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

ORDER PO-2908

Appeal PA09-193

Ministry of Natural Resources

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BACKGROUND AND NATURE OF THE APPEAL:

Covering more than a million square kilometers, Ontario has a rich and diverse geography. The Ministry of Natural Resources (the Ministry) has developed a program called Land Information Ontario (LIO), which manages geographic information for use in maps and Geographic Information Systems (GIS). The Ministry has provided the following information regarding the LIO:

> LIO has a web-accessible data warehouse that contains more than 250 different layers of geographic data. The data ranges from the location of underground wells to satellite imagery. LIO has a number of data sets available to the general public free of charge. It also has a number of data sets which are available for purchase by the general public. Those data sets which are available for purchase are subject to be bound by the Ministry's End-User Agreement.

The Ministry received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> The following [Geographical Information System] data [in identified formats] … from the MNR's geodatabases […]: Trapper Cabin, Trap Line Area, Recreation Access Point, Designated Campsites, Picnic Sites, Trail, Canoe Routes, ANSI Zones, Springwater Source, Dam, Aquatic Feeding Area, Federal Land, Falls, Rapids, MNR Areas, Conservation Reserves, Proposed Conservation Reserves, Proposed Provincial Parks, MNR Sign Site, Fish Species in Lakes/Rivers, Fire Disturbance Area, Work Camp, Kettle Lake, Warm/Cool/Cold Lakes, Old Growth, Roads and Cultural Line/Point in [certain identified MNR districts].

The Ministry responded to the request by denying access to the information on the basis that the information was currently available to the public, and that the discretionary exemption in section 22(a) of the *Act* therefore applied. The Ministry advised the appellant that he could access the files from LIO, which can provide the data under "a limited end-user license" at a rate of $16.00 per megabyte.

The appellant appealed the Ministry's decision. During mediation, the parties identified that some of the requested information (certain information contained in the "Roads" data set) was not publically available in the LIO, as it contained "sensitive" information. As a result, the appellant withdrew his request for the "Roads" data in this appeal.

Accordingly, the information remaining at issue in this appeal is information which is available in the LIO. With respect to this information, the appellant takes the position that it is not publically available under section 22(a), because the requirement that individuals sign an End-User Licence Agreement effectively operates as a barrier to access.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the appeal process. A Notice of Inquiry, identifying the facts and issues in this appeal, was sent to the Ministry, initially, and the Ministry provided representations in response. The Notice of Inquiry,

along with a copy of the Ministry's representations, was then sent to the appellant, who also provided representations.

DISCUSSION:

INFORMATION PUBLISHED OR AVAILABLE

The Ministry takes the position that the requested information qualifies for exemption under section 22(a) of the *Act* which states:

> A head may refuse to disclose a record where,
>
> > the record or the information contained in the record has been published or is currently available to the public;

For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387].

To show that a "regularized system of access" exists, the institution must demonstrate that

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information

[Order P-1316]

Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include

- unreported court decisions [Order P-159]
- statutes and regulations [Orders P-170, P-1387]
- property assessment rolls [Order P-1316]
- septic records [Order MO-1411]
- property sale data [Order PO-1655]
- police accident reconstruction records [Order MO-1573]

The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act* [Orders P-159, PO-1655, MO-1411, MO-1573]. However, the cost of accessing a record outside the *Act* may be so prohibitive that it amounts to an effective denial of access, in which case the exemption would not apply [Order MO-1573].

Representations, Analysis and Findings

On my review of the representations of the parties, I am satisfied that the requested information is publically available, and qualifies for exemption under section 22(a). I find, for the reasons set out below, that all three requirements necessary to find that a regularized system of access exists have been satisfied.

System exists

The Ministry takes the position that a "well established system of public access [to] the requested information" exists, and states:

> … the Ministry has established a system to grant the public greater access to geospatial data through a centralized date warehouse, LIO. The system allows all members of the public access to various types of geospatial data, including that requested by the appellant….

The Ministry then provided specific details about the system of access, referring specifically to the access procedures set out in the Ministry's website for accessing LIO. It also provided a series of progressive links to that website, which set out the way LIO works, the process for requesting the data sets that are free of charge, the process for requesting the for-a-fee data sets, the end-user license agreement, and cost examples. The Ministry also provided hard copies of the referenced web pages.

The Ministry then stated:

> As you can see, there is a well established system of public access [to] the requested information and other geospatial information that originated with the Ministry, other institutions and other sources.

The appellant does not appear to dispute that a system for accessing the information exists.

In the circumstances, and based on my review of the representations of the Ministry, including the links to the access procedures for obtaining information from LIO, I am satisfied that a system of access to this information exists.

Records are available to everyone

The Ministry's representations state that the appellant and any other party seeking access to the information, can access it, provided they sign the appropriate licensing agreement(s).

The appellant's main argument in support of his position that section 22(a) does not apply to the requested information is that, in order to obtain access to the information, individuals must sign a licensing agreement. He states that, as a result, the records are not "available to everyone." The appellant states:

… in order for a section 22(a) exemption to apply, a "regularized system of access" to apply, which allows any interested party to obtain the records in question must exist. While the Ministry has focused much of their representations attempting to prove that a "regularized system of access" exists, I make the claim that the system is not available to everyone and hence does not satisfy section 22(a) of the *Act*.

The Ministry claims that a number of data sets are available for purchase by the public; however, this is not correct. As [I expressed earlier in this appeal] … the Ministry does sell the data, but only to affiliates of the Ministry who have signed special contractual agreements with them (agents which the Ministry refers to as "licensees").

Presumably, the Ministry might suggest that since it is willing to enter into a contractual relationship with any given member of the public under the terms of the Ministry's choosing, the data being sought is available to all members of the public. This claim is completely unfounded. Quoting their own license agreement … they state:

> By accepting this electronic intellectual property agreement, you agree to become a licensee bound by the following terms and condition. If you do not agree with them, or do not want them to be binding on you, you should promptly return the Intellectual property for a full refund.

In this statement they are explicitly making a number of admissions counter to the claims made in their representations:

a) That members of the public are not licensees ("you agree to become a licensee"). The word "become" speaks of a transformation of a member of the public into a special class of entity, a "licensee"
b) That signing the aforementioned agreement with the Ministry might negatively affect the signee ("If you do not agree with them, or do not want them to be binding on you, you should promptly return the Intellectual property for a full refund"). I take this to be an admission that members of the public may be unable or unwilling to become licensees, bound and legally obligated to terms of the Ministry's choosing.

This was exemplified when the IPC mediator asked the Ministry official dedicated to this appeal whether a member of the public who was willing to pay all fees requested by the Ministry for the data, but was unwilling or unable to enter into a special contractual relationship with the Ministry would be able to acquire said data. The ministerial official answered "no." To me, this alone shows that the requested records are not available to everyone, therefore

> indicating that the Ministry's claimed "regularized system of access" has failed the tests set forth in the [Notice of Inquiry] I received. ("To show that a 'regularized system of access' exists, the institution must demonstrate … that the record is available to everyone").

In its initial representations to me, the Ministry had anticipated this argument, and had referred to certain findings in Order PO-2860 in support of its position that the information qualified for exemption under section 22(a). It then stated:

> The nature of this appeal is in many ways analogous to Order PO-2860 which related to an appeal involving [the Ministry of Government Services], Teranet and Land Registry and Land Titles records. That appeal was brought by a requester who had asked for Teranet reports of certain land transactions and copies of the registered instruments involved in those transactions, with a view to reproducing them for its clients. In the portion of the decision dealing with the section 22 exemption claimed for the registered instruments themselves the appellant argued that the Teranet's end-user agreement which prohibited the reproduction of any instruments obtained from using the Teranet software meant that the instruments were not publicly available for the purposes of section 22. [The] decision maker, in response to that argument, stated:
>
> > This supports the position that the reports (the key) are also available. The fact that access to certain records may be restricted if a party breaches a term of an agreement, does not, in my view, alter the fact that the records are available to everyone. In the circumstances, the appellant's argument that the "key" is not available cannot be sustained. The appellant can access the "key" and obtain the instruments identified as being of interest. The fact that the [Ministry of Government Services] has contracted with a third party to sell the information, *and that there are restrictions on the use of this information, does not affect the fact that the information is publicly available*. [emphasis added by the Ministry]

The appellant responds to the Ministry's position on the application of Order PO-2860 by stating:

> The Ministry refers to decision PO-2860 in order to argue that they should not be required to provide the requested data. It is important to note that the referred-to case deals with whether or not a license agreement's restrictions on distribution for already-established licensees might mean that the license was making the requested data not public and hence not protected by section 22(a) of the *Act* ("that there are restrictions on the use of this information, does not affect the fact that the information is publicly available"). I am arguing something very different: that the license the Ministry is allowing only "partners" to sign means that non-partners (the public) are not permitted access. Simply put, without

> becoming a Partner one cannot acquire the data, and the public at large are not partners. As such there is no access to the public (not "restricted access as Order PO-2860 is in regards to).

I have carefully considered the representations of the parties on the issue of whether the requirement to enter a licensing agreement with the Ministry has some bearing on a finding that the records are "available to everyone." I have also reviewed the terms of the licensing agreement that must be entered into by parties who want to access the information in LIO. I note that, in addition to the general terms and conditions, the key terms of the licensing agreement are:

- that the licensee acknowledges that the licensor retains all copyright in the information;
- that the licensee may use and make copies of the information for its professional or non-commercial end-use only; and
- that all reproductions of the information acknowledge the rights of the licensor.

On my review of the information in this appeal, I am satisfied that the records contained in the LIO are "available to everyone" for the purpose of the second part of the test under section 22(a). The Ministry's representations make it clear that any member of the public is entitled to access the information in the LIO. Although parties who wish to access the information must agree to be bound by the terms of the licensing agreement, I find that this requirement does not change the fact that access is available to everyone. Furthermore, I find that the terms of the licensing agreement are not such that they alter my finding that the information is available to everyone.

The appellant argues that the records are not available to everyone because parties who want to access the information must change their status from "the public" to a "licensee" or a "party." However, I find in these circumstances that these distinctions do not affect my finding, largely because everyone can enter such an agreement with the Ministry, and can become a licensee or a party.

I am supported in my decision by the findings in Order PO-2860. In that order, I had found that certain documents (land instruments) were publically available, but I had to determine whether the "key" which would allow a requester to identify the documents he wanted was publically available. I stated:

> With respect to the "key," which would enable the appellant to identify specific instruments without requiring a review of all 2.1 million instruments, as noted above, the [Ministry of …] has not claimed that these records are "publicly available" under section 22(a) of the *Act*. The Ministry has claimed that the exemption in section 18(1) applies to these records. I found above that the records do qualify for exemption, and are not available under the *Act*, because the harms identified in section 18(1) are established; however, I made this finding on the basis of the information provided to me – that the disclosure under section 18(1) would result in the identified harms because the Ministry [through a third party] *sells the information* to anyone who wants to purchase it. Although

> purchasers must enter an agreement with [the third party] to purchase the specific information they want, the parties have made it clear that this information is not restricted and that fees are established for the purchase of the requested information.
>
> Indeed, the appellant confirms that he was able to purchase the "key" from [the third party], and continued to receive the information. The appellant states:
>
> > The Ministry argues … that [the appellant] is not precluded from access to instruments. However, the parties are in agreement that [the appellant] would be precluded from access to the reports if it were to use the instruments in a way that [the third party] did not approve (that is, make copies of the instruments available, on request, to its subscribers).
>
> This supports the position that the reports (the key) are also available. The fact that access to certain records may be restricted if a party breaches a term of an agreement does not, in my view, alter that fact that the records are available to everyone. In the circumstances, the appellant's argument that the "key" is not available cannot be sustained. The appellant can access the "key," and can obtain the instruments identified as being of interest. The fact that the Ministry has contracted with a third party to sell the information, and that there are restrictions on the use of this information, does not affect the fact that the information is publicly available.

I affirm this finding, and apply it to the circumstances of this appeal. The fact that parties wishing to access the information in LIO must enter into an agreement which puts some restrictions on the use of this information does not affect the fact that the information is publically available. In addition, contrary to the appellant's argument, I find that Order PO-2860 is very relevant and applicable to the circumstances of this appeal. It addresses the application of section 22(a) in circumstances where the use of the information that is publically available is restricted because of a required licensing agreement.

I note that the appellant also argues that, if the Ministry can rely on the section 22(a) exemption in these circumstances, the Ministry "would have free reign in defining eligibility conditions, all of which would deny access to those who are unable or unwilling to enter into these contracts." I do not accept this argument. I have found above that, in the circumstances of this appeal, the records are available to everyone and that the terms of the licensing agreement do not alter that finding. It is important to note that in reaching this conclusion, I considered whether the requirements to access the data were excessively restrictive or onerous. In such a case, the information might not be "available to everyone." In this appeal, however, I found that the information is "available to everyone."

Finally, the appellant also provides some representations in which he suggests that not all individuals are allowed to enter a licensing agreement with the Ministry. The appellant refers to the licensing agreements which are required to be signed, and points out that these agreements

contain spaces for requesters to identify certain information (ie: what organization do you represent?) The appellant argues that this suggests that requesters must be organizations or certain types of bodies. If I were to agree with the appellant, and if only limited parties or organizations could enter the licensing agreement and access the data, I would agree that the information is not "available to everyone." However, the Ministry's representations clearly state that the requester, and any other party seeking access to the requested records, would be able to access the records through the online LIO. The fact that the request forms contain boxes which may not be relevant to particular requesters does not affect this finding.

Accordingly, I am satisfied that the publicly accessible information (as is the requested information in this appeal), is available to everyone. In the circumstances of this appeal, the fact that there are restrictions on the use of this information by those who access the information, does not affect the fact that the information is publicly available.

A pricing structure to access the information is in place

The Ministry states:

> Had the requester made his request through the alternative access system provided by LIO the total cost would have been $2,441.83. This amount, it is suggested, would not be so prohibitive as to amount to a denial of access.

Regarding the pricing structure to enable the public to access the information, the Ministry has indicated the calculated fees for the requested information, which are based on specific fee structure for information in LIO. I am satisfied that a pricing structure that is applied to all who wish to obtain the information is in place.

Balance of Convenience

Neither of the parties provided significant representations on the specific issue of whether the balance of convenience favours the application of the exemption. However, given the nature of the data requested (data from the MNR's geodatabases [including the LIO] in electronic format), and given the online access procedures established by the Ministry allow access to precisely this type of information, I am satisfied that the balance of convenience favours the application of section 22(a).

Exercise of discretion

The Ministry has also provided background information regarding the manner in which the LIO data is obtained and made available to the public. The appellant argues that this information is not relevant to the issues regarding whether the records qualify for exemption under section 22(a). Generally I agree with the appellant's position that this information is not relevant to the three part test set out above; however, in my view, this background information relates to the Ministry's position that it properly exercised its discretion to apply section 22 to direct the appellant to the LIO. The Ministry states:

> The rationale for the imposition of the End User Agreement lies in the source of much of the information contained in LIO arises as the Ontario Geospatial Data Exchange (OGDE).
>
> More than 2,000 registered users deposit and extract geographic data from the LIO Warehouse. Users include federal government departments, other provincial ministries, municipalities, public health units, conservation authorities, universities and colleges, boards of education and private sector organizations such as utility companies and land developers. Many of these depositors are members of the OGDE and have signed the Ontario Geospatial Data Exchange Agreement.
>
> The OGDE is a key component of the Ontario Government's commitment to the Land Information Infrastructure. Government had long been aware of the need to provide better ways to share its geospatial data. [LIO] developed a data-sharing co-operative involving all levels of government as well as non-governmental organizations, such as universities and First Nations. The OGDE provides for the centralized sharing of spatial data, through an umbrella agreement among member organizations. This has provided a number of benefits to the government and members of the OGDE. Members can easily share the entire spectrum of Ontario's geospatial data amongst themselves for non-commercial purposes. It eliminates the time and expense of negotiating and administering case-specific, data sharing agreements with a multitude of Ontario-based public sector organizations. The adoption of common data standards is being encouraged, which would make it easier for data from different organizations to be further integrated. The OGDE has resulted in a substantial number of additional data entries into the Ontario Land Information Directory.
>
> The OGDE has facilitated the public to enjoy greater access to information as it is housed in the LIO data warehouse where it creates a central point for access. As part of the OGDE arrangement, members identity data or information which can generally be made available to the public or may be made available to the public through licences which may restrict its use. As a result, the LIO Warehouse contains more than 250 layers of geographic information. Of the 250 layer sets, LIO also makes more than 40 of the 250 data sets available to the public through an Unrestricted Use License. Knowing the some restrictions may be put on the information/data sets access can be put in place through licensing arrangements encourages members to make information available to other OGDE members and the Public. Fees paid by the public who like the appellant seek to access the information fund in part the LIO and the OGDE….

The Ministry then states that, if the information can be accessed through the *Act* without charge or reasonable restrictions, the system will be unable to fund itself, and members will not share information through the OGDE. The Ministry states that this would make it harder for the public to locate and access geospatial information.

The Ministry also states:

> In light of the fact that the Ministry has a system of public access to the records; that the purpose of the system is to facilitate access to Geospatial data by creating a central warehouse; the costs of accessing the system reflect the costs of maintaining and [are not prohibitive]; restrictions in the licensing arrangement are reasonable or necessary to encourage other institutions or bodies to deposit data there; and that the system would be undermined or subverted, if access to the information was provided through the *Act*, the Ministry applied section 22 to the information. It is the position of the Ministry that it did not err in doing so.

The appellant argues that a number of the factors identified by the Ministry are not relevant. The appellant's main arguments can be summarized as follows:

- the requested data belongs to the Ministry and is maintained by it; therefore disclosure through the *Act* is irrelevant to the OGDE members;
- the OGDE members are aware that the data may be subject to the *Act*;
- the data provided by the OGDE members already has protections through the *Act* as well as the *Copyright Act*;
- the question of funding the LIO system through fees is a red herring, and in any event irrelevant, as the database is primarily designed for and used for internal purposes.

On my review of the factors considered by the Ministry, I am satisfied that these considerations are relevant factors in determining whether to apply the section 22(a) exemption. Although the appellant's representations correctly identify the nature of the information at issue (for example – that it is owned by the MNR, subject to the *Act*, and protected in other ways), I also accept the Ministry's position that disclosure without the identified licensing restrictions may impact the willingness or ability of OGDE members to continue to provide the information in the manner in which they now do. Accordingly, based on the representations on the manner in which it exercised its discretion, I am satisfied that the Ministry has properly exercised its discretion to apply the section 22(a) exemption. As a result, I am satisfied that the records qualify for exemption under section 22(a).

ORDER:

I uphold the decision of the Ministry.

Original Signed by: August 26, 2010
Frank DeVries
Adjudicator