Order F24-55

MINISTRY OF FORESTS

Alexander R. Lonergan
Adjudicator

June 27, 2024

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Summary: An applicant requested access to geospatial information held by the Ministry of Forests (the Ministry). The Ministry refused to disclose this information under s. 21(1) (disclosure harmful to a third party's business interests) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator determined that the Ministry is not required to refuse disclosure under s. 21(1) and ordered the Ministry to disclose the information to the applicant. Finally, the adjudicator determined that s. 25(1)(b) (public interest disclosure) does not require the Ministry to disclose the Data without delay.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 21(1), 21(1)(a), 21(1)(b), 21(1)(c)(i), 21(1)(c)(ii), 21(1)(c)(iii), 23(1), 25(1)(b), and 54; Forest Act, RSBC 1996, c 157, ss. 8, 9, and 136; Tree Farm Licence Management Plan Regulation, BC Reg 280/2009, ss. 5 and 6; *Forestry Revitalization Act*, SBC 2003, c 17, ss. 3 and 4.

INTRODUCTION

[1] An individual (the applicant) requested, under the Freedom of Information and Protection of Privacy Act (FIPPA),[1] that the Ministry of Forests (the Ministry) provide him with access to geospatial data files showing the most current version of Timber Harvesting Land Base mapping for BC. The Ministry identified data sets it had received from 20 third parties that held tree farm licences (TFLs)[2], as well as one public body (City of Mission).

[1] All sectional references in this Order refer to FIPPA unless otherwise noted.
[2] Schedule 1 of FIPPA defines a "third party" as including, in relation to a request for access to a record, any person, group of persons, or organization other than the person who made the request or a public body.

[2] The Ministry notified all affected parties about the applicant's request and sought their positions on disclosure under s. 23(1).[3]

[3] Two third parties and the City of Mission consented to disclosure. Seven third parties objected to disclosure under s. 21(1) and 11 did not respond. After considering the third parties' objections, the Ministry decided it was required under s. 21(1) to refuse access to the information supplied by the 18 third parties that either objected or did not respond.

[4] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the Ministry's decision. The applicant says that s. 21(1) does not apply and that disclosure is required by s. 25(1)(b) (public interest disclosure) because it is clearly in the public interest. Mediation by the OIPC did not resolve the matter and it proceeded to this inquiry.

[5] The Ministry and the applicant provided written submissions for this inquiry. The Ministry advised the 18 third parties that if they wanted to participate in the inquiry, they should contact the OIPC's registrar of inquiries. Ultimately, only three provided submissions in this inquiry as appropriate persons under s. 54. The three participating third parties are: Interfor Corporation (Interfor), Teal Cedar Products Ltd. (Teal), and Western Forest Products Inc. (Western). The OIPC permitted Western to submit some of its submission *in camera* (material that only the adjudicator may see).

ISSUE AND BURDEN OF PROOF

[6] The issues I must decide in this inquiry are as follows:

1. Does s. 21(1) require the Ministry to refuse to disclose the information in dispute?
2. Does s. 25(1)(b) require the Ministry to disclose the information in dispute without delay?

[7] Under s. 57(1), the Ministry has the burden of proving that the applicant has no right of access to the information withheld under ss. 21(1).

[8] FIPPA does not say which party has the burden of proving that s. 25(1)(b) applies. However, past orders have said that it is in the best interest of all parties to provide the adjudicator with whatever evidence and argument they have to

[3] Section 23 specifies when and how a public body *must* or *may* give notice to third parties when the public body believes the record contains information that may be excepted from disclosure under ss. 18.1, 21 or 22.

support their position regarding s. 25(1).[4] I will follow the same approach in this matter.

DISCUSSION

Background[5]

[9] The Ministry is responsible for regulating BC's forest sector and ensuring the health of BC's forests. Teal, Western and Interfor are corporations in the business of timber harvesting and the purchase and sale of timber harvesting rights.

[10] In 2003 and again in 2013, the Ministry asked all TFL holders to provide it with geospatial data about their TFLs because the Ministry was considering changes to forest management policy and legislation. Specifically, the Ministry asked for information about the "Timber Harvesting Land Base" of each TFL.

[11] As I understand it, the information the TFL holders provided to the Ministry is what the applicant seeks. The applicant specifically asked for: "Geospatial data files that show the most current version of Timber Harvesting Land Base mapping for all of [BC]" In response to the applicant's request, the Ministry identified computer files that the TFL holders provided to the Ministry in 2003 and 2013.

Records and Information in Dispute

[12] The information in dispute is data in computer files that 18 TFL holders supplied to the Ministry in 2003 and 2013. When the data in these files is placed onto a map of BC, it highlights specific areas in the TFLs. These highlighted areas are called the "Timber Harvesting Land Base".

[13] In any given TFL, the Timber Harvesting Land Base is the area where the TFL holder believes they could harvest timber in a reasonable and economically feasible way. The Timber Harvesting Land Base does not necessarily show the location of past, present, or future harvesting activity.

[14] For convenience, I will use the following terms from this point onward:

- I will refer to the disputed Timber Harvesting Land Base information as the "Data".

[4] Order 02-38, 2002 CanLII 42472 (BC IPC), at para. 39; Order F07-23, 2007 CanLII 52748 (BC IPC) at para. 9.

[5] This background information is based on the information provided in the parties' submissions. It is not information that is in dispute.

- I will refer to the 18 TFL holders that supplied the Data as the "TFL Owners".
- I will collectively refer to Teal, Western, and Interfor as the "Companies".

Section 21(1) - Harm to Third Party Business Interests

[15] The Ministry withheld the information in dispute under s. 21(1). This section requires a public body to refuse to disclose information if its disclosure could reasonably be expected to harm the business interests of a third party.

[16] The parts of s. 21(1) that are relevant to this inquiry are as follows:

> **21** (1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
>
> . . .
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
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> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, . . .

[17] Past orders have established a three-part analytical framework to determine the applicability of s. 21(1), which I will follow in this matter. The Ministry must satisfy all three of the following criteria in order for the information to be properly withheld under s. 21(1):

1. Disclosing the information at issue would reveal the type of information listed in s. 21(1)(a);
2. The information at issue was supplied, implicitly or explicitly, in confidence under s. 21(1)(b); and
3. Disclosing the information at issue could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c).[6]

[6] Order 03-02, 2003 CanLII 49166 (BC IPC); Order F17-14, 2017 BCIPC 15 (CanLII) at para. 9; Order F22-33, 2022 BCIPC 37 (CanLII) at para. 25.

[18] For the reasons that follow, I find that s. 21(1) does not require the Ministry to refuse to disclose the Data.

Type of Information – s. 21(1)(a)

[19] The first step in the s. 21(1) analysis is deciding whether the Data is of the type listed in s. 21(1)(a). The Ministry characterizes the Data as "technical" and "commercial" information of and about the TFL Owners.[7] The Companies varyingly say that the Data is their "commercial", "technical", and "scientific information".[8] The applicant does not discuss how to characterize the Data.

[20] FIPPA does not define these three terms, but I will discuss how each has been interpreted in past orders.

Scientific information

[21] I recently interpreted the term "scientific information" in Order F24-23.[9] I concluded that *"scientific information"* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.

[22] Applying the same interpretation here, based on my review of the Data, I find that the Data does not relate to the observation and testing of any hypotheses in the natural, biological, social or mathematic sciences. While the natural sciences clearly informed the creation of the Data, in substance, it does not fall within any scientific fields of knowledge. Therefore, I find that none of the Data is scientific information.

Technical information

[23] "Technical information" is information belonging to an organized field of knowledge falling under the general categories of applied science or mechanical arts. Technical information usually involves information prepared by a professional with the relevant expertise, and describes the construction, operation or maintenance of a structure, process, equipment, or entity.[10]

[24] The Data describes the economic viability of a timber harvesting process. It was prepared using each TFL Owner's professional expertise in timber

[7] Ministry's submission at paras. 51-59.
[8] Western's submission at paras. 13-17; Interfor's submission at p. 1; Teal's submission at p. 1.
[9] Order F24-23, 2024 BCIPC 30 (CanLII) at paras. 29-33.
[10] Order F10-06, 2010 BCIPC 9 (CanLII), at para. 35; Order F12-13, 2012 BCIPC 18 (CanLII), at para. 11; Order F23-32, 2023 BCIPC 38 (CanLII), at para. 18.

harvesting methods, equipment, and physical geography.[11] For these reasons, I find that the Data is technical information.

Commercial information

[25] "Commercial information" relates to a commercial enterprise but need not be proprietary in nature or have an independent market or monetary value. The information itself must be associated with the buying, selling or exchange of the entity's goods or services.[12]

[26] The Data indicates the part of the TFL where TFL Owners determined they could reasonably and economically feasibly harvest timber. This information is directly associated with the production and sale of the TFL Owners' goods and services. Therefore, I find that the Data is commercial information.

Of or about a third party

[27] Finally, to satisfy s. 21(1)(a), the Data must be "of" or "about" a third party.

[28] The TFL Owners created the Data by considering what was feasible in their unique circumstances, applying their expertise and resources, and analyzing the geography of their TFL. The Data is about commercially valuable harvesting rights that they own.

[29] Additionally, the Ministry's affidavit evidence includes an exhibited letter dated January 7, 2004 that states: "The Ministry of Forests and contractor recognise that ownership rights of the TFL data remain with the licensees."[13] While the parties do not clearly explain the extent and implications of these "ownership rights", this statement indicates that the TFL Owners created and supplied the Data to the Ministry with a mutual understanding that the Data belonged to the TFL Owners that created it.

[30] These circumstances satisfy me that the TFL Owners have at least some ownership interests in the Data. I find that the Data is commercial and technical information of the TFL Owners.

Supplied in confidence – s. 21(1)(b)

[31] The second step of the s. 21(1) analysis is to determine whether the Data was supplied to the Ministry *in confidence.* Past orders have separately considered whether the information was "supplied" by a third party before

[11] Interfor's submission at p. 1; Teal's submission at pp. 1-2; Western's submission at para. 17.
[12] Order 01-36, 2001 CanLII 21590 (BC IPC), at para. 17; Order F08-03, 2008 CanLII 13321 (BC IPC), at para. 63.
[13] Affidavit #1 of TS, Exhibit "B" at p. 1.

deciding whether it was supplied "in confidence", both of which are required to engage s. 21(1)(b).[14] I will apply the same two-step approach to s. 21(1)(b) in this matter.

Was the information "supplied"?

[32] Information is considered "supplied" under s. 21(1)(b) if it is "provided or furnished" to the public body.[15]

[33] In this matter, the Ministry confirms that it received the Data directly from the TFL Owners in 2003 and 2013.[16] Neither the applicant nor the Companies disagree that the Data was supplied to the Ministry, and nothing in the material before me suggests otherwise. I find that all of the Data was "supplied" to the Ministry.

Was the supply of information "in confidence"?

[34] Under s. 21(1)(b), the Ministry must show that the Data was supplied in confidence, either implicitly or explicitly. Specifically, the Ministry must establish that the TFL Owners had an objectively reasonable expectation of confidentiality at the time that they supplied the Data.[17]

Parties' positions, s. 21(1)(b)

[35] The Ministry says that the Data was supplied to it in confidence.[18] In response, the applicant does not directly dispute that the information was supplied in confidence. Rather, he says the Ministry should not have given any express or implicit assurances of confidentiality. The applicant further says that legislation compels the TFL Owners to supply the Data.[19] In light of this, the applicant questions whether the confidentiality agreements that the Ministry offered the TFL Owners are legally enforceable at all.[20]

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[14] Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 26, upheld and cited by *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner),* 2002 BCSC 603; Order F14-28, 2014 BCIPC 31 (CanLII) at paras. 17-18.
[15] Order 01-20, 2001 CanLII 21574 (BC IPC), at para. 93.
[16] Ministry's submission at paras. 26 and 28.
[17] Order 01-36, 2001 CanLII 21590 at para. 23.
[18] Ministry's submission at paras. 63 and 67.
[19] Specifically, the applicant refers to the TFL Owners' obligations to supply information to the Ministry under the *Forest Act*, RSBC 1996, c 157 at s. 9 and the *Forestry Revitalization Act*, SBC 2003, c 17 at s. 4(1). The relevant sections of these acts have not been amended since the Data was supplied to the Ministry.
[20] Applicant's submission at paras. 100, 119, and 123.

Analysis and findings, s. 21(1)(b)

[36] The Ministry says that it explicitly assured the TFL Owners that the Data would be kept confidential.[21]

[37] The Ministry provided me with a copy of a letter that it says it sent to the TFL Owners when it sought Data in 2003. This letter includes the following statement: "The information provided will be considered single purpose data and will be held in confidence. The ministry will enter into a confidentiality agreement with licensees that feel this is necessary."[22] I find the language in the letter the Ministry sent in 2003 unambiguously assures TFL Owners that the Ministry is receiving the Data in confidence. While the parties did not provide a copy of any confidentiality agreements from 2003, Interfor describes one such agreement it signed with the Ministry relating to the Data it supplied in 2003.[23]

[38] Turning to those parts of the Data that were supplied in 2013, the Ministry explains that in 2013 it again requested TFL Owners provide the Ministry with certain information about their TFLs. The Ministry also says that it entered into more written confidentiality agreements with TFL Owners at that time. Finally, the Ministry provides affidavit evidence that confirms the existence of their request and 2013 confidentiality agreements.[24] Additionally, Interfor and Western describe the confidentiality agreements they say they entered into with the Ministry in 2013.[25]

[39] After considering the circumstances, communications, and descriptions of the confidentiality agreements raised by the Ministry and the Companies, I find that the Data was supplied in confidence in both 2003 and 2013. Furthermore, the Ministry's multiple express assurances that it would keep the Data confidential satisfy me that the TFL Owners' expectations of confidentiality were objectively reasonable in the circumstances.

[40] Finally, I find the applicant's argument that it was incorrect for the Ministry to offer assurances of confidentiality is not relevant to the s. 21(1)(b) analysis. Whether or not it was wrong for the Ministry to provide assurances of confidentiality to the TFL Owners when they supplied the Data is not at issue in this inquiry. I am satisfied that the Ministry did offer those assurances and that the Data was supplied in confidence, and that is all that is required to meet the second part of the s. 21 test. However, I will return to what the applicant says about this in the s. 21(1)(c)(ii) analysis below.

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[21] Ministry's submission at paras. 63-66.
[22] Affidavit #1 of TS, Exhibit "A", at p.1.
[23] Interfor's submission at p. 3.
[24] Ministry's submission at para. 65; Affidavit #1 of TS, at paras. 18, 19 and 23.
[25] Interfor's submission at pp. 2-3; and Western's submission at para. 5

Reasonable Expectation of Harm – s. 21(1)(c)

[41] The third and final step in the s. 21(1) analysis is to determine whether disclosing the Data could reasonably be expected to result in any of the harms set out in s. 21(1)(c). If so, the Ministry must refuse to disclose the Data. The standard of harm under s. 21(1)(c) is "a reasonable expectation of harm", which is "a middle ground between that which is probable and that which is merely possible."[26]

[42] The Ministry does not need to prove on a balance of probabilities that disclosure will actually result in the expected harms. Instead, the Ministry must establish that disclosure will result in a risk of harm that is well beyond the merely possible or speculative. Additionally, there must be a clear and direct connection between disclosing the Data and the expected harm.[27] The evidence required to meet this standard depends on the unique circumstances of each case.[28]

[43] The Ministry says that disclosing the Data can reasonably be expected to result in the harms listed at ss. 21(1)(c)(i), (ii) and (iii).[29] I will address each of these harms in my analysis below.

[44] As established by past OIPC decisions, the analysis will proceed on the basis that disclosure to the applicant should be considered a disclosure to the world.[30]

Significant harm to competitive position or interference with negotiating position, s. 21(1)(c)(i)

[45] Section 21(1)(c)(i) requires the head of a public body to refuse disclosure if disclosure could reasonably be expected to significantly harm the competitive position, or significantly interfere with the negotiating position, of the third party.

[46] To engage s. 21(1)(c)(i), the expected harm must also be significant. "Significant" harm is material harm looked at in light of all the circumstances affecting the third party's competitive or negotiating position.[31] Section 21(1) does

[26] Order 10-20, 2001 CanLII 21574 (BC IPC) at para. 57; Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 38; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23, at para. 196; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para. 58; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) [*Ontario*] at paras. 52-54.
[27] Order F07-15, 2007 CanLII 35476 (BC IPC), at para. 17.
[28] *Ontario, supra* note #26 at para. 54.
[29] Ministry's submission at para. 70.
[30] Order 01-01, 2001 CanLII 21555 (BC IPC), at para. 39; and Order 03-33, 2003 CanLII 49212 (BC IPC) at para. 44.
[31] Order 00-10, 2000 CanLII 11042 (BC IPC), at p. 11.

not operate to protect third parties from all negative effects of their dealings with public bodies.[32]

Parties' positions, s. 21(1)(c)(i)

[47] The Ministry directs me to the Companies' submissions to support its claim that s. 21(1)(c)(i) applies.[33] The Ministry did not provide its own arguments to support its reliance on s. 21(1)(c)(i). Therefore, my understanding is that the Ministry is entirely relying on the Companies' submissions to support its position.

[48] Teal and Interfor argue that s. 21(1)(c)(i) applies because disclosure would both significantly harm their competitive positions and interfere with their negotiating positions.[34] Western argues that disclosure would interfere significantly with its negotiating position but makes no comment on how disclosure would affect its competitive position.[35] The applicant says that the Ministry and Companies have failed to show that disclosure can be expected to result in these harms.[36]

[49] I will first consider harm to the TFL Owners' competitive positions before considering interference with the TFL Owners' negotiating positions.

Analysis, significant harm to competitive position

[50] The Companies say that disclosure can be expected to lead to civil disobedience that significantly disrupts their operations, thereby significantly harming their competitive positions. The Companies explain that the applicant and others will misunderstand or misrepresent the Data and mistakenly think it shows the intended locations of timber harvesting. This, in turn, will trigger civil disobedience and protests. In support of these claims, the Companies described examples of recent social media campaigns, blockades, and disruptive protests in TFL areas that caused financial harm to one of them.[37]

[51] The applicant says that neither the Ministry nor the Companies actually explain how disclosure could significantly harm the Companies' competitive position. He explains that the Data does not reveal the areas that the Companies recently harvested, plan to harvest, or even the existing forested area in the TFLs.[38]

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[32] Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 8; and Order F18-28, 2018 BCIPC 31 (CanLII) at para. 58.
[33] Ministry's submission at para. 71.
[34] Interfor's submission at pp. 3 and 4; Teal's submission at p. 2.
[35] Western's submission at paras. 26, 29, and 30.
[36] Applicant's submission at paras. 144 and 166.
[37] Interfor's submission at pp. 3-4; Western's submission at para. 34; Teal's submission at p. 2.
[38] Applicant's submission at paras. 145-147, 155, 164, and 166.

[52] In my view, there is nothing in the Companies' submissions that establishes a competitive aspect to their timber harvesting activity. The TFL Owners already own the timber harvesting rights within their TFLs. Based on what the parties say, my understanding is that the TFL Owners can either sell their TFL, exercise their harvest rights, or lose those rights through government policy changes. Given the Ministry and TFL Owners have not adequately explained how the TFL Owners have a competitive position in any of these scenarios, I am not persuaded that they do.

[53] Furthermore, I am not satisfied that disruptive civil disobedience can be reasonably expected to follow the Data's disclosure. The Companies refer to examples of recent civil disobedience that unquestionably disrupted timber harvesting operations in at least one TFL.[39] However, none of these examples establish, nor do the Ministry or Companies persuasively explain, how there is any connection between the Data's disclosure and the civil disobedience in these examples.

[54] I recognize that the TFL Owners generally have a competitive position insofar as they operate within the same industry and sell their timber products to similar clients. However, apart from triggering persistent, disruptive civil disobedience, which I consider a highly improbable outcome, neither the Ministry nor the Companies adequately explain how disclosure of the Data could significantly harm the TFL Owners' competitive positions in the broader context of the timber market.

[55] In these circumstances, I find that disclosure of the Data could not reasonably be expected to significantly harm the TFL Owners' competitive positions.

Analysis, significant interference with negotiating position

[56] The second argument advanced by the Companies under s. 21(1)(c)(i) is that disclosure would significantly interfere with their negotiating positions. Some of the submissions on this issue were received *in camera* which limits what I can say about them.

[57] Teal and Western say that disclosure would interfere with their ability to negotiate a sale of their TFLs. They argue that the Data, in combination with other publicly available information, would change the TFL's current value in the eyes of prospective purchasers.[40] Neither Teal or Western clarify whether they think that change would be to unfairly inflate or deflate the perceived value of their TFL.

[39] Western's submission at para. 34; Interfor's submission at p. 3; Teal's submission at p. 2.
[40] Teal's submission at p. 2; Western's submission at paras. 3 and 29.

[58] The applicant argues that it is "incomprehensible" that a TFL owner would refuse to provide the Data to a prospective purchaser.[41] The applicant says that in any case, a prospective purchaser could find the information they need to estimate a TFL's current value in other publicly available records. Those other records include satellite imagery, forest management plans, timber supply analyses, and the Chief Forester's annual allowable cut determinations which use numbers to describe the size of the Timber Harvesting Land Base in any given TFL.[42] Thus, the only new information in the Data is the specific areas in the TFLs where the TFL Owners believed that timber harvesting was reasonable and economically feasible in 2003 and 2013.

[59] For the following reasons, I am not persuaded that disclosure could reasonably be expected to lead to significant harm to any third party's negotiating position.

[60] First, I am not satisfied that disclosure would change the perceived current value of a TFL. Neither the Ministry nor the Companies have explained in what way the Data would affect a TFL's perceived value – whether that value would be inflated or deflated. More importantly, there is no explanation of why such a change to the perceived value would significantly interfere with the TFL Owners' negotiating positions. Given the absence of these critical explanations, I find that the Ministry has not established that disclosure could reasonably be expected to interfere with anyone's negotiating position.

[61] Secondly, despite the limited new information that the Data would provide prospective TFL purchasers, I consider it extremely improbable that a prospective purchaser would use the Data to create a reasonably accurate estimate of a TFL's current value. A prospective purchaser can use other publicly available information to create a reasonably accurate estimate of the TFL's value without using the Data.

[62] Finally, the fact that the Data is 11 to 21 years old and predates multiple legislated changes to harvesting rights in the TFLs further reduces any reasonable expectation that disclosure would significantly interfere with anyone's negotiating position. I conclude that disclosure could not reasonably be expected to significantly interfere with the TFL Owners' negotiating positions.

Conclusion, s. 21(1)(c)(i)

[63] I have found that disclosure could not reasonably be expected to significantly harm the TFL Owners' competitive positions or to significantly interfere with their negotiating positions. Therefore, I find s. 21(1)(c)(i) does not apply.

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[41] Applicant's submission at para. 162.
[42] Applicant's submission at paras. 49, 61, 147, and 160-162.

Undue financial gain or loss, s. 21(1)(c)(iii)

[64] Section 21(1)(c)(iii) says that the head of a public body must not disclose information if disclosure could reasonably be expected to result in undue financial loss or gain to any person or organization. "Undue" gains or losses are excessive, disproportionate, unwarranted, inappropriate, unfair, or improper, having regard to the particular circumstances of the matter. Undue gains also include advantages received by a competitor effectively for nothing.[43]

Parties' positions, s. 21(1)(c)(iii)

[65] As with s. 21(1)(c)(i), the Ministry directs me to the Companies' submissions instead of providing its own arguments in support of s. 21(1)(c)(iii).[44] The Companies say that s. 21(1)(c)(iii) applies because disclosure would cause them to suffer undue financial losses.[45] Western additionally argues that disclosure would result in undue financial gains to its competitors.[46]

[66] The applicant says that the Ministry and the Companies have not established that disclosure can reasonably be expected to lead to any undue losses or gains to anyone.[47]

Analysis and findings, s. 21(1)(c)(iii)

[67] The Companies' arguments respecting s. 21(1)(c)(iii) largely repeat their submissions made under s. 21(1)(c)(i). The Companies say that disclosure can reasonably be expected to lead to civil disobedience activity that would lead to operational interruptions and reputational harm, ultimately causing them to suffer undue financial losses.

[68] For the same reasons discussed in the analysis of s. 21(1)(c)(i), I do not find this reasoning persuasive. I acknowledge that unlawful civil disobedience could reasonably be expected to result in undue financial losses to the TFL Owners. However, the Companies do not adequately explain or establish a clear and direct connection between disclosing the specific information at issue here and civil disobedience or reputational harm.

[69] Western says that a professional's interpretation is required to analyze the Data "correctly" to prevent the public from misunderstanding it.[48] On the subject

[43] Order F14-58, 2014 BCIPC 62 (CanLII), at para. 54; and Order 00-10, 2000 CanLII 11042 (BC IPC) at pp. 17-19.
[44] Ministry's submission at para. 71.
[45] Interfor's submission at pp. 3 and 4; Teal's submission at p. 2; Western's submission at paras. 12, 26, and 31-35.
[46] Western's submission at paras. 26 and 32-33.
[47] Applicant's submission at paras. 181-190.
[48] Western's submission at para. 34.

of reputational harm, Interfor says that the public or its shareholders may misunderstand the Data as revealing current harvesting activity.[49]

[70] I disagree. I consider it obvious that a forestry professional's expertise is not needed to understand that a map of the Timber Harvesting Land Base does not represent the areas where timber was, is, or actually will be harvested. The Ministry's affidavit evidence and Interfor's submission confirm the Data does not even represent the current Timber Harvesting Land Base because it predates certain old growth deferrals and wildlife habitat protection areas.[50] I am not persuaded that special expertise is needed to understand these aspects of the Data.

[71] A second argument advanced by the Companies is that disclosure would provide the competitors with their sensitive and commercially valuable information at no cost. They say that this advantage would provide an undue gain for those competitors.[51] The essence of their argument is that the Data permits a reasonably accurate estimate of a TFL's current value, which would give their competitors an unfair strategic insight into their operations.

[72] As discussed under s. 21(1)(c)(i), I am not persuaded that the Data permits a reasonably accurate estimate of a TFL's current value. In the time since the Data was created there have been multiple changes to TFL boundaries, timber harvesting practices, and applicable regulatory regimes.[52] Neither the Ministry nor the Companies adequately explain why the Data is necessary or helpful for estimating current TFL values in spite of these changes. Additionally, the applicant points to many publicly available sources of more-recent information about the TFLs.[53] I am satisfied by what the applicant says about this other information that the Companies' competitors can already estimate the TFLs' current value without using the Data.

[73] Finally, neither the Ministry nor the Companies explain in sufficient detail what other advantages a competitor could gain through disclosure (apart from estimating a current TFL value), or why those other advantages constitute an undue financial gain or loss. In the absence of sufficiently detailed explanations, I am not persuaded that any undue financial gains or losses can be expected to result from disclosure.

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[49] Interfor's submission at p. 3.
[50] Interfor's submission at p. 3; Affidavit #1 of TS at para. 31.
[51] Western's submission at paras. 32 and 33. This reference does not refer to any material received *in camera*.
[52] Ministry's submission at para. 72; Affidavit #1 of TS at paras. 13, 14, 18, 26, and 31; Applicant's submission at paras. 53-54, 56, and 154; Teal's submission at p. 2; Interfor's submission at p.1; Western's submission at para. 34.
[53] Applicant's submission at paras. 147-148, 156, and 162.

Conclusion, s. 21(1)(c)(iii)

[74] The Ministry has not established that disclosure can reasonably be expected to result in undue financial losses or gains to anyone. I find that s. 21(1)(c)(iii) does not apply.

No longer supplied to the public body, s. 21(1)(c)(ii)

[75] Section 21(1)(c)(ii) requires the head of a public body to refuse disclosure if doing so could reasonably be expected to result in similar information no longer being supplied to the public body, when it is in the public interest that similar information continue to be supplied.

Parties' positions, s. 21(1)(c)(ii)

[76] The Ministry argues that s. 21(1)(c)(ii) applies because disclosure will erode its trusting relationship with the TFL Owners.[54] The Ministry says that without this trust, TFL Owners may refuse to provide similar information in the future, leading to the Ministry making policy decisions "without full knowledge of possible impacts on 5.1 million hectares of highly productive forest land".[55]

[77] Similarly, Western and Interfor say that disclosure would cause them to become less willing to provide information to the Ministry in the future. They say they would be unable to trust that the Ministry can honour its assurances of confidentiality.[56]

[78] Interfor specifically refers to ss. 136 and 136.1 of the *Forest Act.*[57] Section 136 places requirements on various entities to keep records of certain information, and to provide those records and information to the Ministry. Section 136.1 requires the Ministry's employees not to disclose the information received under s. 136 other than under certain circumstances.

[79] Teal did not comment on the application of s. 21(1)(c)(ii).

[80] I understand the applicant's argument to be that s. 21(1)(c)(ii) does not apply because the TFL Owners have no choice but to provide the Data when the Ministry asks for it. The applicant points to legislation that requires TFL Owners to supply the Data and similar information,[58] including the *Forest Act*,[59] the *Tree*

[54] Ministry's submission at paras. 73 and 75-76.
[55] Affidavit #1 of TS at paras. 26-28.
[56] Interfor's submission at p. 4; Western's submission at paras. 36 and 37.
[57] Interfor's submission at p. 4 refers to the *Forest Act*, RSBC 1996, c 157, ss. 136 and 136.1.
[58] Applicant's submission at paras. 168-170 and 173-178.
[59] *Forest Act*, RSBC 1996, c 157, at ss. 9(1) and (2).

Farm Licence Management Plan Regulation,[60] and the *Forestry Revitalization Act.*[61]

Analysis and findings, s. 21(1)(c)(ii)

[81] It is typically not reasonable to expect that information will no longer be supplied to a public body in the future if third parties must supply that information under a statutory compulsion. A third party's willingness to supply information is irrelevant if they do not actually have a choice to supply it or not.[62]

[82] In the present matter, the first issue to consider is whether the TFL Owners have any other option but to supply similar information upon the Ministry's request. For the reasons that follow, I find that the TFL Owners are under a statutory compulsion to supply the Data and similar information, so s. 21(1)(c)(ii) does not apply.

[83] Having reviewed the scope and applicability of the legislation raised by the parties, I confirm that the *Forestry Revitalization Act* required the TFL Owners to supply the Data, which is Timber Harvesting Land Base information, to the Ministry in 2003 and for approximately five years thereafter.[63]

[84] I also find that the *Forest Act* requires the TFL Owners supply the type of information at issue in this inquiry to the Ministry.[64] In fact, the Ministry's submission confirms that TFL Owners create and supply Timber Harvesting Land Base information about their TFLs as a mandatory condition of harvesting in their TFL.[65] The TFL Owners are required to supply the Data because it is the information that allows the Chief Forester to determine the annual allowable cut under ss. 8 and 9 of the *Forest Act*.

[85] I am not satisfied that the other legislation cited by the applicant requires TFL Owners to supply the Data or similar information to the Ministry.[66]

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[60] Tree Farm Licence Management Plan Regulation, BC Reg 280/2009, at ss. 5(e) and 6.
[61] *Forestry Revitalization Act*, SBC 2003, c 17, at s. 4(1).
[62] Order 03-05, 2003 CanLII 49169 (BC IPC), at paras. 15 and 16; Order No. 57-1995, 1995 CanLII 19204 (BC IPC) at pp. 6-7.
[63] *Forestry Revitalization Act*, SBC 2003, c 17, at ss. 3(5) and 4.
[64] *Forest Act*, RSBC 1996, c 157, at ss. 8 and 9.
[65] Affidavit #1 of TS at para. 12; Ministry's submission at para. 53; Applicant's submission at paras. 102-103, and 177.
[66] The Tree Farm Licence Management Plan Regulation, BC Reg 280/2009*,* at s. 5 requires the TFL Owners to include certain information in a management plan that does not clearly include the location of timber that is reasonable and economically feasible to harvest. The applicant also argues about whether the TFL Owners have complied with their duty under this regulation to create and publicly disclose their management plans. That is about a matter that is outside the scope of this inquiry, so I have not considered it.

[86] Finally, I reject Interfor's argument that ss. 136 and 136.1 of the *Forest Act* require the Ministry to keep the Data confidential.[67] The restrictions on disclosure in these provisions are limited to specific types of information which do not clearly include the Data or similar information.[68] Furthermore, s. 136.1 of that Act says that the prohibition on disclosure by Ministry employees does not apply if the information is disclosed in accordance with a lawful requirement to disclose it. Whether FIPPA creates such a lawful requirement to disclose the Data is the issue that I am deciding now.

[87] Throughout their submissions, the Ministry and the Companies express great concern about their relationship of trust and how it would be damaged following disclosure, leading to a lack of voluntary supply of information in the future. However, I find that the Ministry's 2003 letter implicitly warns the TFL Owners that they had no choice but to supply the required information. I reach this conclusion from the language in the letter that describes how the Ministry will use this information once received, as well as the reference to "Bill 28" which enacted the *Forestry Revitalization Act*.[69] As discussed above, the *Forestry Revitalization Act* required TFL Owners to supply Timber Harvesting Land Base information to the Ministry. Therefore, despite the friendly tone of the letter and its assurances of confidentiality, I find that the TFL Owners were required to supply the Data to the Ministry in 2003.

[88] Given the limited amount of documentary evidence before me, it is difficult to assess the nature of the communications between the Ministry and the TFL Owners in 2013. While the Ministry says that some TFL Owners only supplied information in 2013 after entering confidentiality agreements,[70] nothing in the Ministry or Companies' submissions establishes that the Ministry's 2013 request was for a voluntary, as opposed to mandatory, supply of information.

[89] I am not persuaded that there is any reason why the Ministry cannot compel the TFL Owners to supply it with similar information in the future by relying on existing legislation. Assurances of confidentiality and voluntary participation by TFL Owners are, based on what I can see in the material before me, completely unnecessary to ensure the continued supply of similar information.

[90] I conclude that the TFL Owners are required to supply information of the type at issue in this inquiry to the Ministry under the *Forestry Revitalization Act* and the *Forest Act*. The TFL Owners have no choice but to supply the Data and similar information to the Ministry because they are required by statute to supply it.

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[67] Interfor's submission at p. 4.
[68] *Forest Act*, RSBC 1996, c 157, at ss. 136 and 136.1.
[69] Bill 28, *Forestry Revitalization Act*, 4th Sess, 37th Parl, British Columbia, 2003.
[70] Affidavit #1 of TS at paras. 19 and 23; Ministry's submission at para. 29.

Conclusion, s. 21(1)(c)(ii)

[91] The Ministry has not established that disclosure can reasonably be expected to result in similar information not being supplied in the future. Therefore, it is unnecessary for me to also consider whether it is in the public interest for similar information to continue to be supplied. I find that s. 21(1)(c)(ii) does not apply.

Conclusions, s. 21(1)

[92] The Ministry has established that the Data is technical and commercial information of and about multiple third parties under s. 21(1)(a), and that this information was supplied to the Ministry in confidence under s. 21(1)(b).

[93] I find that disclosing the Data could not reasonably be expected to significantly harm any TFL Owners' competitive positions or significantly interfere with their negotiating positions under s. 21(1)(c)(i). I also find that disclosure could not reasonably be expected to result in the Data and similar information no longer being supplied to the Ministry under s. 21(1)(c)(ii). Finally, I am not persuaded that disclosure could reasonably be expected to result in any undue financial losses or gains to anyone, so s. 21(1)(c)(iii) does not apply.

[94] Neither the Ministry nor the Companies have established that all three components of s. 21(1) apply to the Data. I find the Ministry is not required or authorized to refuse to disclose the Data under s. 21(1).

Section 25 – Public interest disclosure

[95] Section 25(1) requires a public body to disclose information without delay in certain circumstances. This section overrides all of FIPPA's discretionary and mandatory exceptions to disclosure.

[96] The applicant says that s. 25(1)(b) requires the Ministry to disclose the Data without delay because disclosure is clearly in the public interest.[71] The Ministry says that s. 25(1)(b) does not apply.[72] The Companies do not discuss s. 25(1)(b).

[97] I determined that the Ministry is not required to refuse to disclose any of the Data under s. 21(1) which ordinarily means that the Ministry must disclose the Data to the applicant not later than 30 days after the Ministry receives a copy of this Order.[73] However, s. 25(1) requires the Ministry to disclose the Data

[71] Applicant's submission at paras. 12-97.
[72] Ministry's submission at para. 45.
[73] *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, at s. 59(1).

"without delay", so I consider it appropriate to determine whether s. 25(1)(b) applies notwithstanding my decision concerning s. 21(1).

[98] Section 25(1)(b), disclosure that is clearly in the public interest

[99] The relevant parts of s. 25 are as follows:

> **25** (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> …
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

[100] Given that s. 25(1) overrides all other provisions in FIPPA, the s. 25(1) duty to proactively disclose information exists only in the clearest and most serious of situations. To establish that s. 25(1)(b) applies, the applicant must show that disclosure is clearly (i.e., unmistakably) in the public interest. The high threshold is not met if disclosure is only arguably in the public interest.[74]

[101] The analysis under s. 25(1)(b) begins by considering whether the information at issue concerns a subject, circumstance, matter or event that engages the public interest.[75] The term "public interest" in the context of s. 25(1)(b) relates to matters of a broader, systemic or widespread significance but does not encompass everything that the public might be interested in learning.[76]

[102] Once it is determined that the information is about a matter that engages the public interest, the nature of the information itself must be considered to determine whether it meets the high threshold for disclosure.[77] This is determined by considering all of the circumstances, including whether disclosure would:

- contribute to educating the public about the matter;
- contribute in a substantive way to the body of information already available;

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[74] Order 02-38, at paras. 45-46, citing Order No. 165-1997, 1997 CanLII 754 (BC IPC), at p. 8; Order F23-24, 2023 BCIPC 28 (CanLII), at para. 21; and Elizabeth Denham: Clearly in the Public Interest: The Disclosure of Information Related to Water Quality in Spallumcheen, Investigation Report F16-02, 2016 CanLII Docs 4591 at pp. 26-27 [*Report F16-02*].
[75] *Report F16-02, supra* note #74, at p. 26; Order F20-42, 2020 BCIPC 51 (CanLII), at para. 38.
[76] *Clubb v. Saanich (Corporation of The District)*, 1996 CanLII 8417 (BC SC) at para. 33; Order F20-47, 2020 BCIPC 56 (CanLII), at para. 20.
[77] *Report F16-02, supra* note #74, at pp. 26-27; Order F18-26, 2018 BCIPC 29 (CanLII) at paras. 14-16.

- facilitate the expression of public opinion or allow the public to make informed political decisions; or
- contribute in a meaningful way to holding a public body accountable for its actions or decisions.

Does the Data concern a matter that engages the public interest?

[103] The applicant says that the Data engages the public interest because the Timber Harvesting Land Base is a critical component of annual allowable cut determinations made by the Ministry, therefore, the Data's inadequacy is directly related to excessive timber harvesting activity in TFLs.[78] In support of this argument, the applicant provides several examples of severe economic and environmental consequences that are caused or aggravated by overharvesting of timber in BC.[79]

[104] The Ministry agrees that the Data relates to a matter that engages the public interest because it relates to timber harvesting on provincial lands, which the Ministry acknowledges is a systemic issue with widespread attention and media discussion.[80]

[105] Having considered the parties' positions and the nature of the Data, I find that the Data is directly related to the amount and location of timber harvesting on provincially owned land, which is a subject that engages the public interest.

Is disclosing the Data clearly in the public interest?

[106] The next step is to consider whether the disclosing the Data meets the high threshold of being clearly in the public interest.

[107] The Ministry says that disclosure is not unmistakably in the public interest because the Data is outdated and does not accurately reflect the province or TFL Owners' current practices or policies.[81] In response, the applicant says that the Data is not intended to reflect those current practices or policies but that the Data can still be used to show how the Ministry's current policies and practices affect areas that are subject to timber harvesting.[82]

[108] The applicant elaborates on several ways in which the Data can educate the public about current forest management practices, which he says cannot be done without the Data.[83] Finally, the applicant says that disclosure would

[78] Applicant's submission at paras. 29-32.
[79] Applicant's submission at paras. 36-43.
[80] Ministry's submission at para. 39.
[81] Ministry's submission at para. 42-45.
[82] Applicant's submission at paras. 48-50.
[83] Applicant's submission at paras. 59-62, and 69.

meaningfully contribute to holding the Ministry accountable for several of its forest management decisions, including old growth management areas and annual allowable cut determinations.[84] These detailed explanations satisfy me that the Data is possibly useful to the public for all of the purposes he describes.

[109] However, despite the Data's possible current usefulness, I am not persuaded that the Data is so significant to the issue of provincial forest management that it meets the high threshold imposed by s. 25(1). While the Data provides some additional insights into activity in specific TFLs, in my view, the existing publicly available information is sufficient for the public to make reasonably informed political decisions about forest management practices in BC.

[110] The applicant says that he will use the Data to hold the government accountable for making forestry decisions, including annual allowable cut determinations, while relying on inaccurate and inadequate Timber Harvesting Land Base information from the TFL Owners.[85] It is not apparent to me that the Data is so deficient for these purposes that disclosure without delay is clearly in the public interest. An extensive analysis of the Data alongside other information may contribute to holding the Ministry accountable, but I am not satisfied that disclosing the Data would *unmistakably* lead to that outcome.

Conclusion, s. 25(1)(b)

[111] I do not find that the Data's disclosure is clearly in the public interest, so s. 25(1)(b) does not apply to require disclosure without delay.

CONCLUSION

For the reasons given above, I make the following order under s. 58 of FIPPA:

1. The Ministry is not required or authorized under s. 21(1) to refuse to disclose the information in dispute to the applicant.

2. The Ministry must give the applicant access to all of the information in dispute.

3. When the Ministry complies with item 2 above, it must concurrently provide the OIPC registrar of inquires with a copy of the records and any accompanying cover letter sent to the applicant.

[84] Applicant's submission at para. 96.
[85] Applicant's submission at paras. 9, 42, and 83-97.

Under s. 59 of FIPPA, the Ministry is required to give the applicant access to the information that it is not required to withhold by August 12, 2024.

June 27, 2024

ORIGINAL SIGNED BY

Alexander R. Lonergan, Adjudicator

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