



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2505

Appeal PA-050030-1

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 the following information:

[C]opies of all correspondence that has passed between the Ministry of the Environment and [a named company (affected party)] or its counsel or its consultants relating to [an identified matter] including but not limited to:

- (a) [A named person's] letter dated September 29, 2004, (responding to the Notice of Proposed Order dated August 10, 2004); and
- (b) [The named person's] letter dated September 30, 2004 (referred to as being sent as a follow up to [a meeting between two identified persons] on September 17, 2004.

...

[A] copy of [the] entire file relating to the Proposed Order against a [named company] and our client dated August 10, 2004, and bearing Order Number 8200-636LJQ.

The Ministry located the responsive records and denied access to them. In its decision letter, the Ministry relied on the discretionary exemptions in section 14(1)(a),(b),(d) and (f) (law enforcement) of the Act.

The requester, now the appellant, appealed this decision.

During mediation, the Ministry provided the appellant with an index of records. The index listed 13 responsive records and the exemptions claimed for each record. As a result, the appellant advised that she is no longer seeking access to Records 1, 2, 6, 7, 9, 11, 12 and 13 as she has copies of them. Accordingly, only Records 3, 4, 5, 8 and 10 remain at issue.

The appeal was not settled in mediation and was moved to the adjudication stage. I sent a Notice of Inquiry to the Ministry and to the company identified in the request (the affected party), inviting their representations on the issues. Both the Ministry and the affected party provided representations. Next, I sent a Notice of Inquiry to the appellant, and included the non-confidential portions of the representations of the Ministry and the affected party. The appellant provided representations in response.

RECORDS:

As noted, Records 3, 4, 5, 8 and 10 remain at issue. Access to these records was denied in full. The records are copies of correspondence between the Ministry and the affected party.

DISCUSSION:

LAW ENFORCEMENT

Section 14(1)(a), (b), (d) and (f) state:

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;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source;
- (f) deprive a person of the right to a fair trial or impartial adjudication;

The term “law enforcement” is used in several parts of section 14, and is defined in section 2(1) 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)

The term “law enforcement” has been found to apply in the following circumstances:

- a municipality’s investigation into a possible violation of a municipal by-law [Orders M-16, MO-1245]
- a police investigation into a possible violation of the Criminal Code [Orders M-202, PO-2085]

- a children's aid society investigation under the *Child and Family Services Act* [Order MO-1416]
- Fire Marshal fire code inspections under the *Fire Protection and Prevention Act*, 1997 [Order MO-1337-I]

The term "law enforcement" has been found not to apply in the following circumstances:

- an internal investigation to ensure the proper administration of an institution-operated facility [Order P-352, upheld on judicial review in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (1993), 102 D.L.R. (4th) 602, reversed on other grounds (1994), 107 D.L.R. (4th) 454 (C.A.)]
- a Coroner's investigation under the *Coroner's Act* [Order P-1117]
- a Fire Marshal's investigation into the cause of a fire under the *Fire Protection and Prevention Act*, 1997 [Order PO-1833]

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.)].

Where sections 14(1)(a),(b),(d) and (f) use the words "could reasonably be expected to", 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.)].

It is not sufficient for an institution to take the position that the harms under section 14 are self-evident from the record or that a continuing law enforcement matter constitutes a per se fulfilment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

The Ministry relied on the discretionary exemptions in sections 14(1)(a),(b),(d) and (f) (law enforcement) of the *Act* to deny access to the five records at issue in this appeal. In its non-confidential representations, the Ministry states that its Investigations and Enforcement Branch (IEB) has been "previously identified by the Commissioner as being a law enforcement agency", and relies on Orders P-306, PO-1706 and PO-2211. I agree with this position and find that the Ministry's IEB is a "law enforcement agency" for the purposes of section 14(1).

The Notices of Inquiry sent to the parties contain explanations as to the type of evidence required. Additionally, I asked several specific questions based on the exemptions claimed by

the Ministry. I have carefully reviewed the representations of the Ministry, the affected party and the appellant. Based on my review, I am not persuaded that disclosing the records at issue could reasonably be expected to result in any of the harms outlined in sections 14(1)(a),(b),(d) and (f), for the following reasons.

Sections 14(1)(a) and (b)

Under these exemptions, the Ministry may refuse to disclose a record where the disclosure could reasonably be expected to interfere with a law enforcement matter or investigation. The law enforcement matter or investigation must be a specific, ongoing matter. The exemption does not apply where the matter is completed, or where the alleged interference is with “potential” law enforcement matters [Orders PO-2085, MO-1578].

While I agree that the matter in question relates to a “law enforcement” matter, in my view, the Ministry and the affected party have provided only general assertions which do not constitute “detailed and convincing” evidence of interference. I have not been provided with sufficiently detailed and convincing evidence to allow me to conclude that disclosure of the records could reasonably be expected to *interfere* with a specific law enforcement matter or investigation. Nor am I persuaded that there is, in fact, anything other than a *potential* law enforcement matter or investigation, as opposed to a specific *ongoing* matter. Accordingly, I find that sections 14(1)(a) and (b) do not apply. Because the evidence provided to me with respect to these exemptions is contained in the confidential portions of the Ministry’s representations I am not able to discuss them in any greater detail.

Section 14(1)(d): confidential source

Under this exemption, the Ministry may refuse to disclose a record where the disclosure could reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by a confidential source. The Ministry must establish a reasonable expectation that the identity of the source or the information given by the source would remain confidential in the circumstances [Order MO-1416].

The Ministry has provided only very general confidential submissions, which are not sufficiently detailed to support a finding that the records qualify for exemption under this section. As identified above, 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.

Based on my review of each of the records at issue, I am not satisfied that the disclosure of this information could reasonably be expected to disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source. Accordingly, the records are not exempt under section 14(1)(d).

Section 14(1)(f): right to a fair trial

Under this exemption, the Ministry must show that there is a “real and substantial risk” of interference with the right to a fair trial or impartial adjudication. The exemption is not available as a protection against remote and speculative dangers. [Order P-948; Dagenais v. Canadian Broadcasting Corp. (1994), 120 D.L.R. (4th) (S.C.C.); Order PO-2037, upheld on judicial review in Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner), [2003] O.J. No. 2182 (Div. Ct.)].

The Ministry has again provided very general confidential submissions. As identified above, 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.

Based on my review of the records at issue, I am not satisfied that the disclosure of the information contained in these records could reasonably be expected to deprive a party of the right to a fair trial or impartial adjudication. Accordingly, I find that section 14(1)(f) has no application to the records.

ORDER:

1. I order the Ministry to provide copies of the records to the appellant by **November 1, 2006** but not before **October 27, 2006**.
2. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed pursuant to Provision 1.

Original signed by: _____
Beverly Caddigan
Adjudicator

September 26, 2006 _____