

**Office of the Information and Privacy Commissioner  
Province of British Columbia  
Order No. 319-1999  
July 29, 1999**

**INQUIRY RE: A request by Northwood Inc. for comparative check scale information from the Ministry of Forests**

**Fourth Floor  
1675 Douglas Street  
Victoria, B.C. V8V 1X4  
Telephone: 250-387-5629  
Facsimile: 250-387-1696  
Web Site: <http://www.oipcbc.org>**

**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 June 7, 1999 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by the applicant, a representative of Northwood Inc., a forests product company, of a decision by the Ministry of Forests (the Ministry) to withhold information from summary reports of check scale data.

**2. Documentation of the inquiry process**

The applicant made a written access request, on December 16, 1998, for “comparison information that is generated when doing a checkscale, for each check that is done on Northwood Inc. sample loads” (the applicant is employed as Northwood’s Scaling Coordinator). The Ministry responded, on January 8, 1999, by refusing access to the records under section 17 of the Act. The applicant wrote to the Office on January 18, 1999 to request a review of the Ministry’s decision. The Ministry subsequently informed the Office that it would also rely on the exception under section 22 of the Act to refuse access to some of the information. On April 21, 1999 the Ministry provided the applicant with severed copies of summary reports (65 pages) for a discrete time period within the 1998/1999 fiscal year and, on May 12, 1999, amended the response package to include some section headings.

The Office sent a Notice of Written Inquiry to the applicant, the Ministry, and two parties to whom I had granted Intervenor Status. The initial inquiry date of April 21, 1999 was adjourned twice, as each party requested an adjournment, and was ultimately scheduled for June 7, 1999.

### 3. Issues under review and the burden of proof

The issues under review in this inquiry concern the Ministry's application of sections 17 and 22 of the Act to information in the records in dispute.

The relevant parts of sections 17 and 22 are as follows:

#### *Disclosure harmful to the financial or economic interests of a public body*

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

- (a) trade secrets of a public body or the government of British Columbia;
- (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;

....

#### *Disclosure harmful to personal privacy*

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

- (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

...

- (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,

....

- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
  - ...
  - (d) the personal information relates to employment, occupational or educational history,
    - ...
  - (g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,
    - ....
  
- (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
  - ...
  - (c) an enactment of British Columbia or Canada authorizes the disclosure,
    - ...
  - (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,
    - ....

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under Section 57(1), where access to information in the record has been refused under section 17, 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. Under section 57(2), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

#### **4. Objections**

The applicant contends that the material contained in the Ministry's submission constitutes hearsay, double hearsay, and opinion evidence which should be inadmissible or given no weight. The Ministry objects to the inclusion, in the applicant's reply submission, of information which raises new issues and challenges the credibility of two Ministry employees. The Ministry requests an opportunity to make further submissions, "should the Commissioner consider giving any consideration and credence to such statements." The Ministry also objects to the applicant's characterization of the evidence as "hearsay" and "double hearsay." While the applicant contends that reliance on this material would compromise the fairness of the inquiry, the Ministry takes issue with this assertion.

I considered all of the evidence filed in support of the respective submissions in reaching my determination. I do not accept that the applicant's reply submission raised new issues which constitute improper reply submission. Although I am not prepared to conclude that the hearsay evidence filed by the Ministry is inadmissible, since the strict rules of evidence do not apply, in assessing the weight to be given to such evidence, I was mindful of the fact that the nature of the evidence placed significant limitations on the ability of the applicant to challenge the assertions contained in the affidavits.

## **5. The records in dispute**

The *Forest Act* requires timber/logs to be measured to determine their volume or quantity and to classify their species and quality for the purpose of establishing stumpage rates paid to the government for cutting crown timber. This work is done by licensed scalers. As in this case, the scalers usually work for a forest products company. The results of any scale can be checked by hand for accuracy by a check scaler who is a forest officer employed by the Ministry. The allowable deviation between the company and the check scale is three percent. Checking is done on an unannounced and random basis. Records are maintained for the check scaling process. These are the records in dispute in this inquiry: "Where the check scale replaces the original scale, the operator of the site scale is provided with both the original scale and the check scale by the Public Body." (Submission of the Ministry, paragraphs 5.01 to 5.09)

The Ministry conducts approximately 7,000 check scales per year "to ensure that nothing is done to manipulate the scale in order to reduce stumpage fees payable to the Province." (Submission of the Ministry, paragraph 5.05) The *Forest Act* also imposes various forms of control on licensed scalers, including the possibility of suspension and cancellation of scaling licenses. (Submission of the Ministry, paragraphs 5.06 to 5.09)

Log scaling, which is the usual method of valuing harvested timber, combines subjective and objective elements. A scaler determines species and calculates log volume (by measuring log length and top and bottom diameter), but also exercises skill and judgement by estimating the volume of useable wood left after allowing for such things as rot, splitting, and branches. Since stumpage revenue is based on the volume of useable wood harvested, accurate scaling is important to forest products companies as well as government. Scalers are employed by the Ministry to monitor the work of the private-sector scalers by randomly selecting and scaling loads of logs which have already been scaled. It is their data and results, referred to as check scale data, which, as noted above, form the records in dispute in this inquiry.

The Ministry views check scale data as sensitive information, because the results replace the original estimated volume whenever it is outside an allowable six percent band (over three percent more or under three percent less). The Ministry fears that those who employ log scalers might encourage - if not coerce - them to estimate wood volumes as between two percent and three percent less than actual volumes, so as to reduce stumpage revenue to government. In the Ministry's view, since stumpage revenues are

measured in the millions, even a consistent underestimation of one percent would amount to hundreds of thousands of dollars.

The records in dispute in this inquiry are 65 pages of data headed “Comparison of Scale Against Check - Summary Report.” The Ministry has withheld all information concerning load, site, and timber mark numbers (which it contends might identify an individual scaler), as well as all remarks and names/signatures of the personnel involved.

The Ministry has withheld information from a repetitive set of standard tables for the Prince George Forest Region that could reveal the identity of individual timber scalers, including the following categories of information:

- Headings that refer to the weight scale population [the total volume of timber delivered to a company in a given Forest District in a given year], stratum [weight to volume conversion ratios and timber grade profiles for a given ‘population of timber’], and sampling year under which the timber was scaled;
- The name of the original scaler and the check scaler;
- The timber mark of the timber scaled;
- Hand written remarks; and
- The signature of the forest officer who conducted the check scale. (Submission of the Ministry, paragraph 4.02; and Submission of the Applicant, paragraph 13)

## **6. The applicant’s case**

The applicant, Northwood Inc., submits that the primary policy issue in this case is whether the Ministry “can use the Act to deny the Applicant access to records that are essential to the Applicant’s ability to scrutinize the amount of money the Public Body determines that the Applicant must pay on account of timber the Applicant harvests from the Tenures.” (Submission of the Applicant, paragraph 3)

The applicant describes the process of determining stumpage as follows:

... all harvested timber is weighed, and the weight to volume conversion ratio and grade profiles determined from the hand scale of the sample loads from that population of timber are extrapolated to apply to the entire weight of that timber. This provides a volume figure and a quality distribution for the Public Body to use in order to calculate the stumpage payable on harvested timber.

Accordingly, how accurately sample loads are hand scaled is of significant consequence to the amount of stumpage that the Applicant must pay to the Public Body, due to the fact that the hand scale results of the sample loads are extrapolated to apply to hundreds of loads of a population of timber. (Submission of the Applicant, paragraphs 14, 15)

Thus an error in a hand scale of two percent could have significant consequences for a forest company, in under or over payment of stumpage, because of the extrapolation factor. (Submission of the Applicant, paragraph 16)

The applicant employs up to twenty scalers at any given time in the Prince George Forest Region as either employees or contractors:

Once one of the Applicant's scalers completes a hand scale of a sample load, the scaler provides the Applicant with the data generated in respect of that sampled load. Usually, the scaler will input the data into the Applicant's computer system, and leave a hard copy of the data in a file that the Applicant makes available to the Public Body's check scalers for check scale purposes. (Submission of the Applicant, paragraph 22)

The key point is that the applicant is not now receiving comparable auditing results undertaken for the Ministry in the form of hand scales by check scalers (as described above). The Ministry provides the applicant with a summary of the check scaler's scale of a sample load (the "Check Scale Summary"), but only if the original scale of that sample load is replaced with the check scale data. This usually takes a week. (Submission of the Applicant, paragraph 26) In addition, the Ministry's check scaler always provides the applicant's scaler with a "Check Scale Comparison Report" for each sample load that is check scaled at the time that it happens: (Submission of the Applicant, paragraph 27)

While the Public Body will eventually provide the Applicant with the data generated by a check scale of a sample load, if the check scale data replaces an original scale of that sample load, by that time the sample load is no longer available to scrutinize the check scale data. As well, the Check Scale Summary does not provide a comparison of the check scale data with the original scale data. (Submission of the Applicant, paragraph 29)

The applicant asserts that until five years ago the Ministry routinely released all Check Scale Comparison Reports to licensees in the province. The applicant has demonstrated to me that it received such data from the Prince Rupert Forest Region, but is not receiving them in the Prince George Forest Region. (Submission of the Applicant, paragraphs 30 and 31) The applicant has received edited reports only in response to its access requests. The list of what it has not received is similar to the one I gave early in this Order in section 5.

The consequences for the applicant include the following:

- It cannot identify which of its operations is associated with a given check scale that replaced an original scale and cannot, therefore, keep accurate records of the timber harvested by its various operations under its various tenures.

- Without the identity of the scaler, the applicant can do nothing to improve the scaler's abilities, prevent repetitive mistakes, and identify training needs. (Submission of the Applicant, paragraph 36)

The applicant submits that it has legitimate business reasons for requesting unrestricted access to the Check Scale Comparison Reports. (Submission of the Applicant, paragraph 37) Furthermore, it has no intention, and has never been found culpable, of failing to comply with legislated scaling requirements. (Submission of the Applicant, paragraph 38 to 42)

I have reviewed below the applicant's submissions on the application of various sections of the Act. It wants access to the unsevered copies of the Check Scale Comparison Reports from the Ministry.

## **7. The Ministry of Forests' case**

The Ministry states that the applicant has received "all of the measurements in the summary reports with respect to both the original scale and the check scale. The only information being withheld is information which could identify the original scaler." (Submission of the Ministry, paragraph 5.14)

I have presented below the Ministry's submissions on the application of various sections of the Act to prevent disclosure of the information in dispute.

## **8. The Log Scalers' Association of Western Canada's submission as an intervenor**

The Log Scalers' Association polled a random selection of its membership on the issue of disclosure. The Association supports disclosure of the information in dispute for the following reasons:

1. The information generated by the checkscale comparison provides factual data to the parties involved. Legislation and the BC Scaling Regulations have defined the procedures necessary to confirm the accuracy of scaling data. At this time, as checkscaling is a provincially accepted method of confirming scaling data, the markholder has a vested interest in this information.
2. With the markholder receiving the checkscale comparison information, pressure could be placed on a scaler based on the checkscale results. However, there are avenues to deal with that situation, should it arise.
3. Release of checkscale comparison information could provide an opportunity to identify any training needs.

4. With the parties directly involved having access to this information, it could ensure all parties have been held accountable for the comparison.

## **9. The Northern Forest Products Association's submission as an intervenor**

The Northern Forest Products Association, which supports the access request, made the following submission:

With the recent refusal by the Ministry of Forests to provide check scale data, not only are the elements of cost effectiveness, continuous improvement and transparency seriously eroded in the quality assurance program, but the industry is unable to accurately verify Crown stumpage and royalty invoices in instances where check scale data has replaced sample load data and unable to accurately monitor legal cut control requirement.

This Association specifically addresses the Ministry's section 17 argument in these terms:

The current rigor around scaling of Crown timber and the training and licensing of scalers ... does not leave room to 'reasonably expect' financial or economic harm to accrue to the Crown. The goal of the check scale program is to accurately scale Crown timber. Open sharing of check scale data to all parties in our view would not risk harm, but reduces the likelihood of harm.

The Northern Forest Products Association also contends that disclosure would not be inconsistent with section 22, since "both the company scalers and the check scalers are performing a work function, not personal function, and it is not unreasonable to expect that the results of that work function would be provided to all parties which that work function affects." It adds that there are innumerable examples in forestry where comparative information similar to that in dispute in this inquiry is made available without it being considered an unreasonable invasion of a third party's personal privacy. These include timber cruising, silviculture surveys, lumber graders, site disturbance surveys, and planting quality control assessments.

## **10. Discussion**

### ***Section 17: Disclosure harmful to the financial or economic interests of the Ministry***

The applicant advances a number of arguments in support of the contention that disclosure could not reasonably be expected to harm the financial or economic interests of the government under section 17(1) of the Act. Even if the information could be characterized as falling within the scope of sections 17(1)(a) through (e), the applicant contends that "no objective bystander could 'reasonably' expect the release [of the



information in dispute] to harm the financial or economic interests of the Public Body.” (Submission of the Applicant, paragraph 45)

As the applicant points out, the alleged potential harm would have to relate in some way to the potential manipulation of scaling procedures, so that the applicant’s sample scales produced volumes or values at the lower end of the plus or minus three percent variance permitted under the Regulation. In other words, I would have to accept that it could reasonably be expected that the applicant would use the Check Scale Comparison Reports to cheat the system.

The evidence of harm submitted by the Ministry was contained in an affidavit of a Scaling Policy Forester, who deposed that the Ministry has been informed that some timber companies have put pressure on scalers to scale unreasonable volumes and/or grades in order to reduce the stumpage fees payable. The competition for work among contractors who provide scaling services to timber companies is significant, and such pressure could be effective if it were directed towards specific scalers. In a subsequent affidavit, the Scaling Policy Forester indicated that he was told by the Ministry’s Interior Scaling Supervisor that she had spoken with a scaler who said that they had been pressured by his employer to underestimate his scale results. The Scaling Policy Forester received similar information from the Scaling Manager for the Nelson Forest Region. I note that any pressure from employers to underestimate scale results would conflict with the oath which scalers take.

The Ministry fears harm to its financial interests, if owners or operators of scale sites pressure scalers to make their estimates lower in terms of volume, and thus reduce the stumpage fees payable to the province on the timber. (Submission of the Ministry, paragraph 5.15)

The percentage loss of stumpage fees is said to be significant, because the Ministry typically scales about ten percent of all samples as check scales, meaning that out of 4,000 truck loads in a stratum, only about 400 loads would be selected as samples and only four would be selected as Ministry check scales:

Any potential underestimation of the original scale represents a great potential for revenue loss to the Province. The Province is thus exposed to considerable financial risk through scalers potentially biasing grades on only a small portion of sample loads. (Submission of the Ministry, paragraph 5.20)

Underestimation of the volume of specific loads of timber could further result in a reduction of stumpage payable to the province, which “could lead to an over harvest of timber and threaten the long term viability of the Province’s timber harvest.” (Submission of the Ministry, paragraph 5.21)

The Ministry urges me to find that the “evidence demonstrates that disclosure of the information that has been withheld can reasonably be expected to harm the financial or economic interests of the Province and that the head of the Public Body is authorized to refuse disclosure of this information.”

Based on my review of the evidence, I conclude that the Ministry has not adduced sufficient evidence to establish that disclosure of the information in dispute could reasonably be expected to harm the financial or economic interests of the government. The legislation recognizes that stumpage revenues will vary by three percent. I agree with the applicant’s submission that the government cannot argue that any variance within that three percent range could “reasonably be expected to harm the financial or economic interests” of the government.

Moreover, the evidence indicates that the Ministry released Check Scale Comparison Reports until five years ago and indeed continues to release those reports in some forest regions. The fact that the Ministry chooses to release these records in regions other than the region in which the applicant operates undermines the force of its argument that disclosure could reasonably be expected to result in financial or economic harm.

The evidence put forward by the Ministry to establish harm was also hearsay evidence. Although I considered this evidence in assessing the risk of harm, I attributed less weight to it, because the applicant had no chance to challenge the assertions contained in the affidavits. As the applicant points out, the information could have been obtained from disgruntled employees.

I have also considered the potential for harm in light of the regulatory requirements governing the scaling process. Scalers are licensed by the Province to ensure proper scaling procedures are carried out. A scaler must follow prescribed procedures. Section 102 of the *Forest Act* provides for the suspension and cancellation of scaling licences, if the scaler fails to properly perform the licensed scaler’s duties under the *Forest Act*. Authorization to scale may be cancelled, where the scaler fails to perform in a capable and competent manner pursuant to the Scaling Manual. It is clear that a scaler who succumbs to pressure from an employer would be putting his or her licence at stake. This also militates against the conclusion that release of the information in dispute could reasonably be expected to harm the financial or economic interests of the government.

Finally, I accept the applicant’s argument that, if Northwood were inclined to manipulate the scale data, it would not require the Check Scale Comparison Reports to do so. As the applicant points out, it is capable of undertaking its own check scales to determine whether its scalers tend to scale in the lower or upper regions of the range of allowable variance between original scale data and check scale data. Indeed, as the applicant further points out, it does not even require check scale comparison data to instruct its scalers to hand-scale sample loads in a manner that will generate lower volume figures.

For these reasons, I conclude that the Ministry has not discharged the burden of establishing that disclosure of the information in dispute could reasonably be expected to harm the financial or economic interests of the government.

***Section 22: Disclosure harmful to the personal privacy of third parties***

The Ministry submits that disclosure of the information in dispute would also constitute an unreasonable invasion of the personal privacy of third parties under section 22. The Ministry's core contention is that disclosure of any of the information in dispute could lead to the identification of a specific scaler. (Submission of the Ministry, paragraph 5.26) In particular, it argues that disclosure could lead to their re-identification and thus be an unreasonable invasion of their privacy. (See Order No. 52-1995, September 15, 1995, p. 7) The Ministry estimates that Northwood has eight to ten scalers, only one of whom might work at some sites. He or she might also be identified on the basis of the name of the forest officer who did the check scale, or the release of timber marks and handwriting. (Submission of the Ministry, paragraphs 5.26 and 5.27)

The applicant acknowledges that the Check Scale Comparison Reports contain "personal information" within the meaning of the Act but disputes the Ministry's contention that disclosure of this information would be an unreasonable invasion of the personal privacy of third parties. The applicant contends that the information in the Check Scale Comparison Reports is not personal information that is presumed to constitute an unreasonable invasion of a third party's personal privacy under section 22(3).

I agree with the applicant's submission that the presumptions set out in sections 22(3)(d) and (g) do not apply to the information in dispute. I cannot accept that the information relates to "employment, occupational or educational history" within the meaning of section 22(3)(d). I also reject the Ministry's contention that the information consists of "personal recommendations or evaluations, character references or personnel evaluations about the third party" within the meaning of section 22(3)(g). Thus I do not find that the information in dispute reveals the "occupational history" of particular scalers, nor can it be equated with a "performance appraisal" or even less with a "personal evaluation" as I have construed them in previous Orders. (See Order No. 81-1996, January 25, 1996; Order No. 97-1996, April 18, 1996; and Order No. 226-1998, April 22, 1998.)

The considerations set out in sections 22(2)(a) and (c) have particular relevance to this issue. I find that disclosure of the information in dispute is desirable for the purpose of subjecting the activities of the Ministry to scrutiny. As the applicant points out, it cannot scrutinize the Ministry's check scales without the Check Scale Comparison Reports. By the time the applicant receives the results of the Check Scale Summary, the timber is long gone. Just as the Ministry expresses concern that forest companies will instruct their scalers to manipulate the allowable variance, the applicant points out that it

has an equally legitimate concern that the Ministry might attempt to bias scale results towards the higher end of the allowable variance.

The Ministry relies on section 22(2)(e) to argue that disclosure of the information in dispute will unfairly expose scalers to financial or other harm. The Ministry contends that an owner or operator who knows that a scale is consistently higher than or equal to the check scale may put pressure on the scaler to make the estimates lower in terms of volume and/or quality. I note, however, that the Log Scalers' Association of Western Canada supports disclosure of the information and did not express any concern regarding potential harm or reprisals against scalers. The Ministry contends that the position of the Association should not be taken as representing the consensus of opinion on the issue among scalers, since it represents only fifteen percent of provincial scalers. The Ministry did not adduce evidence of the nature or membership of the Association and simply made reference to information contained in the Association's website. While the Association may not represent the majority of scalers in this province, the fact remains that it represents a large number. The Association's submission that disclosure should be made undermines the Ministry's reliance on section 22(2)(e) of the Act.

I conclude that the applicant has discharged its burden of establishing that disclosure of the information would not constitute an unreasonable invasion of the third parties' privacy under section 22.

## **11. Order**

I find that the Ministry of Forests was not authorized under section 17(1) or required under section 22 of the Act to refuse access to the records in dispute. Under section 58(2)(a) of the Act, I require the Ministry of Forests to give the applicant access to the information withheld under section 17(1) and section 22 of the Act.

---

David H. Flaherty  
Commissioner

July 29, 1999