ORDER PO-2460

Appeal PA-040179-2

Ministry of the Environment

BACKGROUND:

In 1999, the Ministry of the Environment (the Ministry) implemented a mandatory vehicle inspection and maintenance program called the *Drive Clean* program. The purpose of the program is to detect and reduce smog-related emissions from cars, trucks and buses.

The requirements of the *Drive Clean* program are set out in Regulation 361/98 made under the *Environmental Protection Act* and Regulation 628/90 made under the *Highway Traffic Act*. These regulations establish various emissions testing standards and requirements for the operation and registration of various types of vehicles in Ontario.

To establish a *Drive Clean* accredited facility, an individual or business must enter into a performance contract with the Ministry, complete a training program and install Ministry approved equipment to test vehicle emissions. *Drive Clean* accredited facilities can provide testing only, repairs only or both testing and repairs. All facility employees performing *Drive Clean* inspections are required to take a *Drive Clean* Inspector Certification training course to ensure that they are knowledgeable regarding the test and the operation of the test equipment. Facility employees that are certified to perform emission tests are called vehicle inspectors.

The Ministry monitors accredited facilities, vehicle inspectors performing the tests, and certified technicians doing the repairs for expected pass/fail rate and irregularities. The Ministry's website indicates that *Drive Clean* facilities may be suspended or terminated from the program for actions such as:

- Incomplete tests (i.e. failing to conduct the gas cap test)
- Inaccurate tests
- Poor repairs
- Falsifying test results
- Non-compliance with operating procedures such as:
    - Failing to employ a full-time Certified Repair Technician
    - Operating without appropriate insurance
    - Not paying the annual accreditation renewal fees

NATURE OF THE APPEAL:

The Ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the *Drive Clean* Program. Specifically, the requester asked for the following records:

> … notices of suspension and notices of termination of *Drive Clean* testing facilities.

The Ministry located 49 responsive records and provided the requester with an interim decision letter and fee estimate. The Ministry's fee estimate can be broken down as follows:

• Search time 5 hours @$30.00 per hour	$150.00
• Photocopying approx. 290 pages @ 20 cents per page	58.00
• Preparation time 7.5 hours @ $30.00 per hour	225.00
• Delivery	3.00
• **Total**	**436.00**
• **Deposit required 50%**	**218.00**

The requester paid the fee in full and, as a result, the Ministry issued a final decision granting partial access to the responsive records. The Ministry's decision stated the information that was not disclosed consists of:

- one suspension notice/letter pertaining to a matter that is under investigation by the Ministry's Investigations and Enforcement Branch. The information was withheld in accordance with sections 14(1)(a), (b), and (f) [law enforcement] of the *Act*.

- vehicle identification numbers (VIN), vehicle identification certificate numbers (VICN), and vehicle licence plate numbers were not disclosed on the basis that they are exempt under the mandatory exemption in section 21(1) [invasion of privacy] of the *Act*;

- the identity of the vehicle inspectors (name and identification number) in accordance with section 21(1)of the *Act*; and

- covert vehicle identifying information (make, model, plate, VIN, VICN, driver) on the basis that it is exempt under section 14(1)(c) and (l) [law enforcement] of the *Act*.

The requester (now the appellant) appealed the Ministry's decision to withhold portions of the records, as well as the amount of the fee, to this office. During the mediation process, the appellant narrowed the scope of his appeal by limiting his appeal of the fee to the portion that relates to search time. He also limited his appeal with respect to the withheld information and clarified that he only seeks access to the identity of vehicle inspectors performing *Drive Clean* tests, specifically, their names. The appellant confirmed that he does not seek access to the vehicle inspectors' identification numbers.

As a result of the narrowing of the appeal by the appellant, Records 1, 29 and 49 are no longer at issue. Mediation did not resolve this appeal, and the file was transferred to the adjudication stage of the appeal process.

A Notice of Inquiry was sent to the Ministry and to 84 individuals whose names are listed in the notices/letters of suspension and termination, as they may have an interest in the disclosure of the records (the affected parties). Seven of the notices were returned to this office marked "returned

to sender" and current contact information for those individuals could not be located. Ten affected parties responded to the Notice of Inquiry, all of them objecting to the disclosure of information that related to them.

A copy of the Notice of Inquiry was subsequently sent to the appellant, along with a complete copy of the Ministry's representations. The appellant also submitted representations.

RECORDS:

The information that remains at issue in this appeal is found in 46 suspension and termination notices/letters for Drive Clean Facilitates, identified as Records 2 to 28 and 30 to 48. Specifically, the appellant is seeking access to the names of the vehicle inspectors listed in those notices/letters.

DISCUSSION:

PERSONAL INFORMATION

The first issue for me to consider is whether the names of the vehicle inspectors, as listed in the suspension and termination notices, are the personal information of the inspectors. The section 21(1) personal privacy exemption claimed by the Ministry applies only to information that qualifies as "personal information" under section 2(1) of the *Act*.

"Personal information" is defined, in part, to mean recorded information about an identifiable individual, including, information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved [paragraph (b)] and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Representations of the parties

The Ministry maintains that disclosure of the vehicle inspector's name would reveal the identity of an individual whose performance led to the suspension or termination of the facility's designation as a *Drive Clean* test/repair centre. In this regard, the Ministry submitted that:

> Details of the inspector's behaviours and actions which lead to the suspension/termination are considered to be about the individual vehicle inspector which the [M]inistry has already released to the appellant.
>
> The [M]inistry decided to release this information because without the name of the vehicle inspector, the details of wrong-doing such as using a simpler test, substituting another vehicle, not testing the vehicle, etc would not relate to an identifiable individual.

In support of its position, the Ministry makes reference to previous orders which have held that:

> …information about an employee does not constitute that individual's personal information where that information relates to the individual's employment responsibilities or position. **Where, however, the information involved an evaluation of the employee's performance or conduct, orders have determined that this information is "about" the individual employee, and qualifies as the employee's "personal information"** [Ministry's emphasis]
>
> Orders 165, 170, P-256, P-326, P-447, P-448, M-120, P-721, P-939, P-1318, PO-1772 and Reconsideration Order R-980015

As mentioned, ten of the affected parties provided representations objecting to disclosure in response to the Notice of Inquiry. The objections of several related to the disclosure of the name of the testing facility itself, due to the negative impact that such disclosure could have on the facility's reputation and business. Given that the Ministry has already agreed to the disclosure of the names of the testing facilities and that this appeal deals with the disclosure of the names of the vehicle inspectors only, these objections are not relevant.

Representations were submitted on behalf of three affected parties who were affiliated with one of the testing facilities. These representations supported the Ministry's position that the record relating to that testing facility contained their personal information, stating that:

> The names are clearly identifiable within the meaning of Section 2(1) of the Act which defines personal information as recorded information about an identifiable individual. These individuals are personally named and their positions with [the named testing facility] are specified. The Drive Clean suspension was issued to the company only. The name of the business and personal information of the operators together constitutes personal information as provided by order PO-1691.

> The impact of releasing names identified on the suspension notice is to provide information in the nature of wrongdoing that is personal to the individual. Once the implication of personal wrongdoing can be inferred, then the record is no longer just a record pertaining to the individual in a professional capacity. Further, the implication that will be drawn from the record is that there was some personal wrongdoing of the named individual when no such finding was made or intended by the institution.

In his representations, the appellant states:

> It is my submission that the enforcement action is taken against the garage, and not against the employee of the garage. In no case was the action taken against the employee and therefore no wrongdoing is being alleged against the individual inspectors.
>
> Any actions taken against inspectors were separate actions not directly related to these records.

The appellant also attached an extract of a sample performance contract between the Ministry and facilities seeking *Drive Clean* accreditation to his representations. The sample contract states in Article 16.1 that:

> The Applicant agrees that, in the event that it breaches any provision of this Contract, the Province may in its sole discretion:
>
> (a) issue a suspension notice immediately suspending the accreditation of the Facility for such period of time as may be set out in the suspension notice; or
>
> (b) issue a termination notice immediately terminating this Contract and revoking the accreditation of the Facility

The appellant also submitted that:

> … no wrongdoing is being associated with anyone, only a violation of a contract, such violation which is undertaken by the garage and not by the employee. The individual termination and suspension notices clearly state that the action is being taken "pursuant to … the performance contract".

Analysis and Findings

In Order PO-2225, Former Assistant Commissioner Tom Mitchinson addressed the question of whether information relating to an individual in an employment context represents that person's personal information within the meaning of section 2(1). He held that:

Previous decisions of this office have drawn a distinction between an individual's personal and professional or official government capacity, and found that in some circumstances, information associated with a person in a professional or official government capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" (Orders P-257, P-427, P-1412, P-1621). While many of these orders deal with individuals acting as employees or representatives of organizations (Orders 80, P-257, P427, P-1412), other orders have described the distinction more generally as one between individuals acting in a personal or business capacity:

- In Order M-118, former Commissioner Tom Wright ordered the partial disclosure of mailing lists compiled by the City of Toronto that included the names and addresses of individuals who had expressed an interest in certain municipal properties. Commissioner Wright distinguished between the personal or business capacity of the named individual. The distinction did not turn on whether or not the name as it appeared on the list was that of an individual, but rather on whether there was evidence indicating that the individual was acting in a personal or business capacity.

- In Order M-454, former Adjudicator John Higgins found that the name of the owner of a dog kennel, and an address that was both the business and residential address of that owner was not personal information but "information [that] relates to the ordinary operation of the business".

- Order P-710 dealt with records that contained the names of individuals and corporations who were vendors of goods and services to the Liquor Control Board of Ontario. Adjudicator Donald Hale found that the names of individuals should be disclosed as the identifying information related to "the business activities of these individuals" and as such did not qualify as their personal information.

- In Order P-729, former Adjudicator Anita Fineberg found that the amount of financial assistance received from the Ontario Film Development Corporation received by a named individual applicant (as opposed to a corporation, sole proprietorship or partnership) related to the business activities of that individual and could not be characterized as personal information.

Based on the principles expressed in these orders, the first question to ask in a case such as this is: "*in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

> The analysis does not end here. I must go on to ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

Following the analysis set forth in Order PO-2225 the first question I must ask is: "*in what context do the names of the individuals appear*"? The records at issue in this appeal are suspension and termination notices/letters created by the Ministry in accordance to its responsibility to audit and monitor *Drive Clean* facilities. The records describe the circumstances supporting the Ministry's decision to terminate or suspend a facility's inclusion in the *Drive Clean* program. This includes identifying the name of the vehicle inspector responsible for performing the audited emission test or submitting a test result. In the case of some records, it also includes the fact that a named individual (often the vehicle inspector), as a representative of the testing facility, met and had discussions with representatives of the *Drive Clean* program staff. In none of the circumstances described can the inspectors or individuals be said to be acting in a personal capacity. On the contrary, the inspectors were performing the emissions tests as part of their professional responsibilities or were acting on behalf of the testing facility. Taking into consideration the above, I find that the names of vehicle inspectors appear in the notices/letters in a business or professional context only.

The second question I must ask: "*is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

I have reviewed the records at issue and find that releasing the names of the vehicle inspectors to the appellant does not reveal something of a personal nature about them. The notices/letters are issued pursuant to Article 16.1 of the Performance Contract and are addressed to the owner/operators of the *Drive Clean* facilities, not the individual inspector who conducted emission test audited by the Ministry (unless the vehicle inspector is also the owner/operator of the facility).

The purpose of the notices/letters is to provide the owner/operator with a complete explanation of the non-compliance factors that were considered in determining the suspension or termination. The context in which the vehicle inspector's name appears is not one where their performance or conduct is being evaluated. The notices do not contain any findings regarding the vehicle inspector's conduct or performance; rather the notices clearly state that a breach of the performance contract had occurred. Finally, it is important to note that the action of suspending or terminating pursuant to the contract taken by the Ministry is against the testing facility, not the inspector. The fact that the testing facility may have then taken disciplinary action against the inspector is not discussed in the suspension notices and cannot be inferred simply by reading the notices.

Accordingly, I find that the information is not "about" the individuals as it does not relate to an evaluation of vehicle inspectors performance or conduct. As the information does not qualify as "personal information" within the meaning of section 2(1), it cannot qualify for the exemption under section 21(1) of the *Act*.

FEES

General principles

Where the fee is $100 or more, an institution's fee estimate may be based on either:

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.

[MO-1699]

In all cases, the institution must include a detailed breakdown of the estimated fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614]. This office may review an institution's fee estimate and determine whether it complies with the fee provisions in the *Act* and Regulation 460.

As the appellant narrowed the scope of his fee appeal to include only a review of the search time charged by the Ministry, the only issue I am required to decide is whether the Ministry's decision to charge $150.00 for search time complies with the fee provisions in the *Act* and Regulation 460.

Section 57(1)(a) of the *Act* provides that the Ministry is authorized to charge fees for:

> The costs of every hour of manual search required to locate a record.

Section 6 of Regulation 460, made under the *Act*, specifies that the fee to be charged for search time is $7.50 for each fifteen minutes spent by any person, or $30 per hour.

The Ministry charged the appellant $150.00 based on 5 hours @ $30.00 per hour, pursuant to section 57 of the *Act*. The appellant paid the requested fee but requested a review of the Ministry's fee decision related to search time.

Representations of the parties

The Ministry stated that its fee for search time was based on the advice of the three *Drive Clean* office staff involved in the manual search for records responsive to the appellant's request. The Ministry submitted that the three staff members reported that they spent at least five hours manually locating records.

The Ministry advised that the suspension and termination notices/letters are filed in the facility's paper files which are held in the *Drive Clean* office file room. The Ministry stated that most of the paper files were located in the file room except for six files that were located in individual staff offices. The Ministry stated that it took the three staff members at least one hour, collectively, to collect the files containing the responsive records. Once the files were assembled, the three staff members spent not less than four hours reviewing each file to retrieve suspension and termination notices/letters. The Ministry explained that the four hours is based on an estimation of five minutes per file, though there were instances where the review of one file took much longer.

The appellant's representations do not raise a concern about the amount of time Ministry staff spent on locating the responsive records. Rather, the appellant submits that the Ministry should not be permitted to charge for search time under the *Act* on the basis that the Ministry had located and retrieved the suspension and termination notices/letters before its receipt of his request under the *Act*.

The Ministry's representations indicate that prior to its receipt of the appellant's request under the *Act*, the appellant had requested a list of all facilities that were suspended or terminated from the *Drive Clean* program. The Ministry indicated that it provided the appellant with a computer generated list of the facilities suspended or terminated from the *Drive Clean* program. The Ministry stated that the list was generated from a Microsoft Excel spreadsheet without the necessity of searching the paper files. The Ministry also stated that none of the time required to produce the computer generated list was incorporated into the five hours of search time charged to the appellant.

The appellant stated that upon receipt of the computer generated list, he sent an e-mail attaching an edited version of the list to the Ministry and requested copies of the suspension and termination notices/letters referred in the edited list. In response, the Ministry sent him an e-mail directing him to file an access request under the *Act*. The appellant attached a copy of the Ministry's e-mail to him as proof that "the records had not only already been located, but that they had in fact been reviewed, before I was asked to file a request."

The Ministry's e-mail dated May 18, 2004 to the appellant states that:

> The suspension and termination notices which you requested contain information that may be subject to the exclusions under the Freedom on Information and Protection of Privacy Act.

The appellant's representations also submit that:

> If the [M]instry can charge search time retroactively here, what is to stop institutions from adopting such a practice routinely? In my submission, the clock for search time begins when the request is filed, because prior to the request being filed, the act and regulations have no effect. What matters is the location of the records at the time the request is filed.

Analysis

As set out above, section 57(1)(a) of the *Act* entitles an institution to recover the costs of "every hour of manual search required to locate a record". Here, the appellant submits that the Ministry seeks to charge for search time incurred before his request under the *Act* was received. In support of his position, the appellant relies on the Ministry's e-mail to him which predated his request under the *Act*. In essence, the appellant submits that the Ministry's fee for search time is not reasonable as the Ministry's e-mail suggests that the responsive records had already been located, retrieved and reviewed before his request under the *Act* was received.

Having reviewed the records at issue I find that it is reasonable to assume that a knowledgeable staff member at the Ministry could anticipate that the suspension and termination notices/letters may contain information that may be subject to the exclusions in the *Act*, without the necessity of conducting a through search of the responsive records. In this regard, the suspension and termination notice/letters are standardized in that they are all addressed to the facility owner/operator, identify facility staff by name and/or identification number and contain details supporting the conclusion that the performance contract had been breached.

Accordingly, I do not accept the appellant's position that the Ministry's e-mail demonstrates that the Ministry's search efforts to locate and retrieve the responsive records had occurred prior to his request under the *Act* and were therefore not necessary to respond to that request.

I have considered the Ministry's representations and accept the Ministry's evidence that it took its staff five hours to locate and retrieve the responsive records. Accordingly, I find that the fee charged for search time is reasonable in the circumstances and uphold the Ministry's fee decision.

ORDER:

1. I order the Ministry to disclose the names of the vehicle inspectors listed in the records to the appellant no later than **May 1, 2006**, but not earlier than **April 26, 2006**.

2. In order to verify compliance with this Order, I reserve the right to require the Ministry to provide me copies of the material disclosed to the appellant in accordance with provision 1 of this order.

3. I uphold the Ministry's fee decision.

Original signed by: March 27, 2006
Brian Beamish
Assistant Commissioner