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

ORDER P-1316

Appeal P_9500647

Ministry of Finance

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NATURE OF THE APPEAL:

The appellant made a request to the Ministry of Finance (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for electronic copies of the 1995 property assessment rolls for the region of Ottawa-Carleton. The appellant indicated that he understood the rolls were available on nine-track computer tapes in "ASCII" format.

The Ministry denied access to the requested record based on the following exemption:

- information published or available - section 22(a)

In its decision letter, the Ministry advised that the assessment roll for an individual municipality in the Ottawa-Carleton region could be viewed at no cost at the office of the clerk of the municipality. The Ministry also advised the appellant that he could purchase a copy of each roll directly from a municipality or from the Ministry's Assessment Program. Further correspondence between the Ministry and the appellant indicates that the assessment information for all the municipalities in the Ottawa-Carleton region could be purchased on computer tape at an estimated cost of $1,700.

The appellant appealed the Ministry's decision to charge $1,700 for the computer tape. He later clarified that he also wished to appeal the Ministry's reliance on section 22(a) of the Act to deny access to the record.

Mediation was not possible and a Notice of Inquiry was issued to the Ministry and the appellant. Representations were received from both parties.

DISCUSSION:

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;

This 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 (Order P-1114).

In order for a record to qualify for exemption under section 22(a), the record, or the information contained in it, 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 (Order P-327).
Practically speaking, the Ministry proposed two ways for the appellant to obtain access to the requested information. The first was to view or purchase the assessment rolls for each municipality at each municipality. The second was to purchase a computer tape containing the assessment roll information for all the municipalities in the Ottawa-Carleton region at an estimated cost of $1,700.

Purchase/View Roll at each Municipality

In its representations, the Ministry states that "While the requester shows no interest in a paper copy or mere access, ... the [Act] is satisfied by these solutions." However, the Ministry then discusses the costs related to obtaining a paper copy from each municipality and concludes that, "At these costs, you can see that the electronic versions, offered by the province are much cheaper."

The appellant states that in order to obtain the assessment roll in hard copy he would have to travel to 11 municipal offices and copy thousands of pages of computer printouts. He contends that this is contrary to the balance of convenience test articulated in previous orders.

The record which is responsive to the appellant's request is the compilation of assessment roll information from all the municipalities in the region of Ottawa-Carleton. In my view, referring the appellant to the individual municipalities will not satisfy the appellant's request. No one municipality has the compilation. Accordingly, the Ministry has failed to establish that the requested record or the information contained in the record is "published or available to the public" through this source. Therefore, the section 22(a) exemption does not apply with respect to viewing or obtaining hard copies of the assessment roll at each municipality.

As a result of my finding that section 22(a) does not apply, it is unnecessary for me to address the question of balance of convenience. However, I would add that, in my view, sending an appellant to a number of sources to obtain disparate pieces of information which an institution holds in one record is clearly a situation where the balance of convenience would favour the appellant.

Purchase of Computer Tape from Ministry

A computer tape containing assessment roll information for each municipality in the Ottawa-Carleton region may be purchased from the Ministry for approximately $1,700. It is clear that the computer tape responds to the appellant's request.

In his representations, the appellant states that the information should be disclosed in the public interest either at no cost, or for a fee that reflects recovery of the cost of reproducing the information. He maintains that the price established by the Ministry is prohibitive, an impediment to public interest and contrary to the fee provisions of the Act. The appellant appears to be arguing that the fee provisions of the Act, including the discretion to waive fees, should apply in the circumstances of this appeal notwithstanding the fact that the Ministry has claimed section 22(a) to exempt the information from disclosure under the Act.

In Order 159, I discussed the relationship between the fee structure set up in the Act and any fee structure associated with another source of the information. In that order, I took the position that directing an appellant to a court file where she would be required to pay a prescribed fee for retrieving a file and photocopying did not mean that the information was not "publicly available". I stated:

> Support for the position I have taken can be found in an analysis of the way in which the Federal and various Provincial access legislation deals with publicly available information, by McNairn and Woodbury in Government Information: Access and Privacy, De Boo, 1989. At page 2_24 the authors state:
>
> > Other information for which there is already a system of public access in place will be regarded as being available to the public. Someone who is seeking such information will normally be required to proceed in accordance with the rules of that system. A person who puts in an access request for a deed to property or a list of directors in a company's information return, for example, will likely be instructed to visit the land or companies registry to locate and view the relevant document. A government institution is unlikely to undertake a search for such a document when it has provided the facility for that to be done by members of the public or their representatives. If copies of a deed or a company return, once located, are ordered from the public office, charges will be levied in accordance with the scale of fees under the land registration or companies legislation, rather than that under the access legislation.
> >
> > The authority for diverting the requester to another access system in these circumstances is fairly clear under the federal, Manitoba and Ontario Acts. While the other access statutes are silent on this matter, they should not be interpreted as creating a right to use their access processes in preference to resorting to the public record. In other words, the existing systems for access to particular kinds of information will take priority even if not as convenient or cost effective for the requester. In fact, the Quebec Act states specifically that its access rights do not apply to information in certain public registers, namely those with respect to land transactions, civil status and matrimonial regimes. (emphasis added)

In other words, once an institution establishes that section 22(a) applies, the fee structure of the Act, including the provisions for fee waiver, is no longer operative.

In my opinion, in order to establish that a regularized system of access exists for the computer tape, the Ministry must demonstrate that a system exists, the tape is available to everyone and there is a pricing structure which is applied to all who wish to obtain the information.

In many instances, the existence of a regularized system of access is clear because the system and its associated fees are prescribed by statute or regulation. The system of access which the Ministry has established for assessment information in electronic format has not been formalized in such a manner, therefore, I must examine it more closely.

In its representations, the Ministry advises that the electronic tape of assessment roll information has been available to persons outside government since 1988. The Ministry does not advertise the availability of the tape, however those who could take advantage of this format are made aware of its existence when assessment roll information is requested.

The Ministry states that the standard costs associated with the computer tape are as follows:

Set up	$35.00
Administration	$200.00
Processing	$0.0030
Media	
Tape 1600	$25.00
Tape 6250	$25.00
Cartridge	$10.00
plus	
Taxes - GST & PST 15%	

The main component of the appellant's $1,700 fee is the "three for a penny" "Processing" charge for assessment roll entries. (There are 404,938 assessment roll entries in the region of Ottawa-Carleton). The Ministry advises that it offers this component at half price for other ministries, Crown agencies and its statutory clients, i.e. municipalities and school boards; the other price components remain the same.

The Ministry states that other ministries and Crown agencies charges are internal accounting entries, since their money comes from the Consolidated Revenue Fund (CRF) "only to return to the CRF (Finance)." The Ministry states that it has a statutory obligation to provide a paper copy of the assessment roll to the municipalities, but not an electronic copy. It provides the tape to the municipalities at reduced cost because they are its primary clients.

According to the Ministry, the full pricing structure is consistently applied to all requesters outside government such as the appellant. The Ministry also states that it has not licensed its clients to resell the data as yet, but that may come.

In the circumstances, I am satisfied that the tape is available through a regularized system of access. If the appellant purchases the tape he will obtain access to the information he seeks. Accordingly, the Ministry has established that the requested record or the information contained in it is "published or available to the public" and section 22(a) applies.

ORDER:

I uphold the decision of the Ministry.

Original signed by: December 16, 1996
Tom Wright
Commissioner

POSTSCRIPT:

I feel that the appellant's request raises issues of general importance to both purposes of the Act as set out in sections 1(a) and (b) -- information should be available to the public -- protection of privacy with respect to personal information held by government organizations. These issues relate to electronic records and the impact of the move to electronic records on both access to information and protection of privacy.

Originally I intended to comment on both the access to information and privacy implications in this postscript. However, I have decided to restrict my comments to the privacy element since the nature of the issues, although related to electronic records, are otherwise quite distinct. More specifically, the access to information issue relates to the cost to obtain electronic records. Two other appeals which are presently before me raise the same issue and accordingly I will use that opportunity to comment on cost.

Turning then to the privacy issue. In its representations the Ministry comments on the significance of having assessment information in electronic format and how "... digital formats provide a lot more than access to a record ...". Specifically, the Ministry states that, "In combination with other programs, the electronic formats provide the ability to manipulate and analyze data ...".

A CD ROM product containing assessment information which the Ministry also plans to sell has a computer program within each disk which provides the means "... to manipulate data in a plethora of ways and to summon it up various ways: by name, roll number, neighbourhood, address and indeed by any combination of fields." To paraphrase the example offered by the Ministry, you could find all the "Wrights" in Ottawa-Carleton, or in Ottawa itself, or in six-plexes or all those with assessments between x and y dollars who are separate school supporters. All combinations of all the 20 fields can be searched and analyzed on a personal computer (PC). And therein lies the concern - what was described in a recent Globe and Mail editorial as "The scary prospect of fast information".

In Ontario, assessment information is publicly available by law. For years anyone has been able to go to the office of the clerk of a municipality and view the assessment roll. However, the

paper medium on which information was stored provided a built-in privacy protection. Although it was possible to go to a municipality and copy out the information contained on the paper rolls, using the appellant's situation as an example, in order to do so he would have to travel to 11 municipal offices and copy thousands of pages. The sheer enormity of this task made it unlikely that assessment information would be used other than for assessment-related purposes. Using words of the U.S. Supreme Court, I have described this as privacy protection based on "practical obscurity".

But, as these rolls are transferred to electronic format, it grows much easier to retrieve and manipulate the personal data they contain, and to use it for purposes other than those originally intended. Indeed, this ability to manipulate data is described by the Ministry as one of the added benefits of having information in electronic format.

In my 1994 Annual Report to the Legislative Assembly I said that I believe the transition to electronic records requires that the whole question of what personal information truly belongs on the public record needs to be rethought.

I believe this goes beyond the mere musing of a privacy commissioner. There are real-life examples that demonstrate how the public responds when personal information, which has been publicly available in paper format, becomes available electronically. I feel that one recent Canadian example is especially instructive.

Earlier this year the City of Victoria made assessment information available on its Internet web site. This lasted for one day at which time the mayor shut down the web site. Why? The public complained in large numbers that they didn't like the fact that anyone connected to the Internet could have such ready access to assessment information. Yet the exact information has been and remains available on paper at city hall.

I believe this example amply demonstrates that the public feels that it does make a difference when information which has been publicly available in a paper-only world becomes available electronically.

In my opinion, in order for government organizations to determine what personal information should be publicly available electronically, a new test is needed - what I have heard described as putting the information to the "Internet Challenge". This test would involve an assessment of how the public would respond if the information was available on the Internet where quite literally anyone in the world would have access to it. If the sense was that the public would respond negatively, the personal information should not be made publicly available in identifiable form in an electronic format.

For example, in Ontario, land registration records are publicly available. Anyone can physically visit a registry office and find out who owns a particular property, when they purchased it, how much they paid for it, the name of the mortgage company that holds the mortgage, the principal amount of the mortgage, the interest rate, the amount of the monthly payment and when the mortgage matures.

However, I wonder how the public would feel about this information being generally available in electronic format and therefore more readily accessible to anyone, including those who want the information for other than land registry purposes.

There are also more formal steps that could be taken. Legislated privacy controls could be placed on electronic public databanks storing personal information. New Zealand has enacted Public Register Privacy Principles, an approach which in 1994 I recommended to the Standing Committee on the Legislative Assembly during its review of the Municipal Freedom of Information and Protection of Privacy Act.

In a world of electronic information, "practical obscurity" is no longer sufficient protection for publicly available personal information since in reality, it no longer exists. Indeed, the availability of information electronically creates an urgent need to address the overriding question -- just how much is someone else entitled to know about you?