



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

FINAL ORDER P-1572

Appeal P-9700041

Ministry of Consumer and Commercial Relations



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This order represents my final order in respect of all outstanding issues from Interim Order P-1281.

BACKGROUND AND NATURE OF THE APPEAL:

The Ministry of Consumer and Commercial Relations (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for copies of the "MCCR ONBIS Database" (the ONBIS database) and the "MCCR NUANS Database". The second part of the request was later clarified to mean a copy of the magnetic tape containing the information which is supplied by the Ministry to the company that operates NUANS (the NUANS tape).

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

The requester appealed the Ministry's decision and Appeal P-9500288 was opened. The Ministry also claimed exemptions pursuant to sections 18(1)(a), (c) and (d) of the Act for both the ONBIS database and the NUANS tape.

Because there were new developments related to the NUANS tape, and not to the ONBIS database, I decided to issue Interim Order P-1281, disposing of the issues raised with respect to the ONBIS database only.

In Interim Order P-1281, I described the ONBIS database as follows:

ONBIS is a computerized registry of all business entities in Ontario. It was fully implemented on June 30, 1992, and replaces the former method of microfilm or microfiche storage. The creation of ONBIS resulted in a reorganization of how the Ministry maintained its registrations database.

The information in ONBIS is collected as part of the Ministry's regulatory mandate.

There are several provincial statutes and regulations which authorize the collection of this information and specify the nature of the information to be collected. Examples include the Corporations Information Act, the Corporations Act, the Business Corporations Act, the Business Names Act, and the Limited Partnerships Act. These statutes prescribe the nature of the information which business entities are required to provide to the Ministry as a condition of doing business in the province of Ontario.

The information is received by the Ministry's Companies Branch and entered into the appropriate data fields in the ONBIS database. The ONBIS database consists of a number of components which, when combined, comprise this record. These components are:

- the data elements
- the database management system
- the software programs and reports

The first component is the various data registration elements (the data elements) provided by each business. The data elements consist of information such as the name of the company, the date of incorporation and the corporation's head office. These data elements are selected or arranged into approximately 300 relational tables. These tables contain a number of alphanumeric data fields which represent the information from the registration form along with the various management fields created by the Ministry relating to their regulation of the business in question.

Some of the data elements are literal representations of the data entered on the registration form (e.g. the business name). Other data elements are encoded representations for the actual data element on the form (e.g. a code 'FD' might be used to indicate that the business is federally incorporated). Some data elements represent management data for use either by the Ministry or by the database management system.

The second component of the ONBIS database is the database management system. This is a commercially obtained piece of software which the Ministry has selected to manage the data. Certain elements of the data storage, table organization and the programs that have been created to manage the data will be unique to the database management system. The database management system is proprietary to its developer and, as with many such technologies, is licenced to the Ministry for its own use in operating the ONBIS system.

The third component of the ONBIS database is the software developed by the Ministry. The software is required to organize and input the data elements in the appropriate tables, as well as search and retrieve data from ONBIS in a variety of formats including, for example, reports on individual businesses.

I found that the section 22(a) exemption does not apply to the ONBIS database as a whole, and made the following findings with respect to the ONBIS database under section 18(1)(a):

1. The ONBIS database as a whole (i) contains technical information; (ii) which belongs to the Government of Ontario or an institution; and (iii) has potential monetary value. It therefore qualifies for exemption under section 18(1)(a) of the Act.
2. The various software components of the ONBIS database (i) contain technical information; (ii) which belongs to the Government of Ontario. Because these individual software components fall outside the scope of the appellant's request, it is not necessary for me to consider whether they have monetary or potential monetary value, nor to determine whether they qualify for exemption under section 18(1)(a) of the Act.
3. The data elements (i) are not commercial or technical information; and (ii) do not belong to the Government of Ontario. Because the first two

requirements of the section 18(1)(a) exemption claim have not been established with respect to the data elements, they do not qualify for exemption under this section irrespective of whether they have monetary value or potential monetary value.

Because I found in Interim Order P-1281 that the data elements did not qualify for exemption under section 18(1)(a), the question remained whether they satisfied the requirements of either sections 18(1)(c) or (d). However, it was not clear to me whether the appellant was interested in pursuing access to the data elements in bulk, nor had the appellant or the Ministry provided representations on the application of sections 18(1)(c) or (d) to the data elements in bulk form.

The Ministry indicated that it had never done a full “data dump” of all data elements and information contained in the ONBIS database. It took the position that to do so would unreasonably interfere with the operations of the Ministry, as contemplated by section 2 of O. Reg. 460.

I concluded that these were issues which would need to be addressed if the appellant wished to proceed further with the appeal. Consequently, I included the following provisions in Interim Order P-1281, which was issued on October 24, 1996:

1. I uphold the decision of the Ministry to not disclose the ONBIS database.
2. I order the appellant to contact the Ministry in writing by **November 8, 1996** to advise whether he is seeking bulk access to the data elements on the ONBIS database.
3. I order the appellant to contact the Ministry in writing by **November 8, 1996** to clarify what portion, if any, of the data elements on the NUANS tape is the subject of that part of his request.
4. I order the Ministry to provide the appellant with assistance in reformulating his request, ensuring that both parties have a clear understanding of all outstanding issues.
5. Should the appellant contact the Ministry in accordance with Provisions 2 and/or 3, the Ministry is ordered to provide the appellant with a new decision, in accordance with section 26 of the Act, by **November 22, 1996**.
6. Should the appellant not contact the Ministry in accordance with Provision 2 and/or 3, the Ministry may consider this appeal as closed.
7. Both the appellant and the Ministry are to provide copies of any correspondence referred to in Provisions 2, 3 and 5 to this office within five (5) days of the dates referred to in these provisions.

By letter dated October 30, 1996, the appellant requested bulk access to the data elements on the ONBIS database. In addition, he requested the appropriate file layouts, record counts and record

layouts of the ONBIS database, as well as any other pertinent information in respect of Provision 4 of the interim order.

The Ministry issued a decision denying access to the ONBIS data elements pursuant to sections 10(2) and 21(1) of the Act. The Ministry explained its decision as follows:

The ONBIS data elements do not exist as a separate record and the information contained in the elements is so interwoven with the system that it cannot be severed without extensive reprogramming. There is no program in the system that would provide for separation or severance of the data elements. Furthermore if a data dump were possible after reprogramming, it would cause considerable interruptions in the operations of the office that uses the system and service would be interrupted to many other clients while the system was unavailable. This would impose an unreasonable interference on the institution as provided in the Regulations (O. Reg. 460).

In subsequent correspondence to the appellant, the Ministry stated:

Unfortunately, because of the size and complexity of the ONBIS system and other constraints on our technical staff, we cannot provide you with a listing of the data elements. However, we are looking into providing you with more general information describing the data.

The appellant appealed the Ministry's decision. He claimed that it is very easy to extract the public data elements from the ONBIS database without unreasonably interfering with the operations of the Ministry. He maintained that the Ministry already has the software that extracts all data elements from the ONBIS database. The appellant also claimed that the Ministry had not complied with Provision 4 of Interim Order P-1281.

During mediation, the Ministry issued a further decision letter, claiming exemptions pursuant to sections 10(2), 14(1)(a) and (c), 14(2)(a) and (b), 17(1)(a), (b) and (c), 17(2), 18(1)(a), (c) and (d), 21(1) and 29(1)(a) of the Act. The Ministry also re-affirmed its position that, even if a data dump were possible after reprogramming, this would unreasonably interfere with Ministry operations. The Ministry also provided the appellant with a general description of the information contained in the ONBIS database.

A Notice of Inquiry was provided to the appellant and the Ministry. Inquiry Officer Mumtaz Jiwan established the following procedure for submission of representations: the Ministry was asked to provide its representations first, with a copy to the appellant; the appellant would then have three weeks to provide his representations, with a copy to the Ministry.

The Ministry objected to the process for submitting representations. Inquiry Officer Jiwan sought representations on this process issue, after which she issued an interim order requiring the Ministry to provide representations on the substantive issues identified in the Notice of Inquiry as well as the process issue. The Ministry provided representations on all of these issues. On March 9, 1998, I assumed responsibility for this appeal. After reviewing the Ministry's representations, I decided that the most appropriate process to follow was to seek representations

from the appellant on the substantive issues in the appeal. I provided the appellant with a copy of the original Notice of Inquiry, which up to this point had only been provided to the Ministry.

The appellant provided representations which did not deal with the substantive issues. In the appellant's view, the Ministry has not complied with Provision 4 of Interim Order P-1281, and until it does, the appellant has decided not to provide substantive representations on the present appeal. He argues that the issuance of a final order in Appeal P-9500288 would eliminate the need for this appeal, and he also objects to the fact that the Ministry raised several exemption claims outside the allowable time period, particularly its claim under section 2 of O. Reg. 460.

As far as the NUANS tape is concerned, the Ministry issued a decision to the appellant denying access. This decision was not appealed.

PRELIMINARY ISSUE:

Procedural Objection

Because of the way in which I will be disposing of the issues in this appeal, it is not necessary for me to address the issue of the late raising of discretionary exemption claims by the Ministry. However, I will address the appellant's specific concerns with respect to the status of Provision 4 of Interim Order P-1281, and the application of section 2 of O. Reg. 460.

Provision 4 states:

I order the Ministry to provide the appellant with assistance in reformulating his request, ensuring that both parties have a clear understanding of all outstanding issues.

Following the issuance of Interim Order P-1281, the appellant did contact the Ministry and requested bulk access to the data elements. He also asked for several pieces of information about the data elements to assist him in reformulating his request. The Ministry advised the appellant that it was unable to provide him with a list of the data elements due to the size and complexity of the ONBIS database. Instead, the Ministry provided the appellant with a general description of the information contained in the ONBIS database.

The appellant is clearly not satisfied with the level of assistance provided by the Ministry. However, having reviewed all of the circumstances of this appeal and the actions taken by the Ministry, I am satisfied that the Ministry has made a reasonable effort to provide the appellant with as much information as possible regarding the data elements, and has complied with Provision 4 of Interim Order P-1281.

The appellant's claim that the Ministry raised section 2 of O. Reg. 460 too late is without merit. This section reads as follows:

A record capable of being produced from machine readable records is not included in the definition of "record" for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution.

Once the appellant advised the Ministry that he was seeking bulk access to the data elements on the ONBIS database, Provision 5 of Interim Order P-1281 required the Ministry to provide the appellant with a **new** decision under section 26 of the Act. This is precisely what the Ministry did. Once the appellant made it clear that he wanted bulk access to the data elements, the Ministry turned its mind to the access provisions of the Act and regulations, and determined that section 2 of O. Reg. 460 applied. It is also important to state that the question of whether or not the ONBIS data elements in bulk form are a “record” for the purposes of the Act is a jurisdictional one which I am bound to consider before embarking any further on my inquiry into the question of access.

In my view, I have sufficient information before me to complete this inquiry without the need to solicit further representations or to deal further with the process issue regarding submission of representations identified by Inquiry Officer Jiwan at an earlier stage in this appeal.

DISCUSSION:

DEFINITION OF “RECORD”

The term “record” is defined in section 2(1) of the Act as follows:

“record” means any record of information however recorded, whether in printed form, on film, by electronic means or otherwise, and includes,

- (a) correspondence, a memorandum, a book, a plan, a map, a drawing, a diagram, a pictorial or graphic work, a photograph, a film, a microfilm, a sound recording, a videotape, a machine readable record, any other documentary material, regardless of physical form or characteristics, and any copy thereof, and
- (b) subject to the regulations, any record that is capable of being produced from a machine readable record under the control of an institution by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the institution;

As stated earlier, section 2 of O. Reg. 460 provides:

A record capable of being produced from machine readable records is not included in the definition of “record” for the purposes of the Act if the process of producing it would unreasonably interfere with the operations of an institution.

In support of its representations, the Ministry has included affidavits provided by the Director of the Companies Branch of the Business Division, Deputy Director of Client Services of the Companies Branch in the Business Division, the Acting Assistant Deputy Minister of the Business Division and the Freedom of Information and Privacy Co-ordinator.

The Ministry explains that it maintains data on over one million corporations and 800,000 unincorporated businesses in Ontario. There are over 5,500 categories of data in the ONBIS database, 3,000 of which contain information about these corporations and businesses. The remaining 2,500 categories of data are utilized to store or send data, and are referred to as "work elements". As a result, the Ministry states that there are potentially up to 5.4 billion individual data elements in the ONBIS database (1.8 million x 3,000).

The Ministry submits that in order to provide a detailed description of even the data fields into which the data elements are organized, it would be necessary to (1) distinguish between the data fields and the work elements and (2) review each data field in order to determine whether the current description is accurate and, if necessary, write an appropriate description. It is estimated that this process would require the services of senior technical and business staff with knowledge of ONBIS working over 160 days.

The Ministry admits that the ONBIS data elements are capable of being produced from a machine readable record, but adds that this is not possible by means of computer hardware and software or any other information storage equipment and technical expertise normally used by the Ministry.

The Ministry states that new computer programs would have to be developed and tested to both extract the ONBIS data elements from the database, and to sever the exempt portions of the data elements. The Ministry argues that the computer hardware, software and technical expertise which would be required to produce the record are not normally used by the Ministry and, in fact, would represent an abnormal or extraordinary use. Therefore, the Ministry submits that the data elements do not constitute a "record" as defined in the Act and regulations.

The Ministry argues in the alternative that, even if I find that the record is capable of being produced from machine readable records, the process of producing the record would unreasonably interfere with the operations of the Ministry. In support, the Ministry claims that the estimated time to produce and sever the record is 275 days (including the previously noted 160 days to update the categories of data). This would require the services of senior technical and business personnel, who normally are required to support and manage the core business functions of the Companies Branch. Consequently, the Ministry states that additional human resources would be required, at an estimated cost of \$141,525, to either work on the production of the record or to maintain the Companies Branch's services to the public.

In addition, the Ministry submits that the production and severance of the record would require a significant service interruption to all users of the ONBIS system. For example, the Ministry explains that the current hardware is operating at full capacity, so is not available to produce the requested record. Therefore, in order to accommodate the production of the record using the current hardware, the system would have to be taken out of operation for 21 days to run the extract job and a further 21 days to complete the severances. This downtime would prevent the Ministry from entering new registrations received into the ONBIS system and producing the records required by statute. Members of the public who pay the proscribed fees, rely on electronic searches generated through the computer system to conduct business. In the Ministry's view, its failure to provide the search capabilities within a reasonable time would constitute a breach of its statutory duties. The Ministry also has statutory responsibilities under

the Business Names Act, the Limited Partnership Act and the Corporation Information Act for the processing of filings and registrations which would also have to be halted in order to produce the requested record. The Ministry also states that halting the operation of the ONBIS system as described above could result in exposure to civil and contractual liability.

The Ministry argues that the Act does not require an institution to go to such extraordinary lengths to produce a record in response to an access request, and that to do so would “clearly and unquestionably” interfere with the operations of the Ministry. Therefore, the Ministry submits that the ONBIS data elements in bulk form do not fall within the definition of “record” and, as such, are not governed by or accessible under the Act.

Having reviewed the representations of the Ministry, along with the supporting affidavits, I am persuaded that production of the record would require the use of computer hardware, software and technical expertise not normally used by the Ministry in the operation of its programs. I also accept the Ministry’s evidence that, even if the record could be produced from the system normally used by the Ministry, to do so would unreasonably interfere with the operations of the Ministry. Therefore, I find that, in accordance with section 2 of O. Reg. 460, the ONBIS data elements in bulk form do not satisfy the definition of a “record” under section 2 of the Act. Accordingly, the requested record is not accessible under the Act.

Because of the manner in which I have decided this appeal, it is not necessary for me to consider the other substantive and process issues which have been raised.

ORDER:

I uphold the Ministry’s decision.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

May 28, 1998

POSTSCRIPT:

While my order upholding the Ministry’s decision disposes of the issues raised in this appeal, I wish to comment briefly on one of the implications of this case for future government decisions on the design and use of electronic databases.

Historically, when business registration filings were made in paper form and recorded by the Ministry on microfilm or microfiche, information similar to that at issue in this appeal was available to the public in bulk format. At that time, these microfiche and microfilm records could be reproduced by the Ministry with relative ease and were made available to purchasers at low cost. (See my Order P-1114). There is more than a little irony in the fact that the efficiencies of electronic filing, storage and retrieval have become a barrier to access to business registration information in bulk format in this particular case.

I have found that producing the requested record in this case would require resources not normally used by the Ministry and would unreasonably interfere with the Ministry's operations. However, I also note that the total software development, hardware acquisition and staffing costs to produce the record amount to approximately one percent of the total cost of developing the ONBIS system over a period of five years, based on the Ministry's own estimates. While I have no specific evidence on this, I believe it is reasonable to assume that these costs would have been considerably lower if the Ministry had originally designed and developed software components in the ONBIS database which would permit the appropriate data extraction for emulation of bulk records previously available to the public under the Act or otherwise.

Although it is arguably understandable that the Ministry did not turn its mind to these access-related implications when it developed the ONBIS system several years ago, the results of this order clearly demonstrate how this lack of foresight can impact on public access to records. As the Ministry and other parts of government become increasingly reliant on electronic databases such as ONBIS to deliver their programs, it is critically important that public accessibility considerations be part of the decision-making process on any new systems design.

This issue is not unique to Ontario. It has been raised in the past by former federal Information Commissioner John Grace and others, and is a serious concern of access to information professionals in all jurisdictions.

The public's statutory right of access to government records is a critically important component of our system of government accountability. Accessibility and transparency are inexorably linked to public trust and faith in government. Retaining access rights to raw electronic data is an important part of this overall accountability system, and factoring public access requirements into the design of new systems will ensure that these important rights are in fact enhanced rather than irretrievably lost through technology advances.