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

INTERIM ORDER MO-1435-I

Appeal MA_000004_1

The Nottawasaga Valley Conservation Authority

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NATURE OF THE APPEAL:

The Nottawasaga Valley Conservation Authority (the NVCA) received a request from counsel for a named ski resort as represented by a named individual (the representative) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

> copies of all correspondence and documents regarding [five named individuals] for [a named] Secondary Plan and [the named ski resort] for the period January, 1997 to the present date of November 1, 1999.

The NVCA identified a number of responsive records. Before making its decision respecting access to the responsive information, the NVCA contacted the five named individuals (the affected persons) to canvass whether these individuals would consent to the disclosure of their information. All of the individuals objected to the disclosure of any information in the custody or under the control of the NVCA which might refer to them.

After considering the affected persons' responses, the NVCA decided to grant access, in part, to the responsive records. The NVCA denied access to the remaining records which it had identified as being responsive under sections 8(1)(a) and (b) (law enforcement) and 14(1) (invasion of privacy) of the *Act*. In citing section 14(1), the NVCA considered the factor under section 14(2)(h) (information supplied in confidence) of the *Act*. Although not referred to in its decision, the NVCA has indicated on its index of records which was provided to this office, that it also relies on the presumption under section 14(3)(b) (information compiled as part of investigation into a possible violation of law) as a basis for withholding the records under section 14(1).

The NVCA also cited the mandatory personal information exemption under section 14(5) of the *Act* to refuse to confirm or deny whether other responsive records exist.

The ski resort and its representative (collectively, the appellant) appealed the NVCA's decision.

The appellant takes the position that the institution should not, on the one hand, be able to claim that the information provided would constitute an invasion of privacy, while on the other hand, utilize it to affect its economic interests. In my view, the appellant has raised the possible application of the factor in section 14(2)(d) (fair determination of rights) and an unlisted factor concerning the issue of "fairness", both of which, if applicable, would weigh in favour of the disclosure of the personal information in the records.

In its index, the NVCA indicated that the following two records are not responsive to the request:

- Letter from Ministry of Municipal Affairs and Housing to Township of Springwater (the Township) December 15, 1998; and

- Letter from County of Simcoe to the Township December 16, 1998.

During mediation, the appellant indicated that it is not interested in pursuing the issue of whether these records are responsive to the request. Accordingly, these two records are not at issue in this appeal.

I sent a Notice of Inquiry setting out the facts and issues in the appeal, initially, to the NVCA and to the five individuals referred to in the appellant's request. I received representations from the NVCA and two affected persons jointly (who I will refer to as the primary affected person). The Notice of Inquiry that was sent to one affected person was returned to this office as undeliverable. One other affected person contacted this office and indicated that there was nothing further to say beyond what was said to the NVCA following its initial notification.

I subsequently sought the appellant's representations on the issues in this appeal. In doing so, I did not provide it with the submissions that I had received, but rather, prepared a summary of them so that the appellant was able to understand the basis for the positions taken. The appellant was asked to review these summaries and to refer to them, where appropriate, in responding to the issues in the Notice of inquiry. The appellant submitted representations in response.

After reviewing the appellant's representations I decided to seek reply representations from the NVCA and the primary affected person. I provided these parties with the submissions made by the appellant and asked them to respond to its comments. Only the primary affected person responded.

RECORDS:

The NVCA did not number the records, but rather identified them by context and date. For ease of reference, I have listed the records identified by the NVCA below and have assigned a record number to each one as follows:

Permit File

Record 1 - Letter from the Ministry of Environment (the MOE) to the primary affected person dated November 9, 1999 with attachments from one and/or both of the primary affected person
[exempted under sections 8(1)(a) & (b) and 14(3)(b)]

Record 2 - Letter from the primary affected person to the Township dated October 8, 1999
[exempted under sections 8(1)(a) & (b)]

Record 3 - Letter from Sierra Legal Defence Fund to NVCA dated September 30, 1999
[exempted under sections 8(1)(a) & (b) and 14(3)(b)]

Record 4 - Letter from MOE to the primary affected person dated May 12, 1999
[exempted under sections 8(1)(a) & (b) and 14(3)(b)]

Record 5 - Letter to NVCA from the primary affected person dated July 9, 1999
[exempted under sections 14(2)(h)]

Record 6 - Letter from the primary affected person to NVCA dated July 7, 1999
[exempted under sections 8(1)(a)&(b), 14(1)(a)&(b), 14(3)(b), 14(2)(h)]

Record 7 - Letter from the primary affected person to a Township councillor (as Chair of the NVCA) dated June 9, 1999
[exempted under sections 14(3)(b) and 14(2)(h)]

Record 8 - Duplicate of Record 7
[exempted under sections 14(3)(b) and 14(2)(h)]

Record 9 - NVCA Staff notes dated June 25, 1999

[exempted under sections 8(1)(a) & (b) and 14(3)(b), 14(2)(h)]
Record 10 - Letter from Consulting Engineers to NVCA dated November 4, 1998
[exempted under sections 8(1)(a) & (b) and 14(3)(b)]
Record 11 - Letter from Township to NVCA dated October 9, 1998
[exempted under sections 8(1)(a) & (b) and 14(3)(b)]

Secondary Plan File

Record 12 - Memo from the MOE to Planner Southwest Region re: the Township dated November 17, 1998
[exempted under sections 8(1)(a) and (b) of the Act]

DISCUSSION:

REFUSAL TO CONFIRM OR DENY THE EXISTENCE OF RECORDS AND THE PERSONAL INFORMATION EXEMPTION

Introduction

The NVCA relies on section 14(5) of the *Act* as the basis for its decision to refuse to confirm or deny whether additional responsive records exist. This section reads:

> A head may refuse to confirm or deny the existence of a record if disclosure
> of the record would constitute an unjustified invasion of personal privacy.

A requester in a section 14(5) situation is in a very different position from other requesters who have been denied access under the *Act*. By invoking section 14(5), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power which should be exercised only in rare cases [Order P_339].

An institution relying on this section must do more than merely indicate that the disclosure of the record would constitute an unjustified invasion of personal privacy. An institution must provide sufficient evidence to demonstrate that disclosure of the mere existence of the requested record would convey information to the requester, and that the disclosure of this information would constitute an unjustified invasion of personal privacy [Orders P_339; P_808, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 1669, leave to appeal refused [1996] O.J. No. 3114 (C.A.)]

Before the NVCA may be permitted to exercise its discretion to invoke section 14(5), it must provide sufficient evidence to establish that:

1. Disclosure of the record (if it exists) would constitute an unjustified invasion of personal privacy; and

2. Disclosure of the fact that the record exists (or does not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy [Order MO_1179].

Findings regarding the application of section 14(5)

I find that, because of the on-going disputes and communications between the primary affected person and the appellant relating to matters connected with the subject matter of the records at issue in this appeal, the disclosure of the fact that the primary affected person has communicated with the NVCA would not constitute an unjustified invasion of privacy.

Further, one other affected person referred to by the appellant in his request is a Township Councillor and Chair/Vice-Chair (the Chair) of the NVCA. Any responsive records in this appeal that refer to him do so in either of these two official capacities. Accordingly, the records do not contain his personal information and section 14(5) cannot apply to them.

On this basis, I will confirm that an additional 22 records exist that refer to either one or both of the primary affected person and/or the Chair. The following list contains a brief description of each of these records. I have assigned a record letter to each one in order to distinguish these records from the records which were identified by the NVCA as being responsive to the request.

Permit File

Record A - facsimile cover from the primary affected person to the Chair dated October 24, 1999 with letter from the primary affected person attached
[exempted under sections 8(1)(a)&(b), 14(2)(h), 14(3)(b) and 14(5)]

Record B - facsimile from primary affected person to NVCA dated October 22, 1999
[exempted under section 14(5)]

Record C - facsimile from primary affected person to NVCA dated October 20, 1999 with attachments
[exempted under sections 8(1)(a)&(b), 14(2)(h), 14(3)(b) and 14(5)]

Record D - letter from primary affected person to NVCA dated September 22, 1999
[exempted under sections 8(1)(a)&(b), 14(1)(a), 14(2)(h), 14(3)(b) and 14(5)]

Record E - letter from primary affected person to NVCA dated September 1, 1999
[exempted under section 14(5)]

Record F - facsimile from primary affected person to NVCA dated September 8, 1999 with letter to MOE dated September 8, 1999 attached
[exempted under sections 8(1)(a)&(b), 14(2)(h), 14(3)(b) and 14(5)]

Record G - facsimile from primary affected person to NVCA dated August 31, 1999 with copy of MOE letter dated August 30, 1999 attached
[exempted under sections 14(2)(h) and 14(5)]

Record H - letter from primary affected person to NVCA dated July 7, 1999
[exempted under sections 14(2)(h) and 14(5)]

Record I - facsimile cover from primary affected person to NVCA dated June 29, 1999 with letter attached

[exempted under sections 8(1)(a)&(b), 14(2)(h), 14(3)(b) and 14(5)]

Record J - letter from primary affected person to NVCA dated May 30, 1999 with copy of letter Township attached
[exempted under sections 8(1)(a)&(b), 14(2)(h), 14(3)(b) and 14(5)]

Record K - letter to primary affected person from MOE dated May 12, 1999
[exempted under sections 8(1)(a)&(b), 14920(h), 14(3)(b) and 14(5)]

Record L - facsimile from primary affected person to NVCA dated April 13, 1999 with copy of MOE letter attached
[exempted under sections 8(1)(a)&(b), 14(2)(h), 14(3)(b) and 14(5)]

Record M - facsimile from primary affected person to NVCA dated March 25, 1999 with attachments
[exempted under sections 8(1)(a)&(b), 14(2)(h), 14(3)(b) and 14(5)]

Record N - facsimile from primary affected person to NVCA dated February 21, 1999 with "official complaint" attached
[exempted under sections 8(1)(a)&(b), 1492)(h), 14(3)(b) and 14(5)]

Record O - facsimile from primary affected person to NVCA dated February 22, 1999 with attachments
[exempted under sections 8(1)(a)&(b), 14(2)(h), 14(3)(b) and 14(5)]

Record P - letter from primary affected person to MOE dated January 21, 1999
[exempted under sections 8(1)(a)&(b), 14(2)(h), 14(3)(b) and 14(5)]

Record Q - letter from primary affected person to MOE dated December 16, 1998
[exempted under sections 8(1)(a)&(b), 14(2)(h), 14(3)(b) and 14(5)]

Record R - letter from primary affected person to NVCA dated December 30, 1998
[exempted under sections 8(1)(a)&(b), 14(2)(h), 14(3)(b) and 14(5)]

Record S - letter from primary affected person to NVCA dated November 6, 1998
[exempted under sections 8(1)(a)&(b), 14(2)(h), 14(3)(b) and 14(5)]

Secondary Plan File

Record T - cover memorandum from primary affected person to Clerk of Township dated December 17, 1998
[exempted under sections 8(1)(a)&(b), 14(2)(h), 14(3)(b) and 14(5)]

Record U - submission from primary affected person to the named Secondary Plan public meeting dated December 17, 1998
[exempted under sections 8(1)(a)&(b), 14(2)(h), 14(3)(b) and 14(5)]

Record V - letter from primary affected person to MOE dated December 16, 1998 (which was also attached to Record B above)
[exempted under sections 8(1)(a)&(b), 14(2)(h), 14(3)(b) and 14(5)]

I uphold the NVCA's decision to refuse to confirm or deny the existence of records relating to the remaining two affected persons.

I have set out the bases for these findings below. In order to avoid duplication, the following discussion will cover both records that do exist and records which may or may not exist.

Part one: disclosure of the records (if they exist)

Definition of Personal Information

Under part one of the section 14(5) test, the NVCA must demonstrate that disclosure of the records, if they exist, would constitute an unjustified invasion of personal privacy. An unjustified invasion of personal privacy can only result from the disclosure of personal information. Under section 2(1), "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the individual's name where it appears with other personal information relating to the individual or where disclosure of the name would reveal other personal information about the individual [paragraph (h)].

The NVCA states that any personal information in the records at issue or any other records which may or may not exist may be related to an ongoing investigation into a possible violation of the law under the *Conservation Authorities Act* (the *CAA*). The NVCA indicates that to identify that records exist would reveal the fact that one or more of the affected persons, as identified by the appellant, has provided records to it in this regard, whether or not they actually did.

The appellant indicates that charges were laid against it in June 1999 for alleged violations of the *CAA* committed in February 1999 (with an August 1999 date set for the hearing). It states that it believes that the charges were based, to a large extent, on the information which has been withheld from it.

I am satisfied that the records which the appellant is seeking may relate to investigations conducted by the NVCA under the *CAA*. Previous orders of this office have found in various situations that disclosure of a complainant's name would reveal that this individual made a complaint and this qualifies as personal information [See, for example: Order PO-1706, upheld on judicial review (March 5, 2001), Toronto Doc. 666/99 (Ont. Div. Ct.)]. In the current appeal, the appellant has identified a number of individuals by name and is seeking to determine whether or not they have communicated with the NVCA in, what is apparently, a comparable situation. In either case, what is being sought is information linking a particular individual to a complaint, and that is the personal information of the individual.

A number of the records which the NVCA has identified as being responsive to the request and for which it has not claimed section 14(5) pertain to the primary affected person. These records relate to the primary affected person's concerns and involvement in matters arising from the activities of the appellant. As such, I find that these records contain the personal information of the primary affected person. Any other information, if it exists (and I have identified above that it does), would be similar in nature and thus constitute information "about" these two individuals. Such records, if they exist, would also fall within the definition of personal information.

The request refers to other individuals specifically identified by the appellant. I am satisfied that any responsive records would also be of a similar nature, and would reveal information about these individuals, that is, information that they may have communicated with the NVCA in regards to matters under investigation. On this basis, I find that any additional responsive records, if they exist, would constitute the personal information of two of the remaining affected persons.

The request was made on behalf of a corporation. Some of the records refer to the representative in his professional capacity with the corporation. Previous decisions of this office have drawn a distinction between an individual's personal, and professional or official capacity, and found that in some circumstances, information associated with a person in his or her professional or official capacity will not be considered to be "about the individual" within the meaning of the section 2(1) definition of "personal information" (See Orders P_257, P_427, P_1412 and P_1621). For example, information associated with the names of individuals contained in records relating to them only in their capacities as officials with the organizations which employ them, is not personal in nature but is more appropriately described as being related to the employment or professional responsibilities of the individuals (See Order R-980015). Previous orders have also recognized that even though information may pertain to an individual in that person's professional capacity, where that information relates to an investigation into or assessment of the performance or improper conduct of an individual, the characterization of the information changes and becomes personal information (Orders 165, P-447 and M-122).

The appellant attached a number of Summons under section 24 of the *Provincial Offences Act* (the *POA*) to its representations, one of which is addressed to the representative indicating that he has been charged with an offence under the *CAA*. Although the records which the NVCA has identified appear to relate to this individual in his employment or professional capacity, the investigation and resultant charges impact on him personally as they relate to alleged improper conduct. In these circumstances, I find that these records, and any other records that might exist, also contain/would contain his personal information.

One of the affected persons named by the appellant is identified and referred to in the records in his official capacity as Chair/Vice-Chair of the NVCA or as a Township Councillor. Similar to previous decisions of this office (referred to above), I find that any information in the records associated with this affected person in his official capacity as either Chair or Township Councillor is not "about the individual" within the meaning of the section 2(1) definition of personal information. As such, sections 14(1) and 38(b) cannot apply to it vis-a-vis this individual.

In summary, I find that the records identified by the NVCA and in this order contain the personal information of the appellant and the primary affected person. Further, if any other records exist, they would also contain the appellant's personal information as well as that of two of the remaining affected persons identified by the appellant in his request. The records do not contain the personal information of the Chair.

Unjustified invasion of personal privacy

I must now determine whether disclosure of such records would constitute an unjustified invasion of privacy of the four remaining affected persons. Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(b) of the *Act*, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the

information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information.

Sections 14(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 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy.

In *John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767, the Divisional Court found that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of factors set out in section 14(2).

A section 14(3) presumption can be overcome if the personal information at issue falls under section 14(4) of the Act or if a finding is made under section 16 of the Act that a compelling public interest exists in the disclosure of the record in which the personal information is contained which clearly outweighs the purpose of the section 14 exemption [Order PO_1764].

In this case, the NVCA has cited sections 14(2)(h) and 14(3)(b) as the basis for withholding the records it has identified as well as for refusing to confirm or deny the existence of other records. As I indicated above, the appellant has raised the possible application of the factor in section 14(2)(d) and an unlisted factor concerning the issue of "fairness", both of which weigh in favour of the disclosure of the personal information in the records. Sections 14(2)(d), (h) and 14(3)(b) read:

> (2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,
>
> > (d) the personal information is relevant to a fair determination of rights affecting the person who made the request;
> >
> > (h) the personal information has been supplied by the individual to whom the information relates in confidence;
>
> (3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> > (b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The NVCA submits that the exemption in section 14 applies to the information which it has identified as being responsive, as well as to any other records which may or may not exist. The

NVCA notes that it contacted all of the affected persons and each one indicated that he or she did not wish any information about them released to the appellant, whether or not it actually exists.

As I indicated above, a number of the records which the NVCA has identified as being responsive to the request and for which it has not claimed section 14(5) pertain to the primary affected person. The primary affected person objects to the disclosure of any information which they provided to the NVCA. In so objecting, the primary affected person outlines their dealings with the appellant and issues relating to the *CAA*. The primary affected person's representations support those of the NVCA with respect to the application of sections 14(2)(h) and 14(3)(b).

Relationship between the primary affected person and the appellant and their respective positions

Before relating the respective positions of these two parties it is useful to describe the relationship between the primary affected person and the appellant (as outlined by the primary affected person) in order to better understand their positions and my findings in this order.

According to the primary affected person:

> Initially in May of 1998 a road was constructed across from our home that was constructed in wetland without any advance permits whatsoever. At that time we contacted the proponent (the current appellant), the NVCA, Township of Springwater, County of Simcoe, and the MOE to complain. Initially we were informed by all of the above that no breach of any laws had occurred and there was nothing they could do to help us.
>
> We hired a planner and did extensive research on our own regarding the legal aspects of this road. We ultimately filed formal complaints to the MOE, NVCA, Township of Springwater, MNR, Environmental Commissioner of Ontario, and the County of Simcoe.
>
> The following assertions were made in our complaints:
>
> 1. There had been a breach of the Conservation Authorities Act through construction of this road in a fill-regulated area without advance permits.
> 2. There had been a breach of the Conservation Authorities Act by permit condition violations;
> 3. There had been a breach of the Ontario Water Resources Act Section 30.
> 4. There had been a breach of the Environmental Protection Act Section 14, and Regulation 358.
> 5. There had been a breach of the Springwater Zoning By-law 83-15 section 4.22.13.
>
> In the course of investigation by the appropriate Ministries and Agencies all of the above were confirmed but not all were prosecuted.

> **At various times through this process we offered to meet with the proponent (appellant) to resolve these matters and the response was to decline our offer and threaten to sue us for opposing him.** The appellant left us with no choice but to embark on a series of complaints to the various Agencies.
>
> ...
>
> We are still open to the possibility of a meeting with the appellant to discuss our complaints and concerns on this matter and exchange correspondence. Dialogue and statutory compliance would have been a much more fruitful avenue for the appellant had he accepted our earlier offers to facilitate same. [my emphasis]

The primary affected person asserts that citizens have a right to correspond to regulating agencies for suspected breaches of law without fear of reprisal and that to disclose this type of correspondence would constitute a "gross and unnecessary" invasion of privacy and would act as a deterrent in performing the "civic duty to report suspected violation of law".

The appellant explains that it requires the requested information in order to deal with outstanding issues pertaining to the operation of its ski hills. The appellant believes that the withheld information led to charges under the *CAA* which then resulted in the NVCA revoking a permit for a water storage tank which ultimately caused a loss of revenue.

The appellant believes that the withheld information will continue to impact on its economic interests. The appellant states further that various complaints made to the NVCA have had a "severe monetary effect" on the development of its secondary plan because:

> of the NVCA's demands that [the appellant] hire experts, in a reverse onus type of situation, to prove that [the appellant] is not doing anything improper instead of the NVCA showing what it is that [the appellant] is doing that might be improper in the development of its secondary plan.

Findings

Section 14(3)(b) - investigation into a possible violation of law

The NVCA indicates that the records which it has identified as being at issue in this appeal were created as a result of an on-going investigation into violations under the *CAA*. The NVCA continues by stating that any personal information in the records at issue or any other records which may or may not exist would also be related to this investigation. Therefore, the NVCA submits that its disclosure would constitute a presumed unjustified invasion of personal privacy under section 14(3)(b) of the *Act*.

With respect to section 14(3)(b), the appellant states that since charges have already been laid under the *CAA*, there is no longer an "on-going" investigation into a possible violation of law. The appellant notes that previous orders have found that the presumption in section 14(3)(b) does not apply to records generated upon completion of an investigation, including records relating to

the prosecution of an individual as opposed to an investigation into a possible violation of law (Orders M-158 and M-734).

Conservation Authorities Act

The NVCA is established under section 3(1) of the *CAA*. The "Objects" of "conservation authorities" established under the *CAA* are set out in section 20(1):

> The objects of an authority are to establish and undertake, in the area over which it has jurisdiction, a program designed to further the conservation, restoration, development and management of natural resources other than gas, oil, coal and minerals.

The "Powers of authorities" are set out in section 21(1):

> (1) For the purposes of accomplishing its objects, an authority has power,
>
> (a) to study and investigate the watershed and to determine a program whereby the natural resources of the watershed may be conserved, restored, developed and managed;
>
> (b) for any purpose necessary to any project under consideration or undertaken by the authority, to enter into and upon any land and survey and take levels of it and make such borings or sink such trial pits as the authority considers necessary;
>
> (c) to acquire by purchase, lease or otherwise and to expropriate any land that it may require, and, subject to subsection (2), to sell, lease or otherwise dispose of land so acquired;
>
> (d) despite subsection (2), to lease for a term of five years or less land acquired by the authority;
>
> (e) to purchase or acquire any personal property that it may require and sell or otherwise deal therewith;
>
> (f) to enter into agreements for the purchase of materials, employment of labour and other purposes as may be necessary for the due carrying out of any project;
>
> (g) to enter into agreements with owners of private lands to facilitate the due carrying out of any project;
>
> (h) to determine the proportion of the total benefit afforded to all the participating municipalities that is afforded to each of them;

(i) to erect works and structures and create reservoirs by the construction of dams or otherwise;

(j) to control the flow of surface waters in order to prevent floods or pollution or to reduce the adverse effects thereof;

(k) to alter the course of any river, canal, brook, stream or watercourse, and divert or alter, as well temporarily as permanently, the course of any river, stream, road, street or way, or raise or sink its level in order to carry it over or under, on the level of or by the side of any work built or to be built by the authority, and to divert or alter the position of any water_pipe, gas_pipe, sewer, drain or any telegraph, telephone or electric wire or pole;

(l) to use lands that are owned or controlled by the authority for purposes, not inconsistent with its objects, as it considers proper;

(m) to use lands owned or controlled by the authority for park or other recreational purposes, and to erect, or permit to be erected, buildings, booths and facilities for such purposes and to make charges for admission thereto and the use thereof;

(m.1) to charge fees for services approved by the Minister;

(n) to collaborate and enter into agreements with ministries and agencies of government, municipal councils and local boards and other organizations;

(o) to plant and produce trees on Crown lands with the consent of the Minister, and on other lands with the consent of the owner, for any purpose;

(p) to cause research to be done;

(q) generally to do all such acts as are necessary for the due carrying out of any project.

Subject to the approval of the Minister of Natural Resources, a conservation authority may make regulations applicable in the area under its jurisdiction under section 28(1) of the *CAA* for:

(a) restricting and regulating the use of water in or from rivers, streams, inland lakes, ponds, wetlands and natural or artificially constructed depressions in rivers or streams;

(b) prohibiting, regulating or requiring the permission of the authority for straightening, changing, diverting or interfering in any way with the existing channel of a river, creek, stream or watercourse, or for changing or interfering in any way with a wetland;

> (c) prohibiting, regulating or requiring the permission of the authority for development if, in the opinion of the authority, the control of flooding, erosion, dynamic beaches or pollution or the conservation of land may be affected by the development;
>
> (d) providing for the appointment of officers to enforce any regulation made under this section or section 29;
>
> (e) providing for the appointment of persons to act as officers with all of the powers and duties of officers to enforce any regulation made under this section.

Pursuant to section 28(16):

> Every person who contravenes a regulation made under subsection (1) is guilty of an offence and on conviction is liable to a fine of not more than $10,000 or to a term of imprisonment of not more than three months.

Regulation 164 enacted pursuant to the *CAA* regulates and establishes the requirements for the fill, construction and alteration of waterways within the jurisdiction of the NVCA. The relevant provisions in the circumstances of this appeal provide:

> 3. Subject to section 4, no person shall,
>
> > (a) construct any building or structure or permit any building or structure to be constructed in or on a pond or swamp or in any area susceptible to flooding during a regional storm;
> >
> > (b) place or dump fill or permit fill to be placed or dumped in the areas described in the Schedules whether such fill is already located in or upon such area, or brought to or on such area from some other place or places; or
> >
> > (c) straighten, change, divert or interfere in any way with the existing channel of a river, creek, stream or watercourse.
>
> 4. Subject to the Ontario Water Resources Act or to any private interest, the Authority may permit in writing the construction of any building or structure or the placing or dumping of fill or the straightening, changing, diverting or interfering with the existing channel of a river, creek, stream or watercourse to which section 3 applies if, in the opinion of the Authority, the site of the building or structure or the placing or dumping and the method of construction or placing or dumping or the straightening, changing, diverting or interfering with the existing channel will not affect the control of flooding or pollution or the conservation of the land.

> 5. No person shall commence to construct any building or structure or dump or place fill or straighten, change, divert or interfere with the existing channel of a river, creek, stream or watercourse in any area to which section 3 applies before permission to do so has been obtained under section 4.
>
> 7. The Authority may, at any time, withdraw any permission given under this Regulation, if, in the opinion of the Authority, the conditions of the permit are not complied with.
>
> 8. The Authority may, from time to time, appoint officers to enforce this Regulation.

It is apparent from the *CAA* and Regulation 164, that the purpose of establishing conservation authorities covers a broad range of activities, many of which would not be immediately associated with law enforcement. Within its regulatory mandate, much of the NVCA's role relates to the "approvals process" with respect to certain activities. The NVCA's role changes from regulatory to enforcement upon non-compliance with permit or regulation. Based on the authority under the *CAA* for the NVCA to make and enforce regulations and the fact that non-compliance with them constitutes an offence for which the offender can be fined or imprisoned upon conviction, I am satisfied that in its enforcement role, the NVCA conducts investigations into possible violations of law.

As indicated on the index of records, some of the records that have been identified by the NVCA or in this order relate to the appellant's "permit file". Some of the records relate to its "secondary plan application". As I noted above, the primary affected person filed a complaint with the NVCA relating to the appellant's activities claiming that it was in contravention of, among other things, the *CAA*. The appellant provided copies of the charges that were laid against it under the *CAA*. Although the NVCA's submissions are extremely limited on this issue, I am satisfied that many of the records at issue were compiled and are identifiable as part of an investigation into the complaint of a possible violation of law, out of which charges were laid against the appellant. On this basis, I find that the presumption in section 14(3)(b) applies to the personal information in the records at issue that correspond to the complaint and charges against the appellant.

The NVCA and the primary affected person take the position that all of the records relate to the NVCA's enforcement role and should, therefore, all be found to fall within the presumption. Although the NVCA's representations provide very little assistance in determining the nature of the records at issue, my review of them indicates otherwise insofar as certain records are concerned. As I noted above, the records were located in two files relating to the appellant: its "permit" file and its "secondary plan" file. These files, by their very description, reflect the type of activity one would normally associate with the NVCA's regulatory role in granting permits for land use. It appears that the NVCA has not segregated records relating to its enforcement role from these other types of records. However, it is apparent when viewed contextually, that certain records clearly relate to the approvals process. Although it is possible that the NVCA may have compiled these records as part of its investigation of the appellant, the NVCA has not established that it did so.

In approaching my analysis of the records, I consider the various dates relating to the complaint and charges as establishing the general parameters for the NVCA's law enforcement activities. Following this, I have reviewed each record to determine whether it is reasonably related to the law enforcement matter. Therefore, using the date of the primary affected person's complaint (February 21, 1999) as the basis for engaging the NVCA's law enforcement role, the date charges were actually laid (June 24, 1999, it appears) and August 24, 1999 as the date the matter was heard, I find that Records 1, 3, 5, 6, 10, 11 (page 2), 12, A, B, D, E, F, G, H, M (in part), Q, R, S, T, U and V do not fall within the presumption in section 14(3)(b).

The remaining records (Records 2, 4, 7, 8, 9, 11 (Page 1), C, I, J, K, L, M (in part), N, O and P), and any other records that might exist which would relate to the NVCA's law enforcement role, would be exempt under section 14(3)(b). As I noted above, once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of factors set out in section 14(2).

I will now consider the factors and circumstances under section 14(2) to the remaining records and to the issue of whether section 14(5) has been properly invoked by the NVCA. In addition, despite the application of the presumption in section 14(3)(b) to Records 7, 8 and C (pages 4-6), in my view, withholding them from the appellant would result in an absurdity (as I will discuss below). Therefore, I will also consider the application of the factors and considerations under section 14(2) to these three records.

Section 14(2)(d) - fair determination of rights

For section 14(2)(d) to be regarded as a relevant consideration, the appellant must establish that:

> (1) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; and
>
> (2) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed; and
>
> (3) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
>
> (4) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.
>
> [See Orders P-312 [upheld on judicial review in *Ontario (Minister of Government Services) v. Ontario (Information and Privacy Commissioner)* (February 11, 1994), Toronto Doc. 839329 (Ont. Div. Ct.)] and PO-1764]

As I noted above, the appellant indicates that charges were laid against it under the *CAA*. It goes on to state that where an individual or organization is facing possible sanctions as a result, the

disclosure of personal information is justified. The appellant also submits that it "should be entitled to know the identity of his or its accusers".

With respect to this issue, the appellant states:

> These charges led to the [NVCA] revoking a permit for a water storage tank for snow making purposes on my client's property, which in turn, led to a loss of ... revenue ... We suspect that the information withheld will continue to have an economic impact on the ski resort ... In addition, there is a [named] Secondary Plan, and various complaints made to the NVCA by an individual or individuals unknown has already had a severe monetary affect on the development of that secondary plan, because of the NVCA's demands that [the appellant] hire experts, in a reverse onus type of situation, to prove that [the appellant] is not doing anything improper instead of the NVCA showing what it is that [the appellant] is doing that might be improper in the development of its secondary plan.

The NVCA simply states that its lawyers are currently attempting to negotiate an agreement with respect to "one aspect of the file".

I accept, as noted above, that there was an investigation conducted by the NVCA into violations of the *CAA* which, as the evidence clearly indicates, led to charges against the appellant. The copy of the Summons which the appellant provided to this office indicate that the matter was to be heard on August 24, 1999. Neither the appellant nor the NVCA refer to the results of the *POA* matter except in very general terms. It may well be that there are outstanding issues between the NVCA and the appellant relating to, or arising from, this matter. However, many of the records post-date the August 24, 1999 hearing date. While I do not have clear and direct evidence before me that the court proceedings have concluded, I infer from the comments made by both the NVCA and the appellant that they are over. On this basis, I am not persuaded that the appellant is involved in a current or contemplated proceeding to which the requested information is relevant.

Moreover, the appellant's representations focus on its financial interests resulting from the manner in which the NVCA is now treating it, apparently post-hearing. The appellant seems to be seeking the requested information for the purpose of assisting it in its dealings with the NVCA rather than because it is required in order to prepare for the proceeding or to ensure an impartial hearing. Accordingly, I find that section 14(2)(d) is not relevant in the circumstances.

Section 14(2)(h) - information supplied in confidence

The appellant takes the position that the NVCA must establish that assurances of confidentiality were actually provided to the affected parties or that the records clearly indicate that they were being provided in confidence (referring to Orders M-347 and P-516). Further, the appellant argues that in order for this factor to be relevant the personal information at issue must have been supplied by the person to whom it relates. The appellant submits that the section has no application when one person supplies personal information about another to an institution (with reference to Order P-606). Finally, the appellant submits that, even if the records were submitted

in confidence, its interests in disclosure outweigh the privacy interests of the affected persons for all of the reasons previously discussed in this order.

The NVCA indicates that the primary affected person had a reasonable expectation of confidentiality throughout this process and that they had, in fact, explicitly requested confidentiality for certain information. The NVCA suggests that any other affected person communicating with it in this regard would also have a reasonable expectation of confidentiality.

The primary affected person states that any correspondence between them and the NVCA was "supplied implicitly in confidence for the most part and explicitly in confidence at times". The primary affected person refers to certain specific matters relating to the records as evidence of the reasonableness of their expectation of confidentiality.

Some of the records at issue clearly indicate an expectation of confidentiality on the part of the primary affected person. Although most do not, it is apparent from those that do that the expectation was communicated with an intention that it be applied to most, if not all, of the communications between the primary affected person and the NVCA. I find further support for the primary affected person's expectations of confidentiality in the fact that they have indicated a willingness to meet with the appellant and share their records with him. It is apparent from the primary affected person's representations that it is, from their perspective, because of the unwillingness of the appellant to co-operate with them that they have invested so much time and effort in pursuing these issues with the NVCA. As the primary affected person concludes:

> The ultimate argument against disclosure in this case rests with the fact that I have offered on numerous occasions to meet with the appellant and discuss my concerns and findings. These offers have been met with threats to sue me if I proceed and complain against him. The appellant has always had free and liberal access to all of the information; all he had to do was establish dialogue.

In essence, until such time as the appellant co-operates with the primary affected person, their expectation is that the product of their efforts which they shared with the NVCA be maintained in confidence. I find that these expectations are not only reasonable, but that they carry significant weight in the circumstances.

These expectations relate to most of the records to which I have found section 14(3)(b) to apply as well as to Records 1 (page 1 only), 3, 5 (page 1 only), 6, 10, 12, A, B, C (first three pages only), D, E, F, G, H, M (in part), Q, R, S and V.

There is another category of records for which I do not accept the primary affected person's or the NVCA's assertions of confidentiality. It is clear from the face of these records that they be publicly considered, or at least viewed by parties outside of the NVCA. In particular, Records 7 and 8 clearly, on their face express the intention of the primary affected person at the time they were sent to the NVCA that they be made public. The remaining portions of Record C consist of correspondence between the primary affected person and the appellant that was copied to the press. Although I found above that section 14(3)(b) applies to these three records, I find that any expectation of confidentiality on the part of the primary affected person with respect to them is unreasonable.

Similarly, the remaining portions of Record 1 (pages 2 - 6) were copied to the press by the primary affected person and the remaining portions of Record 5 (pages 2 - 4) were copied to the appellant by the primary affected person.

Record 11 was sent to the NVCA by the Township. I found that page 1 of this record satisfied the requirements of section 14(3)(b). Page 2 of this record, however, contains the minutes of a council meeting. This page, taken by itself, does not contain any information about any person other than the appellant. There is no indication that these minutes reflect an *in camera* session of the Township Council. In the circumstances, I find that there can be no expectation of confidentiality with respect to page 2 and this factor is, therefore, not relevant.

Finally, Records T and U are records that were submitted to the NVCA by the primary affected person prior to a public meeting held on December 17, 1998 with the express request that they be read out at the meeting. In response to my queries on this issue, the NVCA confirms that the submissions made by the primary affected person were read out at this meeting.

It is apparent from these records that the primary affected person took an active and public role in lobbying against certain aspects of the appellant's operations and plans. I find that the primary affected person's actions with respect to these identified records/parts of records are inconsistent with an expectation of confidentiality.

As far as any other records that might exist, many previous orders of this office have held that the nature of the "complaint process" is such that it creates a reasonable expectation of confidentiality on the part of complainants (see, for example: Order PO-1706 which dealt with a complaint under the *Ontario Water Resources Act*; Order P-1098 concerning complaints under other environmental laws; Order P-1181 regarding complaints under the *Gaming Control Act*; and Order M-475 relating to the by-law enforcement process.) In many cases, the decision to withhold the identities of complainants has been based on other provisions of the *Act* (section 14(3)(b) or its provincial equivalent 21(3)(b) - possible violation of law, or section 8(1)(d) or its provincial equivalent 14(1)(d) - confidential source). In all of these cases, however, the confidentiality of the complaint process is central to the issues that were considered.

The reason for protecting the confidentiality of the identities of complainants or "confidential sources" as they are often referred to, was noted 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) at page 296:

> ... 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.

Therefore, even in the absence of explicit assurances of, or requests for confidentiality, there is a reasonable expectation that communications between complainants would be maintained in confidence. This extends to information that would identify whether or not an individual was involved in the complaint process.

I have found that many of the records are not sufficiently related to the law enforcement investigation to bring them within the presumption in section 14(3)(b). It is possible that other records may or may not exist that are similarly of a different character. Although not presumed to constitute an unjustified invasion of privacy, it is not unreasonable to expect that private communications between members of the public and regulatory agencies would also be considered confidential.

Organizations such as the NVCA are established, in part, to address, and to a certain extent reflect, the public interest with respect to the use of environmentally sensitive lands. In my view, there are sound public policy reasons in ensuring that the public is able to contribute meaningfully in ensuring that the NVCA fulfills its mandate. Often there are public processes established to consider proposed land usage, as was the case here. Parties who participate in these processes do so with the knowledge that their identities and views will be open to at least some public scrutiny. That does not preclude members of the public from making their views known to the NVCA privately and in confidence.

The affected persons are all local residents. Given the interests at stake in the current appeal, including the very personal interest the affected persons may have with respect to the impact of the appellant's business operations, I am satisfied that there would be a reasonable expectation that the contents of any communications (if they exist) in regards to the NVCA's regulatory role would be maintained in confidence. Similarly, they would have a reasonable expectation that their identities would also be protected (whether or not they actually communicated with the NVCA in this regard).

Accordingly, the verification that a named individual had communicated with the NVCA is, in and of itself, relevant to the issue of confidentiality.

The potential harmful consequence of disclosure of this information leads me to conclude that it is of significant weight in balancing the rights of the appellant to disclosure and the rights of the two remaining affected persons to privacy with respect to their identities.
On the other hand, the involvement of the primary affected person is already known to the appellant. While the content of the primary affected person's communications are not known, and for many they have a reasonable expectation of confidentiality, there can be no similar expectation with respect to their identities. Accordingly, I find that this factor is not relevant for the purpose of a finding under section 14(5) insofar as the primary affected person is concerned.

Fairness

The preamble to section 14(2) indicates that, in deciding whether disclosure would be an unjustified invasion of personal privacy, "all the relevant circumstances" should be considered. "Fairness", sometimes referred to as "adequate degree of disclosure", is a relevant circumstance which is not specifically listed in section 14(2). This circumstance, which favours disclosure, was first identified in Order P-1014, which dealt with an investigation of alleged workplace harassment. In this order, former Adjudicator John Higgins found that "it relates to the fairness of administrative processes, and the need for a degree of disclosure to the parties which is consistent with the principles of natural justice".

The principle of "fairness" has been applied in a variety of circumstances in previous orders for records relating to: a complaint to a Coroner's Council (Order P-1117); work-related complaints or investigations into harassment allegations (Orders P-1133 and P-1245); investigations into a boating accident and Coroner's Inquest of which the appellant, who was subsequently involved in civil litigation arising from the accident, was not initially aware (Order P-1381); a billing dispute with the former Ontario Hydro (Order PO-1723); information about the appellant held by the Family Responsibility Office (Order PO-1750); and allegations or comments made against prospective parents during the adoption process (Orders PO-1756 and PO-1767).

In some of these cases, the appellant was involved in "proceedings" of some kind. These orders found that the parties are entitled to a degree of disclosure which permits them to understand the finding that was made and the reasons for the decision. In Order P-1117, former Adjudicator Higgins noted the importance of a fair process where the body (in that case, the Coroner's Council) is charged with the investigation of complaints, and has the power to make recommendations which can have serious repercussions for the individuals under investigation.

In other cases, there were no "proceedings" *per se*, however, administrative decisions which had the potential of negatively impacting on the individual were seen as requiring a certain degree of fairness. Fairness has been applied in each case in connection with an "individual's" rights to adequate degree of disclosure.

In the current appeal, the primary interests at stake, as identified by the appellant, relate to the financial repercussions to its business interests arising from decisions made by the NVCA, which the appellant believes are based on information in the records at issue. In my view, within the context of its regulatory and enforcement role, the NVCA has a responsibility to act fairly towards parties it is dealing with. This includes applying a fair process in the decisions it makes with respect to these parties. Where the NVCA has made an adverse decision affecting the ability of a party to operate its business, fairness would require that the basis for this decision be communicated to the party and that sufficient information relating to the matter be provided to enable the party to understand or to respond.

Therefore, in the current appeal, fairness is a relevant consideration in balancing the privacy interests involved with the appellant's interests in disclosure. That being said, I do not have information before me regarding the amount of information that the NVCA has already provided to the appellant throughout its dealings with it. Although there is little evidence before me relating to the charges that were brought against the appellant, I must assume that, as part of the disclosure process, if not the trial itself, the appellant would have received evidence relating to the issues. I, therefore, find that although relevant, this circumstance is of only moderate weight.

In his representations, the appellant submits:

> It is a cornerstone of our judicial system that an individual or organization that may face legal or economic sanctions should be entitled to know the identity of his or its accusers. That is, the accusers can not hide in the bushes and "throw stones" that may have an economic or physical impact on an individual without disclosing their identities. One can agree that that is patently unfair.

In response, the primary affected person states:

> The accuser in this instance was the legislation and not the individual. Although the peripheral reference to David and Goliath (throw stones) may in fact be somewhat appropriate in this instance there are fundamental differences. David did not throw stones in this instance. David bought a flashlight and shone it on Goliath as he stole from the public, and then the regulatory authorities acted appropriately. Goliath has no right to know who is holding the flashlight, he only needs to know that he has been caught and charged. I would submit that not disclosing the complainant's name and preliminary accusations are the cornerstones of our judicial system once independent proof of the accusations has been acquired. This is exactly the case in this instance.

With respect to the appellant's position that fairness requires that it be able to know the identity of its accusers, I commented on this issue in Order PO-1706 (upheld on judicial review, as noted above) as follows:

> 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.

I also noted in that order that failure to disclose the identity of a complainant did not infringe the appellant's rights under section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter)*. In this regard, I concluded:

> 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*.

As I suggested in Order PO-1706, once an institution receives a complaint (in the regulatory process in any event), the institution will normally conduct an independent investigation into the matter and any consequences will normally flow from that investigation. If, however, the case against the appellant were based primarily on information obtained from sources outside of the

NVCA (and not independently determined), fairness would require that the appellant be provided with sufficient information to understand the basis of any decisions made against its interests. The relevance of this consideration vis-a-vis the identities of individuals would depend on the context and nature of the information at issue.

Similar to my finding above, I do not know what or how much information the appellant has already been provided with, but must assume that it has some understanding of the basis for decisions made against it. Moreover, in the circumstances of this appeal, none of the considerations noted in Order PO-1706 relating to disclosure of the identity of a confidential source would appear to be present and I find that this consideration carries very little weight insofar as the identities of the remaining affected persons are concerned.

While all of the records pertain to the appellant in some way, the contents of some records are only peripheral to its interests as stated in this order. In my view, "fairness" or "adequate degree of disclosure" is only relevant to those records which are directly related to the appellant's interests in understanding the nature of the complaints made against it. This type of information is found in Records 1 (pages 2 - 6), 5, 7, 8, 10, 11 (page 2), 12, C (pages 4 - 6), F, G, Q, R, T, U and V.

Balancing of the factors and circumstances under section 14(2)

I found above that Records 1 (page 1 only), 3, 5 (page 1 only), 6, 10, 12, A, B, C (first three pages only), D, E, F, G, H, M (in part), Q, R, S and V were provided to the NVCA with a reasonable expectation of confidentiality on the part of the primary affected person. I also found that the other affected persons had a reasonably held expectation that their identities would be kept confidential (whether or not they communicated with the NVCA). As I indicated above, because of the nature of the complaint process and the potential impact of a perceived interference in the regulatory process, these expectations carry significant weight in the balance.

I also found that fairness is a relevant consideration with respect to the information in the records which pertains directly to the appellant and its operations or plans. In reviewing the records, I found that this circumstance applied to the contents of Records 1 (pages 2 - 6), 5, 7, 8, 10, 11 (page 2), 12, C (pages 4 - 6), F, G, Q, R, T, U and V. I also found that it is unlikely that the appellant is not aware of the basis for the NVCA taking certain actions against its interests, even though it may not have all of the information relating to this issue. As a result, I found that fairness only carried moderate weight in balancing the appellant's right to disclosure against the primary affected person's right to privacy with respect to the content of the records at issue and the other affected persons' right to privacy with respect to the content of any other records that may or may not exist. I found further that this circumstance was of very little weight in balancing the appellant's right to disclosure of information that would confirm that the two remaining affected persons communicated with the NVCA against their right to have this information withheld.

In my view, with the exception of Records 1(pages 2 - 6), 5 (pages 2 - 4), 7, 8, 11 (page 2), C (pages 4 - 6), T and U, the privacy interests of the affected persons outweigh the right of the appellant to disclosure under the *Act*. In coming to this conclusion, I find that the public policy interests in encouraging communications between members of the public and the NVCA are

valuable interests worth protecting, particularly in the circumstances as they present themselves in this appeal.

I understand the appellant's concerns about decisions being made which impact on it based on "unknown" information from "unknown" sources. Within the regulatory context, it is not unreasonable to expect that decisions affecting parties under a particular legislative scheme will reflect a certain degree of transparency. There is a danger that when outside sources provide information to the government about another party in confidence, the rights of that party may be compromised, perhaps unfairly, particularly when such action is gratuitous and is motivated by private disputes or personal vendettas.

There are clearly disputes raging in the circumstances of this appeal. However, apart from that, there is nothing before me that even suggests that this situation is remotely similar to the one I alluded to above. In the circumstances, the evidence clearly indicates that any records submitted to the NVCA were done so within the framework of its role with respect to land use. The strength of the convictions of the protagonists does not render this process any less valid. Rather, it demonstrates the importance of the issues to the parties and supports the primary affected person's expectations as to the manner in which the NVCA will maintain the records.

I found above that the primary affected person did not have a reasonably held expectation that Records 1 (pages 2-6), 5 (pages 2-4), 7, 8, 11 (page 2), C (pages 4-6), T and U were submitted or would be maintained in confidence. I found above that all of these records were directly relevant to the issues affecting the appellant and that fairness was relevant to their disclosure. In weighing the appellant's right to disclosure of these records against the primary affected person's right to privacy, I find that the balance is tipped in favour of disclosure.

Therefore, I find that Records 1 (page 1 only), 3, 5 (page 1 only), 6, 10, 12, A, B, C (pages 1-3), D, E, F, G, H, M (in part), Q, R, S and V qualify for exemption under section 38(b) on the basis of the factor in section 14(2)(h).

Absurd Result

In Order M-444, former Adjudicator John Higgins found that non_disclosure of information which the appellant in that case provided to the Metropolitan Toronto Police in the first place would contradict one of the primary purposes of the *Act*, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. This reasoning has been applied in a number of subsequent similar orders of this Office and has been extended to include, not only information which the appellant provided, but information which was obtained in the appellant's presence or of which the appellant is clearly aware (eg. MO-1196, P-1414 and PO-1679).

In Order MO-1323, I had occasion to consider the rationale for the application of the absurd result:

> As noted above, one of the primary purposes of the *Act* is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure (section 1(b)). Section 1(b) also establishes

> a competing purpose which is to protect the privacy of individuals with respect to personal information about themselves. Section 38(b) was introduced into the *Act* in recognition of these competing interests.
>
> In most cases, the "absurd result" has been applied in circumstances where the institution has claimed the application of the personal privacy exemption in section 38(b) (or section 49(b) of the provincial *Act*). The reasoning in Order M-444 has also been applied, however, in circumstances where other exemptions (for example, section 9(1)(d) of the *Act* and section 14(2)(a) of the provincial *Act*) have been claimed for records which contain the appellant's personal information (Orders PO-1708 and MO-1288).
>
> In my view, it is the "higher" right of an individual to obtain his or her own personal information that underlies the reasoning in Order M-444 which related to information actually supplied by the requester. Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where information on a record would **clearly** be known to the individual, such as where the requester already had a copy of the record (Order PO-1679) or where the requester was an intended recipient of the record (PO-1708).

Although this principle has tended to have been applied in circumstances where the requester has supplied the information or was present during its collection, it has been applied in other situations and I am not precluded from extending its application in this regard. In my view, the current appeal presents one of those situations where it is similarly applicable.

Records 7, 8 and C

I found that these three records were all compiled and are identifiable as part of an investigation into a possible violation of law. As I have noted elsewhere in this order, Records 7 and 8 contain the express intention of the primary affected person to make their contents public at the time they were sent to the NVCA. In the circumstances, it is entirely probable that this information was disseminated at some level. The remaining portions of Record C, which were copied to the press, also reflect a clear intention on the part of the primary affected person to have the contents aired in a public forum.

In Order PO-1817-R, I made the following comments regarding the privacy expectations of individuals who take public stands on issues:

> I accept that many individuals and groups have taken public stances against hate groups and it is arguable that they could not expect any additional harm to result from the disclosure of private correspondence sent to the Ministry. However, what an individual says publicly and what that person says privately are not necessarily the same. Had they wished the contents of these records to be public, many individuals or spokespersons for organizations have the means to make

> them public. They chose not to. The question then becomes whether the *Act* should require such disclosure in the absence of their consent.

In that case, I found that disclosure of the records at issue could reasonably be expected to result in danger to the health or safety of an individual. In my view, the reasoning is equally applicable to a discussion under the personal privacy provisions of the *Act*.
In my view, the public airing of the very records at issue distinguishes the current situation from that with which I was faced in Order PO-1817-R. Put another way, in the current appeal, the primary affected person chose to make certain records public. To apply the presumption against disclosure to this information, which is essentially about the appellant, would contradict the appellant's higher right of access to its own personal information which is inconsistent with the purposes of the *Act*. Therefore, to apply the provisions of section 14(2) or (3) in the circumstances of this appeal to Records 7, 8 and the remaining portions of C would result in an absurdity.

Records 1, 5, 11, T and U

To ensure that I have fully considered the primary affected person's privacy interests in this appeal, I have also reviewed Records 1 (pages 2-6), 5 (pages 2-4), 11 (page 2), T and U as if they were subject to the provisions of sections 14(2) or (3). In my view, the above reasoning is similarly applicable to these records. Therefore, even if they qualified for exemption under section 14(2)(h) or 14(3)(b), withholding them from disclosure would result in an absurdity.

On this basis, I find that Records 1 (pages 2-6), 5 (pages 2-4), 7, 8, 11 (page 2), C (pages 4-6), T and U do not qualify for exemption under section 38(b) of the *Act*.

The application of section 14(5)

To a certain extent, the appellant is "fishing" for information relating to complaints made against it. It believes, and perhaps on reasonable grounds, that the NVCA has made detrimental decisions relating to its business interests based on information it has received from "unknown" members of the public. The appellant appears to have his suspicions as to who may be communicating with the NVCA in this regard. In part, they are only suspicions.

It is apparent from the records that have been identified in this order, and the submissions of the primary affected person, that they have actively communicated with the appellant regarding the issues which form the subject matter of this appeal. In these circumstances, it is somewhat absurd to refuse to confirm or deny that records relating to this affected person exist. In any event, in my view, the NVCA and the primary affected person have not established that disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant in such a way as to constitute an unjustified invasion of privacy. Therefore, section 14(5) cannot be used to confirm or deny the existence of records relating to this party.

As far as two of the affected persons are concerned, confirmation that they have or have not communicated with the NVCA, in and of itself, provides the appellant with information about the activities of these two individuals, and in particular, about their possible involvement in a law enforcement matter. I found above, that the presumption in section 14(3)(b) would apply to

personal information compiled as part of the NVCA's investigation under the *CAA*. I also found that members of the public would have reasonable expectations that their communications with the NVCA, either relating to the investigation or in terms of their general concerns/objections to the appellant's activities in the area (unrelated to the law enforcement issue) would be confidential. On this basis, I am satisfied that disclosure of the fact that records exist (or do not exist) would in itself convey information to the appellant, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of privacy. Accordingly, I find that the NVCA may refuse to confirm or deny the existence of records relating to these two affected persons.

Neither section 14(4) nor 16 apply in the circumstances of this appeal.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/LAW ENFORCEMENT

Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. Section 38 provides a number of exceptions to this general right of access.

Under section 38(a) of the *Act*, an institution has discretion to deny access to an individual's own personal information in instances where certain exemptions, including section 8, would apply.

Sections 8(1)(a) and (b) provide that:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to
>
> (a) interfere with a law enforcement matter;
>
> (a) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;

The purpose of the sections 8(1)(a) and (b) exemption is to provide the NVCA with discretion to deny access to records in circumstances where disclosure could reasonably be expected to interfere with an *ongoing* law enforcement matter or investigation. The NVCA bears the onus of providing evidence to substantiate that, first, a law enforcement matter is ongoing and second that disclosure of the records could reasonably be expected to interfere with the matter [See Orders P-324, P-403 and M-1067].

Previous orders of this Office have found that in order to establish that disclosure "could reasonably be expected to" result in a particular harm, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P_373 and *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 and 40 (Div. Ct.)].

Law Enforcement

With respect to the first issue of whether the records relate to an on-going law enforcement matter, the records must satisfy the definition of the term "law enforcement" found in section 2(1) of the *Act*. This section defines "law enforcement" to mean (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).

In its representations, the NVCA states only that:

> The records were created as a result of an ongoing investigation into violations under the [*CAA*]. The lawyers for NVCA and [the appellant] are currently attempting to negotiate an agreement with respect to one aspect of the file.

As I indicated above, it is clear that many of the records at issue in this appeal are related to the law enforcement aspect of the NVCA's role under the *CAA*. However, I have found that most of these records qualify for exemption under section 38(b) of the *Act* (subject to the exercise of discretion). With the exception of Records 7, 8 and C, the remaining records all relate to the NVCA's regulatory role over the development and use of lands within its jurisdiction. Given the context under which they were apparently created and the time frame within which they were created, I cannot accept the NVCA's argument that they were created "as a result of" an on-going investigation. These records all pre-date the complaint which appears to be the impetus for the NVCA's actions against the appellant and the NVCA has not provided sufficient evidence to show that they were compiled as part of its investigation of the appellant.

Further, the NVCA's representations provide no details regarding the nature of the "on-going" investigation. As the appellant points out, the investigation was completed when charges were laid against it in June 1999 and subsequently heard in August 1999. In my view, the NVCA has failed to provide sufficiently detailed and convincing evidence to establish that a law enforcement investigation is on-going or that the remaining records relate to such an investigation.

I accept that there are on-going issues between the NVCA and the appellant that are apparently connected to the law enforcement matter generally, but which also relate to the NVCA's regulatory role. It is not at all apparent to me from the NVCA's representations that the records remaining at issue relate to this matter. Even if I were to accept that they are, the NVCA bears the burden of establishing that disclosure of such records could reasonably be expected to interfere with this law enforcement matter.

Interfere with the Matter or Investigation

The NVCA does not address the second issue of whether disclosure could reasonably be expected to interfere with an ongoing law enforcement matter or investigation in its representations on the application of sections 8(1)(a) and (b). Nor do its representations overall

provide any insight into this issue. Accordingly, I find that the NVCA has failed to meet its onus in providing detailed and convincing evidence to establish that disclosure "could reasonably be expected to" result in either of the harms envisioned by section 8(1)(a) or (b) and neither section applies. In the circumstances, it is not necessary for me to consider the possible application of the discretionary exemption in section 38(a) of the *Act*.

Summary of Findings

Sections 8(1)(a),(b) and 38(a) do not apply in the circumstances of this appeal.

Records 2, 4, 9, 11 (Page 1), C (pages 1-3), I, J, K, L, M (in part), N, O and P qualify for exemption under section 38(b) as they satisfy the requirements of section 14(3)(b).

Records 1 (page 1), 3, 5 (page 1), 6, 10, 12, A, B, D, E, F, G, H, M (in part), Q, R, S and V qualify for exemption under section 38(b) on the basis of section 14(2)(h).

Records 1 (pages 2-6), 5 (pages 2-4), 7, 8, 11 (page 2), C (pages 4-6), T and U are not exempt under the *Act* and should be disclosed to the appellant.

Exercise of Discretion under Section 38(b)

The NVCA did not claim the application of the discretionary exemption in section 38(b) for the records (either at issue or which may or may not exist). It was not readily apparent from reviewing the records that this exemption might be applicable. Rather, as a result of the evidence presented by the appellant in its representations, I concluded that the records contain/would contain the personal information of the representative of the appellant.

Once it is determined that a record contains the personal information of the requester, the provisions in Part II of the *Act* must be considered in determining whether access should be given to the requested information. As I indicated above, section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by a government body. This reflects one of the primary purposes of the *Act* as set out in section 1, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure.

Section 38 provides a number of exceptions to this general right of access. Under section 38(b) of the *Act*, where a record contains the personal information of both the appellant and other individuals and the institution determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the institution has the discretion to deny the requester access to that information. In other words, section 38(b) contemplates that, even where the institution makes a determination that disclosure of a record would constitute an unjustified invasion of privacy, the head may, in his or her discretion, decide to disclose that record regardless (see: Interim Order MO-1277-I). In these cases, the institution must make a two step determination: first, to determine whether disclosure would constitute an unjustified invasion of privacy; and second, to determine whether, in the particular circumstances of the case, the head's discretion should be exercised in favour of disclosure or non-disclosure. It is, in part, this exercise of discretion that the Commissioner will examine on appeal.

In Interim Order MO-1277-I, Assistant Commissioner Tom Mitchinson made the following comments regarding a head's exercise of discretion under Part II of the *Act*:

> As stated earlier, this appeal involves a request that should have been processed by the Police under Part II of the *Act*, which provides the Police with discretion to balance two competing interests - in this case, the appellant's client's right of access to his personal information, and the affected person's right to privacy. If the Police conclude that the balance weighs in favour of disclosure, the records may be released to the appellant, even if the Police have concluded that this disclosure would represent an unjustified invasion of the affected person's privacy.
>
> In Order 58, former Commissioner Sidney B. Linden found that a head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. He stated that, while the Commissioner may not have the authority to substitute his discretion for that of the head, he could and, in the appropriate circumstances, he would order the head to reconsider the exercise of his or her discretion if he feels it has not been done properly. Former Commissioner Linden concluded that it is the responsibility of the Commissioner's office, as the reviewing agency, to ensure that the concepts of fairness and natural justice are followed.
>
> In Order P-344, I considered the question of the proper exercise of discretion as follows:
>
> > ... In order to preserve the discretionary aspect of a decision ... the head must take into consideration factors personal to the requester, and must ensure that the decision conforms to the policies, objects and provisions of the *Act*.
> >
> > In considering whether or not to apply [certain discretionary exemptions], a head must be governed by the principles that information should be available to the public; that individuals should have access to their own personal information; and that exemptions to access should be limited and specific. Further, the head must consider the individual circumstances of the request.
>
> My reasoning in Order P-344 is equally applicable to the exercise of discretion under section 38(b) of the *Act* in the present appeal.

In my view, the comments made by Assistant Commissioner Mitchinson are similarly applicable in the circumstances of this appeal. It is apparent that the NVCA has not turned its mind to the relevant circumstances of this particular case in balancing the appellant's right of access to his own personal information and the affected persons' rights to privacy. Therefore, I have decided to return this matter to the NVCA for the purpose of properly exercising discretion in deciding

whether or not to claim exemption for the records at issue (or the fact that records may or may not exist) pursuant to section 38(b) of the *Act*.

INTERIM ORDER:

1. I order the NVCA to disclose to the appellant Records 1 (pages 2-6), 5 (pages 2 - 4), 7, 8, 11 (page 2), C (pages 4 - 6), T and U by providing him with a copy of these records/parts of records by July 10, 2001 but not before July 3, 2001.

2. I uphold the basis for the NVCA's decision to withhold the remaining records from disclosure under sections 14(2)(h) and (14)(3)(b), subject to the exercise of discretion under section 38(b).

3. I uphold the basis for the NVCA's decision to refuse to confirm or deny the existence of records relating to two of the affected persons under sections 14(2)(h) and 14(3)(b), subject to the exercise of discretion under section 38(b).

4. I order the NVCA to consider the exercise of discretion under section 38(b) with respect to the records referred to in Provision 2 and to its decision to refuse to confirm or deny the existence of additional records relating to two of the affected persons and to provide me with representations as to the factors considered in doing so by **June 25, 2001**. The representations concerning the exercise of discretion should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

5. I remain seized of this appeal in order to deal with the exercise of discretion under section 38(b) by the NVCA with respect to the records and its decision to refuse to confirm or deny the existence of additional records.

Original signed by: June 4, 2001
Laurel Cropley
Adjudicator