ISSN 1198-6182

Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 91-1996
March 11, 1996

INQUIRY RE: A decision by the Ministry of Environment, Lands and Parks to withhold Digital Map Data from the Western Canada Wilderness Committee (WCWC)

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1. Introduction

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner on December 1, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision by the Ministry of Environment, Lands and Parks (the Ministry) to refuse access to digital map data by the Western Canada Wilderness Committee (WCWC), the applicant, primarily because the data are available to the public for purchase. This inquiry flows from Order No. 51-1995, September 14, 1995, in which I asserted jurisdiction over this matter.

This inquiry presents a complicated policy issue. In the first third of this Order, I have followed my usual practice of summarizing the submissions of the two parties and the intervenors. Also as usual, I present these arguments, without commentary, on the basis of my review of the detailed submissions. I wish readers to be aware of the arguments that various participants regarded as significant. Most of the intervenors were granted standing at their own request. In the treatment of intervenors, I have reduced the repetition of the same points.

The last two-thirds of the Order are a discussion of the views of the participants on various points and my commentary and findings on them. The topics covered include the Ministry's exercise of discretion, its reliance on sections 17 and 20 of the Act to refuse disclosure, its pricing policy, the question of a fee waiver, the public interest in access to digital map data, and possible terms and conditions that the government may wish to reflect on during the reconsideration of its pricing policy for digital map data that I recommend.

This inquiry poses a policy issue that does not fit well into the format of a request for review under the Act. It is a matter over which I have jurisdiction under section 42(1) of the Act, which makes me "generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved." At the end of the Order, I invite the Ministry to reconsider the

application of its pricing policy for access to digital map data for all public interest groups working in the land use and environmental areas, irrespective of their positions on these complex issues.

2. Issue

The records in dispute are digital map data, including TRIM (Terrain Resource Information Management) files and digital elevation data used for Baseline Thematic Mapping (BTM) products. WCWC has made several separate requests for access to such data. (See Submission of the Ministry, pp. 3-6)

The issue to be resolved is whether these digital map data were properly withheld under sections 17(1)(b) and 20(1)(a) of the Act. The relevant sections read as follows:

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
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> ...
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
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> ...
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> 20(1) The head of a public body may refuse to disclose to an applicant information
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> (a) that is available for purchase by the public, or
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> ...
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> 75(5) The head of a public body may excuse an applicant from paying all or part of a fee if, in the head's opinion,
>
> (a) the applicant cannot afford the payment or for any other any other reason it is fair to excuse payment, or
>
> (b) the record relates to a matter of public interest, including the environment or public health or safety.
>
> 76(1) The Lieutenant Governor in Council may make regulations
>
> ...
>
> (j) limiting the fees that different categories of persons are required to pay under this Act,

3. Burden of proof

At an inquiry to refuse an applicant access to all or part of a record under sections 17(1)(b) and 20(1)(a) of the Act, the head of the public body must prove that the applicant has no right of access to the record (section 57(1)). In this case, the Ministry must prove that the WCWC does not have a right of access to the digital map data in dispute.

4. The Western Canada Wilderness Committee's case as the applicant

The WCWC's first argument is that the proposed price of about $30,000 for the digital mapsheets it wants is an effective barrier to access, since it cannot afford to pay such a price and the Ministry has refused to consider its requests for a reduced price.

The WCWC's second argument is that its access to the data in dispute serves a legitimate public purpose: "Digital mapping has superseded paper-based mapping in most major land use planning processes in B.C." (Submission of WCWC, p. 2) All key parties in these processes are quickly expanding their capacity to use digital maps. WCWC further argues that TRIM maps are becoming the standard used by all parties:

> By using TRIM maps as a unique standard reference point in land use planning processes, the ministry has created an important new component of British Columbia's economic and social infrastructure. While this is highly desirable, it also means that WCWC and other non-profit conservation organizations *require* reasonable access to TRIM maps in order to participate effectively in land use planning and decision-making in the province. (Submission of WCWC, p. 3)

WCWC is concerned that the Ministry has not adopted the least restrictive price structure for addressing its objectives for revenue generation, because the current price structure limits the access of groups such as WCWC. It claims that the commercial price of $600 per file for TRIM mapsheets is not the problem:

> The issue is that there should be some form of fee waiver system in place so that WCWC and other non-profit organizations that cannot afford the commercial price can have an opportunity to use this important information on an affordable and timely basis. (Submission of WCWC, p. 3)

WCWC's argument is that a fee waiver system will not harm the financial or economic interests of the Ministry.

WCWC argues that the Ministry already charges reduced prices for digital maps to government agencies. It further states that "the government offers TRIM mapsheets of Tree Farm Licences *free of charge* to forest companies, apparently in recognition of the supply of relevant data by the forest companies to the government, most, if not all, of which is required to be submitted anyway." It is discriminatory not to offer a similar arrangement to WCWC, which also submits data on trail building to the government. (Submission of WCWC, p. 5; and Statutory Declaration of Ian Parfitt, paragraphs 6-8. For the Ministry's response to this point, see Reply Submission of the Ministry, paragraphs 13, 14) WCWC further argues that:

> Free access or reduced fee provisions for government products or services are frequently provided where, as here, doing so would not cost the government substantially more to provide the service nor would it cost the government any substantial amount of lost revenue. One key example is the fact that an increasing amount of government information is available to the public for free on the Internet, including digital mapping information, such as the data used by the Cariboo Chilcotin CORE table and Ministry of Forests biogeoclimatic data for the province. (Submission of WCWC, p. 6)

In conclusion, WCWC recommends a series of options. I should order the Ministry to grant it access to the disputed records. Or, I should order the Ministry to reconsider its decision to deny access, spelling out various terms and conditions. (Submission of WCWC, p. 7)

5. The Ministry of Environment, Lands and Parks' case as the public body

The TRIM Program began in 1986 and is scheduled for completion in 1997. It is a computerized land information project, which converts high-altitude photographs and satellite locations of survey points into three-dimensional map data, giving the altitude of every point of the map: "This allows fully contoured replicas of B.C. terrain to be projected onto a computer screen." (Submission of the Ministry, pp. 8, 9) The TRIM database will contain the topographic data of this province in 7,000 "mapsheets" at a scale of 1:20,000. Other data of interest (e.g., forest cover) can be superimposed on TRIM; such data are retrievable in a Geographical Information System (GIS).

TRIM data are available for access graphically in a number of formats: as a map on a computer screen, as a printed map for a modest price ($4), and as a printed array of numbers in digital form. WCWC has asked for 42 TRIM mapsheets in digital form, which cost close to $30,000, including taxes and shipping. The price outside government is $600 per map. The cost within government is $150, which reflects the basic cost of packaging, distribution, and management infrastructure. (Submission of the Ministry, pp. 9, 10; and Reply Submission of the Ministry, paragraph 12)

TRIM is intended to create a state-of-the-art capability in B.C.'s mapping sector. Consequently, the government seeks to achieve cost recovery from sales to the public. Startup costs are estimated to be over $70 million. The data compilation costs for each mapsheet are estimated to be approximately $10,000. Annual update costs of $1.5 to $2 million per year are intended to be funded entirely by revenue from sales. In February 1991 the Minister of Finance and the Treasury Board approved a policy of distribution to the private sector and other governments at a market price that allows some cost recovery. The $600 per file sales price was approved in April 1993. (Submission of the Ministry, pp. 10-12)

The Ministry prepared a "written policy" on its product pricing that mandates competitive pricing with the private sector and consideration of all costs incurred to produce the product. Free copies may only be given out for research or promotional purposes. (Submission of the Ministry, p. 12; and Book of Affidavits, appendix K) Sales of TRIM data outside of government generated $663,640 between October 1, 1994 and September 30, 1995 (which means sales of

about 1,100 separate mapsheets). This represents approximately two-thirds of the total revenue generated from sales of TRIM data in this period. (Submission of the Ministry, p. 13)

The Ministry asks that I confirm its decision under sections 20(1)(a) and 17(1)(b) of the Act to refuse access to the information requested by the applicant.

6. The case of the Canadian Union of Public Employees (CUPE), British Columbia Division, as an intervenor

CUPE's interest in this inquiry springs from its need for access to government information to pursue its various goals as a union:

> Our Regional Office conducts research on a variety of issues ranging from environmental issues, to statistical analysis of workplace trends, to briefs related to a variety of government policies that could impact on our members. In all of these cases, we have in the past not always been able to obtain information that would have been useful to us. (Submission of CUPE, p. 2)

CUPE regards the present inquiry as concerning the extent to which such public access will be facilitated.

CUPE supports WCWC's position that information of the type it has requested "ought properly to be available free of charge, or at a price that is sufficiently low as to not constitute a barrier to access." (Submission of CUPE, p. 2) It urges the government to set a fee structure for the costs of production of government information, "which would be less financially harmful to the government, while guaranteeing that the right of access was in fact a meaningful one." (Submission of CUPE, p. 2) Such a goal, in CUPE's view, reflects the broad purposes of the Act.

CUPE cites sections 75(5)(a) and 76(1) of the Act as indicating the willingness of the Legislature to allow a public body to waive all or part of an access fee and to exercise discretion in the area of fee setting. (Submission of CUPE, p. 3) CUPE also points out that section 76(1)(j) establishes the power to make regulations "limiting the fees" that different categories of persons are required to pay under the Act. (Submission of CUPE, p. 4) CUPE urges me to order the Ministry to waive all or part of the fees applicable to this inquiry.

7. The case of the B.C. Environmental Network Forest Caucus as an intervenor

The Forest Caucus is a coalition of 46 non-profit environmental organizations that share similar concerns about B.C. forest management. It argues, through Jim Cooperman, its coordinator, that the "current [pricing] system denies affordable public access to a wide spectrum of information about our publicly owned forests .... In order for the environmental community to continue its work, it needs to prepare up-to-date maps using the latest technology." Since the stumpage system has already paid for the cost of digital information developed by government agencies, the current pricing is "unfair because it is an attempt to charge the public for information they in a sense already own."

The Forest Caucus states that digital information has the "potential to accurately display the true nature of our forests," but only for-profit companies can use it to exploit our forests: "[T]hose organizations dedicated to the protection of non-timber forest values and functions are denied the ability to use this information."

The Forest Caucus asks that I recommend a fee waiver system to the government that will facilitate the work of non-profit organizations.

8. The case of the Sierra Club of British Columbia as an intervenor

Vicky Husband, Conservation Chair, argues on behalf of the Sierra Club that environmental non-government organizations play a valuable role in land use planning for the protection of environmental values. But, at present, the playing field is not level because such non-profit groups cannot afford to access necessary information:

> The Sierra Club and other environmental organizations are effectively denied access to digital mapping information that is crucial to the land use debate because of the prohibitively high cost. For-profit enterprises, such as timber and mining companies, can afford to access these materials.

Affordable access to digital mapping information is important if environmental non-government organizations are going to continue to fulfill their role as full partners in land use decision-making. The Sierra Club supports WCWC's recommendation of a two-tiered pricing policy and a fee waiver system.

9. The case of a Map Librarian, W.A.C. Bennett Library, Simon Fraser University, as an intervenor

Poh Chan, the Map Librarian at Simon Fraser University, supports WCWC's position in this inquiry in favour of affordable and timely access to digital map information. In his view, the present price structure for TRIM maps and forest cover digital data "is prohibitive to non-profit conservation organizations and higher educational institutions and libraries." In the current tight financial situation, the purchase of such digital data "is well beyond the budgets of educational institutions and libraries."

> [A]ccess to such information is of vital importance in order that we can fulfill our mandate to train and educate our students for the working world so that when they graduate they have the knowledge and training to participate and contribute to the economic health of the province.

10. The case of Marshik and Associates, professional land surveyors, as an intervenor

Larry Marshik has been a professional land surveyor in this province since 1975 and is currently based in Lillooet. He is familiar with the technical aspects of TRIM mapping and the

practical requirements necessary to use and benefit from such data. He supports WCWC's request for a fee waiver for access to TRIM digital files.

In Marshik's view, TRIM data represent a major government effort to bring all spatial data into one unified, standardized, and accurate common data base. They provide a common reference point of discussion, permit the addition of new public or private spatial data, and allow updating. According to Marshik, users are disempowered if they can only comment on the reports of others and not manipulate the data themselves:

> ... the majority of public policy land use issues now utilize computer based Geographic Information Systems (GIS) as the main data analysis and presentation tool/methodology. This TRIM digital data is intended to be the reference base map and starting point of the GIS data base. (p. 2)

But there are many cumulative, technological barriers to using TRIM mapsheets:

> To use the file requires a major investment in computer hardware and software and an equally major investment in training and 'learning curve' practice to obtain meaningful expertise and proficiency in getting practical benefit from this data. Without expertise in working with this map data and related analytical tools (GIS software), much of the 'information' in these digital maps files is not readily or practically accessible. (p. 2)

Marshik is the sole land surveyor in a large rural area, who has tried to adapt his practice to technological change. But he does not own a single TRIM digital map: "If these maps were available at a more nominal fee, I would probably accept the initial pain and unrecoverable costs of incorporating them into my practice."

> If the present TRIM map fee has been this significant an obstacle to acquiring these maps in a *for-profit* survey business, I suggest that it is an even larger obstacle for *not-for-profit* groups. Not-for-profit groups do not have frequent projects/jobs that generate a cash flow to subsidize such hardware and software infrastructure and also provide the necessary learning practice. (p. 3)

Marshik emphasizes that not-for-profits "provide a necessary and valuable contribution to democratic planning and decisions. To tie their hands and minds by placing critical 'raw' land information beyond their practical reach, is against the public interest and against the spirit, intent and substance of the *Freedom of Information and Protection of Privacy Act*." (p. 3)

Marshik argues that the evaluation of the reasonableness and affordability of a government information product should include the perspective of the purchasers and not simply the seller with a monopoly position: "What may seem a minor requirement to one community, can be the razor wire on top of an already high wall to another community." (p. 4)

Marshik concludes that the current price for TRIM data "is a barrier to and an effective denial of meaningful access to such information and that such barrier and denial is against the public interest." His view is that until the Ministry institutes a fee waiver policy, not-for-profit

groups should be allowed to acquire TRIM data for only a reasonable shipping and handling charge.

11. The case of Ecotrust Canada as an intervenor

Ecotrust Canada emphasizes that access to digital maps is essential for non-profit organizations and First Nations in their land use negotiations with government and industry. Current prices for such data are unreasonably high and constitute a barrier to public access, which is why Ecotrust supports the position taken by WCWC.

Ecotrust also submitted an opinion piece by its director, Ian Gill, from the Vancouver Sun, November 21, 1995 about the unfairly high prices of digital maps. He charges that "the B.C. government has created a policy of cost recovery that prices important data out of the reach of everyone but industry, and government itself." Gill describes the charge of $600 for a TRIM mapsheet as "outrageous." He claims that it cost $18,000 for the Ahousaht Band council to obtain digital maps of its own territory in Clayoquot Sound. Non-profits do not have such financial resources and cannot write off such charges as a business expense:

> Whether individual taxpayers subscribe to a conservation ethic, or support First Nations' treaty aspirations, or couldn't care less, they should all be concerned about a basic question of equity, which is that information gathered at taxpayer expense is being unjustly doled out according to ability to pay. (Vancouver Sun, Nov. 21, 1995)

In Ecotrust's opinion, taxpayers have already paid for the data in dispute. The products of mapping should not be reserved for those in power.

12. The case of the B.C. Freedom of Information and Privacy Association (FIPA) as an intervenor

FIPA "strives to represent the broad public interest in the areas of access to information and privacy protection." Darrell Evans, its executive director, asserts that "fee structures and policies must not become a barrier to access, particularly when it is clearly in the public interest." (p. 1)

> Next to an outright refusal to disclose, which must be justified under the Act, cost *is the most effective barrier to access*. If cost removes information from access by the public, there is no access and no adherence to the spirit and purpose of the Act. (p. 2)

FIPA emphasizes the significance of access to digital maps for the work of environmental groups:

> Because processes such as digital processing can be considered to "add value" to public information, governments are seeing this as a possible revenue source or as a way of recapturing some of their investment in the new information

> technologies. This is understandable, but it also constitutes perhaps the single largest threat to the purposes of the Act. (p. 2)

FIPA, in addition to raising sections 25(1)(b) and 75(5) of the Act because of their references to the "public interest," quotes then Attorney General Colin Gabelmann's statement to the Legislature on June 5, 1992, that "[f]ees will not be a barrier to access." It believes that any fees levied for cost recovery "must meet a test of reasonableness and take into account the important public interest represented by environmental groups." (p. 3)

The discretion for a head of a public body to act under sections 17(1)(b) and 20(1)(a) must, in FIPA's view, be exercised reasonably:

> Barring access simply because the information is available for purchase by the public without reviewing the circumstances of the particular case is patently unreasonable. Likewise, it is unreasonable on the basis of harm to the financial or economic interest of a public body to refuse access to information to a group which does not have the resources to purchase the information in any event. (p. 3)

FIPA urges me to order the Ministry to disclose the records requested by WCWC.

13. The case of the B.C. Civil Liberties Association (BCCLA) as an intervenor

Murray Mollard, Policy Director of the BCCLA, emphasizes the central importance of section 2 of the Act in determining the outcome of this case:

> 2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
>
> ...

Accountability, in the BCCLA's view, has two meanings: 1) accountability of elected officials and government employees for present and past actions, and 2) accountability in the form of effective instruments for participatory democracy:

> Democracy, if it is to exist and flourish, must provide practical mechanisms by which all individuals can meaningfully participate in the governing of society on an ongoing basis.... [I]ndividuals in society, the real sovereign in a democracy, must be able to influence and shape government law making and policy development in a meaningful way. Public bodies facilitate participatory democracy (i.e., are more accountable) if individuals are able to access government held information so that they can influence the outcome of decision making that affects them. (p. 3)

As authority for this statement, it quotes then Attorney General Gabelmann speaking in the Legislature on June 18, 1992 (at 2737) and my Order No. 51-1995, pp. 4, 5.

The BCCLA argues that public interest, non-profit groups such as WCWC play an important and valuable role in a democracy by "making public bodies more accountable," to use the language of section 2. They "can only be effective in promoting accountability if they are able to marshal credible arguments and positions which in turn depends upon their ability to access, analyze and present relevant information to government, industry and the public." (pp. 4, 5) By charging a high price for cost recovery purposes and not considering ability to pay, the BCCLA argues that the Ministry "effectively undermines the fundamental purpose of the Act." It should "create policies and procedures for exempting or reducing prices of information available for purchase in order to facilitate access and government accountability."

The BCCLA urges me to rely on sections 52 and 56 to review the Ministry's exercise of discretion under sections 20 and 17. The BCCLA claims that the Ministry has not acted reasonably and fairly in considering and weighing relevant factors. The BCCLA also wants me to use section 58 either to order free disclosure of the data to WCWC or to require the Ministry to reconsider its decision. In either case, it wishes me to specify, under section 58(4), that the Ministry develop a policy and procedure for the disclosure of information available for purchase by the public for free or for a reduced price. (pp. 9, 10)

14. The case of the Cortes Island Forest Committee as an intervenor

This Forest Committee supports WCWC's request for an appropriate fee schedule or a fee-waiver system, because of its own experience of requiring access to expensive data to participate in public land use decisions. It recently had to spend almost $1500 to purchase colour aerial photos from the government, relying on cash raised at bake sales. The Forest Committee finds that its own participation in the Sunshine Coast Timber Supply Review is exceedingly difficult because even mapped data are only available for review at a district office three ferry rides away from this isolated island.

15. The case of the B.C. Coalition for Information Access (BCCIA) as an intervenor

The BCCIA is a coalition of community organizations to promote the information/electronic highway, including groups of librarians and teachers. Jacqueline van Dyk, its chair, emphasizes the importance of access to information to enhance public participation in government decision-making. There should not be "barriers on the ability of the public to participate on an equal basis with those corporations or institutions that have substantial financial resources." Digital mapping files, such as TRIM and forest cover mapsheets, are often the only source of information for land use planning processes. The net effect of digitizing this information has been to restrict access to those who can afford it, which means a lack of equality in consultative processes.

The BCCIA cites as a precedent for free or reduced access provisions for government products the fact that the Internet provides free access to an increasing amount of government information, "including digital mapping information, such as the data used by the Cariboo

Chilcotin CORE table and Ministry of Forests biogeoclimatic data for the province." The BCCIA favours a fee-waiver system for such products for public interest and environmental organizations.

16. Discussion

In what follows, the reader should distinguish between my decision on the application of sections 17 and 20 of the Act and my more general discussion of factors that the government might take account of in reshaping its pricing policy for TRIM data and/or its application of a fee waiver policy in processing similar requests under the Act. I intend much of the discussion as a contribution to the policy debate on access to digital map data from the perspective of the broad goals set out in section 2 of the Act.

The Ministry's exercise of discretion

WCWC is concerned that the Ministry responded to its requests with a decision that the Act applies to information which it says is available for purchase by the public and refused to exercise its discretion to disclose under sections 17 and 20 of the Act. Now, WCWC argues, "the ministry is not entitled to the benefit of either of these sections in relation to what is otherwise its statutory obligation to provide the requested data." (Submission of WCWC, p. 6)

If, in the alternative, the Ministry can be said to have exercised its discretion, WCWC argues, "then the Ministry unlawfully fettered its discretion by implementing a 'blanket' policy that requests for price waivers or reductions regarding TRIM and BTM maps are not granted as these products are available for purchase by the public." The Ministry cannot simply reject particular access requests on this basis, as WCWC claims it has done in the present inquiry. (Submission of WCWC, pp. 6, 7) The Ministry's view is that its head did not make his decision in this case on the basis of a blanket policy, since he knew that there are certain limited circumstances under which TRIM products can be supplied free of charge. (Ministry's Reply to the Reply Submission of WCWC, paragraph 3)

The question of the appropriate exercise of discretion arose again in the context of the reply submissions of the two main parties. On the basis of the Ministry's own submission, WCWC argues that the Ministry "unlawfully fettered the discretion that it must exercise in order to rely on sections 20(1)(a) and 17(1)(b) of the *Freedom of Information and Protection of Privacy Act* as a justification for not providing the requested records." WCWC noticed that the Ministry's written policy "clearly contemplates an exercise of discretion by the responsible official as to whether or not to supply a digital mapping product free of charge in a particular situation." Although the policy leaves this discretion unfettered, WCWC argues that the Ministry's own officials interpreted the policy as requiring it to reject the application for access. Thus, it asserts, the Ministry failed to exercise appropriate discretion. (Reply Submission of WCWC, pp. 1, 2)

WCWC thus claims that:

> ... the evidence shows that the ministry failed even to acknowledge that the Act applied in the situation, that it did not make a decision under the Act, and that it certainly did not properly exercise any discretion under sections 20(1)(a) and 17(1)(b) of the Act. (Reply Submission of WCWC, p. 2)

In its view, the Ministry cannot retrospectively attempt to remedy its failure to act under the Act in processing WCWC's request. (Reply Submission of WCWC, pp. 2, 3) I should note, however, that until Order No, 51-1995, the Ministry took the position that this access request was outside the scope of the Act.

The Ministry strongly argues that my overview of the exercise of discretion by the head of a public body is limited to "whether the discretion was exercised in good faith, and not for an improper purpose, or based on irrelevant considerations. The Commissioner is not to act as a surrogate decision-maker. The weight that the Head of the Public Body may have placed on one factor over another in exercising his discretion is not reviewable by the Commissioner." (Reply Submission of the Ministry, paragraph 4) The Ministry asserts that it made its sections 17 and 20 decisions "in good faith, and not for an improper purpose, or based on irrelevant considerations. The Head made conscious and reflective decisions without regard to extraneous considerations and without discrimination." (Reply Submission of the Ministry, paragraph 15)

While the exercise of discretion is relevant to the application of sections 17 and 20, as discretionary exceptions in the Act, I am more inclined to agree with the Ministry's view. Arguments of a more technical and legal nature, such as whether discretion has been fettered, are more properly a matter for a court of law to decide, not something that I should determine under the Act.

Section 17(1): The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interest of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

....

(b): financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value

In what follows, I deal first with the specific application of two sections of the Act and then with more general policy considerations that in my view are relevant to the sale of digital map data to public interest groups.

WCWC points out that section 17(1) and section 20(1)(a) are discretionary exceptions that must be exercised in accordance with the broad goal of promoting public access to information:

> Where the commercial price constitutes an effective barrier to access to information by the applicant and where access would serve a legitimate public purpose, WCWC contends that the ministry ... is obliged to ensure that the price

> structure is designed to address the ministry's revenue generation objectives in a manner that causes the least adverse impact on access. (Submission of WCWC, p. 4)

The Ministry asserts that there is no authority in law for such a requirement. Such a requirement in its view would make section 20(1)(a) meaningless, because its purpose is to protect the ability of government to sell information. (Reply Submission of the Ministry, paragraph 11)

BCCLA argues that a Ministry must act fairly and reasonably in applying the section 17 and 20 exceptions. The interest of government accountability should counterbalance the interest of cost recovery. (Submission of the BCCLA, pp. 8, 9) The Ministry can accomplish the former by a policy for exemption from, or reduction of, prices to particular individuals and groups, where specific criteria are met.

The Ministry submits that section 17(1)(b) fully applies to the map data in dispute in this inquiry. (Submission of the Ministry, pp. 19-23) I accept its characterization of this data as commercial (available for purchase and priced competitively), technical (pertaining to geomatics), and scientific information (defining the extent and shape of the earth's surface). (Submission of the Ministry, p. 20) The fact of $1 million in sales during the past year establishes monetary value but that does not settle the burden of proof on the issue of harm under section 17. (Submission of the Ministry, p. 21)

The Ministry offers various reasons why disclosure of the data in dispute for free, or at a reduced price, can reasonably be expected to harm its financial or economic interests and that of the government. The Ministry also worries about its inability to enforce the licensing agreement that it uses for the sale of TRIM data:

> Although the Applicant in this case may be willing to enter into a license agreement, the next applicant may not. Furthermore, if the information can be obtained for free, it would [be] difficult to protect the government's copyright interest in the TRIM data since it would make little sense to protect the copyright on a free good. (Submission of the Ministry, pp. 22, 23)

My view is that I have to deal with the case at issue and not a hypothetical future situation. (See also the Reply Submission of WCWC, p. 9) WCWC is prepared to sign and abide by the standard licensing agreement for access to TRIM data. (Submission of WCWC, p. 7) Because of the government's emphatic views on the necessity of cost recovery, I also have no intention in this inquiry of ordering the provision of the map data to WCWC as a "free good."

The BCCLA argues that a waiver or reduction of the price of mapping information for WCWC cannot reasonably be expected to harm the financial interests of government. But it is my view that what is actually at issue in this specific inquiry is foregoing a price of $600 per TRIM mapsheet, not a request for a fee waiver or a price reduction. The BCCLA argues that the total revenue foregone would be minimal, which is insufficient to find "harm" under this section. (Submission of the BCCLA, p. 8) WCWC also concludes that the Ministry has not proved that

there is a reasonable expectation of harm under this section. (Reply Submission of WCWC, p. 10) I do not accept these arguments.

The Ministry emphasizes that there is no requirement under section 17 that it prove substantial or significant harm. Other sections of the Act speak of "immediate and grave harm," [(19)(2)], "harm significantly," [(21)(1)(c)], and "significant harm" [(25)]. Thus, "[i]f the Legislature had intended that the harm to the financial interests of the Public Body or the Province be 'significant' or 'substantial' it would have expressly stated so." (Reply Submission of the Ministry, paragraph 18)

I find that the data in dispute in this inquiry are covered by section 17(1)(b) of the Act and that the Ministry has met the burden of proving harm to its financial or economic interests.

Section 20(1)(a): the head of a public body may refuse to disclose to an applicant information (a) that is available for purchase by the public,

The Ministry emphasizes that the Act contemplates the sale of information to the public. A 1993 amendment to section 20 struck out the words "published and" from the original text of the Act: "The deletion of those words in the existing legislation indicates the intention of the legislature to have section 20(1)(a) apply to all types of information sold by the public bodies, as opposed to only 'published' information." (Submission of the Ministry, p. 15)

WCWC argues that the Ministry only has the discretion to act under this section: "If that discretion is not exercised at all or is not exercised properly, as WCWC argues happened here, then clearly the Commission[er] does have the authority to order the information to be disclosed." WCWC thinks that each application under this section must be considered on its own merits: "With a discretionary exemption, equality is achieved by ensuring that each application is considered fairly and reasonably on its own merits, not that the outcome of the exercise of discretion should be the same in every case." (Reply Submission of WCWC, pp. 3, 4)

The Ministry argues that WCWC is trying to advance the view that prices are an effective barrier to access, so that section 20 should be interpreted in a manner which would not allow such a barrier to exist, because the applicant cannot afford the price. The Ministry argues correctly that I cannot add words to the Act. Moreover, it states, the Legislature did not specify a standard of reasonableness or appropriateness for this section, as it did for fees charged under the Act. (Submission of the Ministry, pp. 16, 17)

> Nowhere in the Act is the power given to the Commissioner to make such an inquiry, and order that the price charged by the Public Body for the sale of information be changed. This would clearly be outside the jurisdiction of the Commissioner.

WCWC thinks that the Ministry misunderstands its argument on this section:

> The fact that the price constitutes an effective barrier to access is a factor that it is reasonable for the ministry to take into account when it exercised its discretion under section 20(1)(a) in the unique circumstances of a particular application. WCWC is not arguing that section 20(1)(a) should be interpreted to require that a barrier would *never* occur. (Reply Submission of WCWC, pp. 4, 5)

The Ministry claims that the applicant is effectively asking me to change the Ministry's pricing policy, which is the product of a decision made by the Minister of Finance and Treasury Board. (Submission of the Ministry, p. 17; see also p. 22) I agree with the Ministry that I cannot do so in an inquiry such as this one.

Furthermore, the Ministry claims that it has to have the same pricing policy for all customers, since it should not have to launch investigations into who can afford the purchase price:

> ... it is obviously in an applicant's interest to claim they do not have the resources to purchase the information; or, if they have the resources to purchase one map, they don't have the resources to purchase all the maps. This could completely undermine the ability of government to sell *any information*. (Submission of the Ministry, p. 18; see also p. 22)

I agree with WCWC that this line of reasoning is exaggerated, since the government is capable of making determinations about financial hardship. Indeed, it must do so on occasion under section 75(5). See Order No. 90-1996, March 8, 1996. (Reply Submission of WCWC, p. 4)

The Ministry chose to examine the latest available financial statement of WCWC to the end of April, 1994, which showed an operating surplus and liquid assets of over $100,000 in each category. Its annual income for 1993/94 was close to $2.2 million. The Ministry concludes that:

> The Applicant should have the resources to purchase the requested information - any "barrier" that has been created in this case is based on the purchasing decisions of the Applicant. (Submission of the Ministry, p. 19)

Implicitly pursuing a line of argument advanced by the Vancouver Police Department in a recent case (Order No. 79-1996, January 19, 1996), the Ministry concludes that any person, organization, or company could make the argument that they could not afford a record or document "available to the public." In effect, "... this would destroy the government's ability to sell information, and would eliminate this revenue source for the government." (Submission of the Ministry, p. 19) In my view, this fails to acknowledge the very specialized character of the digital map data at issue in the present inquiry.

WCWC responds that the Ministry's reading of its financial statements is unfounded and draws totally incorrect conclusions. WCWC has no means of recovering its expenditures on digital mapsheets, which vastly exceed the price for paper maps. Its balance sheet indicates that by far the largest asset is an unsold inventory of calendars and postcards, which is not equivalent

to cash available for the purchase of TRIM maps. WCWC argues that its current liabilities dwarf the liquid assets shown on the balance sheet: "In short, WCWC's financial statements do not in any way indicate that the price charged for this information is not an effective barrier to access." (Reply Submission of WCWC, p. 5)

I am not able to make any conclusion on the financial ability of WCWC, based on the evidence in this inquiry. This is an issue which may be relevant in the development or application of policy.

The BCCLA emphasizes, in the same vein as WCWC, that the Ministry must act fairly and reasonably in exercising its discretion under section 20(1)(a). In its view, acting fairly requires "fair procedures to deal with requests for waiving the purchase price for access to information available by purchase." According to the BCCLA, the WCWC's request must be considered seriously, which requires "an open process and specific criteria for evaluating applications for exemption from or reduction to the purchase price." (Submission of the BCCLA, p. 6) Thus an order for disclosure in this case is supported by the purposes of the Act, the nature of the information, the importance of accountability, and the compelling need associated with the financial inability of WCWC to pay. (p. 7) Again, I need to emphasize that this inquiry concerns WCWC's request for access to certain TRIM data, not a request for a price reduction or a fee waiver.

According to the Ministry, WCWC's concern with this section is that the head "has either failed to exercise its discretion, fettered its discretion, or improperly exercised its discretion." The Ministry's response is that it "exercised its discretion in good faith by considering all relevant circumstances." WCWC has produced no evidence to support its serious allegations on this point, whereas the Ministry has presented sworn evidence. (Reply Submission of the Ministry, paragraphs 5, 6)

Furthermore, the Ministry states that it has not fettered its discretion under this section, since it does not have a blanket policy covering all requests for access to TRIM or BTM mapsheets. The British Columbia Institute of Technology (BCIT), Simon Fraser University, and the University of Victoria have received free copies in connection with approved research projects. In March 1993 the Ministry rejected a research proposal from WCWC involving three TRIM mapsheets. WCWC did not make a proposal for research access in the current inquiry. (Reply Submission of the Ministry, paragraph 10) WCWC's reply is that the Ministry refused to grant its 1993 project the status of a research proposal without reference to its quality:

> ... the Ministry was *not* open to reviewing research proposals from WCWC. The transaction also illustrates that the ministry incorrectly limited the research category to universities, and that the ministry treated the "guidelines" in the policy as a binding prohibition. This is precisely the 'blanket' policy that WCWC has argued the ministry applied. (WCWC's Reply to the Ministry's Reply Submission, pp. 2, 3)

The Ministry responds that it exercised its discretion to refuse access under section 20(1)(a) by applying the pricing policy, which provides that products may be given free of

charge in special circumstances: "[a]s a guideline, products will only be granted free of charge in the case of approved pilot and research projects, and for promotional purposes." With respect to WCWC's argument that the Ministry fettered its discretion by applying the guideline to it so rigidly, I consider arguments of this kind more appropriate for a court. My role in reviewing the exercise of discretion relates more to ensuring that the underlying policies and goals of the Act are taken into account.

The Ministry states that the data in dispute fall within section 20(1) and that it "has exercised its discretion in good faith in refusing to disclose the information." It argues that under section 58(2)(b) of the Act, I must either confirm its decision or require it to reconsider the decision: "The Commissioner cannot require the Public Body to give the Applicant access to the information." (Submission of the Ministry, p. 14; and Reply Submission of the Ministry, paragraphs 4, 32) I agree with the Ministry on this point.

In the circumstances of this inquiry, I find that the Ministry was authorized to withhold the requested records on the basis of section 20(1)(a).

The Ministry's pricing policy for TRIM data

Intervenors have argued that the Ministry's current charges for TRIM data are excessive. This has to be an issue for me as Commissioner in considering the broad purposes of the Act. By way of illustration, I would have felt compelled to intervene, under section 42(1) of the Act, if the government decided to price its printed phone book at $600 per copy, and then refused to give out phone numbers in any other way, because the information was available for purchase by the public. I regard the sale of TRIM data at $600 per mapsheet as potentially falling within the same category of problem.

The Ministry's submissions imply that the written policy on pricing was prepared for the purposes of the map data in dispute. In fact, it was developed to "provide overall policy for the pricing of products distributed by Surveys and Resource Mapping Branch" of the then Ministry of Crown Lands in February 1991. (Book of Affidavits, exhibit K) Thus the policy applies to a whole series of products, not just digital map data, in response to the 1988 recommendation of the Privatization Committee of the former Social Credit government (the goals of which are self-evident). There is also a separate Treasury Board document on the pricing and distribution of government digital land information.

I note, in particular, the following statement in the written pricing policy:

> Surveys and Resource Mapping Branch products may be supplied free of charge, in special circumstances, upon written authorization of the Director, Surveys and Resource Mapping Branch. As a guideline, products will only be granted free of charge in the case of approved pilot and research projects, and for promotional purposes.

Thus, authority does exist for the "free" distribution of map products. The pricing policy does not prohibit discount pricing sensitive to "special circumstances," such as those affecting access by a public interest group of any stripe.

I have also reviewed the TRIM On-Line Pricing Policy, dated March 1993. (Book of Affidavits, Exhibit K) I note very particularized pricing policies within government, so that data are paid for only once. The Director, Surveys and Mapping Branch appears to be willing to go to considerable lengths to facilitate internal government usage of TRIM data (item 3.4). Moreover, the prices set in 1993 were $400 for public clients and $100 for government clients. Appendix A breaks down TRIM component prices at public and government prices under 17 different categories to establish these overall pricing amounts. Thus the government already has a complex pricing policy that should be able to accommodate the needs for access of a variety of public interest groups crossing the spectrum of land use policy.

In an affidavit on behalf of the Ministry, Alan J. Barnard, the Comptroller General for the province, stated that all ministries are required to follow a detailed policy of the Treasury Board entitled the "Financial Administration Operating Policy (FAOP)." An excerpt from FAOP concerns the establishment and review of fees and licences. Treasury Board has established four major categories of fees to be charged for government services. Digital mapping data, he claims, fits within the "private sector competitive category." (Affidavit of A. Barnard, paragraphs 4, 6, 7)

WCWC argues, in response, that TRIM data should fall within the "public subsidy" category based on the government's own FAOP policy, since TRIM data "meet the general social and economic needs of all British Columbians." Secondly, government's cost recovery is not 100 percent but only 20 percent of the actual cost of providing TRIM mapsheets. WCWC and most intervenors are of the view that the current subsidy for TRIM maps primarily benefits the forest and mining corporations that are the main non-governmental purchasers of TRIM maps. (Reply Submission of WCWC, pp. 8, 9)

The Ministry's response on this need-for-access point is that "if environmental non-government organizations participate in the land use planning processes, they will be able to review the data upon which decisions are made." Thus the Sierra Club was able to participate in three CORE "land use processes, despite the fact that ownership of the spatial mapping data used at the tables was not transferred to them." (Reply Submission of the Ministry, paragraphs 20, 21) It seems to me that the government may be failing to recognize, as pointed out by Marshik and Associates, that using TRIM data effectively requires regular access, specialized software, and practical experience. Not having access to TRIM mapsheets may prevent an organization on any side of an issue from intervening on land use matters where it wants to try to shape the government's agenda rather than simply responding to it. This aspiration is in line with the broad goals of the Act in a high-tech environment.

The Comptroller General attaches paramount value to the equitable treatment of all taxpayers in the setting and administering of fees:

> The revenue collected through the sale of digital map products 'reimburses' the general taxpayer for activities carried out for the benefit of the purchaser of the information. The sale of information at a lower or no cost to specific people or organizations amounts to a subsidy by the general taxpayers. This would be the inequitable treatment of taxpayers. (Affidavit of A. Barnard, paragraph 8)

At first glance, this is a very compelling argument. With respect, however, the seeming flaw in this argument is the notion that WCWC, and other non-profit, "public-interest" organizations, are doing work for their own benefit as purchasers. In a variety of ways, governments provide subsidies, often through the tax system itself, to a range of organizations, like WCWC or, indeed, pro-logging groups, because they are "perceived" as serving the public interest, rather than their own interest. Of course, there are competing visions of the public interest held by stakeholders, over which government does not have control.

WCWC argues that a reduced or waived fee would only be a subsidy if the organization receiving the product would otherwise have paid the full price, and it says that it cannot afford to pay the commercial price. In its view, exceptions to full cost recovery already exist: "[T]here already *is* a two-price system in which some forest companies are offered TRIM maps free of charge in exchange for the submission of information most of which they are already obliged to provide." (Reply Submission of WCWC, pp. 7, 8)

The Comptroller General's second reservation about non-profits is, as noted above, the additional costs in research and study of a two-tier pricing policy. In addition, "[i]f the aims of the 'non-profit' organization were not shared by the majority of taxpayers, then the general taxpayer, or the "for-profit" users, would be asked to fund an organization benefiting a minority." (Affidavit of A. Barnard, paragraph 9; and Submission of the Ministry, p. 23) As referred to above, all kinds of minority groups receive comparable subsidies from the public purse. Further, there are rules about how non-profits are set up and how they acquire and maintain any tax exempt status that have nothing to do with whether they represent a majority or minority of taxpayers. In fact, the province operates a registry of non-profit organizations in the same Ministry that houses the Comptroller General which perhaps could be consulted for the purpose of establishing the bonafides of "public interest" applicants for reduced price TRIM data.

When the Ministry of Forests purchases TRIM mapsheets from the Ministry for use in such a data exchange agreement, the Ministry of Forests in fact pays the Ministry a total of $600 per mapsheet ($150 initially and then $450 after entering into the data exchange). (Reply Submission of the Ministry, Supplemental Affidavit of Gary T. Sawayama, paragraph 4) This arrangement requires suppliers of data to provide the Ministry of Forests with up-to-date information in a certain format in exchange for the use of the digital map sheets. (Reply Submission of the Ministry, Supplementary Affidavit of David Gilbert, paragraph 2) The Ministry foregoes significant revenue per mapsheet in this exchange but benefits from what it calls "value-added" data collected to a known standard. (Reply Submission of the Ministry, Supplementary Affidavit of David Gilbert, paragraphs 3-5) As an extension of this practice, there may be an argument for treating interested not-for-profits in a similar manner, based on a rationale that the "added value" in such cases is the return to the government and society at large

for use by not-for-profits of TRIM data in matters of public interest in a pluralistic setting. Some such groups may use TRIM data to support government positions, others to criticize them.

Finally, the Comptroller General ventures the opinion that "a two-price system based on profit vs. non-profit status would make equitable administration of government fees virtually impossible." (Affidavit of A. Barnard, paragraph 10) I have already indicated my skepticism on this point in the specialized circumstances of digital map data. At the same time, I acknowledge that this is a policy decision for the government to make.

WCWC is critical of various assumptions and arguments put forward by the Comptroller General and concludes that government pricing policy "is entirely consistent with some form of fee waiver provision for organizations that would not otherwise be able to afford to purchase the maps anyway." (Reply Submission of WCWC, p. 7) I agree with the applicant on this point, provided that the government's basic costs of distribution are covered.

The Ministry kindly provided me with an informative analysis, prepared by a management consultant, of the financial harm to the Ministry arising from the pricing of spatial data. (Affidavit of Chris F. Jones, Exhibit B) This analysis primarily considers the implications of free distribution of such information, which seems to me to be an unacceptable option, given the firm position of the Ministry on cost recovery and the financial exigencies of the 1990s. (See also Reply Submission of WCWC, pp. 6, 7, which questions various assumptions that it claims the consultant made.) Despite the consultant's referral to pricing at a reduced cost, his analysis does not address any adverse consequences of simply charging WCWC a lower price, which appears to be the middle road in this tortuous matter.

The Ministry will have expended approximately $70 million to complete the TRIM data set (7,000 mapsheets at $10,000 in development costs per sheet). It would cost $4.2 million, plus applicable taxes, for a single purchaser outside government to acquire a complete set of TRIM mapsheets (7,000 mapsheets at $600 per sheet). It is hard to imagine any single non-governmental environmental organization, or a consortium of all of them, being able to afford such a capital expenditure, plus related costs of updating and actual usage of the data. Similarly, I doubt that any university or college map library in the province, charged with educating a new generation of students to use the latest technology and technological resources, could afford, individually or perhaps even collectively, to purchase a full set of TRIM data for training and research purposes.

The pricing of digital data for sale to the public is a matter of first impression under this Act. The framers of the legislation had many more complicated matters to address, at least in specific terms of the Act, than the availability of digital mapping data for purchase by the public. It is my view that the Legislature may not have anticipated the type of issues posed by Geographical Information Systems and could not have intended to include them in the phrase, "available to the public," under section 20(1)(a) of the Act without some expectation of reasonable pricing appropriate to the circumstances of various categories of purchasers. Even if a $600 price per mapsheet reflects actual costs, it does not take into account the limited purchasing power of libraries and/or public interest groups.

The Ministry, at several points, argues to the effect that overruling the Ministry of Finance on the pricing of the data in dispute would undermine "revenue generation from the sale of all government information." (Submission of the Ministry, p. 22; see also p. 17) In the present case, one is dealing with a very particular and novel kind of problem. No one intends to stop MAPS-BC from continuing to sell what it is able to sell and thereby to generate several million dollars in revenue annually, for example. This is not an inquiry about the government's overall right to sell information. I regard digital map data produced by government on a monopoly basis as a special case.

I am encouraged by the Ministry's statement that the Land Use Coordination Office is currently reviewing the pricing of spatial data products sold by government and is expected to make recommendations to the Treasury Board. (Submission of the Ministry, p. 24) I trust that this process will contribute toward the successful settlement of this debate.

A fee waiver system?

WCWC wants a fee waiver system to assure access to the data in dispute by it and other non-profit conservation groups. The Ministry has no income to lose in doing so, it argues, because it does not derive "significant income" from sales to such groups. Moreover, WCWC is willing to pay a fee to cover the marginal cost of distributing the information to it. WCWC argues that:

> ... the revenue that the government would forego as a result of releasing the requested TRIM maps to WCWC is precisely zero, because WCWC cannot afford the $25,000 (plus tax and shipping) to purchase the maps at the commercial price. The costs incurred would be zero, because WCWC has agreed to cover them. The *value* that the ministry would receive is the value of fostering the purposes of the *Freedom of Information and Protection of Privacy Act*. (WCWC's reply submission to the Ministry's reply, p. 5)

WCWC will be satisfied if I recommend that the Ministry adopt a policy regarding some form of fee waiver or price reduction program for digital map data. (Submission of the WCWC, pp. 7, 8) However, the Ministry correctly emphasizes that this inquiry is not a fee waiver case, since no fees have been assessed against the applicant. (Submission of the Ministry, pp. 7, 8)

It is relevant to the issue of a fee waiver that the variable cost to distribute a single map is about $150 per map: "[F]or each purchase of a map, the Public Body incurs a cost, additional to the development costs already incurred, in order to fill the order." (Submission of the Ministry, p. 23) The price of $150 per mapsheet at least establishes a starting point for discussion and compromise. Thus a negotiated price per map sheet to public interest groups of every stripe should allow the Ministry to recover the additional distribution costs, and some development costs, and also generate some sales revenue. The Sierra Club argues that:

> There will be no loss of revenue to the Ministries because there is currently no money flowing to those ministries from the engos [environmental non-governmental organizations]. Considering the amount of taxpayer's money spent

> on creating the digital mapping information, the cost recovery from selling the information is minimal.

The government should seriously consider this point.

I note from a summary in an affidavit submitted by the Ministry that the February 1991 cost recovery edict from Finance instructed it to charge a market price sufficient to recover:

> *the incremental costs of distributing the data, and, whenever possible,
> *a reasonable contribution towards the British Columbia Government's costs of gathering, processing and storing the data. (Affidavit of Gary T. Sawayama, paragraph 25)

The phrases, "whenever possible," and a "reasonable" contribution, provide some leeway for fashioning a creative solution to the apparent needs of WCWC and comparable non-profit organizations.

The public interest in promoting the use of TRIM data

I am concerned that to date no one seems to have pointed out the cost to society of not using TRIM data to the fullest advantage in the making of public policy with input from all affected and interested parties. The Treasury Board has mandated cost recovery, a view that no taxpayer can fail to applaud. But is such cost recovery, at current pricing levels, truly feasible from public-interest organizations of every persuasion involved in some of the most important issues facing this province in this decade?

One of the fundamental goals of the Act is to promote more accountability of government to the public by encouraging greater openness with respect to information held by government. In this sense, it is inconsistent with the Act for an organization such as WCWC not to be able to obtain access to the data in dispute. WCWC is self-described on its letterhead as "achieving wilderness preservation through public education and scientific research." The use of the latter term at least implies a public-interested goal. TRIM data are a public good, and it is arguable that the government should promote their use in the public interest.

I agree with the submission of CUPE that reducing barriers to access to information is a goal of section 2 of the Act. As well, as CUPE also argued, access rights have to be meaningful. Section 2 promotes the public interest in a more open and more accountable government in a way that the current TRIM pricing policy for digital mapsheets for non-commercial purchases may contravene. (See Order No. 51-1995, pp. 4, 5)

The entrenched positions of the various parties in this inquiry are counter to the imperative to find a solution in the public interest. It is not in the best interests of this province for WCWC, or public interests groups with widely divergent goals, not to have access to TRIM data from the Ministry, and it is not in the best interests of the Ministry to completely forego cost recovery as mandated by the Ministry of Finance and the Treasury Board. As is often the case, a solution likely lies somewhere in the middle.

An Ontario decision on access to published information

On July 14, 1993 Tom Wright, the Ontario Information and Privacy Commissioner, issued his decision in Order P-496 concerning the Ontario Securities Commission (OSC). The approach that the Commissioner adopted has relevance for the present inquiry. When an applicant sought certain information from the Ontario Securities Commission, it replied that the information was available by subscription from a private company. The Ontario *Freedom of Information and Protection of Privacy Act* has an exemption, section 22(a), which reads as follows:

> A head may refuse to disclose a record where, the record or the information contain in the record has been published or is currently available to the public;

In making his determination of this matter, the Commissioner felt compelled to address the broad purposes of the Ontario Act to make information available to the public and relied on them as "key to the interpretation and application of section 22(a)." In his view, "the section should not be applied in a way that could indirectly prevent or limit the public's access to information. To do so would be contrary to the purposes of the Act." (p. 3)

The Commissioner concluded that the Ontario Securities Commission's arrangement with the private company "has the very real potential to inhibit the public's right of access." In my view, the present inquiry in British Columbia has similar characteristics. The Ontario Commissioner stated:

> In the circumstances of this appeal, although a private sector entity such as Micromedia may provide a system of access, it does not, in my view, provide a regularized system of access available to members of the public generally. Micromedia is not the equivalent of a government publications centre or a government run public registry such as those referred to by the OSC.
>
> Therefore, in my view, the fact that the records at issue in this appeal are available from Micromedia does not render the information "currently available to the public" within the meaning of section 22(a). Accordingly, the records do not quality for exemption under section 22(a). (p. 3)

In a postscript to his decision, the Ontario Commissioner described the issue raised in the appeal as going "to the heart of Ontario's access to information legislation." His point is that all governments are seeking ways to increase non-tax based revenue by selling information:

> ... a very real question arises: How will the government's new initiatives maintain and balance the rights of the public to access information for which it has already paid, with the desire to find new sources of revenue? In this connection, I believe that it is a fundamental component of this balancing that government sees itself as the custodian or trustee of the information it holds.

> Ultimately, I believe that how the balancing I have described is resolved will go a long way to determining whether universal access to government information will be the norm or whether an information elite will be created and only those who can afford to pay will have access to government-held information. In my opinion, this latter situation would be unacceptable in an open and democratic society.
>
> ... decisions on what types of information should be sold must always be made against the backdrop that members of the general public must continue to have a right of access to information held by government. (p. 5)

I find the points made by the Ontario Commissioner quite compelling in the context of the present inquiry in this province. Although I am not prepared to follow his finding, his perspectives seem very relevant to a reconsideration of existing policy in this case.

Comments for a reconsideration

I agree with the Ministry that it exercised its discretion in applying section 20(1)(a) "in good faith, and not for an improper purpose, or based on irrelevant considerations." I also recognize that the Ministry applied a policy which covers a whole series of products, as well as with a policy produced by Treasury Board on pricing and distribution of government digital land information. While I do not intend to make an order requiring the Ministry to reconsider its decision under section 20(1)(a), I am of the view that there should be a general reconsideration by the Ministry and other government departments about the application of its overall pricing policies for TRIM mapsheets.

In addition to the arguments presented by the applicant and the intervenors in this inquiry, and my discussion of the relevant issues, there are a number of approaches to solving this problem which I encourage the government to consider. I offer these comments in the spirit of recognizing the broad principles underlying the Act.

Although the assessment of fees was not an issue in this inquiry, the current fee schedule under section 75 of the Act, with its distinction in the regulations between commercial and other applicants, suggests that the government believed this difference was appropriate when public bodies are responding to requests for information or records. It may be appropriate to consider a similar approach to other procedures for requesting records.

Data submitted to this inquiry raise real questions of how many not-for-profit groups can really afford to purchase TRIM data, use it effectively, and then keep it updated at additional cost. I would urge the Ministry to conduct a detailed analysis of the sales of TRIM data to non-government sources to see if non-profits are indeed purchasing the map sheets. For example, if environmental groups other than WCWC are actually purchasing TRIM data, that would be revealing. The fact that all intervenors in this case chose to be on the side of the WCWC suggests that affordable access to TRIM data does not exist. However, I did not have the benefit in this inquiry of hearing from a broader range of intervenors. How many small businesses in

this province, which are critical to our economy, can in fact afford the global expenditures associated with effective use of TRIM data?

At the very least, I would ask the Ministry to further consider adopting a two-tiered system of pricing that would distinguish between for-profits and not-for-profits. It would be worth knowing more, in this regard, about how other federal, provincial, and state jurisdictions in North America have dealt with the pricing of Geographical Information System (GIS) data produced from the public purse.

In reconsidering its current treatment of WCWC's access request as a policy issue, I would refer the Ministry to the ongoing debate about open access versus revenue generation in the field of Geographic Information Systems. In 1994 I participated in an American conference on Law and Information Policy for Spatial Databases. I offer this as information for the government to consider. Canadian jurisdictions are not immune from the same discussions, as this current inquiry illustrates. See Harlan J. Onsrud, ed., Proceedings of the Conference on Law and Information Policy for Spatial Databases, October 28-29, 1994 (National Center for Geographic Information and Analysis, University of Maine, Orono, ME, 1995). Such recent literature indicates that the prevailing test for distribution of digital data by U.S. government bodies (national and local) is the marginal cost of dissemination or lower. The same unpublished article concludes as follows on the basis of a U.S. survey of local and county government GIS agencies:

> Considering the costs incurred by the GIS agencies in instituting and servicing revenue generation approaches, the argument that charging for data allows a GIS agency to reduce the burden on the local taxpayer by charging users is unsupported by these survey findings. The costs recovered in proportion to the overall GIS agency annual budgets typically appear to be negligible or offset by the costs to service the revenue generation policy. (Harlan J. Onsrud, Jeffrey Johnson, and Judy Winnecki, "GIS Dissemination Policy: Two Surveys and a Suggested Approach," unpublished manuscript, National Center for Geographic Information and Analysis, University of Maine, Orono, ME, 1996. Quoted with permission.)

While this limited U.S. survey should hardly dictate the Ministry's policy on cost recovery, its current practices, as evidenced by the submissions of the applicant and the intervenors in this inquiry, may merit some reconsideration.

A submission from Ecotrust Canada stated that some components of the conservation movement have recently established the B.C. Conservation Mapping Consortium to pool resources in order to increase their reach and effect. This is another idea that I would like the Ministry to consider. It could be that the environmental movement might only have to purchase, at a reduced or waived rate, one complete set of TRIM data for purposes of sharing, and keep them updated by arrangement. This would mean that non-profits in the land use business could pool, in particular, the technical resources necessary to use such information effectively and in the public interest.

With respect to the issues of a fee waiver policy and/or a two-tier system of pricing for non-profit organizations in the land use business, of the possibility of commercial vendors being encouraged to re-sell GIS data to non-profit and other users, of the extent to which the government might encourage a consortium of users, and of the utility and relevance of cost recovery in this kind of scenario, I urge the Ministry to involve the Chief Information Officer of the province in discussing such matters. The Chief Information Officer is also in a position to ensure that any governmental review of pricing policy for information is actually completed, because of his overreaching responsibility for information policy.

17. Order

I find that the Ministry was authorized to refuse access to the records in dispute to the applicant under sections 17(1)(b) and 20(1)(a) of the Act. Under section 58(2)(b), I confirm the decision of the Ministry of Environment, Lands and Parks to refuse access.

However, I invite the Ministry to reconsider its decision in this case, based on the arguments, discussion, and approaches set forth in these reasons.

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David H. Flaherty
Commissioner

March 11, 1996