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

ORDER PO-1706

Appeal PA-980228-1

Ministry of the Environment

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant submitted a request to the Ministry of the Environment (the Ministry) under the Freedom of Information and Protection of Privacy Act (the Act) for access to all records contained in a file entitled "Occurrence 9860000188, Permit to take water, Hudson Township". This record documents a complaint made to the Ministry that a company represented by the appellant was pumping water from a lake in contravention of the Ontario Water Resources Act (the OWRA).

The Ministry granted partial access to the record, withholding the name and address of a complainant pursuant to section 21(1) of the Act (invasion of privacy). The appellant appealed this decision, and raised the possible application of the so-called "public interest override" in section 23 of the Act.

During the mediation stage, the mediator contacted the complainant to determine whether this person would consent to disclosure of his or her personal information. The complainant did not consent to disclosure.

This office sent a Notice of Inquiry to the appellant, the Ministry and the complainant. Representations were received from the Ministry, the appellant and the complainant. In addition to the representations provided by the Ministry's Freedom of Information and Privacy Co-ordinator, an investigator with the Investigations & Enforcement Branch of the Ministry also submitted representations which, essentially reiterated those provided by the Co-ordinator, but also referred to the current status of the matter.

In his representations, the appellant indicates that he is only seeking the name of the complainant and not the address or telephone number of this person. The appellant also raises, for the first time in his representations, the question of whether his rights under the Canadian Charter of Rights and Freedoms (the Charter) have been violated by non-disclosure of the complainant's name.

I notified the appellant of the requirements of section 109 of the Courts of Justices Act, and asked him to comply with the notice requirements of this section, or satisfy me that these requirements are not applicable in the circumstances of these appeals. Section 109, which applies to proceedings before tribunals as well as to courts, requires a person who seeks a ruling that a legislative provision is constitutionally invalid or inapplicable, to serve a Notice of Constitutional Question (a NCQ) on the Attorney General of Canada, the Attorney General of Ontario and any other parties.

A NCQ was then sent by the appellant to the Attorney General of Canada, the Attorney General of Ontario and the Ministry. The appellant provided a copy of the NCQ to this office to be forwarded to the complainant.

Because the constitutional issue raised by the appellant was not included in the original Notice of Inquiry, I issued a Supplementary Notice in order to provide the parties with an opportunity to submit representations on the specific constitutional issues raised in the NCQ. A copy of the Supplementary Notice was also provided to the Attorney Generals of Canada and Ontario. Supplementary representations were received from the Ministry and the Attorney General of Ontario jointly and the appellant. The Attorney General of Canada advised this office that it would not be submitting representations in this matter.

These representations were shared among the parties who submitted representations and each party submitted a response. At the appellant's request, a further reply was permitted and the reply representations were again shared among these parties. Each party submitted a further reply.

RECORD:

The record at issue consists of a one-page document entitled "Occurrence Report". The only information at issue on this document is the name of the complainant.

PRELIMINARY MATTER:

ACCESS TO REPRESENTATION OF OTHER PARTIES

The appellant argues that the principles of natural justice and procedural fairness require that he be given an opportunity to respond to the reasons for the denial of access put forward by the Ministry. In effect, he is asking for access to the Ministry's representations to this office. As I indicated above, the appellant and the Ministry have agreed to exchange their representations regarding the Charter issues raised by the appellant and they have, in fact, been exchanged and responded to. S The appellant's arguments in this discussion pertain only to representations concerning the application of the exemptions claimed by the Ministry.

Section 52 of the Act sets out the powers of the Commissioner with respect to conducting inquiries to review decisions of institutions that are appealed to the Commissioner. The statutory authority of the Commissioner includes, among other things, the right to conduct an inquiry in private. Specifically, section 52(13) of the Act reads as follows:

> The person who requested access to the record, the head of the institution concerned and any affected party shall be given an opportunity to make representations to the Commissioner, but no person is entitled to be present during, to have access to or to comment on representations made to the Commissioner by any other person.

The appellant has been provided with a Notice of Inquiry which describes the record, explains the exemptions which have been relied on and the onus requirements under the Act. In my view, the appellant has been provided with sufficient information to enable him to address the substantive issues in this appeal and he has, in fact, made detailed representations on all the issues in this appeal. Accordingly, I find that this is not a case in which the exchange of representations should be ordered.

DISCUSSION:

PERSONAL INFORMATION/INVASION OF PRIVACY

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual (section 2(1)(h)).

The appellant submits that the complainant's name alone is not recorded information "about" an identifiable individual. He argues that, in this case, the information in the record is recorded information about the appellant and thus constitutes his personal information.

The Ministry submits that the complainant's name when associated with the fact that he/she filed a complaint is sufficient to establish that it constitutes his/her personal information. I agree, and find that the record contains the personal information of the complainant under section 2(1)(h) as disclosure of the complainant's name would reveal that this individual made a complaint to the Ministry relating to the contravention of the OWRA.

The Ministry submits further that the references to the owner of the company in the record do not relate to this individual personally but rather, refer to him as the owner/representative of the company in his official capacity. Further, the Ministry points out that the request was made by another representative of the company and indicates that the record does not contain this individual's personal information. While I note that the request does not indicate that the person making it is doing so on behalf of the owner of the company, I accept, in the circumstances, that it was, in fact, made on his behalf. Therefore, I will consider the application of the exemptions to the record in this context in order to determine whether the analysis should be made under sections 21(1) or 49(b) of the Act.

Previous orders of this office have held that information relating to an individual in his or her professional or employment capacity does not, generally, qualify as personal information. In a recent Reconsideration Order (Order R-980015), former Adjudicator Donald Hale reviewed the history of the Commissioner's approach to this issue and the rationale for taking such an approach. He also extensively examined the approaches taken by other jurisdictions and considered the effect of the decision of the Supreme Court of Canada in Dagg v. Canada (Minister of Finance) (1977), 148 D.L.R. (4th) 385 on the approach which this office has taken to the definition of personal information. In applying the principles which he described in that order, Adjudicator Hale came to a number of conclusions, including the following:

> I find that the information associated with the names of the affected persons which is contained in the records at issue relates to them only in their capacities as officials with the organizations which employ them. Their involvement in the issues addressed in the correspondence with the Ministry is not personal to them but, rather, relates to their employment or association with the organizations whose interests they are representing. This information is not personal in nature but may be more appropriately described as being related to the employment or professional responsibilities of each of the individuals who are identified therein. Essentially, the information is not **about** these individuals and, therefore,

> does not qualify as their "personal information" within the meaning of the opening words of the definition.

In my view, this conclusion applies equally to the current situation. I find that the complaint was made against the company, and any references to the owner of the company in the record relate to his association with the company in his business or professional capacity. Therefore, I find that the record does not contain his personal information. Nor does it contain the personal information of the appellant as he is not referred to in the record in any capacity, nor is the information in the record "about" him.

Once it has been determined that a record contains personal information, section 21(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of this appeal is section 21(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

Sections 21(2) and (3) of the Act provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of the personal privacy of the individual to whom the information relates. Section 21(2) provides some criteria for the head to consider in making this determination. Section 21(3) lists the types of information whose disclosure is presumed to constitute an unjustified invasion of personal privacy.

The Ontario Court of Justice (General Division) determined in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767, that the only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made under section 23 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 21 exemption.

Section 21(3) presumptions

The Ministry does not explicitly raise the application of any of the presumptions in section 21(3) in its original representations. The record at issue is identified as an "occurrence report" and according to the investigator, the matter is still under active investigation by the Ministry for a possible violation of section 34 of the OWRA. In its representations in response to the Supplementary Notice of Inquiry, the Ministrytakes the position that section 21(3)(b) applies to the name of the complainant.

The appellant submits that section 21(3)(b) does not apply. In his view, section 21(3)(b) is intended to protect the identity of the person who is being investigated for committing a possible violation of the law, not the identity of the person who makes the complaint. He argues further that such an approach is compatible with the structure of the Act since section 14 (law enforcement) of the Act is already in place and designed to protect other interests in law enforcement matters. In this regard, he submits that to take any other interpretation would render the law enforcement exemptions in section 14, and in particular, section 14(1)(d) (identity of confidential source) redundant.

The extent to which "law enforcement" information should be protected under the Act was discussed in Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report):

> In addition to investigative records relating to individuals who have engaged in criminal activity, or are suspected of having done so, information concerning witnesses, informants, relatives or associates of suspected parties or victims will also be recorded ... The interest of such individuals in obtaining access to law enforcement files is an aspect of the informational privacy problem which will be the subject of discussion in subsequent sections of this report ... As will be seen, however, we feel that the law enforcement exemption to the freedom of information scheme should be parallelled by a similar exemption from the general rule that persons about whom personal information is recorded by government should be afforded an opportunity to see their files.

The Williams Commission Report examined the need to protect the identities of confidential sources in both the criminal and quasi-criminal or regulatory context and observed:

> ... the effect of erring on the side of too much disclosure in law enforcement matters may have very severe consequences for affected individuals. Inadvertent disclosure of the identity of informants, for example, could not only prove embarrassing but may place their lives or safety in peril.

In commenting on whether personal privacy interests in law enforcement matters should be protected under the law enforcement exemption or a more general personal privacy exemption, the Williams Commission Report concluded:

> ... the exemption of sensitive personal information [in the law enforcement context] is a more general problem and, for this reason, a general exempting provision relating to privacy invasion is included ... in our proposals. It is our view, therefore, that it would be redundant to make reference to the privacy protection issue in the context of the law enforcement exemption.

I have taken these comments and observations into consideration in examining this issue.

In Order P-223, former Assistant Commissioner Tom Wright commented on the interpretation of section 21(3)(b):

> I note that this subsection does not specify whether the "investigation into a possible violation of law" must be one which examines the activities of the individuals who are subject to investigation or is more properly referable to those of the individuals interviewed in the course of such investigations. It is my opinion that the subsection may be interpreted in either way.

Consistent with this approach, orders of this office have held that the presumption in section 21(3)(b) is potentially applicable to the personal information of **any** person where it is compiled and is identifiable as part of an investigation into a possible violation of law. In my view, this approach is neither incompatible with the structure of the Act nor would it lead to redundancy. Rather, it reflects the need for two separate exemptions in the "law enforcement field" as identified in the Williams Commission Report.

In this regard, I note that many of the provisions in section 14 require that a number of conditions be met before this section can be applied. In particular, section 14(1)(d) requires that the source of information be "confidential", that is, there must be some evidence that the source provided information to a law enforcement agency in circumstances that would lead a decision-maker to conclude that it was given in a confidential manner. There is no similar requirement under section 21(3)(b). In addition, section 14(1)(d) could apply to anyone who is a source of confidential information, whether a natural person or not, and regardless of an individual's capacity, that is, whether the individual is acting in a professional or official capacity or not. Section 21(3)(b) is only available in cases where the information qualifies as "personal information".

In my view, the approach taken to the interpretation of section 21(3)(b) by this office in past orders recognizes the sensitivity of records which are compiled as part of a law enforcement investigation and the need to protect the privacy interests of individuals involved in such matters. Further, this approach is consistent, generally, with the purposes of the Act which include the protection of the privacy of individuals with respect to personal information about themselves held by institutions.

It is well-established that the Ministry's investigative and compliance functions with respect to Ontario's environmental laws, and in particular, the OWRA, qualify as "law enforcement" activities for the purposes of section 14 of the Act (Order P-306). Therefore, in my view, personal information which is compiled as part of an investigation by Ministry staff into the appellant's company's activities in order to determine whether his company has contravened the provisions of the OWRA falls within the presumption in section 21(3)(b) as this constitutes an "investigation into a possible violation of law". Consequently, I find that the name of the complainant is inextricably tied to this investigation and disclosure of it would be a presumed unjustified invasion of personal privacy.

As I noted above, the Ontario Court of Justice (General Division) determined in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993), 13 O.R. (3d) 767, that the only way in which a section 21(3) presumption can be overcome is if the personal information at issue falls under section 21(4) of the Act or where a finding is made under section 23 of the Act that there is a compelling public interest in disclosure of the information which clearly outweighs the purpose of the section 21 exemption. However, I have decided to consider the factors and considerations under section 21(2) as they are relevant to the final resolution of all of the issues in this appeal. I will consider whether sections 21(4) or 23 apply following this discussion.

Section 21(2) factors and considerations

The Ministry indicates that when the complainant supplied information to it, he/she did not provide consent to disclose his/her identity. The Ministry indicates further that it has historically and consistently kept the names of complainants confidential in order to encourage the public to be the Ministry's "eyes and ears" and to ensure that complainants are not intimidated or harmed in any way. Although the Ministry does not specifically refer to any particular provision of section 21(2), in my view, its representations raise the application of sections 21(2)(f) (highly sensitive) and 21(2)(h) (provided in confidence). Finally, the Ministry submits that it has disclosed the nature of the complaint to the appellant and that disclosing the identity of the complainant would not add anything to the understanding of the issue raised by the complaint. In my view, this is a relevant circumstance in determining whether disclosure of the identity of the complainant would constitute an unjustified invasion of privacy.

The complainant reaffirms that he/she does not consent to the disclosure of his/her identity and has expressed some concern about the motivation of the owner of the company in seeking this information, his tactics, and his influence in the community.

The appellant submits that the release of an individual's name is not normally highly sensitive. Relying on Order P-434, the appellant states that there must be evidence that the release of the information would cause excessive personal distress. He submits further that the complainant could not have an expectation of confidentiality when he or she made the complaint because he or she must have known that the complaint would be recorded and investigated, and that his or her name would be disclosed in a possible prosecution by the Ministry. The appellant also submits that the matter is not on-going and therefore, it is not necessary for the complainant's identity to be kept secret.

The appellant argues that the purposes for disclosing the information in this case are relevant considerations. In particular, the appellant asserts that he must be able to know who has made a complaint against the company to assist him in determining why such a complaint would have been made and because it is a basic principle that a person has a right to know who accuses him or her of a possible contravention of law.

The appellant also submits that section 21(2)(b) (access to the personal information may promote public health and safety) is relevant. In this regard, the appellant argues that release of the identity of the complainant would assist the appellant in informing this person about why the complaint was not valid and to assist the appellant in determining whether the complainant has suffered any harm or to prevent future harm.

The appellant refers to Order 27 in which former Commissioner Sidney B. Linden ordered the disclosure of the name of an individual who made an access request under the Act and argues that the two cases are analogous. I disagree with the appellant. In Order 27, former Commissioner balanced the interests of the appellant with those of the requester in the context of an access request and found that, in the circumstances of that case, the institution did not establish that disclosure would result in an unjustified invasion of privacy.

In the current appeal, the context is very different in that it involves a complaint. While I agree that the interests of the appellant must be balanced against those of the complainant, the basis for concluding that a particular provision of sections 21(2) or (3) is or is not relevant must be determined on the facts as they present themselves in each case.

In considering the representations and the nature of the information which has been withheld from the record, I find that, in the context of a complaint, the identity of a complainant is highly sensitive. I am also convinced that the complainant provided the information to the Ministry with an expectation that his/her identity would be held in confidence. I find that the factors in sections 21(2)(f) and (h) are relevant in the circumstances, and that these factors favour privacy protection. Moreover, I find that these two factors carry significant weight in the final analysis of this issue. I agree with the appellant that, in general, fairness would require that an individual be able to know the identity of his or her accuser if an accusation has resulted in the government taking legal action against that individual, and that this is a relevant consideration favouring disclosure. In my view, it is also relevant that although initiated by a complaint, the actual investigation was conducted by the Ministry and any consequences will ultimately flow from that investigation. Moreover, I note that charges have not, to date, resulted from the Ministry's investigation into this matter. Further, as the Ministry indicates, the appellant has already been apprised of the nature of the complaint and the identity of the complainant has little, if any, relevance to any consequences which flow from the Ministry's investigation into it. Therefore, the weight of the fairness issue is considerably diminished by this other unlisted consideration.

In my view, the appellant has provided no basis to conclude that disclosure of the name of the complainant may promote public health or safety. Rather, the appellant's arguments lead me to conclude that its disclosure may promote his own interests in the matter. Therefore, I find that section 21(2)(b) is not relevant.

In the circumstances of this appeal, I find that the consideration which weighs in favour of disclosure is materially outweighed by the factors and considerations favouring privacy protection. I am particularly persuaded in this case by the fact that the Ministry's own investigation into the matter, rather than any accusation, will be the impetus for any action taken against the appellant's company if, in fact, any is taken. I find that section 21(4) does not apply in the circumstances.

The appellant has raised the possible application of the so-called "public interest override" in section 23 of the Act. Section 23 of the Act reads as follows:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and **21** does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption.

The appellant submits that if a person identified in the record has made a complaint based on inaccurate information, the public interest would be best served if the appellant was given the opportunity to correct that information. He argues that to do so requires that the identity of the complainant be known. In another vein, the appellant argues that if someone was harmed by the company's actions it is in the public interest that such harm be minimized or prevented.

The appellant is of the view that the only reason for the Ministry to protect this information would be to protect information relating to an on-going law enforcement matter or a confidential source. He argues that there is no evidence of any on-going investigation or of a breach of the law. Therefore, it is no longer necessary to protect the identity of the complainant and it is, in fact, in the public interest that this information be disclosed.

I have considered the appellant's representations on this issue. Taking all of the circumstances of this appeal into consideration, I find that any interest the appellant may have in the records is purely a "private" interest as opposed to a "public" interest. Therefore, I find that section 23 does not apply. As a result, I find that the withheld information in the record is properly exempt under section 21(1) of the Act.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

In his NCQ, the appellant states:

> ... the failure of the MOE to disclose the name of the complainant is a violation of his rights under section 7 of the Charter which cannot be justified under section 1 of the Charter. The appellant is entitled to "know his accuser", and there are no reasons why the complainant should be permitted to hide behind a mask of secrecy in the present case, when the complainant never had an expectation of privacy or confidentiality when he or she made the complaint, and he or she is not a confidential information who the MOE has relied on to enforce the law.

As the legal basis for the constitutional question, the appellant states:

> The appellant's section 7 Charter rights would be violated if section 21(1)(f) or section 49(b) of the Act were interpreted to apply in this case to prevent the release of the complainant's name.

Section 7 of the Charter reads:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

As I noted above, in providing representations on this issue, the Ministry and the Attorney General for the province of Ontario have responded jointly. For ease of reference, I will refer to their joint representations as those of the Ministry.

General arguments on the application of the Charter

The appellant states that the Commissioner is required to interpret and apply sections 21(1)(f) and 49(b) of the Act in a manner consistent with the appellant's section 7 Charter rights. The Ministry agrees, but submits that the refusal to disclose the name of the complainant to the appellant under the Act does not infringe any rights under section 7 of the Charter.

I accept that I am required to interpret and apply sections 21(1)(f) and 49(b) of the Act in a manner consistent with the Charter. I have found above that section 21(1)(f) applies to the information at issue in this appeal. I must now determine whether the application of section 21(1)(f) to this information infringes the appellant's section 7 rights under the Charter. Both parties have made extensive representations on this issue. I intend only to highlight them in this discussion.

The appellant submits that the request for access to information is analogous to a request for disclosure of Crown evidence in a prosecution. In that context, the Charter requires disclosure of much of the evidence in the possession of the Crown. The appellant refers to recent high level court decisions which confirm the growing trend in the courts to extend the application of section 7 of the Charter beyond the criminal law context (see, for example: Blencoe v. British Columbia (Human Rights Commission), (1998) 160 D.L.R. (4th) 303 (B.C.C.A.), leave to appeal ganted [1998] S.C.C.A. No. 366, and B.(R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315).

Referring to the, at time, conflicting caselaw, the appellant states:

> It is clear that this is an evolving area of law. In our submission, the weight of authority supports a conclusion that section 7 protects rights to fundamental justice outside the criminal law context, and should be interpreted broadly. An essential element of fundamental justice at all levels is that a person should know the name of his accuser.

The appellant states that, in this case, the complainant's name arises in the context of an accusation that his company committed an offence. The appellant submits that the Ministry could commence legal action against his company "using the complainant's evidence". In this regard, the appellant submits that the principles underlying section 7 of the Charter require the government to disclose all information to a person accused of a violation of law whether or not the person has been charged with an offence. The appellant refers to R. v. Stinchcombe, [1991] 3 S.C.R. 326 and Blencoe, *supra*, in support of this position. The appellant submits that failure to disclose the complainant's name is a breach of section 7 of the Charter.

In responding to this argument generally, the Ministry claims that a request for information under the Act is not analogous to a request for disclosure of Crown evidence in a prosecution. The Ministry points out that the appellant has not been charged with an offence and submits that there is no judicial authority for the

proposition that section 7 is triggered where allegations are made in the absence of charges. The Ministry submits that a hypothetical future risk of a deprivation does not violate "life, liberty or the security of the person" (see: Bennett v. British Columbia (Securities Commission) (1992), 94 D.L.R. (4th) 339 (B.C.C.A.) at 355, leave to appeal refused (1992), 97 D.L.R. (4th) vii (S.C.C.).

Moreover, the Ministry submits that none of the authorities relied on by the appellant support a finding that section 7 is relevant to a proceeding before the Commissioner. In particular, the Ministry notes that Stinchcombe involved disclosure of Crown information to accused persons in the midst of a criminal proceeding and asserts that this case is clearly distinguishable from the current situation.

The Ministry submits that the rights guaranteed by section 7 of the Charter only arise where there is a threat of physical restraint or imprisonment or where the physical or mental integrity of an individual is at stake. Referring to Order P-743, the Ministry asserts that a request under the Act does not engage any "life, liberty or security of the person" issues.

In Order P-743, former Adjudicator Donald Hale stated:

> ... although the principles regarding the Crown's disclosure obligation discussed in the cases referred to by the appellant may be relevant in the context of other proceedings in which the appellant may be involved, in my view, they have no application in the context of proceedings under the Act.

The appellant argues that Order P-743 is distinguishable from the present case for several reasons: it dealt with certain procedural requirements; and it appeared that the appellant in that case had other avenues available to him to address the allegations against him. In this case, the appellant asserts that there are no other avenues available to him to "obtain the information necessary to defend his liberty and security interests".

Particulars

The appellant submits that there are two bases for a finding that refusal to disclose the name of the complainant breaches his section 7 Charter rights.

Adequate Disclosure of Information

First, he argues that he has not been provided with "adequate disclosure of information about himself in the government's possession to enable him to refute the accusations that he violated the OWRA". The result of this, in his view, is embarrassment in the community and harm to his reputation. The appellant states that the courts have recognized that section 7 applies where an individual is subjected to stigma and general prejudice as a result of allegations of wrong-doing (Saskatchewan (Human Rights Commission) v. Kodellas (1989), 60 D.L.R. (4th) 143 (Sask. C.A.) and Blencoe, *supra*).

The Ministry asserts that both of these cases are distinguishable from the present case as they dealt with actual formal complaints of sexual harassment against individuals to a tribunal which by their nature caused a high degree of stigma and prejudice. In the current situation, the Ministry points out that there are no proceedings against the appellant, and submits that there is no basis for a finding that the appellant has suffered any stigma.

Moreover, the Ministry submits that any "embarrassment" or "harm to his reputation" stem from the allegations themselves, which have been disclosed to the appellant, rather than from the name of the complainant.

Right to Know Accuser

With respect to the second basis, the appellant argues that he has "a right to know his accuser", so that he can "educate the complainant about why he is innocent" or understand what caused the complainant to make the complaint. Referring to Stinchcombe, *supra*, the appellant states that:

> The Supreme Court of Canada held that there was a general rule in favour of disclosure of the names of witnesses and there was no reason why such disclosure should not be made about a person who had provided information to the Crown in respect of alleged violation of law. The only grounds to justify the non-disclosure of the name of a witness would be in cases of informer privilege or where there were possible threats of harassment to the informant.

The appellant submits that this case is analogous to Stinchcombe and, therefore, failure to disclose the complainant's name violates his section 7 Charter rights.

With respect to the appellant's second point, the Ministry submits that there is no free-standing right to "know the name of one's accuser" R. v. Douglas (1991), 5 O.R. (3d) 29 (C.A.), affirmed [1993] 1 S.C.R. 893 and R. v. O'Connor, [1995] 4 S.C.R. 411). Rather, disclosure of Crown information flows from the right to make full answer and defence in criminal proceedings R. v. Gillis (1994), 5 M.V.R. (3d) 217 (Alta. C.A.) and Stinchcombe).

The appellant points out, however, that his position is not premised upon a general and overriding right to know one's accuser. Rather, in the circumstances of this particular case, the appellant will have no satisfactory means of addressing the injury to his dignity and integrity caused by the allegations without knowing the identity of the complainant.

Finally, the Ministry submits that, even if charges were ultimately laid against the appellant, the Supreme Court of Canada has recognized both informer privilege and privilege regarding information needed to protect an on-going investigation as a basis for non-disclosure and that this privilege is consistent with fundamental justice under the Charter R. v. Leipert (1997), 143 D.L.R. (4th) 38 (S.C.C.)).

The Ministry notes that informer privilege can arise in both the criminal and non-criminal contexts (see: Canada (Solicitor General) v. Ontario (Royal Commission of Inquiry into the Confidentiality of Health Records), [1981] 2 S.C.R. 494 and Promex Group Inc. v. R. (1998), 98 D.T.C. 1588).

The appellant submits that the principle of "informer privilege" is not relevant in the context of this case as: this is not a criminal investigation; and the communication does not meet the Wigmore criteria for confidentiality (see: R. v. Leipert and Reference Re Legislative Privilege (1978), 83 D.L.R. (3d) 161 (Ont. C.A.)). In this regard, the appellant submits that the complainant made a voluntary complaint to a public authority and could not be given assurances, or have any expectation, of confidentiality.

Findings

After considering the representations and the authorities cited by both parties, I do not accept the appellant's position that his section 7 Charter rights are infringed as a result of non-disclosure under the Act.

In my view, the "right to disclosure" flows from the right to make full answer and defence in criminal, quasi-criminal, and arguably in regulatory proceedings, and only within the confines of those proceedings. I agree with the observations of former Adjudicator Hale in Order P-743. In my view, there are no proceedings against the appellant under this Act, or any other Act which would trigger any disclosure obligations in a manner similar to those cited by the appellant.

Moreover, in my view, the principles of "informant privilege" are relevant in situations where an individual makes a complaint under the OWRA. In this regard, I find that the importance of protecting the identity of an informant or complainant is related to protecting the privacy interests of the particular informer/complainant and to encouraging a general practice of public participation in the enforcement of environmental laws through a policy of confidentiality. Referring back to my discussion of the Williams Commission Report, it is apparent that this type of information was considered by the Commission as an example of information which should be subject to protection under Freedom of Information legislation.

Further, the courts have recognized that the identity of informants in criminal and quasi-criminal proceedings is privileged. The common law does recognize certain exceptions to 'informant privilege", for example:

- under the "innocence at stake" rule (D. v. National Society for Prevention of Cruelty to Children, [1978] A.C. 171 (H.L.); Bisaillon v. Keable (1984), 7 C.C.C. (3d) 385 (S.C.C.); R. v. Hunter (1988), 34 C.C.C. (3d) 14 (C.A.);

- where the informer is a material witness R. v. Scott (1991), 116 N.R. 361 (S.C.C.); or

- where an informer has acted as an "agent provocateur" R. v. Scott, *supra*).

However, the courts have stated that these limited rights to know the identity of informants do not extend beyond the right of a person prosecuted for an offence to obtain the information when necessary to make

full answer and defence to the charges R. v. Stinchcombe, *supra*; R. v. Egger (J.H.) (1993), 153 N.R. 272 (S.C.C.) and R. v. Scott, *supra)*. The importance of informant privilege was noted by the Supreme Court of Canada in R. v. Leipert, *supra*. In this decision, the Supreme Court found that the Charter rights of an accused outweigh informant privilege only where the identity of the informer is necessary to demonstrate the innocence of the accused. Other than this situation, "informer privilege is of such importance that it cannot be balanced against other interests" (p.45). Moreover, the Supreme Court also found that informer privilege is consistent with fundamental justice under the Charter (p.49).

Accordingly, I find that the appellant's section 7 Charter rights have not been infringed by non-disclosure of the complainant's name and this information is exempt under section 21(1) of the Act.

ORDER:

I uphold the Ministry's decision.

Original signed by: August 24, 1999
Laurel Cropley
Adjudicator