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# Office of the Information and Privacy Commissioner
# Province of British Columbia
# Order No. 130-1996
# November 12, 1996

**INQUIRY RE: A decision by the Ministry of Environment, Lands and Parks to release environmental consulting reports concerning a site owned by Shell Canada Products Ltd.**

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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 on July 26, 1996 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 a third party, Shell Canada Products Ltd., which objected to the proposed release of information to BC Tel, the applicant, by the Ministry of Environment, Lands and Parks (the public body).

## 2. Documentation of the inquiry process

On January 25, 1996 BC Tel requested from the Ministry of Environment, Lands and Parks copies of information in the Ministry's file concerning alleged gas contamination at Shell Canada's property at locations in Squamish and Victoria, B.C. The applicant subsequently withdrew its request for records relating to the Victoria location. The Ministry, by way of correspondence dated February 27, 1996, consulted with Shell Canada concerning its position on the release of the requested information. It objected to the release on the basis that its interests should be protected by the application of section 21 of the Act, and that the records in question met the three-part test under that section.

On April 11, 1996 the Ministry informed Shell Canada that the records in question did not meet the third part of the three-part test set out in section 21 and that it intended to release the records. (Submission of the Ministry) On April 29, 1996 the third party initiated a request for review with my Office.

## 3. Issue under review at the inquiry and the burden of proof

The issue under review in this inquiry is the application of section 21 of the Act to the records in dispute. This section 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 ...

(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, ...

(iii) result in undue financial loss or gain to any person or organization, or ....

Section 57 establishes the burden of proof on parties in this inquiry. Under that section, if a public body has decided to give an applicant access to a record or part of a record which contains non-personal information that relates to a third party, it is up to the third party to prove that the applicant has no right of access to the record or part thereof. In this inquiry, Shell Canada has the burden of proving that the applicant has no right of access to the environmental consulting reports that are in dispute.

## 4. The records in dispute

The records in dispute consist of a number of environmental consulting reports concerning possible gasoline contamination of property owned by Shell Canada in Squamish. The records were prepared by Morrow Environmental Consultants Inc. in 1994 and 1995.

## 5. Shell Canada's submission as the third party

Shell Canada essentially argues that the records in dispute meet the three-part test set out in section 21 of the Act and should not be released, because disclosure will significantly interfere with its negotiating position with BC Tel. I have reviewed its detailed submissions below.

## 6. BC Tel's reply submission as the applicant

BC Tel states that it requested documentation from the Ministry in order to conduct an investigation of specific hydrocarbon contamination as economically as possible and to avoid duplication of effort and work if possible. (Submission of BC Tel, paragraph 7)

BC Tel argues that Shell Canada has not met the third part of the three-part test set out in section 21. (Submission of BC Tel, paragraphs 14-36) I have discussed its detailed submissions below.

## 7. Discussion

***Section 21(1): The head of a public body must refuse to disclose to an applicant information (a) that would reveal ... (ii) commercial, financial, labour relations, scientific or technical information of a third party,***

Shell Canada submits that the environmental reports in dispute qualify as scientific and technical information under the Act. (Submission of Shell Canada, paragraph 10) I have previously determined that environmental testing reports from former service station sites qualify as technical and scientific information. (See Order No. 57-1995, October 10, 1995, p. 5) The applicant does not dispute this point.

***Section 21(1)(b): that is supplied, implicitly or explicitly, in confidence,***

Shell Canada submits that the records in dispute were supplied in confidence and treated that way by the Ministry. On the evidence provided in this case, I find that the third party did submit the various records in dispute to the Ministry either explicitly or implicitly in confidence. (Submission of Shell Canada, paragraphs 11-15, and Affidavit of Colin H. Dunwoody) The applicant does not dispute this point.

***Section 21(1)(c): the disclosure of which could reasonably be expected to (i) ... interfere significantly with the negotiating position of the third party, ... (iii) result in undue financial loss or gain to any person or organization, ....***

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)

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)

In my view, BC Tel has engaged in largely semantic arguments about the application of section 21(1)(c) in this case, such as that there are no "negotiations" actually underway with Shell Canada, that any "harm" that could occur with disclosure has already happened if hydrocarbon contamination indeed escaped from Shell Canada's property, and that no undue financial "loss" can occur for Shell Canada because any harm is a natural consequence of

allowing hydrocarbon contamination to escape from its property. (Submission of BC Tel, paragraphs 20, 24, 26, 27, and 31; see also paragraph 36 about the possibility of litigation) I do not find these arguments persuasive with respect to the application of this part of the test. BC Tel has in fact made a claim against Shell Canada for compensation. Issues of liability and damage are in dispute. I am more persuaded by Shell Canada's argument that it is engaged in somewhat unilateral "negotiations" with BC Tel. (Reply Submission of Shell Canada, paragraphs 2-5)

***The context of this case***

I note that there is no clear public interest in disclosure of the environmental test results in this case, such as existed with respect to Orders No. 56-1995, October 4, 1995, and No. 57-1995. (See Submission of Shell Canada, paragraphs 41, 42) Although there is a public interest in continued telephone service in the affected area, responsibility for this should be settled by existing modes of commercial dispute resolution.

Shell Canada wishes BC Tel to obtain its own environmental consulting reports on the site in question. If BC Tel is to obtain Shell Canada's reports, the latter wishes this to occur under the Rules of Court of the Supreme Court of British Columbia after an action has commenced. This makes eminent sense to me in the context of the present case, since BC Tel is making claims against both Chevron Canada and Shell. As Shell states with respect to its negotiating strategy:

> The Applicant has to weigh the risks and costs associated [with] conducting its own testing and commencing litigation against Shell and factor this into its negotiating position. By seeking the documents now using the Freedom of Information legislation, the Applicant is attempting to obtain (the discovery of documents) where it otherwise would not have been entitled to these documents. This is exactly the type of situation where the Freedom of Information process will obstruct, or meddle, with Shell's future negotiations with the Applicant over the Squamish Site. (Submission of Shell Canada, paragraphs 34, 35; and Reply Submission of Shell Canada, paragraphs 8, 9)

Using Order 19-1994, July 27, 1994, as a precedent, Shell Canada argues that "there is a reasonable expectation on Shell's part that disclosure of this information would not only significantly interfere with Shell's negotiating position for the Squamish site, but may well set a costly precedent for sites right across the Province of British Columbia." (Submission of Shell Canada, paragraph 39)

BC Tel had originally asked the Ministry for environmental reports about a Chevron Canada site as well, which the Ministry has already disclosed to it. (Submission of BC Tel, paragraphs 11, 22) Chevron Canada obviously decided not to contest the Ministry's decision on disclosure, whereas Shell Canada has decided that it is in its best interests as a third party to do so in accordance with sections 23, 24, and 53 of the Act.

BC Tel also states that it disclosed information to Shell Canada about the alleged contamination in Squamish in response to a request, and that Shell is now trying to block access to its information. (Submission of BC Tel, paragraph 22) Whatever the accuracy or merits of this description of what has transpired, it has nothing to do with my decisionmaking in this particular case.

***Order No. 67-1995***

The applicant referred to Order No. 67-1995, December 11, 1995, to support its argument under section 21(1)(c).

In Order No. 67-1995, I found that the third party had not met the test in section 21(1)(b) and (c)(i), (ii), and (iii), essentially relying on the evidence before me. I concluded the information was not supplied in confidence and further that the third party had failed to meet its burden of proving that disclosure in the circumstances would interfere significantly with its negotiating position. The applicant in Order No. 67-1995 was not involved in litigation, although it had retained lawyers to pursue a claim against the third party for the costs of remediation of its property. There was already litigation among the third parties, and the reports at issue had been discussed at various meetings between the parties and the regulatory agencies.

I accepted the applicant's evidence in Order No. 67-1995 that the third party supplied the records to the Ministry "because of the contamination migrating to other sites ... and because of the presence of contamination at special waste levels so that provisions of the Special Waste Regulation and the ... *Waste Management Act* would apply." (p. 7) The intent of supplying the documents to the Ministry was to secure some indication of regulatory approval by the Ministry.

In this present case, the only evidence and submissions before me relate to the applicant's claim against the third party, which may be pursued further in the litigation process. There is no evidence as to why the information was supplied to the Ministry, as there was in Order No. 67-1995. The applicant conceded that it was supplied in confidence. The Ministry implicitly conceded the same, since its position was that the third part of the section 21 test was not met.

## 8. Order

I find that the information requested by the applicant in this case does fall within the exception provided in section 21(1) of the Act and that the head of the Ministry of Environment, Lands and Parks is required to refuse access. Under section 58(2)(c), I require the head of the Ministry of Environment, Lands and Parks to refuse access to the records in dispute to the applicant.

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David H. Flaherty
Commissioner

November 12, 1996