Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-1980

Appeal PA-010121-1

Ministry of the Environment

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NATURE OF THE APPEAL:

In 1999, the Ministry of the Environment (the Ministry) implemented the Drive Clean Program. According to the Ministry, the purpose of the Program was to detect and reduce smog-related emissions from cars, trucks and buses. The Ministry states:

> The Drive Clean Program has four main goals, which have guided the Program since its inception: a) to reduce smog-causing pollutants by means of testing and repairing vehicles, b) to have zero tolerance for customer abuse by Drive Clean facilities (DCFs") or non-compliance by DCFs with Program requirements, c) to maintain public and industry support for the Program, and d) to have the Drive Clean Program operate as a [sic] remain revenue-neutral environmental initiative.

The Ministry points out that similar programs exist in other jurisdictions, and that Ontario's program has been one of the most successful in meeting its goals.

The Ministry explains:

> Gas emission results of every vehicle tested in the program are stored in the Drive Clean database, along with the identification of the vehicle, the license plate number [assigned by the Ministry of Transportation (the "MTO") to the vehicle], service facility identification, and Inspector or Technician identification. There are currently over 3,300,000 such records in the database. The vehicle identification and plate numbers are the same data as contained in the MTO vehicle registration database. The remainder of the data is unique to the Drive Clean database.
>
> Both the MTO database and the Drive Clean database are instruments for administering and enforcing Ontario Regulation 628 of the *Highway Traffic Act* and Regulation 361/98 of the *Environmental Protection Act*, respectively.
>
> In the case of Regulation 361/98, the data are used by [the Ministry] to enforce vehicle emissions limits, as well as performance contracts with service stations.

The regulations referred to by the Ministry establish various emissions testing standards and requirements for the operation and registration of various types of vehicles in Ontario.

NATURE OF THE APPEAL:

This appeal arises from a request made to the Ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to electronic records recording information about inspections carried out by facilities under the Drive Clean Program. The requester stated that any information contained in responsive records that could identify individuals should be severed prior to disclosure. He also asked the Ministry to provide an outline explaining the layout of any database files disclosed to him, as well as the file format and translation of all codes used in any database fields. Finally, the requester asked for a paper printout of the first 50 responsive records identified by the Ministry.

After notifying one organization whose interests might be affected by disclosure of the responsive data, the Ministry decided not to apply the mandatory third party commercial information exemption claim (section 17(1)) and advised the organization accordingly. The organization did not appeal the Ministry's decision. The Ministry then responded to the requester by identifying that it "is in discussions with a number of private entities to market specialized data formats relating to the [emissions] tests", and denied access to the records on the basis of the following exemptions in the *Act*:

- section 18(1)(a) (valuable government information), and
- section 18(1)(c) and (d) (economic and other interests)

The requester (now the appellant) appealed the Ministry's decision to this office.

Mediation was not successful in resolving the issues in this appeal, and the file was transferred to the adjudication stage. I sent a Notice of Inquiry to the Ministry, seeking representations on the issues. After receiving representations, I sent a copy of the Notice to the appellant, together with the non-confidential portions of the Ministry's representations. The appellant also provided representations, including detailed submissions on the application of section 18(2) of the *Act*. This section is an exception to the section 18(1) exemptions. Because section 18(2) had not been specifically identified in the original Notice, I sent a reply Notice to the Ministry, providing it with an opportunity to submit representations on the possible application of this section. The appellant's representations were attached to the reply Notice. The Ministry submitted representations addressing section 18(2).

Upon receipt of the Ministry's representations by this office, it was determined that they contained a summary of issues discussed during the mediation stage. This portion of the representations was removed before the materials were passed along to me for review, in order to ensure that this "mediation privileged" information was not before me in the context of completing my adjudication of the issues in this appeal.

RECORDS:

The records at issue in this appeal consist of the data elements of the Ministry's Drive Clean database, excluding any portions that might reveal the identity of any individuals.

DISCUSSION:

VALUABLE GOVERNMENT INFORMATION/ECONOMIC AND OTHER INTERESTS

The Ministry takes the position that section 18(1)(a), (c) and (d) of the *Act* apply.

The appellant disagrees, but also maintains that even if any of the section 18(1) exemptions can be established, the records fall within the scope of the section 18(2) exception and must be disclosed for that reason.

The relevant sections of the *Act* read as follows:

> (1) 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;
>
> …
>
> (2) 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.

Section 18(2) exception

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. Even if the Ministry is able to establish that disclosure of the requested data could reasonably be expected to result in the harms contemplated by sections 18(1)(c) and/or (d), or that the requirements of section 18(1)(a) are present, it would be required to disclose this information if the records fall within the scope of section 18(2) and the circumstances outlined under paragraphs (a) or (b) of that section are not present (Order P-1562).

In order for section 18(2) to apply, a record must contain the results of product or environmental testing carried out by or for the Ministry.

The appellant submits that the data contained in the Drive Clean database are the results of environmental testing done for the Ministry. He states:

> The Drive Clean Program is certainly a testing program. Vehicles are taken to garages where equipment and procedures are employed to determine the presence and quantities of pollution-causing gases that are emitted by the vehicles. A pre-set procedure is used to critically evaluate the presence of certain gases in the exhaust stream.
>
> The tests are also environmental. As the Ministry states in its submissions, "The Drive Clean program was implemented in 1999 in Ontario for the purpose of detecting and reducing smog-related emissions from cars, trucks and busses, as they are the single, largest, local source of smog-causing pollutants".
>
> The submission states that "residents of Ontario benefit from improved air quality…" as a result of the program.
>
> Smog is a major pollution problem in Ontario that reduces the quality of the "conditions that surround one." Testing specifically designed to help reduce that problem is clearly environmental testing.
>
> Finally, the data in the Drive Clean database constitute results. The gas readings recorded in the database are the "consequences or outcome" of the environmental tests, and the remaining information serves to identify the vehicle and testing location associated with each set of results.

The Ministry does not specifically address the appellant's position that the record contains "the results of environmental testing". However, in its representations, the Ministry acknowledges that the Drive Clean Program was established for the purpose of improving air quality as a result of reduced emissions from on-road vehicles, and proudly points to the success of the Program as evidence of improved environmental conditions throughout the province.

On my review of the sample records provided to me in this context of this appeal and the documentation submitted by the parties, I am satisfied that the data elements contained in the Drive Clean database constitute "test results". The Ministry would appear to acknowledge this where it states in its representations: "gas emission results of every vehicle tested in the program are stored in the Drive Clean database". I am also satisfied that these test results fall within the scope of "environmental testing", as required by section 18(2). The Drive Clean Program was established in order to address an environmental policy priority, specifically improving air quality through the reduction of smog-causing emissions from vehicles. Each vehicle owner must contribute to improving overall air quality by ensuring that emission levels are within allowable limits, and the principal means of determining whether the Ministry's stated policy goal of improved environmental air quality has been met is "by means of testing". It would appear to be beyond dispute that the Ministry undertakes a number of different types of "environmental testing" in order to measure and enforce environmental standards in various contexts. In my view, the emission tests conducted under the Drive Clean Program are one such type of test used to measure and enforce a specific environmental standard, air quality. Accordingly, I find that emission test results contained in the Drive Clean database, considered

both individually and collectively, are properly characterized as the "results of environmental testing" for the purposes of section 18(2) of the *Act*.

The appellant also maintains that this environmental testing is "carried out by or for an institution", as required in order to fall within the scope of section 18(2). In this regard, he submits:

> The tests are carried out by garages and other businesses that have entered into contracts with the province that specify how the tests will be conducted, what equipment can be used, what training is required of those doing the tests, how much the businesses may charge for doing the tests, and how much money must be remitted to the province for each test done, among other requirements. Further, the tests are done to satisfy the requirements of a government program and the results must be submitted to the province for its records. Garages are subject to surprise audits to ensure that they are providing the testing in the manner specified. Many make no money at all from the portion of the prescribed fee they can keep.

The Ministry disagrees, and takes the position that:

> The Drive Clean emissions test is not carried out by or for [the Ministry]. The Drive Clean emission test is carried out by a private facility at the request of a customer.

I do not accept the position taken by the Ministry. The emission tests are carried out in order to fulfill statutory and regulatory requirements established by the *Highway Traffic Act* and the *Environmental Protection Act*. The regulations authorize the Ministry to enter into contracts with garage operators to do the various tests, and to accredit these businesses as Drive Clean Facilities. Once accredited, the facilities must provide the various test results to the Ministry as part of the regulatory scheme. In my view, the Ministry mischaracterizes the testing program as one that is simply carried out by a private facility at the request of a customer. Clearly, the "customer" is dealing with the "private facility" because he/she is a vehicle owner who must obtain an emissions test from a certified Drive Clean Facility under a regulatory requirement established by the province and administered by the Ministry. In these circumstances, I find that the Drive Clean emission test is carried out for the Ministry by the various garage facilities under contract with the Ministry and certified to do so.

Therefore, I find that the requirements of section 18(2) have been established. I must now ascertain whether any of the exceptions to this provision listed in paragraphs (a) and (b) are present before determining whether the mandatory exception to the section 18(1) exemptions applies.

The Ministry takes the position that paragraph 18(2)(a) applies. This paragraph reads:

> 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,
>
> > 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;

The Ministry submits:

> The Drive Clean emission test is performed as a service to individual vehicle owners. The Drive Clean emission test is performed for a fee and a copy of the vehicle inspection report (the "VIR") is provided to the vehicle owner. The information from the VIR allows the vehicle owner to make decisions relating to the operation, transfer or sale of the vehicle. The maximum fee for the Drive Clean emission test is $30.00 plus applicable taxes. Accordingly, the specific facts fall squarely within clause 18(2)(a).
>
> The appellant erroneously argues that since "the vehicle owner has no choice but to submit to the test, by law, the owner is not being served at all, but rather is fulfilling a legal requirement." The Appellant has confused the act of providing a service with the purpose of obtaining a service."

The appellant takes the opposite position. He maintains that, although a fee is paid, the other requirements of paragraph (a) are not present.

The appellant first points to section 18(2) and section 11 of the *Act* to support his position that the legislation provides a special status for environmental information, and recognizes that it can and should be disclosed even if to do so "could result in harms enumerated elsewhere in the list of exemptions". In the appellant's view, the exception in section 18(2)(a) should be read narrowly, since "it could not have been the intention of the legislative assembly to allow the special right of access to environmental information to be easily overridden."

The appellant goes on to submit:

> A close reading of the precise and elegant language chosen for 18(2)(a) makes it clear what circumstances the legislative assembly had in mind: cases where the testing is done as an essentially commercial service for a private, third party who both benefits from and pays for the work.
>
> The first key phrase is "the testing was done as a service…". If the testing was not done as a service, 18(2)(a) cannot apply

The dictionary says "as" is an adverb, meaning "In the role, capacity or function of."

As an adverb, it speaks to the character of the Action (in this case "the doing") and the purposes of the Action, as opposed to the nature of the thing (the testing). This is an important distinction.

In order for section 18(2)(a) to apply, the testing must inherently be **done** as a service. It is not sufficient that it merely be structured **as if** it were a service. The result (and inherently therefore the purpose) of the Action must be to serve.

Further, the testing must be done as a service "to a person, a group of persons or an organization other than an institution…".

This means the beneficiary of the service must be this "person, group of persons or … organization …". The testing must be done as a service **to** them.

I submit that the legislative assembly's real intention was to protect from disclosure the results of environmental tests where the tests were done as a commercial (hence the fee) service to discrete and identifiable persons, groups or institutions who are the beneficiaries of the testing.

Examples of when the 18(2)(a) exception might apply include those instances where an institution offers a program of environmental or product testing on a commercial and voluntary basis, where the clear beneficiary is the person, group of persons or institution buying the test. An example could be product testing done for a private company, or water testing done for private well owners.

But the Drive Clean testing is much different.

With Drive Clean, the testing is done (for an institution) as a way of protecting the environment and as a means of administering a scheme of licensing. The vehicle owner has no choice but to submit to the test, by law. The owner is not being served at all, but rather is fulfilling a legal requirement. If the owner does not pay for the test, and pass it, he, she or it cannot register and use the vehicle. The fact that a garage literally provides an automotive service does not mean that the testing is done as a **service** to those who submit the vehicles to the tests. The garage merely acts on behalf of the government and customers bring their vehicles for testing because they have to do so.

Throughout its submission, the Ministry repeatedly acknowledges the nature and purpose of its testing program. For example, it says "The Drive Clean program was implemented in 1999 in Ontario for the purpose of detecting and reducing smog related emissions …". This clearly states the raison d'etre of Drive Clean, what the testing is "done as" so to speak. Later on, the submission states: "Drive Clean reduces smog-causing emissions … by identifying polluting vehicles and

> requiring them to be repaired before their registration or registration renewal by the Province for use on the roads." This outlines clearly the beneficiary of the tests (the environment) and the fact that the tests are done as part of the scheme of vehicle registration. [appellant's emphasis]

Although the test results are provided by the Drive Clean Facilities to the vehicle owners, and the owners are free to take those results and make decisions regarding the operation, transfer, repair or sale of their vehicle, in my view, it is not reasonable to ignore the fact that the whole reason for the testing program and any private relationship that may exist between the Drive Clean Facility and the vehicle owner is the regulatory scheme for controlling gas emissions established by the province under the *Highway Traffic Act* and the *Environmental Protection Act*, and administered by the Ministry. I accept the appellant's position that the Drive Clean Facility simply acts on behalf of the Ministry and that vehicle owners bring their vehicles for testing because they have to do so in order to drive these vehicles in the province. In my view, the Drive Clean emissions test is not "done as a service"; rather it is a done as a requirement set by statute and regulation as a pre-condition of continuing to use a vehicle for on-road transportation.

I am also essentially in agreement with the appellant's position regarding the purpose of this provision. It would appear to me that the rationale for including this provision is a recognition that the Ministry of the Environment, in discharging its functions, may acquire expertise in the area of product or environmental testing that could be of assistance to other individuals or organizations concerned with environmental matters. The overall purpose of the section 18(1) exemption claim is, generally speaking, to protect certain economic interests of the Government of Ontario. In my view, it is consistent with this purpose to ensure that Ministry is not precluded from charging a fee for providing a service of this nature that is derived from its acquired expertise. However, in the circumstances of this appeal, I find that no service is being provided **by** the Ministry. Rather, any "service" being provided is a service by the Drive Clean Facilities **for** the Ministry, and not "for a person, a group of persons or an organization other than an institution" as required by section 18(2)(a).

In summary, 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. Therefore, I find that the Ministry is precluded from relying on the provisions of sections 18(1)(a)(c) and/or (d) of the *Act* as the basis for denying access to the data contained in the Drive Clean database. My finding in this regard should not be interpreted as meaning that the data contained in the records 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*. As I noted in Order P-1562, my finding in this regard is consistent with the approach taken by the Federal Court of Canada, Trial Division, in the case of *Pride Beverages Ltd. v. Canada (Minster of Agriculture)*, [1996] F.C.J. No. 720 in interpreting section 20(2) of the federal *Access to Information Act*, which contains wording very similar to section 18(2) of the *Act*.

The appellant makes it clear that any personal information or information that could serve to identify any individuals should be severed from the records prior to disclosure. He specifically states in his representations: "I would expect that under the terms of this request, license plate

numbers would be removed in any case, as these would be personal information under section 21 of the Act".

Based on the representations provided by the parties in the context of this appeal, and my independent review of the sample records provided to me by the Ministry, it is not clear to me which data elements contain or would reveal personal or identifiable information, although I accept that some of them fit this characterization. I have decided in the circumstances to err on the side of caution, and to order the Ministry to sever information that I have concluded would most likely fall within the scope of the restriction on access identified by the appellant. Accordingly, I will include a provision in this order requiring the Ministry to sever any reference to any identifiable individuals included in the database, including license plate numbers and vehicle identification numbers.

In the confidential portion of its representations, the Ministry raises concerns regarding the disclosure of vehicle inspection certification numbers. These are unique numbers generated by the Drive Clean database and provided to individual vehicle owners in the context of the emissions testing process. The Ministry does not tie these concerns to any specific exemption claim, so I assume that they relate to all three of the section 18(1) exemptions. Based on the material provided to me by the Ministry, I am not persuaded that disclosure of these numbers, which are routinely provided on an individual basis through the administration of the Drive Clean Program, could reasonably be expected to result in the harms suggested by the Ministry. In any event, my finding under section 18(2) precludes the application of any of the section 18(1) exemption claims in the circumstances of this appeal.

The Ministry has also raised concerns relating to disclosure of the "TIN" number field in the database, maintaining that it could have an impact on one particular identified third party that was not notified by the Ministry. Based on the portions of the Ministry's confidential representations that discuss this issue, I am not clear on what this number refers to or precisely how this party could be exposed to harm. However, it is also not clear that the appellant's request for "information about inspections carried out by garages" would encompass this number. Given this ambiguity and because the harm identified by the Ministry raises the possible application of a mandatory exemption claim (section 17(1)), I have decided, at this time, to require the Ministry to sever the "TIN" numbers from the records prior to disclosure to the appellant.

Finally, I would like to address the issue of format. The appellant indicates in his original request letter that he wants access in electronic format, as well as hardcopy printed versions of the first 50 records contained in the database. By that, I assume the appellant is interested in receiving access to paper copies that contain all data gathered through the emissions testing process for 50 vehicles, subject to severance of the specific data elements that have been removed from the scope of his request. In my view, although my order determines that section 18(1) does not apply to the records at issue in this appeal, it is not clear to me that the appellant, quite understandably, has been provided with sufficient information to make an informed determination of how much and in what format he wishes to receive the information from the Ministry. I have concluded that most appropriate way of proceeding at this stage is for the

Ministry to provide the appellant with the printed content of a representative sample of 50 emission test results. This will put the appellant in a position to determine what further information he requires, and in what format, which will then allow the Ministry to determine what fees, if any, are required in order to comply with the provisions of this order. I will remain seized of the appeal in order to deal with any issues that arise in this context that cannot be resolved by the parties.

ORDER:

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

2. I order the Ministry to provide the appellant with the printed content of all database entries relating to a representative sample of 50 vehicles tested under the Drive Clean Program, with the TIN numbers, licence plate numbers, vehicle identification numbers, and any other personal information severed prior to disclosure. This disclosure is to be made by the Ministry by **January 15, 2002**.

3. I reserve the right to require the Ministry to provide me with a copy of the record that is disclosed to the appellant pursuant to Provision 2.

4. I remain seized of this appeal in order to deal with any issues arising from this Order.

Original signed by: December 20, 2001
Tom Mitchinson
Assistant Commissioner