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

ORDER PO-2849

Appeal PA08-221

Ministry of the Environment

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BACKGROUND:

In Ontario, emissions of air, water, sewage, industrial wastewater and other possible contaminants are regulated under various statutes, including the *Environmental Protection Act* (the *EPA*), the *Ontario Water Resources Act* (the *OWRA*), and the *Safe Drinking Water Act* (the *SDWA*). According to the website of the Ministry of the Environment (the Ministry), facilities in Ontario that release emissions to the atmosphere, discharge contaminants to ground or surface water, provide potable water supplies, or store, transport or dispose of waste must obtain a Certificate of Approval (CofA) before they can operate lawfully. Further, the Ministry's website indicates that

> Each completed Certificate of Approval addresses matters that fall within the mandate of the ministry, focuses on site specific characteristics relevant to each proposal and contains enforceable requirements for each facility to ensure the protection of human health and the natural environment.
>
> Certificates of Approval help to inform and educate applicants who want to operate such facilities. They are also used by ministry staff to ensure the operation of facilities complies with environmental laws. Certificates of Approval, once issued, are available to the public.

CofA are issued by the Environmental Assessment and Approvals Branch of the Ministry (Approvals Branch).

NATURE OF THE APPEAL:

The requester, a provider of an environmental risk information service, submitted a request to the Ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all CofA for the year 2005 in the following categories: air, water, sewage, waste water, waste sites, and waste systems.

The Ministry issued a decision letter that stated:

> This letter is in response to your request made pursuant to the [*Act*] relating to all 2005 [CofA] in Ontario.
>
> The information … is being denied in full in accordance with section 22(a) of the *Act* as the information is publicly available from the Ministry's … Approvals Branch, [specified address and contact name]. … In addition, the [CofA] are the Ministry's commercial, scientific and technological information and are denied in accordance with section 18(1)(a) of the *Act* as the information has monetary value to the Ministry.

The requester, now the appellant, appealed the Ministry's decision to this office, which appointed a mediator to explore resolution of the issues. During mediation, the appellant advised that he had contacted the Approvals Branch as directed but had been informed that CofA are

available only for individual, specific addresses upon request, and not in the comprehensive "bulk list" format he requires. The appellant also indicated that he was aware that there could be a significant fee for the data but stated that he was prepared to pay for the information. A mediated resolution of the appeal was not possible and it was transferred to the adjudication stage, where it was assigned to me to conduct an inquiry.

I initially sent a Notice of Inquiry outlining the facts and issues to the Ministry, seeking representations, which I received. Next, I sent a modified Notice of Inquiry to the appellant, along with a complete copy of the Ministry's representations, inviting submissions on the issues, which I received. Upon review of the appellant's representations, I determined that it was necessary to seek reply representations from the Ministry with respect to the possible application of section 22(a) of the *Act*. I specifically advised the Ministry that I did not require submissions from it regarding the appellant's representations on matters related to copyright, as this issue is beyond the scope of my authority to address.

RECORDS:

The Ministry provided this office with a representative sample of the records, consisting of three CofA. The Ministry confirmed that 6,970 CofA were issued in the year 2005.

DISCUSSION:

INFORMATION AVAILABLE TO THE PUBLIC

The Ministry claims that the information is publicly available, and that it is exempt under section 22(a) of the *Act*, which states:

> A head may refuse to disclose a record where,
>
> > the record or the information contained in the record has been published or is currently available to the public;

In order to establish that a "regularized system of access" exists, the Ministry must provide evidence of a system of access through which the record is available to everyone. The Ministry must also establish that there is a pricing structure that is applied to all who wish to obtain the information [Order P-1316].

Section 22(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. It is not intended to be used in order to avoid an institution's obligations under the *Act* [Orders P-327, P-1114 and MO-2280]. The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fee structure under the *Act* [Orders P-159, PO-1655, MO-1411 and MO-1573].

Representations

The Ministry's representations include background information regarding a previous commercial agreement between it and the appellant whereby the Ministry provided the appellant with various electronic record holdings, including periodic updates of certificates of approval granted by the Ministry, convictions and fines, as well as other related data and reports. The Ministry states that no updated information had been provided to the appellant since the expiry of the contract in 2003.

The Ministry's position that the records at issue are publicly available is based on its reading of section 19 of the *EPA* and section 13.1 of the *OWRA*. According to the Ministry, these provisions of the *EPA* and the *OWRA* require it to maintain a searchable, alphabetical index of the names of all persons to whom instruments are issued. Section 13.1(4) of the *OWRA* defines an instrument as "an approval, permit, licence, direction, notice, order or report." The Ministry submits that the searches referred to in the identified provisions of the *EPA* and the *OWRA* can be based on the name of the certificate holder, the number of the certificate or the address of the facility.

The Ministry notes that the fee for each certificate is $10 which "is not so prohibitive that it amounts to an effective denial of access (Order MO-1573)." According to the Ministry's Approvals Branch Supervisor, 700 such requests are received each year.

In response to my request that the Ministry address the appellant's concern that the records are not available from the Approvals Branch in the format he seeks, i.e., a comprehensive, electronic "bulk list" of certificates issued in the specified year, the Ministry merely restates its "view that it has a regularized system of access in accordance with the requirements of the [*EPA*] and the [*OWRA*]."

I also asked the Ministry to respond to the appellant's statement that the Supervisor of the Approvals Branch declined to produce the records due to the onerous resource requirements of fulfilling the request. The Ministry states:

> According to [the Supervisor], to provide a copy of 6,970 certificates of approval for 2005 in electronic format would take approximately two weeks of staff time to retrieve and load onto a CD.
>
> What differentiates the appellant's request for records from other requests is that [it] is using the *Act* with its nominal fee structure to obtain data for commercial purposes. …
>
> Other members of the public regularly request bulk access to certificates of approval from the … Approvals Branch related to the marketing of their products or services and that Branch has consistently not provided the information in bulk format.

The appellant provided representations that refuted several positions taken by the Ministry, including the assertion that the Ministry had not provided updated information to it since 2003.

According to the appellant, "many bulk records have been received" from the Ministry "up to and including some in 2009, with the exception of the [CofA]."

The appellant notes that "every other province and territory in Canada provides the [CofA] information to [it] for a nominal fee (less than $500 per annum) or at no cost at all." In this context, the appellant submits that it would be prohibitively expensive to obtain the 6,970 CofA on an individual basis at the Ministry's stated fee of $10 per record as this would amount to $69,700. Further, the appellant submits that

> [I]t would also not be in the best interests of the Ministry to process 6,970 requests vs. the 700 they current[ly] receive. …
>
> [The appellant] had offered to pay for the public records, so as not to deny the income stream to the government and, in addition, offered to pay for the time and expenses associated with extracting the data in "bulk" format onto a CD. The payment offers were flat fee, royalties, flat fee and royalties, etc. … The Ministry, however, will not even discuss costs, fees or the like in association with the data.
>
> Despite [the appellant's] numerous meetings with the Ministry representatives, telephone conversations and e-mail correspondence, with many ministry staff, [the appellant] has continually been denied access to the C of A records.
>
> …
>
> [The appellant] has offered to hire an independent third party of the Ministry's choosing to extract the data and pay for the service required [in view of the Ministry's position that it would take "approximately two weeks of staff time to retrieve and load" the data]. The Ministry refused to accept this assistance.

The appellant questions what he perceives to be a contradiction in the Ministry's approach to the issue of access to the CofA.

> Are all C of A records then denied to any source, other than on an individual FOI request or only those requested by [the appellant]?

In conclusion, the appellant states that it cannot effectively access the CofA through the "regularized public system" in a timely or cost efficient manner since it appears that this access would unnecessarily tax the civil service and be "cost prohibitive" for the appellant.

The appellant and the Ministry each provided a copy of the commercial agreement through which information of the type sought in this appeal was formerly shared. The preamble to the 1998 agreement, which granted a "non-exclusive license to use of certain data sets" to the appellant, states:

> Whereas the Ministry of the Environment as part of its ongoing operations maintains a variety of data sets containing environmental information, and the Queen's Printer controls the copyright in such data sets…

Another portion of the agreement sets out the province's ownership of "all right, title and interest" in the environmental data sets provided to the appellant.

In its reply representations, the Ministry states that, in recent years, a great deal of effort has been put into the promotion of routine dissemination of environmental information to the public rather than recourse to access under the *Act*. The Ministry notes that it posts significant CofA on the Environmental Registry website. The Ministry also advises that it worked with the appellant between 2003 and 2007 to "identify ways to make property-related information available outside the *Act*," but states that these discussions did not lead to an information sharing agreement. Further, the Ministry states that:

> In response to enquiries from [the appellant], including a formal request under the *Act*, the Ministry's Freedom of Information and Protection of Privacy Office has consistently indicated that a request pursuant to the *Act* is not the appropriate route for entering into a commercial licensing agreement. …

The Ministry describes other requests relating to, and uses of, the environmental data it gathers. This portion of the Ministry's reply representations includes argument relating to concerns about the appellant's "commercial use" of "government copyright data" which are beyond the scope of this inquiry.

For the most part, the remainder of the Ministry's reply representations merely re-state the position articulated in its initial representations regarding the public availability of the CofA pursuant to the scheme enacted in the *EPA* and the *OWRA* which, in its view, amounts to a "regularized system of access" for the purpose of section 22(a) of the *Act*. The Ministry submits that the appellant's request for bulk access to CofA has led to denial of access by the Approvals Branch because of the "commercial use of the data," but the "fact that there is no bulk user fee does not make [the information] any less public."

Analysis and Findings

My decision on the Ministry's claim that the exemption in section 22(a) applies to the information at issue is based on a review of the representations, including the attachments provided, and the relevant provisions of the *EPA* and *OWRA*. Having considered the evidence before me, I conclude that a regularized system of access exists and that the CofA sought by the appellant are publicly available within the meaning of section 22(a) of the *Act*.

As outlined previously, for section 22(a) to apply, the Ministry is required to establish that the record is available to the public generally, through a regularized system of access. A regularized system of access exists if a system exists for dissemination of the record, the record is available to everyone, and there is a pricing structure that is applied to all who wish to obtain the information [see Order P-1316].

First, I am satisfied that this type of record – a Certificate of Approval – is available through the Environmental Assessment and Approval Branch of the Ministry of the Environment. I am also satisfied that any individual may fill out a Request for a Copy of a Certificate of Approval, a form which was provided to me for review in this appeal, and submit it to staff in the Approvals Branch for processing.

Next, I find that there is a pricing structure in place for routine disclosure of this particular type of record. At present, the cost is $10 for each CofA, as designated by the Ministry. I am satisfied that this fee applies to any individual seeking access to this type of record. Based on my review of the copy of the Request form provided, I conclude that it reflects the intent of the Ministry to charge for providing access to CofA on a cost recovery basis.

I acknowledge that the appellant has expressed concern about various difficulties encountered in obtaining CofA through the Approvals Branch, such as the cost of doing so and the Ministry's apparently contradictory position as regards access to this information for commercial use. I will address each of these in turn.

As acknowledged previously, section 22(a) may apply despite the fact that the alternative source of the information is based on a fee system different from the fees charged under the *Act* (Orders P-1316, PO-1655, MO-1573 and MO-1948). In Order MO-1573, former Senior Adjudicator David Goodis reviewed past orders of the office that addressed the application of alternate fee structures. Senior Adjudicator Goodis stated:

> In Order P-1387, former Commissioner Wright considered the appellant's argument that the exemption should not apply due to the higher cost of access to the records. In rejecting this argument, the former Commissioner stated:
>
> > The appellant's representations address the issue of cost as a factor to be considered in examining the application of section 22(a) of the *Act*. He states that the *Act* supports the proposition that any impediments to making law available, such as costs, should be restricted as much as possible. The appellant submits that where a government institution itself has entered into the profit-driven market for the sale of its information resources, then it cannot take shelter in section 22(a). Since I have found that section 22(a) has been properly applied to exempt the information at issue, the fee structure of the *Act*, including the provisions for fee waiver, are no longer operative and I am unable to consider the issue of cost.

Order MO-1573 also addresses the rare circumstance where the costs to be charged under the alternate fee structure are so high as to be prohibitive, thereby effectively resulting in a denial of access. In accepting that there could be situations where the cost of obtaining a record outside the *Act* could have that effect, former Senior Adjudicator Goodis noted:

> In a recent case in the United States, *Hartford Courant Co. v. Freedom of Information Commission*, (SC 16568) (July 23, 2002), … the Supreme Court of

> Connecticut was asked to decide whether a request for criminal history records should be considered as falling under a departmental fee for services statute, or the freedom of information statute. The applicable fee under the departmental statute was over $20 million, while the fee under the freedom of information statute was far lower. For various reasons that are not applicable here, having to do with the interpretation of the specific legislation, the court decided that the freedom of information statute applied. The court's final point in support of its decision read as follows:
>
> > Were we to hold otherwise, the fee for the plaintiff's request would be $20,375,000, a result that would have the practical effect of denying the plaintiff access to records that, by statute, must be made available to the public. Such a result would be inconsistent both with the act's broad policy favoring the disclosure of information and with the well established canon of statutory construction "that those who promulgate statutes or rules do not intend to promulgate statutes or rules that lead to absurd consequences or bizarre results." *State v. Siano*, 216 Conn. 273, 278, 579 A.2d 79 (1990).
>
> I agree with this view. Applying the "absurd result" principle here, this office may find in certain circumstances that a record is not in fact "publicly available" under section 15(a) [the municipal equivalent of section 22(a)], due to the magnitude of the fee. However, the "absurd result" principle is not engaged here, particularly where the evidence indicates that the Police have granted access to similar records based on the by-law fee structure.

In my view, these reasons are applicable in the present appeal. While I accept that this office may find in certain circumstances that a record is not in fact "publicly available" for the purposes of section 22(a) due to the amount of the fee, I find on the evidence before me that the "absurd result" principle described in Order MO-1573 is not engaged in this appeal. The Ministry regularly provides access to CofA, approximately 700 annually, through its system of access at the Approvals Branch, with the same fee of $10 applied to each certificate. In my view, it is the scope of the request (i.e. the number of CofA sought) and not the actual fee per certificate that results in the amount to be charged for access to such records for the entire year.

I must also address the issues raised with respect to the eventual use of the information. I note that considerable portions of the parties' representations were dedicated to descriptions of their previous commercial agreement for the sharing of this type of information, including the disputed reasons for the ending of that agreement and subsequent unsuccessful efforts to negotiate a new arrangement satisfactory to both of them. The evidence includes allegations about potential copyright violation. With these arguments, the parties have ventured into territory outside my authority and the scope of an inquiry under the *Act*.

It must be emphasized that concerns about the eventual use of the information and the related potential for infringement of government copyright are not matters over which I have jurisdiction

under the *Act*. Indeed, the use to which the information in the CofA may be put once it is obtained through the Ministry is not relevant to my determination of whether the requirements of section 22(a) are established.

Moreover, in my view, the Ministry cannot have it both ways. Either the type of record at issue in this appeal is publicly available or it is not. According to the Ministry's own website, it is. As stated on the website and reproduced in the introductory section of this order: "Certificates of Approval, once issued, are available to the public."

Accordingly, I find that the Ministry has satisfied the requirements of section 22(a) of the *Act*. Having found that section 22(a) applies, and that a regularized system of access for the certificates exists at the Ministry's Approvals Branch, the appellant may obtain the records he seeks if he pays the requisite fee charged under the alternative fee structure in place, namely $10 for each of the 6,970 CofA for a total of $69,700. Notwithstanding the submissions to the contrary, it is no answer for the Ministry to refer to the scope of this request or to compare the usual volume of requests for CofA with the volume contemplated by the one at issue in this appeal. Having established that a regularized system of public access under section 22(a) exists, the Ministry is obliged to produce the records once the required fee under the alternative fee structure is paid, regardless of the number of CofA that are requested.

Moreover, respecting the Ministry's arguments about copyright, I note that the connection between this concept and access to information laws has been addressed in previous orders. In Order MO-2263, Adjudicator Steve Faughnan reviewed the claim of the Peel Regional Police Services Board that section 15(a) of the municipal *Act* applied to the Operations Manual & Users Manual for a specified speed laser detection system (the User's Guide). The system manufacturer, an affected party, argued that copyrighted information is excluded from the *Act* and not, therefore, subject to its provisions. In that appeal, the appellant responded that his use of the information fell within the "fair dealing" exception for research or private study under section 29 of the *Copyright Act* (R.S., c. C-30) and did not infringe copyright. The Police disputed this assertion, and argued that the appellant sought access to the User's Guide in order to represent people charged with traffic offences. In my view, this fact situation resembles the one before me in the present appeal. Adjudicator Faughnan dismissed the manufacturer's copyright argument, noting that:

> It is not necessary for me to delve into this issue in great length. I accept that the User's Guide is subject to the *Copyright Act*; however, this does not oust the application of the *Act*. Sections 32.1(1)(a) and (b) of the *Copyright Act*, provide:
>
> > 32.1 (1) It is not an infringement of copyright for any person
> >
> > (a) to disclose, pursuant to the Access to Information Act, a record within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like material;

> (b) to disclose, pursuant to the Privacy Act, personal information within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like information; …

Disclosure, however, is subject to the limitation set out in section 32.1(2) of the *Copyright Act*, which states that:

> Nothing in paragraph (1)(a) or (b) authorizes a person to whom a record or information is disclosed to do anything that, by this Act, only the owner of the copyright in the record, personal information or like information, as the case may be, has a right to do.

Simply put, the fact that the User's Guide may be subject to copyright, while it may suggest some measure of ownership, … does not, in and of itself, provide a basis to deny access to the information under the provisions of the *Act*, or oust its application.

I agree. In the present appeal, I accept that the parties acknowledged in their previous agreement (as evidenced in the preamble reproduced in this order) that information contained in the CofA is subject to government copyright. However, consistent with Order MO-2263, I find that this fact does not oust the application of the *Act* or affect my finding under section 22(a).

Exercise of Discretion

The section 22(a) exemption is discretionary, in that it permits an institution to disclose information, despite the fact that it could be withheld because it is publicly available. On appeal, this office may review the institution's exercise of discretion to determine whether or not it has erred in doing so. An institution will be found to have erred in the exercise of discretion, for example, where it does so in bad faith, for an improper purpose, takes into account irrelevant considerations, or fails to consider relevant considerations.

This office may send the matter back to the institution for a re-exercise of discretion based on proper considerations, but this office may not substitute its own discretion for that of the institution (section 54(2) of the *Act*).

According to the Ministry, it considered several factors in exercising its discretion to deny access under section 22(a), including the fact that it maintains a regularized system of public access to the information and that the cost of providing the information in accordance with the fee provisions of the *Act* would not be "of value to the Ministry." The Ministry also mentioned consideration of factors relating to copyright and the appellant's intended use of the information.

The appellant's submissions do not directly address the Ministry's exercise of discretion in claiming section 22(a) to deny access to the records.

I have already addressed the Ministry's arguments relating to copyright and the intended use of the information by the appellant in this order. While I dismissed their relevance in my

determination of the application of section 22(a), I am satisfied that the Ministry's consideration of these factors in its exercise of discretion was not done in bad faith. Rather, based on all of the circumstances of this appeal, I am satisfied that the Ministry exercised its discretion in good faith, albeit mistakenly. I am also satisfied that the remaining factors considered by the Ministry in denying access under section 22(a) were relevant. Accordingly, I uphold the Ministry's claim of section 22(a) to exempt the records.

In view of my finding that section 22(a) of the *Act* applies to the CofA, it is not necessary to review the application of section 18(1)(a).

ORDER:

I uphold the Ministry's decision to deny access to the records on the basis that section 22(a) of the *Act* applies to them.

Original signed by: November 26, 2009
Daphne Loukidelis
Adjudicator