OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 00-36

INQUIRY REGARDING A CAPITAL HEALTH REGION RESEARCH PROTOCOL

David Loukidelis, Information and Privacy Commissioner
August 11, 2000

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Summary: Applicant sought copy of research protocol for publicly-funded study of possible human health effects of aerial spraying for European gypsy moth. Certain research information of post-secondary educational body employees found to be excluded from Act by s. 3(1)(e). Because public body failed to establish reasonable expectation that disclosure would deprive a researcher of priority of publication, it was not entitled to withhold other information under s. 17(2).

Key Words: research information – post-secondary educational body – research information – researcher – priority of publication – reasonable expectation.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(e), 17(2), 25(1).

Authorities Considered: B.C.: Order No. 264-1998; Order 00-10; Order 00-21.

1.0 INTRODUCTION

The backdrop to this decision is the aerial spraying in 1999 of a bacterial pesticide to combat a European gypsy moth infestation in the Victoria area. Aerial application of the pesticide Foray 48B – which contains the bacterium *Bacillus thuringiensis var. Kurstaki* ("Btk") – was conducted under the authority of a Cabinet order under the *Pesticide Control Act* (*i.e.*, Order in Council 169/99). In connection with that aerial spraying program, the Ministry of Forests ("MOF") – under a memorandum of understanding with the Capital Health Region ("CHR") – provided $455,000 to the CHR for a human health surveillance study of the effects of such spraying ("Btk Study").

The CHR established a scientific committee to conduct that study. The members of the committee included a variety of scientific and medical experts and a community representative. According to the CHR's submissions in this inquiry, the study's goals were "to summarize and add to the current understanding of the public health effects of aerial spraying of Btk" and to "monitor people in the spray zones for signs of potential health effects caused by the spray". It appears from the CHR's submissions that the study was designed with a view to publication of scientific papers based on study results. Although it is not clear from the material before me how or when it was done, at some point a research methodology, or 'Btk Study Protocol', was prepared for the study ("Btk Study Protocol"). This is the record in dispute in this inquiry.

Among other things, the Btk Study Protocol articulates the research methodology to be followed in conducting the study. It addresses the

- method of assessing study participants' exposure to the spray,
- procedure for (and details of) a random population health survey to be conducted before the first spraying,
- procedure for a random study of asthmatic children in the region, and
- methodology for laboratory surveillance of Btk presence in clinical and environmental specimens.

On May 14, 1999 the applicant, who is a research toxicologist, made an access to information request to the CHR under the *Freedom of Information and Protection of Privacy Act* ("Act"). In that request, the applicant sought access to a variety of records related to the Btk Study, including "a copy of the Btk Study Protocol for the human health surveillance study", *i.e.*, the Btk Study Protocol. On June 30, 1999, the CHR responded by refusing to disclose any part of the Btk Study Protocol. It relied on s. 17(2) and s. 21(1) of the Act. The CHR also declined to disclose other records sought by the applicant.

The applicant then requested a review, under s. 52 of the Act, of the CHR's decision. As a result of mediation by this Office, the CHR disclosed portions of the Btk Study Protocol, but continued to withhold some of it under s. 17(2). Because the matter was not fully settled by mediation, I held a written inquiry, under s. 56 of the Act, into the applicant's request for review.

2.0 ISSUES

The Notice of Written Inquiry issued by this Office clearly states that the only issue to be considered in this inquiry is the CHR's application of s. 17(2) of the Act to the Btk Study Protocol. The applicant restricted his arguments to that issue. The CHR did not consider itself similarly bound, since it now argues – for the first time – that s. 3(1)(e) of the Act applies to the disputed record, so that the Act does not apply to that record.

It is, to say the least, rather late in the day for the CHR to be raising this argument. It responded to the applicant's request without having raised the point and it remained silent

on the issue even though the Notice of Written Inquiry this Office sent to the parties did not mention s. 3(1)(e) as being in issue. The CHR gave no reason for its actions. Because the s. 3(1)(e) issue goes to my jurisdiction, however, I have addressed the question. (In order to ensure the applicant had a reasonable opportunity to be heard on the point, I gave him an opportunity to respond specifically to the CHR's s. 3(1)(e) argument and he made a submission.)

The applicant in that further submission also argued that the severed information should be disclosed under s. 25 of the Act. He had expressly referred to s. 25 in his original request for review, although it is not mentioned as an issue in the Notice of Written Inquiry and was not addressed by the CHR in its initial or reply submissions. It is clear from previous orders that the applicant has the burden of establishing that s. 25 applies. In view of my conclusion on the s. 25 issue, I saw no need to call for a further submission from the CHR.

Section 57(1) of the Act places the burden on the CHR to establish that s. 17(2) applies. Consistent with previous decisions on the point, the CHR also bears the burden of proof with respect to the s. 3(1)(e) jurisdictional issue. See, for example, Order No. 00-21.

3.0 DISCUSSION

3.1 Does the Act Apply? – The CHR says, in effect, that it did not need to respond to the applicant's access request because the disputed record is not subject to the Act by virtue of s. 3(1)(e). That section reads as follows:

> 3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
> …
>
> (e) a record containing teaching materials or research information of employees of a post-secondary educational body; … .

Section 3(1)(e) only applies to "teaching materials" or "research information" *of* an "employee of a post-secondary education body". Here is the CHR's argument on the s. 3(1)(e) issue, as set out in its initial submission:

> 5.05 The Capital Health Region, as a Public Body, operates in a manner remarkably similar to a post-secondary educational body in having its employees and others carry out research.
>
> 5.06 In this case, some of the Public Body researchers who share a proprietary interest in the research information are employees of a post-secondary educational body. Therefore, it is submitted in accordance with section 3(1)(e) of the Act that the record of the research information severed from the Btk Study Protocol is not subject to a request under the Act.

First, the CHR does not claim that it is a "post-secondary educational body", a term that is not defined in the Act. It simply says that it "operates in a manner remarkably similar" to such a body. That is not a sufficient ground for concluding that s. 3(1)(e) applies to the Btk Study Protocol.

Second, the CHR simply asserts that some of the "Public Body researchers who share a proprietary interest in the research information" are employed by unidentified post-secondary educational bodies. The only other support for this is found in paragraph 3.11 of the CHR's initial submission, which reads as follows:

> In addition to the researchers who are employees of the Public Body, there are also three researchers who participated in the Study who are employees of universities. These university researchers understood that they would have rights to the research information arising from the Study for publication purposes within their specialized area of study.

The supporting evidence for these arguments is found in the affidavit of Dr. Richard Stanwick, the CHR's Medical Health Officer. He deposes that he has read the CHR's submissions and that the "facts" set out in paragraphs 2.01 to 2.03 and 3.01 to 3.21 of the submissions are true. (This does not cover factual assertions made in paragraphs 5.05 and 5.06 of the CHR's submissions, quoted above.) No further detail is given in the Stanwick affidavit, or elsewhere in the CHR's material, about the identity of university researchers involved in the endeavour, about the nature of their participation in the Btk Study Protocol or study, about their interests (if any) in "research information" in the Btk Study Protocol or other relevant aspects of the s. 3(1)(e) issue. Although better evidence would have been desirable, I have nonetheless concluded that certain portions of the Btk Study Protocol qualify as "research information of an employee of a post-secondary educational body" within the meaning of s. 3(1)(e) and are therefore excluded from the Act's application. I have arrived at this conclusion based on evidence internal to the Btk Study Protocol itself, as discussed below.

First, I accept that the Btk Study Protocol is a record containing "research information". Second, it is evident from the record itself – and the CHR's evidence as described above – that certain portions of it were generated by identifiable individuals for use in research associated with the Btk Study. I have reached this conclusion based on the material described below and on its association with specific researchers who are identified in the Btk Study Protocol as employees of either the University of Victoria ("UVic") or the University of British Columbia ("UBC").

The CHR withheld the names of various researchers in the disputed record including from pp. 1, 4, 5, 6 and 7 of the Btk Study Protocol and from pp. 2 and 3 of Appendix 1. These names were not properly withheld from the record under either s. 3(1)(e) or s. 17(2).

Next, p. 8 of the Btk Study Protocol refers to research to be carried out by UVic's Centre on Aging, as approved by UVic's "Ethics Review Panel" (*i.e.*, its Human Research Ethics Committee). Appendix 3 to the Btk Study Protocol also refers to participation by UVic

researchers in aspects of the Btk Study. This supports the conclusion that s. 3(1)(e) applies to the text severed by the CHR from the first paragraph of p. 8 of the Btk Study Protocol and the portions of the questionnaire for the general population study severed by the CHR. As an exception to this, the CHR cannot withhold the name of the company that was to administer the questionnaire by calling respondents cannot be withheld under s. 3(1)(e) (or under s. 17(2), in light of the discussion below).

Similarly, Appendix 1 to the Btk Study Protocol supports the conclusion that the exposure assessment aspects of the Btk Study Protocol constitute research information of UVic employees. Section 3(1)(e) properly applies to the text severed from p. 7 of the Btk Study Protocol and Appendix 1 to the Btk Study Protocol.

Section 3(1)(e) also applies to the information severed from the last two paragraphs on p. 8 of the Btk Study Protocol and the first paragraph on p. 9 of the Btk Study Protocol. This information is research information of UVic researchers, as is evident from the Certificate of Approval by UVic's Human Research Ethics Committee, found in Appendix 4, and from other material before me.

It should be said that s. 3(1)(e) will not apply simply because someone who happens to be employed by a post-secondary educational body is engaged, under contract or otherwise, to do research for or with a public body such as the CHR. Section 3(1)(e) is intended to protect individual academic endeavour. It will protect the intellectual value in teaching materials or research information developed by an employee of a post-secondary educational body, for her professional purposes, by protecting it from disclosure to those who might exploit it to her disadvantage.

I will give an example of information that would likely not be excluded from the Act under s. 3(1)(e). If an expert on water quality, who happens to be employed by a university, is retained by a local government to conduct water quality tests, the results of those tests will not be "research information of" that person. If the person is retained to develop new methods for water testing (or does so in the course of conducting tests for a public body) and has or retains no intellectual property in the methods she devises, the methods – assuming they truly qualify as "research information" within the meaning of s. 3(1)(e) – will not be research information "of" that person. They will, at best, be research information of the public body and thus will not be excluded from the Act by s. 3(1)(e).

3.2 Does Section 17(2) Apply? – The information that I have found is excluded from the Act by s. 3(1)(e), as just described, is the bulk of the information withheld by the CHR. It is necessary, however, to address the CHR's application of s. 17(2), as it severed minor amounts of information under that section.

The CHR argues that disclosure of the information it has severed could reasonably be expected to result in the applicant, or anyone to whom the applicant gives the information, reproducing the "results" of the Btk Study and publishing them in advance of the Btk Study researchers. Without giving any supporting evidence for its conjecture,

the CHR says this "is not hypothetical, it is very probable". It says s. 17(2) of the Act applies.

Sections 17(1) and 17(2) read as follows:

> 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;
>
> (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia.
>
> (2) The head of a public body may refuse to disclose under subsection (1) research information if the disclosure could reasonably be expected to deprive the researcher of priority of publication.

On its face, s. 17(2) only applies if disclosure of "research information" could "reasonably be expected to deprive the researcher of priority of publication". In order to rely on s. 17(2), a public body must establish a number of things. It must establish that the requested information is "research information". It must then establish that there is a reasonable expectation that disclosure of that information could deprive a specific researcher, who is connected in some rational way with the research information, of priority of publication of the research information itself or, in my view, of the results of research that uses the research information or proceeds from it.

On the first issue, I accept that the Btk Study Protocol itself qualifies as "research information" within the meaning of s. 17(2) of the Act. As is noted above, it sets out the research methodology for a multi-faceted scientific study of any possible health effects of Btk aerial spraying. It is information that relates to research.

As for the second point, as is discussed above, I accept that individuals identified in the Btk Study Protocol as being responsible for conducting the Btk Study can be characterized as 'researchers' within the meaning of s. 17(2). I have reached this conclusion based on my review of the disputed record itself, with less assistance from the CHR's material than would have been desirable.

Standard of Proof

In terms of the evidence available in this case, I note that in Order No. 264-1998 my predecessor agreed that, in s. 17(2) cases, a researcher whose priority of publication is allegedly jeopardized is best placed to demonstrate in an inquiry whether his or her priority of publication is in fact threatened within the meaning of s. 17(2). The Act does not place any burden of proof on such individuals – s. 57(1) places that burden on the public body – but as a practical matter the best evidence may well come from a potentially affected researcher. Although I draw no negative inference here, it would have been helpful if the CHR had adduced evidence from the researchers involved to supplement the evidence of Dr. Stanwick and the record itself.

The central issue under s. 17(2), of course, is whether disclosure of the disputed information "could reasonably be expected to deprive" a researcher "of priority of publication". At p. 10 of Order No. 00-10, I commented on the standard of proof for harms-based exceptions under the Act. Consistent with my observations there, the quality and cogency of evidence adduced by a public body in relation to s. 17(2) must be commensurate with a reasonable person's expectation that disclosure of the requested information could deprive a researcher of priority of publication. Although it is not necessary to establish with certainty that disclosure would deprive someone of priority of publication, speculative evidence is not sufficient.

Harm to CHR's Economic Interests

The CHR argues that if it is forced to disclose the Btk Study Protocol, the ability of its researchers "to achieve priority of publication will be seriously jeopardized and its economic interests harmed". Harm to the CHR's economic interests would follow, it says, because it could lose other research projects that result in free medical equipment and treatment being provided for the CHR's facilities and its patients. The CHR gives no details of any research projects that have resulted in such benefits flowing to it, or specifically how such benefits might be lost, to back up this assertion.

It also argues – again, in an argument that really relates to s. 17(1) and not s. 17(2) directly – that its economic interests would suffer because disclosure of this information "could have a significant impact on staff recruitment and retention", since respected specialists would find a setting devoid of research opportunities unacceptable. The CHR did not say how depriving researchers of priority of publication in this case would lead to a "setting devoid of research opportunities". Section 17(2) must be assessed on a case by case basis. The fact that some of severed information may be released here does not mean research information will always be released, thus somehow destroying all research

opportunities. Further, in this case, much of the apparently contentious information is, for the reasons given above, protected under s. 3(1)(e). Even if this argument could properly be made under s. 17(2), I find that the CHR's claims of harm to its "economic interests" are speculative and not supported by evidence that establishes a reasonable expectation of this kind of harm.

The Priority of Publication Issue

On the main issue of priority of publication, the CHR says it is "quite likely" that disclosure of that information would allow the applicant – or anyone else having access to that information – to use the Btk Study Protocol "for the purposes of conducting their own study or studies". The CHR says that a Btk spraying "is planned in the Burnaby area in the Spring of 2000" and that Btk sprayings occur quite regularly in many parts of the U.S. and Canada. The CHR says that since Btk spraying occurs regularly in North America, "the circumstances are ripe for conducting another study". As the CHR puts it, this

> ... provides ample opportunity for the Applicant or anyone else possessing the unsevered portions of the Protocol to conduct their own studies and submit them for publication. This could reasonably be expected to result in the Applicant or others having their papers published before the Public Bodies' research is published.

Such speedy publication might be possible, the CHR claims, because some publications have "less rigorous peer review of material" and publish their research more quickly than publications which have a more "extensive peer review procedure or process". It also says that

> … because many researchers would find the research information unique and therefore valuable, it is not unlikely that they would use the information to their advantage. Namely, to enhance their reputations by publishing unique and important research in advance of others.

Last, the CHR submits that

> … it is to be reasonably expected that should the research information contained in the severed portion of the Protocol be widely disseminated, it is likely that reputable scientific publication would not publish the Study at all. What makes research attractive to a reputable scientific publications is its uniqueness and novelty. That is why they have editorial policies that require the research not [*sic*] be given to anyone else during the peer review.

In response, the applicant says he wishes to review the Btk Study Protocol in order to determine its scientific validity. He says he is concerned about the human health effects of Btk spraying and wishes to use the Btk Study Protocol, in the public interest, to subject government use of this pesticide to public scrutiny from a public health perspective. He says he has no intention of disseminating the Btk Study Protocol or using it for his own research purposes. Among other things, he says that it would be extremely costly to

conduct an independent study of human health effects of Btk aerial spraying using the Btk Study Protocol. He says that he does not have access to the considerable financial resources that would be needed to do this.

I do not understand the CHR to be arguing that disclosure of the remaining information in the Btk Study Protocol could deprive a researcher of priority of publication of the Btk Study Protocol itself. This is presumably because no one is interested in publishing the Btk Study Protocol itself. Instead, the CHR's arguments deal with its concern that, if all of the Btk Study Protocol is disclosed, others will be able to use it to 'reproduce' the Btk Study or to publish "unique and important research in advance of others". This focusses on protecting priority of publication of the Btk Study itself and, more generally, of research on the human health effects of Btk aerial spraying.

Before discussing these arguments, I should mention the CHR's January 19, 2000 news release – a copy of which was appended to the Stanwick affidavit – as an item of some interest here. That release disclosed results of the Btk Study itself – after the CHR's decision had been made respecting the applicant's access request. Quoting Dr. Stanwick, the release says that the research confirms that the spraying of Foray 48B "causes no general health risk to the population, nor to vulnerable groups within it, including the immunocompromised". The release also indicates, again quoting Dr. Stanwick, that the research "essentially backs up, with greater scientific detail and certainty, previous studies undertaken in Vancouver, in the US and in New Zealand". Last, the release contains the following paragraph:

> These findings were summarized in a 64 page report, entitled *"Human Health Surveillance during the Aerial Spraying for Control of the North American Gypsy Moth on Southern Vancouver Island, British Columbia, 1999"* and was submitted to the Pesticide Administrator, Ministry of Environment, Lands and Parks on December 31, 1999, by the CHRs [*sic*] Medical Health Officer.

The release indicates that copies of the report could be obtained from the CHR. A copy of it formed Exhibit "C" to the affidavit of Dr. Stanwick. It gives quite a detailed description of the methodology used in the Btk Study, as found in the Btk Study Protocol. Again, the report was published after the CHR denied the applicant's request and the correctness of its decision must be judged in light of the circumstances at that time. In any case, publication of that report would not change the fact that aspects of the Btk Study Protocol setting out methodologies technically remain excluded from the Act by s. 3(1)(e), even if they have in effect been disclosed through the report.

On the issue of priority of publication of the Btk Study itself, it seems to me that if other studies were to be conducted (by the applicant or others) using the Btk Study Protocol, they would entail collection of new data in relation to different Btk aerial spraying programs, perhaps in locations other than the Victoria area. By definition, it seems to me, any such studies would be new and different studies. Publications based on those new studies would not deprive any researcher of priority of publication of the Btk Study involved here.

Further, if the CHR is arguing that disclosure of the Btk Study Protocol would deprive researchers of priority of publication of unique, or the first, research on the human health effects of Btk aerial spraying, its own news release and report undermines any such argument. The Btk Study clearly is not the first research of its kind.

In any event, quite apart from the applicant's position on his intended use of the Btk Study Protocol, I have concluded that the CHR's arguments and evidence are not sufficient to satisfy the s. 17(2) test. Apart from the assertions quoted above, the CHR has not provided evidence commensurate with a reasonable person's expectation that disclosure of the disputed information could deprive a researcher of priority of publication in any of the ways described above or otherwise. Apart from arguing simply that disclosure of the severed information could lead to other studies being done, the CHR's evidence did not buttress its claims in any detail. Conversely, the applicant says any such data collection and research would be very costly to carry out and that he, at least, does not have the money to do this even if he wanted to. He argues, in effect, that by the time any further data collection could be done, publication of material stemming from the Btk Study would have occurred.

For the reasons given above, I find that the CHR is not authorized by s. 17(2) to refuse to disclose to the applicant the information it withheld under s. 17(2).

3.3 Disclosure In the Public Interest – The applicant argues that s. 25 requires disclosure of the Btk Study in the public interest. Section 25(1) reads as follows:

> 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.

The applicant – who says he has "concerns about the health and quality of life of the people in the spray region" – submits that the Btk Study Protocol should be disclosed to him so he can, applying his scientific expertise, evaluate the Btk Study. He believes the Btk Study and the Btk Study Protocol should be "peer reviewed" by "scientific authority", before further Btk spraying is carried out in British Columbia. Noting that the Btk Study Protocol and Btk Study have been paid for with public funds, he says they should be made available to him. He argues in his initial submission that

> … keeping these documents from public scrutiny may result in failure to disseminate information with serious adverse consequences for public health.

The applicant does not specifically say how these consequences would come about. Presumably he means that failure to disclose the Btk Study Protocol or the Btk Study will

preclude the applicant, or other scientists, from determining if the Btk Study Protocol contains sound methodologies or whether the Btk Study reveals public health risks.

In my view, this case is not one where the compelling or urgent need for publication, in the public interest, contemplated by s. 25(1), is present. I note that the results of the Btk Study have since been published, albeit in summary form, as required by law. The Btk Study results are therefore available to the public. In terms of the applicant's evaluation of the Btk Study Protocol, it is clear that it will be part of the peer review process entailed in any further publication of the Btk Study's results. Further, it is clear that two university research ethics committees have passed on, and approved, aspects of methodologies contained in the Btk Study Protocol and used in the Btk Study.

4.0 CONCLUSION

For the reasons given above, the following orders are made:

1. Under s. 58(2)(a) of the Act, subject to the order in paragraph 2, I require the Capital Health Region to give the applicant access to the portions of the disputed record withheld by the Capital Health Region under s. 17(2) of the Act; and

2. I find that, by virtue of ss. 3(1)(e) and 4(2) of the Act, the Act does not apply to the information severed by the Capital Health Region and described above in this order as being subject to s. 3(1)(e) of the Act.

Since I have found that s. 25(1) does not apply to information in the disputed record, no order is necessary in that respect under s. 58.

August 11, 2000

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia