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News Release

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Commissioner issues report about Mount Polley mine tailings pond breach and duty to proactively disclose information in the public interest

VICTORIA—B.C. Information and Privacy Commissioner Elizabeth Denham today issued an investigation report that examines whether government had a duty to release information relating to the failure of the Mount Polley mine tailings pond dam. The report also re-interprets a section of the *Freedom of Information and Protection of Privacy Act* (FIPPA) relating to public bodies' obligations to disclose information that is clearly in the public interest.

The Commissioner initiated an investigation in August 2014 after receiving complaints alleging government had failed in its duty to disclose information about a risk the tailings pond could breach, potentially causing significant harm to the environment and to the public. To investigate these complaints, the office reviewed all records related to the structural integrity or safety of the tailings pond from Jan. 1, 2009 through to Aug. 4, 2014, which was the day of the breach.

The Commissioner's investigation did not find any documents indicating that the Ministry of Energy and Mines or the Ministry of Environment had information describing a risk of significant harm to the environment, health or public safety, including any risk posed by design inadequacies related to the foundation of the dam – the root cause of the tailings pond breach as described by the government-appointed independent review panel – that it should have disclosed pursuant to s. 25(1)(a) of FIPPA.

However, the investigation did reveal two documented events that could have triggered a disclosure requirement – a tension crack described in a 2010 annual inspection report, and a “freeboard incident” where the water level in the tailings pond rose above that which was permitted by safety protocols. Upon review of all documents, and in consultation with an engineering expert, the Commissioner determined that these two events did not constitute a risk of significant harm to the environment, health or public safety that would have triggered disclosure requirements under s. 25(1)(a) of FIPPA.

With respect to the obligation to disclose information that is clearly in the public interest under section 25(1)(b), the Commissioner found that while there was a public interest in information about the Mount Polley mine tailings pond breach *after* the event occurred, the existing interpretation of this section – that there be a temporal urgency in the disclosure – was not met, and therefore the ministries were not compelled to disclose information about the tailings pond breach that was clearly in the public interest.

In this investigation report, Commissioner Denham also analyzed the existing interpretation of the “clearly in the public interest” test.

“In a prior report on section 25 I expressed the view that public interest disclosures should not require urgent circumstances; such a requirement effectively undermines the purposes of the legislation. My investigation of the Mount Polley mine tailings pond breach presented the opportunity to examine this issue in depth.

“With today’s report, I have concluded 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 FIPPA,” said Commissioner Denham.

In light of the re-interpretation of section 25(1)(b) presented in the investigation report, the Commissioner has recommended that the Ministries of Energy and Environment promptly and diligently consider what information, if any, must be disclosed in the public interest specific to the Mount Polley mine tailings pond breach.

“With the publication of this report, it is incumbent upon all public bodies to evaluate their policies for disclosure pursuant to s. 25(1)(b) of FIPPA, and to promptly re-evaluate whether they currently have information that should be proactively disclosed as clearly in the public interest as described in this report. This may include information that is currently the subject of an access to information request,” said Denham.

Investigation Report F15-02: Review of the Mount Polley mine tailings pond failure and public interest disclosure by public bodies is available at:
www.oipc.bc.ca/report/investigation-reports/

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