

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 67-1995
December 11, 1995**

INQUIRY RE: A request to the Ministry of Environment, Lands and Parks for reports of the North Fraser Harbour Commission concerning contamination of a Vancouver site

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 604-387-5629
Facsimile: 604-387-1696
Web Site: <http://www.cafe.net/gvc/foi>**

1. Introduction

As Information and Privacy Commissioner, I conducted a written inquiry on August 25, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out a request for review submitted by Ocean Construction Supplies Ltd. (the applicant).

On January 26, 1995 the applicant requested from the Ministry of Environment, Lands and Parks (the Ministry) copies of information in the Ministry's files submitted by the North Fraser Harbour Commission (the third party) concerning the third party's property at 9250 Oak Street in Vancouver. The applicant wanted any records concerning the environmental condition of the property, the extent of any contamination, any remediation plans, and related correspondence on its environmental condition.

The Ministry consulted with the North Fraser Harbour Commission (NFHC) concerning the requested information. The NFHC objected to the release on the basis that the information, namely a series of expert reports, was prepared in connection with ongoing litigation in the Supreme Court of British Columbia. The NFHC also asserted that its interests should be protected under section 21 of the *Freedom of Information and Protection of Privacy Act* (the Act). The Ministry responded that the records did not meet the three-part test set out in section 21 and should be released.

2. The records in dispute

The records in dispute are six reports. The descriptions are taken from the affidavit submitted by the North Fraser Harbour Commission, paragraph 4. When referred to in the body of the Order, these reports are described by number.

1. Preliminary Investigation of Contamination at 9250 Oak Street, Vancouver, B.C. prepared for the NFHC by Norecol Environmental Consultants Ltd., dated June 1988 (211 pp.);
2. Site Contamination at 9250 Oak Street: Risk Assessment and Remedial Options, prepared for Davis & Company by Norecol Environmental Consultants Ltd., dated August 1989 (69 pp.);
3. Memorandum on the North Fraser Harbour Commission Additional Work Program, 9270 Oak Street Property, to the B.C. Ministry of Environment, Lands and Parks from Norecol Environmental Management, dated February 4, 1992 (4 pp.);
4. Memorandum on North Fraser Harbour Commission--Results from Additional Work Program and Summary of Remedial Plan to the B.C. Ministry of Environment, Lands and Parks from Norecol Environmental Management, dated February 21, 1992 (11 pp.);
5. Assessment of Remedial Options, 9250 Oak Street, Vancouver, B.C., prepared for Davis & Company by Norecol Environmental Management Ltd., dated July 1992 (160 pp.);
6. Preliminary Design of Containment System for 9250 Oak Street property, Vancouver, B.C., prepared by HBT Agra Limited, Calgary, Alberta, submitted to Singleton Urquhart MacDonald, dated July 6, 1994 (109 pp.).

3. Issue under review and the burden of proof

The issue under review at this inquiry is whether the records in dispute are protected from disclosure by section 21 of the Act. The relevant section reads as follows:

- 21(1) The head of a public body must refuse to disclose to an applicant information
- (a) that would reveal
...
 - (ii) commercial, financial, labour relations, scientific or technical information of a third party,
 - (b) that is supplied, implicitly or explicitly, in confidence, and
 - (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, or

....

Under section 57(3)(b) of the Act, the North Fraser Harbour Commission bears the burden of proof to establish that the applicant has no right of access to the records in dispute.

4. Ocean Construction Supplies Ltd.’s case

The applicant’s initial submission consisted of an affidavit from the vice-president of environmental management for its “sister” company, Tilbury Cement Ltd. It largely concerns the issue of whether contaminants present on a site it owns may have migrated from the NHFC property, its attempts to obtain relevant reports from the Harbour Commission, and related efforts by various parties and property owners to have the property remediated. These formed much of the factual background for the applicant’s reply submission, which is discussed in the next paragraph. It is evident from the affidavit that Environment Canada is also concerned about contamination of the Fraser River in this physical location.

Ocean Construction Supplies’ first substantive submission was essentially a reply to the submissions of the other parties. It discusses the location and possible migration of contaminants among the various properties in considerable detail, but that is not very relevant to my decision in this case. I have presented below its detailed submissions on the application of various sections of the Act, as I deemed it appropriate to do so.

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

The Ministry submits that section 21(1) of the Act does not apply to the records in dispute, because the three-part test set out in paragraphs (a), (b), and (c) has not been met. It does agree that the records in dispute contain scientific and technical information as required under section 21(1)(a). However, the Ministry does not regard these records as having been supplied implicitly or explicitly in confidence as required by section 21(1)(b) and, in its view, none of the harms tests specified in section 21(1)(c) have been met. (Submission of the Ministry, p. 2)

6. North Fraser Harbour Commission’s case as a third party

The Harbour Commission, which is a federal body, submitted an extensive affidavit from its chief executive officer, essentially arguing that the records in dispute are covered by section 21 of the Act. These records are associated with NFHC’s purchase in 1986 of the property at 9250 Oak Street in Vancouver and its concern about continuing surface contamination on the site in the form of coal tar. It claims that it chose to provide these reports to the Ministry for its information and comments but was not required to do so by law. In the interim, NFHC remained unhappy with the condition of the property it had purchased and had additional reports prepared by Norecol Environmental Consultants Ltd., which it again supplied to the Ministry on a voluntary basis. Negotiations among the various parties over the condition of the site and what to do about it sometimes involved the Ministry. (Affidavit of NFHC, paragraphs 6-18)

I have presented below the detailed arguments of the NFHC about how the records in dispute meet the three-part test of section 21.

7. Lawson Industries' case as a third party

Since Lawson Industries holds a mortgage on the property which is the subject of the documents in dispute, I consented to its addition as a third party during the written inquiry. It concurred with the submission of the NFHC that disclosure should not be ordered "where the result of that would be companies would be less willing to provide information to a public body in the future." I have also presented its discussion of "settlement privilege" below.

8. Discussion

The applicability of other sections of the Act

The NFHC argued that the Ministry should have excepted the records in dispute under section 16(1) of the Act. (Affidavit of NFHC, paragraphs 19-32) I note simply that the Ministry made its initial decision to disclose on the basis that section 21 of the Act did not apply and that issue alone is properly before me in this inquiry. Once a public body has made a decision about a request for information under a specific section of the Act, a third party can only challenge that particular application in a subsequent request for review. I have no opinion, for the moment, as to whether a public body like the Ministry could subsequently attempt to except records in dispute from disclosure under another section of the Act were I to agree that a section like 21 does not apply.

The Ministry emphasizes that, in the exercise of its discretion, it believed that section 16 of the Act did not apply, that the NFHC has now raised the issue improperly, and that the Ministry should be heard on the matter were I to decide that section 16 is determinative of the issue. (Reply for the Ministry, pp. 1, 2)

For reasons set out in the two previous paragraphs, I am not addressing NFHC's and Lawson Industries' arguments about why the Ministry should not rely on section 25 to disclose the records in dispute. (Affidavit, paragraphs 48-51)

Section 21(1)(a): Commercial, financial, labour relations, scientific or technical information of a third party

The Ministry, the third party, and the applicant agree that the information in the records in dispute is of a scientific or technical nature. However, the applicant notes that record 6, involving HBT Agra, is not the information of third party NFHC and thus must be disclosed. (Submission of the Applicant, paragraphs 39, 40) I note that HBT Agra relied on the submissions of NFHC in this inquiry.

I find that the records in dispute do consist of scientific or technical information.

Section 21(1)(b): Supplied, implicitly or explicitly, in confidence

NFHC emphasizes that all of its dealings with the Ministry in connection with its specific property “have been on a confidential basis.” (Affidavit of NFHC, paragraphs 27, 28) NFHC states that it supplied the records in dispute to the Ministry as confidential government information. It claims that it forwarded these documents, “prepared for the dominant purpose of litigation and not pursuant to a regulatory requirement,” in connection with “certain settlement discussions in ongoing litigation. NFHC and its representatives and agents have consistently treated the reports as confidential vis-à-vis third parties.” (Affidavit, paragraphs 35, 37)

The applicant engaged in a substantial review of extant documentation in this case to seek to establish that the records in dispute “were not submitted in confidence or with an expectation of confidence but were submitted with the purpose of addressing the contamination on site, the regulatory requirements for delineation of that contamination and the necessary requirements and approvals for remediation of the site.” (Submission of the Applicant, paragraph 21, items a to o) The applicant noted a number of occasions when the NFHC provided one or other of the records in dispute to the Ministry with no indication in the covering letter that the reports were provided in confidence. In a number of instances, the applicant suggests, the “objective” evidence in the correspondence indicates that the purpose of the provision of a report was to secure regulatory approval and not to facilitate settlement negotiations.

The second major theme of the applicant’s submission on confidentiality is that “[s]ome of the Reports in issue have been disclosed publicly either in full or in part. Accordingly, any confidentiality which would apply has been lost and any further expectation of confidentiality, if such existed, would no longer apply.” (Submission of the Applicant, paragraph 24, items a to d) Such “disclosures” have mainly included legal proceedings.

The applicant concluded as follows:

On the objective evidence, the Applicant submits that the Reports in issue were not submitted in confidence, or an expectation of confidence, or for any purpose other than to allow the Public Body to provide input as to the acceptable evaluation of the site and remediation plans as required for regulatory approvals. (Submission of the Applicant, paragraph 25)

In the applicant’s view, any expectation of confidence no longer exists for the records in dispute numbered (above) as 1, 3, 4, and 5. Its considered view is that “all of the correspondence between the Public Body and the Third Party NFHC or Norecol is made with an air of openness designed to facilitate the evaluation and approval of proposed remediations.” (Submission of the Applicant, paragraph 32)

In specific discussion of section 21(1)(b), the applicant emphasized again that the records in dispute were not prepared for the dominant purpose of litigation, but with the “expectation and intention of cleaning up the NFHC Property....” (Submission of the Applicant, paragraphs 43-45)

The Ministry's statement about the records in dispute is that it "did not treat the information as confidential in the past, either generally or on this one file." The Ministry also states that it became aware of the litigation only laterally: "To the best of the Ministry's knowledge, at the time of the preparation of the documents, or of the forwarding of the documents, there was no litigation in progress." (Reply of the Ministry, p. 1)

I find on the basis of my review of the evidence before me that the records in dispute were not supplied, implicitly or explicitly, in confidence to the Ministry. The third party has failed to meet the burden of proof on the second part of the section 21 test.

Section 21(1)(c)(i): Harm significantly the competitive position or interfere significantly with the negotiating position of the third party

The NFHC argues that disclosure of the records in dispute would interfere significantly "with the negotiating position of NFHC in the conduct of current and anticipated litigation." The reason is that the applicant owns property near, or contiguous to, the NFHC's property at 9250 Oak Street:

The applicant has engaged solicitors to pursue a claim against NFHC for the cost of remediation of their property, and have made demands of NFHC for the cost of remediation of their property, even though (a) there is no proof the contaminants came from the NFHC property, and (b) any contamination would have occurred long before the NFHC became the owner of the property. Estimates of the cost of soil remediation or contaminant containment on 9250 Oak Street range from \$1 million to approximately \$20 million. Depending on the size of the contiguous property, it is reasonable to expect that the costs of remediation may be of similar magnitude. (Affidavit, paragraph 40)

The applicant states that it is not involved in any litigation regarding the NFHC property. (Submission of the Applicant, paragraph 51) Moreover, "[t]he reports have been discussed at various meetings between the parties and the regulatory agencies. It is not reasonable to expect any interference at all in any negotiations among those parties involved in the current litigation." (Submission of the Applicant, paragraph 50) As noted again below, the applicant's evidence on why the NFHC supplied the records in dispute is quite different and, in my view, more plausible. I find that the NFHC has failed to meet its burden of proof on this part of the section 21 test, since disclosure would not interfere significantly with its negotiating position.

Section 21(1)(c)(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

The NFHC suggests that this anticipated consequence has already happened in the present case. (Affidavit, paragraphs 42, 46) It states that documents 1, 2, 5, and 6 were supplied to the Ministry "so that parties to the litigation would have an indication of the suitability of proposed remediation and containment efforts, and could therefore better quantify the amount in dispute between them." (Affidavit, paragraph 43) Apparently, the intent was to secure some indication of regulatory approval by the Ministry. (Affidavit, paragraph 45) NFHC now

suggests that if these records are disclosed, the choice of organizations in its position in future will be not to involve government officials. This will have negative consequences in a case like this one where provincial agencies have no jurisdiction over a federal body like the NFHC. (Affidavit, paragraph 46)

The applicant's perspective on the matter is that the NFHC had to supply these reports to the Ministry "because of the contamination migrating to other sites and to the Fraser River and because of the presence of contamination at special waste levels so that provisions of the *Special Waste Regulation* and the province *Waste Management Act* would apply." (Submission of the Applicant, paragraph 59)

It is not reasonable to conclude that similar information would no longer be supplied to the Public Body in similar circumstances. Parties with contaminated property that require clean up, or where they wish to develop the property, will still supply information to the Public Body to ensure their plans, as they develop, have Ministry approval in order that they do not reach the end of their clean up and seek the necessary approvals or certificates only to find that they have not complied with Ministry requirements.... In addition, most parties in a situation where their property is contaminated and is also affecting others will supply information to the Public Body and seek to work with them in order to avoid pollution abatement orders and charges for violating environmental statutes. (Submission of the Applicant, paragraph 62)

I find the applicant's argument persuasive on this point and determine that disclosure of the records in dispute in this case will not result in similar information no longer being supplied to the Ministry, when it is in the public interest that similar information continue to be supplied. It seems self-evident to me that any landowner with a contaminated site has to do business with the Ministry either by voluntarily submitting relevant reports or by being forced to do so under provincial environmental protection acts.

Section 21(1)(c)(ii): Result in undue financial loss or gain to any person or organization

The NFHC submits that disclosure will result "in undue financial loss to NFHC and undue financial gain to the applicants." It has spent more than \$200,000 in preparing these expert reports for litigation in which millions of dollars are at stake. (Affidavit, paragraph 47)

The applicant is of the view that the NFHC has failed to provide detailed and convincing evidence of facts that lead to an expectation of harm. Nor will the applicant secure undue financial gain, since the value of its property will not increase: "What will occur is the Applicant will have a better base of knowledge for understanding the contamination that may be affecting its property and how better to deal with it." (Submission of the Applicant, paragraphs 65, 67)

On the basis of my review of the evidence presented to me, I find that disclosure of the records in dispute will not result in undue financial loss or gain to any person or organization.

Settlement document privilege

As advanced by Lawson Industries as a third party intervenor, this common law rule apparently refers to the desirability of good faith exchange of records in the settlement of disputes, thereby establishing a privilege for them comparable to solicitor-client privilege. With respect to the present inquiry, the argument is that the records in dispute cannot be the subject of production or disclosure under the Act, because they were allegedly provided to the Ministry for settlement discussions. According to Lawson Industries:

It would be contrary to the purpose and policy of the Act to allow an applicant to obtain documents by an application under the Act, where the Court would refuse to order production of the same documents on an application in court proceedings.

I have reviewed the evidence advanced by Ocean Construction Supplies, the applicant, with respect to why the records in dispute were submitted to the Ministry. It pointed out that the disclosure occurred for the purpose of regulatory input from the Ministry on the evaluation of the contamination and what to do about it and added that the Ministry would not be a party to litigation or a settlement in any event. (Reply Submission of the Applicant)

With respect, I do not think that the settlement document privilege has any distinct status under the Act. The Legislature specifically incorporated solicitor-client privilege in section 14. In general, I prefer not to incorporate various rules of civil courts into the freedom of information regime, unless they are specifically recognized in the Act. I agree with the applicant that disclosure of the records in dispute in this inquiry must depend on the application of the explicit statutory exceptions in the Act. (Reply Submission of the Applicant) I note that none of the parties raised section 14 in this inquiry.

9. Order

I find that the records requested by the applicant in this case do not fall within the exception provided in section 21(1) of the Act. Accordingly, the Ministry is not required to refuse access to the records in dispute to the applicant.

Under section 58 (2)(a) of the Act, I require the head of the Ministry of Environment, Lands and Parks to give access to the records in dispute to the applicant.

David H. Flaherty
Commissioner

December 11, 1995