

Lesson 9.

INFORMATION: GATHERING & MANAGEMENT

Introduction:

Adequate and accurate information is vital to the operation of a health department. Virtually every activity produces valuable information. This is especially true with regard to the regulatory function of an environmental health agency. The conduct of surveys, inspections and investigations produce qualitative and quantitative information through observations, sampling and testing. Another major source of information, for some programs, is the records and reports which a regulated industry may be required to keep and make available to the regulatory agency. In this lesson we will explore some of the legal issues surrounding the gathering, management, retention and disclosure of information.

The case record is the principal repository of information regarding the actions and activities of the agency and of the regulated property, industry or individual. The proper management of environmental health records is important to the practitioner and to the agency for a number of reasons. One reason is the public responsibility and trust placed in the department. Another is maintaining good public relations and avoiding embarrassments. And, still another is the fact that many of the records may contain sensitive information which might result in severe personal and economic losses to persons who might hold the department responsible.

However, the most obvious reason for proper management of records is the administrative necessity of knowing what events have taken place and what are the results of specific agency actions. From the point of view of both good administration and proper enforcement, it is essential that the case record contain all of the information pertaining to the situation investigated.

Thus, one set of issues is concerned with the gathering and maintenance of information so that it is useful to the agency in assessing the situation and for use in possible enforcement proceedings. There is, however, another set of legal issues which concern the manner in which the information is used. Who has access to the information? This is a question of increasing concern and importance in view of the recent trends of states to enact freedom of information laws.

Lesson Objectives:

This lesson is intended to provide the student with the information and materials necessary to be able to:

1. Identify the types of information required to document an environmental health problem or condition;
2. Explain how to obtain the necessary information; and,

3. Describe the proper usage of the *subpoena duces tecum* and the procedures for obtaining one.
4. Understand the requirements for the control of information contained in official records of inspections and investigations;
5. Understand the concepts of privileged and confidential information as they pertain to agency records; and,
6. Be able to discuss the legal issues surrounding the application of freedom of information to agency records.

Key Points:

I. GATHERING INFORMATION

Adequate and accurate information is vital to the operation of an administrative agency. Virtually every activity in the department produces valuable information. This is especially true with regard to an inspection program. There are two main sources of information -- that which is obtained by the inspector through observations, sampling and testing, and that which is obtained from a regulated industry or activity through required records and reports.

A. What Information?

From a practical point of view, the question often becomes "what information is required or necessary in the case file or record?". Unless the enabling statute requires that certain information be kept, the answer to this question is basically an administrative one -- requiring a determination of the type, amount and form of information necessary to operate an effective regulatory program. However, there are several areas in which legal concerns can help to define the important data which must be included in a case file.

1. Required Records/Information: Those items required by enabling legislation, i.e., statutes, codes and rules and regulation often specify that certain records must be maintained by a regulated industry and made available to the administrative agency. they may also require that the administrative agency establish and maintain certain records.
2. Evidence: Information which may be used at some point as evidence in an administrative, criminal or civil proceeding should adhere to the Rules of Evidence. These, plus certain legal precedents, govern not only what kind of information is needed, but also how it may be obtained and kept. At a minimum, it is usually necessary to have the following information:
 - a. Location of the Property -- identified by address, lot and block records, platting designation, or some other specific, verifiable identification;
 - b. Owner of Record -- including any agents, operators, managers, executors, heirs, unrecorded purchasers, etc.;

c. Legal Rationale for action -- either the case involves a regulated industry or activity (i.e., a routine or periodic inspection) or it is concerned with an event or situation covered by statute, regulation or common law within the jurisdiction of the agency (complaint, survey, inquiry based inspections); and

d. Facts of the Case/Incident -- all names, dates, places, times, sample and test results, observations, inspection reports, correspondence, etc., which relate to the case (normally these are kept in chronological order).

3. Inappropriate information: Certain types of information may be inappropriate and should not be contained in a case file. The "rules of evidence and relevance" may be helpful in judging whether a specific item should or should not be included. As a rule of thumb: any information which would be clearly judged by the courts as inadmissible in a legal action probably does not belong in a case file.

B. Obtaining/Gathering Information

1. Voluntary Disclosure: Information may be obtained in a variety of ways and still be considered voluntary. Responses to questions asked during an inspection, information provided in personal or telephone conversations, and information provided in response to questionnaires and surveys are all ways of obtaining information, when properly recorded and documented, voluntarily. Grad states that the voluntary disclosure of information "creates no legal problems." There may be no legal problems with the method of obtaining the information, but there may well be legal problems concerning the use and disclosure of this information. (This issue will be dealt with in more detail in lesson 10)

2. Compulsory Disclosure: It may not be possible or practical for an agency to commit the resources necessary to continuously monitor the operation of an industry or site. Requiring the owner/operator of the regulated activity to maintain records of key items, conditions or processes (e.g., records of chlorination, BOD levels, and food temperatures.) can be an effective way of ensuring compliance between visits.

C. Methods

1. Observations: The principal means of identifying and documenting a problem is for the inspector to see it. This places a considerable burden on the inspector.

a. He/she must be able to recognize the problem (deviation from code or standard, unsafe practice, etc.).

b. He/she must be able to describe it in terms that will later be understood by each of the parties concerned (industry, supervisor, courts, etc.).

c. He/she must document its existence--data, time, place, circumstances and persons present (photographs can be invaluable).

NOTE: The procedures on recognition of various industrial hygiene and safety hazards (OSHA Field Operations Manual) should prove useful to environmental health inspectors in many other program areas.

2. Test and Samples: Where simple observations are not sufficient to show or document the existence of a hazard, the inspector must use other means. Time, temperature, light and noise levels are common physical factors which can be measured on site. So can a number of situations involving chemical concentrations, e.g., CO levels, chlorine concentration in water, and certain other gases in air. Most biological, and certain physical and chemical, problems require the collection and laboratory analysis of samples.

a. In Situ Tests. For tests conducted at the site of an investigation, the legal requirements include:

- 1) The test used be accepted -- by common sense (e.g., a thermometer for temperature), by testing and practice (e.g., Standard Methods for the Examination of Water and Wastewater), or by theoretically consistent design;
- 2) The tests must be conducted under proper circumstances;
- 3) Any instrumentation must be properly calibrated;
- 4) The tests must be carried out in accordance with accepted practice; and,
- 5) The results must be recorded.

The further a test is from an obvious common sense standard, the more likely it is to be challenged, and therefore, the greater is the degree of documentation of its appropriateness, reliability and accuracy that will be required.

b. Sample Collection and Analysis.- For sample collection and analysis, all of the above requirements are equally true. In addition there is a requirement that the agency must be able to demonstrate (document) that the results in the record are the results of the sample collected, and further that the sample was indeed analyzed (within the proper limits of time, temperature, accuracy, procedures, etc.) and that it was not contaminated, tampered with or otherwise made unsuitable for use as evidence. This is known as the chain of custody requirement

3. *Subpoena duces tecum*: Another important source of information is the regulated industry. Most regulated industries, businesses or other activities maintain records of their operation. In some cases the administrative agency can/should require that certain records be kept and made available to it. (See below.)

The *subpoena duces tecum* is a useful tool for obtaining necessary information that is not otherwise available. This is a court order to produce the specified documentary material.

a. Nature/Authority. The subpoena should not be considered as a routine investigatory tool. In the first place it is usually not needed, and in the second, not all administrative agencies have the legal authority to use it.

b. Requirements/Use. The material covered by the subpoena must be relevant to the purpose of the agency, i.e., it can not be used as a "fishing expedition", but must be confined to certain specified data concerning an operation which the agency has specific authority to regulate. However, note that you do not have to wait until you have filed a legal action before you can use the subpoena duces tecum. An agency, which has the power to obtain information by subpoena duces tecum may use it to discover and produce information necessary to determine whether further legal action is warranted.

4. Industry Records:

a. Requiring an Industry to Maintain Records. There have been some attempts made to set aside the ability of an agency to require regulated industries to maintain and make available records. These have usually involved an argument that such a requirement amounts to "self-incrimination", and hence is unconstitutional. The courts, however, have generally been unsympathetic to this argument. (See Reading #11, U.S. v. Tivian Laboratories.)

b. Program Requirements. A program which requires an industry to supply records demonstrating that it is taking the mandated actions to protect health and safety can be an effective and efficient method of regulation, if the agency:

- 1) Knows what information it needs to have reported in order to determine compliance;
- 2) Is able to collect it, i.e., the industry must be able to supply the data;
- 3) Is able to monitor the incoming reports to ascertain that all the regulated industries are reporting, and that the reports are complete and the data is reliable; and
- 4) Is able to verify the data through periodic inspections or other methods.

If each of these are in place, then, the failure of an industry to file a report will serve as a trigger or alarm that will permit the agency to take immediate enforcement action.

c. Failure to Report. The simple act of failing to file a required report should be immediately obvious to the regulating agency and permits the agency to choose from several enforcement options, e.g., revocation of the license, obtain a search warrant, subpoena of records, etc. Thus, the failure of a regulated industry to file the required reports is generally considered a misdemeanor.

d. Reliability of Required Records/Reports. A more difficult problem for the agency is identifying inaccurate or unreliable information. This requires close scrutiny of all submitted reports, considerable experience with the regulated industry in order to know what is reasonable and what is not, and familiarity with the particular business or establishment. Past case histories, complaints and periodic inspections are all useful

sources of information which may indicate that a record or records contain false data. Common sense and an understanding of the economic incentives for filing false reports may also provide a basis for selecting those industries/businesses which require closer scrutiny. However, from a legal point of view, it would be wise to establish a written policy and procedure which outlines the reasons, and the criteria, for selecting such priority establishments.

NOTE: The submission of false information is harder to detect and is more likely to present a greater health and safety hazard, than is the failure to submit a report. It also constitutes a form of fraud and, therefore, the courts tend to take a much tougher stand on falsification of records than they do on failing to report.

II. INFORMATION MANAGEMENT

As we have said, the case record is the primary repository of information regarding the actions and activities of the agency and the regulated industry, and it is essential that the case records contain all of the information pertaining to the situations investigated, the findings of the investigations, and the communications between the parties involved. The OSHA *Field Operations Manual* provides an example of the types of information collected by OSHA Compliance Officers in the course of their inspections. While the variety and depth of informational types covered may not be suitable to all agencies, the standardization of reporting and records management provide useful guidance for many other program areas in environmental health.

Once we have the record, however, the question becomes how do we use it and to whom do we permit access to the record. Most department have traditionally held that case records are part of an enforcement program and hence are not open to public inspection. Recently, however, some people (and especially the news media) have argued that these records are subject to examination under the various "Freedom of Information" and "Sunshine" Acts.

A. Freedom of Information

With the passage of the federal Freedom of Information Act, and a number of similar state statutes, the traditional reticence of administrative agencies to release certain types of information has come under challenge. The trend in case law seems to view the case file as a part of the information gathering function of government, and thus possibly open to some public inspection. However, before we turn to the case law, it is necessary to first become familiar with the basic provisions of the freedom of information acts.

1. **Federal Agencies:** All federal agencies, with some exceptions such as the military, are bound to the provisions of the federal Freedom of Information Act [5 U.S.C.A. 552 (1977)].

a. Each federal agency is required to make available to the public the following information.

- 1) Published Information:
 - Organization of the agency

- Function and Operation of the agency
 - Rules of Procedures
 - Substantive Rules, Policies, etc.
- 2) Available for Inspection and Copying:
 - Final opinions
 - Statements of policy and interpretation adopted by the agency and not published
 - Administrative staff manuals, instructions (Unless promptly published and available)
 - 3) Any other record reasonably described.

b. However, the act recognizes that not all information which is in government files should be made available to public inspection with out restraint. The following types of information and records are exemptions to the Freedom of Information Act.

- 1) Matters of national security
- 2) Internal personnel rules and practices
- 3) Specifically exempted by statute
- 4) Trade secrets and commercial or financial information (privileged/confidential)
- 5) Inter-agency/intra-agency memoranda
- 6) Personnel and medical files
- 7) Investigatory records compiled for law enforcement purposes (restrictions)
- 8) Records of financial institutions
- 9) Geological/geophysical information concerning wells

2. **State and Local Agencies:** Many states have adopted freedom of information statutes which are similar, or even more stringent, than the federal one. In the state of Washington, for example, the public disclosure act [RCW 42.17 (1979)] is similar to the federal code and applies to all state and local administrative agencies.

B. Privacy

In both the federal and state policies regarding public information there are a number of exemptions or restrictions which might provide the grounds, or require the agency, to prohibit a person from viewing parts or all of a case record. Some of these are:

- a. Privacy acts which may protect the names or individuals involved in the case;
- b. Trade secrets acts which may protect certain information pertaining to processes and formulations; and,

- c. Enforcement actions -- where the case is being or has been filed for legal action.

This represents the flip side of the public information coin. While it is arguably in the public interest that certain records be available for public examination, it is equally arguable that certain information, contained in some records, would, if released, be an infringement on the rights of some individuals. As in many areas of law, this requires a balancing of "public good" against "protection of individual liberties". In the final analysis, the right decision in a particular case may have to be decided by the court. Because of the numerous circumstances in which disclosure of records may arise, an administrative agency needs a policy and procedure on releasing records so that its employees are not left adrift in deciding what to do when confronted by a person wanting to see a particular record. The sanitarian or other government official will find that most cases can be handled through the establishment of, and close adherence to, a written policy and procedure developed by the department's legal counsel or the state's attorney general. Cases which do not appear to be covered by such policies and procedures will need to be referred to an attorney for advice before permitting anyone to examine a record. In either case, the existence of such a policy and procedure should lift the liability from individual employee.

Lesson Assignment:

1. Readings:

a. Statutes & Regulations

- OSHA - § 8. Inspections, Investigations and Recordkeeping (29 USCA 657)
- RCRA - § 6933 Hazardous Waste Site Inventory (42 USCA 6933)
- TSCA - § 11. Inspections and Subpoenas (15 USCA 2610)
- FDCA - § 373 Records of Interstate Shipment (21 USCA 373)
- FDCA - §§ 705 Publicity (21 USCA 375)
- 5 USCA 552a. Federal Privacy Act
- 5 USCA 552b. Federal Sunshine Act
- R.C.W. 42.17. Disclosure.

b. Reading #11 -- U.S. v. Tivian Laboratories, Inc., 589 F.2d. 49 (1978).

c. Reading #12 -- U.S. v. Ouelette, 11 ERC 1350 (1977).

d. Reading #13 -- General Motors Corp. v. Director of NIOSH, 636 F.2d. 163 (1980).

2. Suggested Readings:

- a. Grad -- Chapter 14, pp. 265 - 287.
- b. Gellhorn -- Appendix I. pp. 405-447
- c. Statutes & Regulations

3. Suggested Readings:

- a. Virginia, Health Regulations and the Law: A Manual for Virginia Health Enforcement Personnel. This manual was prepared health enforcement personnel in the Commonwealth of Virginia. Chapter III.B deals specifically with the application of the Virginia Freedom of Information Act to the state and local health departments.
- b. Tennessee Code Annotated, 1982.
- c. Mood EW, et al. Housing and Health, § XVII Collection and Dissemination of Information, pp. 37.
- d. Section 509 of the Clean Water Act (42 USCA 1369).
- e. Occupational Safety and Health Administration, Field Operations Manual, U.S. Department of Labor, Washington DC, 1981.
- f. Manual for Virginia State Environmental Health Enforcement Personnel, Commonwealth of Virginia, 1974.

Study Questions:

1. Information which is voluntarily disclosed to an agency is often useful in the investigation of environmental health problems.

- a. What are some of the legal and practical limitations in gathering and using voluntary information?
- b. What guarantees of accuracy and coverage do you have regarding information which is voluntarily disclosed?
- c. Can you use voluntary disclosure techniques to obtain all of the information which you need?
- d. Is the public becoming more or less willing to disclose information? Why or why not?

2. The power of compulsory disclosure of information is acquired like all other powers of a government agency, through delegation.

- a. Does the power to require reports, include in it the powers to inspect books, re-cords and premises? Would it include the power to subpoena witnesses and documents?
- b. Assuming that an agency has been delegated this power, how does the agency determine how and when to use it?

c. May an agency require the submission of reports as a condition of licensure, i.e., the requirements for obtaining a license includes agreeing to submit certain reports. What can an agency do if a licensee fails to provide the required information?

3. It is usually considered a felony to falsify a public or quasi-public record.

a. Why should a person be subjected to a year or more in jail for falsifying a record when a person who fails to keep a similar record is merely charged with a misdemeanor and on conviction receives only a fine or short jail sentence?

b. Is it a valid defense for the person who falsifies a record to claim that he did not intend to violate the law, even though he knew that the data was false?