OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
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British Columbia

Order 01-36

MINISTRY OF WATER, LAND AND AIR PROTECTION

David Loukidelis, Information and Privacy Commissioner
August 8, 2001

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Summary: The third-party scrap tire recycler supplied the Ministry with a list containing names and addresses of scrap tire generators in the province. The list was used to generate another list and then send to those listed a letter about financial incentives to recycle tires. The applicant, who represents a competitor of the third party, sought access to the list. Ministry decided it was not required by s. 21(1) to withhold the list and the third party requested a review of that decision. Ministry is not required to refuse access under s. 21. The list is commercial information of the third party, but the third party did not establish that the information was supplied to the Ministry in confidence. Third party also did not show that disclosure could reasonably be expected to cause significant harm to its competitive position or negotiating position or that disclosure could reasonably be expected to result in undue financial loss or gain to anyone.

Key Words: trade secrets of a third party – supplied in confidence – undue financial loss or gain – competitive position – negotiating position – interfere significantly.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1)(a), (b), (c).

Authorities Considered: B.C.: Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 00-22, [2000] B.C.I.P.C.D. No. 25; Order 00-37, [2000] B.C.I.P.C.D. No. 40; Order 00-39, [2000] B.C.I.P.C.D. No. 42; Order 01-20 [2001] B.C.I.P.C.D. No. 21; Order 01-26, [2001] B.C.I.P.D. No. 27. **Ontario:** Order P-373, [1992] O.I.P.C. No. 173; Order P-561, [1993] O.I.P.C. No. 292.

Cases Considered: *Air Atonabee Ltd.* v. *Canada (Minister of Transport)*, [1989] F.C.J. No. 453 (T.D.); *Ontario (Workers' Compensation Board)* v. *Ontario (Information and Privacy Assistant Commissioner)* (1998), 164 D.L.R. (4th) 129.

1.0 INTRODUCTION

[1] This inquiry centres on a list containing the names and addresses of businesses and government bodies that generate scrap tires in British Columbia. The list came into the hands of the Ministry of Water, Land and Air Protection ("Ministry"), in connection with a scrap tire recycling program initiated by the Ministry in June of 1991, known as the Financial Incentives for Recycling Scrap Tires ("FIRST Program"). The FIRST Program operates on the basis of a $3 levy on the sale of each new tire in British Columbia. Tire retailers collect the levy and voluntarily take back scrap tires from consumers. Other sources of scrap tires for the FIRST Program include local government landfills and automobile salvage yards.

[2] The FIRST Program provides financial support for the transportation of scrap tires from generators anywhere in the province to scrap tire processors registered in the FIRST Program. The support takes the form of a transportation credit and processing and use credits. Scrap tire processors can only receive these credits if they are registered in the FIRST Program. Scrap tire transporters need not be registered, but must have entered into an arrangement under which a processor will accept tires from the transporter. The transporter is paid directly by the scrap tire processor.

[3] The Ministry contracted out the administration of the FIRST Program to the firm PricewaterhouseCoopers LLP ("PWC"). At some point, PWC asked the Ministry if it had a list of scrap tire generators that could be used for the FIRST Program. The Ministry had no such list. It appears that PWC learned that the third party in this inquiry, Western Rubber Products Ltd. ("Western Rubber"), had such a list and asked it to provide a copy for the FIRST Program. Western Rubber did so, supplying (it appears) both a list of scrap tire generators and a list of contacts. Western Rubber's list was used to create a list of tire generators. The list thus created is the record in dispute here. The overlap between Western Rubber's list and the disputed list is almost complete. Some postal codes had to be added to the Ministry's list and the names of two businesses, not found in Western Rubber's list, were added.

[4] On March 27, 2000 the applicant made an access request, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the Ministry for a "copy of the generators/retailers lists that the letter was sent out to". The letter referred to is the Ministry's March 13, 2000 letter to all "tire retailers" concerning the FIRST Program. Before the Ministry decided the matter, it notified Western Rubber, under s. 23 of the Act, and invited representations. In a May 31, 2000 letter to the Ministry, Western Rubber took the position that the list should not be disclosed. It is worth quoting from that letter at some length:

> The mailing list is proprietary. While all of the information contained in the list is in the public domain, it is not all together. The list was compiled at our expense by downloading some of the information from the internet and then adding the postal codes. This was quite a time consuming process. We do not believe a competitor should benefit. When the list was prepared, it was just a mailing list. However, it is more like a supplier list now as the vast majority of the people on the list now supply us with used tires.

> The mailing list was given to PWC on the strict understanding that it was for their sole use. A list was never provided to the Ministry although we were aware PWC would use the list in their capacity as FIRST program administrators. We had a reasonable expectation of privacy and confidentiality as we were supplying the list to a firm of Chartered Accountants.
>
> We do not see why any competitor should be given the list. Even if it is only to more effectively compete with us then it must do us harm. Quantifying the harm that could be caused is another question. If for example … [a named individual] of Target were to get the list he could do a mail out that would not necessarily be factually correct and this could seriously damage our relationship with our suppliers.
>
> There is a side issue. Mike Roberge at the STAC meeting on April 19th informed the Ministry they could release the list. This was in error and that was pointed out to the Ministry less than 24 hours later. A copy of our notification is attached. The fact that he gave permission to release the list in error does not affect what had transpired previously.

[5] The Ministry decided that it would give the applicant access to the list, specifically on the basis that sufficient evidence of harm had not been provided under s. 21(1)(c)(iii) of the Act.

[6] This decision prompted Western Rubber to seek a review, under s. 53 of the Act, of the Ministry's decision. Because mediation by this Office did not succeed in resolving the matter, I held a written inquiry under s. 56 of the Act.

[7] I note here that the applicant provided me with copies of pleadings in a court case involving the Ministry and the FIRST Program. I have not considered this material in this inquiry.

2.0 ISSUE

[8] The only issue in this case is whether the Ministry is required, by s. 21(1) of the Act, to refuse to disclose the list to the applicant. Under s. 57(3)(b) of the Act, Western Rubber must prove that the applicant has no right of access to the list.

3.0 DISCUSSION

[9] **3.1 Outline of Section 21** – Section 21(1) of the Act requires a public body to refuse to disclose to an applicant certain information of a third party that has been supplied to the public body in confidence and the disclosure of which could reasonably be expected to result in any of four kinds of harm specified in 21(1)(c). Section 21 reads as follows:

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

(i) trade secrets 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,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

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

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

(2) The head of a public body must refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

(3) Subsections (1) and (2) do not apply if

(a) the third party consents to the disclosure, or

(b) the information is in a record that is in the custody or control of the British Columbia Archives and Records Service or the archives of a public body and that has been in existence for 50 or more years.

[10] I will now consider whether Western Rubber has established that all three parts of the s. 21(1) test have been met.

[11] **3.2 Is This "Commercial Information"?** – Section 21(1) applies only if the disputed information qualifies as "trade secrets of a third party" or "commercial, financial, labour relations, scientific or technical information of a third party". The Ministry has conceded that the information contained in the list is Western Rubber's "commercial" information. The applicant has not conceded this point. For the reasons given below, I have decided that the information is "commercial information" of Western Rubber under s. 21(1)(a).

[12] As Western Rubber's submissions and s. 23 representations acknowledge, the disputed list consists of a compilation of publicly-available information. Western Rubber's evidence establishes that the names and addresses in the list were obtained from Internet sources and that postal codes for various addresses were derived from other Internet sources. Western Rubber does not argue that any skill, judgement or other original effort was applied in compiling this publicly-available information. It does say,

however, that it incurred expenses, and devoted staff time, to the exercise and that the value of those efforts is "roughly $5000".

[13] It also submits that what was compiled as a mailing and contact list is now a "relatively complete" list of its customers, although it does not say whether the list had that function or status at the time of its supply to the Ministry or at the time of the Ministry's decision on the applicant's access request. Western Rubber's s. 23 representations said that the list had become "more like a supplier list", as the "vast majority of the people on the list now supply us with used tires". Western Rubber argues that there "can be little dispute that, generally speaking, a current list of suppliers or clients is commercial information" (para. 12, initial submission). Further, it contends, Western Rubber is "a going business concern" and the fact that it "expended its own resources to assemble and develop" such a list demonstrates that "the information contained therein has some commercial value" (para. 12, initial submission). Last, Western Rubber says the fact that the applicant is a competitor of Western Rubber demonstrates that it is "information that has some commercial value" (para. 12, initial submission).

[14] It is not entirely clear from the material before me when the list was originally compiled by Western Rubber (nor is it clear when the list was given to PWC). At para. 3 of his affidavit, Peter Phillips, Western Rubber's comptroller, deposed that the list was compiled for the purpose of *developing* a "supplier/client base". Paragraph 6 of Peter Phillips' affidavit reads as follows:

> The List *now* represents a relatively complete and current list of all of Western Rubber's suppliers and clients. As such, Western Rubber has always treated the List as sensitive and confidential commercial information. [emphasis added]

[15] In other words, Western Rubber considers the list – at least at present – to be sensitive and confidential commercial information because it "now" represents a relatively complete and current list of Western Rubber's suppliers and clients. According to Peter Phillips' evidence, the disputed record "is a list of retailers to which the Ministry … sent a letter regarding financial incentives for scrap tires" (para. 2). Although he does not say when it was done, Western Rubber's employees "originally searched the Internet for the names and address of a number of companies that were likely to be scrap tire generators" (para. 4). Employees then found the postal codes associated with those addresses, again using the Internet or a postal code directory. All of this information was converted into a mailing list and a contact list.

[16] Again according to Peter Phillips, "the scrap tire generators on the [l]ist were contacted and visited by Western Rubber and their business was solicited" (para. 4). Phillips deposes that the list "now represents a relatively complete and current list of all Western Rubber's suppliers and clients". He did not specify how many of the listed generators are suppliers or clients of Western Rubber or how the list is incomplete. It is clear from his evidence, however, that the list and Western Rubber's clients or suppliers

are not co-extensive. Peter Phillips also asserts, at para. 13 of his affidavit, that Western Rubber's competitors "clearly intend to gain a competitive advantage" by "communicating directly with Western Rubber's suppliers/clients in an attempt to steal business away."

[17] Section 21(1)(a) distinguishes between a "trade secret", which is defined in the Act, and "commercial information", which is not defined. It is notable that s. 17(1)(b) refers to commercial information that "belongs to" a public body and that "has, or is reasonably likely to have, monetary value", but s. 21(1)(a) does not. In this light, I conclude that "commercial information" under s. 21(1)(a) of the Act is information that relates (by its specific nature, derivation or use) to a commercial enterprise and consider that – although it must, under s. 21(1)(a)(ii), be "of" a third party – it will not necessarily be proprietary in nature or have independent marketable value.

[18] I respectfully agree, therefore, with the conclusion reached in *Air Atonabee Ltd.* v. *Canada (Minister of Transport)*, [1989] F.C.J. No. 453 (T.D.). In that case, which dealt with the federal *Access to Information Act*, McKay J. decided that factors such as whether the information has independent monetary value or whether quantifiable economic loss will result from disclosure of the information are not incorporated into the definition of commercial information. Those factors are, in the case of our Act, addressed elsewhere in the Act's access to information scheme, in this case under s. 21(1)(a)(i) and s. 21(1)(c)(i) and (iii).

[19] In Order 00-39, [2000] B.C.I.P.C.D. No. 42, I accepted that wage rates and similar information in compilations prepared from public sources by the Greater Vancouver Regional District, for labour relations purposes, were financial or commercial information of various third-party businesses under s. 21(1)(a)(ii).

[20] In Order 01-20, [2001] B.C.I.P.C.D. No. 21, on the other hand, I found that a map of the University of British Columbia campus – which was attached to a schedule to a contract with the University and which showed the location of cold beverage vending machines on campus – was not a trade secret or financial, commercial, scientific or technical information under s. 21. At para. 134, I said the following:

> Vending machines are highly visible. They are intended to be highly visible, so as to advertise the products they contain and attract customers. One could go so far as to say the locations of vending machines constitutes consumer information.

[21] Further, in Order 01-26, [2001] B.C.I.P.D. No. 27, where I considered a request for a list of companies that had been the subject of complaints to the Financial Institutions Commission, I observed that, although business names have commercial value and are information pertaining to a commercial enterprise, it did not necessarily follow that the names were commercial information under s. 21(1)(a)(i). This observation is consistent with, for example, Ontario Order P-373, [1992] O.I.P.C. No. 173, in which the lists of names and addresses of employers subject to fines and levies by the Ontario Workers' Compensation Board were found not to be commercial, financial or labour relations information or a trade secret. This finding was upheld by the

Ontario Court of Appeal in *Ontario (Workers' Compensation Board)* v. *Ontario (Information and Privacy Assistant Commissioner)* (1998), 164 D.L.R. (4th) 129. My observation in Order 01-26 also reflected the fact that, although a business name relates to the commercial enterprise it identifies, in my view it strains logic to describe the name, in that context, as "commercial information" of that enterprise when it is a public (and legal) identifier and is simply being used by others to refer to the enterprise.

[22] In this case, Western Rubber claims that the names and addresses of other businesses are the commercial information of Western Rubber, to the extent that they are in the list compiled by Western Rubber. It is true that the list Western Rubber provided to PWC and the Ministry was compiled from public sources. It was, however, prepared for a business purpose specific to Western Rubber, whether the list is characterized as a mailing and contact list or (at this time) as a supplier list. This is not a case where, for example, it is being contended that a public telephone directory is commercial information just because it is used by Western Rubber – a commercial enterprise – to telephone or otherwise contact people or businesses. If such an argument were made, I would reject it. Rather, public information was compiled in this case to create a list that had business-specific uses for and by Western Rubber. The compilation did not take particular skill, but some quantifiable time and effort was involved to create it. In my view, the information qualifies as commercial information of Western Rubber for the purposes of s. 21(1)(a)(ii) of the Act.

[23] **3.3 Supply in Confidence** – I am not persuaded that Western Rubber supplied information to the Ministry, implicitly or explicitly, in confidence for the purposes of s. 21(1)(b). The supply element is met, but the "in confidence" element is not. To establish confidentiality of supply, a party must show that information was supplied under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was provided.

[24] An easy example of a confidential supply of information is where a business supplies sensitive confidential financial data to a public body on the public body's express agreement or promise that the information is received in confidence and will be kept confidential. A contrasting example is where a public body tells a business that information supplied to the public body will not be received or treated as confidential. The business cannot supply the information and later claim that it was supplied in confidence within the meaning of s. 21(1)(b). The supplier cannot purport to override the public body's express rejection of confidentiality.

[25] Western Rubber's material does not assert, or support, an argument that it expressly said it needed confidentiality from PWC or the Ministry or that it received an express promise or agreement of confidentiality at the time the list was supplied. Western Rubber's argument, rather, is that the list was implicitly supplied in confidence

[26] The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of

confidentiality. The circumstances to be considered include whether the information was:

1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;

2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;

3. not otherwise disclosed or available from sources to which the public has access;

4. prepared for a purpose which would not entail disclosure.

[27] I also adopted these criteria – which were originally expressed in Ontario Order P-561, [1993] O.I.P.C. No. 292 – in Order 00-37, [2000] B.C.I.P.C.D. No. 40.

[28] In this case, Peter Phillips deposed, without giving particulars, that Western Rubber made the list available to the Ministry through PWC "on the condition that it was exclusively to be used by the Ministry" (para. 9). He also acknowledged that "an agent of Western Rubber at one time purported to authorize distribution of the list to Western Rubber's competitors", but says that PWC "was advised that this was an error and that authority revoked within 24 hours of the mistake being made" (para. 9). On this point, Phillips' affidavit refers to an April 3, 2000 letter sent by Western Rubber's lawyers to the Ministry, which he characterizes as "revoking the authorization to disclose the List erroneously made by Western Rubber's President" (para. 10). He also refers to e-mails between the Ministry and himself in April of last year.

[29] Relying on Peter Phillips' evidence that Western Rubber has "always" treated the list "as sensitive and confidential commercial information", Western Rubber argues that the list was provided to PWC "on the condition it was for their exclusive use only", that Western Rubber consented to distribution of the list only when "its agent erroneously gave that authorization" (subsequently corrected) in a meeting with the Ministry and that "simple common sense dictates that a business would keep this information confidential" because it is (we now know, at least) a list of Western Rubber's suppliers (para. 13, initial submission).

[30] I have already commented on the fact that Western Rubber has, in the request and review process under the Act, for the first time disclosed the nature of the list and, for the first time, indicated that it has always treated the contents as confidential and sensitive – without giving particulars of how it has so treated the list. It has not elaborated on the bare assertion that it has always treated the list as confidential. It has not provided me with any evidence as to how it has handled the list internally or in any dealings with others. There is no evidence before me of security measures to ensure confidentiality or other circumstances suggesting that Western Rubber was concerned to keep the list

confidential before it was supplied to PWC. Certainly, the copy of the list provided to me for the purposes of this inquiry is not marked as being confidential.

[31] Western Rubber has not provided me with any evidence that its attitude towards or treatment of the list was communicated to PWC or to the Ministry at the time the list was supplied. Nor has it shown that the list's nature as a confidential supplier list was communicated to PWC or the Ministry at the time it was supplied – or at any time before this proceeding. In fact, Western Rubber's evidence is quite consistent with the conclusion that both PWC and the Ministry considered the list was only a mailing list, as it was described in Western Rubber's s. 23 representations to the Ministry. According to the Ministry's initial submission, PWC asked for a copy of the list so that it could be used to contact scrap tire generators, by letter, for the purposes of the FIRST Program.

[32] Peter Phillips' evidence is that, when the list was given to PWC, it was provided on the condition that it was for the exclusive use of PWC and the Ministry for the purposes of the FIRST Program. His role in the supply of the list to PWC is not clear from the material before me and he does not say how this expectation of exclusive use was made known to PWC or the Ministry at the time of its supply. The fact that Phillips, after the applicant's access request had been made, "reminded" the Ministry that the list had been supplied for the exclusive purposes of the FIRST Program does not, in any case, establish that any expectation of "exclusive" use was communicated at the time of supply. In the absence of supporting evidence – *e.g.,* in the form of an enclosure letter or an accompanying e-mail or even evidence of an oral communication of the confidentiality expectation Western Rubber now says it had – I cannot place great weight on Peter Phillips' assertion that there was a condition of exclusive use. In any case, a stipulation of limited use for the FIRST Program would not establish a reasonable expectation of confidentiality, either on its own or in combination with any other factors evident in the material before me.

[33] I turn now to the giving and revocation of consent by Western Rubber to, as Peter Phillips and Western Rubber's counsel put it, the "distribution of the List". The Ministry argues, at para. 2 of its reply submission, that Western Rubber's later consent to disclosure of the list to Western Rubber's competitors supports the view that Western Rubber's agent did not "appear to expect that such information would need to be treated confidentially". According to the Ministry, this means the initial supply of the list was not "accompanied by the required intent that the information was being supplied in confidence" (para. 2, reply submission). The fact is that Western Rubber was, after the list was given to PWC, asked if the list could be distributed and its "agent" – its president – gave permission for that to be done. The giving of that consent by Western Rubber's president is not necessarily determinative of whether the original supply of the list was confidential, but it is a relevant factor and one that supports the conclusion Western Rubber did not consistently treat the list as confidential. Conversely, I do not consider that Western Rubber's revocation of its president's consent to disclosure proves, contrary to Western Rubber's argument, that the list was supplied in confidence.

[34] Last, I do not accept Western Rubber's argument that, because it supplied the list to a firm of chartered accountants, it had a reasonable expectation of confidentiality. This

argument was made in Western Rubber's s. 23 representations to the Ministry, not in the inquiry. But it is worth noting here that the supply of information to a firm of chartered accountants is not, on its own, a sufficient marker of confidential supply.

[35] It should also be noted here that the list in dispute was created based on the list actually given to PWC by Western Rubber. The Ministry has shown that the names and addresses of two suppliers in the original list as supplied by Western Rubber, and several postal codes in that list, were added to Western Rubber's list and were therefore not supplied to the Ministry by Western Rubber. Since that information was not supplied at all by Western Rubber, it is not protected by s. 21(1).

[36] As for the contents of the list supplied by Western Rubber, having considered all of the material before me, I am not persuaded that the information in the list was supplied in confidence, either implicitly or explicitly, to the Ministry through PWC. I therefore find that the information was not, implicitly or explicitly, supplied in confidence to the Ministry as required by s. 21(1)(b) of the Act. This finding is sufficient on its own to dispose of this case.

[37] **3.4 Harm to Western Rubber** – Western Rubber argues that disclosure of the list could reasonably be expected to cause two different kinds of harm under s. 21(1)(c), *i.e.*, those contemplated by ss. 21(1)(c)(i) and (iii). The Ministry did not argue these points; only the applicant responded to Western Rubber's harm arguments. Before dealing with Western Rubber's arguments, I will address the standard of proof under s. 21(1).

Standard of Proof Under Section 21

[38] As I have said before, the standard of proof for harms-based exceptions is to be found in the wording of the Act. In the case of s. 21(1), the test is whether the disclosure of information could reasonably be expected to cause the specific harm to be protected against under that section. As I have observed in other cases, evidence of speculative harm will not meet the test, but it is not necessary to establish certainty of harm. The quality and cogency of the evidence must be commensurate with a reasonable person's expectation that the disclosure of the requested information could cause the harm specified in the exception. The probability of the harm occurring is relevant to assessing the risk of harm, but mathematical likelihood will not necessarily be decisive where other contextual factors are at work. As I noted in Order 01-20, [2001] B.C.I.P.C.D. No. 21, at para. 65, evidence submitted in support of a s. 21 claim "must be tied to the various elements of … s. 21" and the "evidence must be sufficiently detailed and cogent to establish each of those elements."

[39] As I observed in Order 00-10, [2000] B.C.I.P.C.D. No. 11, it is neither possible nor wise to attempt to define exhaustively what is meant by the phrase "harm significantly" in s. 21(1)(c)(i). Use of the modifier "significantly" clearly connotes something more than harm, but it is difficult to go further than that in the abstract. At a minimum, the party bearing the burden of proof must establish that the anticipated harm is – when looked at in light of the circumstances affecting the third party's competitive

position or negotiating position – significant. It may be relevant, in determining whether the alleged harm is significant, to consider the extent of the harm in relation to the assets or revenues of the third party. In some cases, it will not be possible to analyze the issue in anything like precisely-quantified monetary terms.

Significant Harm to Western Rubber's Competitive Position

[40] Western Rubber argues, at para. 19 of its initial submission, that, although it is "not possible to analyze the magnitude of the harm to Western Rubber in quantifiable dollar terms", disclosure of the list could reasonably be expected to cause significant harm to its competitive position. It says that it had the "foresight" to incur roughly $5,000 in costs to create the list, as well as unspecified "considerable further expenses in developing it". (As is noted below, this further development of the list relates really to Western Rubber's efforts in developing a supplier base using the list.) Western Rubber goes on to argue, at para. 22 of its initial submission, as follows:

> It is submitted that the mere act of providing Western Rubber's competitors with valuable information that Western Rubber had to invest a significant sum to develop constitutes a significant harm to Western Rubber's competitive position. This is because Western Rubber, its competitors, or any other business for that matter, have their margins dictated by their operating expenses. To relieve competitors of a significant expense and to effectively cause Western Rubber alone to bear the cost thereof is an unfair obstacle to fair competition.

[41] Western Rubber's concern for "fair competition" is a theme repeated throughout its submissions. At all events, I do not accept its contention that the "roughly five thousand dollars" it expended to develop the list from publicly-available information sources establishes that disclosure of the list to one or more of its competitors would – almost by definition, it seems – significantly harm Western Rubber's competitive position because competitors are relieved of the expense of creating the list.

[42] Western Rubber next argues that further harm to its competitive position is likely to result "from the use to which competitors may put the List". It says, at para. 23 of its initial submission, that the list would

> … permit Western Rubber's competitors not only to know the identity and addresses of all of its clients, but also to infer from that List which are Western Rubber's largest and most significant producers of scrap tire material.

[43] I note, first, that the evidence does not support the claim that the list identifies "all of its clients". Peter Phillips' affidavit only says that the list represents a "relatively complete" list of Western Rubber's suppliers. Second, since Western Rubber says that it has 85% of the market, one would expect that a competitor could use publicly-available information – just as Western Rubber did – to identify scrap tire suppliers and proceed on the assumption that all of them are Western Rubber's suppliers. Surely competitors know Western Rubber has a large share of the market, even if they did not know until this inquiry that Western Rubber has something like an 85% share. It seems to me the benefit to be gained from the list is the relative ease with which a competitor could contact

businesses or organizations that are likely to be, or are assumed to be, Western Rubber suppliers. The benefit lies in saving the expense that would otherwise be needed to compile the list.

[44] In this vein, Peter Phillips deposed at, para. 15 of his affidavit, that the list could be used to "identify and target Western Rubber's larger scrap tire suppliers" by combining the information in the list with "tire generation statistics publicly-available from the Ministry". No details were given about the Ministry's statistics or how the two sets of information could be used to identify Western Rubber's "larger scrap tire suppliers". It seems to me that, even if the Ministry's statistics do not directly identify larger scrap tire suppliers in the province, the same process of identification using publicly-available information, in combination with the Ministry's statistics, would be open to any competitor.

[45] Western Rubber also argues, at para. 24 of its initial submission, that "common sense" dictates that a competitor would only wish to have the list for the following purposes (to quote from that paragraph):

> (a) In order to attempt to sour Western Rubber's relationship with some of its scrap tire suppliers/clients;
>
> (b) In order to affect Western Rubber's negotiations on commercial terms of its relationship with some of its scrap tire suppliers; or
>
> (c) In an effort to attempt to reduce the size of Western Rubber's market share by soliciting Western Rubber's scrap tire suppliers.

[46] At para. 18 of his affidavit, Peter Phillips acknowledged that there "is simply no direct evidence available that any of these results would necessarily flow from disclosure" of the List. He deposed, however, "that it is almost a certainty that at least one, if not all, of the above consequences of disclosure will result". His assessment of the consequences is based on his self-described "extensive knowledge of the scrap tire recycling market and simple common sense".

[47] Again, it seems to me that if a competitor wished to do any of the things identified in para. 24 of Western Rubber's initial submission, it could do so without having a copy of the list. Armed with the knowledge that Western Rubber has a large share of the market, a competitor would simply have to identify scrap tire generators in the province – using the same publicly-available information that Western Rubber used to compile the list – and take a run at Western Rubber in any of the three ways feared by Western Rubber. In this light, I am not persuaded that there is a link, in this case at least, between disclosure of the list and this kind of competitive pressure.

[48] Another argument advanced by Western Rubber is that the applicant, in particular, is likely to cause "even greater harm" to Western Rubber's competitive position than might be the case if any other competitor had access to the list. Western Rubber says this is "because of the history of savage and sometimes underhanded competition with Western Rubber" in which the applicant has engaged (para. 29, initial

submission). Western Rubber alleges the applicant has, in the past, inaccurately "held himself out to be an owner and representative of Western Rubber". It says, at para. 29, that the

> … harm that may flow from a person who utilizes such tactics having a relatively complete copy of Western Rubber's suppliers/clients [*sic*], particularly with the ability to extrapolate the more important ones, is self-evident.

[49] Western Rubber refers to two incidents in which the applicant allegedly misrepresented its actions or intentions and, it says, later apologized for his supposed misrepresentation of the circumstances. For example, it says that, in February of 2000, the applicant told one of Western Rubber's suppliers that Western Rubber was "unhappy with their relationship and intended to betray the good faith that they had developed". Western Rubber says that it "learned of this sabotage" and corrected the "misinformation before the relationship was irreparably damaged".

[50] The fact that the applicant already may have held himself out as an associate of Western Rubber or approached a Western Rubber supplier with a view to interfering with Western Rubber's commercial activities shows that he does not need the list in order to engage in such activity. He has been, and remains, in a position to say and do things that simply do not depend on his having access to the list. Of course, if he had a copy of the list, the applicant would find it easier to do the things Western Rubber alleges he has done. Again, however, it seems to me that the only advantage that would accrue to the applicant from disclosure of the list is the saving of the expense he would otherwise have to incur in order to compile a list of scrap tire generators in British Columbia. Having compiled such a list, the applicant could, applying the knowledge that Western Rubber has a large share of the market, assume that all generators on the list are Western Rubber suppliers and proceed accordingly. At the end of the day, I do not accept the posited link between the applicant's access to the list and the harm feared by Western Rubber from the applicant's alleged dirty tricks.

[51] Even if one assumes, for the sake of argument, that the list's disclosure could reasonably be expected to harm Western Rubber's competitive or negotiating positions, Western Rubber has not shown that any such harm to its competitive or negotiating positions would be significant, as is required by s. 21(1)(c)(i). The reasons for this conclusion follow.

[52] Paragraphs 25-28 of Western Rubber's initial submission reads as follows:

> 25. The extent of the harm that any or all of these uses of the List might have on Western Rubber cannot be known prior to disclosure since it will depend on the degree of success that other parties have in soliciting Western Rubber's business. However, should Western Rubber's competitors succeed to any extent in accomplishing the only purposes for which they might be seeking the List, harm to Western Rubber's competitive position will clearly result.
>
> **Affidavit of Phillips, paragraph 23**

> 26. Should Western Rubber's competitors succeed in souring or taking away even 5% of Western Rubber's business by identifying and targeting Western Rubber's largest suppliers of scrap tires, the loss of revenue sustained by Western Rubber would total roughly $300,000.
>
> 27. As a result, it is respectfully submitted that disclosure of the List could lead to immediate loss of certain key suppliers or may "lead to a longer-term strategic impact in a way that could reasonably be expected to significantly harm the competitive position…" of Western Rubber.
>
> **OIPC, Order 00-10, *Inquiry regarding Liquor Distribution Branch Data on Annual Beer Sales* (April 19, 2000) at page 15**
>
> 28. Therefore, it is submitted that, for both of these reasons, the competitive advantage Western Rubber's competitors would have over it as a result of disclosure of the List is likely to result in significant harm. [bold in original]

[53] I am not persuaded that, through disclosure of the list, there would be an "immediate loss of certain key suppliers" and that this would (self-evidently, it seems) lead to a longer-term strategic impact that could reasonably be expected to cause significant harm to Western Rubber's competitive position. This contention is speculative both in terms of the predicted result (loss of unidentified "key suppliers") and in terms of the significance of that loss for Western Rubber's competitive position.

[54] Further, the 5% revenue-loss figure given by Peter Phillips is speculative. At para. 23 of his affidavit, he says merely that, "[s]hould Western Rubber's competitors succeed in souring or taking away even 5%" of Western Rubber's business, the revenue loss would "total roughly $300,000". This statement assumes, without an evidentiary foundation, that competitors will be able to take away some of Western Rubber's business *and* that they will take away 5% of its revenues. Peter Phillips could as easily have said that, if competitors take away 95% of Western Rubber's business, the loss of revenue to Western Rubber would total roughly $5.7 million, a much larger apparent impact on Western Rubber. I consider this evidence to be speculative and not persuasive on the question of the extent of any harm flowing from disclosure.

Undue Financial Gain or Loss

[55] At para. 32 of its initial submission, Western Rubber acknowledges that a "much simpler argument can be made" that disclosure of the list would result in undue financial gain to the applicant and an undue financial loss to Western Rubber. Section 21(1)(c)(iii) requires a public body to refuse to disclose information that meets the other two branches of a s. 21(1) test if disclosure could reasonably be expected to "result in undue financial loss or gain to any person or organization".

[56] First, I consider that, in stipulating that any financial loss or gain under s. 21(1)(c)(iii) must be "undue", the Legislature recognized that competitors might, from

time to time, gain a financial advantage or inflict a financial loss using the right of access. As I said in Order 00-22, [2000] B.C.I.P.C.D. No. 25 at p. 11, s. 21(1)(c)(iii) is

> … not an open door for the recognition of harm to business interests of a third party which could reasonably be expected to flow, in some way or to some degree, from the disclosure of confidential business information.

[57] To hold otherwise would, among other things, render s. 21(1)(c)(i) all but devoid of significance. Second, as I said in Order 00-10 and Order 00-22, that which is "undue" generally speaking can only be measured against that which is due, with some guidance being available from previous cases.

[58] Western Rubber says, at para. 33 of its initial submission, that it "expended roughly five thousand dollars in compiling the List and an unquantifiable further sum in developing it." Paragraph 5 of Peter Phillips' affidavit refers to Western Rubber's use of the list to develop a relationship with scrap tire generators "as clients". He says the value of Western Rubber's efforts to develop those clients "cannot be quantified, but says it "can fairly be said to constitute most of the value of Western Rubber". He says Western Rubber would not be in "its dominant competitive position" if it had not had the "foresight to compile and develop such a List." It is clear, therefore, that Western Rubber's reference to "developing the List" refers to the efforts Western Rubber has made to develop a supplier base among the businesses and organizations identified in the list.

[59] I do not accept that any goodwill associated with Western Rubber's work in developing its supplier base is associated with the list itself, thereby increasing its value or the amount of any loss to Western Rubber from its disclosure. The goodwill associated with Western Rubber's activities attaches elsewhere – it arises because of Western Rubber's success in developing its business. That goodwill will not, it seems to me, be lost through disclosure of the list itself. It can already be affected through legitimate competitive pressure that does not, for the reasons given above, turn on access to the names and addresses in the list itself. I am not persuaded that access to the list will result in any gain of goodwill, and therefore a financial gain to the applicant, or any corresponding loss of goodwill and value for Western Rubber.

[60] There is no doubt, however, that access to the list will save the applicant the expense of duplicating Western Rubber's efforts in compiling it from public information sources. The question remains, however, whether that gain to the applicant would be "undue" within the meaning of s. 21(1)(c)(iii).

[61] At para. 35 of its initial submission, Western Rubber argues that, even if I am not satisfied with its evidence as to the extent of the harm that would be caused to Western Rubber, there is no doubt that "to require Western Rubber to disclose it [the list] to … [the applicant] for free is inappropriate and unfair" and therefore undue.

[62] Western Rubber says, "there is nothing to distinguish this situation" from that in Order 00-10.

[63] I do not agree. In that case, I accepted that certain annual beer sale figures would, if disclosed, enable competitors to gain valuable insight into the inner workings of two brewers. This insight, which I accepted would be of long-term strategic importance, had to do with things such as the relationship over time between precise sales volumes and revenues and also the ways in which specific marketing initiatives affected overall financial performance. I therefore accepted that it would be unfair and inappropriate, and therefore "undue", for the applicant to obtain otherwise confidential commercial information of the nature just described and thereby reap a competitive windfall. I specifically noted that the gain to the applicant was not undue on the ground that the cost-saving to the applicant was large. The financial gain was, again, undue because of the competitive windfall that would accrue to the applicant through disclosure of the particular confidential financial and commercial information in issue in that case. I also accepted that there would be a resulting financial loss, through use of that competitively valuable information, to the third parties that reached into the millions of dollars.

[64] In this case, the gain to the applicant (and perhaps others) from disclosure of the list is the saving of expense that would otherwise be required to create the list of scrap tire generators. I am not persuaded that this saving in the order of roughly $5,000, which is a financial gain to the applicant, would be undue within the meaning s. 21(1)(c)(iii). The amount is relatively small, despite Western Rubber's contention that an expenditure of that magnitude is "significant". Nor is the gain inappropriate or unfair given the fact that the information is publicly available and the fact that the list does not give the applicant a competitive windfall of the kind present in Order 00-10.

[65] For the reasons given above, I find that Western Rubber has not established a reasonable expectation of harm within the meaning of either s. 21(1)(c)(i) or (iii).

4.0 CONCLUSION

[66] All three parts of the test under s. 21(1) must be satisfied before the Ministry is required to withhold requested information. My finding that Western Rubber has not established supply in confidence under s. 21(1)(b) is sufficient, on its own, for me to find that the Ministry is not required by s. 21(1) to withhold the disputed information. My finding that Western Rubber has not satisfied the requirements of s. 21(1)(c) is also, on its own, sufficient for me to dispose of this case. Each ground is separate and sufficient.

[67] For the reasons given above, under s. 58(2)(a) of the Act, I require the Ministry to give the applicant access to all of the disputed record.

August 8, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia