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

Order 01-13

MINISTRY OF ENVIRONMENT, LANDS AND PARKS

David Loukidelis, Information and Privacy Commissioner
April 10, 2001

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Summary: Applicant requested information relating to surveys of First Nations moose harvesting, in two regions of British Columbia, in each of three years. Ministry provided some data, but refused to disclose numbers of moose killed by aboriginal persons in Region 6 in each of the three years. The Ministry's evidence clearly established that all participating First Nations took part in the survey only on the express, repeated basis that all data would be kept in confidence. The evidence also established that the data had been collected in each First Nation by representatives of the First Nation's government and then supplied to the Ministry's survey contractor. Disclosure of the disputed information could reasonably be expected to harm the British Columbia's government's conduct of relations with the participating aboriginal governments and could reasonably be expected to reveal information received in confidence from those aboriginal governments. The Ministry's head properly considered public interest factors in deciding not to disclose the information.

Key Words: intergovernmental relations – aboriginal government – treaty negotiations – information received in confidence.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 16(1)(a), (b) and (c).

Authorities Considered: B.C.: Order No. 14-1994, [1994] B.C.I.P.C.D. No. 17; Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44.

1.0 INTRODUCTION

[1] This case arises out of an access to information request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the Ministry of Environment, Lands and Parks ("Ministry") relating to the harvesting of moose by First Nations. The request, which was framed as a series of questions, sought details of the Ministry's

surveys, in each of 1996, 1997 and 1998, of First Nations moose harvest in Ministry Regions 6 and 7.

[2] The applicant wanted to know which First Nations in those regions had been contacted for the survey and which of them provided information. He also wanted to know how the harvest information was obtained, e.g., through personal contact, letters, meetings with the various First Nations or other methods. Last, he asked that the Ministry "[p]rovide results of above survey for 1996, 1997, 1998. Specifically, number of kills" by First Nations. In its February 9, 2000 response to the applicant, the Ministry answered all of the applicant's questions but the last. Although it gave him the total number of moose deaths, from all reported sources of mortality, it declined to provide him with the number of moose killed by all First Nations or the number of moose killed by each First Nation. It cited s. 16 of the Act in doing so. The Ministry told the applicant that no surveys had been carried out in Region 7 for those years. The Ministry provided the applicant with an explanation – in the form of an e-mail from a knowledgeable Ministry employee – of why the severed information was being withheld under s. 16.

[3] This prompted the applicant to request a review, under s. 53 of the Act, of the Ministry's decision. Ultimately, because the matter did not settle in mediation by this Office, I held a written inquiry under s. 56 of the Act.

2.0 ISSUE

[4] The only issue in this inquiry is whether the Ministry is authorized by s. 16 of the Act to refuse to disclose the aggregate number of moose killed by all First Nations during 1996, 1997 and 1998 in Region 6. The Ministry relies on ss. 16(1)(a), (b) and (c). Under s. 57(1) of the Act, the Ministry bears the burden of establishing that it is authorized to withhold the disputed information.

[5] On p. 1 of his initial submission, the applicant seeks to expand the scope of his access to information request. Although he acknowledges there that it might not be permissible for him to do so "at this point in the process", he wishes to add a further question to his request, i.e., the number of hunters who participated in the survey. As the Ministry pointed out in its reply submission, it is not open to the applicant to expand the scope of his access to information request during this inquiry. The only issue that is properly before me, therefore, is the one just described.

3.0 DISCUSSION

[6] **3.1 Background to the Inquiry** – The Ministry's evidence and argument paint a detailed picture of the context within which the applicant's access request exists. Although I do not propose to recite here all of that detailed background, an outline of it is useful before addressing the s. 16 issue.

[7] The disputed information was generated as part of what is known as the Northwest Wildlife Harvest Data Survey ("Survey"). The Survey has been conducted since 1996, using Ministry funding from Common Land Information Base sources, in order to provide the Ministry with data summaries that can be used in its wildlife

management efforts in northwestern British Columbia. A contractor retained by the Ministry oversees and administers the Survey, although co-ordinators and interviewers selected by each First Nation actually collect the data respecting the First Nation's moose harvest. The First Nation provides the data to the Ministry's contractor. I discuss this aspect further below.

[8] The Survey also covers moose killed by non-aboriginal hunters (whether licensed or unlicensed), as well as estimates of the number of moose killed by collisions with vehicles and trains. The Ministry carries out the Survey in co-operation with the Ministry of Aboriginal Affairs. It is one of a number of projects co-sponsored by those ministries to collect regional wildlife harvest information in the northern and northwestern parts of the Skeena Region of British Columbia.

[9] Sean Sharpe, who is a biologist and the Skeena Wildlife Section Head for the Ministry, deposed at para. 5 of an affidavit he swore for the Ministry that the purpose of the Survey

> … is to assist the participating aboriginal communities in capacity-building for better management of their aboriginal hunting and to provide a more complete assessment of total harvest so that the management of wildlife populations can be tailored to better respond to conservation requirements. The Harvest Studies were designed to enable both aboriginal and non-aboriginal hunters to contribute a regionally integrated database about harvest, population and trends.

[10] He also deposed, at para. 6, that the Ministry's contractors work with the Northwest Wildlife Committee, which is "an advisory committee composed of aboriginal and other representatives (including BC Wildlife Federation, Guide Outfitters Association of BC) to develop and implement the objectives of the project."

[11] According to the Ministry, wildlife conservation efforts can only succeed if a sufficient number of female moose are left alive each year. In order for the Ministry to properly monitor wildlife populations, and to work with First Nations to achieve conservation goals in the long term, the Ministry requires information concerning the harvesting of wildlife by aboriginal peoples.

[12] **3.2 Information Received in Confidence** – Section 16(1) of the Act deals with the conduct of inter-governmental relations by the British Columbia government. It also addresses the conduct of negotiations respecting aboriginal self-government or treaties. The Ministry relies on all three aspects of s. 16(1) in this case. Section 16(1) reads as follows (ss. 16(2) & (3) are not relevant here):

> **Disclosure harmful to intergovernmental relations or negotiations**
>
> 16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:

(i) the government of Canada or a province of Canada;

(ii) the council of a municipality or the board of a regional district;

(iii) an aboriginal government;

(iv) the government of a foreign state;

(v) an international organization of states,

(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, or

(c) harm the conduct of negotiations relating to aboriginal self government or treaties.

[13] In light of my findings in relation to s. 16(1)(a) and s. 16(1)(b), it is not necessary for me to deal with s. 16(1)(c). I will deal first with the Ministry's case under s. 16(1)(b).

Survey Participants Are Aboriginal Governments

[14] Section 16(1)(b) applies only where disclosure of information could reasonably be expected to reveal information received in confidence from, in this case, an aboriginal government. In order to rely on this provision, the Ministry must establish that it received information in confidence and also that it received this information from an aboriginal government. Relying on Order No. 14-1994, [1994] B.C.I.P.C.D. No. 17, the Ministry argues that each of the First Nations that participates in the Survey is an "aboriginal government" within the meaning of the Act. Schedule 1 to the Act defines "aboriginal government" as meaning "an aboriginal organization exercising governmental functions". In Order No. 14-1994, my predecessor rejected the argument that the term "aboriginal government" is limited to bands or groups that have concluded self-government agreements or treaties. I agree that such a formulation is overly restrictive. At the very least, an "aboriginal government" includes a "band" as defined in the Indian Act (Canada). I am satisfied on the material before me that the First Nations involved in the Survey are aboriginal governments for the purposes of the Act.

[15] It remains to be seen whether the disputed information was "received in confidence" by the Ministry "from" each of the First Nations. I will deal first with the question of whether the information was received "from" aboriginal governments.

Receipt From Aboriginal Governments

[16] It is plain from the Ministry's evidence that, initially at least, many First Nations were reluctant to participate. In fact, only eight communities within the various First Nations participated in the 1996 Survey, while 22 communities were involved in the 1998 Survey. The participation rate increased because the Ministry agreed that each First Nation would, in effect, control the collection and dissemination of data.

[17] The affidavit sworn by Brenda Burghardt speaks to this issue. She is a principal of the contractor that has carried out the Survey for the Ministry. She deposed that the Ministry recognized early in the Survey's life that members of the various First Nations would only provide information to members of their own communities, not to representatives of the contractor or the Ministry. As a result, a Survey co-ordinator and one or more interviewers are engaged in each community. The interviewers obtain moose-kill information from individual aboriginal hunters.

[18] All contact between the Ministry's contractor and the various First Nations is between the relevant Chief Counsellor, Band manager or First Nation president. The community co-ordinators and interviewers are all selected and dispatched by the government of that First Nation. In some cases, Band offices select co-ordinators and interviewers, while in other cases the First Nation's treaty office or the Chief's office chooses the co-ordinators and interviewers. Co-ordinators and interviewers are selected by the aboriginal governments on the basis of their respected positions in the community, sometimes because of their status as hereditary chiefs. Each year, the Ministry's contractor sends a letter to each of the participating First Nations to initiate the Survey. The contractor then enters into a subcontract with the co-ordinator selected by the First Nation.

[19] The affidavit of Sean Sharpe also attests to this. He deposed that the Survey information was voluntarily supplied by the various aboriginal governments and was only "provided upon the government of the aboriginal community consenting to such collection" and disclosure (para. 22). He deposed that, before any survey information was collected, representatives of the various aboriginal governments were consulted, in order to determine whether they approved of the data collection. If the aboriginal government approved of the survey, it would provide the Ministry with the name of a contact, who would in turn provide the data to the contractor, as described in Brenda Burghardt's affidavit.

[20] Sean Sharpe's evidence is that the individuals who collect the data and provide it to the Ministry's contractor are representatives of the relevant aboriginal government. Brenda Burghardt's evidence is to the same effect. I am satisfied that, although the data-collectors in each community are paid by the Ministry's contractor, they are not acting as the Ministry's agents, for the purposes of s. 16(1)(b) in collecting the data. Each is, instead, the chosen representative of his or her First Nation. From the point of collection of the data onward, the data are within the control of the relevant aboriginal government, subject only to the terms on which data are disclosed to the Ministry's contractor and on which summaries for each community are disclosed in turn to the Ministry. I am satisfied that, in receiving data respecting each First Nation (including their member communities), the Ministry is receiving the data from an aboriginal government.

Receipt In Confidence

[21] In Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44, I articulated criteria to be used in determining whether information has been received by the British Columbia government, in confidence, from an entity described in s. 16(1)(a). In that case, I

expressed the view that there must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information before s. 16(1)(b) will apply. As I noted there, the legislative policy underlying this section is to promote and protect the free flow of information between governments, and their agencies, for the purposes of discharging their duties and functions.

[22] Applying the non-exhaustive criteria expressed in Order No. 331-1999, the Ministry argues that the disputed information was received in confidence for the following reasons:

> (a) A reasonable person would, under the circumstances, regard such information as confidential. This is information which would ordinarily be kept confidential by the supplier and the recipient;
>
> (b) The Information was supplied for a purpose wherein it would not be expected that it would be required to be disclosed or would be disclosed in the ordinary course;
>
> (c) There was an express understanding on the part of the Public Body and the aboriginal governments who participated in the Surveys that the Information was to be provided and received in confidence.
>
> (d) The Information supplied by the aboriginal governments was supplied voluntarily and there is no legal requirement for them to provide such information to the Public Body;
>
> (e) There was an express agreement between the Public Body and the aboriginal governments who participated in the Survey that the Information collected during the course of the Surveys would be treated as confidential by the Public Body.
>
> (f) The actions of the Public Body and the aboriginal governments who participated in the Surveys provide objective evidence that there is an expectation and concern for confidentiality.
>
> (g) The past practice of the Public Body is to treat similar types of information when received from aboriginal governments (i.e. other Survey Information) in a confidential manner.

[23] I do not agree with the Ministry that statements (a) or (b) have been proven in this case. I have, however, readily concluded that the disputed information from the Survey was, in the case of each of the participating First Nations, received by the Ministry "in confidence". There is ample evidence that explicit verbal and written assurances of confidentiality respecting the Survey data were given on many occasions to participant First Nations and prospective participants. I do not propose to recite that evidence here, other than to note that such assurances were given by Ministry representatives, by representatives of the Ministry of Aboriginal Affairs and by the Ministry's contractors. These assurances were given at various meetings, including meetings of the Northwest Wildlife Council. They also were given in Ministry correspondence with various First Nations.

[24] The methods by which the Survey is carried out also speak to the confidentiality of the data supply. By agreement between the Ministry and the various First Nations, the

Ministry's contractor only provides the Ministry with summaries of data – the Ministry does not see data that would identify individual hunters. The First Nations retain the raw data. Moreover, various First Nations are not permitted to see data on the harvest of moose by other First Nations. It is clear that the participating First Nations agreed to take part on the condition that the data would be received in confidence. It is equally clear that the Ministry has agreed to receive the data in confidence and to deal with it on that basis. For all of these reasons, I find that the disputed information was received in confidence by the Ministry.

[25] For the above reasons, I find that s. 16(1)(b) applies to the disputed information and that the Ministry is authorized to refuse to disclose it to the applicant.

[26] **3.3 Inter-Governmental Relations** – For reasons that I will state only briefly, I also find, under s. 16(1)(a), that disclosure of the disputed information could reasonably be expected to harm the British Columbia government's conduct of relations with the aboriginal governments that have participated in the Survey. It bears emphasis that this finding turns on the specific circumstances of this case.

[27] I have already described the nature and purpose of the Survey. The evidence leaves me in no doubt that the Ministry and the Ministry of Aboriginal Affairs have had to work hard to persuade the various First Nations to participate. It is apparent that the participating First Nations were, because of past events, reluctant to participate in the Survey. The Ministry has worked with these First Nations to assure them that their Survey participation will not come back to haunt them, at the treaty negotiation table or through conservation-based restrictions on aboriginal hunting rights. The assurances of confidentiality given by the Ministry and the various mechanisms put in place to ensure that not even the Ministry is aware of community-specific or individual-specific harvest data speak to the First Nations' concerns.

[28] According to the Ministry, disclosure of the disputed information could reasonably be expected to result in the participating First Nations refusing to provide any wildlife harvest information to British Columbia in the future and refusing to co-operate with British Columbia on wildlife management. The Ministry argues that disclosure of the information would be seen by the first Nations as a "breach of trust", because they would see it as evidence that British Columbia is not able to "protect from disclosure such confidential, government-to-government supplied information" (para. 4.26, initial submission). This is more properly a s. 16(1)(b) argument, not a s. 16(1)(a) harm argument. I also question whether it is appropriate to cast this as involving "breach of trust" in even an everyday sense of that term.

[29] The willingness of these First Nations to participate in the Survey is premised on the condition of confidentiality (which goes so far as to prevent the Ministry itself from seeing raw data). I am persuaded that, if the disputed information were disclosed, the disclosure – in this case, at least – could reasonably be expected to harm the conduct of relations between the British Columbia government and each of the participating aboriginal governments.

[30] This finding has everything to do with the circumstances of this case and does not have broader implications for s. 16(1)(a). There may well be cases where confidentiality is promised, but the element of information-receipt – which is necessary for the purposes of s. 16(1)(b) – is not present. It is far from certain that, just because confidentiality has been promised in relation to some dealings between the British Columbia government and an aboriginal government – or any other government or organization mentioned in s. 16(1)(a) – disclosure of information could reasonably be expected to harm the conduct of relations between them. To be clear, s. 16(1)(a) is not triggered simply because confidentiality is agreed upon in relation to a matter and the disclosing government or organization might be upset by disclosure. The s. 16(1)(a) finding here is specific to the facts of this case.

[31] **3.4 Harm to Treaty & Other Negotiations** – In light of my findings on s. 16(1)(a) and s. 16(1)(b), I need not consider s. 16(1)(c). If it were necessary to do so, however, I would be inclined to find that the Ministry has – for reasons similar to those expressed in relation to s. 16(1)(b) – established a sufficient basis for its reliance on this exception. As with the Ministry's reliance on s. 16(1)(b), however, I should emphasize that, in other cases, an understanding or agreement for confidentiality will not necessarily suffice on its own to establish a s. 16(1)(c) claim.

[32] **3.5 Exercise of Discretion** – The Ministry submitted an affidavit sworn by Derek Thompson, Deputy Minister, in his capacity as the Ministry's head for the purposes of the Act. He deposed that, in deciding to withhold the disputed information under s. 16, he considered a variety of factors before deciding that he should not exercise his discretion in favour of disclosure. The factors that he considered, which are set out at para. 7 of his affidavit, show that he carefully considered whether he should exercise his discretion by disclosing the information, but decided that his discretion should be exercised to refuse disclosure.

4.0 CONCLUSION

[33] For the reasons given above, under s. 58(2)(b) of the Act, I confirm the decision of the Ministry under s. 16(1)(a) and s. 16(1)(b) of the Act to refuse to disclose the disputed information.

April 10, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia