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Order F15-27

MINISTRY OF FORESTS, LANDS AND NATURAL RESOURCE OPERATIONS

Ross Alexander
Adjudicator

June 25, 2015

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Summary: The applicant requested records relating to a 2012 landslide near his home that originated at a logging site. The issue was whether the Ministry of Forests, Lands and Natural Resource Operations was required to disclose to the applicant a report regarding the slide under s. 25 of FIPPA. Section 25 requires public bodies to, without delay, disclose information that is about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or because disclosure is otherwise clearly in the public interest. The adjudicator determined that s. 25 does not apply to the information in the report.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 25

Authorities Considered: B.C.: Order 02-38, 2002 CanLII 42472 (BC IPC).

Cases Considered: *John Doe v. Ontario (Minister of Finance)*, 2014 SCC 36.

INTRODUCTION

[1] This inquiry relates to an applicant's December 2014 request to the Ministry of Forests, Lands and Natural Resource Operations (the "Ministry") for records related to a landslide that occurred near Cherryville, BC in April 2012 (the "slide"). The applicant asserted that records should be released without delay because the information is about a risk of significant harm to the environment or to the health or safety of a group of people in relation to current

logging that is occurring in the area. He also contended that disclosure is “clearly in the public interest” within the meaning of s. 25 of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

[2] The Ministry initially responded to the applicant by requesting payment of a preliminary fee for processing the request. In reply, the applicant requested that the Ministry immediately consider whether s. 25 of FIPPA applies to any of the requested records. He also submitted, regardless of the application of s. 25, that a fee waiver should be granted on public interest grounds.

[3] The Ministry decided that s. 25 of FIPPA did not apply to the requested records. It also advised the applicant that it was declining his request for a fee waiver.

[4] The applicant requested that the Office of the Information and Privacy Commissioner (“OIPC”) review the Ministry’s decision that s. 25 did not apply, as well as its decision to not waive or reduce the fees for processing his request.

[5] The OIPC addressed the s. 25 issue on an expedited basis. Mediation did not resolve this matter, and the applicant asked for it to proceed to inquiry. A written inquiry process occurred with truncated timelines for the s. 25 issue only, and both parties provided evidence and submissions. This inquiry does not address the fee waiver issue or whether the applicant is entitled to the requested information for any reason other than s. 25.¹

ISSUE

[6] The issue in this inquiry is whether the Ministry is required by s. 25 of FIPPA to disclose the requested information without delay.

[7] **Burden of Proof** – The Ministry submits that Order 02-38 properly articulates the burden of proof concerning s. 25, which the applicant does not dispute.² This order states in part:

...s. 25(1) requires a public body to disclose information where certain facts exist, regardless of whether an access request has been made. Section 25(1) either applies or it does not and in a Part 5 inquiry it is ultimately up to the commissioner to decide, in all the circumstances and on all of the evidence, whether or not it applies to particular information. Again, where an applicant argues that s. 25(1) applies, it will be in the applicant’s interest, as a practical matter, to provide whatever evidence the

¹ For clarity, in the event that s. 25 does not apply, the applicant may still be entitled to some or all of the information in dispute pursuant to the other provisions of FIPPA. The Ministry acknowledges this in its submissions, stating that the issue of whether the applicant is otherwise entitled to information will be dealt with in processing the applicant’s request for records.

² Ministry’s initial submissions at para. 3.02; applicant’s submissions at paras. 24 and 25. The Ministry cites Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 37 to 39 as the proper interpretation.

applicant can that s. 25(1) applies. While there is no statutory burden on the public body to establish that s. 25(1) does *not* apply, it is obliged to respond to the commissioner's inquiry into the issue and it also has a practical incentive to assist with the s. 25(1) determination to the extent it can.³

[8] I adopt the above quote with respect to the burden of proof and apply it here.

DISCUSSION

[9] **Background** – On April 24, 2012, the slide occurred on the upper slopes of Cherry Ridge (the “Ridge”) above Shuswap River, approximately 10 km from Cherryville, BC. It went through private property – narrowly missing a house – and into Shuswap River. It occurred in an area where Tolko Forestry was logging.

[10] No one was physically injured in the slide.⁴ It caused damage to trees and the landscape of the slide area on the slope, as well as causing silting in Shuswap River for a few days.⁵ There is no evidence in this inquiry of harm to wildlife or lasting environmental harm as a result of the slide.

[11] The Ministry's Compliance and Enforcement Branch conducts investigations into alleged noncompliance with legislation such as the *Forest and Range Practices Act* and the *Forest Practices Code of British Columbia Act*. It also takes enforcement action under those Acts, resulting in administrative and quasi-criminal hearings.⁶

[12] The Ministry's Compliance and Enforcement Branch investigated the slide. In support of its investigation, a Ministry geomorphologist and a Ministry geotechnical engineer visited the slide site in May 2012 to collect data. Based on their findings, they completed a report containing their opinions (the “Report”).

[13] The Ministry has ongoing enforcement proceedings against Tolko and the previous licensee for the slide area (the “licensees”) in relation to the slide. A hearing is scheduled for the end of June 2015.⁷

[14] The applicant lives near the location of the slide. He states that local residents were not adequately consulted prior to the logging that caused the slide. Prior to the logging, local residents expressed their concerns to Tolko at community meetings that logging in that location may cause a landslide.

³ Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 39

⁴ I note that both the applicant and a Registered Forestry Technician opine that the slide could have resulted in the loss of life.

⁵ Affidavit of the applicant at paras. 14 and 15, and video footage provided by the applicant.

⁶ Affidavit of a Ministry Compliance and Enforcement Officer at para. 5.

⁷ Affidavit of a Ministry Compliance and Enforcement Officer at para. 23.

Residents requested technical reports from Tolko, but were told by Tolko experts to not worry.⁸ The applicant believes the slide was caused by Tolko's failure to uphold "the principles of stewardship"⁹ and its failure to listen to the concerns of residents. He also points to the naturally steep, vertical funnel shape of the slope where the slide occurred.

[15] The applicant says that the slide has affected his sense of safety, since it came so close to his house. He is concerned for his own and his neighbours' safety, and states that the slide has negatively impacted property values. The applicant believes the Report will let him understand why the slide occurred, and help with preventing a future landslide.

[16] Another forestry company, B.C. Timbers Sales ("BCTS"), is now road building and logging on the other side of the Ridge, approximately 7.5 km from the location of the slide. The applicant says that Cherryville residents are once again not being properly consulted, and he is concerned about the prospect of another landslide. If a new landslide were to occur, it would not be on private property because there is no private property below the logging, but it may block a nearby river and that could result in damage.

[17] There is a history of landslides in the area, both on the side of the Ridge where the 2012 slide occurred and on the side of the Ridge where BCTS is road building and logging.¹⁰

[18] **Record in Dispute** – The only record in dispute is the Report. The purpose of this Report was to assist the Ministry's Compliance and Enforcement Branch investigation into the slide.¹¹

[19] **Section 25** – Section 25 of FIPPA requires a public body to disclose information, even if other provisions in FIPPA would otherwise require or authorize it to refuse to disclose the information.¹² Further, if s. 25 applies, the information must be disclosed "without delay" rather than within the usual timeframe for a response that is prescribed by FIPPA.¹³ Subsection 25(1) states:

- (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

⁸ Affidavit of the applicant at para. 10.

⁹ Affidavit of the applicant at para. 12.

¹⁰ Affidavit of the Registered Forestry Technician at paras. 7 to 11.

¹¹ Affidavit of the Ministry geomorphologist at para. 10.

¹² Section 25(2) states that s. 25(1) applies despite any other provision of FIPPA.

¹³ Section 7 of FIPPA relates to time limits for public bodies to respond to an access request.

- (b) the disclosure of which is, for any other reason, clearly in the public interest.

[20] For both ss. 25(1)(a) and (b), previous orders have stated that s. 25(1) requires an urgent and compelling need for disclosure before it is triggered, due to the use of the words “without delay” in s. 25.¹⁴

[21] The applicant acknowledges this interpretation of s. 25 in previous orders, but he submits that it is unduly restrictive to interpret the phrase “without delay” to mean that temporal urgency is required before either ss. 25(1)(a) or (b) can apply. The Ministry submits that orders have consistently found that s. 25 requires an element of temporal urgency, and the applicant's argument should be rejected here for the same reasons as in Order 02-38.¹⁵

[22] While the parties provided able submissions on this point, because of my findings that follow it is not necessary for me to decide whether the words “without delay” require an element of temporal urgency under ss. 25(1)(a) and (b). Therefore, I will not address this issue.

Section 25(1)(a)

[23] For s. 25(1)(a) to apply, the information must be “about a risk of significant harm to the environment or to the health or safety of the public or a group of people”. As stated in Order 02-38:

...The circumstances of each case will necessarily drive the determination, but information “about” a risk of significant harm to the environment or to the health or safety of the public or a group of people may include, but will not necessarily be limited to:

- 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,
- information that allows the public to take or understand action necessary or possible to meet the risk or mitigate or avoid harm.¹⁶

[24] The applicant makes multiple submissions with respect to harm. Some relate to past and existing harms resulting from the slide, while others relate to future potential harms.

¹⁴ Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 53.

¹⁵ Ibid.

¹⁶ Ibid at para. 56.

[25] The applicant suggests that s. 25(1)(a) requires disclosure even when the harm has already occurred, and he describes these past harms as a “realized risk”. He submits that transparency and accountability regarding the slide may be necessary to allow individuals and communities to process and move beyond those past harms.¹⁷ He states that there is psychological harm to him and others in his community because they live in a community where landslides are likely to occur from time to time, and there has been no official explanation as to the cause of the slide. In his view, if the Report discloses that the slide occurred due to poor logging practices and not fundamental issues related to the stability of the Ridge, then its release may go some way to reducing his concerns. He also submits that it would help his property value, which he says has decreased as a result of the slide.

[26] With respect to future potential slides, the applicant submits that disclosure of the Report may provide Cherryville residents with information that can be used to mitigate future landslide risks, such as risks associated with the new BCTS logging that is taking place. He further submits that disclosure may help avert future risks because the information could be used to assist a broader study that the Cherry Ridge Management Committee is seeking to conduct regarding landslides, slope stability and water quality issues on the Ridge.¹⁸

[27] The Ministry submits that s. 25 only applies in the clearest and most serious of situations, and that this is not one of those cases. It emphasizes that information must be about a significant risk of serious harm for s. 25(1)(a) to apply. It submits that while there may be some risk of harm in this case, in the sense that a landslide could potentially occur in any area, the mere possibility of something occurring is not sufficient to determine that there is a significant risk of serious harm. It states the evidence shows that there is no significant risk. Moreover, it submits the evidence shows that any harm that could occur does not meet the required threshold for s. 25 to apply. On the issue of psychological harm, it submits that the level of psychological harm here does not reach the required threshold for s. 25 to apply. For the slide site, it submits that the licensees have advised the Ministry that remediation work has been completed in the slide area. As for the BCTS logging site and future sites, it says the Report does not disclose the existence of any risk, let alone a serious risk of significant harm.

¹⁷ Applicant’s submissions at para. 45.

¹⁸ The Cherry Ridge Management Committee is a society that is attempting to ensure that the Ridge is sustainably and responsibly managed. It has requested funding from local government to conduct a study regarding the Ridge. This study is intended to include a review of the available reports about landslides that have occurred on the Ridge: affidavit of the Registered Forestry Technician at para. 22.

Analysis - s. 25(1)(a)

[28] The modern approach to statutory interpretation requires the words of legislation to be read in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of the legislature.¹⁹

[29] Section 25(1)(a) relates to “information about a risk of significant harm”. Given both the plain meaning of these words and the context of s. 25 as a provision that overrides all other provisions in FIPPA, there is little doubt that s. 25 sets a high threshold that is only intended to apply in serious situations. The potential harm must be significant, and the information about a risk of significant harm should be viewed in the totality of the circumstances.

[30] The applicant submits that s. 25(1)(a) applies to both past and future harms because there can be a need for transparency and accountability concerning past harms, and disclosure may be necessary to allow individuals to process and move beyond those past harms. My understanding of the Ministry’s position is that s. 25(1)(a) only applies to future potential harms.

[31] In my view, s. 25(1)(a) only refers to future harms because the section refers to a *risk* of significant harm. The grammatical and ordinary meaning of the word “risk” contained in s. 25(1)(a) is something that may or may not occur.²⁰ It refers to future events, not past events. Therefore, information pertaining solely to past harms would not fall under s. 25(1)(a), since it is not about a risk. To the extent that the Report information relates to past harms, I find that s. 25(1)(a) does not apply. In my view, information regarding past harm or events is more appropriately considered under s. 25(1)(b).

[32] The applicant also submits that disclosure of the Report may prevent the significant harm of a future landslide. He believes that disclosure may help prevent a landslide at the BCTS site, and also that the Cherry Ridge Management Committee would use the Report information as part of a study about Ridge stability (with this research possibly leading to the prevention of future landslides on the Ridge). He also submits that he (and others) will continue to suffer ongoing psychological distress until he knows the cause(s) of the slide and whether another slide is likely to occur.

¹⁹ *John Doe v. Ontario (Minister of Finance)*, 2014 SCC 36 at para. 18 citing (R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 1 and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

²⁰ For example, *Webster’s New World College Dictionary* defines the word “risk”, in part, as: “the chance of injury, damage, or loss; dangerous chance; hazard...”: *Webster’s New World College Dictionary*, 5th ed., s.v. “risk”.

[33] It is important to emphasize here that the statutory basis for my inquiry is whether the Report discloses a risk of significant harm. I have reviewed the information in the Report in that light, and find it does not do so.

[34] The applicant submits that the Report may disclose landslide risks for the BCTS site because the slide and BCTS sites are similar. However, the Report information is about the cause(s) of the 2012 slide, not logging in relation to the BCTS site. Based on the materials before me, including the contents of the Report and *in camera* materials about why the Report information does not disclose a risk of significant harm, I find that the Report is not about a risk of significant harm to the environment or to the health or safety of the public or a group of people regarding the BCTS site.

[35] The applicant's argument that the Report might be useful for research purposes that could then help prevent future landslides also does not fall under s. 25(1)(a). The obligation of a public body to disclose information under s. 25(1)(a) is based on the information disclosing a risk of significant harm, not on its potential usefulness for research.

[26] Further, while I appreciate the psychological distress the applicant feels due to the slide, s. 25(1)(a) is an objective test as to whether something in the Report discloses a risk to the health of the public or a group of people. The Report does not contain such information, and for that reason I reject the applicant's argument.

[37] Therefore, for the above reasons, I find that the information in the Report is not about a risk of significant harm to the environment or to the health or safety of the public or a group of people, and that s. 25(1)(a) does not apply.

Section 25(1)(b)

[38] Section 25(1)(b) relates to the disclosure of information that is *clearly* in the public interest. Previous orders have explained this as follows:

...the duty under section 25 only exists in the clearest and most serious of situations. A disclosure must be, not just arguably in the public interest, but *clearly* (i.e., unmistakably) in the public interest...²¹

[39] Further, in deciding whether disclosure is in the clearly public interest, former Commissioner Loukidelis stated that:

...consideration must also be given to whether the information in issue contributes, in a substantive way, to the body of information that is already

²¹ Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 45 citing Order No. 165-1997, [1997] B.C.I.P.C.D. No. 22.

available to enable or facilitate effective use of various means of expressing public opinion and making political choices.²²

[40] The Ministry submits that disclosure of the information in the Report would not contribute in a substantial way to enable or facilitate the various means of expressing public opinion and making political choices. It states that the information does not further the education of, or the debate among, the public on a topical issue, either with respect to the slide or BCTS sites. It further states that disclosure is not necessary for the purpose of holding the licensees accountable, since there are ongoing proceedings against them that will lead to penalties if they contravened the law. The Ministry submits that, in fact, disclosure prior to the completion of the proceedings would be contrary to the public interest because it could affect the proceedings or have an undue negative effect on the reputations of the licensees prior to a decision. It further says that if disclosure causes the proceedings to be compromised, then the Ministry may not be able to hold the licensees accountable, to the extent they ought to be, for their past practices.

[41] The applicant submits that he has a very real and legitimate concern about the health and safety of the members of his community. He submits that there is a public interest for transparency in this case in terms of providing the community with an understanding of what happened with the slide, particularly while new logging is underway in an area that bears a resemblance to the slide site. In response to the Ministry's assertion that disclosure may interfere with the proceedings against licensees, the applicant submits it is not at all clear from the evidence or the submissions how the proceedings would be affected by releasing the information.

Analysis – s. 25(1)(b)

[42] For the reasons that follow, I find that while disclosure would benefit the public, it does not meet the required threshold in s. 25(1)(b) of being *clearly* in the public interest.

[43] There are a number of factors supporting the applicant's position that disclosure is in the public interest. The applicant and others live at the bottom of the Ridge, a location where there is a history of landslides. Prior to logging on the Ridge above the applicant's property, the applicant and others informed the logging company of their concerns, and the logging company told them not to worry. Logging then commenced and there was a landslide near homes. The applicant's evidence is that he now has concerns for himself and others about the possibility of a future slide.

²² Order 02-38, 2002 CanLII 42472 at paras. 56 and 66.

[44] In these circumstances, the group of people who live at the base of the Ridge – and to a lesser degree the public in general – have an interest in information about the reason(s) for the slide.²³ Understandably, the applicant is concerned because the slide went past his neighbour's house, and he does not know why the slide occurred or the likelihood of another landslide occurring. In my view, it is in the public interest for the group of people who live at the base of the Ridge to receive this information, so they have the opportunity to either take the appropriate action(s) or for the information to allay their anxieties and concerns about a similar incident in the future.

[45] The applicant also submits that disclosing the information in the Report could be used to help prevent future landslides on the Ridge, both for the current BCTS logging operations and in the future generally because it may assist in a Cherry Ridge Management Committee study of slope stability and water quality issues on the Ridge. The objective for this study is to have a comprehensive look at available data and expert opinions on landslides to better understand the stability of the Ridge, and to address community concerns with respect to logging.²⁴

[46] In my view, the public interest in disclosure of the Report as it relates to BCTS' logging operations is not strong because the Report is not about the BCTS site. Further, even if I were to accept that the slide and BCTS sites are similar and that the Report is applicable to the BCTS site, there is no private property below the BCTS site, so disclosing the Report information would not serve the same purpose of providing peace of mind to residents living below the logging area like it would for the slide site. Moreover, the Ministry provided expert evidence from the geomorphologist who drafted the Report, in which he opines that BCTS will minimize its risk of landslides by following the recommendations in the existing professional design plans that are guiding BCTS' operations. Therefore, this is not a situation where disclosure of the Report would disclose information about landslide risks that are not already accounted for in BCTS' operations plans.²⁵

[47] As for the applicant's argument regarding the Cherry Ridge Management Committee using the Report to conduct research, on the facts of this case I find that the possibility that the Report information may be useful for future research purposes is not a significant factor with respect to s. 25(1)(b). In saying this, I am mindful that the reasons for invoking s. 25 must be of sufficient gravity to override all other provisions of FIPPA.

[48] The Ministry submits that the disclosure of Report information may lead to outcomes that are not in the public interest. In particular, proceedings against

²³ Assuming that this information is not already publicly known.

²⁴ Affidavit of the Registered Forestry Technician at para. 22.

²⁵ Affidavit of the Ministry geomorphologist at paras. 11 to 14.

the licensees are nearing a hearing, and the Ministry believes that disclosing the Report prior to the completion of the proceedings against the licensees could negatively effect, compromise or bias those proceedings. The Ministry also submits that disclosure could have an undue negative effect on the reputations of the licensees prior to a decision being made.

[49] Based on the materials before me, I find that it is possible that disclosing information in the Report would negatively impact the proceedings. The Report contains untested expert opinions as to the reason(s) for the slide that the licensees may take exception to being publicly disclosed, and there is a risk that publicly disclosing the Report before the hearing commences may negatively impact the proceedings in some way. In particular, the proceedings against the licensees are scheduled to commence this month, which increases the likelihood that they will be adjourned if publicly disclosing information in the Report gives rise to any new issues. Therefore, I find there is a risk that the proceedings may be negatively impacted by the disclosure of information in the Report.

[50] At the time of this inquiry, proceedings against the licensees were scheduled to commence in approximately one month, and disclosure may negatively affect the proceedings. Further, the reason(s) for the slide that are alleged in the Report will presumably soon become publicly available during the proceeding.²⁶ In my view, these factors weigh against disclosure of the Report information under s. 25 of FIPPA.

[51] The notion of what is clearly in the public interest is contextual. The slide occurred in April 2012. For three years, the applicant and others have had the worry and uncertainty of living at the base of the Ridge without knowing why the slide occurred. However, the applicant's request for records was not until more than two and a half years after the slide, and nearly two years after he learned of the existence of the Report. Without concluding that the Ministry had a duty to disclose the Report upon its completion in 2012, in my view there was a stronger public interest in disclosing the reason(s) for the slide in 2012 than there is now.²⁷ Three years have passed since the slide occurred, and in my view the public interest in disclosure of this information has decreased as time has passed and remediation work has been completed around the slide site.²⁸

[52] In summary, given the passage of time and the possible ramifications of disclosing the Report given the impending legal proceedings described above,

²⁶ I presume that the open court principle, which is also increasingly being seen to apply to administrative tribunals, applies to the Ministry's proceedings against the licensees.

²⁷ For clarity, this statement is not intended to suggest that the Ministry was required to disclose the Report in 2012 under s. 25 of FIPPA or to otherwise be critical of the Ministry in any way. The circumstances as they existed in 2012 are not before me in this inquiry.

²⁸ I note that remediation work has been done within the logging cutblock, but not below the cutblock (which is not accessible by machine) where the slide occurred or to the watercourse below: affidavit of the Registered Forestry Technician's at para. 15.

I find that s. 25(1)(b) of FIPPA does not apply to any of the information contained in the Report because disclosure is not *clearly* in the public interest.

CONCLUSION

[53] For the reasons given above, under s. 58 of FIPPA, I confirm that s. 25 does not require the Ministry to disclose information in the Report to the applicant.

June 25, 2015

ORIGINAL SIGNED BY

Ross Alexander, Adjudicator

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