



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

Order 03-11

**MINISTRY OF SUSTAINABLE RESOURCE MANAGEMENT**

David Loukidelis, Information and Privacy Commissioner  
March 26, 2003

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**Summary:** Section 17(1) authorizes the Ministry to withhold the electronic record of scientific information, disclosure of which could reasonably be expected to harm the Ministry's interests and cause undue harm to a third party.

**Key Words:** financial or economic harm – commercial information – scientific or technical information.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 17(1)(b) and (d), 17(3).

**Authorities Considered:** **B.C.:** Order No. 91-1996, [1996] B.C.I.P.C.D. No. 17; Order 02-50, [2002] B.C.I.P.C.D. No. 51. **Ontario:** Order P-496, [1993] O.I.P.C. No. 186.

## 1.0 INTRODUCTION

[1] The Living Oceans Society (“Living Oceans”) is a British Columbia-based non-profit marine conservation organization. It made a request to the Ministry of Sustainable Resource Management (“Ministry”) for access, under the *Freedom of Information and Protection of Privacy Act* (“Act”), to what Living Oceans has described as “digital marine spatial data” for British Columbia. It said it was requesting the information for “public education and analysis of marine ecosystems throughout British Columbia.” It also says (at p. 3 of its initial submission in this inquiry) that it wishes the information to “evaluate the possible effects of marine activities (such as aquaculture), and to analyse areas of conservation concern (such as high biodiversity).”

[2] It asked for the spatial data in a “digital electronic format compatible with the geographic information system [“GIS”]” and specified a format that would be acceptable.

Living Oceans explicitly said it did not want access to “paper format spatial data of any kind”, including “maps or pictures”, since data in a paper format “cannot readily be incorporated in GIS analysis.” Living Oceans asked that the data be disclosed on a CD-ROM disc. The request had 14 parts. It also set out the following background:

The Land Use Coordination Office (LUCO) has spent several years compiling and digitizing marine biological and physical data of BC. Some of these data were created completely by LUCO, while others have been collected from various sources, using paper copies, interviews, and so forth. These data have been compiled to assist decision-making within LRMP processes, and for purposes such as examining possible consequences of oil spills. As such, LUCO has one of the most complete collections of marine data in BC. Furthermore, these data are in spatial (GIS mapping) format, whereas the source data were usually not. It is this digital format that makes the data useful for mapping and spatial analyses. Converting data into digital format is time-consuming and costly.

LUCO has not shared any marine data with any marine non-governmental organizations in BC, despite several requests from different organizations. December 2000, Living Oceans Society resumed attempts to begin a dialogue towards a data-sharing agreement. In March 2001, we requested what is known as “metadata,” which describes the origins and details of the datasets. We received no specific metadata, however, but were directed to their website which has some metadata information of a general nature. Not all LUCO data are listed on this website, however (e.g., the Biophysical Shorezone Units); it is not specific to individual datasets; nor is it entirely up to date (05/02/99).

[3] It appears from its request that Living Oceans had already unsuccessfully attempted to obtain a copy of electronic marine spatial data through means other than the Act, but not by purchase.

[4] In its October 9, 2001 response, the Ministry disclosed spatial data that responded to four parts of the fourteen-part request. It disclosed digital data respecting biophysical shore zone units (item 1 of the request), eelgrass beds (item 2), cetaceans (item 8) and coastal seabirds (item 10). The Ministry’s response went on, however, to say the following:

All of the other information you are seeking falls outside the scope of the Act. Section 2(2) states, “*This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public*”. I have noted below where requested information may be routinely obtained. [original italics]

[5] The Ministry also refused access to certain records under s. 21 of the Act, in the following terms:

All of the records you requested that were supplied to the Ministry of Sustainable Resource Management (the ministry) by Burrard Clean Operations [a division of Western Canada Marine Response Corporation] (Burrard Clean) have been withheld from disclosure under Section 21 of the Freedom of Information and Protection of Privacy Act (the Act).

Section 21 Disclosure Harmful to the Business Interests of a Third Party.

I have enclosed a signed copy of the Memorandum of Understanding between Burrard Clean and the former Land Use Coordination Office so that you can see exactly what has been agreed upon with regards to the sharing of this information.

[6] Living Oceans requested a review, under Part 5 of the Act, of the Ministry's decision to deny access. Because the matter did not settle in mediation, a written inquiry was held under Part 5 of the Act. Burrard Clean received a copy of the notice of written inquiry and made submissions in the inquiry.

## 2.0 ISSUES

[7] The Notice of Written Inquiry that this Office issued to the parties indicated that the only issue was whether s. 21 requires the Ministry to refuse access to the disputed records. Three days before the date for the delivery of initial submissions, however, counsel to the Ministry wrote to this Office and said that the Ministry had "now decided that the information should also be withheld under section 17 of the Act." The inquiry was adjourned to give the parties an opportunity to address the s. 17 issue. The Ministry gave no explanation for its last-minute decision to rely on s. 17 in addition to s. 21. Living Oceans did not formally object to this late addition of the s. 17 exception.

[8] The Ministry has, in its initial submission, abandoned its reliance on s. 21 of the Act. At para. 4.07, it says that I must, in light of its decision not to rely on s. 21, consider its s. 17(1) claims, since

... the effect of a refusal by the Commissioner to entertain submissions from the Public Body on section 17 would be to see the Information in Dispute disclosed.

[9] I have considerable difficulty with the thrust of this submission, noting that we could say this is a risk the Ministry took in changing its position as it did. I need not, however, address the merits of this submission. I have decided to consider the Ministry's claim that s. 17(1) protects the disputed information, noting that the parties have been heard on that issue.

[10] Section 57(1) of the Act provides that the Ministry has the burden of proof respecting s. 17(1).

## 3.0 DISCUSSION

[11] **3.1 Description of the Information** – Neither the Ministry nor Burrard Clean has identified a specific record that contains, in digital format, the information Living Oceans has requested. The Ministry's submissions confirm that it has disclosed "much of the requested information" to Living Oceans or has directed Living Oceans to more appropriate sources for it.

[12] According to Burrard Clean, the disputed information is available in a hard copy atlas, *Coastal Resources Oil Spill Response Atlas Southern Strait of Georgia*. The copyright in this 1994 publication is, according to Burrard Clean, owned by the Province. Burrard Clean says the information in that atlas is the same as the digital information in dispute here. According to Burrard Clean, the public can purchase the atlas for \$150.00, although Burrard Clean does not say where it can be purchased. Burrard Clean says, however, that it is prepared to give Living Oceans a copy of the atlas for free. At p. 4 of its initial submission, Living Oceans says the datasets in dispute were used for the atlas.

[13] As to the nature of the disputed information, an affidavit sworn on the Ministry's behalf by Mark Zacharias, its Manager of Coastal and Resource Issues, says Burrard Clean and the Province entered into a related memorandum of understanding ("MOU") dated July 5, 1991. He deposed that the Province and Burrard Clean entered into the MOU in relation to their joint project to develop oil spill response and countermeasure tools and programs. As part of that project, he deposed at para. 3, Burrard Clean purchased

... from private sources, marine biological and physical data (ie., data describing and locating shoreline type (eg., sand, cobble, etc.), vegetation, and marine invertebrate populations) pertaining to intertidal areas of the Strait of Georgia (the "Digital Shorezone Data for the Strait of Georgia"). The Third Party paid those private sources for the Digital Shorezone Data for the Strait of Georgia, and had those private sources deliver the Digital Shorezone Data for the Strait of Georgia to the Public Body, in digital format. ...

[14] Living Oceans says there is some confusion about the datasets in dispute. At p. 3 of its initial submission, it says the following datasets are in issue:

- The datasets Living Oceans Society is requesting to be released in this inquiry are:
  1. Physical shorezone units (type of beach, such as cobble, sand, etc.)
  2. Biological banding of the shorezone units (plant species such as eelgrass)
  3. Fisheries use datasets (commercial and recreational fisheries)
  4. Marine birds (alcids, shorebirds, waterfowl, marbled murrelets, etc.)
  5. Marine mammals (seals, sea lions, whales, porpoises, dolphin [*sic*])
- All information involved in this inquiry are [*sic*] requested in electronic mapping (GIS) format and associated attributable tables.

[15] Living Oceans says the Ministry disclosed these datasets for all regions of British Columbia other than the Strait of Georgia and the Juan de Fuca Strait.

[16] At para. 4 of his affidavit, Mark Zacharias deposed that "out of all the information requested" by Living Oceans, only the information described in the above quote from para. 3 of his affidavit is in dispute. At para. 2.01 of its initial submission, the Ministry also raises the question about which information is in dispute here, but at para. 2.01 of its reply submission further explains its position on what data are in issue. At the end of the day, whether or not the parties agree on what data are in dispute here, the Ministry does

not deny that it has one or more records in its custody or under its control that contain the data Living Oceans seeks. In any event, noting that none of the parties has contended that the case for disclosure or non-disclosure differs according to which data “set” is in issue, I am persuaded that the Ministry is authorized to refuse access to the data regardless of which data “sets” are in dispute.

[17] **3.2 Harm Under Section 17** – The Ministry says disclosure of the disputed information could reasonably be expected to cause harm to its financial or economic interests within the meaning of s. 17(1). Several of the Ministry’s arguments, however, really address the issue of harm to a third party, Burrard Clean. Burrard Clean’s own submissions also deal with harm to its interests. The Ministry’s decision to abandon its reliance on s. 21(1) does not eliminate the third-party harm issue in this case, however, since both the Ministry and Burrard Clean have pressed the third-party issue and s. 17(1)(d) of the Act explicitly addresses third-party harm. Accordingly, I will deal with the submissions on harm to the Ministry and also to Burrard Clean.

*Applicable principles*

[18] Section 17(1) reads 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;
- (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.

[19] The principles to be applied in s. 17(1) cases – including as regards the standard of proof – are set out in a number of previous decisions. See, for example, Order 02-50, [2002] B.C.I.P.C.D. No. 51. I have applied those principles in this case, including as to the standard of proof the Ministry must meet.

[20] For the purposes of this case I have, as in previous such cases, approached the evidence as to harm on the basis that disclosure to Living Oceans would be disclosure to the world.

*Ministry's harm arguments*

[21] At para. 4.15 of its initial submission, the Ministry argues that disclosure of the disputed information could reasonably be expected to result in harm within the meaning of s. 17(1) as follows:

1. There would be no incentive for Burrard Clean or any other “potential industry partner” to work co-operatively with the Ministry in collecting information and developing products if a third party could, through an access request under the Act, gain access to Ministry information without incurring the expenses of “such joint partnership”;
2. Burrard Clean intends to recover the cost of collecting data for joint projects with the Ministry through the “sale and licensing of the data”, but if the data are accessible from the Ministry through an access request under the Act, Burrard Clean’s opportunity to recover its costs will be lost, because no one would have any incentive to license the data from Burrard Clean when it can be obtained through an access request under the Act;
3. If the disputed information is disclosed under the Act, “it would be susceptible of corruption” since Living Oceans could change it. If the disputed information is changed, “or even if there were only a possibility of change”, it would no longer be reliable and that would presumably give rise to liability concerns on Burrard Clean’s part. Those liability concerns would make Burrard Clean reluctant to enter into joint projects with the Ministry;
4. Burrard Clean has stopped providing funds to the Ministry for inventory, data collection and research related to marine inventory and oil-spill response and counter measures until the accessibility under the Act of the disputed information is resolved. To date, Burrard Clean has terminated a \$100,000 “partnership” with the Ministry for fiscal 2002-2003; and
5. Provincial ministries have been directed to explore large-scale opportunities for public-private partnerships with industry to develop off-shore hydrocarbon reserves and these partnership possibilities would be jeopardized if “the resulting product could be accessed under the Act”, with the financial losses to the provincial government being “expected to be up to several million dollars”.

[22] Several of the Ministry’s arguments concern harm to a third party, Burrard Clean, that the Ministry says could reasonably be expected to flow from disclosure. The Ministry’s arguments also address harm to its interests, or the interests of the provincial government, that it says could reasonably be expected to flow from disclosure.

[23] As for harm to the interests of the Ministry or the province, the last line of attack summarized above is too speculative to meet the burden of proof under s. 17(1). Among other things, no basis whatsoever is cited for Mark Zacharias's opinion that losses to the provincial government in unspecified future public-private partnerships are "expected" – by whom he does not say – to be "up to several million dollars".

[24] The Ministry characterizes the weight of the evidence as having "clearly" established a reasonable expectation of harm to the Ministry, since (it says) there has already been actual harm given Burrard Clean's termination of the "partnership" with the Ministry worth \$100,000 (para. 4.16, initial submission). The Ministry also says Burrard Clean will not enter into any other joint project unless the Ministry can give assurances "as to data confidentiality" (para. 7, Mark Zacharias's affidavit). Paragraph 7 of Mark Zacharias's affidavit reads as follows:

Until the accessibility under the Act of the Digital Shorezone Data for the Strait of Georgia is resolved, the Third Party has ceased providing funds to the Public Body for inventory, data collection, and research related to marine inventory and oil spill response and countermeasures. Specifically, I have been informed that the Third Party has terminated a \$100,000 2002/03 partnership with the Public Body and has stated that it will not enter into any other joint projects if assurances cannot be made as to data confidentiality.

[25] The Ministry's evidence and submissions were unclear as to the nature of the "partnership" that Burrard Clean has put on hold. An affidavit sworn by Kevin Gardner, Burrard Clean's president and general manager, addresses this. He deposed that Burrard Clean will not conclude an agreement with the Ministry to develop "coastal atlases for the north and central coasts of British Columbia" until Burrard Clean receives an "assurance" that the "digital data will remain confidential and will be protected from corruption" (para. 11). At para. 12, he added that Burrard Clean's concerns relate to data integrity and confidentiality.

[26] Burrard Clean says it has spent some \$410,418 (including GST) with respect to shoreline sensitivity mapping since 1991. It also says, at p. 4 of its reply submission, that its participation in the "joint project" with the Ministry "has ceased" if "assurances cannot be made as to the integrity of the data." Elsewhere in its submissions, Burrard Clean also argues that it will lose business opportunities to dispose of the electronic version of the data if it is disclosed under the Act.

[27] The MOU was entered into in 1991, before the Act was enacted. The parties' expectations at that time, and since then, may not coincide with the realities of access to information under the Act's provisions. There is evidence that the 1991 MOU was "updated" in 1993 and 1997, but it is not clear whether those updates related to contribution levels, project type or the nature or terms of the MOU itself. Both the Ministry's and Burrard Clean's submissions appear to proceed on the basis that the terms of the 1991 MOU remain relevant. At all events, in light of the Act, the Ministry cannot, through the MOU or any other contract, give ironclad assurances of confidentiality. To permit this would be to permit the Ministry to contract out of the Act, which is clearly not tenable.

[28] To my mind, the real force of the Ministry's case stems from the evidence that the Ministry and Burrard Clean jointly own the electronic version of the disputed information. (The MOU itself says this is the case and the evidence of the Ministry and Burrard Clean supports this conclusion also.) The provincial government, in other words, has an ownership interest in the electronic format. The evidence also shows that attempts have been made, and can be expected to be made in the future, to sell or licence the electronic version. Disclosure under the Act would reveal electronically-stored and organized information that has "monetary value" to the Ministry, to use the words of s. 17(1)(b).

[29] Further, in this case the 1991 MOU contemplates ongoing contributions by Burrard Clean to Ministry projects, but disclosure of the jointly-owned information will clearly lead to Burrard Clean not proceeding with such projects. Nothing in the MOU explicitly prevents Burrard Clean from doing this. In the circumstances, I am persuaded that Burrard Clean's refusal to provide further funding to the Ministry creates a reasonable expectation of harm under s. 17(1). In this case and in these circumstances, therefore, disclosure of the requested records could on this basis reasonably be expected to harm the Ministry's interests within the meaning of s. 17(1) of the Act.

#### ***Undue loss or gain to Burrard Clean***

[30] As is clear from the discussion so far, to some degree the Ministry and Burrard Clean base their resistance to disclosure on the harm to Burrard Clean that would allegedly result. One concern is the possible liability of Burrard Clean if the data are disclosed and become corrupted or are misrepresented, thus causing loss on anyone who relies on the data. If I understand this argument correctly, Burrard Clean would be able to manage this liability risk through licensing agreements for the electronic version of the data, but it cannot manage the risk if the data are disclosed under the Act, *i.e.*, outside its control.

[31] Living Oceans argues that any liability risk would not arise from its use and is, in any case, not a realistic concern. Certainly, the fact that the data relate to biological resources and related matters suggests that any risk of liability stemming from a third party's reliance on such data may be relatively remote. I consider that the supposed risk of harm to Burrard Clean through its being liable to third parties who might rely on corrupted data to their detriment is too speculative to qualify as a "financial loss" within the meaning of s. 17(1)(d).

[32] This does not, however, end the matter as regards Burrard Clean's interests. As indicated above, the data are jointly owned by the provincial government and Burrard Clean. In the circumstances, including considering the nature of the 1991 arrangement between the provincial government and Burrard Clean respecting ownership of the data, I am persuaded, for reasons similar to those respecting the Ministry, that disclosure of the electronic version of the data could, under s. 17(1)(d), reasonably be expected to result in undue financial loss to Burrard Clean or gain to third parties that would otherwise have to pay for the data. In arriving at this finding I have concluded that the reasonably expected

financial loss or gain would be “undue” in light of Burrard Clean’s investment in the data and the value to it of that data and its exploitation.

[33] In arriving at this conclusion, I have considered Living Oceans’ argument (among others) that Burrard Clean has not established that it has really tried to exploit sales or licensing of the electronic version. I am persuaded, at the very least, that Burrard Clean’s interest in commercially exploiting the data and its past efforts to do so have been established.

***Risks stemming from commercialization of public information***

[34] In this case, Living Oceans can obtain the print atlas for free from Burrard Clean and, I understand from its submissions, input the data in it into its own electronic GIS-arranged database. I acknowledge that Living Oceans has said this process is time-consuming and difficult, but, without discounting those concerns, the fact remains that the requested information is available to Living Oceans. Having said this, I am concerned that public interest work undertaken by Living Oceans and other non-governmental agencies might be unduly impaired by the intellectual property claims of public bodies. We are, after all, usually dealing with information that has been generated at the sole or at least partial expense of taxpayers. Of course, s. 20(1)(a) of the Act permits public bodies to refuse access requests where the requested information is “available for purchase by the public”, but reliance on this exception could in the aggregate unduly limit public interest groups’ access to information they need. (I will note here that the evidence before me suggests the Ministry could have relied on s. 20(1)(a) in this case but did not do so.)

[35] Consistent with the concern just expressed, Living Oceans’s submissions in many places ask me to balance the public interest in its work against the interests advanced by the Ministry and Burrard Clean. This is not something I can do under the Act. Only public bodies can, under discretionary exceptions such as s. 17(1), take competing public interests into account in deciding whether to disclose information that is technically exempt from disclosure (an issue to which I return below). Similarly, it would be desirable for public bodies to develop policies respecting their reliance on s. 20(1)(a) of the Act, again on the basis that s. 20(1)(a) should not become a barrier to access to information by the non-governmental organizations that are an important means of ensuring accountability for governmental policy and action.

[36] Public bodies should heed observations made some years ago by the Ontario Information and Privacy Commissioner regarding government initiatives to commercially-exploit information generated using taxpayers’ dollars. In a post-script found at p. 5 of Order P-496, [1993] O.I.P.C. No. 186, Commissioner Wright said the following:

I am aware that the government is actively looking at the information it holds as a potential source of non-tax revenue generation. In itself, I see nothing wrong with this approach. In the 90’s, information is increasingly being seen, by government

and the private sector alike, as a commodity. In fact, information has been referred to as the “commodity of the 90’s”.

However, a very real question arises: How will the government’s new initiatives maintain and balance the rights of the public to access information for which it has already paid, with the desire to find new sources of revenue? In this connection, I believe that it is a fundamental component of this balancing that government sees itself as the custodian or trustee of the information it holds.

Ultimately, I believe that how the balancing I have described is resolved will go a long way to determining whether universal access to government information will be the norm or whether an information elite will be created and only those who can afford to pay will have access to government-held information. In my opinion, this latter situation would be unacceptable in an open and democratic society.

In closing, I accept the notion that, in some cases, government should be able to sell the information it holds. There are valid reasons for this, economic and otherwise. However, in my opinion, decisions on what types of information should be sold must always be made against the backdrop that members of the general public must continue to have a right of access to information held by government.

[37] Access to information that has been generated at public expense should not, consistent with the Act’s accountability goal, be limited only to those private interests that can afford to pay whatever price a public body wishes to charge for such information. Access to information is, as the Act expressly acknowledges, intended to make public bodies more accountable to the public. If data crucial to that endeavour can only be obtained at a cost that effectively shuts out non-profit groups, we risk a situation in which accountability through access to information exists more in name than in fact.

[38] My predecessor expressed similar concerns in Order No. 91-1996, [1996] B.C.I.P.C.D. No. 17. That case dealt with a request by a non-governmental group for access to digital map data. At p. 22, he said he was encouraged that the then Ministry of Environment, Lands and Parks had told him that the Land Use Co-ordination Office was reviewing its pricing of spatial data products and was expected to make recommendations to Treasury Board about product pricing, quite clearly in reference to access by non-governmental groups

[39] Over seven years later, I do not know whether the provincial government has adopted a policy that gives non-governmental groups (of whatever nature or political perspective) access to mapping or resource data at either reduced or nominal cost. I am not aware of any such policy, noting as earlier that Living Oceans says the Land Use Co-ordination Office has not, at least in the past, made data available.

#### **4.0 CONCLUSION**

[40] For the above reasons, under s. 58 of the Act I confirm that s. 17(1) authorizes the Ministry to refuse to disclose the disputed information.

March 26, 2003

#### **ORIGINAL SIGNED BY**

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David Loukidelis  
Information and Privacy Commissioner  
for British Columbia