



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

ORDER P-496

Appeal P-9200679

Ontario Securities Commission



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ORDER

BACKGROUND

The Ontario Securities Commission (the OSC) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of the following:

1. a current list of Limited Market Dealers
2. a current list of Securities Dealers
3. every Form 20 filed with the Ontario Securities Commission during 1991 and 1992 to date

The OSC acknowledged that records responsive to the request existed but denied access pursuant to section 22(a) of the Act. The OSC advised the requester that the records could be obtained by subscription through a private company, Micromedia Limited, (Micromedia) or at the Metropolitan Toronto Reference Library (the Library). The requester appealed the decision.

During the course of mediation, the appellant advised the Appeals Officer that the records were not available at the Library but if they were, he would be satisfied with this alternative access system. The Appeals Officer verified that the Form 20's (Record 3) could be obtained at the Library and the appellant withdrew his appeal as it related to that record. The remaining records [Records 1 and 2, above] were not available from the Library.

Further mediation was not possible and the matter proceeded to inquiry. Notice that an inquiry was being conducted to review the decision was sent to the appellant and the OSC. Representations were received from both parties.

The sole issue in this appeal is whether the records qualify for exemption under section 22(a) of the Act which reads as follows:

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;

The OSC submits that the records are currently available to the public. The OSC states in its representations that:

The OSC makes available its "public records" through a contractual arrangement with Micromedia Limited ... The records maintained by Micromedia Limited

include both those which the OSC is under a statutory duty to make available to the public and those which the OSC has determined to make available to the public, apart from any statutory duty.

... the search facility made available by Micromedia serves the same function for members of the public as the land registry or company registry maintained by the Ministry of Consumer and Commercial Relations, although Micromedia is a private sector Corporation. [sic]

In Order P-327, Assistant Commissioner Tom Mitchinson considered the meaning of "currently available to the public" for the purposes of section 22(a) as follows:

In my view, in order for records to qualify for exemption under section 22(a), they must either be published or available to members of the public generally, through a regularized system of access, such as, for example, a public library or a government publications centre.

Section 22(a) is unique among the exemptions contained in Part II of the Act. The other exemptions, if applicable, permit an institution to deny **access** to the requested information because of its content or the potential harm that might reasonably be expected to result from disclosure. Under section 22(a), the requested information is not disclosed to the requester under the Act because the institution claims that it is publicly available elsewhere.

Despite its unique nature, section 22(a) remains an exemption and in making a determination respecting the application of exemptions, I must be mindful of the purposes of the Act which are set out in section 1. Section 1 states in part:

The purposes of this Act are,

- (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
 - (i) information should be available to the public,
 - (ii) necessary exemptions from the right of access should be limited and specific ...

These purposes of the Act are key to the interpretation and application of section 22(a). In my view, the section should not be applied in a way that could indirectly prevent or limit the public's access to information. To do so would be contrary to the purposes of the Act. It could result in

situations where members of the public would not be able to effectively exercise their right of access to information even when that information is most directly connected to the statutory mandate of an institution.

In my opinion, to adopt the position of the OSC would be to accept the proposition that a government organization covered by the Act can enter into an unrestricted business arrangement with a private company to provide access to government information, even though such an arrangement has the very real potential to inhibit the public's right of access. Basing an individual's right to access on his or her ability to meet conditions for access determined by a private sector vendor may result in inequitable access to information held by government.

In the circumstances of this appeal, although a private sector entity such as Micromedia may provide a system of access, it does not, in my view, provide a regularized system of access available to members of the public generally. Micromedia is not the equivalent of a government publications centre or a government run public registry such as those referred to by the OSC.

Therefore, in my view, the fact that the records at issue in this appeal are available from Micromedia does not render the information "currently available to the public" within the meaning of section 22(a). Accordingly, the records do not qualify for exemption under section 22(a).

ORDER:

1. I order the OSC to disclose the records at issue to the appellant in their entirety within fifteen (15) days of the date of this order.
2. In order to verify compliance with the provisions of this order, I order the OSC to provide me with copies of the records disclosed to the appellant, **only** upon request.

POSTSCRIPT:

In my view, although the facts of this appeal are straightforward, the issue raised goes to the heart of Ontario's access to information legislation.

I am aware that the government is actively looking at the information it holds as a potential source of non-tax revenue generation. In itself, I see nothing wrong with this approach. In the 90's, information is increasingly being seen, by government and the private sector alike, as a commodity. In fact, information has been referred to as the "commodity of the 90's".

However, a very real question arises: How will the government's new initiatives maintain and balance the rights of the public to access information for which it has already paid, with the desire to find new sources of revenue? In this connection, I believe that it is a fundamental

component of this balancing that government sees itself as the custodian or trustee of the information it holds.

Ultimately, I believe that how the balancing I have described is resolved will go a long way to determining whether universal access to government information will be the norm or whether an information elite will be created and only those who can afford to pay will have access to government-held information. In my opinion, this latter situation would be unacceptable in an open and democratic society.

In closing, I accept the notion that, in some cases, government should be able to sell the information it holds. There are valid reasons for this, economic and otherwise. However, in my opinion, decisions on what types of information should be sold must always be made against the backdrop that members of the general public must continue to have a right of access to information held by government.

Original signed by: _____
Tom Wright
Commissioner

July 14, 1993