



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

# ORDER P-1387

Appeal P\_9500389

Management Board Secretariat



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/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **NATURE OF THE APPEAL:**

The appellant made a request to Management Board Secretariat (MBS) under the Freedom of Information and Protection of Privacy Act (the Act) for the Revised Statutes of Ontario (RSO's), and the Revised Regulations of Ontario (RRO's), or any portions thereof, that were available in electronic format. The appellant also requested the most up-to-date consolidations where statutes had been consolidated with amendments made subsequent to the 1990 RSO's and RRO's. The appellant indicated that his preferred electronic formats were, in descending order of preference, "ASCII" text, any WordPerfect version, any other word processor format available by retail purchase and a non-retail proprietary format.

The appellant also asked that his request continue in force for two years pursuant to section 24(3) of the Act.

MBS denied access to the requested record based on the following exemption:

- information published or available - section 22(a)

In its decision letter, MBS stated that the RSO's were available in electronic format for a fee from Publications Ontario. However, MBS informed the appellant that only two of the regulations in the RRO's were available for purchase. Access to the remaining regulations was denied because the record did not exist in the format requested.

The appellant appealed MBS's decision. Mediation was not possible and a Notice of Inquiry was issued to MBS 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 (Orders P-1114 and P-1316).

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 (Orders P-327 and P-1316).

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 (Orders 159 and P-1316).

In its representations, MBS states:

On [the date of the request], the Statutes of Ontario in diskette form consolidated to 1994 ... were published and available to the public through Publications Ontario at MBS for a fee of \$1524.75 (\$1,425.00 + \$99.75 GST). The records containing the consolidated Statutes of Ontario were and are available on 147 high-density 3.5" diskettes in WordPerfect 5.1 format, consolidated to September 1994. ... [A]s of September 1995, the Statutes of Ontario in CD-ROM format were also available to the public through Publications Ontario.

With respect to the regulations, MBS states in its representations that some regulations relating to four statutes existed in electronic format at the time of the request and are available from Publications Ontario. When asked for further details, a staff member of MBS explained that the problem with the availability of the remaining regulations stemmed from the transition period which followed a decision to bring production and maintenance of the regulations "in-house". The transition involved the transfer of the regulations from two outside printers to Legislative Counsel at the Ministry of the Attorney General. The regulations were transferred in two different kinds of printer files. These are typeset files that only a printer would use.

Conversion of all the regulations at the time of the request to a uniform format from the printer files was cost prohibitive in terms of both fiscal and human resources. Conversion involved stripping all codes, writing new macros, coding again and then filtering the files into a more useable format. In some instances, information had to be recreated in computer format from hard copies of a regulation. There were also concerns about accuracy of the information due to the labour intensive nature of the conversion process.

Since MBS submitted its representations, the situation has changed. Consolidated versions of both the statutes and regulations are now available on CD ROM at a cost of \$325 plus tax. The statutes are current to December 31, 1995; the regulations are current to at least September 30, 1994. MBS hopes to release updated CD ROM's in the spring and fall of each year, the spring edition to include the previous fall session of the Legislature and the fall edition to include the previous spring session.

MBS also advises me that both the statutes and the regulations are now available on the Internet at the following web site:

[www.gov.on.ca/MBS/english/publications/statregs/contents.html](http://www.gov.on.ca/MBS/english/publications/statregs/contents.html)

In Order 167, I discussed whether it was appropriate for the Commissioner or the head of an institution to take into account events that had occurred after the institution's decision had been made. I stated:

It is my view that it would be unreasonable to adopt a position whereby the Commissioner or his delegate would be prohibited from taking into consideration facts and developments which have arisen subsequent to the head's decision. In order to give effect to the purposes of the Act, it is essential that all relevant facts and developments that arise prior to the date of an order be considered. I note parenthetically that the head is also free, during the course of an appeal, to take notice of a change of circumstances which might affect the application of the Act, and to change his/her decision in respect of the appeal accordingly. For example, when certain events which have prompted an exercise of discretion in favour of not disclosing a record have passed, a head might alter the original decision and the appeal could be settled.

Accordingly, it is my view that I may consider all relevant facts and developments in reviewing the head's decision, and in deciding whether or not a particular record falls within a specified exemption.

This approach was also followed in Orders M-450 and M-796. Therefore, in my view, my responsibility is to determine whether section 22(a) applies when the matter is before me, based on a consideration of all relevant facts and developments. In this case that means that I must take into consideration the full extent of the availability of the statutes and regulations at the time my decision is made.

As I have outlined, since the date of the appellant's request, both the RSO's and the RRO's, in consolidated and updated versions, are now available on CD ROM and on the Internet. Print copies of the RSO's and RRO's remain available at a cost of \$695 and \$495 plus tax respectively. Supplements containing more recent amendments may also be purchased at an additional cost.

MBS also advises me that while Publications Ontario still maintains the WordPerfect 5.1 database, no further consolidations have been made since September 1994 and none are expected to be made. Purchasers are warned that the diskettes they purchase will not contain amendments made after September 1994.

These are the facts upon which I will base my decision as to the availability of the requested information under the Act.

In Order P-327, former Assistant Commissioner Tom Mitchinson stated that 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.

In Order P-1316, I stated that in order to establish that a regularized system of access exists an institution must demonstrate that a system of access exists, that the record or information is available to everyone and that there is a pricing structure which is applied to all who wish to obtain the information. In my view, although he did not elaborate, former Assistant

Commissioner Mitchinson used the example of a government publications centre because it makes information available in a systematic way to everyone at a standard price.

In the circumstances of this appeal, I am satisfied that the RSO's and the RRO's are available through a regularized system of access in both print and electronic format through Publications Ontario. If the appellant purchases the CD ROM he will obtain access to the information he seeks. In addition, access is also available at no direct cost via the Internet.

Accordingly, I find that MBS has established that the requested record or the information contained in it is "published or available to the public" and section 22(a) applies. In the circumstances of this appeal, the balance of convenience favours this method of alternate access.

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.

## **CHARTER OF RIGHTS AND FREEDOMS**

The appellant has argued that the denial of access by MBS violates the Canadian Charter of Rights and Freedoms (the Charter). In particular, he refers to sections 1, 2(b) and 7 of the Charter. These sections state:

Section 1:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 2(b):

Everyone has the following fundamental freedoms:

freedom of thought, belief, opinion and expression, including  
freedom of the press and other media of communication;

Section 7:

Every person has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

The appellant's submissions under section 2(b) relate to freedom of expression, and under section 7, to potential loss of liberty as a result of ignorance of the law. He claims that these rights have been violated or limited by the application of section 22(a) as a result of a denial or a limitation of his access rights, which he argues are pivotal to the Charter rights to which he refers. The appellant's reference to section 1 consists of an argument that the alleged violations of sections 2(b) and 7 are not justified under section 1.

In my view, section 22(a) does not involve an outright denial of access; rather, it directs the appellant and other requesters to alternative sources for the information they seek.

In Order P-496, I made the following comments about section 22(a):

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.

In this case, the requested information may be purchased from Publications Ontario. Accordingly, in my view, neither the purpose or the effect of section 22(a) is to deny or limit access to the requested information. For this reason, I find that the appellant's Charter arguments are not substantiated.

### **CONTINUING ACCESS**

The appellant sought continuing access for new statutes, regulations and consolidations of statutes for a period of two years under section 24(3) of the Act. 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 (Order P-1114).

In the circumstances of this appeal the appellant was denied access to the record he requested under section 22(a) of the Act. I have upheld the decision of MBS to deny access. Therefore, section 24(3) does not apply to the appellant's request.

### **ORDER:**

I uphold the decision of MBS.

Original signed by: \_\_\_\_\_

Tom Wright  
Commissioner

April 29, 1997

## **POSTSCRIPT:**

I feel that this appeal and a similar one (P\_9500674, Order P\_1388) bring to the fore issues which highlight the effect of the rapid transition of government information from paper to an electronic format.

In this instance, within a relatively short time frame, the information moved from being partially available on diskette, to CD ROM and most recently to a web site. I feel that this metamorphosis resulted in improved public access to information through the use of technology.

However, in my view, in order to maximize the effectiveness of public access through technology, there is a need for a government-wide information strategy. I take note that the federal government has been working on the development of a new information policy framework. The following principles, which I have paraphrased, are under discussion:

1. The free flow of information between government and the public is essential to a democratic society.
2. The management of information should protect the public's right of access to it.
3. The ease of retrieval and use of information is an essential part of good management of information.
4. The individual's right to privacy must be protected.
5. All levels of government must cooperate in the management of information.
6. Modern information technology can improve service to the public and the availability of diverse information formats provides the public and government with more flexibility in using government information.
7. Public access to government-held information can be facilitated by utilizing a diversity of sources, including the library community and the private sector.
8. Government should encourage the widest possible dissemination of information by making it available free of charge or at a price that does not exceed the marginal cost of dissemination.
9. Information management principles must be integrated into the planning process by which government organizations determine strategic operational priorities.

I believe that the development of a such a policy framework in Ontario will require focussed leadership. This is one reason why in my 1995 Annual Report I encouraged the government to formally recognize the role and mandate of a chief information officer. In my view, doing so would signal the importance of managing information across the corporation that is the government of Ontario.

Specifically, with respect to principle 8, I believe that charging a premium for electronic information must continue to be resisted. Indeed, the treatment of the RSO's and RRO's

provides a good example of how information can be made available more cost effectively, by the government and for the public, in electronic rather than print format.

By my calculations, the CD ROM version of the RSO's and RRO's is available at approximately a third of the cost of the print versions. More importantly, the Ontario government has also made the RSO's and RRO's available through the Internet. This is a progressive step and one which I see being utilized with even greater frequency with respect to other information that the public is seeking from government.

However, I would also sound a note of caution. While I regard the proliferation of web sites as a positive development, the transition to a fully wired society is just beginning. A StatsCan survey released in October 1996, showed that only 7.4% of Canadian households are on the Internet. Although these percentages are increasing rapidly, in my view it is essential that governments not prematurely dispense with paper-based communications. To do so would be to invite a new social division between information "haves" and "have\_nots" and would be inconsistent with a number of the principles I have outlined.