



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

ORDER PO-1898

Appeal PA-000184-1

Ministry of the Environment



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NATURE OF THE APPEAL:

The Ministry of the Environment (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain information relating to an oil spill, which occurred in the vicinity of the appellant's property, as well as the scope of the environmental remediation work being carried out by a named company. Specifically, the appellant asked the Ministry to respond to the following inquiries:

1. Please describe the scope of work being carried out by [the named company] on the [appellant's] property;
2. Please describe the nature, extent and source of the contamination which has occurred on the property of [two named individuals] situated at [a specified location];
3. Please describe what steps have been taken to date by the [named company] to remediate the [property where the oil spill occurred];
4. Please describe what soil, ground water or other contamination has been discerned to date on properties appurtenant to the [property where the oil spill occurred];
5. If no soil, ground water or other contamination has yet been verified with respect to the [appellant's] property, could you please provide us with your opinion on the probability of such contamination eventually being confirmed in light of the experience of similar neighbouring properties.

The Ministry responded by advising the appellant that it would provide partial access to the responsive records and would remove the identity of the complainants to protect their privacy, in accordance with section 21 of the *Act*. The Ministry also issued a fee estimate in the amount of \$78.00 and requested that the appellant pay this amount if he wished to obtain the records.

In turn, the appellant provided the Ministry with the requested fee and at the same time appealed the Ministry's decision to deny access to the remainder of the records.

Subsequently, the Ministry issued a revised decision to the appellant. In its decision, the Ministry advised the appellant that "after reviewing the records and contact with the investigator, it appears that additional investigation is to be conducted by our investigator." As a result, the Ministry indicated that it was denying access to the records in accordance with sections 14(1)(a), (b) and (f) (law enforcement) of the *Act*. The Ministry went on to indicate that those records revealing the identity of private citizens and witnesses will also be denied in accordance with section 21 (invasion of privacy). One handwritten note, which the Ministry explained reveals the legal advice of counsel for the Ministry, was also denied pursuant to section 19 (solicitor-client privilege) of the *Act*.

With its revised decision, the Ministry disclosed Records 1, 26 and 48 to the appellant. These records relate directly to the appellant, and include documentation relating to the water testing

which was undertaken by the Ministry on the appellant's property. Accordingly, these records are no longer at issue in this appeal.

Also, during mediation, the appellant advised that he is not pursuing access to Records 7, 10, 13, 16, 22, 29, 34, 37, 44, 55, 59, 66 and 67. These records were identified in the Ministry's index of records as "not requested." Accordingly, these records are also no longer at issue in this appeal.

It should also be noted that Record 32 is a duplicate of the fifth page within Record 1, which has been disclosed to the appellant. Therefore, this record is also not at issue in this appeal.

I sent a Notice of Inquiry to the Ministry initially setting out the issues in the appeal, and received representations in response. I then sent the Notice to the appellant along with the non-confidential portions of the Ministry's representations. The appellant also provided representations.

RECORDS:

There are 53 records which remain at issue in this appeal. These records consist of correspondence; memos; e-mails; handwritten notes; well water sample submissions; certificates of analysis; lab reports; authorizations; a witness statement; occurrence and supplemental reports; a synopsis; photos; a remedial action plan; a status report; a hydrogeological investigation report and other related documents as outlined in the Ministry's index of records.

DISCUSSION:

DISCRETION TO REFUSE APPELLANT'S OWN INFORMATION/LAW ENFORCEMENT

Although the Ministry relied on sections 14(1)(a), (b) and (f) to withhold all of the records at issue in this appeal, the first issue which must be considered is whether the records contain the personal information of any individuals, since if it contains the personal information of the appellant, section 49(a) may also apply. Further if the record contains the personal information of the appellant and of other individuals, section 49(b) may apply.

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual and the individual's name where 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.

Based on my review of the records, I find that, with the exception of Records 30, 36, 46, 52, 61 and 70, the records at issue contain the personal information of a number of identifiable individuals, including the names of witnesses and individuals who may have been affected by the oil spill, as well as the subjects of the investigation. The records also contain other information about these individuals, including their addresses, telephone numbers and their involvement in the events under investigation. Records 42, 54 and 50 also contain the appellant's personal

information, specifically the appellant's name and telephone number. Records 30, 36, 46, 52, 61 and 70 do not contain any personal information.

Under section 49(a) of the *Act*, the Ministry has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Section 49(a) reads:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, **14**, 15, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information; (emphasis added)

As indicated above, the Ministry claims that all of the records at issue qualify for exemption under sections 14(1)(a), (b) and (f). Because I have determined that Records 42, 45 and 50 contain the appellant's personal information, I will also determine the application of section 49(a) to these records below.

Interference with law enforcement/right to a fair trial: sections 14(1)(a), (b) and (f)

Sections 14(1)(a), (b) and (f) read as follows:

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

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- ...
- (f) deprive a person of the right to a fair trial or impartial adjudication;

In order to establish that the particular harm in question under section 14(1)(a), (b) or (f) "could reasonably be expected" to result from disclosure of the records, the Ministry must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [Order PO-1772; see also Order P-373, two court decisions on judicial review of that order in *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 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

In its representations, the Ministry explains that the records at issue relate to the Ministry's investigation into the oil spill for a possible violation of the *Environmental Protection Act* (the *EPA*). The Ministry submits:

...

The Investigations and Enforcement Branch of the Ministry has been undertaking an investigation with the view of laying charges. This group has been previously identified by the Commissioner as being a law enforcement agency.

The general provisions of the of the [EPA] cover all types of pollution, forbidding the discharge of any contaminant to the natural environment in amounts, concentrations or levels exceeding those prescribed by regulation. A contaminant is defined as a solid, gas, liquid, odour, heat, sound, vibration, radiation or combination of any of these, resulting directly or indirectly from human activities, which may cause injury to humans, flora or fauna.

...

This investigation may result in a Crown Brief being prepared with respect to possible prosecution. This recommendation requires the concurrence of the Legal Services Branch of the Ministry prior to any action being commenced.

If an information is laid a trial before a judge of the Provincial Court will be held and such court could impose a penalty or sanction.

The law enforcement matter continues until the Ministry decides not to lay charges or the court rules on any charges - subsection 14(1)(b).

The records represent the anticipated evidence of the Ministry and its witnesses should the matter proceed to trial.

Evidence presented in court proceedings are not made public until presented to the court as it has the potential to:

- prejudice ability to conduct a fair trial; and
- impair impartiality of any witness.

...

The disclosure and subsequent use of publicized anticipated evidence of a witness could inflame the issues or influence the evidence of other witnesses. It is important to note that at this type of trial, the court usually excludes all witnesses from the proceedings and testimony, other than their own personal evidence, to prevent the tainting of the evidence of future witnesses.

The release of any of the records would be in contradiction of the intention of the court should the matter proceed to trial.

Prior to the issuance of this order, the Ministry provided an update with respect to this matter. The Ministry explained that although its investigation has now been completed, a Crown Brief has been prepared, an Information was sworn and a Summons has been served. The Ministry

also explained that so far there have been three court appearances and that the matter will be proceeding to pre-trial within the next couple of months.

The appellant submits:

The request for information was carefully worded so as to allow the [Ministry] to withhold information gathered by them with a view to attributing fault for the contamination in question. All we have asked for is full particulars of the nature, extent and source of the contamination together with a full description of the remediation efforts undertaken on the site following the spill. We have not asked for legal opinions regarding prosecuting offenders nor are we interested in such materials. We simply want to find out what damage has been caused and what is being done to remediate the damage.

Previous orders of this office have found that the Ministry's investigative and compliance functions with respect to Ontario's environmental laws, and in particular, the *EPA*, qualify as "law enforcement" activities for the purposes of section 14 of the *Act*. (Orders P-306, PO-1653, PO-1706).

In Order P-306, Assistant Commissioner Tom Mitchinson dealt with an appeal involving the Ministry where the records at issue related to an investigation by the Ministry into a possible violation of the *EPA* and the *Ontario Water Resources Act*. In this order, the Assistant Commissioner found that the circumstances surrounding the creation of the records at issue can properly be described as a "law enforcement matter" for the purposes of subsection 14(1)(a) of the *Act*. The Assistant Commissioner went on to state the following:

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

Consistent with previous orders, I find that the records in the current appeal involve a matter of "law enforcement" within the meaning of the definition in section 2(1) of the *Act*. The Ministry has also established that although its investigation has now concluded, the law enforcement matter is ongoing as it is still before the courts.

Based on the evidence and arguments provided by the Ministry and my review of the records, I am satisfied that the records contain information relating to the ongoing law enforcement matter and were compiled by the Ministry with a view to laying charges. I am also satisfied that the records contain information that may represent the anticipated evidence of the Ministry, as well as other possible witnesses, and that the premature disclosure of the records could reasonably be expected to interfere with the law enforcement matter. Accordingly, I find that the records at

issue are properly exempt under section 14(1)(a) of the *Act*. I also find that section 49(a) is applicable to Records 42, 45 and 50, which contain the appellant's personal information.

It is evident from some of the records, that the Ministry, as well as the company that has been undertaking the environmental remediation work, have attempted to keep the individuals who may have been affected by the oil spill informed about the scope of the work to be conducted, although it is not clear whether the Ministry and/or the company has had any direct discussions with the appellant. As noted above, the Ministry has, however, disclosed those records that relate directly to the appellant, including the water testing results concerning the appellant's property. I understand, however, the appellant's desire to know more details about this matter. It is clear from the Ministry's representations that its primary concern is the premature disclosure of information prior to the trial, as well as the protection of personal privacy of individuals other than the appellant. In light of this, once the law enforcement matter has concluded, the Ministry may wish to reconsider its decision with respect to the information it has withheld under section 14 on its own initiative or in response to a new access request. I would also encourage the Ministry to continue to provide the appellant with as much information as possible which may relate directly to the appellant and/or his property.

Because of the above findings, it is not necessary for me to consider the possible application of sections 14(1)(b) and (f), 19 and 21 of the *Act*.

ORDER:

1. I uphold the Ministry's decision.

Original signed by: _____
Irena Pascoe
Adjudicator

_____ April 30, 2001