



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2329**

**Appeal PA-030164-1**

**Ministry of the Environment**



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## **NATURE OF THE APPEAL:**

The requester made a request to the Ministry of the Environment (the Ministry) for records relating to a Certificate of Approval. The requester specified that she was seeking access to records held at the Ministry's Environmental Assessment and Approvals (EAA) Branch, its Investigations and Enforcement Branch (IEB), its London District Office and its Southwestern Regional Office, from January 1, 2000 to the date of the request.

The Ministry issued a decision to the requester denying access to the records, relying on the exemptions at sections 14(1)(a), (b), (d) and (f) (law enforcement).

The requester (now the appellant) appealed the Ministry's decision.

Mediation did not resolve this appeal, and the file was transferred to adjudication. I sent a Notice of Inquiry to the Ministry, initially, outlining the facts and issues and inviting it to make written representations. The Ministry submitted representations in response to the Notice. I then sent a Notice of Inquiry to the appellant, together with a copy of the non-confidential portions of the Ministry's representations. The appellant did not make any representations in response to the Notice.

## **RECORDS:**

The following records remain at issue:

- 41 records generated by the IEB, including occurrence reports and supplemental reports, investigator log sheets, correspondence, e-mails, faxes, fax cover sheets and statements; and
- 17 records generated by the London District Office and provided to the IEB.

## **BRIEF CONCLUSION:**

The records are exempt from disclosure under section 14(1)(a).

## **DISCUSSION:**

### **DOES THE LAW ENFORCEMENT EXEMPTION AT SECTION 14(1)(A) APPLY TO THE RECORDS?**

I have decided to begin by reviewing whether the records qualify for exemption under the discretionary exemption at section 14(1)(a), which reads:

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

interfere with a law enforcement matter;

## General principles

Because section 14(1)(a) is a discretionary exemption, even if the information falls within the scope of this section, the institution (here, the Ministry) must nevertheless consider whether to disclose the information to the requester.

The term “law enforcement,” which appears in section 14(1)(a), is defined in section 2(1) of the *Act* as follows:

“law enforcement” means,

- (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).

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context (*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)).

In order for a record to qualify for exemption under section 14(1)(a), the law enforcement matter in question must be specific and ongoing (Order MO-1578). The institution holding the records need not be the institution conducting the law enforcement matter (Order PO-2085).

In addition, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm.” Evidence amounting to speculation of possible harm is not sufficient (Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.), *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)).

## The Ministry’s representations

The Ministry submits that all the records “relate to a current law enforcement matter,” namely, the prosecution of a corporation charged with two offences under the *Environmental Protection Act* (the *EPA*). More recently, the Ministry advised this office that the trial has commenced but not concluded, and that a future court date has been scheduled for the purpose of setting a date for continuing the trial.

Among other things, the Ministry submits:

The records at issue represent the anticipated evidence of the Ministry and some of its witnesses...

It is common practice that evidence presented in court proceedings [is] 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.

... disclosure of any of the records at issue could deprive the company and its officers of a fair trial ...

The disclosure and subsequent use of publicized anticipated evidence of witnesses 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 Ministry also submits that disclosing the records “would reveal the very information the Ministry expects to present at trial.” It submits that some of the records “represent[ ] what the witnesses will say and it is the very information that if disclosed could see the case tried in the media or taint the evidence of other witnesses.” In addition, the Ministry submits that much of the information at issue will be “crucial” to the trial.

The Ministry also makes certain confidential representations that I am not at liberty to disclose in this order.

### **Findings**

I find that the records qualify for exemption under section 14(1)(a).

First, the ongoing prosecution under the *EPA* constitutes a “law enforcement matter” within the meaning of section 14(1)(a). As noted above, section 2(1) defines “law enforcement” for the purposes of the *Act*. The ongoing trial is a “proceeding in a court or tribunal” in which “a penalty or sanction could be imposed,” as described in paragraph (b) of section 2(1). Thus, the trial fits within the definition of “law enforcement” in paragraph (c) of section 2(1) (“the conduct of proceedings referred to in clause (b)”).

I am also satisfied that the prosecution is a specific and ongoing matter: it has not been completed and future court dates are in the process of being scheduled.

Secondly, based on the materials before me, I find that disclosing the records could reasonably be expected to interfere with the ongoing prosecution. In particular, I am persuaded by the

Ministry's representations that disclosing the records could interfere with the trial in a number of specific ways, as outlined above.

Accordingly, the records qualify for exemption under section 14(1)(a). In addition, I am satisfied that the Ministry did not err in exercising its discretion to withhold the records.

Because the records are exempt under section 14(1)(a), it is not necessary for me to review the Ministry's other exemption claims.

**ORDER:**

I uphold the Ministry's decision.

Original Signed By: \_\_\_\_\_  
Shirley Senoff  
Adjudicator

\_\_\_\_\_ September 30, 2004