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# Office of the Information and Privacy Commissioner
# Province of British Columbia
# Order No. 311-1999
# June 18, 1999

**INQUIRY RE: A decision by the Ministry of Environment, Lands and Parks to disclose reports listed on its Contaminated Site Registry that pertain to a decommissioned Petro Canada service station**

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## 1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on May 17, 1999 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision by the Ministry of Environment, Lands and Parks (the Ministry) to disclose reports listed on its contaminated site registry that pertain to a decommissioned Petro Canada service station.

## 2. Documentation of the inquiry process

On November 5, 1998 the applicant submitted a request to the Ministry of Environment, Lands and Parks for specific reports.

On November 24, 1998 the Ministry notified Petro Canada that it had received a request for the reports. It requested representations on whether disclosure of the reports would harm Petro Canada's business interests. On December 16, 1998 the latter responded to the Ministry's notice, objecting to release of the reports it had submitted to the Ministry.

On January 5, 1999 the Ministry informed Petro Canada that it had decided to release the reports to the applicant because it did not think that the company's representations provided sufficient evidence of harm under section 21 of the Act.

On January 25, 1999 Petro Canada requested a review of the Ministry's decision to release the reports to the applicant. The ninety-day review period ended on April 26, 1999.

On April 7, 1999, the parties agreed to an extension of the ninety-day time period to May 17, 1999. The Office sent the Notice of Written Inquiry to the parties on April 23, 1999, setting the inquiry for May 17, 1999.

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

The issue in this inquiry is whether the Ministry is required, under section 21 of the Act, to refuse to disclose the records requested by the applicant.

The relevant parts of section 21 are as follows:

***Disclosure harmful to business interests of a third party***

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets defined in the schedule of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

…

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

....

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(3)(b), at an inquiry into a decision of a public body to give an applicant access to all or part of a record containing non-personal information that relates to a third party, it is up to the third party, in this case Petro Canada, to prove that the applicant has no right of access to the record or part of the record.

## 4. Objections

Petro Canada has raised a jurisdictional objection concerning the Ministry's decision. Its submission on this issue is as follows:

> Petro Canada submits that Susan Butler [Manager of Information and Privacy for the Ministry of Environment, Lands and Parks] has not been delegated authority to make the decision contained within Section 24(1) of the Act by virtue of a lawful delegation under Section 66 and therefore no decision has yet been made by a head, and consequently the Ministry should be ordered to consider the material received by the Ministry to date and to make a decision in compliance with the Act by a person lawfully authorized to do so.

The instrument of delegation, which was filed in this inquiry, delegates the "powers and duties set out in Schedule A attached." The attachment is a "Delegation Matrix" which sets out the various individuals who may exercise delegated authority under section 66 of the Act.

Petro Canada contends that the instrument is an improper delegation because (a) the attachment is not identified as Schedule "A" at the top; and (b) the attachment has not been signed by the head of the public body although there is a space for a signature. Petro Canada also contends that the attachment does not confer the power of decision under section 24 of the Act, only the power to notify the parties of a decision, based on the wording of the Delegation Matrix.

I am satisfied on the basis of the substantial evidence filed by the Ministry that the attachment forms part of the instrument of delegation. The absence of the words "Schedule A" at the top of the attachment does not render the delegation unlawful; nor is it necessary for the head of the public body to sign the attachment in order to effect a proper delegation. Similarly, there is no merit to the argument that the instrument of delegation does not confer authority to make a decision under section 24 of the Act. I accept that the instrument of delegation intended to delegate to the Ministry's Manager of Information and Privacy all of the powers and duties under section 24 of the Act.

In summary, I accept that the delegation of authority to Susan Butler is valid. It follows that Ms. Butler had the requisite authority to render the decision of the Ministry under section 24 of the Act.

## 5. The records in dispute

The records in dispute are three reports pertaining to a decommissioned service station which were submitted by Petro Canada to the Ministry and subsequently listed on its contaminated site registry. The site at issue ceased being used as a service station in November 1994. The reports were prepared in 1995 by consultants retained by Petro Canada and submitted to the Ministry.

## 6. The applicant's case

A peculiarity of the present inquiry is that the applicant for information about the service station site is also the owner of the property, which he had operated (with a

partner) for a number of years before leasing the site to Petro Canada (which has now left the site). The applicant is "trying to establish what needs to be done to lease the property to another individual."

The applicant claims that the site was not in operating condition when Petro Canada left it in 1994: "Banks and lenders will not loan money against the site without a clean bill of Health, and I have been unable to get the reports which would tell us what condition the property is in." He does not want to go to the additional expense of commissioning a new report, since (he claims) the data already exist in the records that he is requesting under the Act:

> I would like to have copies of the Reports submitted by Petro Canada to help establish levels of contamination prior to the new lease, so that the new Lessee will be responsible for any further contamination in the event a cleanup is required in the future. I feel that as owners of the property it is only right that this public document be made available to us.

The applicant also pointed out that during his company's years of operation of the service station, he had no control over how much fuel was stored in the tanks on the site, since the oil companies, including Petro Canada, controlled deliveries and, indeed, used the tanks on the site to store surplus fuel that they did not want to transport back to a terminal.

The applicant also believed that a site clean-up conducted by Petro Canada shortly after it entered into a lease with the applicant (in 1988) "had cleaned up the problems they had created, and that the site would now be clean." (Reply Submission of the Applicant) He now needs to see the reports that were created in 1995 and sent to the Ministry:

> As owners of the property since 1969, I think we should be notified by Petro Canada of any changes they have made to the property, including results of the first cleanup, installation of different tanks, and any further pollution of the site.... I would ask that these reports be released to us so we can get on with our business without further problems from this Company who took our once thriving business, and ran it into the ground, closing the station, and trying to prevent re-opening with pollution concerns raised by these reports, as yet not seen by us.

The applicant states that there is no legal action currently underway with Petro Canada and he is not threatening Petro Canada with legal action.

## 7. The Ministry of Environment, Lands and Parks' case

The Ministry decided to disclose the records in dispute after receiving written submissions from the third party opposing disclosure. The Ministry subsequently informed the third party that there was not "sufficient evidence of harm under

section 21(1)(c) to justify withholding the requested records." (Submission of the Ministry, paragraph 1.07)

The Ministry accepts that the records in dispute meet the first two parts of the three-part test set out under section 21 of the Act. But, with respect to the third part, it submits "that the information provided to it by the Third Party to date is not sufficient to demonstrate that the disclosure of the records in dispute would meet this part of the test." (Submission of the Ministry, paragraphs 5.03 to 5.05)

## 8. Petro Canada's case as the third party

Petro Canada stresses that the reports contain the results of environmental testing which were not paid for, or contributed to, by a public body. It submits that the applicant "has access to the property and to any information which could be derived from the property by his own means." (Submission of Petro Canada, p. 5)

Petro Canada contends that the owner of the property and "any other parties who are financially interested in this property" are more likely to pay a part of the cost of obtaining these reports, or contribute to the cost of these reports, if they are not provided free access. The free distribution of these reports will deprive Petro Canada of a financial and negotiation advantage.

Petro Canada also points out that the professionals who prepare these reports take steps to limit the use and dissemination of their work so as to minimize their potential liability and errors and omissions insurance costs.

Petro Canada fears litigation on the part of the applicant claiming that it is responsible for contamination on a site that has been used as a service station since at least 1958:

> ... any conclusions, plans or speculations about remedial methods, scope and costs [in the records in dispute] constitute commercial information of Petro Canada prepared both in contemplation of the litigation and to assist in the negotiations over the remediation of the site and to later assist in the remediation of the site, if conducted by Petro Canada. (Submission of Petro Canada, pp. 6-7)

Petro Canada submits that its negotiations with the applicant and his representatives to settle these matters have, to date, been unsuccessful.

I will present below the submissions of the third party on section 21(1)(c), since this branch of the test is the only matter, under the Act, at issue among the parties.

## 9. Discussion

### The Contaminated Sites Registry of the Ministry

Since my earlier Orders on access to information about contaminated sites, the Ministry has established a site registry to record documentation of the cleanup process at a site and to provide public access to information in the registry. However, the records in dispute in this inquiry are only *listed* on the site registry, so access to them has to be determined under the Act. (Reply Submission of the Ministry, paragraphs 11, 13) I regard the decision of the Ministry to establish a site registry as an important process for determining how information about contaminated sites should be made available to the interested public, including owners of property. Such routine disclosure of information is worthy of emulation by all public bodies.

***Section 21: Disclosure harmful to the business interests of a third party***

Petro Canada submits that disclosure of the information in dispute could reasonably be expected to significantly harm its negotiating position, if the information is disclosed without charge. (Submission of Petro Canada, p. 11)

Petro Canada submits that the facts and decisions in Order No. 130-1996, November 12, 1996, and Order No. 246-1998, July 9, 1998, are relevant and helpful in the present inquiry. It relies on Order No. 130-1996 to advance the argument that the applicant could obtain his own environmental testing results, and that he is attempting to obtain disclosure of existing reports that he could not obtain through litigation. Petro Canada also submits that Order No. 246-1998 establishes that evidence of ongoing negotiations results in a reasonable expectation that disclosure of the records would interfere significantly with the negotiating position of the parties. In the particular circumstances of that decision, I was of the view that the ongoing nature of the negotiations indicated litigation if the negotiations were unsuccessful.

The present inquiry, Petro Canada submits, should be "properly characterized as a private dispute between the applicant and the third party...." (Submission of Petro Canada, pp. 13-14)

In its reply submission, the Ministry makes the telling point that the third party has not "provided evidence as to the extent of any potential financial harm to it in the event that the records are disclosed." (Reply Submission of the Ministry, para. 17) In its reply submission, Petro Canada simply states its position as follows:

> ...the release of these reports will constitute the loss of valuable information to Petro Canada which has commercial value, and will also impair the negotiation position of Petro Canada with [the applicant].

The burden lies on Petro Canada to demonstrate that disclosure of the information could reasonably be expected to harm significantly its competitive position or interfere significantly with its negotiating position. The language of section 21(1)(c)(i) speaks of harming "significantly" the competitive position or interfering "significantly" with the third party's negotiating position. Section 21(1)(c)(iii) stipulates a threshold of "undue"

financial loss to the third party or "undue" financial gain to any person or organization. The evidence that I have reviewed does not establish this threshold of harm.

It is not sufficient merely to assert that disclosure could reasonably be expected to cause significant harm or interference with a negotiating position. The third party must adduce some evidence concerning the nature and magnitude of the harm. Petro Canada contends that disclosure of the records under the Act will deprive it of the opportunity to sell the information to the applicant or to any other person with a financial interest in the property. That may be so, but without evidence concerning the cost of the reports, or the value of the information, I cannot assess whether the loss of that opportunity would "harm significantly the competitive position or interfere significantly with" Petro Canada's negotiating position under section 21(1)(c)(i).

Petro Canada contends that it fully expects litigation in this matter. The applicant contends that he is not threatening legal action. As I have held in previous Orders, the absence of litigation is not necessarily determinative of the issue. (See Order No. 246-1998, July 9, 1998, p. 9) However, there is insufficient evidence to establish how disclosure would interfere significantly with the negotiating position of Petro Canada in the event of litigation. I share the Ministry's view that Petro Canada's concern regarding the recovery of a fee for disclosure undermines the assertion that disclosure of the information would cause significant harm.

Petro Canada accepts the position of the applicant that the site of the service station should be remediated before a new operator is put in place, "and certainly from the point of view of Petro Canada this is the only way that Petro Canada's further and future exposure on the site can be completely resolved." (Reply Submission of Petro Canada, p. 1) It appears to me that a step in this process is to enable the owner/applicant to gain access to the records in dispute, which report on the state of the site in 1994/95.

I find that the third party has not met its burden of proof under section 21 of the Act.

## 10. Order

I find that the Ministry of Environment, Lands and Parks was not required to withhold the record in dispute under section 21 of the Act. Under section 58(2)(a), I require the Ministry to give the applicant access to the record.

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David H. Flaherty
Commissioner

June 18, 1999