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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 56-1995
October 4, 1995

****** This Order has been subject to Judicial Review ******

INQUIRY RE: A request by the Cowichan Estuary Preservation Society for environmental test results submitted to the Ministry of Environment, Lands and Parks by Fletcher Challenge Canada Limited

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria on July 21, 1995 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for information submitted by the Cowichan Estuary Preservation Society (the applicant) to the Ministry of Environment, Lands and Parks (the Ministry) for test results from the Swallowfield landfill site utilized by Fletcher Challenge Canada Limited (the third party). The third party holds a refuse permit for the site, which permits it to dump certain waste from the operation of its Crofton pulp mill.

The applicant requested the test results by way of a letter to the Ministry dated February 15, 1995. The Ministry consulted with the third party and, after a time extension taken pursuant to section 10 of the Act, replied with its decision on April 11, 1995. The Ministry denied the applicant access to the test results on the basis that disclosure would be harmful to the business interests of the third party, contrary to section 21 of the Act. On April 23, 1995 the applicant submitted a request for review to the Office of the Information and Privacy Commissioner (the Office).

2. Documentation of the inquiry process

On July 6, 1995 the Office issued a Notice of Inquiry and a one-page Portfolio Officer's fact report (the fact report), which was accepted by the parties as accurate for the purpose of conducting this inquiry.

The Office invited representations from the applicant, the public body, and the third party. The parties responded according to the timelines set out in the Notice of Inquiry. In addition, I authorized additional representations by the parties to ensure that they received a fair opportunity to make the arguments and present the evidence that they viewed as relevant.

3. Issue under review at the inquiry

The issue in this inquiry is the applicability of section 21 of the Act to the records in dispute. Section 21 of the Act reads as follows:

Disclosure harmful to business interests of a third party

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal
(i) trade secrets of a third party, or
(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
(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

4. The record in dispute

The record in dispute in this inquiry is laboratory test data prepared by a private testing agency from samples provided by the third party. The third party thereafter supplied the test data to the Nanaimo Regional office of the Ministry.

5. The Cowichan Estuary Preservation Society's case

The applicant asserts that there is no basis under the Act for refusing its request for access to the test results. It argues that section 21 of the Act is not applicable, because:

The test results are not "scientific or technical information;" the test results were not supplied to the Public Body in confidence; and, disclosure of the test results could not reasonably be expected to result in similar information not being supplied to the Public Body. (Submission of the Applicant, pp. 2-3)

The applicant argues with respect to section 21(1)(b) of the Act that there is no evidence of an explicit request by the third party that the public body should keep the test results confidential:

The Third Party provided information to a Public Body which has a statutory obligation to provide certain information to the public. In the absence of an explicit request for confidentiality, the Third Party should have assumed the test results would be disclosed. (Submission of the Applicant, p. 3)

The applicant emphasizes that there is no other authority for the public body to treat the test results in dispute as confidential. It included as references in support of this position the letter of transmittal attached to the third party's permit to operate this landfill and sections 21, 22, and 31 of the *Waste Management Act*. (Submission of the Applicant, pp. 4-5) In the applicant's view, the third party could not reasonably have believed that the public body would or could keep the test results confidential, "[b]ased on the Third Party's knowledge of the Public Body's obligations," the agreement of the third party's representative with a representative of the applicant to exchange test results, and the reasonable expectation that the applicant would seek access to the test results "based on the Applicant's ongoing interest in this issue." (Submission of the Applicant, pp. 5-6)

Furthermore, the applicant believes that the information in dispute does not fall into any of the categories of section 21(1)(c), especially subsection (ii). In practice, "[i]nformation similar in content will continue to be provided either voluntarily or as a result of government requests for information." (Submission of the Applicant, p. 6)

The applicant also relies on section 25(1)(a) and (b) of the Act to insist that the Ministry must disclose the test results in the public interest.

It is the applicant's submission that there is no potential for harm to the third party if the information is disclosed. Because the applicant has a significant concern regarding the health and safety of the environment and the public, even if there is no actual risk posed in this case, the disclosure of the information is also necessary in order to:

> (i) ensure the public that there is no environmental risk or concern, if that is the case;
> (ii) maintain public confidence in the integrity of the environmental management regime; and
> (iii) allow members of the public to seek or produce information in response to the test results of the Third Party which are apparently being relied upon by the regulator ....

The Applicant submits that the interests to be served in disclosing the information significantly outweigh those to be served by refusing to allow the information to be disclosed. (Submission of the Applicant, p. 7)

The applicant asks me to determine that there is no basis under the Act for refusing disclosure of the test results. It believes that the resistance of the third party to disclosure "is not because of any belief on the part of the Third Party that the disclosure will harm its business interests, but

because of a history of a certain degree of animosity between the Third Party and the Applicant." (Reply Submission of the Applicant, p. 5)

6. The Ministry of Environment, Lands and Parks's case

The Ministry specifically relies upon section 21(1)(a)(ii), (b), and (c)(ii). I have read its submissions carefully and present below those portions of its argument that struck me as significant for the interpretation of this section.

7. Fletcher Challenge Canada Limited's case as the third party

On the basis of section 21, the third party does not consent to the release of data on leachate samples from the Swallowfield refuse site, which it collected on January 25, 1995: "We submit that the Ministry of Environment, Lands and Parks ... must refuse to disclose the requested information because the disclosure would reveal scientific or technical information of Fletcher Challenge Canada that was supplied implicitly or explicitly in confidence and disclosure of the information could reasonably be expected to result in similar information no longer being supplied to the Ministry." (Submission of the Third Party, p. 1) Further relevant details of the third party's submissions are treated below.

8. Discussion

The Cowichan Estuary Preservation Society wants access to the third party's test results for the Swallowfield Farm landfill/refuse site, (which are in the custody and control of the Ministry), even though it has done its own testing and has received the Ministry's own test results. The applicant is concerned that contaminants from this site have reached, are reaching, or may reach the Cowichan River estuary. Waste from the Crofton pulp mill, owned by the third party, has been dumped on this farm for years.

Section 21(1)(a)(ii): Scientific or technical information of a third party

In my judgment, environmental test results fall within the meaning of "technical" information in this section. This conclusion is supported by Ontario Order P-584, November 24, 1993 (Donald Hale, Inquiry Officer):

The information contained in the record is the result of a technical study of the subject properties undertaken by a firm of consulting engineers who are experts in the field of environmental testing and analysis. The record details a number of analytical tests undertaken at the subject lands and states the conclusions of its authors as to certain environmental issues. I am satisfied that the first part of the section 17(1) test has been met as the disclosure of the record would reveal technical information.

In my view, section 21(1)(a)(ii) is intended to protect from disclosure, as "technical" or "scientific" information, data of the sort that a company collects from a landfill site, such as in

the present inquiry. Thus I agree with the Ministry's submission on this subsection, including its (and the third parties') reliance on Ontario Order P-584. (Submission for the Ministry, pp. 2-3)

Similarly, I agree with the third party that the "words `scientific' and `technical' would surely include information that is the result of scientific environmental sampling at an industrial site and chemical laboratory analysis of the samples collected." (Submission of the Third Party, pp. 1-2; and Reply Submission for the Third Party,
pp. 1-2)

I would summarize my interpretation of the words "scientific" and "technical" in this section as follows for purposes of this inquiry. They cover test data of the third party conducted in one of its own mills to evaluate the efficiency of a process or actual conditions during a product run. The words "scientific" or "technical" include, in the context of this case, the results of environmental testing by a third party at a site away from its normal place of doing business. The third party was testing a site where it dumps waste from its industrial processes, using a consulting firm, to ensure that there are no safety risks to the public from its use of the waste site. Thus I find that the test results are "scientific" or "technical" information of the third party for the purposes of section 21(1)(a)(ii) of the Act.

Section 21(1)(b): Information supplied in confidence

I agree with the applicant that an objective test or standard, as opposed to a subjective one, should be applied to determine whether information in dispute was supplied with an understanding that it would be kept confidential. It cited in support of this contention the decision of the Federal Court Trial Division in Re Maislin Industries Ltd. and Minister for Industry, Trade and Commerce (1984) D.L.R. (4th) 417 with respect to the federal *Access to Information Act*.

The applicant argues that the Ministry should not have implicitly agreed in advance to keep the test results confidential, because section 25 of the Act:

specifically requires disclosure of environmental information where the information is about a risk of significant harm to the environment or the health and safety of the public or a group of people or where disclosure is for any other reason, in the public interest. Prior to having received the information, the Public Body would not have been in a position to determine whether this overriding provision mandating disclosure applied. As a sophisticated corporate entity, the Third Party should have known of the Public Body's obligations. (Submission of the Applicant, pp. 3-4)

The Ministry's response to this section 25 argument is that:

If the Applicant's argument was correct, then Public Bodies could not agree to hold any information, whether it was information about the environment or not, implicitly in confidence, because the disclosure of this information could be found to be in the public interest (section 25(1)(b)). (Reply Submission of the Ministry, p. 1)

The Ministry attaches considerable significance to the fact that the third party supplied the test results implicitly in confidence, "based on the practice of the Vancouver Island Regional Office to hold unsolicited analytical data of this nature in confidence, and not to disclose the information without the consent of the party providing the information." (Submission of the Ministry, p. 4; Affidavit of George E. Oldham, paragraph 4; see also Submission of the Third Party, pp. 2-3, and Reply Submission of the Third Party, pp. 2-4) I note simply that such traditional practices of one office are now subject to the requirements for disclosure of records and information under the *Freedom of Information and Protection of Privacy Act*. (See the Reply Submission of the Applicant, pp. 6-7)

The arguments of the applicant and the Ministry on this point raise a significant issue with respect to the application of the Act and the use of section 25. While the logical extension of the applicant's argument may be to negate the application of section 21(1)(b), I do not think section 25 can be ignored, particularly when information could fall under section 25(1)(a). A public body must consider the possible application of this section when it decides to receive information with implied or express promises of confidentiality.

One consequence of the Order I make below is that the Ministry will be wise to regularize, across the province, its collection and disclosure of environmental test results from third parties, especially since "this information may greatly assist the Ministry in forming accurate conclusions regarding the contamination of a site." (Submission of the Ministry, p. 4) The burden of section 25 in this sensitive area, as the applicant argues, is that it may be difficult for the Ministry of Environment, Lands and Parks to make absolute promises of confidentiality in advance of such data collection and analysis. At best, the Ministry could make conditional promises. In other words, section 25 considerations might override the third party's desire for non-disclosure.

The third party claims that section 31 of the *Waste Management Act* requires the Ministry not to disclose these test results, if they relate "to a process that the disclosing party keeps confidential." (Submission of the Third party, p. 3) The third party uses this point to bolster its argument under section 21(1)(b). I agree with the applicant that the test results do not concern the "processes" of the third party but rather "environmental conditions on the property." Thus section 31, the applicant argues, does not protect the disclosure of the test results. (Reply Submission of the Applicant, p. 3) I agree with this analysis and find it unnecessary to consider whether the Act applies notwithstanding the *Waste Management Act*.

Based on the evidence provided in this case, the third party did supply the test results to the Ministry on the implicit understanding, from past and regular practice, that it would be not disclosed without its consent. It appears that, in this case, the Ministry determined that the information was not required to be disclosed under section 25(1)(a).

Section 21(1)(c)(ii): Similar information no longer being supplied

I agree with the following statement of the applicant with respect to the interpretation of this subsection:

... this branch of the exception is directed at ensuring that information which need not be supplied except on a voluntary basis remain available to the Public Body. In this case, if the information is not voluntarily disclosed, it can be obtained by the Public Body through a Waste Management Act request for the information. It is not necessary for the public interest that disclosure be denied so that similar information continue to be supplied. (Submission of the Applicant, p. 6)

The Ministry and the third party emphasize the importance of voluntary disclosures of test results to the Ministry by third parties. (Submission of the Ministry, pp. 4-5; see also Submission of the Third Party, p. 3; and Reply Submission of the Third Party, pp. 4-5) The Ministry "is often not able to carry out its own environmental testing, or its testing may be limited." Thus continued sharing of such information is in the public interest, "as this information may greatly assist the Ministry in forming accurate conclusions regarding the contamination of a site." While I have no doubt about the Ministry's wishes on this score, it has alternative ways of obtaining the same information, if it judges it important to do so (as the applicant has indicated). (See also the Reply Submission of the Applicant, pp. 7-8) The third party admits that the Ministry can use the *Waste Management Act* to get the same information from industries, but claims that it would cost more and "undermine the existing co-operative relationship between the Ministry and many industry participants." (Submission of the Third Party, p. 3)

The findings of Ontario Order P-584 are in accord with my discussion of this section of the Act. (See Reply Submission of the Applicant, pp. 3-4) Whether it would be better for the Ministry to continue to rely on voluntary disclosure of environmental test results by industry, rather than to rely on Pollution Abatement Orders or its own test results for the same purpose, is of secondary importance to my handling of a request for access to records under this Act. (See Reply Submission for the Ministry, p. 2) However, I have taken this into account in reaching my conclusion. As the Information and Privacy Branch's *Freedom of Information and Protection of Privacy Act* Policy and Procedures Manual, C.4.12, p. 18, points out, it is unlikely that information would no longer be supplied where there is a financial or other incentive to continue supplying that information, or *where it is legally required to do so* (italics added).

The applicant also contests the notion that the samples in this case were taken and provided "voluntarily."

This is not a situation where the Third Party independently decided to take samples, obtained sample results, and turned the results over to the Public Body. It is the Applicant's understanding that the Ministry had determined that tests would be taken. As is often the practice, a representative of the party on whose site that Public Body is taking samples, accompanied the Public Body representative, observed what was occurring and obtained its own samples in order to verify or disprove results obtained by the Public Body. This is a common practice recommended by corporate counsel regarding steps to be taken when government officials arrive on site. (Reply Submission for the Applicant, pp. 4-5)

I note that despite the crossfire of affidavits among the three parties in this case, the Ministry and the third party did not deny this point. While these "facts" show that the third party may not

necessarily have taken samples voluntarily, it does not change the fact that it gave the results to the Ministry voluntarily.

On balance, however, I find that disclosure of the test results could not reasonably be expected to result in such information no longer being supplied to the public body.

Section 25: Disclosure in the public interest

I am considering section 25 of the Act because of the arguments advanced to me by the several parties, even though my finding in this inquiry is based on the application of section 21 only. Section 25 is, in my view, a very important part of the Act, and I wish to comment on its use beyond what I have already said in Order No. 22-1994,
September 1, 1994, pp. 15-16.

Section 25 of the Act reads in part as follows:

Information must be disclosed if in the public interest

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

> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (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.

I am in agreement with the applicant's arguments, cited above, to the effect that the Ministry could have considered disclosure of the test results under this section. (Submission of the Applicant, p. 7) Evidence of public interest is apparent in a newspaper article submitted to me by the Ministry entitled "Farmland pollution suspected near mill," from the Cowichan News Leader, January 25, 1995. (Submission of the Ministry, Affidavit of George E. Oldham, Exhibit A. I note that there was a rush to test on this site on the same day that the newspaper story appeared.)

I would place little weight on the fact that the applicant has already received the Ministry's test results, even if they were taken on the same day as the third party's. (Submission of the Third Party, pp. 3, 4; Reply Submission of the Third Party, p. 6) What the applicant wants is the third party's test results for reasons that seem perfectly plausible and "in the public interest." See also affidavit of George Oldham, Ministry Submission, paragraph 6: "The more sampling and analysis that is carried out, the more accurate are the conclusions which can be drawn." (On the issue of "public interest," see also the Affidavit of John Werring, a registered professional biologist and environmental investigator for the Sierra Legal Defence Fund, paragraphs 9 and 12 and his field notes, in the Reply Submission of the Applicant.) It may be also irrelevant to this particular access request that the third party has now "put in place a closure plan and environmental control measures which eliminate runoff from the Swallowfield site." (Reply

Submission for the Third Party, p. 5) The applicant, which has an ongoing interest in the matter, wants to know more about environmental conditions on the site on January 25, 1995 by receiving the test results of the third party from the Ministry.

The Ministry has sought to argue that section 25 has no relevance to the present matter because "the information in dispute in this case is not information about a risk of significant harm to the environment or the health or safety of the public or a group of people .... The Ministry submits that the disclosure of the records in dispute is not clearly in the public interest." (Reply Submission for the Ministry, pp. 2-3) The Ministry has advanced no reasons for this position beyond these assertions, which I do not find persuasive in the face of this particular application for access to records. If the Regional Manager, Environmental Protection for Vancouver Island Region 1 was trying to inform me that the test results in dispute are "not information about a risk of significant harm to the environment or to the health or safety of the public or a group of people" on the basis of his knowledge of the test results given to the Ministry by the third party, then he should have said so explicitly and should also have shared this information with the applicant, as I now encourage the Ministry to do. (See Reply Submission for the Ministry, Supplementary Affidavit of George E. Oldham, paragraph 5) If as the third party alleges, the Ministry did consider section 25 as grounds for disclosure and rejected doing so because of section 21 considerations, it would have been helpful for the Ministry to make this point directly to me and in adequate detail. There is no such evidence in the voluminous submissions made to me by the Ministry. (See Reply Submission of the Third Party, p. 5)

The Ministry further submitted "that the duties and responsibilities set out in section 25 belong to the public body alone. The Commissioner does not, therefore, have the power to make an order requiring disclosure of a record pursuant to section 25." (Reply Submission of the Ministry, p. 3) It cites Ontario Order 187, July 13, 1990 (Tom A. Wright, Assistant Commissioner) in support of this position. I agree with the Ministry that it has the responsibility to make an initial determination under section 25. But it is my opinion that I am authorized to exercise oversight under section 42 of the Act with respect to the obligations of the heads of public bodies under section 25. I am also of the view that the section in the Ontario Act comparable to section 25 is not as strong as the B.C. provision, when considered in the context of the legislation as a whole.

I also make the observation that with respect to perceived risks of environmental contamination, such as inspired this particular access request, the head of a public body must consider wherever section 25(1)(a) would require disclosure of the kinds of test results at issue in this particular case.

Section 57(1): The burden of proof

The Ministry accepts that it has the burden of proof in this case. It relies on its own submissions as well as those of the third party, "excluding references to section 31 of the Waste Management Act." (Submission of the Ministry, p. 5) As noted above, with respect to section 21(1)(c), I am not persuaded by either the Ministry's or the third party's arguments that disclosure of these test results could reasonably be expected to result in similar information no longer being supplied. (Reply Submission for the Third Party, p. 5)

I find that the Ministry did not discharge its burden of proof in this inquiry because it did not meet the three-part test established under section 21 of the Act. (See also the Reply Submission of the Applicant, p. 8)

Agreement between the applicant and the third party to exchange test results

Among the other arguments for access to the test results made by the applicant is the claim that it and the third party had agreed to exchange copies of their respective test results. So far this has been a one-way street. (Submission of the Applicant, p. 1, and Affidavit of Robert Holden) The third party contests this point. (Reply Submission for the Third Party, p. 1) Whatever the merits of the respective positions on this point, and the number of affidavits submitted to me dealing with it, I do not find it relevant to my decision in this matter.

9. Order

I find that the Ministry of Environment, Lands and Parks was not authorized or required to refuse access to the record in dispute to the applicant under section 21(1) of the Act. Under section 58(2)(a), I order the Ministry to give the applicant access to the test results of the Swallowfield site of Fletcher Challenge Canada Limited that are in its possession.

October 4, 1995

David H. Flaherty
Commissioner