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

ORDER P-1114

Appeal P_9500297

Ministry of Consumer and Commercial Relations

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

The Business Names Act (the BNA) requires individuals, partnerships and corporations who carry on business or identify themselves to the public under another name to register the name with the Companies Branch of the Ministry of Consumer and Commercial Relations (the Ministry). In order to register, these businesses must complete and file a "Form 1" with the Ministry. The statute also describes the responsibilities assigned to a Registrar for maintaining records filed under the BNA, and authorizes storage formats. The government has regulatory authority under the BNA which permits the charging of fees.

Until 1995, each Form 1 was filed in hard copy format, and the completed forms were stored on the business names registration microfilm (the microfilm). Since October 1995, registrants have also been permitted to file electronically. With the advent of electronic filing, the microfilm now contains only those forms which were filed in hard copy. The Ministry plans to discontinue storage on microfilm as soon as the electronic filing system is fully operational.

I have examined a sample of the microfilm provided by the Ministry. It contains the Form 1 registrations made over a number of days, organized by date of registration. Each Form 1 is completed by the registrant, and sets out the name and address of the business, the name, address, and signature of the registrant, and a short description of the nature of the business activity to be undertaken. Within a square marked "Ministry Use Only" there is a "BIN" number, a shortened version of the name, the registration date, and the expiration date, five years from the date of the registration. Each day's registrations are preceded by a page which indicates that the registrations for a particular date follow.

Until October 1995, Regulation 624/93 under the BNA set out a fee for purchasing the microfilm. It stated that registrations filed on a particular day and stored on microfilm were available at a fee of 40 cents per page of text, as long as the request for copies was made in advance, and no search was required for the documents. Concurrent with the enactment of the regulation permitting electronic filing, Regulation 624/93 was revoked.

NATURE OF THE APPEAL:

In November 1993, a company which had been purchasing microfilm from the Ministry on a weekly basis was informed that the sale of microfilm might be discontinued because of the government's proposed policy on tradeable data. The Ministry continued to provide microfilm to this company until March 1995 when, after giving two months notice of its intentions, the Ministry denied any further access. As a result, the company submitted a formal request under the Freedom of Information and Protection of Privacy Act (the Act) for on-going access to copies of the microfilm.

In its request letter, the company points out that it is willing to comply with policy and guidelines developed by the Ministry for sale of bulk data. However, as the request letter states: "... in the absence of any guidelines, it is difficult to understand the rationale for the MCCR's decision to deny access to the weekly Microfilm to [the company]. As previously explained to you by [the company's] representatives, the failure to supply the Microfilm has greatly prejudiced [the company's] ability to continue in business in Ontario."

The Ministry denied access to the microfilm based on the exemption contained in section 22(a) of the Act (information published or available to the public).

The Ministry informed the company that all information on individual business registrations is available on a record-by-record search basis at the Ministry's Companies Branch. The fee for each search is $8.

The company appealed the Ministry's decision.

Within the 35-day period provided in the Confirmation of Appeal for raising additional discretionary exemptions, the Ministry also claimed the following exemptions:

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

A Notice of Inquiry was provided to the appellant and the Ministry. Written and oral representations were received from both parties. In its representations, the Ministry withdrew the section 18(1)(g) exemption claim.

PRELIMINARY ISSUE:

REGULATION - BUSINESS NAMES ACT

The appellant argues that the existence of Regulation 624/93 indicates that the business registration data is "clearly public information", and should be accessible without recourse to the Act.

The Ministry states that the provision in the regulations does not create a right of access to the microfilm, and that this right must be determined under the Act. The Ministry further argues that the only disclosure of information authorized by the regulations is found in section 7(2) of Regulation 121/91. This section provides that upon payment of the applicable fee any person shall be issued a certified copy of an individual registration. The Ministry states that the regulations do not create any right of access to data in bulk form.

I agree with the Ministry's position with respect to the right of access to the data in bulk form, but I would also extend this reasoning to apply to the right of access to individual registrations as well. In either case, the right of access is determined under the Act, not by any statutory or regulatory provisions of the BNA.

A regulation which sets a fee for providing a copy of a record or type of record does nothing more than establish a price for the document. In my view, section 7(2) of Regulation 121/91, and Regulation 624/93 (until its revocation) simply create a fee structure which operates outside the provisions of the Act. This is something clearly contemplated by the introductory wording of section 57(1) of the Act, which reads:

> Where no provision is made for a charge or fee under any other Act, ...

Just as these regulations do not create a right of access, the revocation of Regulation 624/93 does not eliminate this right. If a record is accessible under the Act, and no provision is made for a charge or fee under any other statute, section 57(1) goes on to state "... a head shall require the person who makes a request for access to a record to pay ...", charges enumerated in various fee categories.

In short, Regulation 624/93, while in force, had a bearing on the **cost of access** to the microfilm, but not the **right of access**, which must be determined under the Act.

DISCUSSION:

PURPOSES OF THE ACT

Section 1(a) of the Act outlines the purposes of the statute, including the following principles which govern the right of access to government-held information:

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific

I will bear these principles in mind in applying the various exemptions claimed by the Ministry.

INFORMATION PUBLISHED OR AVAILABLE

Section 22(a) of the Act 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;

The Ministry maintains that section 22(a) of the Act exempts the microfilm records from disclosure because copies of the individual forms recorded on the microfilm may be obtained upon payment of a fee of $8, if the business was registered in the last five years. The Ministry states that it has established a regularized system of access to the information contained in the microfilm rolls through the business names registration database, and that this database is accessible to any person on a record-by-record basis upon payment of the prescribed fee.

The appellant argues that the individual registration forms are not a substitute for the microfilm because the microfilm provides a unique compendium of information which is more comprehensive in nature and can be accessed without necessitating a search.

In Order 170, Inquiry Officer John McCamus discussed the purpose of the discretion conferred by section 22(a). On Page 108 of that order, Mr. McCamus stated:

> In general terms, the Ministry appears to be correct in suggesting that the purpose of the discretion conferred by section 22(a) relates to questions of convenience. Obviously, there is no other public interest to be served by withholding disclosure of information which is readily available elsewhere. Accordingly, the discretion to disclose is conferred for the evident purpose of enabling a head to avoid disclosure where that process merely involves expending the resources of the Ministry on the photocopying of material which is otherwise readily available and, from the Ministry's point of view, more conveniently available to the requester in another form. It would, on the other hand, be an abuse of the discretion conferred by section 22(a) if the head were to refuse disclosure of information otherwise publicly available where the refusal does not rest on a balance of convenience of this kind and/or where the refusal to disclose will have the effect of refusing to disclose the nature of the information contained in the Ministry's records which is thought by the Ministry to be responsive to the request.

I applied this line of reasoning in Order P-327, where I made the following statement regarding section 22(a):

> In my view, the section 22(a) exemption 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.

In my view, if the requested information is otherwise available from a public library, government publications centre or other similar system, then access rights under the Act are not diminished by requiring members of the public to utilize these alternative sources (Order P-327). However, I feel that section 22(a) should only be invoked in situations where the request can be satisfied through the alternative source.

In the circumstances of this appeal, I find that the information responsive to the appellant's request is the compendium of registrations included on the microfilm, which consists not only of the individual registration details, but additional information as to which registrations were filed on a particular day. The business names registration database allows someone to search by business name or registration number, but not by date. By receiving the microfilm, which organizes registrations by date, the appellant is able to compile a list of newly registered businesses. He is unable to do this through the database, since he knows neither business names nor registration numbers. The information which responds to the appellant's request is the compendium of registrations filed on any particular day, and, in my view, directing the appellant to the business names registration database on an individual record-by-record search basis does not provide him with access to the requested information.

Accordingly, I find that the alternative system of access established by the Ministry will not provide the appellant with access to the information he seeks, and the section 22(a) exemption does not apply in the circumstances of this appeal.

VALUABLE GOVERNMENT INFORMATION - Section 18(1)(a)

Section 18(1)(a) of the Act reads as follows:

> A head may refuse to disclose a record that contains,
>
> > 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;

In order to qualify for exemption under section 18(1)(a), the Ministry must establish that the **information contained in the record**:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**

2. belongs to the Government of Ontario or an institution; **and**

3. has monetary value or potential monetary value.

Each part of this three-part test must be satisfied in order for a record to qualify for exemption under section 18(1)(a).

Part One

The Ministry claims that the records contain commercial and technical information, although the representations provided by the Ministry only deal with the commercial aspect of the definition. Having reviewed the records, I find that the only category of information listed in section 18(1)(a) which could potentially describe the information contained in the microfilm is "commercial" information.

The wording of section 18(1)(a) is quite specific. The only type of record which is eligible for exemption under this section is a record which **contains** commercial information.

The term "commercial information" was originally considered by former Commissioner Sidney B. Linden in Order 16, one of the first orders issued under the Act in 1988. In that order Commissioner Linden states:

> The Act does not define the term "commercial", and I have looked to other sources for guidance.
>
> The seventh edition of the Concise Oxford Dictionary defines "commercial" as follows:
>
> > "Of, engage in, bearing on, commerce".

"Commerce" is defined as follows:

> "Exchange of merchandise or services... ...buying and selling".

Black's Law Dictionary (fifth edition) defines "commercial" as:

> "Relates to or is connected with trade and traffic or commerce in general; is occupied with business and commerce. Generic term for most all aspects of buying and selling."

The records at issue contain no information concerning the buying or selling of goods and therefore, in my view, do not qualify as "commercial" information. While not an exhaustive list, the types of information that I believe would fall under the heading "commercial" include such things as price lists, lists of suppliers or customers, market research surveys, and other similar information relating to the commercial operation of a business.

The approach taken by former Commissioner Linden has been adopted in subsequent orders, where commercial information has been defined as information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" has also been found to apply to both profit-making enterprises and non-profit organizations, and to have equal application to both large and small enterprises.

The Ministry submits that the microfilm records contain commercial information because they contain the basic core details on commercial entities operating in the province. The Ministry points out that there is a whole business sector which is engaged in the buying and selling of the type of information found on the microfilm, and that the company represented by the appellant is part of this sector.

In Orders P-318 and P-319, I dealt with the proper characterization of Form 1 records filed under the Corporations Information Act. In determining whether the records contained "commercial information", I made the following finding:

> In my view, the information contained in the records is not commercial information as that term is understood in section 17(1) [of the Act]. The Form 1 records contain information which is merely descriptive of the corporation, setting out the corporate name, the address of the corporate office, and the names of some of the directors and officers of the corporation; and the transmittal letter simply provides an explanation of certain circumstances surrounding the submission of the forms. These records do not relate to activities normally associated with commercial activity, such as the exchange of goods, products or property, or the buying, selling or exchange of goods and services.

Sections 17(1) and 18(1)(a) both deal in the first instance with the same threshold issue of what constitutes "commercial information". The Form 1 records at issue in the present appeal, which were filed under the Business Names Act, have similar properties to the records in Orders P-318 and P-319, and I feel the same reasoning should apply.

The information contained in the Form 1 records is basic identifying data provided to the Ministry in compliance with regulatory requirements. This information simply confirms that the name of the business is registered with the Ministry, as required by statute. No commercial relationship exists between the Ministry and individual registrants, and the information contained on the forms is not connected to or associated with the buying, selling or exchange of merchandise or services carried on by any of these businesses.

Although an argument could be made that when the information contained on various registration forms is consolidated in bulk on a database such as a microfilm, this new microfilm record might have a commercial **value**, in my view, this is relevant only in determining whether part three of the section 18(1)(a) exemption test has been established, not part one. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information. These two aspects of the exemption must be considered separately. Unless the records themselves **contain** commercial information, the fact that the format in which the information is stored may give the record monetary or potential monetary value will not, on its own, bring the record within the scope of section 18(1)(a).

If considerations of potential commercial value were in themselves determinative of the character of the information, enormous amounts of government information would qualify as "commercial information" which, in my view, could not have been the legislature's intention, and would be inconsistent with one of the fundamental principles of the Act, that exemptions from the right of access should be limited and specific.

This narrower interpretation of what constitutes commercial information is also consistent with the discrete listing of various categories of information in section 18(1)(a). If commercial information was intended to have the broad meaning advanced by the Ministry, it would have been unnecessary for the section to identify trade secrets, financial, scientific and technical information as other separate categories distinct from commercial information.

For all of the above reasons, I find that the information contained on the microfilm is not properly characterized as commercial information for the purposes of section 18(1)(a) and, therefore, the first part of the exemption test has not been established.

Part Two

In order for this part of the test to be satisfied, the Ministry must establish that the information contained on the microfilm belongs to the Government of Ontario.

The appellant argues that the information belongs to the businesses which have registered their information with the government.

In the Ministry's view, the fact that it is able to sell the data on the Form 1 records through its regularized system of access is proof that the information in question belongs to the Ministry.

Individuals, businesses and other entities may be required by statute, regulation, by-law or custom to provide information about themselves to various government bodies in order to access

services or meet civic obligations. However, it does not necessarily follow that government bodies acquire legal ownership of this information, in the sense of having copyright, trade mark or other proprietary interest in it. Rather, the government merely acts as a repository of information supplied by these external sources for regulatory purposes.

Under the law of copyright, compilations of information can be accorded copyright protection as so-called "literary works". However, copyright does not exist in the absence of original work or effort. Unless the government alters, complies or otherwise manipulates information to make something different from the raw data supplied to it by others, it cannot be said to have acquired any ownership interest in the information.

As far as the records at issue in this appeal are concerned, the Form 1s are prepared by the individual businesses and contain information supplied by them to the Ministry for regulatory purposes. The information on the form cannot be altered or manipulated by the Ministry. If there is ownership in the business name contained on the form, it lies with the business in question and not with the Ministry. The assignment of a BIN number at the time of registration is done for regulatory purposes, and the addition of this number does not fundamentally change the character of the information in a manner sufficient to create ownership in the document. As far as the microfilm record is concerned, it is merely a convenient means of storing the raw information that appears on the form. In my view, storage of the forms on microfilm does not constitute a reworking or rearrangement of the information on the forms in a manner which gives the Ministry a right of ownership in a newly created record.

In the circumstances of this appeal, I find that the Ministry is the custodian of the information contained on the Form 1 records and the microfilm, not the owner, and that the information does not belong to the Government of Ontario for the purposes of part two of the exemption test under section 18(1)(a) of the Act.

Part Three

The purpose of section 18(1)(a) is to provide a discretionary exemption for certain **proprietary** information of institutions. This exemption is not designed to protect information which may have monetary value or potential monetary value if the information does not belong to the Government of Ontario.

Both parties have made representations regarding whether the information has monetary value or potential monetary value. However, because I have found that the information does not belong to the Government of Ontario (part two) and that it does not qualify as commercial information (part one), it is not necessary for me to consider whether the information contained in the record has monetary value or potential monetary value (part three).

Because all three parts of the test must be satisfied in order for the exemption to apply, I find that the microfilm records do no qualify for exemption under section 18(1)(a) of the Act.

ECONOMIC AND OTHER GOVERNMENT INTERESTS - Sections 18(1)(c) and (d)

Sections 18(1)(c) and (d) of the Act, state:

A head may refuse to disclose a record that contains,

> (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;

To establish a valid exemption claim under section 18(1)(c), the Ministry must demonstrate a reasonable expectation of prejudice to its economic interests or competitive position arising from disclosure.

Similarly, to establish a valid exemption claim under section 18(1)(d), the Ministry must demonstrate a reasonable expectation of injury to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of the province arising from disclosure.

With respect to both sections 18(1)(c) and (d), the Ministry states that in this time of scarce government resources, both the Ministry and the government as a whole are attempting to make certain government services cost recoverable, based on the philosophy that those who use government services should pay a reasonable cost associated with providing the services. The Ministry cites the fee of $8 charged to retrieve individual registrations as an example of this philosophy.

The Ministry says that should the appellant obtain access to the microfilm through the Act he would be able to set up a parallel system of access in competition with the Ministry's individual registration retrieval service. In the Ministry's view, allowing access to the microfilm under the Act would result in taxpayers subsidizing the appellant's business, which could then operate in competition with the Ministry. The Ministry feels that this situation would allow the appellant to gain an unfair advantage over the Ministry in providing its service, because it would not have to develop, maintain and provide general public access to the information contained on the microfilm. Taking this one step further, the Ministry feels that permitting the appellant to avoid paying the same $8 fee charged to other members of the public could reasonably be expected to prejudice the economic interest of the Ministry, since any reduction in the fees collected by the Ministry from the individual registration retrieval system would have to be supplemented through general tax revenues. This in turn would result in less public funds being available for other less commercially viable public services, a situation which the Ministry feels would be injurious to the financial interests of the Government of Ontario.

The appellant submits that it is not reasonable to expect that disclosure of the information on the microfilm could result in the harms outlined in sections 18(1)(c) or (d). The appellant points out

that the Ministry's business names registration database releases the same information which is contained on the microfilm, and he feels that it cannot reasonably be argued that the release of this same information in bulk form would prejudice the economic interests of the government or the Ministry. In the appellant's view, disclosure of information which has already been disclosed, albeit in a different type of record, is not information properly protected under sections 18(1)(c) and/or (d).

The appellant also refers to the fact that, prior to March 1995, the microfilm was regularly disclosed and at no time did the Ministry raise any section 18 concerns regarding this ongoing access. The appellant points to the fact that the establishment of a fee for purchasing the microfilm by regulation was evidence that the economic interests of the government had been identified and were limited to collecting the fees prescribed by the regulation.

In my view, the existence of the statutory and regulatory provisions of the BNA and the Ministry's past practices in making the microfilm available to anyone who was prepared to pay the fee under Regulation 624/93, is inconsistent with the existence of any of the harms identified in sections 18(1)(c) and (d) of the Act. I also find that, because the microfilm now only contains those registrations which are filed in paper copy (a number which is decreasing and will disappear when the electronic filing system is fully operational), it would be virtually impossible for the appellant to set up a system in competition with the business registration database. Even if I were to accept that the protection of section 18(1)(c) can extend to situations where the only potential competition is with a fee-based cost recovery system established by regulation, this is not the appropriate case to do so. In my view, the competitive position of the Ministry cannot be prejudiced by providing the appellant with microfilm records which no longer include all business registrations. If the Ministry's competitive position is not prejudiced, then the rationale provided by the Ministry for a reasonable expectation of the other harms identified in sections 18(1)(c and (d) must also fail.

I also note that the experience gained during the period when the Ministry was providing the microfilm to the appellant could have provided the Ministry with evidence of any effect this was having on the revenue generated through public use of the business names registration database. However, the Ministry has not presented me with any evidence to indicate that purchase of the microfilm during this period in any way damaged the Ministry's competitive position or economic interests.

The appellant's business relies on the value he adds to the information obtained from the Ministry. This value-added service does not appear to compete with any service currently offered by the Ministry, nor has the Ministry provided evidence to suggest that it plans to offer a service similar to that offered by the appellant. The appellant directs his value-added service to his own clients rather than to those who seek the information found in an individual registration. In my view, this removes the appellant from any potential competitive relationship with the Ministry.

Having carefully reviewed all representations, I find that the Ministry has failed to establish that disclosure of the microfilm could reasonably be expected to prejudice the economic interests or competitive position of the Ministry, or be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the provincial economy. On

this basis, I find that the microfilm does not qualify for exemption under sections 18(1)(c) or (d) of the Act.

In summary, I find that the microfilm does not qualify for exemption under section 22(a) or any of sections 18(1)(a), (c) or (d) of the Act, and should be disclosed to the appellant.

CONTINUING ACCESS

The appellant's original request was for access for a two-year period on the same weekly basis as had been provided up to that point. The appellant later wrote to me, asking for this two-year period to be made effective from the date of my order.

Section 24(3) provides that a requester may indicate in the request that it will, if granted, continue to have effect for a specified period of up to two years. It is clear from the wording of this section that the two-year period is effective from the date of the request and cannot be extended on appeal. Accordingly, I am not able to grant the appellant's request to have the two-year period made effective from the date of this order.

Sections 24(3) and (4) are intended to apply to the kind of record which is likely to be produced and/or issued in series. The microfilm records at issue in this appeal clearly qualify, as they were previously produced and provided to the appellant on a weekly basis. Consequently, now that I have determined that the appellant is entitled to disclosure of the microfilm, and that the record is one to which sections 24(3) and (4) are intended to apply, it follows that the appellant is entitled to disclosure of each record which has been produced since the date of his request to the date of this order.

Under the provisions of section 24(4) of the Act, once it has been determined that the appellant is entitled to access, it is up to the Ministry to provide the requester with a schedule showing when the request will be deemed to have been received again, and why those dates were chosen. Accordingly, for the records which will be produced after the date of this order, the Ministry is required to provide a schedule of dates ending two years from the date of the original request on which the request shall be deemed to have been received again, and I will include a provision to that effect in this order. If the requester is not satisfied with this schedule, he is entitled under section 24(4) to ask the Commissioner's office to review it.

The Ministry has informed me that it intends to discontinue maintaining business names registrations on microfilm at some point in the upcoming months. By ordering the Ministry to provide a schedule for continuing access to the microfilm records, I am not requiring the Ministry to maintain these records for longer than they normally would, simply to comply with this request. In addition, it is not practical to require the Ministry to continue to reactivate the appellant's request according to the schedule once the Ministry has discontinued its practice of maintaining these microfilm records. Accordingly, in the event that the Ministry stops maintaining business registrations on microfilm within two years of the date of the original request, the Ministry will no longer be required to reactivate the appellant's request according to the schedule provided as a result of this order.

FEES

As mentioned earlier in this order, with the repeal of Regulations 624/93, there no longer exists any fee provision specifically covering the microfilm records. As a consequence, the fee provisions of the Act apply and are available to the Ministry in the circumstances of this appeal. If fees are imposed by the Ministry, section 57(5) of the Act allows the appellant to ask the Commissioner's Office to review the amount of the fee or a decision by the Ministry not to waive the fee.

ORDER:

1. I order the Ministry to disclose to the appellant the business names registration microfilm produced from the date of his request to the date of this order by sending him a copy no later than **February 21, 1996**.

2. I order the Ministry to provide the appellant with a schedule showing dates for two years following the date of his original request on which the request shall be deemed to have been received again in accordance with section 24(4) of the Act, by **February 21, 1996**. This schedule is to continue to have effect only as long as the Ministry continues to maintain the business name regulations on microfilm during this period of time.

3. Provisions 1 and 2 of this order do not prevent the Ministry from charging a fee for access to records under section 57 of the Act.

4. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1 and a copy of the schedule referred to in Provision 2

Original signed by: February 1, 1996
Tom Mitchinson
Assistant Commissioner