ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2012-03

January 20, 2012

ENERGY RESOURCES CONSERVATION BOARD

Case File Number F5389

Office URL: www.oipc.ab.ca

Summary: In a request to the Energy Resources Conservation Board (the "Public Body") dated March 22, 2010, the Applicant requested "a complete copy of the General Well Data File ("GWDF") as described on page 30 of the 2010 Catalogue of Publications, Maps and Services." The Applicant also requested monthly updates to the file on an ongoing basis. The GWDF is a database containing information on wells drilled in Alberta. The Public Body offers the GWDF as a publication for purchase for $66,491.00, with optional monthly, quarterly, or annual updates for an additional fee; monthly updates are $13,183.00. The GWDF is listed in the Public Body's catalogue.

The Public Body refused the Applicant's request, citing the exception to access for information that is available for purchase by the public.

The Adjudicator determined that the requested information was available for purchase by the public, and the Public Body properly exercised its discretion to withhold the information.

The Adjudicator also found that section 32 of the Act did not require the Public Body to disclose the requested information in the public interest.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 3, 29, 32, 88, 72. **BC:** *Freedom of Information and Protection of*

Privacy Act, R.S.B.C. 1996, c. 165, s. 20(1)(a). **ONT:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 22(a).

Authorities Cited: AB: Orders 97-009, 97-018, F2004-026, F2009-010. **BC:** Order 01-51.

Cases Cited: *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259.

I. BACKGROUND

[para 1] In a request to the Energy Resources Conservation Board (the "Public Body") dated March 22, 2010, the Applicant requested "a complete copy of the General Well Data File ("GWDF") as described on page 30 of the 2010 Catalogue of Publications, Maps and Services." The Applicant also requested monthly updates to the file on an ongoing basis. The GWDF is a database containing information on wells drilled in Alberta. The Public Body offers the GWDF as a publication for purchase for $66,491.00, with optional monthly, quarterly or annual updates for an additional fee; monthly updates are $13,183.00. The GWDF is listed in the Public Body's catalogue.

[para 2] The Public Body refused the Applicant's request citing the exception to access for information that is available for purchase by the public. The Applicant then made a request for the fees to be excused under section 93(4) of the Act. The Public Body also refused this request, as the fee for the GWDF is not a fee for access under the FOIP Act. The Applicant requested a review of the Public Body's decision to refuse access to the GWDF, as well as the updates.

[para 3] The Applicant requested a review of the Public Body's response. As mediation was unsuccessful, the matter proceeded to inquiry.

II. RECORDS AT ISSUE

[para 4] The records at issue are the GWDF and monthly updates to that file.

III. ISSUES

[para 5] The Notice of Inquiry dated May 30, 2011 lists the following issues:

1. **Did the Public Body properly apply section 29 of the Act (information that is or will be available to the public) to the records/information?**

2. **Does section 32 of the Act (information must be disclosed if in the public interest) require the Public Body to disclose the records/information?**

As the fees charged for access to the GWDF are not fees charged under the FOIP Act, but rather under the Public Body's own process, the discussion of the fees for access to the GWDF will be considered in the discussion of section 29.

IV. DISCUSSION OF ISSUES

1. Did the Public Body properly apply section 29 of the Act (information that is or will be available to the public) to the records/information?

> *29(1) The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is readily available to the public,*
>
> *(a.1) that is available for purchase by the public, or*
>
> *(b) that is to be published or released to the public within 60 days after the applicant's request is received.*

[para 6] It is clear that the GWDF is available for purchase by the public; any company or individual can order the file from the Public Body's catalogue, provided they have the ability to pay.

[para 7] The Applicant argues, with respect to section 29(1)(a.1):

> For any data an agency of government does not want to make public, they simply need to publish a prohibitively high price for it. They can then invoke 29(1)(a.1) of the *Act* which states '*[t]he head of a public body may refuse to disclose to an applicant information… that is available for purchase by the public.'* Don't want to disclose the budget for the next fiscal year? Simply have the Minister of Finance declare it's available for purchase for $1,000,000 and they don't have to.
>
> Of course, the latter is ridiculous – the public outcry would simply be overwhelming. But once you've crossed that threshold, then what amount for this data *is* reasonable? $750,000? $500,000? Or how about $1? Or even $0.01? Similarly, if it is unreasonable to charge for data in which the public has a deep and abiding interest, then what is the mechanism by which it's determined which data should be free, and which data should have a price?

[para 8] I do not think that the cost of the information is a factor in determining whether the information is available for purchase by the public as contemplated under section 29(1)(a.1). This provision acknowledges that a public body might provide an alternative route for accessing certain information, outside the FOIP Act. Section 3(a) of the Act specifies that the FOIP Act is in addition to and does not replace existing procedures for access to information or records. Additionally, section 88 permits the head of a public body to specify categories of information to be made available to the public without a request under the Act and to require that a fee be paid for that information. Section 29(1)(a.1) permits a public body to refuse access to this information in response to a request under the FOIP Act, if the applicant can access the information via the

alternative route. What the public body chooses to charge for that alternative route of access is outside of the scope of the Act. However, section 29(1)(a.1) is a discretionary provision; a public body may still grant an applicant access under the FOIP Act to information available by other means, and the public body must exercise its discretion in determining whether or not to do so.

[para 9] The Applicant's argument above is relevant to the Public Body's exercise of discretion in this case.

[para 10] In Order F2004-026 the Commissioner stated the following with respect to a public body's appropriate exercise of discretion:

> In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case. I find support for this position in orders of the British Columbia Information and Privacy Commissioner. Orders 325-1999 and 02-38 include a list of factors relevant to the exercise of discretion by a public body. In addition to "the general purposes of the legislation (of making information available to the public) the list includes "the wording of the discretionary exception and the interests which the section attempts to balance". It strikes me as a sound approach that the public body must have regard to why the exception was included, and whether withholding the information in a given case would meet that goal.

[Order F2004-026, at para. 46]

[para 11] The Public Body states that in exercising its discretion under section 29(1)(a.1) it considered the following factors:

- at the time of the Applicant's request, there were 13 subscribers to the GWDF; 11 receiving monthly updates, and one each receiving quarterly and annual updates. Nine subscribers are private businesses, some are oil and gas companies, and at least five others are vendors that assemble, compile and analyze the information to sell a value-added product (with approval from the Public Body);
- the sale of the GWDF generates substantial revenues: between 2007 and 2010, sales of the updates totaled $314,825.00 (no initial subscriptions were sold in this time frame);
- the Public Body's website and catalogue clearly state that information obtained from the catalogue or website is not to be resold or otherwise offered for commercial use (unless permission has been obtained). The Applicant already makes information obtained from the Public Body's website available to third parties, without permission, which is a violation of the Public Body's terms. The Applicant also intends to make the information in the GWDF available [for free] on his website.

[para 12] The Applicant argues, with respect to the revenues, that the income from the GWDF represents about 0.06% of the Public Body's annual operating budget, which the Applicant submits was $505 million between 2007 and 2010. The Applicant's conclusion is that the only purpose of the fee is to sustain the status quo.

[para 13] The Public Body submits that the cost of the GWDF was determined based on "staff time required to enter data into a number of [Public Body] systems, check the entered data for accuracy, coordinate the compilation of the data from several different [Public Body] systems/databases, compile all such well files in one location and facilitate the sale of the GWDF to the public." It also states that the Public Body is not entirely funded by the Government of Alberta. Rather, approximately half of its revenue is generated from industry levies. If the Public Body were required to provide for free, the information that is currently provided for a fee, industry would be required to make up a large portion of that lost revenue through increased levies.

[para 14] The Public Body states that information about single wells is available for $11.00. It has confirmed that if a person purchases the single well data, at $11 for each well, that person would have all of the information contained in the GWDF, for a total fee of $4,710,717 (for 428,247 wells). The Public Body adds that "the $66,491 [for the GWDF] seems reasonable by comparison."

[para 15] The Applicant has not presented reasons why the Public Body should provide the GWDF free of charge to him, specifically. Rather, the Applicant states that his intention is to make the GWDF information available to the general public for free via his website. He states that by doing so, "it enables companies like [the Applicant's] and others to build innovative, useful applications for which we believe there is a ready market." I have no doubt that the Applicant, and others, could create valuable products based on the data in the GWDF. This could probably be said about other information in the custody or control of public bodies. However, the FOIP Act contemplates situations in which a public body charges fees for information, outside of the FOIP Act, and section 29(1)(a.1) permits a public body to decline an access request in favour of that other process. The Public Body's rationale for the fees it charges for the GWDF seems to me to be reasonable. An individual or organization wanting information about a particular well or group of wells can purchase that information from the Public Body at a significantly lower cost of $11 per well. Additionally, the fact that the Applicant has acknowledged that to provide the information to him free of charge is to effectively provide the information to the general public free of charge, was appropriately considered by the Public Body in exercising its discretion, since this would undermine the Public Body's ability to offset some of the costs associated with the collection and compilation of all the data in the GWDF. I find that the Public Body properly exercised its discretion to apply section 29(1)(a.1) to the information.

[para 16] The Applicant has indicated in his submission that other jurisdictions offer "the necessary base data" free of charge. In responding to a letter from the Applicant, Hon. Ron Leipert, then Minister of Energy, noted that the volume of data in the GWDF exceeds the data collected by most other jurisdictions. I do not have evidence as to what

information is provided free of charge by other jurisdictions, nor how this compares to the information provided by Alberta in the GWDF. Regardless, in providing routine access to information outside of the FOIP process, the decision of whether to charge a fee and how much to charge is a policy decision of the Public Body, and I do not have jurisdiction to review it.

[para 17] I note that a similar issue has been considered by both the BC and Ontario Information and Privacy Commissioners. Orders from the Ontario office indicate that the exception in the Ontario *Freedom of Information and Protection of Privacy Act* for information otherwise available to the public (section 22(a)) applies only where the balance of convenience favours that other avenue of access.

[para 18] In Order 01-51, the former BC Commissioner considered this approach with respect to the BC *Freedom of Information and Protection of Privacy Act* exception or information available for purchase by the public (section 20(1)(a), since repealed), and preferred instead an approach similar to the one I have taken: once it is shown that the requested information is otherwise available for purchase by the public, the remaining question is whether the public body properly applied its discretion to withhold the information under that exception.

> I have no doubt the case law is "available for purchase by the public" within the meaning of s. 20(1)(a). If a record is made available to anyone who is prepared to pay the price charged by the seller – or a price negotiated by seller and purchaser – it is available for purchase. (It does not matter whether the price paid includes a profit element or only covers the seller's costs of production and sale.) A record will, for example, be "available for purchase by the public" where it is produced by a privately or publicly owned publisher or entity and can be acquired at a bookstore or similar facility – whether traditional or on-line – or be obtained directly from the publisher or entity or an agent. A record will also be available for purchase by the public where a public body has formally decided – in accordance with any applicable law or any policy or rules applicable to the public body – that particular records, or kinds of records, are available for purchase by the public and are held out to the public, in some way, as being available for purchase. This may include cases where a public body tells people that records are available for purchase at the time they inquire about obtaining them – it is not necessary to publicly advertise their availability for purchase in advance. These examples of how a record may be available for purchase by the public do not exhaust the meaning of "available for purchase by the public".
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> …
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> The applicant argues that, consistent with the Ontario approach, the 'balance of convenience' means the Ministry should not be allowed to rely on s. 20(1)(a), since it can readily give the applicant access to the case law. In the British Columbia context, I prefer to approach the issue by asking whether the public body has considered the exercise of its discretion to disclose records despite the fact that it is authorized to refuse access under s. 20(1)(a). This is consistent with the approach I have taken to the exercise of discretion in relation to other of the Act's permissive exceptions. See, for example, Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38, and Order 00-14, [2000] B.C.I.P.C.D. No. 17. It is also

consistent with Commissioner Flaherty's approach to this issue in Order No. 91-1996.

[BC Order 01-51, at paras. 47 and 50]

2. Does section 32 of the Act (information must be disclosed if in the public interest) require the Public Body to disclose the records/information?

[para 19] Section 32 of the Act states

> *32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant*
>
> *(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or*
>
> *(b) information the disclosure of which is, for any other reason, clearly in the public interest.*
>
> *(2) Subsection (1) applies despite any other provision of this Act.*
>
> *(3) Before disclosing information under subsection (1), the head of a public body must, where practicable,*
>
> *(a) notify any third party to whom the information relates,*
>
> *(b) give the third party an opportunity to make representations relating to the disclosure, and*
>
> *(c) notify the Commissioner.*
>
> *(4) If it is not practicable to comply with subsection (3), the head of the public body must give written notice of the disclosure*
>
> *(a) to the third party, and*
>
> *(b) to the Commissioner.*

[para 20] The Applicant cites a publication from this office, *Adjudication Practice Note 2*, as stating that the public body, organization or custodian had the burden of proof. The Applicant then argues that therefore, the Public Body must "provide proof that the release of the GWDF would have had a *negative* impact on a future situation similar to Calmar. If either *no harm*, or a *positive impact* were to be expected as a result of better access to relevant data by stakeholders, then clearly your office is obliged to order the release of the GWDF at the earliest possible opportunity, as clearly the information is '*in the public interest'*."

[para 21] I note that *Adjudication Practice Note 2* states the following:

> *In most inquiries*, the public body, organization or custodian has the burden of proof. Because the Commissioner is typically reviewing whether a decision was made in accordance with the applicable Act, public bodies, organizations and custodians are usually in the best position to support their decisions even when they do not formally have the burden of proof. (My emphasis)

In some cases, an applicant or complainant (as the case may be) will have the burden of proof. Previous Orders from this office have stated that it is the Applicant who bears the burden of showing that section 32 applies. With respect to section 32(1)(a), the Applicant must provide some evidence that there is an actual risk of harm, and that the harm is significant (Order 97-009). With respect to section 32(1)(b), it is not enough for the Applicant to argue that the public has some interest in the information; the Applicant must show that there is compelling public interest (Order 97-018).

[para 22] In Order F2009-010, the Adjudicator considered comments from the Ontario Court of Appeal with respect to Alberta's section 32 in *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259. The Court stated in that decision that "[t]here is no balancing between the public interest and the exemption: the test is whether disclosure is 'clearly in the public interest'." The Adjudicator agreed that the test for section 32 is whether disclosure would be clearly in the public interest, but added that

> … the application of this test requires a balancing of the public interest in disclosure versus the public interest represented by the exceptions in the Act, in situations where an exception to disclosure applies, to determine whether disclosure is "*clearly* in the public interest". The right of access is subject to limited and specific exceptions. Each exception to disclosure in the Act reflects the decision of the legislature that a specific public interest in withholding the information may outweigh an individual's right of access. Consequently, one must balance the public interest in disclosure with the public interest in withholding information, in order to determine whether disclosing or withholding information best serves the public interest, or is clearly in the public interest.

[Order F2009-010, at para. 55]

[para 23] The Applicant provided, as evidence of a public interest in disclosure, articles from the *Edmonton Journal* and *Calgary Herald* concerning a gas leak occurring in Calmar, Alberta in 2008. According to these articles, a housing development had been built on land that contained an abandoned well that had begun to leak, which forced several people to move. Apparently neither the municipality nor the developer checked with the Public Body to determine whether any abandoned wells were located on the property.

[para 24] The following are quotes from the *Edmonton Journal* and *Calgary Herald* articles provided by the Applicant:

> The ERCB said it has been available for more than 10 years to municipal planning authorities and land developers to identify all oil and gas infrastructure in areas under consideration for development. "It is very similar to the call-before-you-dig program, and is used commonly, particularly over the past years given Alberta's growth," ERCB spokesman Darin Barter said.

["Gas Leak Force Out Families", *Edmonton Journal*, June 2, 2010]

> The town contracted out its development work to an Edmonton consulting company that checked the land titles to make sure there weren't any issues, but despite repeated notices sent out by the province since 1996, no one checked with the Energy Resources Conservation Board for the locations of abandoned oilfield infrastructure.

["Leaking Natural Gas Wells a Nightmare for Homeowners near Edmonton," *Calgary Herald*, April 11, 2010]

[para 25] The Applicant argues

> …if information in the GWDF – such as the location of abandoned wells – had been widely available, there is a reasonable chance that some organization could have provided a simple visualization of the data which would have assisted in avoiding the situation in the first place. The Calmar scenario arose from a lack of communication between agencies of government entrusted to act in our best interests. In light of this fiasco, prospective homeowners may be inclined – at the very least, they should have the right – to do their own research, independent of any government agency, to establish if there are factors which might impact the safety and integrity of their prospective family homes. Tools to support this type of research – such as Google Earth® - are now widely available, mainstream and free.

[para 26] The Public Body points out that it offers a Land Development package, which is a list of all wells, pipelines and facilities in a 10-plot radius around a particular quarter section parcel of land, for $33.00. In other words, it seems highly speculative to say that the Calmar incident would have been avoided were the information in the GWDF freely available to the public, given that well information specific to the development area *was* available to the municipality, developer, or any interested individual, for a low fee.

[para 27] The Public Body also notes that the GWDF would not be particularly helpful for researching emergency or acute situations, as it is a historical database, and the information contained in the GWDF is such that geological expertise and/or specialized software is required for the GWDF information to be useful. The GWDF does not contain information on emergency planning zones, emergency response plans, or sour gas information that would be useful to the general public. This type of information is available from the Public Body in other formats.

[para 28] I also note that the Calmar incident has passed, and that even if that incident met the test for section 32(1)(a) at the time, there is no longer a *risk* of harm. The Applicant may be arguing that similar incidents might occur in the future unless the GWDF is provided; however, that argument is too speculative to meet the test for section 32(1)(a).

[para 29] In support of his arguments for disclosure in the public interest, the Applicant also provided comments from other (unnamed) interested parties in support of his claim that the disclosure is in the public interest. The comments largely emphasize the

usefulness of the ERCB data to develop new applications and to Albertans generally as a source of information.

[para 30] As noted above, I have no doubt that the information in the GWDF could be used to create valuable products that may be made available to the public for free. However, this does not constitute a compelling public interest for the purposes of section 32(1)(b).

[para 31] The Public Body has submitted that the fee for the GWDF offsets some of the costs associated with collecting and compiling all of the data. I am persuaded that there is a public interest in permitting, as section 29(1)(a.1) does, the Public Body to offset costs in such a manner, especially given that the information in the GWDF is available for purchase on a per-well basis for a much more affordable fee. Therefore I find that the public interest in disclosing the GWDF to the Applicant is outweighed by the public interest in applying section 29(1)(a.1) of the Act.

V. ORDER

[para 32] I make this Order under section 72 of the Act.

[para 33] I find that the Public Body properly applied section 29(1)(a.1) to the information at issue.

[para 34] I find that section 32 does not apply to the information at issue.

[para 35] Under section 72(2)(b), I confirm the Public Body's decision to refuse the Applicant access to the General Well Data File.

Amanda Swanek
Adjudicator