

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 66-1995
November 27, 1995**

INQUIRY RE: A request by Almforest Aktiengesellschaft to the Ministry of Environment, Lands and Parks for the identity of an individual who made a contamination report

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1. Introduction

As Information and Privacy Commissioner, I conducted an inquiry on Wednesday, August 2, 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 submitted to this Office on May 1, 1995 by Almforest Aktiengesellschaft (the applicant). On March 30, 1995 the applicant requested from the Ministry of Environment, Lands and Parks (the Ministry) information held by the Ministry concerning the identity of an individual or individuals (the third party) who made a report to the Ministry about mercury contamination on a mine site owned by the applicant.

The Ministry, by way of a letter dated April 12, 1995, denied access to the information requested on the grounds that the identity of the third party was protected by the personal privacy (section 22) and law enforcement (section 15) provisions of the Act.

The third party was not given notice of this inquiry, because the Ministry was unable to locate the third party. In writing this Order, I am treating the third party as a single person, even though there may have been more than one complainant.

2. The record in dispute

The record in dispute consists of various forms or documents created by the Ministry, which contain the name of the third party and the details of the complaint.

3. Issue under review at the inquiry and the burden of proof

The issue under review at this inquiry is whether the records in dispute are protected from disclosure by sections 15 and 22 of the Act. The relevant portions of these sections read as follows:

- 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
- ...
- (d) reveal the identity of a confidential source of law enforcement information,
-
- 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
- (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
- ...
- (c) the personal information is relevant to a fair determination of the applicant's rights.
- ...
- (e) the third party will be exposed unfairly to financial or other harm,
 - (f) the personal information has been supplied in confidence,
- ...
- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
- ...
- (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
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At an inquiry into a decision to refuse an applicant access to all or part of a record, the head of a public body must prove that the applicant has no right of access (section 57 (1)). In the present case, this means that the Ministry must substantiate its claim that disclosure would reveal a source of confidential law enforcement information. However, under section 57(2) of the Act, the applicant bears the burden of proof to establish that disclosure of the information requested would not be an unreasonable invasion of the third party's personal privacy. This means that the owner of the site must prove that it would not be an unreasonable invasion of personal privacy for it to learn the name of the individual who reported the mercury contamination to the Ministry.

4. Almforest's case

Almforest engages solely in forest activities in this province. Timbered property that it purchased in 1973 in the Nelson Land Title District includes an abandoned mine site. It believes that the persons who reported visible mercury at the mine site to the Ministry may be the same individuals responsible for depositing the mercury on the property. (Outline of Argument, paragraphs 1-3, 14) This site is now subject to a pollution abatement order issued by the Ministry on August 9, 1994. Almforest states that “[c]ompliance with that Order will be exceedingly costly.” (Outline of Argument, paragraph 12) A consultant’s report on the mercury contamination found it only at a very specific spot and suggested that the visible mercury may have reached its current location relatively recently. (Affidavit of H.R. Smith, paragraphs 5-7)

The applicant quotes my Order No. 36-1995, March 31, 1995 in support of its argument for disclosure of the names of the individuals. Because of the allegedly “suspicious circumstances surrounding the deposit of mercury on its property,” disclosure of the identity of the third party is critical to a fair determination of the applicant’s rights under section 22(2)(c) of the Act. (Outline of Argument, paragraph 15) I have presented below other aspects of the detailed argument of the applicant about specific sections of the Act.

Almforest essentially argues that “the disclosure of the third party’s identity is necessary to further investigate the suspicious circumstances surrounding the third party’s alleged discovery of visible mercury on Almforest’s property.” (Outline of Argument, paragraph 22)

5. The Ministry of Environment, Lands and Parks’ case

The Ministry bases its grounds for non-disclosure on sections 15(1)(d), 22(1), 22(2), and 22(3) of the Act. Its argument is that disclosure would reveal a confidential source of law enforcement information and unreasonably invade the personal privacy of the third party. I have presented below its more detailed arguments on the application of these specific sections.

6. Discussion

The most important point that I can make to the applicant is that it could bring an action in the courts against the Ministry and John Doe if it needs the record in dispute in this case to establish its legal rights to recover costs of remediation. The civil and criminal law include mechanisms for redress of the applicant’s grievances in this regard. It is a matter beyond my purview under the Act, at least based on the evidence submitted to me in this case.

Section 15(1)(d): Reveal the identity of a confidential source of law enforcement information

The Ministry basically argues that the “administration of the different acts under the jurisdiction of the Ministry are law enforcement matters.” (Argument for the Ministry, paragraph 4, which the applicant also accepts; see Reply of the Applicant, paragraph 3) Two examples of such laws that contain offences that carry with them a number of possible penalties and sanctions are the *Waste Management Act* and the *Environment Management Act*. (Argument for the Ministry, paragraph 6) I agree with the Ministry that in the area of the reporting of

environmental problems there is a strong rationale not to reveal the identity of those reporting suspected infringements of such acts. (Argument for the Ministry, paragraphs 10, 11) In my view, section 15(1)(d) authorizes such non-disclosure in instances like the present inquiry.

The applicant raises an interesting point with its argument that “the Ministry has provided no direct evidence that the third party provided information to the Ministry with either the express or implied assurance that their identity would remain secret [I]t has the onus of establishing that the information was provided by the third party on a confidential basis.” (Reply of the Applicant, paragraphs 4, 9) The Ministry states that it is in the process of developing a written policy in response to my suggestion in Order No. 36-1995. Further, it states that the complainant in the present case was told of the confidential nature of the reporting. (Reply of the Ministry, paragraph 8)

Both the applicant and the Ministry have cited my Order No. 36-1995. In my view, Order No. 36-1995 stands for the proposition, as the Ministry argues, that law enforcement matters provide greater reason not to disclose the identity of complainants. (Reply of the Ministry, paragraph 4) I find that disclosure of the record in dispute in this case would reveal the identity of a confidential source of law enforcement information.

Section 22(1): The disclosure would be an unreasonable invasion of a third party’s personal privacy

The Ministry’s basic argument on this section is that disclosure “of any identifying material” in this case would be an unreasonable invasion of the third parties’ personal privacy. The Ministry also makes the point that it will have no control over what this applicant does with the information in dispute: “This is particularly so given the unsubstantiated allegations and the spurious evidential links of the applicant.” (Argument for the Ministry, paragraphs 20, 21) Normally, I do not consider relevant the possible uses that an applicant may make of released information but, in the circumstances of the present inquiry, it seems very relevant to determining whether disclosure would result in an unreasonable invasion of the privacy of the third party.

Section 22(2)(c): Personal information is relevant to a fair determination of the applicant’s rights

The applicant, a corporation, argues that it cannot protect its rights without access to the information in dispute. Although I have some sympathy with its position in this particular case, my view is that the intent of this particular provision of the Act is to protect the rights of individuals, not corporations. The section requires the balancing of competing personal interests, that is the privacy rights of one individual against another’s, when these are thought to be opposed. It is well accepted that a corporation does not have privacy rights as such, since privacy is a human right, not a corporate right (the latter may make claims of confidentiality and secrecy, for example, which are not at issue in this inquiry). There is also no person associated with the corporate applicant whose privacy interests are at stake in this matter, which, in my view, is the concern of this section.

Thus I agree with the Ministry that disclosure in this case is not necessary for a fair determination of the applicant's rights. (Argument for the Ministry, paragraph 23) While the applicant correctly indicates that the standard is not "necessity" but "relevance," such a distinction makes no difference to my finding in this current case. (Reply of the Applicant, paragraph 11)

Section 22(2)(e): The third party will be exposed unfairly to financial or other harm

The applicant argues that disclosure of the disputed record would not itself expose the third party to further financial or other harm; that would require further inquiries into any wrongdoing. (Outline of Argument, paragraph 16) I do not find this distinction persuasive. In fact, disclosure would be the first step in an interconnected series of steps that might indeed unfairly expose the third party to financial or other form of harm. Thus I am somewhat skeptical of the applicant's argument that "[t]here is no suggestion that disclosure of the third party's identity would result in physical or professional retaliation against the complainant. This is not a circumstance where a disclosure of an informant's identity would lead to concerns for the informant's well-being." (Outline of Argument, paragraph 18) Common sense suggests that the informant may in fact face just such risks if he or she is identified.

In my judgment, the Act is an inappropriate and clumsy vehicle for forcing such a disclosure for purposes of possible civil or criminal actions. This should normally be done in the courts.

Section 22(2)(f): The personal information has been supplied in confidence

The applicant notes that there is no evidence that the third party's information was supplied in confidence. (Outline of Argument, paragraph 17) The Ministry, on the other hand and as noted above, has demonstrated its ongoing practice of treating information supplied under these environmental protection acts as confidential. Moreover, "[i]t is unreasonable to suppose that any such complainant will lodge a complaint that has the potential to harm another person, or company, without an inherent assumption of confidentiality." (Outline of Argument, paragraph 25) I accept the Ministry's arguments on this section, based on the somewhat limited evidence submitted to me. But, in my view, there is some urgency for the Ministry to establish the written guidelines that I called for in Order No. 36-1995, p. 16.

The applicant made an additional submission on August 16, 1995 concerning two separate points. The Ministry objected that this letter was not a response to a change in an affidavit, as my office had requested, but further argument and therefore inadmissible. After considering the Ministry's objections, I concluded that the additional submission should be considered. However, nothing contained in that submission affected my finding on this particular section.

Section 22(3)(b): The personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation

This section is a presumption against disclosure on the grounds that it would be an unreasonable invasion of a third party's personal privacy. The applicant attempts to argue that the Ministry did not "compile" the identity; the third party supplied it. Further, the investigation did not begin until after receipt of the initial complaint. (Outline of Argument, paragraphs 20, 21) I do not find these points persuasive. It is fairly clear to me that the purpose of supplying the original information was to make possible an investigation, which is indeed what the Ministry did. The Ministry notes that it used standard reporting forms in the present case, and that the complainant was under no obligation to provide his or her name. (Reply of the Ministry, paragraph 10) In my view, this section clearly militates against disclosure of the disputed information in this particular case of an investigation into a possible violation of law by the applicant.

The applicant further seeks to argue that the Ministry has shown itself unconcerned about investigating how visible elemental mercury was deposited on the property. Thus the applicant needs the record in dispute to conduct its own investigation. (Outline of Argument, paragraph 21) Unfortunately for the applicant, this particular section is designed to authorize further disclosures for a Ministry to conduct additional investigations, which is not the situation in the current case. The applicant may have remedies under civil or criminal law to seek alternative means of acquiring the information that it believes it needs, in a setting where a judge can review the evidence on both sides of the matter. This is not a task that I can perform under the Act. In this respect, the Ministry claims that it has requested further information from the applicant in order to investigate these allegations (which could lead to the pressing of charges), but no further information has been forthcoming. (Outline of Argument, paragraph 28) The Ministry's "conclusion" is that the mercury resulted from historical mining/milling activities on the site. (Reply of the Ministry, paragraph 2)

Section 57(2): The burden of proof and the standard of proof

The Ministry argues that the so-called reverse onus in the B.C. Act "recognizes that it will be very rare for one person to obtain access to another person's personal information without the consent of the person to whom the information relates." (Argument for the Ministry, paragraph 16) In the present inquiry, it submits that the applicant has not shown clear and compelling reasons why the presumption of privacy in section 22(3) is overcome. (Argument for the Ministry, paragraphs 17-19) For specific reasons advanced above, I agree with the Ministry on this point.

Under section 15(1)(d) of the Act, I find that the Ministry was authorized to refuse access to the record in dispute, since disclosure would reveal a confidential source of law enforcement information. Under section 22, I find that disclosure of the information in dispute would be an unreasonable invasion of the privacy of the third party. Thus the Ministry is required to refuse access.

7. Order

Under section 58(2)(b) of the Act, I confirm the decision of the Ministry of Environment, Lands and Parks to refuse access to the record in dispute pursuant to section 15(1)(d). Under section 58(2)(c) of the Act, I require the Ministry to refuse access to the records in dispute to the applicant pursuant to section 22(1).

David H. Flaherty
Commissioner

November 27, 1995