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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 246-1998
July 9, 1998

INQUIRY RE: A decision by the Ministry of Environment, Lands and Parks to refuse to disclose environmental consulting reports concerning property owned by Imperial Oil Ltd., which is adjacent to properties owned by the applicant

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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 (the Office) on February 16, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of the applicant's request for review of a decision by the Ministry of Environment, Lands and Parks (the Ministry) to refuse access to records relating to hydrocarbon contamination of property in Vancouver owned by the third party (Imperial Oil Ltd.).

2. Documentation of the inquiry process

The applicant, as counsel for I.R. Capital Corporation (I.R. Capital), wrote to the Ministry on May 21, 1997 to request records relating to hydrocarbon contamination of properties in the vicinity of property owned by I. R. Capital on East Broadway in the City of Vancouver. The request was for "documents or stored information" relating to six specific topics, especially the investigation and remediation of contamination, and stated that the request was for all records "including, without limitation, telephone notes, letters, memoranda, test results, reports, agreements and all other documents whatsoever."

The Ministry acknowledged receipt of the access request on May 23, 1997 and advised the applicant by letter dated June 12, 1997 that it had given notice to a third party and would notify the applicant of its decision about whether to disclose the records by July 14, 1997. The Ministry then wrote to the applicant and the third party on July 24, 1997 to advise them that the requested records would be provided by

August 13, 1997, unless the third party asked the Information and Privacy Commissioner to review that decision. The third party requested such a review on August 13, 1997. The Ministry subsequently advised the applicant, on November 4, 1997, that it had decided to deny access to the requested records.

The applicant then wrote to my Office on December 3, 1997 to request a review of the Ministry's (final) response to his access request. He set out six grounds for requesting a review, one of which is that "disclosure of the records is in the public interest under section 25 of the Act."

3. Issue under review and the burden of proof

There are two issues under review. The first issue concerns the Ministry's use of section 21 of the Act to refuse to disclose the information in the records in dispute. The second issue concerns the applicability of section 25 of the Act. The relevant portions of both sections are 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.

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.

(3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify

(a) any third party to whom the information relates, and

(b) the commissioner.

Under section 57(1) of the Act, where access to information in the record has been refused under section 21, it is up to the public body, in this case the Ministry, to prove that the applicant has no right of access to the record or part of the record.

Section 57 of the Act is silent with respect to a request for review about the extent of the Ministry's obligation to use section 25 of the Act to disclose information when an applicant claims that disclosure is in the public interest. As I decided in Order No. 162-1997, May 9, 1997, the burden of proof is on the applicant.

4. The records in dispute

The Ministry describes the records in dispute as "a number of environmental consulting reports concerning possible gasoline contamination of property owned by the Third Party in Vancouver. These include chemical and soil analysis results and project status reports ... prepared by a consultant retained by the Third Party." There are four such reports, totalling 67 pages.

5. The applicant's case

The applicant owns a property in Vancouver that is the subject of hydrocarbon contamination which, it argues, has migrated to its site from the Imperial Oil site. It is now building a condominium on this location.

The applicant is making this request in order to ensure that the barrier system that is currently being built to protect the site is built based on the best available information and more complete disclosure can be made to those acquiring units and ultimately to the Strata Council. (Submission of the Applicant, pages 7, and 8 to 12) The applicant states that it has not commenced any litigation in connection with the contamination of its site, and it is not seeking access to these documents in order to establish liability. (Submission of the Applicant, pages 13, 15) Since it needs the records promptly, because construction is underway, the applicant claims that section 25 of the Act is applicable. (Submission of the Applicant, page 16)

I have reviewed below the specific submissions of the applicant on the application of section 21 of the Act.

6. Imperial Oil's case as the third party

Imperial Oil has submitted a chronology of its dealings with the applicant with respect to its property, including an agreement with respect to reimbursement of the applicant for costs associated with the remediation of its property as a result of contamination. Imperial Oil has made a series of payments. (Submission of Imperial Oil, pp. 1-4)

I have discussed below Imperial Oil's submissions on the application of section 21 of the Act. Its view is that the records in dispute are fully protected on the basis of section 21 of the Act.

7. The Ministry's case

The Ministry changed its earlier decision to disclose the records in dispute, after it learned that the applicant had submitted claims for reimbursement from the third party. The Ministry concluded:

> ...the requested records qualify as technical and scientific information, were supplied to it implicitly in confidence, and, because there is a commercial dispute between the two parties with respect to the remediation costs from gasoline contamination, the Third Party had a well-grounded claim that disclosure of this information would interfere significantly with its negotiating position with the Applicant and could result in undue financial loss to it as well (See Order 130-1996). (Submission of the Ministry, paragraph 1.08)

The Ministry submits that the records in dispute meet each of the three parts of the section 21 test. (Submission of the Ministry, paragraph 5.08)

I have discussed below the Ministry's submission on the application of specific sections of the Act.

8. Discussion

The applicant observed that it was limited in its ability to make submissions concerning the three tests in section 21 because it obviously has not seen the records in dispute and has no information concerning the circumstances under which they were provided to the Ministry. It does, however, argue that the Ministry has failed to discharge its evidentiary burden under section 21.

The applicant contends that the Ministry and third party failed to put forward any evidence in support of their arguments concerning sections 21 and 25. In its reply submission, the applicant argued that "(v)irtually the entirety of the submissions of the third party and the public body are not based on evidence, but rather on the unsworn hearsay assertions of counsel." The Ministry filed one affidavit. Counsel for the third party submitted a letter setting out a chronology of events, which was not supported by affidavit evidence. The applicant also made a second, consequent objection: "Any evidence submitted in reply in respect of those matters set out in the submissions of the Third Party and the Public Body should not be accepted or considered by the Commissioner."

In conducting written inquiries, I am not required to accept only those facts which have been sworn to in an affidavit. While I prefer that parties to an inquiry submit evidence through sworn affidavits, the Act does not require it. (See Order No. 153-1997, March 11, 1997, p. 5; and Order No. 214-1998, February 10, 1998, p. 8) As a result, I am not precluded from considering the chronology contained in the letter from the third party's legal counsel. The applicant refers to the information as "unsworn hearsay assertions of counsel" but does not appear to take issue with the substance of those assertions. While I am generally inclined to attach greater evidentiary weight to assertions which are supported by affidavit material where conflicts exist, there does not appear to be a conflict concerning the chronology set out in the third party's submissions, and I have therefore taken it into account in considering the application of section 21.

Section 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, ... scientific or technical information of a third party,

The Ministry submits that the records in dispute "qualify as technical and scientific information." (Submission of the Ministry, paragraph 5.04) Imperial Oil has made the same submission, which I agree with for the purposes of this inquiry. (Submission of Imperial Oil, p. 4) As I have previously determined, environmental

testing reports from former service station sites qualify as technical and scientific information for the purposes of section 21(1)(a). (See Order No. 57-1995, p. 5; Order No. 130-1996, p. 3)

(b) that is supplied, implicitly or explicitly, in confidence

The Ministry submits that at the time in the early 1990s when the records in dispute were supplied to it by the third party, its practice was to receive this type of information with an implicit understanding of confidentiality. See Order No. 56-1995, October 4, 1995, pp. 5-7. (Submission of the Ministry, paragraph 5.05) The Ministry also points out that the reports prepared for the third party state that they are prepared for the exclusive use of the third party.

Imperial Oil submits that it implicitly supplied the records in dispute in confidence to the Ministry. (Submission of Imperial Oil, p. 4, 5)

The applicant, as noted above, objects to the lack of evidence offered by either the Ministry or Imperial Oil on this issue of confidentiality and relies on Order No. 57-1995 and Order No. 67-1995 in support of this contention. The applicant submits in this regard that the practice concerning confidentiality appeared to be different in the Lower Mainland Region than in the Vancouver Island Region, the former being relevant to this inquiry. (Reply Submission of the Applicant, pp. 2-4) I cannot rely on evidence of those practices submitted in previous inquiries but rather must make my decision on the basis of the material submitted in this hearing. Both the Ministry and Imperial Oil have submitted that the records submitted in the early 1990s were supplied implicitly in confidence.

Based on my review of the material put forward by the parties, I accept that the Ministry has discharged its burden of establishing that the information was supplied implicitly in confidence.

(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....

The applicant submits that section 21(1)(c) does not prevent disclosure in the present inquiry because it wants the information to ensure that the barrier system currently being built is based on the best available information and to provide more complete disclosure to prospective purchasers. While the Ministry of Environment, Lands and Parks has approved the barrier system, the applicant indicates that it would prefer to act on "its own analysis and judgment." The applicant stresses that it has not commenced any litigation against Imperial Oil, nor is it seeking access to these documents in order to establish liability.

The Ministry submits that disclosure of the information could reasonably be expected to interfere significantly with the negotiating position of the third party under subsection (i) and could reasonably be expected to result in undue financial loss under subsection (iii). (Submission of the Ministry, paragraph 5.06) It relies in particular on a decision that I made involving Shell Canada and BC Tel, the applicant, in Order No. 130-1996, November 12, 1996. (Submission of the Ministry, paragraph 5.07) In that Order, I made the following observations in relation to section 21(1)(c)(i) and 21(1)(c)(iii):

> Shell Canada is relying on both of these subsections to argue against disclosure of the records in dispute to BC Tel. Because there is a commercial dispute between the two parties with respect to responsibility for alleged damage to telephone cable lines from gasoline contamination underground at the Squamish site, I am of the view that Shell Canada has a well-grounded claim that disclosure would interfere significantly with its negotiating position with BC Tel and that disclosure could result in undue financial loss to it as well. (Submission of Shell Canada, paragraphs 16-40; and Reply Submission of Shell Canada, paragraphs 13-15)
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> Ultimately, I agree with Shell Canada that it could suffer significant harm in its negotiating position with BC Tel if the records in dispute are disclosed at this early stage of BC Tel's claim against it. (Reply Submission of Shell Canada, paragraph 17)

The Ministry emphasizes the similarity of circumstances between Order No. 130-1996 and the present inquiry and submits "that the Third Party has a well-grounded claim that disclosure would interfere significantly with its negotiating position with the Applicant and that disclosure could result in undue financial loss to the Third Party." (Reply Submission of the Ministry, pp. 1-2)

Imperial Oil also submits that disclosure of the records in dispute "is likely to cause significant harm to [its] business interests." It is engaged in ongoing negotiations with the applicant with respect to reaching a settlement agreement with respect to various issues relating to the property in question. (Submission of Imperial Oil, p. 5) Imperial Oil further submits that it is open to the applicant to retain its own consultants and conduct its own environmental testing, if it is sincere in its wish to "do all it can to ensure that the condominium site is wholly remediated and fully protected against risks of further contamination." (Submission of the Applicant, p. 14)

The applicant submits that section 21(1)(c) should not prevent disclosure in the present inquiry when one has regard to the purposes for which access is requested, the absence of litigation, the fact that a single site is involved, and the fact that purchasers of condominiums will be ordinary members of the public:

> The competitive position of the Third Party is hardly is at stake in this request. Similarly, there is no risk, let alone a *reasonable expectation*, that release could interfere *significantly* with the negotiating position of the Third Party. Liability is admitted, and the documents do not relate to any issues in dispute between the Applicant and the Third Party. (Submission of the Applicant, pp. 14, 15)

The applicant and the Ministry differ in their interpretation of Order No. 130-1996, especially with respect to the existence of litigation, ongoing discussion of liability, and the prospects of discovery in civil proceedings. (Submission of the Applicant, page 8) The applicant submits that the reasoning in Order No. 67-1995 is more appropriate, because the parties are not involved in litigation, there is no apparent dispute as to liability, and there is reason to believe that litigation may never in fact be commenced. (Submission of the Applicant, p. 7) The applicant further relies on Order No. 57-1995, in which I ordered disclosure of information about a contaminated service station site to the Dunbar Residents Association, and has furnished a list of relevant factors that militate in favour of disclosure in the present inquiry. (Submission of the Applicant, pages. 10-13) The applicant seeks to invoke that strong public interest in disclosure of information that I found to exist in Order No. 57-1995. (Submission of the Applicant, p. 13)

Imperial Oil disagrees with the applicant's assertion that issues of liability do not exist. It submits as follows:

> The Applicant is not able to 'compartmentalize' its purposes which will not harm Imperial Oil Limited's negotiating position and business interests from those stated purposes that will not inflict such harm;...
>
> Imperial Oil Limited submits that the Applicant must weigh the risks and costs associated with conducting its own [environmental] testing and commencing litigation against Imperial Oil Limited and factor this into its position with respect to the current negotiations.... In our view, the utilization of the FOI process in this situation will seriously hamper Imperial Oil Limited's future negotiations with the Applicant over the Property. In our view, this situation is virtually identical to OIPC Order No. 130 in respect of '*Shell Canada Products Ltd.'* (Reply Submission of Imperial Oil, p. 2)
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> Once the Commissioner is satisfied that the Section 21 test has been met then the analysis stops. Section 21 does not contemplate a further step in the analysis where the Applicant's stated purposes are weighed against the potential harm to Imperial Oil Limited established by Imperial Oil Limited. (Reply Submission of Imperial Oil, p. 4)

The Ministry concludes that section 21 of the Act, a mandatory exception, requires it to withhold the records in dispute in the circumstances of this inquiry (Reply Submission of the Ministry, p. 3)

I agree that the applicant's stated purpose for the information does not address the potential harm to the third party in circumstances of this inquiry. The fact that the applicant seeks the information for the purposes of ensuring that the barrier is constructed on the basis of the best possible information does not preclude the applicant from using this information to its benefit in its ongoing negotiations with Imperial Oil.

Nor is the absence of litigation determinative of the issue. Imperial Oil points out that there is reason to believe that litigation will be commenced, if the current negotiations are not completed to the satisfaction of both parties. It further points out that it has not admitted liability for contamination that it did not cause. Even if liability is not in issue, there are outstanding issues concerning quantum of loss. The applicant contends that the only "negotiations being undertaken with the third party relate to the extent to which various costs the applicant has incurred can in fact be attributed to the contamination. The fact remains that there are ongoing negotiations between the applicant and Imperial Oil with respect to various issues relating to the property in question. Resolution has not been achieved with respect to issues concerning quantum of costs, liability for those costs, the allocation of liability for anticipated and potential future costs, and issues concerning releases and indemnities."

In view of the ongoing nature of the negotiations, I conclude that disclosure of the records could reasonably be expected to interfere significantly with the negotiating position of the third party. Having regard to the amounts already paid to the applicant with respect to progress claims, I also accept that disclosure could reasonably be expected to result in undue financial loss to Imperial Oil.

Imperial Oil adds that as the owner of numerous sites across British Columbia it has cooperated with the Ministry with respect to disclosure of relevant records to it: "It is clearly in the public interest for such information to continue to be supplied to the Public Body without resort to mandatory orders or similar measures... The present circumstances clearly satisfy the criteria contemplated by Section 21(1)(c)(ii)." (Submission of Imperial Oil, p. 5) The third party also points out that:

> The Applicant and Imperial Oil Limited are sophisticated business undertakings and if they are unable to arrive at a settlement agreement in respect of the Property, it is entirely open to the Applicant to obtain the Documents during the discovery process once litigation proceedings are commenced down the road. (Submission of Imperial Oil, pp. 5-6)

The applicant relies on Order No. 56-1995, Order No. 57-1995, and Order No. 67-1995 for the proposition that disclosure of the records in dispute will not result in similar information not being provided in the future. The applicant also refers to the *Waste Management Act*, R.S.B.C. 1996, c. 482, which requires certain information to be placed

on a public registry, which appears to encompass the type of information contained in the records in dispute. (Reply Submission of the Applicant, pages 8 and 9) I agree with the applicant's submissions in this regard. I conclude that disclosure of the information could not reasonably be expected to result in similar information no longer being supplied to the public body under subsection (ii).

My conclusion that the information should not be disclosed is based on section 21(1)(c)(i) and (iii) of the Act. I agree with the Ministry's conclusion that section 21 of the Act, a mandatory exception, requires it to withhold the records in dispute in the circumstances of this inquiry. (Reply Submission of the Ministry, p. 3)

I find that disclosure of the records in dispute could reasonably be expected to interfere significantly with the negotiating position of Imperial Oil as the third party. I find that the Ministry has met the three-part test set out in section 21.

Section 25: Public Interest Paramount

The applicant, as noted in part above, submits that its property is the subject of hydrocarbon contamination, which is continuing to occur from the third party's site, and that other adjacent properties have also been contaminated. It is building a condominium on this site, beginning with a barrier system, with construction of the building expected to be completed in September 1998. Pre-sales of units to the public have commenced. (Submission of the Applicant, pages 16 and 17)

The applicant laments the amount of time that has elapsed since it made its request for information under the Act, because it is preventing any necessary adjustments to its barrier system and (somehow) limits its ability to communicate relevant information to purchasers. (Submission of the Applicant, p. 18) Delay in this instance is "defeating the public interest purpose of the request." The applicant relies on Order No. 56-1995 to support the application of section 25. (Submission of the Applicant, pp. 19-20; see also the Reply Submission of the Applicant, p. 10)

The Ministry has set out an interpretation of this section as an "exceptional provision." I agree with the Ministry that this positive duty of disclosure "only exists in the clearest and most serious of situations." See Order No. 165-1997, p. 8. It further points out that in Order No. 130-1996, as discussed above, I stated that there was no clear public interest in disclosure of reports of environmental test results involving contamination from a service station. (Submission of the Ministry, paragraphs 5.10 to 5.12)

I agree with the Ministry that this request for access concerns a private dispute between the applicant and the third party: "The interests of the Applicant do not rise to the level of public interest as defined by section 25 of the Act." (Submission of the Ministry, paragraph 5.12; and Reply Submission of the Ministry, p. 3)

9. Order

I find that the Ministry of Environment, Lands and Parks was required to withhold information in the records in dispute under section 21(1) of the Act. Under section 58(2)(c) of the Act, I require the Ministry to withhold the records withheld under section 21(1).

I also find that the Ministry of Environment, Lands and Parks was not required to disclose information from the records pursuant to section 25 of the Act. I make no order in this respect other than to note that the applicant has not satisfied me that the application of section 25 to the records at issue is required under the Act.

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David H. Flaherty
Commissioner

July 9, 1998