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

ORDER PO-2169

Appeal PA-010121-2

Ministry of the Environment

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BACKGROUND

In 1999, the Ministry of the Environment (the Ministry) implemented a mandatory vehicle inspection and maintenance program called the "Drive Clean" program. The purpose of the program is to detect and reduce smog-related emissions from cars, trucks and buses.

The Ministry states:

> The Drive Clean program was designed with four specific performance targets, and they have guided the development and implementation of the program since its inception:
>
> a) to reduce smog-causing pollutants by means of testing and repairing vehicles;
>
> b) to consistently achieve a high degree of public acceptance for the program. This target is met by a wide mix of private sector facilities located throughout Ontario, reasonable access times for customers, affordable test fees, and high standards of information access and customer services;
>
> c) to consistently achieve a high level of acceptance by the vehicle inspection industry and repair industry sectors; and
>
> d) to consistently achieve a high degree of business integrity by ensuring "zero tolerance" for non-compliance by Drive Clean facilities with program requirements.

The Ministry points out that similar programs exist in other jurisdictions, and states that Ontario's program has been one of the most successful in significantly reducing emissions from motor vehicles and in meeting the program's performance targets.

The requirements of the Drive Clean program are set out in Regulation 361/98 made under the *Environmental Protection Act* and Regulation 628/90 made under the *Highway Traffic Act*. These regulations establish various emissions testing standards and requirements for the operation and registration of various types of vehicles in Ontario.

Results from vehicle testing under the Drive Clean program are gathered and stored electronically in computer systems maintained by the Ministry. The Ministry explains:

> Gas emission results of every vehicle tested in the program are stored in the Drive Clean database, along with the identification of the vehicle, the license plate number [assigned by the Ministry of Transportation (the "MTO") to the vehicle], service facility identification, and Inspector or Technician identification. There are currently over 3,300,000 such records in the database. The vehicle identification and plate numbers are the same data as contained in the MTO vehicle registration database. The remainder of the data is unique to the Drive Clean database.

The Ministry's Drive Clean database also contains specific "garage identifiers", also referred to as the "DCF Number" or the "Station ID." The Ministry explains that a garage identifier is a "4-digit numerical string" that is assigned to a Drive Clean facility:

> Each Drive Clean facility has its own garage identifier. It is used to identify the facility for all aspects of the Program. To a Drive Clean facility, the garage identifier is its own unique Drive Clean identification number.

NATURE OF THE APPEAL:

The Ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about inspections carried out by facilities under the Drive Clean program in electronic format. The requester did not identify any particular source or database for the information.

The Ministry identified the responsive record as the data elements of the Ministry's Drive Clean program, excluding any portions that might reveal the identity of individuals. The Ministry denied access to this record pursuant to section 18 (economic and other interests).

The requester (now the appellant) appealed that decision (Appeal PA-010121-1).

After conducting an inquiry, I issued Order PO-1980. In it, I found that the data elements relating to the Drive Clean program did not qualify for exemption under section 18. I also provided the parties with direction on the format of the record, as follows:

> Finally, I would like to address the issue of format. The appellant indicates in his original request letter that he wants access in electronic format, as well as hardcopy printed versions of the first 50 records contained in the database. By that, I assume the appellant is interested in receiving access to paper copies that contain all data gathered through the emissions testing process for 50 vehicles, subject to severance of the specific data elements that have been removed from the scope of his request. In my view, although my order determines that section 18(1) does not apply to the records at issue in this appeal, it is not clear to me that the appellant, quite understandably, has been provided with sufficient information to make an informed determination of how much and in what format he wishes to receive the information from the Ministry. I have concluded that most appropriate way of proceeding at this stage is for the Ministry to provide the appellant with the printed content of a representative sample of 50 emission test results. This will put the appellant in a position to determine what further information he requires, and in what format, which will then allow the Ministry to determine what fees, if any, are required in order to comply with the provisions of this order. I will remain seized of the appeal in order to deal with any issues that arise in this context that cannot be resolved by the parties.

In compliance with Order PO-1980, the Ministry issued a decision to the appellant and provided him with the hardcopy version of a representative sample of 50 vehicle emission test results, with certain items of information removed. The Ministry also estimated that the total fee for producing the entire record would be $593.

In response, the appellant advised the Ministry that the hardcopy version of the record did not contain the unique garage identifiers, and that he wanted access to this information. The appellant also objected to the fee.

The Ministry responded by advising the appellant that disclosing the garage identifiers would reveal information about identifiable test facilities, and that this could not be done without their consent. The Ministry also revised the fee as follows:

> Based on our discussions, the total fees for your request have been recalculated as follows:
>
> | | |
> |---|---|
> | Records Preparation 9 hours @ $30 | $270 |
> | Compact Disks 5 @ $10/disk | $ 50 |
> | Shipping | $ 3 |
> | Total | $323 |

The appellant appealed the Ministry's decision regarding both access to the garage identifiers and the fee.

The Ministry's position on the garage identifiers raises the potential application of section 17(1) of the *Act* (third party information). I advised the parties that, because this exemption is mandatory, I was required by virtue of sections 50(3) and 52(13) of the *Act* to notify the individual Drive Clean facilities (the facilities) as affected parties and provide them with an opportunity to make representations before deciding whether the garage identifiers fell within the scope of the exemption.

I then sent a Notice of Inquiry to the Ministry, setting out the issues and seeking representations. I also notified the 2,132 facilities, inviting them to participate in the appeal and to ask for a copy of the Notice of Inquiry on the section 17 issue. A total of 667 facilities requested and were provided with a copy of the Notice, and 438 provided representations, either individually or through a representative on behalf of a group of facilities. The Ministry also submitted representations.

I then sent a copy of the Notice of Inquiry to the appellant, together with the non-confidential portions of the Ministry's representations and a representative sample of the representations submitted by the facilities. The appellant responded with representations.

RECORDS:

Order PO-1980 dealt with all data elements from the Drive Clean program other than those that had been removed from the scope of the request, and the garage identifiers. This includes the Drive Clean test results from each facility.

The record in this appeal consists of the one final responsive data element - the specific garage identifiers.

DISCUSSION:

THIRD PARTY INFORMATION

General Principles

Sections 17(1)(a), (b) and (c) of the *Act* read:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

For a record to qualify for exemption under this section, the parties resisting disclosure (in this case the Ministry and/or the facilities) must satisfy the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the Ministry in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding my Order P-373 stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words "**detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.)]

Part 1: Type of Information

This office has defined the terms "commercial information" and "financial information" as follows:

> ***Commercial Information***
>
> Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. [Order P-493]
>
> ***Financial Information***
>
> The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. [Orders P-47, P-87, P-113, P-228, P-295 and P-394]

I adopt these definitions for the purpose of this appeal.

Representations

Ministry

The Ministry submits that the "garage identifiers, in conjunction with Drive Clean test data, clearly constitute commercial information." The Ministry argues that:

> [D]isclosing the garage identifier would reveal commercial information because it would disclose information related to the selling of services (specifically, Drive Clean testing services) by a commercial enterprise. Further, it would permit creation of a "commercial profile" of a Drive Clean facility because it would enable the Appellant to match each Drive Clean test in the database with the Drive Clean facility that conducted it. The Appellant could then conduct an electronic analysis of all the test results for each facility and create a profile of the facility's operations. The profile could include, for example, the volume of test business (a measure of business income), the number of vehicles tested per hour or day (a measure of business productivity), the vehicle client base of the facility, its days and hours of operation, its busiest periods, patterns of customer use, periods when the facility is not testing vehicles, and pass/fail rates of tested vehicles. These measures could be analyzed over time to determine business trends at any facility. This is commercial information by any standard.

The Ministry also submits that the "garage identifiers, in conjunction with Drive Clean test data, constitute financial information." The Ministry argues:

> [F]inancial information can also be considered as information that customarily appears on the financial statements of an enterprise. Income from a business customarily appears on financial statements. As noted above, disclosing the garage identifier with the test data discloses the number of tests that a Drive Clean facility performs, thus disclosing its income from conducting tests. The disclosure of income clearly constitutes the disclosure of financial information.

Facilities

The facilities that provided representations, for the most part, agree with the Ministry's position on part one of the test.

The most common argument put forward by the facilities is that the information is commercial in nature because it relates to the selling or provision of emissions testing, and access to the garage identifiers along with the emissions test results from the database would allow the appellant to determine a facility's volume of repairs and market share of emissions testing for any period of time.

As far as financial information is concerned, another common submission of the facilities is that, because facilities generally charge maximum permitted fees for emissions testing, disclosing test results and the specific garage identifiers would enable the appellant to calculate the revenue generated by a facility and ultimately the profits of that facility.

Appellant

The appellant disagrees, and submits:

> The information constitutes the identity of the garages, and nothing more.
>
> It does not relate to the buying, selling or exchange of merchandise or services (commercial information), nor is it information "relating to money and its use of distribution" (financial information). It relates to Drive Clean tests and the results of those tests. There is not a single financial figure of any kind in the information requested.
>
> The fact that the release of the data would, by extrapolation, allow a rough calculation of amounts paid to the garages as a result of a public program does not make the information financial or commercial. If such a definition were allowed, it would open the door for a wide range of other information to be similarly withheld. For example, data on restaurant health inspections could be defined as commercial or financial on the basis that it would reveal the amounts paid by each restaurant in inspection fees, an expense item on their balance sheets. Similarly, information on tax arrears owed by businesses could be defined as financial or commercial information on the basis that the outstanding taxes also represented an item on balance sheets. Expense receipts of politicians and civil servants could also be construed to reveal the confidential gross earnings of restaurants and hotels.

The appellant also disputes the Ministry's position that disclosure of the data would permit the calculation of income, because there is no fixed Drive Clean fee. The appellant argues:

> [W]hile many garages choose to charge the maximum fee, they are not required to do so. Therefore, any calculation of the gross revenue from Drive clean tests would be at best an estimate. It would also not take into account many circumstances that could alter the actual figures, such as discounts that may be offered to certain clients, free tests that might be conducted for employees or families of employees, discounts for the testing of bulk numbers of vehicles, etc.

The appellant also argues that disclosing the garage identifiers would not lead to an ability to calculate profits of a particular facility because "there is no way to know the net earnings of garages through an unreliable estimate of gross revenues from one portion of the business." He submits that "even in the case of test-only garages there would be no accurate way to determine net revenues."

The appellant accepts the Ministry's position that disclosure of garage identifiers would allow one to determine the pass/fail rates of individual garages, but disagrees that this would constitute commercial or financial information. He submits:

> It is information about the performance of vehicles, not about the garages themselves. It has absolutely nothing to do with "the buying, selling, or exchange of merchandise and services." Knowing how many vehicles passed or failed at a particular garage provides no insight into the commercial or financial performance of the garage. It is not a measure of anything except the results of a public program.

Findings

Having reviewed the *pro forma* Drive Clean performance agreement used by the Ministry and the various participating garage facilities, I have some reservations as to whether it reflects a commercial relationship in the usual sense, since the garage is not selling a product or service to the Ministry.

However, there can be no dispute that garage facilities operate as commercial enterprises, selling goods and services to their customers for a fee. Emission testing services clearly fit within this category, and I agree that information which would reveal testing activity for an identifiable facility relates directly to the operation of the facility's business, and falls within the scope of the definition of "commercial information". In the context of this appeal, Order PO-1980 provides the appellant with a right of access to most of the data associated with the Drive Clean program, including individual test results. He has access to other publicly available information that links the garage identifier to a particular facility, and is also seeking access to this information in the context of this appeal. Providing the appellant with the garage identifier in a format that would enable him to associate individual test results with an identifiable garage facility would, in my view, reveal "commercial information" of the particular facility, within the meaning of section 17(1) of the *Act*.

I also find that disclosing the garage identifiers in this context would reveal "financial information". Although, as the appellant points out, there is "not a single financial figure of any kind in the information requested", in my view, once a particular facility's test results become known through their linkage to the garage identifier, it is a relatively straightforward exercise to take these results, multiply them by the test fees permitted under the Drive Clean program, and come up with a figure that reflects income to the facility. The appellant correctly points out that a facility has discretion to charge fees less than the maximum set by the contract. However, in my view, given the relatively modest level of the fee ($30) it is reasonable to assume that most facilities charge at the maximum permitted rate, and any anomalies that may exist are not significant enough to impact my finding.

Therefore, I find that the requirements of "commercial" and "financial" information have been established, thereby satisfying part 1 of the section 17(1) test.

Part 2: Supplied in Confidence

In order to satisfy part 2 of the test, the facilities and/or the Ministry must show that the information was "supplied" to the Ministry "in confidence", either implicitly or explicitly.

Supplied

This second requirement of section 17 reflects the purpose of the section 17(1) exemption claim - protecting the informational assets of third parties. The following passage, from *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), addresses this purpose:

> [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. *Act* and the Australian Minority Report Bill, so as to indicate clearly that *the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself*. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind. (pp. 312-315) [emphasis added]

To meet part 2 of the test, it must first be established that the information was actually supplied to the Ministry, or that its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry [Orders P-203, P-388 and P-393].

In Confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that there was a reasonable implicit or explicit expectation of confidentiality on the part of the supplier at the time the information was provided. This expectation must have an objective basis (Order M-169).

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the Ministry on the basis that it was confidential and that it was to be kept confidential

- treated consistently in a manner that indicates a concern for its protection from disclosure by the facilities prior to being communicated to the Ministry
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose which would not entail disclosure

(Order P-561)

Representations

Ministry's Representations

The Ministry submits that "the garage identifier is supplied by a Drive Clean facility to the Ministry, as part of a Drive Clean test record" and that "it is supplied in confidence, explicitly and implicitly."

Specifically with respect to the "supplied" component, the Ministry submits:

> Each time a Drive Clean facility conducts an emissions test on a vehicle, it prepares a Vehicle Emissions Inspection Report. It prepares the Vehicle Emissions Inspection Report at its facility …The Vehicle Emissions Inspection Report contains all necessary information related to the test, including the vehicle tested, the actual results of the test and related information. Also included are the name and address of the testing facility, and the garage identifier for the facility. The garage identifier is shown as the "DCF #" and it is located at the bottom right hand corner of the Report. The Report itself is supplied by the facility to the Ministry by means of an electronic transfer of information to the Program's Systems Contractor. Once supplied by a Drive Clean facility, all the information is then stored in the Drive Clean database.

Turning to the "in confidence" component, the Ministry submits that the expectation of confidentiality is evidenced by the fact that the performance contract entered into by each garage applying to become accredited as a Drive Clean facility "requires that test results be kept confidential by the Applicant."

The Ministry also states that during information sessions related to the launch of the Drive Clean program, the Director of the Drive Clean Office provided specific assurances of confidentiality to owners of businesses interested in becoming accredited as Drive Clean facilities. The Ministry's representations attach an affidavit of this former Director attesting to the assurances of confidentiality made by him on behalf of the government at the time the Drive Clean program was launched in 1999.

The Ministry also submits that it treats the information confidentially, and points to its agreement with the Drive Clean Systems Contractor (who services the database on behalf of the Ministry),

that includes a term requiring the contractor to hold what is referred to as the "Provincial Proprietary Information" in strict confidence.

Facilities

The facilities submit that the information was supplied in confidence, both explicitly and implicitly: implicitly, because the garage identifier can be directly linked to confidential business information belonging to the facilities; and explicitly, based on a provision in the standard form contract that states:

> The Applicant agrees that all information obtained by the Facility in conducting emissions tests and performing emissions related repairs will be used solely for such purposes and will not otherwise be used or disclosed.

Although not specifically addressed in the wording of this provision, the facilities argue that it can reasonably be inferred from the language that both the applicant facility and the Ministry are bound to this confidentiality requirement.

The facilities also point out that the Ministry treats summaries of test results as confidential and will not disclose test volume information about a facility to any other facility participating in the Drive Clean program.

Some facilities also argue that, despite a provision in the standard form contract stating that the test results are the sole and exclusive property of the province, the information was nonetheless supplied by the facilities because the data is entered by the facilities through use of the Drive Clean program computer located at the facility.

Appellant

The appellant disagrees, and takes the position that:

> In order to supply something, it seems reasonable that it must be yours to supply. The contract signed by Drive Clean facilities specifically states that all data belongs to the province and that the garages have no right to it at all. They are even specifically prohibited from divulging it to anyone else. Control over the analysis, disclosure or any other use of the information resides solely with the province. It is impossible to supply something that you do not own or control.
>
> As well, the operation of the computer system is such that the information is not really supplied, even in a technical sense. The garage is connected to the Drive Clean database system by way of an active data link. The computer system in the garage contacts the central computer, requesting certain information on the vehicle from MTO. This information is then combined with information from the tests, and stored in the Drive Clean database. The emissions test report is produced as a consequence of this information process and printed out at the

> garage. It is not the source of the information, but is simply the product of a data processing and collection system wholly controlled by the province.
>
> While the garage conducts the test and collects the test fee, the testing is done as a consequence of provincial policy, provincial legislation and provincial regulations. The province collects the information that is generated as a result of its policy, legislation and regulations and reserves all rights to the information itself. Therefore, the garages do not supply it.

As to whether the information was supplied in confidence, the appellant submits:

> In their submissions, the Ministry and garages cite section 13.3 [of the standard form contract] as evidence that the information is to be kept confidential. But section 13.3 must be read in the broader context of section 13, and in particular, in the light of the subsections 13.1 and 13.2 which precede it. These sections deal with obligations on the part of the facility not to use or disclose information supplied or owned by the province for any other purpose than to conduct emissions tests and perform emissions-related repairs. In particular, it is referring to the results of the emissions test and the vehicle-specific information made available through the data link by the Ministry of Transportation.
>
> The real purpose of Section 13 of the contract is to impose obligations on the garages with respect to the use of information belonging to the province. It does not in any way impose a scheme of general confidentiality and certainly does not bind the province in any way. The garages argue that such reciprocal confidentiality was somehow implied, but in the presence of clear contract language indicating the exact opposite, it is difficult to understand how the garages could have concluded such a reciprocal obligation existed. There is not one word in the contract that commits the province to keep any of the data confidential. If such a restriction had been intended, it would have been included in the contract.
>
> It is clearly the province's information to do with as it pleases. This is made clear in the contract with …, the company that provides the data services for the Drive Clean program. The contract states clearly the province's position with respect to how it may use or disclose the information: "The Systems Contractor and the Province each acknowledge and agree that the Provincial Proprietary Information shall be the sole and exclusive property of the province…" The province claims for itself "the sole and exclusive right to use, sell, license or **grant access** to the Provincial Proprietary Information (e.g. the Drive Clean data), **in its sole discretion**, without payment of any kind by the Province to the Systems Contractor or any other Person. (my emphasis added)"
>
> Tellingly, neither contract contains any provision requiring consultations with the garages about how the information might be disclosed or used. This couldn't be clearer. Not only was confidentiality not implicitly or explicitly stated, but in fact

> the province's right to use or disclose the information in any way it pleases is stated explicitly. Any garage joining the program and doing its due diligence would have been aware of these provisions and therefore cannot claim that they expected the information to be kept confidential.
>
> In its submission in the original appeal in this matter [Order PO-1980], the Ministry stated "…it is exceedingly clear that the Province is the exclusive and sole owner of all the Drive Clean data. There has never been any prior claim made to the data, no other entity has ever claimed to own, nor are we aware of any legal basis on which such a claim could be advanced. "

As far as the affidavit evidence is concerned, the appellant submits:

> … The Ministry is asking the Commissioner's Office to give more weight to the memories of the one interested individual about conversations that took place four years ago than the clear wording of the contracts it signed with parties involved in the Drive Clean program. …

Findings

Having carefully reviewed all of the representations, as well as the documentary and affidavit evidence submitted during the course of both the current appeal and the related appeal that led to Order PO-1980, I find that neither of the components of part 2 of the section 17(1) test has been established. I have reached this conclusion for a number of reasons.

"Supplied"

In my view, barring exceptional circumstances that are not present here, it is not possible to "supply" information within the context of section 17(1) if the information in question belongs to the government. As the Williams Commission made clear in speaking to the purpose of the third party commercial exemption, "it is designed to protect the information assets of non-government parties rather than information relating to commercial matters generated by the government itself". It is clear and unambiguous from the wording of section 13.2 of the *pro forma* Drive Clean performance agreement that "the data collected as a result of an emissions test are the sole and exclusive property of the Province". The province's ownership rights are confirmed in the wording of its agreement with its Drive Clean database service contractor, which uses the term "Provincial Proprietary Information" when referring to the contents of the database. Simply put, the information gathered at the various facilities during the course of conducting emissions testing and fed into the computer terminal provided by the Ministry in accordance with the performance contract, belongs to the province and not to the facility. As such, it cannot be "supplied" to the Ministry for the purposes of section 17(1).

As far as any hardcopy report produced in the context of the emissions test is concerned, although such a report may be provided to the customer by the facility that undertook the test, I have no evidence to suggest that any hardcopy report is submitted by the facility to the Ministry.

Rather, it would appear that the data is transmitted electronically to the Drive Clean computer system through the technology supplied by the Ministry to the facility.

It is also significant to note that, after considering the Ministry's submissions, I determined in Order PO-1980 that the data elements from the Drive Clean program did not qualify for exemption under section 18(1), the claim the Williams Commissioner describes as "designed to protect … information relating to commercial matters generated by government itself". In my view, there is some inconsistency in the Ministry now arguing that a particular data element from the program (i.e. the garage identifier) was "supplied" by the various facilities for the purposes of section 17(1), which speaks to an entirely different purpose.

"In Confidence"

- The confidentiality provisions of the Drive Clean performance agreement bind the facilities, but not the Ministry. The wording of clause 13.3 is clear and unambiguous in providing that all information obtained by the facility "in conducting emissions tests and performing emissions-related repairs will be used solely for such purposes and will not otherwise be used or disclosed". No corresponding confidentiality clause applies to the Ministry and, in my view, it is not reasonable to read clause 13.3 as incorporating implicit reciprocal confidentiality obligations on the Ministry. It is clear from the text of the agreement that the government owns the data collected through the Drive Clean program and, absent explicit language restricting the owner's use of the data, it is not reasonable to infer any such restrictions.

- I give no weight to the facilities' argument that holding one facility's information confidential from another facility supports a conclusion that the Ministry is bound by a confidentiality expectation. I see that as a discretionary decision made by the Ministry as the owner of information to use the information as it deems appropriate, subject to any provision to the contrary in the performance agreement.

- I accept the uncontradicted affidavit evidence of the former Director of the Drive Clean office that he may have given assurances of confidentiality to certain garage facilities during the launch period for the Drive Clean program. However, I give it minimal weight. There is no evidence to suggest that any such assurances were otherwise communicated in a systematic way to all potential facility owners, as might reasonably be expected in the circumstances, nor that any assurances of confidentiality have been given to new facility owners joining the program since its inception. In my view, had the Ministry intended to bind itself to restrictions on its use of the data gathered through the Drive Clean program, it is reasonable to expect that this would have been addressed in the performance agreement itself. That has not been done.

- It is also clear that the Ministry has provided access to the data from the Drive Clean program to its computer service contractor, which is inconsistent with any absolute assurance of confidentiality having been provided to the facilities. The fact that the agreement with the service contactor contains a confidentiality clause is irrelevant, since this clause was inserted at the option of the Ministry, not as a result of any binding obligations outside the context of the service agreement itself.

- I also give minimal weight to the statements by a number of facilities that they joined the program on the basis of an expectation that information provided to the Ministry would be treated confidentially. While it might be reasonable for facilities to expect that their proprietary information would be held in confidence, in my view, absence explicit assurances to the contrary, it is not reasonable for facilities to expect that any such confidentiality would extend to the government's own proprietary information.

- Any assurance of confidentiality provided in the context of an agreement such as the performance contract for the Drive Clean program or informally through assurances of a Ministry employee cannot be absolute and would be subject to any rights of access by members of the public under the *Act*.

For all of these reasons, I find that the various data elements gathered through the administration of the Drive Clean program, including the garage identifiers, were not "supplied" by the facilities to the Ministry, and clearly not supplied "in confidence". Therefore, part 2 of the section 17(1) test has not been established.

Because all three parts of the section 17(1) test must be established in order for a record to qualify for exemption, it is not necessary for me to discuss and consider part 3 before making my finding that the record at issue in this appeal does not qualify for exemption and should be disclosed. However, because the representations from the parties have addressed the part 3 requirements in detail, I have decided to also deal with part 3 in this order.

Part 3: Harms

Under part 3, the Ministry and/or the facilities must demonstrate that disclosing the garage identifiers "could reasonably be expected to" lead to a specified result. To meet this test, the parties resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient (*Ontario (Workers' Compensation Board)*).

Representations

Ministry

The Ministry submits that "disclosure of the record will enable the comparison and use of commercial and business information to such an extent that it will significantly prejudice the

competitive position of the Drive Clean facilities" as contemplated by section 17(1)(a) of the *Act*". The Ministry argues that:

> [t]his may lead to some facilities losing business to others, going out of business themselves or withdrawing from the Program, and adversely affecting public access to Drive Clean services. In the Ministry's submission, no group of private commercial enterprises is subject to the degree of intrusive information gathering, and the lack of commercial privacy, that would result if the Information and Privacy Commissioner permits the data matching that the appellant requests in this appeal.

The Ministry also submits that disclosing the garage identifier will significantly interfere with the contractual or other negotiations between the Drive Clean Office and Drive Clean facilities in connection with the program. The Director of the Drive Clean Office states in his affidavit:

> I am concerned that the release of the "garage identifiers" to the appellant will significantly interfere with the contractual negotiations that are conducted on an ongoing basis with Drive Clean facilities. The interference will occur in two ways. First, the release of the "garage identifiers" is likely to damage the existing contractual relationship between the Drive Clean Office and many Drive Clean facilities, leading to requests to negotiate contract provisions to terminate performance contracts and withdraw from the program. This will significantly interfere with my ability to manage the existing performance contracts. Second, the release is likely to significantly interfere with my ability to negotiate additional performance contracts and recruit further businesses into the program to provide Drive Clean services to the public. Neither result is in the public interest.

The Ministry makes the following submissions that would appear to be relevant to the type of harm identified in section 17(1)(b):

> A critical component of the program's success is its wide network of private, commercial businesses who deliver the program in all areas of the province through their direct operation of Drive Clean facilities. Currently, there are more than 2,000 Drive Clean facilities. More than 99% of these facilities are private commercial businesses. …
>
> The Drive Clean program is a decentralized program: the Ministry of the Environment does not operate any public testing facilities itself. It relies entirely on the efforts of the private commercial businesses that have joined the program. They have done so voluntarily. Nothing compels a private commercial business to become a Drive Clean facility. A private business joins the program voluntarily and may withdraw from the program at any time. An unexpected change to the underlying business requirements, such as disclosure of the garage identifier, could cause Drive Clean facilities to withdraw from the program. If facilities do withdraw, the network of facilities will be weakened. The impact on

> the public will depend on the number of facilities that withdraw and their location. Testing and repair services could be restricted, inconvenient, or unavailable, and the effectiveness of the program could be severely challenged. A public reaction could force dramatic modifications to the program, or its cancellation, thereby damaging air quality.

Also with respect to section 17(1)(b), the Ministry submits that facilities will no longer provide information because:

> [t]he Drive Clean facilities may require that the Drive Clean program be modified so that vehicle test results are no longer supplied electronically. Such a modification would increase testing times for the public, increase program costs, restrict or remove the ability to conduct effective quality assurance/quality control within the program, restrict or eliminate the ability to calculate emission reductions, and limit customer service features in the program: electronic transmission of Drive Clean data allows drivers license transactions (renewal or transfer of ownership) by the public without a paper record. None of these impacts are in the public interest.

As far as the section 17(1)(b) harms are concerned, the Ministry submits:

> The average cost to become accredited as a Drive Clean facility has ranged from $65,000 to $100,000. This includes the cost of equipment, training of staff, and other accreditation costs. The current number of Drive Clean facilities is over 2000. We understand that about thirty percent of that number have contacted the Commissioner's Office in connection with this appeal. If thirty per cent withdraw, then the aggregate financial loss is in excess of $39,000,000 to $60,000,000. This is an undue loss by any standard.

Facilities

The facilities' representations focus primarily on their position that the sections 17(1)(a) and (c) harms could occur if individual garage identifiers are released along with the emissions test results. Some of the more common concerns expressed by the facilities include:

- Release of the facility identifiers coupled with the information in the Drive Clean database could be used to gain factual financial information that could be used by competitors to create a complete financial picture of the facility or to undermine the competitive process in bidding for business.

- Information relating to test results would be published without explanations as to why test results at individual facilities differ, which include:

    - the fact that some facilities service older automobiles, which result in a higher failure rate than facilities servicing newer model cars (ie: facilities connected with new car dealers);

    - facilities in rural areas service cars that might have a higher failure rate than facilities in urban centres (ie. rural areas have high volume of older model cars, etc);

    - facilities in areas where the population has lower per capita income might have a higher failure rate due to the higher volume of older cars.

- Although facilities have no influence on actual test results, because they are standardized, discrepancies among facilities would result in undue loss or increase in business due to the perception that a facility is in fact responsible for the results.

- If a facility or group of facilities conducts an advertising campaign, disclosure of test results during or after the campaign could be used by competitors to monitor the effectiveness of the advertising campaign.

- As far as new car dealer facilities are concerned, knowing the number of tests done at a dealer would allow competitors to attract customers once their vehicles come off warranty; and disclosing the test results would allow independent competitors to know "precisely how many customers with older vehicles [a particular facility] has".

- Release of information would allow 'unfair comparison between brands of vehicles.

The facilities make no direct reference to the section 17(1)(b) harms in their representations.

Appellant

The appellant submits that, because Drive Clean testing is regulated by law "the provision of the Drive Clean tests does not take place in an open, competitive marketplace" and there is no competitive position to be prejudiced.

In response to the argument that some garages could lose business as a result of pass/fail rate differentials, the appellant submits:

> Such rates are clearly a function of the vehicles tested, not the specific garage. Speculation that a published report **might** fail to report certain details, such as the

> fact a garage was located in a part of town with many older vehicles, does not constitute detailed and convincing evidence of probable harm. Just as likely, and in fact more likely, is that any published reports would take these factors into consideration and duly report them. If incorrect and defamatory information were published about businesses due to a failure to put pass/fail rates in their proper context, the businesses would have recourse to civil remedies…Further, if pass/fail rates vary for any other reason, then it is profoundly in the public interest to know this because it would indicate that the tests are not even-handed and fair as the government maintains.

In response to the Ministry's section 17(1)(b) arguments, the appellant points out that the Drive Clean contracts do not allow facilities to withdraw or amend the terms of the contract. He submits that the Ministry has not presented any evidence to support the contention that even one facility would withdraw, and argues that common sense would suggest the opposite:

> Why should a business withdraw from a program that can, according to submissions, generate new traffic or help maintain existing traffic? Why would a business withdraw from a program after investing tens of thousands of dollars in equipment? Why would a business withdraw from a program that guarantees a regular stream of customers to the facility due to the mandatory nature of the Drive Clean program? The answer is that they would not do so, nor would they likely demand changes to their contracts.

Along the same vein, the appellant states that "Drive Clean garages are locked into contracts lasting until 2008 that require them to connect to the Drive Clean computer system to permit the electronic collection of test results by the province." He submits "there is no provision in the contracts which would allow them to refuse to supply the information in this manner in the future."

The appellant argues that, given the closed marketplace, there can be no undue loss or gain as contemplated by section 17(1):

> As there is no real competitive marketplace for Drive Clean services, all of the garages perform the tests under the same strict terms and conditions as dictated in their contracts, and the customer base is guaranteed because of the legal requirement to have the tests performed before the registration or re-registration of a vehicle falling within the terms of the program, it is not credible to suggest that any one garage would suffer undue loss or make undue gains as a result of the information requested being released.

In response to the arguments from new car dealer facilities that knowing the number of tests done at a dealer would allow competitors to attract customers once their vehicles come off warranty, the appellant submits that:

> [N]o detailed and convincing evidence is provided as to why this would be the case, how it would be done or why the already vigorous attempts to attract

> customers coming off warranty would be any more successful or effective with the addition of the knowledge of how many cars are tested.

On the other point raised by new car dealer facilities regarding the impact of disclosure on the identification of the number of customers, the appellant points out:

> Even with the release of the data as ordered by the commissioner's office, no information would be available on the number of customers, or even on the exact number of vehicles. This is because all customer and vehicle specific information has already been ordered removed from the data prior to release.

The appellant also responds to the facilities' suggestion that disclosure would allow unfair comparison between brands of vehicles by submitting that "release of the garage information will not in any way affect the ability to analyze the pass/fail rates of particular brands of vehicles", since "any reporting of the difference between vehicles would take into account many factors, only one of which is the brand."

The appellant also submits that it is not reasonable to claim that the disclosure of the information would allow competitors to assess the effectiveness of advertising programs. He argues:

> The reason a garage might see a waxing or waning of its test traffic would be many, including past experience of customers with that facility in the context of other services offered, the availability or lack therefore of appointments at times when people sought tests, possible outages of equipment or lack of availability of staff, the distribution of birth dates in the service area (resulting in more or fewer vehicle owners coming up for registration renewal) and many other factors. It would be impossible, therefore, to determine whether any one factor, such as an advertising campaign, had affected the volume of business.

The appellant concludes his submissions by stating:

> Section 17 was included in the *Act* in order to protect confidential information provided by businesses and other third parties to the government when certain harms could be demonstrated. It exists to provide protection to genuine, internal business information, provided in confidence to institutions. It was not designed to allow institutions to shield information related to the operation of key public programs.
>
> The involvement of private businesses in the Drive Clean program is integral to the program, but only because it made sense to the government of the day to have the actual testing done by garages in the business of providing automotive services. With or without the involvement of the garages, the provision of Drive Clean testing is done for one purpose, to deliver a government program. The public has a right to detailed information about the operations of government programs, especially programs such as Drive Clean which affect so many citizens.

> Information about the tests, the results, the locations where the tests were conducted and the revenues raised by the tests do not constitute the confidential information of businesses, but instead are the most basic details about a government-administered program, one which every vehicle owner must submit to in order to renew vehicle registrations. To withhold these details from public scrutiny is to make the public blind to the workings of an intrusive public program.

Findings

Again, having carefully considered the representations provided by the Ministry and the various facilities, I find that I have not been provided with the detailed and convincing evidence necessary to establish a reasonable expectation of any of the harms outlined in sections 17(1)(a), (b) or (c) of the *Act*. Accordingly, even if my finding under part 2 is not reasonable, or even incorrect, the garage identifiers do not qualify for exemption and should be disclosed.

As a general conclusion, I find that the potential harms described by the parties resisting disclosure are, for the most part, speculative assertions not supported by evidence. In other words, these parties have failed to demonstrate that disclosing garage identifiers could reasonably be expected to lead to any of the specified outcomes and, for that reason, part 3 of the section 17(1) exemption claim must fail.

I have reached this conclusion for a number of specific reasons:

- The Drive Clean program is not competitive. Garage facilities throughout the province are permitted to participate in the program, subject to a willingness to comply with the terms of the *pro forma* performance agreement. Owners are given the choice of taking their vehicles to any accredited facility, and the fee charged for the service is set by contract and consistently applied throughout the province. Although, as stated earlier, facilities are permitted discretion to charge less than the maximum fee, at a top rate of $30 per test, in my view, there is limited opportunity for competition based on price, and scant evidence to suggest that consumers see emissions testing as a competitive service among garage facilities.

- Even if I accept that the association of test results with an identifiable facility could reveal "financial" information, which I do, it does not necessarily follow that one could create a complete financial picture of a facility, as suggested by a number of facilities in their representations. For the most part, emission testing is only one of many services offered by garages to their customers, and the income derived through the Drive Clean program is far removed from the type of financial records or statements that might be useful to a competitor. Even in the case of test-only facilities, which admittedly involve proportionately more extensive financial information, in my view, the level of disclosure provided by the release of garage identifiers would not be sufficient to result in a reasonable expectation of competitive harm. There are too many other variables associated

with business operations (including those identified by the appellant) that would not be impacted by disclosure of the garage identifier, in order to make this harm reasonable in these circumstances.

- The Ministry's arguments regarding interference with its ongoing negotiations with Drive Clean facilities are considerations that might be relevant in the context of a section 18 exemption claim, which is available to protect the legitimate commercial interests of an institution. However, in my view, this argument is not relevant to the harms described in section 17(1)(a), which are restricted to persons or organizations outside of government.

- The Ministry's section 17(1)(b) arguments are highly speculative. As the Ministry points out, Ontario has a highly successful emissions testing program, and part of this success is undoubtedly associated with the ready access to testing facilities and wide participation by more than 2000 garages throughout the province. In my view, the Ministry's suggestion that providing representations in this inquiry can be linked to a decision to withdraw from the Drive Clean program is flawed. The representations provided by the more than 450 participating facilities do not support the Ministry's position on section 17(1)(b). Instead, they focus almost exclusively on the perceived potential harm to their competitive position or commercial losses in their business operations (i.e. sections 17(1)(a) and/or (c)), with little if any indication that they would consider withdrawing from a program that no-doubt represents a significant source of income.

- It is clear from the wording of the *pro forma* performance agreement that information provided by facilities to the Ministry under the terms of the Drive Clean program would no longer be under their control. The facilities presumably concluded that it was in their business interest to agree to these terms and accepted that their performance would be subject to review and audit by the Ministry. Having accepted these terms, in my view, it is not reasonable to now argue that objective information such as test results for identifiable facilities could reasonably be expected to prejudice competitive interests or result in undue loss or gain. The information requested by the appellant relates to all facilities throughout the province, not any particular facility, and I am not persuaded that any loss or gain that may result from the disclosure of objective test results could accurately be characterized as "undue" in these circumstances.

For all of these reasons, I find that, even if the garage identifiers (as well as all other data elements associated with the Drive Clean program) were "supplied" by the facilities to the Ministry "in confidence", disclosure of this information could not reasonably be expected to result in any of the harms identified in sections 17(1)(a), (b) or (c) of the *Act*.

In the confidential portion of the representations provided by the Ministry in the earlier related appeal that led to Order PO-1980, the Ministry identified an additional reason for withholding certain information associated with the Drive Clean program, as well as the possible application of a new discretionary exemption claim for certain specific information. I am unable to discuss

this further without revealing information I agreed to treat confidentially. However, I can state that I have considered the Ministry's position on these two matters, and determined that they do not impact my findings.

In summary, I find that the Ministry and/or the facilities have established the requirements of part 1, but have failed to establish the requirements of both parts 2 and 3 of the section 17(1)(a), (b) and (c) exemption claim. Because all three parts must be established in order for a record to qualify for exemption, the exemption claim fails, and the responsive record should be disclosed to the appellant.

FEES

General Principles

Sections 48(1)(c) and 57(1) require an institution to charge fees for requests under the *Act*; and section 57(4) provides for the waiver of fees in certain circumstances. More specific provisions regarding fees and fee waivers are found in sections 6 through 9 of Regulation 460. Section 57(5) provides that the Commissioner's Office may review the amount of a fee or fee estimate, or the institution's decision not to waive a fee.

Section 57(1) reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

Section 6 of Regulation 460 prescribes:

> The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For floppy disks, $10 for each disk.

3. For manually searching a record, $7.50 for each 15 minutes spent by any person.

4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.

6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

Ministry's Fee Estimate

The Ministry states that *Drive Clean* Office staff responsible for the requested record provided the information for the following fee estimate:

Activity	Units	Cost/Unit	Extended Cost
Creation of Oracle SQL statements (1 for Light Duty Vehicles, 1 for Heavy Duty Vehicles)	1 hour	$30/hour	$ 30.00
Running queries on database	3 hours	$30/hour	$ 90.00
Creation of Excel file detailing field names and data structure	2 hours	$30/hour	$ 60.00
Exporting records to CD-ROM	3 hours	$30/hour	$ 90.00
Compact discs	5	$10/disc	$ 50.00
Shipping			$ 3.00
TOTAL			**$323.00**

Representations

Ministry

The Ministry submits that "the fee estimate of $323 should be upheld as it is an accurate and reasonable assessment of the costs of preparing the records for disclosure to the appellant."

The Ministry states that the fee estimate is based on information provided by the Systems Contract Advisor of the *Drive Clean* Office, who has extensive knowledge of the records and the databases used for the Drive Clean program.

The Ministry states:

> The fee estimate provided to the appellant was based on the time and resources required to prepare a representative sample of 50 records. This sample was prepared in accordance with the requirements set out in Order PO-1980 issued on December 20, 2001 by Assistant Commissioner Tom Mitchinson. …

The Ministry also submits that:

> It should also be noted that the time estimates provided for the calculation of the fee estimate were determined by estimating the cost to prepare the representative sample of 50 records. The actual number of records to be provided to the appellant is approximately 2 million. Accordingly, it is likely that the actual time spent preparing the final records package for the appellant will be higher than that used in providing the fee estimate. In addition, further review of the costs to prepare the records for disclosure identified the additional time required to complete the manual steps 5 and 10 described [below]. These manual steps will involve 4 hours in the case of step 5 and 5 hours in the case of step 10. Despite the increased costs, the Ministry is not proposing to modify the fee estimate.

The Ministry also points out that extra time may be required to process the request. Specifically, it will:

> [L]ikely require a minimum of 4 hours of staff time to manually remove exempt records from the data to be released to the appellant. While this time may be chargeable as "preparation time", the Ministry chose to exclude the time from the fee estimate. In addition, the Ministry expects to spend at least 5 hours verifying the records to ensure proper data transfer.

The Ministry assesses no fees for manual search time.

As far as computer costs for locating, retrieving, processing and copying the records are concerned, the Ministry states that the necessary data is stored in two Oracle Database tables that are maintained by a contractor on behalf of the Ministry. The Ministry provides the following explanation of the steps it would need to extract the data from these databases:

> 1 – Determination of appropriate fields and date range of information to extract from Oracle database.
>
> 2 – Two Oracle SQL statements will be created that will select the exact fields and date range for the information that is being requested: One for Light

Duty Vehicles/Heavy Duty Non-Diesel Vehicles, one for Heavy Duty Diesel Vehicles (1 hour).

3 – The two queries will be double-checked against the list of fields authorized for release and to ensure accuracy.

4 – The queries will be run on the Oracle database and 2 tables will be created [and] moved into the *Drive Clean* Office's MS SQL 2000 database. This step will speed up the export of data into an acceptable format for the appellant as MS SQL 2000 is more user friendly for data exporting than Oracle and will also allow removal of records that are not being released (see step 5). The queries will be run after hours [so] as not to impact the production *Drive Clean* System (3 hours).

5 – Exempt data records will be removed from the data set prior to export (4 hours).

6 – The 2 tables will be double-checked to ensure the correct number of fields and correct data range has been extracted.

7 – The number of rows in the 2 MS SQL 2000 tables will be recorded.

8 – An Excel file will be prepared that lists the Field Name and data structure for each field. This is necessary in order for someone to use and import the data into another database (2 hours).

9 – The 2 tables will be exported into comma delimited text files using monthly date ranges to facilitate transfer to CD ROMs. We will likely need several CD ROMs for each table (estimate 5) (3 hours).

10 – Each CD Rom will be tested by re-importing text files into the DCO SQL 2000 database. The data set will be compared to the original data set in order to ensure that the correct number of records has been exported (5 hours).

As far as preparation charges are concerned, the Ministry submits that it must:

> Manually remove any fields and records that are exempt from public release (e.g. VIN). Format electronic data to allow for export to CD-ROM for use by appellant and transfer of responsive records to CD-ROM for delivery.

The Ministry submits that the total amount of time to prepare the records for release to the appellant is "9 hours, based on the time to prepare the representative sample of 50 records as provided by staff knowledgeable about the records and their retrieval."

Appellant

The appellant accepts the $30 fee for writing the Oracle SQL statements.

As far as the $60 fee for the document listing the field names and data structure is concerned, the appellant states that "as the Ministry has already provided a paper printout with the field definitions, the Excel file proposed to be created will not be required."

The appellant submits that "previous orders have disallowed charges for computer run time", and that the Ministry should not be able to charge the $90 fee for running queries to extract the data or the $90 fee for copying the records to CD-ROM. He submits:

> Only the time spent by an operator actually setting up the copy operation can be charged, as well as the nominal amount of time it takes to change CDs in the CD burner (even these fees may be encompassed within the $10 per disk fee).
>
> In any case, fast CD burners today can burn one disk in just a few minutes. The ministry proposes to take almost 40 minutes per disk.

In summary, the appellant submits that:

> The Ministry can charge for one hour for creating SQL statements, and for the actual time taken by an operator during the process of copying the data to CD-ROM.

In response to the Ministry's suggestion that the work will actually take longer than they are charging for, the appellant points out what he describes as redundancies:

> Step 5, for example, seems redundant as step 2 has already selected "the exact data fields." This makes perfect sense. Why would the Ministry include the exempt fields when it first exports the data from Oracle. And having left them out, why would they need to be removed later?
>
> Double checking data once exported is not chargeable and neither is the testing listed under step 10.

Findings

Because the appellant no longer wants a record detailing field names and data structure, the $60 charge for this record is removed from the fee.

The appellant accepts the $30 charge for creating the SQL statements; and the $3 shipping charges and $50 fee for compact discs would not appear to be in dispute.

The two remaining fee items, $90 for running queries on the database and $90 for exporting records to CD-ROMs, would appear, based on the descriptions provided by the Ministry, to

represent the time required for the computer system to generate the required output based on the two queries. As the appellant points out, previous orders have found that time spent by an individual running reports from a computer system are chargeable "preparation fees" under section 6 of Regulation 460, but as former Adjudicator Holly Big Canoe stated in Order M-1083:

> … It should be noted, however, that [the institution] can only charge for the amount of time spent by any person on activities required to generate the reports. The [institution] cannot charge for the time spent by the computer to compile the data, print the information or for the use of materials and/or equipment involved in the process of generating a record.

(See also Order MO-1456)

Following this reasoning, I find that the $180 fee for running queries on the database and exporting the records to CD-ROMs is not permitted under the *Act* and regulations, and is not chargeable.

Therefore, I do not uphold the Ministry's fee decision, and find that it should be reduced from $323 to $83, for the reasons outlined above.

FORMAT:

In his original request to the Ministry, the appellant sought access to "electronic records recording information about inspections carried out by garages under the Drive Clean program". He did not specify any particular source of this information, but did ask the Ministry to provide him with translations for all codes used in the responsive records.

In correspondence sent by the appellant to the Ministry following the issuance of Order PO-1980, he reiterates that he did not ask for information from any specific database, only for "electronic records" containing the requested information. He states:

> The request also specifically refers to "database(s)", further underlining that this is not a request for any single database, and asks for translations for all codes, which include the unique garage ID.
>
> As the file containing the garage name and address information is inherent to the understanding of the test readings table and provides the required translation of the garage ID field, it is by definition included in this request whether it is a related table in the same database, or a table in another database.

In appealing the Ministry's decision to deny access to the garage identifiers, the appellant again makes the point that he is seeking access to whatever electronic records would best respond to his request and not access to information contained in a specific database. He also makes reference to this point in his representations submitted during the course of this inquiry.

It is clear that, throughout the lengthy proceedings stemming from his original request, the appellant has repeatedly and consistently described the type of information he considers to be responsive, and the format in which it should be disclosed. The Ministry has also acknowledged during the course of the appeal that information relating to the Drive Clean program is stored in more than one database. Based on my review of the file, it would appear that the garage identifier computer code linked to the test results is contained in one database, and more extensive details about the individual garage, such as name and address, is contained in another database.

In my view, in order to provide the appellant with the access to information that is responsive to his clearly worded request, the Ministry must access all of its electronic information holdings relating to the Drive Clean program, extract the pertinent information from the various data fields, and provide the appellant with electronic access to all information that addresses the various aspects of the request. If, as would appear to be the case here, the garage identifier code is in one database and more descriptive information about the individual garage is in the other, then the relevant portions of both databases must be provided to the appellant. Because all personal information has been removed from the scope of the appellant's request, and I have determined that section 17(1) has no application, there is nothing inappropriate about providing the appellant with access to electronic data that can be "matched" in ways that best meet his particular needs.

ORDER:

1. I uphold the Ministry's fee in the reduced amount of $83.00.

2. I order the Ministry to provide the appellant with an electronic copy of all data database entries relating to the Drive Clean program from its various database holdings, including all garage identification information, and excluding the TIN numbers, licence plate numbers, vehicle identification numbers, and any other personal information. This disclosure is to be made by the Ministry by **September 8, 2003** but not before **September 3, 2003**.

3. I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant pursuant to Provision 2 of this order.

Original signed by: July 31, 2003
Tom Mitchinson
Assistant Commissioner