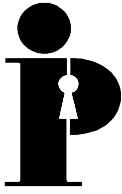

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2189

Appeal PA-020274-2

Ministry of Public Safety and Security

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NATURE OF THE APPEAL:

The appellant made a request to the Ministry of Public Safety and Security (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for the following information from the Centre of Forensic Sciences (CFS):

1. All of the instructor overheads used in the last two years in the Breath Alcohol Training Course conducted by staff at the Ministry's Centre of Forensic Sciences. These overheads would deal with, but not limited to such topics as the theory, use, operation, protocols, and associated scientific and legal aspects of the Intoxilyzer 5000C, Breathalyzer Models 900 and 900A and the Alcotest 7410 GLC/PA3.

2. A copy of a list of all previous and current qualified Breath Alcohol Training Course instructors, Breath Alcohol Training Course directors, seconded police Breath Alcohol testing Co-ordinators, and breath alcohol testing equipment maintenance/repair technical people.

3. An electronic copy of the computerized database referred to as the "alcohol database" at the Centre of Forensic Sciences which has been assembled by [a named individual] and colleagues, the contents of which resides in [the named individual's] office, and which provides references to scientific, technical, and legal articles, the respective names(s) of the author(s) of each article, and the respective abstract of each article.

The Ministry identified one responsive record for each part of the appellant's request.

The Ministry provided access to the responsive portions of Record 2, and denied access to Records 1 and 3. The Ministry relied on the section 22(a) (published information) for a portion of Record 3, and the following exemptions for Record 1 and the remaining portions of Record 3:

- sections 14(1)(c) and (l) - law enforcement
- section 17(1) - third party information
- sections 18(1)(a) and (c) - economic interest of Ministry

The Ministry identified section 18(1)(b) as an additional exemption for the portions of Record 3 not covered by the section 22(a) exemption claim.

During mediation, the appellant took the position that additional records responsive to part 2 of the request should exist, so the reasonableness of the Ministry's search for part 2 records was added as an issue in this appeal.

Mediation was not successful, so the file was transferred to the adjudication stage of the appeal process. I sent a Notice of Inquiry to the Ministry and two companies whose interest could be affected by disclosure of Record 1 (the affected parties). Only the Ministry responded with representations. In its representations, the Ministry withdrew the section 18(1)(c) exemption

claim. I then sent the Notice to the appellant, along with the non-confidential portions of the Ministry's representations. The appellant submitted representations.

RECORDS:

There are two records at issue in this appeal:

Record 1 - Breath Alcohol Training Program Overheads

This record is comprised of materials from three courses, and consists of charts, diagrams, graphs and other information relating to the operation of Breathalyzer and Intoxilyzer equipment.

Record 3 - The "Alcohol Database"

This record consists of one CD-ROM containing the published and unpublished portions of the CFS alcohol database.

DISCUSSION:

ADEQUACY OF SEARCH

The only record identified by the Ministry as responsive to part 2 of the request is a 1-page list of toxicologists and police coordinators participating in training programs. In its original decision letter to the appellant, the Ministry explains:

> … [P]lease be advised that a complete listing of the requested information is not available from CFS. However, the current Breathalyzer/Intoxilyzer Training Schedule (April 2002-March 2003) contains the names of DGS toxicologists scheduled as training leads and the names of individuals scheduled as CFS police coordinators. A copy of the responsive parts of this record is attached.

The appellant takes the position that there should be more responsive records.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [P-624].

The Ministry explains that each province has an appointed Breath Alcohol Testing Program Director, who is responsible for all program records. Ontario's Program Director is an employee of the CFS, and this individual submitted an affidavit as part of the Ministry's representations. In explaining why no additional records exist, the Program Director states:

> … No list of "all previous and current qualified Breath Alcohol Training Course instructors, Breath Alcohol Training Course Directors, seconded Breath Alcohol Test Co-ordinators, and breath alcohol testing equipment maintenance/repair technical staff" has ever been compiled or maintained by [the CFS] as there has never been a legal requirement or managerial reason to do so.
>
> Individuals are assigned as lead instructors (otherwise known as the Course Directors) with the responsibility for the supervision of courses by the Breath Alcohol Testing Programme Director. This is done on an annual basis and the information is distributed to the staff for action as required over the respective year. This list is strictly a temporary record for the given year as there is no need to track this information once the course has been completed. The lead instructor has the responsibility for ensuring that the classes within the course are taught by individual instructors. No record of this assignation is compiled because again there is no legal or managerial requirement to do so. All scientific staff of the Toxicology Section for [the CFS] are qualified to instruct on the course once they have completed the respective course on which they will be instructing.
>
> Two Ontario Provincial Police officers are seconded to [the CFS] to act as Breath Alcohol Test Co-ordinators. This secondment is for a period of two years but may be extended as required. No list of these officers' names has been or is currently maintained as there has never been a compelling reason to do so.
>
> No list of breath alcohol testing equipment maintenance/repair technical staff has been or is currently maintained as there has never been a compelling reason to do so.
>
> No searches for the requested lists were conducted as this organization does not maintain lists of this nature.

The appellant appears to accept that no lists exist, but maintains that other records could be used to create "lists" that are responsive to part 2 of the request. He identifies travel expense accounts of Testing Co-ordinators and court attendance schedules for toxicologists as two examples of the types of records that, in his view, would contain responsive information.

In my view, the Ministry has provided a reasonable explanation for why additional records responsive to part 2 of the request do not exist. In part 2, the appellant asks for a specific type of record - a series of lists. The Ministry explains why lists of this nature do not exist and, in my view, requiring the Ministry to create so-called "lists" by gathering and severing of the types of records identified by the appellant is not reasonable in the circumstances.

Based on the representations provided by the Ministry, I find that reasonable efforts have been made to locate records responsive to part 2 of the request, and I dismiss this part of the appeal.

RECORD 3

The Ministry relies on a combination of sections 22(a) and 18(1)(b) as one basis for denying access to Record 3 - section 22(a) for the published portions of the "alcohol database", and section 18(1)(b) for the unpublished portions.

These two sections read as follows:

> Section 18(1)(b):
>
> A head may refuse to disclose a record that contains,
>
> > information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;
>
> Section 22(a):
>
> A head may refuse to disclose a record where,
>
> > the record or the information contained in the record has been published or is currently available to the public;

Section 18(1)(b)

Section 18(1)(b) requires the Ministry to establish that:

(i) the record contains information obtained through research of an employee of the Ministry, and

(ii) its disclosure could reasonably be expected to deprive the employee of priority of publication.

[Order P-811]

For this exemption to apply, the Ministry must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified harm. To meet this test, the Ministry 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) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The Ministry's representations include an affidavit sworn by the individual named in the appellant's request, who is a scientist employed in the Toxicology Section of the CFS. The employee states:

> … During the past twenty years I have devoted several thousands of hours of my own time and the Ministry's time, reading, editing, abstracting, and compiling published, publicly available scientific research in the area of forensic alcohol toxicology and entering this data into an alcohol database. The original database consisted of typed 3" x 5" cards in a filing cabinet. I then entered the data into a software program called Rapid File, which was then updated into the software program Endnotes. I published the alcohol database in a book called "A Bibliography of Forensic Aspects of Alcohols (1872-1991)" which was published by the non-profit Forensic Science Foundation in 1992. I intend to publish an updated version of this database.

The Ministry submits that if the unpublished portions of Record 3 are made available to anyone before its employee publishes them, it would deprive this employee of "priority of publication".

The appellant submits:

> … [the named employee's] affidavit does not state that he will be publishing both titles of the articles and their corresponding abstracts. The Ministry cannot therefore claim that release of the record in response to the access request will deprive [the named employee] of priority of publication. The term "published" means to make known to the people in general. In his affidavit, [the named employee] admits that the information he put into the database was "published, publicly available scientific research." … The information in the requested record was not first published by [the named employee]. He never had priority of publication.

The appellant also challenges the employee's capacity to publish information stored in the "alcohol database", since the database has been copyrighted under the Queen's Printer for Ontario.

As stated in Order PO-2166, previous orders dealing with section 18(1)(b) have upheld the exemption in circumstances where cogent evidence was provided to support the position that an employee intended to publish a specific record. For example, in Order P-811, section 18(1)(b) was claimed for a record entitled "A Review of the Biological and Conservation Implications of Game Farming". Adjudicator Donald Hale in that case was provided with an affidavit, sworn by the author of the record, wherein she stated that she intended to publish the record following an internal peer review. Based on this affidavit, the adjudicator was satisfied that the employee intended to publish the record in an appropriate scientific forum, and that the premature release of the record could reasonably be expected to deprive her of priority of publication.

In this case, the employee has provided an affidavit in which he swears that he intends to publish an updated version of the CFC alcohol database. The fact that portions of the database have

already been published by this employee lends credibility to his position. This prior publication would also appear to indicate that copyright issues between the Crown and the employee can be addressed in a manner that would permit him to proceed with publication. I am also satisfied that the unpublished portions of Record 3 contain essentially the same information requested by the appellant.

Based on the Ministry's representations, including the employee's affidavit, I am satisfied that the information contained in the unpublished portion of the CFC alcohol database was obtained through research by the individual identified in the appellant's request, an employee of the Ministry. I am also satisfied that this employee intends to publish the information and that disclosing it could reasonably be expected to deprive him of priority of publication. Accordingly, I find that both requirements of section 18(1)(b) have been established for the unpublished portion of Record 3.

Section 22(a)

In order for a record to qualify for exemption under section 22(a), the information contained in the record must either be published or available to members of the public generally, through a regularized system of access.

[See Orders P-327, P-1316, P-1387 and PO-1655]

The Ministry submits:

> "Part of the CFS alcohol database was published in 1992, in book form, as *A Bibliography of Forensic Aspects of Alcohols 1872-1991* for $US 45. The book is currently available for sale to the general public from the Forensic Sciences Foundation Inc."

The Ministry also points out that the alcohol database is in fact compiled by the CFS using on-line resources and that anyone using these publicly-available resources "has access to ALL the information contained in the CFS database and much more".

The appellant submits that the purpose of section 22(a) is related to matters of convenience. He states:

> … Where the head exercises his or her discretion to not disclose documents that are otherwise available to the public, the head must consider the convenience of the requester compared to the institution. In this case, the balance of convenience favours the requester as I could simply place the CD-ROM containing the copy of the electronic DFS alcohol database into an Endnotes software equipped computer and view the titles of the articles and their corresponding abstracts. To follow the institution's instructions would require me to search several sources and then two to four databases to locate and compile only some of the information available from the institutions on one CD-ROM. The balance of convenience thus favours me and the record may not properly be withheld under section 22(a).

I do not accept the appellant's position. I have already determined that all unpublished portions of Record 3 qualify for exemption under section 18(1)(b), so it is not possible for the Ministry to simply provide a copy of the CD-ROM to the appellant. The Ministry has identified that the published portions of the alcohol database can be purchased through the non-profit Forensic Sciences Foundation. I am satisfied that this alternative source is available to members of the public generally through a "regularized system of access", thereby establishing the requirements of section 22(a). Had all portions of Record 3 been accessible to the appellant under the *Act*, my analysis of section 22(a) might have been different. However, given that only portions of this record are accessible, in my view, pointing the appellant to the published book containing precisely the accessible portions is reasonable in the circumstances.

In summary, I find that the published portions of Record 3 qualify for exemption under section 22(a) and the unpublished portions qualify for exemption under section 18(1)(b). Accordingly, I do not need to consider Record 3 further, and I will restrict my discussion of the remaining exemptions to Record 1 only.

RECORD 1

Law Enforcement

The Ministry claims two law enforcement exemptions for Record 1 - sections 14(1)(c) and (l). These sections read as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

The Ministry's representations state that sections 14(1)(c) and (l) apply to "parts" of Record 1, but do not identify which portions of the record they refer to.

Section 14(1)(c)

In order to meet the "investigative technique or procedure" test, the Ministry must establish that disclosing a technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally does not apply if the technique or procedure is generally known to the public [Orders P-170, P-1487]. The technique or procedure must be "investigative", and the exemption does not apply to "enforcement" techniques or procedures [Orders PO-2034, P-1340].

The Ministry states that the overheads for the Breath Alcohol Training Program are used specifically to train police officers and CFS toxicologists pursuant to provisions of the *Criminal Code* of Canada, and that similar courses of this nature held in Canada and the United States are restricted to peace officers. The Ministry submits that, although "information on general scientific principles of breath alcohol testing" is available on certain web sites, no site identified by the Ministry contains "the highly detailed, specific technical information being sought by the appellant".

The Ministry also points out that all police services in Canada are legally required to use an approved screening device and instrument for prosecutions under the *Criminal Code*, and that "parts of the overheads contain confidential information that is not normally available to members of the public". In the Ministry's view:

> Unrestricted release of information relating to the construction, operation, calibration and maintenance of specified breath testing instruments would seriously compromise the effectiveness of the identified techniques and procedures.

The appellant identifies that he was also the requester in two previous related appeals (P-1487 and PO-1682), and received access to copies of both the Breathalyzer Training Manual and the Intoxilyzer 5000C Training Manual. He maintains that the information in the overheads is very similar to the information in the manuals, and also submits:

> Section 14(1)(c) does not apply to this access request because the information contained in the overheads can easily be found by a member of the public. … [I]t does not take much effort to locate books that discuss the theory, use, operation, protocols, and maintenance and calibration of both evidentiary breath test instruments …, or approved screening devices … As for the Internet, I noted that some internet sites inform people that the Ministry's Intoxilyzer's 5000C Training Manual can be photocopied at the CFS library (the H. Ward Smith Library). I also located a website discussing "Ten Semi-Easy Points to make in the Cross-Examination of an Intoxilyzer 5000 expert." … In summary, the investigative techniques and procedures in use with respect to breath alcohol testing are well known and easily obtainable.

Having reviewed the contents of Record 1, it is clear that much of the information contained in the overheads does not constitute nor would it reveal "investigative techniques and procedures". As might be expected, these instructional materials contain a great deal of factual information, as well as technical information explaining the operation of various types of equipment.

It is also significant to note that, as the appellant suggests, various internet web sites contain a wide range of information similar to much of the information contained in the overheads relating to the construction, operation, calibration and maintenance of specified breath testing instruments. I also agree with the appellant that the previously disclosed Breathalyzer and Intoxilyzer Training Manuals would contain highly similar information to the various overheads used by the CFS in implementing the actual training programs for these same technologies.

For all of these reasons I am not persuaded that the Ministry has discharged the burden of establishing the requirements of section 14(1)(c) for Record 1.

Section 14(1)(l)

The Ministry's specific representations on section 14(1)(l) consist of the following statement:

> In particular, the release of information regarding conditions that may lead to invalid breath samples, substances that may interfere with the function of the breath testing instruments, substances that may cause inaccurate or false readings and contaminates that lead to ambient failures may reasonably be expected to help facilitate the commission of an illegal act and hamper the control of crime.

The appellant responds:

> With respect to section 14(1)(l), the Ministry has not explained how knowledge of the information contained in the overheads would reasonably be expected to facilitate the commission of an illegal act and hamper the control of crime.

He also suggests that the very type of information identified by the Ministry is "widely available and easily obtainable". In the appellant's view:

> … Disclosure of this kind of information makes breath testing programs better, as it helps to ensure that the results of the breath test are accurate and that only the truly guilty are convicted.

I find that the vague assertions made by the Ministry are not sufficient to discharge the onus of establishing the requirements of section 14(1)(l).

Third Party Commercial Information

Section 17(1) of the Act states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labor 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; or

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), the institution and/or an affected party resisting disclosure must satisfy each part of 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 institution 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.

The Ministry and the appellant agree that the overheads comprising Record 1 contain scientific and technical information. I concur, and find that part 1 of the section 17(1) test has been established.

The Ministry's representations on parts 2 and 3 of the test consist of the following:

> The Ministry is of the view that this information was implicitly submitted in confidence to the Ministry by the affected parties for the purposes of providing training to Breathalyzer technician students.
>
> The Ministry and the affected parties maintain a co-operative relationship in which information has been freely exchanged in order to resolve issues of mutual interest in a timely manner. The Ministry believes that disclosure of the records exempted in accordance with section 17(1) may compromise this relationship. It is in the public interest that the Ministry and the affected parties continue to exchange information with respect to issues that may impact on public safety.
>
> The Ministry also submits that the release of the parts of the overheads that contain proprietary information would be advantageous to the competitors of the affected parties. Unrestricted disclosure of such information has the potential to undermine the business interests of the affected parties.
>
> The Ministry is aware that the affected parties have been notified by [the Commissioner's Office]. The affected parties are in a position to provide more detailed comments about the application of section 17(1) to their own information.

As noted earlier, neither of the affected parties responded to the Notice of Inquiry.

For part 3 to apply, the Ministry (as the only party resisting disclosure) must demonstrate that disclosing the record "could reasonably be expected to" lead to one or more of the section 17(1) harms. To meet this test, the Ministry 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) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

I find that the Ministry's representations do not establish a reasonable expectation of any of the various harms identified in sections 17(1)(a), (b) or (c). The representations are, at best, speculative, particularly in the absence of any supporting submissions from the affected parties. It is also significant to note that the overheads comprising Record 1 consist, to a large extent, of information provided by manufacturers to several government and police organizations throughout North America, and is widely accessible on websites operated by trial lawyers in the United States.

I also find that the confidentiality requirement of part 2 of the test has not been established. There is nothing on the face of Record 1 to suggest that any of the information on the overheads was supplied by the affected parties with an explicit expectation that it would be treated confidentially by the Ministry, and the Ministry's statement that it was "implicitly submitted in confidence" is simply not adequate to establish an expectation of confidentiality based on reasonable and objective grounds (Order P-561).

For these reasons, I find that parts 2 and 3 of the test have not been established, and therefore Record 1 does not qualify for exemption under sections 17(1)(a), (b) or (c) of the *Act*.

Economic and Other Interests of the Ministry

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

> A head may refuse to disclose a record that contains,
>
> > trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;

In order to qualify for exemption under this section, the Ministry must establish that the information in Record 1:

1. is a trade secret, or financial, commercial, scientific or technical information; and
2. belongs to the Government of Ontario or an institution; and
3. has monetary value or potential monetary value.

I found in my earlier discussion of section 17(1) that the overheads comprising Record 1 contain scientific and technical information, thereby also satisfying the first requirement of section 18(1)(a).

In Order PO-1783, Senior Adjudicator David Goodis reviewed some of my earlier orders (Orders P-1281 and P-1114) and then provided the following comments on the phrase "belongs to" in section 18(1)(a). He states:

> [Assistant Commissioner Mitchinson] has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business-to-business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. …

The Ministry submits that it "has a proprietary interest, in a traditional intellectual property sense, as the Breath Alcohol Training Program overheads have been copyrighted". The appellant agrees that "by virtue of the holding of a copyright the overheads belong to the Government of Ontario". I concur, and find that the second requirement of section 18(1)(a) has been established for Record 1.

In Order M-654, Adjudicator Holly Big Canoe made the following statements with respect to part 3 of the test under the municipal counterpart to section 18(1)(a):

> The use of the term "monetary value" in section 11(a) requires that the information itself have an intrinsic value. The purpose of section 11(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information . . ..

The Ministry argues that there is an inherent monetary value in the information resulting from the application of skill and effort on the part of the CFS staff in developing the information contained in the overheads. The Ministry also points out that other public and private sector organizations (including one of the affected parties in this appeal) charge for courses equivalent to the CFS Breath Alcohol Training Program, and submits that "this supports the proposition that the overheads have monetary value or potential monetary value".

The Ministry also submits that the overheads would be of significant assistance to any organization involved with training peace officers on the operation and maintenance of breath testing instruments and screening devices, and states:

> Providing the overheads would constitute a considerable savings of time and money to such organizations. A number of former CFS staff are associated with private organizations that deliver these type of services. The Ministry submits that the overheads are highly valuable business information assets to these organizations in the current marketplace.

The appellant disagrees, relying on the findings of Adjudicator Laurel Cropley in his previous appeal involving the CFS manuals (Order P-1487). The appellant reiterates that the information in the overheads is very similar to the information previously released in the Breath Alcohol Training Program manuals, and that this information is widely available from other sources.

The appellant also submits that, even if the overheads did have an intrinsic value, the fact that they have been copyrighted "removes the monetary value or potential monetary value of the information". He elaborates on this point as follows:

> If a request was made under the *Act*, and the requested information was copyrighted with the copyright held by the Queen's Printer for Ontario, then it is clear that the information can only be reproduced if it is to be used for non-commercial purposes. Thus any economic interests of the Government of Ontario would remain intact. In short, copyrighting a record under the Queens' Printer for Ontario prevents one from using it for commercial purposes (unless one wishes to be liable for copyright infringement). The fact that information has been copyrighted under the Queen's printer for Ontario would effectively kill its monetary value or potential monetary value (assuming it had some) and therefore section 18(1)(a) could not apply as an exemption as the third part of the test would not have been met. The exemption is designed to protect the economic interests of Ontario, but the copyright under the Queen's Printer for Ontario achieves this objective on its own, while allowing access to the information. …

Although the Ministry has identified a market for breath alcohol training programs, in my view, it does not necessarily follow that the overhead materials used in the CFS's program have intrinsic monetary or potential monetary value. The Ministry does not argue that its program materials have been sold to others, or that it is pursuing potential purchasers. On the contrary, it would appear that others conducting breath alcohol training programs, whether in the public or private sectors, are developing their own training materials, presumably using the type of publicly-available sources of information identified by the appellant. Given the wide availability of information concerning breathalyzer and intoxilyzer technology, I am not persuaded that the particular training materials developed and copyrighted by the CFS have intrinsic monetary value, at least not on the basis of the generalized submissions provided by the Ministry.

I also find the appellant's arguments on the impact of Crown copyright to be compelling. Copyright protection of the overhead materials would appear to place the Ministry in a position

of legal control over their legitimate use by others. Accordingly, even if the materials become publicly available through the *Act* or otherwise, they can have no actual monetary value to others, absent agreement by the copyright holder.

Therefore, given the wide availability of information concerning the breathalyzer and intoxilyzer technology contained in the overheads, I am not persuaded that they have inherent monetary or potential monetary value, despite the fact that they are protected by Crown copyright. In other words, the copyright obtained by the Ministry for these materials is evidence to support the second requirement of section 18(1)(a), but is not sufficient to establish the third requirement. Alternatively, even it could be successfully argued that the overheads have intrinsic potential monetary value, I find that the copyright protection serves to eliminate any actual monetary or potential monetary value in the information unless the CFS decides to allow it.

Accordingly, I find that the third requirement has not been established, and Record 1 does not qualify for exemption under section 18(1)(a) of the *Act*.

ORDER:

1. I uphold the Ministry's decision to deny access to Record 3

2. I order the Ministry to disclose Record 1 to the appellant by **November 5, 2003.**

3. In order to verify compliance with Provision 2, I reserve the right to require the Ministry to provide me with a copy of Record 1 disclosed to the appellant.

Original signed by: October 15, 2003
Tom Mitchinson
Assistant Commissioner