the parameters set out above. I do not believe that the appellant could actually be requesting this information as, as I have previously indicated, this is a determination which has yet to be made by the body which will hear the appeal. Thus, at the time of the request, no such records existed.

Based on the previous description of the assessment appeal process, the request could also be interpreted as seeking access to the Ministry's list of comparables. I say this because in his submissions, the appellant modifies his request somewhat to refer to "... records **which may, in the opinion of the Commissioner,** constitute "similar real property in the vicinity..."

As part of its representations, the Ministry has included an affidavit of a property assessor with the North York Regional Assessment Office, the office in which the file on the Subject Property is located. The assessor indicates that after receiving the request, he searched the property assessment of the Subject Property and that there was no list of comparables in the file. The Ministry submits that:

This [the information contained in the affidavit] would indicate that nobody has put their mind to the question of which buildings to use at the hearing as Ministry comparables in the current assessment appeal.

Thus, even if the request is to be interpreted as one for information about the properties on the Ministry's list of comparables, no records exist as the Ministry has not yet developed its list. Furthermore, the Ministry argues that the Act does not oblige it to create such a record at this time. I agree.

The request could also be interpreted in a third manner. In his submissions, the appellant appears to suggest that such records must exist as they are created for the annual return of the assessment roll. It is true that the "raw data" in the form of the assessment information exists, but it has not been analyzed on the basis of the categorization which the appellant seeks, i.e. comparables. Thus, based on this interpretation of the request, at the date of the request no record existed of the Ministry's list of comparables; nor were they obliged to create one.

As I have previously indicated in my discussion of the assessment appeals process, property owners may identify their own list of comparables. The appellant has not done so in this case.

Thus, based on my findings above, I need not consider the arguments of the appellant and the Ministry on the application of section 53(3) of the Assessment Act and the confidentiality provision in section 67 of the Act.

While I have confirmed the Ministry's decision in this case, I do believe that it was incumbent on them to assist the appellant in clarifying his request pursuant to section 24(2) of the Act. In saying this, I do not

mean that the Ministry was obliged to prepare a list of comparables. Rather, the Ministry should have determined which of the above three interpretations was consistent with the appellant's intention in submitting the request.

ORDER:

I uphold the decision of the Ministry.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ April 18, 1995