Office of the Information & Privacy Commissioner for British Columbia

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INVESTIGATION REPORT F15-02

Review of the Mount Polley Mine Tailings Pond Failure and Public Interest Disclosure by Public Bodies

Elizabeth Denham
Information and Privacy Commissioner for BC

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COMMISSIONER'S MESSAGE

The Mount Polley mine tailings pond dam failure on August 4, 2014, was a serious environmental disaster. In the wake of the tailings pond breach, government initiated three separate investigations to determine what went wrong, including an Independent Expert Engineering Investigation and Review Panel, whose final report on the mine tailings pond breach was published on January 30, 2015.

At the time of the tailings pond breach, my Office received complaints alleging that government had information about the incident that it should have disclosed to the public as per section 25 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

The principle underlying s. 25 is an important one. Public bodies are the stewards of large volumes of information about our health, safety, environment, and other matters of public concern. It is their legal duty under s. 25 to release information about a risk of significant harm to the environment, or health or safety of the public and also to release information if disclosure is "clearly in the public interest". This is a mandatory provision that must be acted on proactively, whether or not a request for information has been made.

Section 25 of the Act is not often used, and is a powerful obligation as it overrides all other sections of the Act. That said, it is an important component of ensuring timely release of significant and important information held by public bodies.

In response to these complaints I initiated an investigation into whether government had information in its possession about the risk posed by the dam that it should have released prior to the breach. I also took this opportunity to delve further into the correct interpretation of s. 25(1)(b), which is the requirement to disclose information that is "clearly in the public interest".

I have been concerned about the proper interpretation of the public interest disclosure requirement for a number of years and chose this investigation as the appropriate opportunity to clarify its interpretation.

With this report, I am making a finding that re-interprets s. 25(1)(b) to clarify that urgent circumstances are no longer required to trigger proactive disclosure where there is a clear public interest in disclosure of the information. This returns the section to a plain-language reading of what I have determined to be the intention of the Legislature in its enactment of this section of the Act.

In light of this updated interpretation of s. 25(1)(b), I have asked the ministries of Energy and Mines and Environment to review all information pertaining to the Mount Polley mine tailings pond failure to determine what information, if any, should be proactively disclosed under this section.

I further recommend all public bodies in British Columbia promptly evaluate whether they currently have information that should be proactively disclosed as clearly in the public interest as described in this report.

Elizabeth Denham
Information and Privacy Commissioner for British Columbia

EXECUTIVE SUMMARY

This investigation was initiated in response to public concerns about what government knew about the condition of the Mount Polley mine tailings pond dam prior to the August 4, 2014 breach that released effluent into Polley Lake, Hazeltine Creek, and Quesnel Lake, and whether government should have notified the public of potential risks before the failure occurred.

This report also considers the meaning of s. 25(1)(b) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") by examining whether the public interest disclosure provision should be re-interpreted by this office.
The Office of the Information and Privacy Commissioner ("OIPC") investigated the following issues in this investigation:

1. Did government have information that the Mount Polley mine tailings pond dam presented a risk of significant harm to the environment or to the health or safety of the public or to a group of people that it should have disclosed pursuant to s. 25(1)(a) of FIPPA;

2. Did government have information about the Mount Polley mine tailings pond dam that was clearly in the public interest that it should have disclosed pursuant to s. 25(1)(b); and

3. Should s. 25(1)(b) be interpreted to require an element of temporal urgency in order to require the disclosure of information that is clearly in the public interest?

As part of this investigation, the Office of the Information and Privacy Commissioner ("OIPC") requested that the Ministry of Energy and Mines as well as the Ministry of Environment provide copies of all records that relate to the structural integrity or safety of the tailings pond, from January 1, 2009 through to August 4, 2014. The OIPC also requested copies of all records on this topic over the same time period that Imperial Metals Inc., AMEC Environment & Infrastructure, and Knight Piésold Ltd. provided to the ministries.

In considering the interpretation of s. 25(1)(b) of FIPPA, the OIPC requested and received submissions from the two ministries, the University of Victoria's Environmental Law Centre, and the Freedom of Information and Privacy Association.

The Commissioner's findings in this investigation are:

1. That government did not have information that indicated the Mount Polley mine tailings pond dam presented a risk of significant harm to the environment or to the health or safety of the public that it should have disclosed pursuant to s. 25(1)(a) of FIPPA.

2. That government did not have information about the Mount Polley tailings pond dam that was clearly in the public interest such that should have been disclosed pursuant to s. 25(1)(b). While there was sufficiently clear public interest to justify disclosure of the information, there was not an urgent or compelling need for its disclosure.

3. That s. 25(1)(b) be re-interpreted to no longer require an element of temporal urgency for the disclosure of information that is clearly in the public interest.

As a result of the change in interpretation, public bodies must proactively disclose information pursuant to s. 25(1)(b) where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest.

In light of this revised interpretation, the Commissioner recommends that the ministries promptly assess what information in relation to the failure of the Mount Polley tailings pond dam, if any, must be disclosed pursuant to s. 25(1)(b) as being clearly in the public interest.

Similarly, the Commissioner recommends that all public bodies diligently and promptly assess what information they have that must be disclosed pursuant to s. 25(1)(b). All public bodies should also develop policies that provide guidance to employees and officers about the public body's obligations under s. 25 of FIPPA and update existing policies to reflect the revised interpretation of s. 25(1)(b).

1.0 PURPOSE AND SCOPE OF REPORT

1.1 INTRODUCTION

On August 4, 2014 the tailings pond at the Mount Polley mine failed, breaching the mine's tailings pond perimeter embankment, and releasing 25 million cubic litres of water and effluent into Polley Lake, Hazeltine Creek, and Quesnel Lake.

The tailings pond perimeter embankment was composed of core material which was designed to be impervious to the tailings stored inside the pond. The core was contained by filter material and buttressed upstream and downstream by fill material composed mostly of rocks.

In the aftermath of the breach, public concerns were raised about what government knew about the condition of the Mount Polley mine tailings pond prior to its breach and whether the government should have notified the public of potential risks before the failure occurred.

On August 8, 2014, my Office received a complaint from the Freedom of Information and Privacy Association ("FIPA") alleging that government had information indicating that the tailings pond presented a risk of significant harm to the environment or to the health or safety of the public or a group of people which should have been disclosed by government pursuant to s. 25(1)(a) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

Section 25(1)(a) of FIPPA requires a public body to immediately disclose information about a risk of significant harm to the environment or to the health or safety of the public or a group of people. That section applies despite any other provision of FIPPA and must be acted on proactively, whether or not a request for the information has been made.

On August 14, 2014, I initiated an investigation into whether government should have notified the public about potential risks relating to the Mount Polley mine pursuant to s. 25 of FIPPA.

On August 18, 2014, an independent expert engineering investigation and review panel ("Review Panel") was commissioned by the Government of British Columbia to investigate and report on the cause of the breach. The Review Panel determined that the tailings pond embankment breach was a result of failures in the design of the embankment. It found that the design "did not take into account the complexity of the sub-glacial and pre-glacial geological environment", making the perimeter embankment susceptible to failure.[1] Consequently, the breach was caused primarily by the dislocation of the pond embankment due to the sliding of its foundation.[2]

The Review Panel described the failure as sudden and "without precursors".[3] That is, the failure was not preceded by indications that could have warned of the breach. It went on to observe that the regulatory actions of the Ministry of

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[1]Independent Expert Engineering Investigation and Review Panel, *Report on Mount Polley Tailings Storage Facility Breach*, January 30, 2015, Province of British Columbia; Available at: https://www.mountpolleyreviewpanel.ca/final-report, (Review Panel Report) at p. iv.
[2] Review Panel Report, at pp. 12, 18.
[3] Review Panel Report; at p. 116.

Energy and Mines were appropriate and that no amount of inspection could have uncovered the latent flaw in the design of the tailings pond.

However, the Review Panel did note that the same circumstances that caused the breach at the Mount Polley mine may exist at other mines in B.C., and recommended that inspections of those tailings ponds be informed by the findings of its report, specifically with regards to the potential failure of the embankment foundations similar those present at Mount Polley mine.

The owners of the Mount Polley mine have since applied to government for a "restricted re-start" of the mine. That application is currently under review.[4]

In addition to the Review Panel investigation, there are two other investigations ongoing with respect to the failure of the tailings pond dam. The Chief Inspector of Mines is conducting an investigation to determine whether charges will be laid for contraventions of the *Mines Act* and the Conservation Officer Service is investigating possible breaches of the *Environmental Management Act*.

Each of those investigations differs in purpose and scope from this investigation. The Review Panel was tasked with determining the cause of the breach. The Chief Inspector of Mines and the Conservation Service are investigating contraventions of their respective statutes. In contrast, this investigation focuses solely on government's compliance with s. 25 of FIPPA. The objective of that section is accountability to the public and it imposes obligations on public bodies to disclose information when they have knowledge of a risk of significant harm. Therefore, the investigation conducted by my Office sought to determine whether government *actually* had information about the possibility of a breach, not whether it *should* have had such information.

On October 8, 2014, I received a letter from the University of Victoria's Environmental Law Centre ("ELC") submitting a complaint that government was failing to disclose information following the breach of the tailings pond that was clearly in the public interest, in breach of s. 25(1)(b) of FIPPA.

Section 25(1)(b) of FIPPA imposes an obligation on a public body to disclose information where the disclosure is clearly in the public interest. This obligation also applies despite any other section of FIPPA, and unlike s. 25(1)(a), could apply either *before* or *after* an incident has occurred.

My Office has historically interpreted both ss. 25(1)(a) and (b) to require that there be an element of temporal urgency to the risk of harm or to the public

[4] Mount Polley Tailings Breach; Government of British Columbia; http://www2.gov.bc.ca/gov/topic.page?id=BB2BE7299657481185F9E1C95698E91A; accessed June 15, 2015.

interest in order to trigger an obligation to disclose information. That interpretation is reflected in numerous earlier decisions and orders by my Office.[5]

However, the ELC's complaint suggested that while it may be appropriate to require that there be some temporal urgency to the risk of harm under s. 25(1)(a), it is not proper to interpret FIPPA to require an element of temporal urgency with respect to the disclosure of information that is clearly in the public interest under s. 25(1)(b).

I discussed the interpretation of s. 25(1)(b) in my 2013 investigation report entitled *Public Body Disclosure of Information under Section 25 of the Freedom of Information and Protection of Privacy Act*. In that report I described how s. 25(1)(b) had been interpreted in such a manner that it rarely imposed an obligation on public bodies to proactively disclose information that is clearly in the public interest. Instead, the requirement of temporal urgency created such a high threshold that, in practice, there have been very few instances resulting in an obligation to disclose under s. 25(1)(b).

On December 16, 2014, I notified government, the ELC, and FIPA that I was extending the scope of this investigation to consider those earlier Orders and, more directly, whether it was proper to interpret s. 25(1)(b) to require temporal urgency in order for there to be a requirement to disclose information.

I requested submissions from all parties on whether s. 25(1)(b) requires that, in order for there to be an obligation on a public body to disclose information pursuant to that section, the information giving rise to the obligation must be both clearly in the public interest *and* have some element of temporal urgency relating to its disclosure.

In the course of this investigation I reviewed the submissions of government, FIPA, and the ELC regarding the interpretation of s. 25(1)(b). In addition, I required the production of relevant documents held by the Ministry of Energy and Mines ("Energy and Mines"), the Ministry of Environment,[6] Imperial Metals Inc., AMEC Environment & Infrastructure ("AMEC"), and Knight Piésold Ltd. Both Ministries have assured me that my Office has been provided with all material evidence and records that are relevant to this investigation.

My Office retained a professional engineer with experience in the design and operation of tailings dams to assist staff in reviewing those documents in order to ascertain whether they contained information about a risk of significant harm to

[5] Two leading Orders are: Order 02-38, *Office of the Premier & Executive, Ministry of Skills Development and Labour*, July 26, 2002; Order 01-20 *University of British Columbia*, May 25, 2001.

[6] I will periodically refer to the Ministry of Energy and Mines and the Ministry of Environment collectively as the Ministries.

the environment or the public which met the threshold for proactive disclosure under s. 25.

1.2 INVESTIGATION PROCESS

As the Information and Privacy Commissioner for British Columbia I have a statutory mandate to monitor the compliance of public bodies with FIPPA to ensure the purposes of that Act are achieved.

The purposes of FIPPA, as stated in s. 2(1), are to make public bodies more accountable to the public and to protect personal privacy. The measures to ensure accountability include the obligation to disclose information in accordance with access to information rights contained in Part Two of that Act, including the obligation to proactively disclose information where such disclosure is in the public interest.

Under s. 42(1)(a) of FIPPA, I have the authority to conduct an investigation to ensure compliance with FIPPA.

Background

The Ministry of Energy and Mines has responsibility for oversight and regulation of the structural integrity of the Mount Polley mine tailings pond dam pursuant to the *Mines Act*, the *Health, Safety and Reclamation Code for Mines in British Columbia* (“Code”), and the *Mine Regulation*. The Ministry therefore conducts annual inspections of the dam and requires Annual Inspection Reports for the mine detailing the operation of the mine and its compliance with the *Mines Act*, its regulations, and the Code. Similarly, the Ministry of Environment has responsibility for oversight and regulation of the environmental impact of the Mount Polley mine.

The owner of the Mount Polley mine is Imperial Metals Inc. It is responsible for maintaining the tailings pond dam in accordance with provincial regulations, and industry best-practices.

The Code requires Imperial Metals Inc. to contract with an engineering firm to conduct regular inspections of the tailings pond and submit a report on the annual inspection of the tailings pond dam to the Ministry of Energy and Mines. AMEC was the engineer of record at the time of the tailings pond breach, and Knight Piésold designed the tailings pond and was the engineer of record until March 8, 2011.

In order to determine whether government had information about the risk that the Mount Polley mine tailings pond could breach, potentially causing significant harm to the environment, I requested that the Ministries provide my Office with copies of all records that relate to the structural integrity or safety of the tailings pond, from January 1, 2009 through to August 4, 2014.

Similarly, in order to cross-reference the records provided to my Office by government, I requested that Imperial Metals Inc., Knight Piésold, and AMEC provide my Office with copies of all documents that were provided to the Ministry of Energy and Mines or to the Ministry of Environment that relate to the structural integrity or safety of the tailings pond, from January 1, 2009 through to August 4, 2014

2.0 ISSUES IDENTIFIED

2.1 ISSUES

The issues in this investigation are:

1. Did government have information that the Mount Polley mine tailings pond dam presented a risk of significant harm to the environment or to the health or safety of the public or to a group of people that it should have disclosed pursuant to s. 25(1)(a) of FIPPA; and

2. Did government have information about the Mount Polley mine tailings pond dam that was clearly in the public interest that it should have disclosed pursuant to s. 25(1)(b), and

3. Should s. 25(1)(b) be interpreted to require an element of temporal urgency in order to require the disclosure of information that is clearly in the public interest pursuant to s. 25(1)(b)?

3.0 SECTION 25 OF FIPPA

Section 25 of FIPPA requires a public body to immediately disclose information where there is a risk of significant harm to the environment or to the health or safety of the public or a group of people, or where that disclosure is clearly in the public interest and provides guidance on how to convey this information.

Section 25 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.
>
> (2) Subsection (1) applies despite any other provision of this Act.
>
> (3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify
>
> (a) any third party to whom the information relates, and
>
> (b) the commissioner.

This office has interpreted s. 25(1) in several previous Orders.

In Order 02-38, former Commissioner David Loukidelis provided examples of information about a risk identified in s. 25(1)(a). Such information could include:

- information that discloses the existence of the risk;
- information that describes the nature of the risk and the nature and extent of any harm that is anticipated if the risk comes to fruition and harm is caused; and
- information that allows the public to take action necessary to meet the risk or mitigate or avoid harm.

Previous Orders and Investigation Reports have instructed public bodies to engage in a two-step analysis when determining whether to disclose information that is clearly in the public interest, pursuant to s. 25(1)(b). That analysis required that there must be both an urgent or compelling need for the disclosure as well as a clear public interest.

Both ss. 25(1)(a) and (b) have been interpreted to require an "element of temporal urgency" in order to trigger the obligation to disclose information. The source of this requirement is the phrase "without delay" in s. 25(1), which sets a very high threshold before public bodies are required to disclose information under that section.

As discussed above, in this Investigation I requested the submissions of the parties on the question of whether the requirement for temporal urgency should apply to disclosure under s. 25(1)(b). I will address that question in Section 5 of this report. However in the next section I will determine whether government had an obligation under s. 25(1)(a) to disclose information about a risk of significant harm the public or to the environment in relation to the failure of the Mount Polley mine tailings pond dam.

4.0 ANALYSIS

4.1 APPLICATION OF FIPPA

FIPPA applies to public bodies. The definition of a public body in Schedule 1 of FIPPA includes a ministry of the Government of British Columbia The Ministry of Energy and Mines and the Ministry of Environment are therefore public bodies and subject to FIPPA.

4.2 INFORMATION ABOUT RISK OF SIGNIFICANT HARM

ISSUE 1: Did government have information that the Mount Polley mine tailings pond dam presented a risk of significant harm to the environment or to the health or safety of the public or to a group of people that it should have disclosed pursuant to s. 25(1)(a) of FIPPA?

As discussed above, if government had information about the Mount Polley mine tailings pond dam that indicated it posed a risk of significant harm to the environment or to the health or safety of the public then it would have been required to immediately disclose that information. It is important to note that this is not a question of whether government *should have had* information about such a risk, but whether it actually had such information.

My staff reviewed documents that were in the custody of the Ministries of Energy and Mines and Environment that related to the structural integrity or safety of the tailings pond, from January 1, 2009 through to August 4, 2014. In addition, we reviewed documents provided to government by Imperial Metals Inc., AMEC, and Knight Piésold from January 1, 2009 through to August 4, 2014, and that related to the structural integrity or safety of the tailings pond.

The analysis of each of the documents was conducted by first cross referencing the records provided by each party, followed by a detailed review of each record's content. This revealed two documented events that we were concerned may have constituted information about a risk of significant harm to the public or to the environment, which should have been disclosed pursuant to s. 25(1)(a). However, in consultation with a mining engineering expert I determined that these events did not constitute such a risk. Our analysis was also informed by the Report of the Independent Review Panel.[7]

The first event was a tension crack on the perimeter embankment of the tailings pond that was described in the 2010 Annual Inspection Report conducted by Knight Piésold for the tailings storage facility.

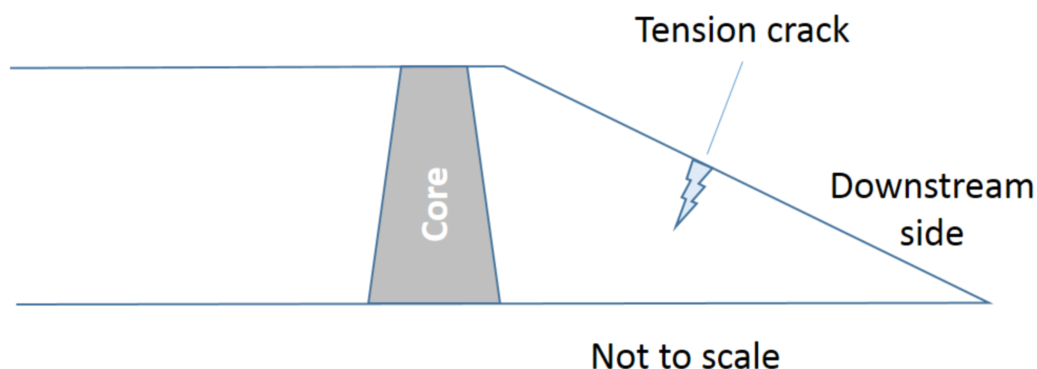
The second event was a "freeboard incident" that occurred May 24, 2014, where the water level in the tailings pond exceeded that which was authorized by the Ministry of Energy and Mines, resulting in a loss of operating freeboard.

TENSION CRACK

The 2010 Annual Inspection Report conducted by Knight Piésold described a tension crack in the tailings pond perimeter embankment and provided two photographs of the crack.

I have determined that this tension crack did not pose a risk to the public or to the environment. As stated in the 2010 Inspection Report, the downstream sides of perimeter embankments do not receive significant compaction, so that a localized shallow failure is possible. However such a failure would not present significant risk because it is shallow and would not extend vertically or horizontally into the embankment or into the core of the dam.

The following schematic interpretation illustrates this concept.



[7] Review Panel Report; https://www.mountpolleyreviewpanel.ca/final-report.

The independent Review Panel commissioned by the Government of BC also addressed the issue of cracking in the tailings pond dam. While the tension crack discussed above was on the downstream side of the perimeter embankment and did not extend to the core, the Review Panel investigated whether there was cracking in the core of the dam. It did not find evidence that the breach was caused by "cracking resulting in uncontrolled internal erosion."[8]

FREEBOARD INCIDENT

On May 24, 2014 a "freeboard incident" occurred at the tailings pond when the water level in the tailings pond rose above that which was permitted by the safety protocols for the pond dam. The incident occurred at a number of locations along the dam where the elevation of water in the tailings pond was at or close to the top of the dam. This was caused by a large rainstorm on May 24 (approximately 24 mm in 24 hours). Rain continued until May 27.

The elevation of the top of the dam varied slightly along the length of the dam and it was at the low points that the water was at or close to the top of the dam. Beginning on May 25, 2014, berms were installed at the low points to contain water. Construction activity to raise the dam elevation began and continued through June and July. All water was diverted from the tailings pond and stored in the mine pit.

On May 27, 2014, Mount Polley Mining Corporation advised the Ministry of Energy and Mines of a loss in operating freeboard in the tailings pond. Essentially, the issue was that due to significant rain over the preceding few days the water level in the tailings pond had risen beyond that which was permitted by the safety protocols for the dam.

Water level readings indicated that water at several low points was at the elevation of the dam crest or higher. However, only standing water was observed on the top of the dam (which is about four meters wide) and there were no signs of seepage or erosion of the dam.

My Office reviewed correspondence between Mount Polley mine, AMEC, and the Ministry of Energy and Mines in relation to this incident. Mount Polley mine reported the loss of operating freeboard to the Ministry and described the measures being undertaken to mitigate the risk of overtopping and remediate the loss of operating freeboard. The correspondence between Ministry engineers indicated that in their opinion the situation was under control and the mitigation measures were acceptable.

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[8] Review Panel Report, at p. 12.

In addition to this correspondence, the records reviewed by my Office included the "Advice of Geotechnical Incident Form" submitted to the Ministry of Energy and Mines regarding this incident, memoranda from AMEC regarding the activities, observations, and recommendations made by AMEC in relation to this incident, as well as Mount Polley Mining Corporation's plan to re-establish safe operating freeboard, and updates to the Ministry on the progress of that plan.

Records and correspondence described that the water had only ponded on the top of the dam and indicated a lack of signs of erosion. This was a serious incident and would have been more serious if no action had been taken to mitigate the freeboard problem. However, as noted by our engineering consultant, the quick response to divert water from the tailings pond and construction to raise the dam elevation avoided this possibility.

The documents reviewed by my Office and by our engineering consultant in relation to this incident did not indicate that Government had information about a risk of significant harm to the public or the environment.

The Review Panel discussed the incident in its report and it too found no evidence of failure due to loss of operating freeboard or overtopping.[9]

As discussed above, the Review Panel found that the cause of the breach was a failure in the foundation of the dam which resulted from latent flaws in the design of the dam. In short, our investigation did not find any documents indicating that the Ministries of Energy and Mines or Environment had information describing a risk posed by a design inadequacy or issues with the foundation of the dam.

I find that government did not have information that the Mount Polley mine tailings pond dam presented a risk of significant harm to the environment or to the health or safety of the public or to a group of people that it should have disclosed pursuant to s. 25(1)(a) of FIPPA.

4.3 DISCLOSURE IN THE PUBLIC INTEREST

ISSUE 2: Did government have information about the Mount Polley mine tailings pond dam that was clearly in the public interest that it should have disclosed pursuant to s. 25(1)(b)?

My Office has required public bodies to undertake a two-step analysis when determining whether to disclose information pursuant to s. 25(1)(b).

[9] Review Panel Report, at p. 11.

Previous Orders have required that there be a sufficiently clear public interest in disclosure of the information in question *and* that there be an urgent or compelling need for disclosure of the information.

In order for there to be a clear public interest, the information must contribute in a substantive way to the body of information that is already available. It must enable or facilitate the expression of public opinion and the making of political choices. Section 25(1)(b) does not apply to information that will add little or nothing to that which the public already knows.

However, a merely *potential interest* by the public in learning about an issue would not meet the threshold for disclosure of that information as being "clearly" in the public interest. In order to meet that threshold the disclosure of information must contribute to the education of or debate amongst the public on an issue that is topical. This is not to say that in order for information to be disclosed the issue it relates to must already be known to the public; there will certainly be instances where disclosure is clearly in the public interest despite not already being a topical issue, or even known to the public.

In Section 4.2 above, I found that government did not have information about the likelihood of the failure of the tailings pond. Therefore, government did not have information about the Mount Polley mine tailings pond that it was required by s. 25(1)(b) to disclose prior to the breach. However, unlike the determination of what constitutes risk of significant harm under s. 25(1)(a), the determination of whether information is clearly in the public interest is contextual and can be affected by current events. For example, while disclosure of information about the Mount Polley mine was not, applying the existing approach to s. 25(1)(b), clearly in the public interest prior to the breach, it may have come to be in the public interest *after* the breach. This is the question that was raised by the ELC in its complaint to our office: whether government had a duty to publicly disclose information that was clearly in the public interest following the Mount Polley mine tailings pond breach.

I have little difficulty finding that the disclosure of information relating to the failure of the tailings pond and its regulation and oversight is certainly topical and the subject of widespread debate, both in the media as well as in the Legislature. The disclosure of information in relation to the failure of the tailings pond dam meets the first step of the analysis in that it represents a sufficiently clear public interest to justify the disclosure of such information.

However, with respect to the second step of the test, I cannot find, given the present approach to interpreting s. 25(1)(b), that there is an urgent or compelling need for the disclosure of the information. The failure of the tailings pond dam has already occurred. Further, government set in motion three investigations into the cause of the breach, including that of the Review Panel that was expressly

tasked with reporting on the cause of the dam failure, actions that could have been taken by government to prevent such a failure and recommendations that will ensure the prevention of similar failures. These are the very topics that are subject of public debate and the information was subsequently reported on by the Review Panel.

I find that government did not have information about the Mount Polley mine tailings pond dam that was clearly in the public interest such that it should have been disclosed pursuant to s. 25(1)(b). While there was sufficiently clear public interest to justify the disclosure of the information, there was not an urgent or compelling need for its disclosure.

This finding, as I noted above, is based on the current approach this Office takes to interpreting s. 25(1)(b). The complaints that gave rise to this investigation, together with my Office's work in Investigation Report F13-05, have caused me to consider whether this is the proper interpretation of s. 25(1)(b) and whether it should be approached differently going forward. I will consider that question in the next section.

5.0 PUBLIC INTEREST

5.1 INTERPRETATION OF SECTION 25(1)(b)

ISSUE 3: Should s. 25(1)(b) be interpreted to require an element of temporal urgency in order to require the disclosure of information that is clearly in the public interest pursuant to s. 25(1)(b)?

As discussed above, on December 16, 2014, I wrote to the Ministries of Environment and Energy and Mines and advised them that I was expanding the investigation's scope to include interpretation of s. 25(1)(b) and invited them to make submissions on that issue. I also invited ELC and FIPA to make submissions.

All three did so and I have very carefully considered these submissions in determining the proper interpretation of s. 25(1)(b) in light of previous decisions of this Office.

The concept of stare decisis

An important judicial concept is the principle of *stare decisis*, which was addressed by the Ministries, ELC and FIPA. This Latin phrase expresses the convention that a court that decides a case is bound to follow earlier decisions of the same court on the same issue and similar facts. The decisions of higher courts are also binding on lower courts. This outline of the concept is somewhat bluntly-stated and perhaps under-inclusive but is sufficient for present purposes.[10]

It is well-recognized that *stare decisis* does not apply to administrative tribunals such as this Office. The Ministries acknowledge that previous s. 25 decisions of this Office are not binding precedents, but argue that consistency in decision-making is important. It also promotes predictability and supports the rule of law as consistency helps build public confidence in the integrity of administrative justice system. They cite the Supreme Court of Canada and academic authorities in support of this, concluding that the nature of this Office and its expertise make it even more important to continue to interpret s. 25(1)(b) as it has been interpreted in the past.[11]

ELC also acknowledges that *stare decisis* does not apply with rigour, arguing that this leaves room for s. 25(1)(b) to be interpreted in a different manner. ELC submitted that this is “readily apparent from a review of the previous decisions” on s. 25, since, it says, over time this Office has “altered its interpretation with regard to s. 25 and the burden of proof”.[12] FIPA too submits that *stare decisis* does not apply to this Office.

By urging me in the name of consistency and predictability to continue to apply previous interpretations, the Ministries ask me to perpetuate what may possibly be an error in order to maintain consistency and predictability. It is true that earlier decisions from this Office can “usefully illuminate sound legal principles and assist in achieving coherent, consistent and predictable results, which is fundamental to the administration of justice generally, and specifically in this case for the application of FIPPA”.[13] However, if these previous interpretations of the legislation were wrong, this principle need not apply.

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[10] A useful recent discussion of *stare decisis* can be found in *Altus Group Limited v Calgary (City)*, 2015 ABCA 86, and see Sara Blake, *Administrative Law in Canada*, 5th ed (Markham: LexisNexis Canada Inc., 2011).
[11] Paras. 18-19, Ministries’ submission.
[12] ELC submission, pp. 3-4. FIPA makes the same argument, at p. 4, about burden of proof and interpretation of s. 25. Deciding in the absence of statutory direction where any burden of proof lies is not the same task as interpreting what the provision itself means.
[13] Order F14-44, 2014 BCIPC 41, at para. 8.

While predictability is important, predictability in interpretation cannot justify adhering to an interpretation if it is wrong. I would also note that the courts have not upheld the existing interpretation.

In my respectful view, the issue here is essentially whether this Office's prevailing interpretation of s. 25(1)(b), most prominently embodied in Order 02-38, is wrong.

Summary of the Submissions

The Ministries made a joint submission in defence of the existing interpretation. The Ministries rely on the 'modern' approach to statutory interpretation, as do ELC and FIPA, an approach that this Office has cited in many cases:

> The words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[14]

The Ministries argue that interpreted in its grammatical and ordinary sense the phrase "without delay" conveys an intention that s. 25(1)(b) applies only where there is an element of temporal urgency, requiring a determination that the duty to disclose arises only where it must be urgently complied with.

They argue that this approach is bolstered by the fact that, viewed in the context of FIPPA as a whole, s. 25 is exceptional in that it over-rides all other FIPPA provisions, including the "significant public interests protected elsewhere in the Act".[15] The Ministries cite many of the access exceptions found in Division 2 of Part 2 as embodying public or societal interests, adding that the Supreme Court of Canada has found that such exceptions in laws like FIPPA "reflect important public interest considerations".[16]

Conversely, both ELC and FIPA argue that the same interpretive principles drive one to the conclusion that the current interpretation of s. 25(1)(b) is wrong.[17] It is fair to say that neither denies that the access exceptions reflect, or embody, important public interests. They simply say that the requirement of temporal urgency sets the standard too high and effectively undercuts the public interest purposes generally underlying FIPPA and specifically underlying s. 25.

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[14] Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada Inc., 2008), at p. 1.
[15] Ministry's submission, para. 6.
[16] Ministries' submission, para. 7. It is convenient to note here that the Supreme Court of Canada has also made it plain that where an institution is exercising its discretion to disclose or withhold under a discretionary access exception, it must consider the public interest objectives of openness and accountability. See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, at para. 46: "to properly exercise this discretion, the head must weigh the considerations for and against disclosure, including the public interest in disclosure."
[17] And, in the case of FIPA, s. 8 of the *Interpretation Act*.

A key theme of the Ministries' submission is that removing the temporal urgency requirement would introduce uncertainty: "how would a public body determine what was 'clearly in the public interest' under s. 25, absent temporal urgency considerations, in the face of its obligations under Part 3, which are also clearly in the public interest"?[18] The Ministries made the same argument about indeterminacy in the face of public body obligations under the access exceptions. The difficulty with this is that "temporal urgency"—a phrase chosen by Commissioner Loukidelis—is no more determinate and provides little if any more guidance than the statutory concept of that which is "clearly in the public interest".[19]

The Ministries contend that s. 25(1)(b) requires disclosure of information only where the *disclosure* is clearly in the public interest, not where the *information* is itself clearly in the public interest:

> It is the act of disclosing information that is mandated under this provision. The act of disclosing information and the consideration of whether the disclosure is required at a point in time cannot be considered except in its temporal context. The issue will be whether, at a given point in time, disclosure of the information is required under s. 25. The Ministries submit that the requirement of temporal urgency flows from that reality. The wording of s. 25(1)(a) also makes this clear. That paragraph deals with risks to the environment or health or safety of the public or a group of people. The issue will be whether, at a point in time, there is a significant risk. One cannot apply that provision without considering whether there is an element of temporal urgency. In other words, the issue will be whether the s. 25 threshold is met at that point in time. The Ministries submit that the notion of temporal urgency is a necessary by-product of the wording used in the provision.[20]

The Ministries contend that the language of s. 25(1)(b) must be read in conjunction with the "requirement for immediate disclosure" and "by giving full force to the word 'clearly'."[21] The existing interpretation of s. 25, they say, is in keeping with FIPPA's legislative goals. It is consistent with the accountability goal of the legislation, but also, given the over-riding nature of s. 25, the element of urgency protects personal privacy, another legislative goal.

ELC argues, first, that we are required by the *Interpretation Act* to interpret statutes in a fair, large, and liberal manner and that interpreting "without delay" as necessitating a test of urgency does not meet that requirement. Rather, the

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[18] Ministries' submission, para. 7.
[19] I return below to the question of what is in the public interest and where disclosure is clearly in that interest.
[20] Ministries' submission, para. 8.
[21] Ministries' submission, para. 9.

requirement for urgency "detracts from two core purposes of FIPPA—the right to information, and the need for public accountability."[22]

ELC does say, however, that, given the need for a "risk of significant harm" in s. 25(1)(a), the temporal urgency element is implicit in that provision. For this reason, it argues, the words "without delay" were necessary in s. 25(1)(b), to make it clear that disclosure of public interest information was to be without delay. It says Commissioner Loukidelis erred in suggesting that "without delay" was added to introduce a criterion of urgency:

> ... it would be irrational to require that requested information be disclosed "without delay", while allowing disclosure of information for which disclosure is "clearly in the public interest" to be otherwise deferred. For this reason, the words "without delay" needed to be included in s. 25(1)(b) because s. 25(1)(a) (as it is now named) carries an <u>inherent</u> temporal aspect which <u>automatically</u> requires disclosure "without delay". Section 25(1)(a), because it requires disclosure "about a *risk of significant harm* to the environment or to the health or safety of the public or a group of people" obviously necessitates *urgent* disclosure in order to address this risk (emphasis added).[23] On the other hand, s. 25(1)(b), which does not necessarily address risk of significant harm, does <u>not</u> carry an inherent temporal urgency. Thus, without the addition of "without delay", s. 25(1)(b) could be interpreted as allowing for deferred disclosure.[24] [original emphasis]

According to ELC, "without delay" should be read as limiting the "requirement of urgency to the implementation of the public body's act of disclosure."[25] It argues that, contrary to the views of Commissioner Loukidelis in Order 02-38, "without delay" works toward the same end as the public body duty under s. 6(1) to make every reasonable effort to respond to access applicants "without delay". Section 25 sits outside the Part 2 scheme of request and response, which

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[22] ELC submission, p. 4.
[23] Similarly, in *Clubb v. Saanich (District)*, 1996 CanLII 8417 (BCSC) [*Clubb*], Melvin J. commented that s. 25(1)(a) requires imminence or urgency to the risk of significant harm before disclosure is required. He made no definitive finding on the point, however.
[24] ELC submissions, p. 6. Footnotes omitted. It is apparent from this passage that ELC believes that the phrase "without delay" is found in s. 25(1)(b), *i.e.*, that it does not apply to s. 25(1)(a). This view is made explicit in the last paragraph on p. 6 of ELC's submissions, and elsewhere. This is not the case, however, as the phrase "without delay" is found in the introductory portion of s. 25(1), such that it clearly applies to both s. 25(1)(a) and (b). Order 02-38 and other orders dealing with s. 25 recognize this, as does the Ministries' submission.
[25] ELC's submission, p. 5.

imposes timelines and processes, but public bodies should not for that reason be relieved of a duty to disclose without delay:

> It would be irrational to require that requested information be disclosed "without delay", while allowing disclosure of information for which disclosure is "clearly in the public interest" to be deferred indefinitely.[26]

The upshot, ELC argues, is that "without delay" merely requires public bodies to, in an urgent manner, disclose information the disclosure of which is otherwise "clearly in the public interest" (or, under s. 25(1)(a), where there is a risk of significant harm.

ELC acknowledges that s. 25(1)(b) "should have a high threshold", but says removal of the temporal urgency element will not "lead to public bodies being flooded with new disclosure requirements", since the criterion of clear public interest in disclosure "already provides an adequate safeguard".[27] ELC cites discussion on this point in Investigation Report F13-05,[28] and *Clubb*, where Melvin J. acknowledged that the term "public interest" in s. 25(1)(b) is difficult to define, but "cannot be so broad as to encompass anything that the public may be interested in learning...[as]…the public interest "is not defined by the various levels of public curiosity."[29]

In FIPA's view, Commissioner Flaherty "saw fit" to add the requirement of "urgent and compelling nature" to the s. 25(1)(b) test even though the actual language of the provision is silent on this. Later orders have, FIPA says, continued to "conflate the temporal urgency attached to the public body's disclosure of the information with a temporal urgency attached to the information or matter itself."[30] It is, FIPA argues, "an unwarranted extrapolation" to interpret "without delay" as also modifying the words of s. 25(1)(b).[31] Instead, FIPPA's statutory purposes favour the view that "without delay" modifies the verb "disclose". Put simply, FIPA says, there is no temporal requirement beyond this, as the plain words of s. 25, viewed in light of the context and purpose of FIPPA, establish. The result, it argues, is this:

> …the reading-in of a temporal requirement into s. 25 can have the effect of encouraging public bodies and their officials to try to 'wait out' situations

[26] ELC's submission, p. 5.
[27] ELC's submission, p. 7.
[28] At p. 10.
[29] *Clubb*, at para. 33. Cases cited by Melvin J. at paras. 31-2 also speaks to this. ELC also says that *Grant v. Torstar Corporation*, 2009 SCC 61 [*Torstar*], at para. 105, provides guidance on what "public interest" means. The cited paragraph may be of some general assistance.
[30] FIPA's submission, p. 3.
[31] FIPA's submission, p. 3.

> where the public or the environment may be at risk in the hope that the temporal aspect will fade away and no information need be disclosed.[32]

Having considered all of the submissions, I will now set out my analysis of s. 25(1)(b).

OIPC Analysis of s. 25(1)(b)

In Investigation Report F13-05, I expressed the view that "the public interest disclosure provision should not require urgent circumstances" and recommended, as my predecessor did, that s. 25(1)(b) be amended to clarify that temporal urgency for disclosure is not needed before public bodies have a duty to disclose information that is clearly in the public interest. Investigation Report F13-05 was a general report about s. 25 and its application in selected situations. The views I expressed there were general, and preliminary. This investigation into ELC's complaint allows me the opportunity to consider the meaning of s. 25(1)(b) in the context of a specific complaint and decide the proper interpretation of that provision.[33]

I am interpreting s. 25(1)(b) by applying the accepted approach to statutory interpretation. The Ministries, FIPA and ELC all acknowledge that this requires the words of s. 25 to be read "in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention" of the Legislature.[34] The Supreme Court of Canada has, in interpreting freedom of information legislation, said that the "goal is to determine the intention of Parliament by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the object of the statute.[35]

A guide to the Legislature's intention in using the language it did in s. 25(1)(b) is found in s. 2(1) of FIPPA:

> 2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
>
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
>
> (c) specifying limited exceptions to the rights of access,

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[32] FIPA's submission, p. 5.

[33] In interpreting s. 25(1)(b), I will be guided, as this Office always is, by the generally-accepted interpretive principle quoted above, from the Ministries' submission.

[34] See *Sullivan*, above.

[35] *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25. I note here, in passing, that the Court there expressed the interpretive exercise as follows, at para. 27.

(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(e) providing for an independent review of decisions made under this Act.

(2) 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.

In interpreting s. 25(1)(b) I will consider these purposes when applying the principles of statutory interpretation to determine what the Legislature intended a plain reading of the words to mean.

The meaning of "without delay"

The core of the issue with the existing interpretation of s. 25(1)(b) is the emphasis on the need for temporal urgency or a compelling need for disclosure. As indicated above, the concept of *temporal urgency or compelling need* originated in decisions of Commissioner Flaherty, with Commissioner Loukidelis following his lead. The most-often-cited decision reflecting this approach is Order 02-38, a decision of Commissioner Loukidelis. In that case, he interpreted the introductory words "without delay" as introducing a requirement for "temporal urgency" of "an urgent and compelling need for public disclosure", adding

> …this element must be understood in conjunction with the threshold circumstances in ss. 25(1)(a) and (b), with the result that, in my view, those circumstances are intended to be of a clear gravity and present significance which compels the need for disclosure without delay.[36]

There is also some validity to the Ministries' point that the question of whether disclosure of information is required because it is clearly in the public interest may have a temporal aspect. Information might, at the time it is created or compiled, be entirely routine administrative information such that there is, at the time it is created or other times after that, no public interest in disclosure. Circumstances may change, however, such that disclosure of that same information becomes clearly in the public interest. The nature of the information remains the same, but circumstances evolve such that disclosure is clearly in the public interest.[37]

However, there may be situations where information is inherently of a nature that gives rise to a clear public interest in its disclosure. The element of temporality need not, in other words, always be present. Take the example of routine

[36] Para. 53.

[37] The Ministries submit that the focus of s. 25 is in one sense on disclosure of information, rather than on whether the information is "inherently in the public interest". This does not advance matters, however, since it is true of all of Part 2 of FIPPA. Part 2 is about disclosure of information.

technical inspection reports regarding nuclear power plants. The reports may disclose maintenance or repair problems that must be addressed within a certain timeframe or they may describe a risk of harm within in any timeframe. They may, however, disclose problems or concerns of a kind or degree that make their disclosure clearly in the public interest, even if there is no temporal aspect of any kind.

This example would not arise in British Columbia now, but it has arisen on several occasions in Ontario. Section 23 of Ontario's *Freedom of Information and Protection of Privacy Act* contains a public interest over-ride that differs from s. 25. It arises in the context of access requests—it is not a pro-active disclosure duty—and applies despite selected access exceptions only where there is a "compelling public interest" in disclosure.

Yet decisions from the Office of the Information and Privacy Commissioner of Ontario which deal with routine nuclear plant reports or peer reviews find an over-riding public interest in disclosure even where there is no suggestion of temporal urgency.[38] I am well aware of the differences in the language of the Ontario and British Columbia public interest disclosure provisions and mechanisms. I cite these Ontario cases merely to illustrate that it is possible to assess whether disclosure of information is in the public interest without necessarily accounting for, or requiring, an element of temporal urgency.

Nor does the fact that a temporal aspect to disclosure exists in some cases support the Ministries' argument that s. 25 as a whole, or either of its subsections, require that an element of "urgency" or "present significance" be present in *all* cases. I do not agree, therefore, with their contention that "urgency is a necessary by-product of the wording used in the provision."[39]

The same can be said for the further suggestion in the previous decisions of this Office that the language of s. 25 can be read to require, in *all* cases, that there must be a "compelling need" for disclosure. This is what Commissioner Flaherty and Commissioner Loukidelis concluded, by speaking of "compelling need", "present significance" and "clear gravity" in relation to s. 25's threshold circumstances as a whole, and specifically in relation to s. 25(1)(b). I do not find a basis for this in the language of s. 25. The Legislature said no such thing. The language of s. 25(1)(b) is clear: the test is whether, in the circumstances, disclosure of information is "clearly in the public interest".

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[38] See, for example, Order P-270, PO-1805, PO-2072 and PO-2098. These and other Ontario decisions mentioned in this report are all accessible through www.ipc.on.ca.

[39] Ministries' submission, para. 8. As regards the idea that temporal urgency, and so on, is found in the language of s. 25(1)(b), I note that the equivalent Alberta provision, which has the same language as s. 25(1)(b), has not been interpreted in that way. Decisions from the Office of the Information and Privacy Commissioner of Alberta speak of "clear", and sometimes "compelling" public interest in disclosure, but not in relation to urgency or present significance. See, for example, Order 097-18.

With great respect to Commissioners Flaherty and Loukidelis, the language of s. 25, its structure, the surrounding statutory scheme and the statutory purposes do not reasonably bear the meaning they gave to the provision.

Although the meaning of s. 25(1)(a) is not at issue in this investigation, I will note that it follows from the above discussion that the words "without delay" in the opening portion of s. 25 similarly do not introduce an element of temporal urgency into s. 25(1)(a). In my view it is the requirement in s. 25(1)(a) that there be a "risk" of significant harm that incorporates a temporal aspect to that provision, not the phrase "without delay".[40]

Having regard to the language of s. 25 as a whole, assessed in the context of FIPPA's overall scheme, it is clear that the requirement for disclosure "without delay" relates only to the timing of the disclosure duty itself.[41] Put another way, the words "without delay" are about the timing of disclosure. As soon as the head of a public body becomes aware, directly or through a delegate, that the public body has custody or control of information the disclosure of which is, inherently or in light of the then prevailing circumstances, "clearly in the public interest", she or he must publicly disclose that information "without delay". The head cannot delay the release of the information or time its disclosure to suit the interests of the public body or others.[42]

This interpretation accords with the plain meaning of the language and is consistent with FIPPA's statutory purpose of making public bodies more open and accountable to the public. What was intended is pro-active, mandated and timely disclosure of information the disclosure of which is "clearly in the public interest.[43]

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[40] Even then, I cannot dismiss the possibility that there may be cases where temporality is not present, but there is nevertheless risk of significant harm.

[41] The submissions in this investigation in places assume that "without delay" means "immediately" or something very close to it. I consider "without delay" to mean something approaching "immediately", perhaps, but would not go quite that far.

[42] I will note here that I have kept in mind that in *Clubb*, at para. 30, Melvin J. commented, in relation to s. 25(1)(a) that it "appears that the legislature has directed itself to imminent and substantial risk of harm". At para. 34, Melvin J. observed in passing that s. 25(1)(a) disclosure may have been justified if there had been a "substantial and imminent risk" to the health or safety of children. Melvin J.'s observation about the requirement for imminent risk for s. 25(1)(a) purposes was not accompanied by any extensive analysis, doubtless because he did not need to decide the point. Further, he did not say that s. 25(1)(b) requires there to be a temporal element of imminence here before information must be disclosed.

[43] I will note here that there will undoubtedly be cases in which the public is not aware that the information exists, meaning that an access request may not be made. Ensuring that a limited class of information that should be known, without request, in the clear public interest advances FIPPA's legislative goals of openness and accountability. It also can advance other important public interests, as s. 25(1)(a) illustrates and as s. 25(1)(b) can as well.

As regards the Ministries' argument that incorporating a requirement for temporal urgency has the effect of protecting privacy, I do not see how that element is necessary to protect the privacy or other interests or rights protected under FIPPA's access exceptions. A variety of interests and rights are protected by access exceptions.[44] However, ample protection is found in the fact that disclosure pursuant to s. 25(1)(b) is only triggered where it is "clearly" in the "public interest"

Again, there is no warrant in the language of s. 25(1)(b) for an across-the-board threshold of "compelling need", "urgency", or even "clear gravity" in a temporal sense. The circumstances may reflect these characteristics, but s. 25(1)(b) uses no such language and none can properly be implied. Section 25(1)(b) requires disclosure where that is "clearly" in the "public interest", and the remaining question is what did the Legislature intend in using this language.

The meaning of the phrase "clearly in the public interest"

The next question is what the Legislature intended by using the word "clearly" in s. 25(1)(b). While the dictionary definition of the adverbial word "clearly" is not determinative of its meaning in s. 25(1)(b), it is of some assistance. The *Oxford English Dictionary*,[45] for example, defines "clearly" as "manifestly, evidently".

With respect to case law, not surprisingly no cases that are directly on point were cited by any of the parties. As discussed earlier, *Clubb* comments on s. 25(1)(b) in passing, but neither mentions nor decides what is meant by "clearly". While there are cases that have considered the word "clearly" in relation to trade marks law and other statutes, none are particularly compelling. I do note, however, that the British Columbia Court of Appeal, in a case dealing with what was then Rule 19(24) of the British Columbia *Rules of Court*, stated that "clearly" is the equivalent to "plain and obvious".[46]

It is not desirable to lay down any hard and fast rule for what the term "clearly" means in s. 25(1)(b). Nor would it be appropriate to conclude that the Legislature intended to create something like a standard of proof. It seems to me, however, that "clearly" means something more than a 'possibility' or 'likelihood' that disclosure is in the public interest. The ordinary meaning of that word, reflected in dictionary definitions, strongly suggests that more than "possibly" or "likely" is needed. I must also consider that that s. 25 overrides all of FIPPA's

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[44] In passing, it remains to be seen, given the fundamental importance of solicitor-client privilege, whether s. 25 validly over-rides privilege, especially where the privilege in question belongs to a third party, not the public body.

[45] *Oxford English Dictionary*, 2nd ed. (Oxford: Clarendon Press, 1989).

[46] *Chapman v. Canada (Minister of Indian and Northern Affairs)*, 2003 BCCA 665, at paras. 24 and 25.

discretionary and mandatory exceptions to disclosure, suggesting that the Legislature did not intend a low threshold for disclosure in the public interest.

Given all of this, s. 25(1)(b) requires disclosure where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest.[47] A public body should, when deciding whether information "clearly" must be disclosed in the public interest, consider the purpose of any relevant access exceptions (including those protecting third-party interests or rights that will be, or could reasonably be expected to be, affected by disclosure).[48] In addition, the nature of the information and of the rights or interests engaged, and the impact of disclosure on those rights or interests will be factors in assessing whether disclosure is "clearly in the public interest".

This is not to suggest that a public body is required or entitled to apply FIPPA's access exceptions in determining whether public interest disclosure is required. Nor does this mean that a public body can disregard a clear public interest in disclosure in order to prioritize or protect third-party or public body interests or rights. Section 25 explicitly provides that the disclosure duty applies despite any other provision, including the access exceptions found in Part 2. The duty to notify affected third parties under s. 25(3) also speaks to this.

The public body's assessment will necessarily have regard to what is the relevant "public interest". It is not possible to determine whether disclosure is "clearly" required without considering the public interest in the disclosure. The meaning of the term "public interest" is undoubtedly difficult to define in the abstract, in any general manner.[49] In *Clubb*, Melvin J. referred to the "vagueness" of the term

[47] I do not find support in the language of s. 25(1)(b) for a standard of "compelling" public interest in disclosure—the word "clearly" does not go that far. I therefore disagree with Alberta Order F2012-14. In that decision, an adjudicator stated, without analysis, that the word "clearly" in s. 32(1)(b) of the Alberta *Freedom of Information and Protection of Privacy Act* means "compelling". It is true that the Ontario law uses the word "compelling", but that word is not, with deference, the word found in s. 32(1)(b), which has the same language as s. 25(1)(b) of FIPPA. The word "compelling" is not a synonym for "clearly". It is not open to me to excise the word that the Legislature used and transplant another in its place.

[48] In this regard, I note that there is a public interest underlying interests protected through at least some of FIPPA's exceptions, notably Cabinet confidences (as expressed in s. 12), solicitor-client privilege (s. 14) and informer privilege (s. 15). Also see, generally, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23.

[49] As McLachlin C.J.C. wrote in in *Torstar*, at para. 103, "[t]he authorities offer no single 'test' for public interest, nor a static list of topics falling within the public interest". This was said in the context of the public interest defence in defamation, but it illustrates a general point. As the Court also said in *Torstar*, consistent with my observation below, "[g]uidance, however, may be found in the cases".

and cited Supreme Court of Canada and other authority to the same effect.[50] He went on, however, to say this about the "public interest" for s. 25(1)(b) purposes:

> 33. The term "public interest" in s. 25(1)(b) cannot be so broad as to encompass anything that the public may be interested in learning. The term is not defined by the various levels of public curiosity. The public is, however, truly "interested" in matters that may affect the health or safety of children.

I agree that the "public interest" is not merely that which the public may be interested in learning or defined by public curiosity.[51] The Legislature did not attempt a precise or exhaustive definition of the term "public interest", so it is not appropriate for me to do so.[52]

However, surely the public interest is that which affects, or is in the interests of, a significant number of people, something that transcends private interest, that is of concern or interest to the public. This is consistent with the Supreme Court of Canada's observation, in the context of defamation law, that a subject will be of public interest if it is "one inviting public attention, or about which the public has some substantial concern because it affects the welfare of citizens or one to which considerable public notoriety or controversy has attached".[53]

The public interest may, to give only a few examples, involve the interests of the public in relation to matters of public finance or financial management, or relating to proper public administration.[54]

The "public interest" is a concept that can only be determined after analyzing the facts and circumstances of a particular case, as is appropriate.

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[50] *R. v. Morales*, [1992] 3 S.C.R. 711, *R. v. Farinacci* (1993), 86 C.C.C. (3d) 32 (ONCA), and *R. v. Sparrow* (1990), 56 C.C.C. (3d) 263. These cases dealt with statutory provisions involving bail decisions and thus whether constitutional rights protected under the *Canadian Charter of Rights and Freedoms* were infringed by that vagueness. This is a different question from that at hand. Nothing in these cases suggests that the term "public interest" in FIPPA is not amenable to interpretation.

[51] I note also that in Alberta Order 96-014 (External Adjudication Order No. 1), Cairns J. distinguished between information that "may well be of interest" to the public and information that is "a matter of public interest".

[52] This does not mean that one is driven as far as Justice Potter Stewart, of the United States Supreme Court, who once concluded that, although obscenity is not easy to define, and he might "never succeed in intelligibly" defining it, "I know it when I see it": *Jacobellis v. Ohio*, 378 U.S. 197.

[53] *Grant v. Torstar Corp.*, 2009 SCC 61, at para. 105. This is merely a useful conceptual statement about what the "public interest" involves. I do not mean to suggest that the principles and analytical approach to the public interest in defamation law apply under s. 25(1)(b).

[54] The last of these is of relevant especially in light of FIPPA's accountability objective and the focus of s. 25(1)(a) on harm to the environment and health or safety.

In the context of freedom of information legislation, Ontario decisions suggest that a key question is whether "there is a relationship between the record and the Act's central purpose of shedding light on the operations of government", with the information having to "serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices".[55] This does not exhaust the meaning of what is the "public interest" for s. 25(1)(b) purposes, but it offers some assistance in identifying what the "public interest" involves.

Another consideration in many cases will be whether "the information in issue contributes, in a substantive way, to the body of information that is already available to enable or facilitate effective use of various means of expressing public opinion and making political choices".[56] Another perspective on this is found in Investigation Report F13-05:

> The requirement that the disclosure be clearly in the public interest means more than a general interest in public policy or policy debate. The information must be of substantial concern to the public or to an affected group of people such that they have a genuine stake in the issue, or disclosure would directly affect their actions and contribute to public understanding or debate on the issue.[57]

I would also add that consideration should be given to whether the information in issue may contribute, in a meaningful way to holding a public body accountable for its actions or decisions. In saying this, I am aware that contrary views were expressed in Order 00-16[58] and Order 04-09,[59] as well as Investigation Report F13-05. In Investigation Report F13-05, I said this:

> While information rights are an essential mechanism for holding government to account, s. 25(1)(b) is not intended to be used by the public to scrutinize public bodies. In these circumstances, the public may still use its general right to access records under FIPPA.[60]

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[55] Ontario Order P-3461, at para. 40.
[56] Order 02-38, at para. 66, and Investigation Report F13-05, at para. 10.
[57] At p. 34.
[58] [2000] B.C.I.P.C.D. No. 19. I note that this decision dealt with an access applicant's general assertion that his wish to subject the inner workings of the Labour Relations Board to scrutiny of some kind sufficed to trigger s. 25(1)(b). Commissioner Loukidelis clearly was not swayed, but he did not lay down any rule that accountability could never be a factor in s. 25(1)(b) cases.
[59] [2004] B.C.I.P.C.D. No. 9. This decision appears to have interpreted Order 00-16 as laying down a rule, but I do not see it that way.
[60] At p. 10.

This refers to the fact that s. 25(1)(b) is not intended to supplant FIPPA's scheme for request-driven access to records as an instrument for, consistent with FIPPA's purposes, holding public bodies to account.

I do not believe, by the same token, that the Legislature intended to preclude the possibility that pro-active public interest disclosure under s. 25(1)(b) could never serve that purpose. There may be cases where pro-active disclosure is clearly in the public interest in order to hold the public body, or others, accountable.

Guidance as to what the public interest is may also be found by examining the circumstances in cases decided in other jurisdictions, including those from Alberta and Ontario under the freedom of information laws of those provinces. Although the Ontario legislation uses the term "compelling" rather than "clearly" when modifying the term "public interest", these cases[61] can help illustrate when the public interest has been engaged and where it has not been engaged.[62]

In Ontario Order P-3461, a ministry was ordered to disclose the dates on which DNA samples had been taken from crime victims, noting that there was a public interest in knowing whether the DNA evidence had been collected and processed in a timely way:

> [47] … the public interest in this case stems not only from the identity of the criminal (the affected party in this appeal) and the notoriety of his crimes, but from a strong concern in knowing whether law enforcement officials handled crucial and time-sensitive evidence in this case in an appropriate manner. I accept there is a compelling public interest in the issue of the efficacy of the conduct of this law enforcement investigation. The disclosure of the record at issue in this appeal would shed light on this very matter.

Another example from Ontario is Order P-1409, where the adjudicator referred to records relating to the public interest in the Ipperwash confrontation, where the adjudicator considered the following circumstances:

> (…) the death of an aboriginal person at the hands of the police in a land-claims dispute, extensive discussion in the Legislature concerning the government's role in events at the Park, including remarks made by the Attorney General in the Legislature on the very subject referred to in the passages found to be exempt under section 13(1), and the comprehensive reporting of events in the news media.[63]

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[61] These are cited at footnote 37 above.

[62] Orders on public interest fee waivers under s. 75 of FIPPA will not be of much assistance, I agree, given the differences between fee waivers in the public interest and the s. 25(1)(b) issues. See Order 02-38, at paras. 63-64.

[63] Ontario Order P-1409, at p. 30.

Other examples of situations where a public interest has been found in Ontario, related to the economic impact of Quebec separation; the integrity of the criminal justice system where it has been called into question; public safety issues relating to the operation of nuclear facilities; the safe operation of petrochemical facilities; the province's ability to prepare for a nuclear emergency; and records containing information about contributions to municipal election campaigns.[64]

Retrospective application of s. 25(1)(b)

I acknowledge that public bodies have for many years operated under what has been, before this report, the prevailing interpretation of s. 25(1)(b). In relation to the complaint under investigation here it is not appropriate for me to apply this revised interpretation of s. 25(1)(b) to make a finding at this time about whether the Ministries are in breach of their duty under s. 25(1)(b) in relation to any information that is now in their custody or control.

I expect the Ministries, however, to diligently and promptly assess what I have said about the proper interpretation of s. 25(1)(b) and consider what information, if any, must be disclosed as being clearly in the public interest. They will no doubt have regard to the publicity and debate that has surrounded the Mount Polley mine situation, the environmental and other interests involved, the amount of information that is already available to the public, the nature of the information itself, the purpose of any relevant access exceptions, and other factors that may be relevant to determining if the public interest clearly requires disclosure of information.

Further, I note that in 2013 I recommended, in Investigation Report F13-05, that public bodies such as the Ministries "develop policies that provide guidance to employees and officers about the public body's obligations under s. 25 of FIPPA".[65]

The policies should be tailored to specific program areas, anticipating the range of harms that may occur within each area.

Public bodies should also set out the specific steps an employee should take to escalate relevant information to the attention of the head of the public body.

It also follows from my determination in this Report that all public bodies must diligently and promptly assess what information, if any, within their custody or control, must be disclosed pursuant to s. 25(1)(b) as being clearly in the public interest.

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[64] Ontario Order PO-2355, at pp. 11 and 12.
[65] Investigation Report F13-05, at pp. 31 and 32.

I conclude that public bodies must disclose information pursuant to s. 25(1)(b) where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest.

Section 25(1)(b) will no longer be interpreted to require an element of temporal urgency in order to require the disclosure of information that is clearly in the public interest pursuant to s. 25(1)(b).

What follows from this is that the Ministry of Energy and Mines and the Ministry of Environment must promptly assess what information in relation to the failure of the Mount Polley mine tailings pond dam, if any, must be disclosed pursuant to s. 25(1)(b) as being clearly in the public interest.

RECOMMENDATION 1:

In light of this finding, the Ministry of Energy and Mines and the Ministry of Environment must assess what information in relation to the failure of the Mount Polley mine tailings pond dam, if any, must be disclosed pursuant to s. 25(1)(b) as being clearly in the public interest.

RECOMMENDATION 2:

All public bodies must diligently assess what information, if any, must be disclosed pursuant to s. 25(1)(b) as being clearly in the public interest.

RECOMMENDATION 3:

All public bodies must develop policies that provide guidance to employees and officers about the public body’s obligations under s. 25 of FIPPA, and update existing policies to reflect the revised interpretation of s. 25(1)(b) described in this investigation report.

6.0 SUMMARY OF FINDINGS AND RECOMMENDATIONS

6.1 SUMMARY OF FINDINGS

I have made the following findings in this investigation:

1. **I find that government did not have information that the Mount Polley mine tailings pond dam presented a risk of significant harm to the environment or to the health or safety of the public or to an affected group of people that it should have disclosed pursuant to s. 25(1)(a) of FIPPA.**

2. **I find that government did not have information about the Mount Polley mine tailings pond dam that was clearly in the public interest such that it should have been disclosed pursuant to s. 25(1)(b). While there was sufficiently clear public interest to justify the disclosure of the information, there was not an urgent or compelling need for its disclosure.**

3. **I conclude that s. 25(1)(b) should not be interpreted to require an element of temporal urgency in order to require the disclosure of information that is clearly in the public interest pursuant.**

   Public bodies must proactively disclose information, pursuant to s. 25(1)(b), where a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that disclosure is plainly and obviously in the public interest.

6.2 SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1

I recommend that the Ministry of Energy and Mines and the Ministry of Environment promptly assess what information in relation to the failure of the Mount Polley tailings pond dam, if any, must be disclosed pursuant to s. 25(1)(b) as being clearly in the public interest.

RECOMMENDATION 2

I recommend that all public bodies diligently and promptly assess what information, if any, must be disclosed pursuant to s. 25(1)(b) as being clearly in the public interest.

RECOMMENDATION 3

All public bodies must develop policies that provide guidance to employees and officers about the public body's obligations under s. 25 of FIPPA, and update existing policies to reflect the revised interpretation of s. 25(1)(b) described in this investigation report

7.0 CONCLUSION

The failure of the Mount Polley mine tailings pond dam resulted in the catastrophic release of 25 million cubic metres of water and mine tailings into Polley Lake, Hazeltine Creek, and Quesnel Lake. The environmental effect of the breach is only just beginning to be understood and is likely to persist for decades. The public interest in information relating to the cause of the failure, as well as the subsequent investigations and mitigation measures, was predictable and understandable.

The complaints from FIPA and ELC that led to this investigation are a manifestation of this public interest and should serve to focus the attention of public bodies on their obligation under FIPPA to proactively disclose information that is clearly in the public interest. While this has been a requirement of FIPPA since its enactment in 1992, disclosures pursuant to s. 25 have been few and far between. This is likely partly due to a lack of awareness by public bodies about the requirements of s. 25 and partly due to the historical interpretation of that section by my Office. This Investigation

Report resets that interpretation, returning to a plain-language reading of what I have determined to be the intention of the Legislature in its enactment.

As discussed in both this Investigation Report and in my 2013 Investigation Report: *Public Body Disclosure of Information under Section 25 of the Freedom of Information and Protection of Privacy Act*, this section requires the proactive disclosure of information related to a risk of significant harm or where the disclosure is clearly in the public interest. That obligation is extraordinary in that the Legislature chose to make s. 25 supersede all other sections of FIPPA, including those exceptions to disclosure set out in Part 2 of the Act.

With the publication of this Investigation Report it is incumbent upon all public bodies to evaluate their policies for disclosure pursuant to s. 25 of FIPPA, and to promptly re-evaluate whether they currently have information that should be proactively disclosed in the public interest. This may well include information that is currently the subject of an access to information request under Part 2 of FIPPA. My Office is available to assist any public body in that assessment.

8.0 ACKNOWLEDGEMENTS

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In addition I would like to thank Dr. Scott Dunbar, head of the Norman B. Keevil Institute of Mining Engineering at University of British Columbia who contributed his technical knowledge and expertise to this investigation.

July 2, 2015

ORIGINAL SIGNED BY

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Elizabeth Denham
Information and Privacy Commissioner
for British Columbia