



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

ORDER P-306

Appeal 900585

Ministry of the Environment



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ORDER

BACKGROUND :

This is an appeal from a decision made by the Ministry of the Environment (the "institution"). The decision was in response to a request made by the appellant pursuant to the Freedom of Information and Protection of Privacy Act, (the "Act").

The appellant's request was for access to "occurrence reports, photos, video tape related to the alleged connection of 3 settling pits to the municipal sewer system at Varnicolour, Elmira on February 9, 1990 and statements by [named individual] (witness); reports were filed by [5 named individuals]." The appellant requested viewing access to the original photos and videotape.

The "occurrence" referred to in the request was an alleged discharge of a contaminant into the natural environment contrary to the Environmental Protection Act ("EPA") and the Ontario Water Resources Act ("OWRA"), said to have occurred on February 9, 1990 at the property of Varnicolor Chemical Ltd. in Elmira, Ontario.

The institution granted viewing access to the original photos and advised the appellant that no videotape existed. The appellant was content with that decision.

The institution also granted access to an Occurrence Report and Supplementary Occurrence Report regarding an occurrence at Varnicolor Chemical Limited on January 25, 1990, with personal identifiers severed from the records. The appellant was also content with that decision and the severances made by the institution.

Therefore, the records which are at issue in this appeal can be described as follows:

1. Occurrence Report O111, dated February 9, 1990.
2. Occurrence Report OC 0142, dated February 15, 1990.
3. Supplementary to Occurrence Report OC 0142, dated March 13, 1990.

4. Severed portions of witness statement by [a named individual].

The institution initially denied access to the records, claiming sections 14(1)(a), (b) and (f) and 21(1)(f) of the Act. In its representations, the institution withdrew its claims under sections 14(1)(b) and 21(1)(f), thereby narrowing the scope of this appeal to the application of sections 14(1)(a) and/or (f) of the Act.

Attempts to mediate this appeal were not successful and the matter proceeded to inquiry. The institution, Varnicolor Chemical Ltd., and the appellant provided written representations. The named witness did not provide representations but did advise the Appeals Officer that he knew who the requester was and consented to disclosure of his statement in full. The institution disclosed all portions of the statement, except those which it felt qualified for exemption under sections 14(1)(a) and/or (f).

ISSUES/DISCUSSION:

The issues arising in this appeal are as follows:

- A. Whether the information contained in the records qualifies for exemption under section 14(1)(a) of the Act.
- B. Whether the information contained in the records qualifies for exemption under section 14(1)(f) of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the information contained in the records qualifies for exemption under section 14(1)(a) of the Act.

Section 14(1)(a) of the Act reads as follows:

A head may refuse to disclose a record if the disclosure could reasonably be expected to,

interfere with a law enforcement matter;

The term "law enforcement" is defined in subsection 2(1) of the Act as follows:

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b);

The institution submits that the records relate to the investigation which commenced with the allegation of a violation of the EPA, and that a premature release of the record would prejudice the ability to conduct a fair trial, and impair the impartiality of witnesses who will subsequently testify in court. In the institution's view, this brings the matter within the scope of the definition of "law enforcement" under section 2(1) of the Act.

In support of its position regarding "law enforcement" the institution states that the EPA prohibits various forms of pollution including discharge of any contaminant into the natural environment and that it authorizes designated Ministry of Environment provincial officers to enter and inspect properties in order to investigate potential sources of pollution. The EPA further provides a comprehensive system of penalties for contravention of the EPA, which apply to both corporations and individuals.

The institution also states that the OWRA gives the institution extensive powers to regulate water supply, sewage disposal and the control of water pollution, including authorization to supervise and examine surface water to determine the nature, cause and extent of contamination. Penalty structures exist under this statute which are similar to those under the EPA.

The institution submits that in response to the alleged occurrence on February 9, 1990, a provincial officer was

assigned to carry out an inspection pursuant to the EPA and OWRA. The Occurrence Report dated February 9, 1990 is a summary of the officer's actions and transfer of the matter to the Investigation and Enforcement Branch of the institution.

The institution also submits that after the transfer, two investigations were commenced, one in February and one in March of 1990. It would appear from a review of the appeal file that these investigations resulted in the Occurrence Report 0142, dated February 15, 1990, and the Supplementary to Occurrence Report 0142, dated March 13, 1990, respectively.

The institution also states that as a result of these investigations, the matter was referred to the Crown Attorney's office, where a Crown brief was prepared recommending prosecution. Twenty-two charges were subsequently laid against Varnicolor Chemical Ltd. and a named director of the company. A copy of the documentation which initiated these charges was attached to the institution's representations.

The institution points out that the trial of these charges began in 1991 and will continue over the course of several hearing dates in the summer and autumn of 1992.

With respect to whether the disclosure of these records would interfere with the law enforcement matter, the institution submits that evidence in Court proceedings are not made public until presented to Court because of the potential to prejudice the ability to conduct a fair trial and to impair the impartiality of witnesses.

The representations from Varnicolor Chemical Ltd. support the institution's position.

In Order 225, Commissioner Tom Wright, found that records which were prepared for use at a criminal trial qualified for exemption under section 14(1)(a). He determined that a criminal trial meets the requirements of "law enforcement" under section 2(1) of the Act, because a finding of guilt under the Criminal Code would result in a penalty or sanction. In my view, similar reasoning applies to prosecutions under the EPA and OWRA. The particular sections of those statutes under which Varnicolor Chemical Ltd. and one of its directors have been charged, carry with them penalties and sanctions. Accordingly, I find that the circumstances surrounding the creation of the records at issue in this appeal can properly be described as a "law enforcement matter" for the purposes of subsection 14(1)(a) of the Act.

I must now decide whether disclosure of these records could reasonably be expected to result in the harm specified in section 14(1)(a).

The expectation of harm resulting from disclosure must not be fanciful, imaginary or contrived, but one based on reason. Further, the institution must provide sufficient evidence to substantiate the reasonableness of the expected harm [Order 188].

The institution states that disclosure of the records could result in a publication of the evidence to be used at the trial, which would interfere with the law enforcement proceedings. Having reviewed the records, it is clear that they are likely to be used in the trial. The information in the three occurrence reports and the severed portions of the statement by the named individual, represent the anticipated evidence of subpoenaed witnesses. Accordingly, I agree with the institution's position, and find that a premature disclosure of the records could reasonably be expected to interfere with the law enforcement matter, and all records are properly exempt under section 14(1)(a) of the Act.

Section 14 of the Act provides the head with the discretion to disclose a record even if it meets the test for an exemption. In the circumstances of this appeal, I find nothing improper in the way in which the head has exercised discretion.

Because I have found that the exemption provided by section 14(1)(a) applies to all records, it is not necessary for me to consider the application of section 14(1)(f).

ORDER:

I uphold the head's decision to withhold all records at issue in this appeal.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ June 3, 1992