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INFORMATION & PRIVACY
COMMISSIONER
for
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Order 04-08

MINISTRY OF COMPETITION, SCIENCE & ENTERPRISE

David Loukidelis, Information and Privacy Commissioner
April 1, 2004

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Summary: A corporation owned and controlled by the Province of British Columbia was a third party and not a public body under the Act. The applicant local government made an access request to the Ministry for a report prepared by business and financial consultants for that corporation, respecting its investment in a forest products company. The Ministry is not authorized to refuse access under s. 13(1) because information was not developed by or for a public body or minister, but the Ministry is required to refuse access under s. 21(1).

Key Words: public body – advice or recommendations developed by or for a public body or a minister – commercial or financial information – supplied in confidence – undue financial loss or gain – competitive position – negotiating position – interfere significantly with.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1) and 21(1), Schedule 1 definitions "public body", "local public body", "local government body".

Authorities Considered: B.C.: Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-03, [2003] B.C.I.P.C.D. No. 3; Order 04-06, [2004] B.C.I.P.C.D. No. 6.

Cases Considered: *Jill Schmidt Health Services Inc.* v. *British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79 (S.C.), 2001 BCSC 101; *Canadian Pacific Railway* v. *British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.), 2002 BCSC 603; *Canada Post Corp.* v. *Canada (Minister of Public Works)*, [1993] 3 F.C. 320 (T.D.) (affirmed [1995] 2 F.C. 110 (C.A.)); *Canada Post Corp.* v. *Canada (Minister of Public Works)*, [2004] F.C.J. No. 61 (T.D.); *Gitxsan and other First Nations* v. *British Columbia (Minister of Forests)*, [2002] B.C.J. No. 1761, 2002 BCSC 1701.

1.0 INTRODUCTION

[1] Skeena Cellulose Inc.—now known as New Skeena Forest Products Inc. ("Skeena")—operated forest-products facilities at Prince Rupert, Terrace, Hazelton, New Hazelton, Smithers and Kitwanga. In early 1997, Skeena filed for protection under the Canada *Companies' Creditors Arrangement Act* ("CCCA") after its owner abandoned Skeena's operations and ownership to its creditors. The Province of British Columbia ("Province") participated in Skeena's CCAA restructuring plan and became Skeena's majority owner in 1998, when the restructuring plan was accepted by Skeena's creditors and received court approval. The Province's ownership interest in Skeena was held by 552513 British Columbia Ltd. ("552"), a company incorporated and wholly-owned by the Province for that purpose and for the purpose of providing financing for Skeena's Prince Rupert pulp mill.

[2] In March of 2001, 552 hired Arthur Andersen Inc. ("Andersen") to produce a report identifying and analyzing options available respecting the Skeena investment. Andersen produced a draft report dated May 22, 2001, which is entitled, in part, "Analysis of Alternatives with Respect to Skeena Cellulose Inc." ("Report").

[3] In the autumn of 2001, the Village of Hazelton ("Village") asked the Minister of Competition, Science & Enterprise ("Minister") for a copy of the Report. The Minister declined and, on January 28, 2002, the Village made a request for the Report, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to the Ministry of Competition, Science & Enterprise ("Ministry"). The Ministry disclosed some of the Report, but refused to disclose significant amounts of information under ss. 13(1), 17(1) and 21(1) of the Act.

[4] On April 29, 2002, the Village requested a review under the Act of the Ministry's decision to withhold information

[5] On April 30, 2002, 552 sold its interest in Skeena to a new owner. At the time of the change in ownership, 552 held a 71% ownership interest in Skeena and the Province and 552 had provided approximately $264 million in total funding to Skeena in the form of loans, loan guarantees and contributions to facilitate its restructuring.

[6] The Village's request for review did not settle in mediation and an inquiry was held under Part 5 of the Act. By the time of the inquiry, the Ministry had withdrawn its reliance on s. 17(1).

2.0 ISSUES

[7] The issues before me are as follows:

1. Did s. 21(1) of the Act require the Ministry to refuse to disclose information in the Report?
2. Did s. 13(1) of the Act authorize the Ministry to withhold information in the Report?

Under s. 57(1) of the Act, the Ministry bears the burden of proof on both issues.

3.0 DISCUSSION

[8] **3.1 Status of 552** – The process and submissions relating to this inquiry did not focus on 552 as a third party separate from the Ministry as a public body. The distinction is significant to the applicability of both the s. 13(1) and the s. 21(1) disclosure exceptions, but I have found it does not affect the result in this inquiry.

[9] 552 was, at the relevant times, wholly owned and controlled by the Province. It fits, for the purposes of the provincial government's fiscal management, within the definitions of "government corporation", "government body" and "public body" in the *Financial Administration Act*. It is not, however, a "public body" as defined in Schedule 1 of the Act, the relevant portions of which read as follows:

> "public body" means
>
> (a) a ministry of the government of British Columbia,
> (b) an agency, board, commission, corporation, office or other body designated in, or added, by regulation to, Schedule 2, or
> (c) a local public body

[10] 552 is not a ministry, a body designated in Schedule 2 or a local public body. This conclusion is reinforced by a closer examination of the local public body component of the definition of public body. Local public body is itself a defined term in Schedule 1:

> "local public body" means
>
> (a) a local government body,
> (b) a health care body,
> (c) an educational body, or
> (d) a governing body of a profession or occupation, if the governing body is designated in, or added by regulation to, Schedule 3;

[11] The term "local government body" is also defined in Schedule 1:

> "local government body" means
>
> (a) a municipality,
> (b) [Repealed 2003-52-79.]
> (c) a regional district,
> (d) an improvement district as defined in the *Local Government Act*,
> (e) a local area as defined in the *Local Services Act*,
> (f) a greater board as defined in the *Community Charter* or any incorporated board that provides similar services and is incorporated by letters patent,
> (g) a board of variance established under section 899 of the *Local Government Act* or section 572 of the *Vancouver Charter*,
> (h) the trust council, the executive committee, a local trust committee and the trust fund board, as these are defined in the *Islands Trust Act*,
> (i) the Okanagan Basin Water Board,
> (j) a water users' community as defined in the *Water Act*,
> (k) the Okanagan-Kootenay Sterile Insect Release Board,

> (l) a municipal police board established under section 23 of the *Police Act*,
> (m) a library board as defined in the *Library Act*,
> (n) any board, committee, commission, panel, agency or corporation that is created or owned by a body referred to in paragraphs (a) to (m) and all the members or officers or which are appointed or chosen by or under the authority of that body,
> (o) a board of cemetery trustees established under section 18 of the *Cemetery and Funeral Services Act*,
> (p) the Greater Vancouver Transportation Authority, or
> (q) the Park Board referred to in section 485 of the *Vancouver Charter*;

[12] The effect of paragraph (n) of the definition of "local government body", in combination with the definitions of "local public body" and "public body", is to include in the definition of "public body" some, but not all, public body-owned or -created corporations. There is no comparable provision of this kind for corporations owned by the Province, such as 552.

[13] It is evident from the definition of "public body" in Schedule 1 of the Act, and the definitions of its components, that the Legislature chose not to designate, as a class of public bodies under the Act, corporations owned or controlled by the Province. With the exception of the limited applicability of paragraph (n) of the definition of "local government body", the legislators have made Crown-owned or -controlled corporations public bodies under the Act through specific designation in Schedule 2.

[14] 552 was not designated a public body under Schedule 2 of the Act and, though owned and controlled by the Province, is not a branch of or synonymous with the Ministry, which is a public body under the Act. Since 552 is neither a public body nor the person who made the request for access in this case, it is a "third party" in this inquiry. That term is defined as follows in Schedule 1 of the Act:

> "third party", in relation to a request for access to a record or for correction of personal information, means any person, group or organization other than
>
> (a) the person who made the request, or
> (b) a public body;

[15] The result, again, is that 552, though wholly-owned and controlled by the Province, is not a public body under the Act, and is instead a third party relative to the Village's access request to the Ministry. This is similar to the treatment of federal Crown corporations under the federal *Access to Information Act*, where a Crown corporation that is not scheduled as a "government institution" is a third party in relation to a request for access to information from a government institution. See *Canada Post Corp.* v. *Canada (Minister of Public Works)*, [1993] 3 F.C. 320 (T.D.) (affirmed [1995] 2 F.C. 110 (C.A.)) and *Canada Post Corp.* v. *Canada (Minister of Public Works)*, [2004] F.C.J. No. 61 (T.D.).

[16] **3.2 Andersen's Engagement and the Report** – The Report was prepared under a March 20, 2001 contract between 552, represented by its president, Mark

Lofthouse, and Andersen, represented by a managing partner, James Stuart. The seven-page contract was signed by representatives of 552 and Andersen. Three of its pages consist of a letter of engagement, from Andersen to 552, that is attached to the contract as Appendix 1 and describes the services Andersen was to perform. Both the contract and the engagement letter are addressed to 552 and Mark Lofthouse at an office of the Ministry of Employment and Investment in Victoria.

[17] According to the engagement letter, 552 retained Andersen "to develop an inventory of options available to 552 with respect to its investment in the Company [Skeena]". The engagement letter outlines areas of review and analysis and the expectation that Andersen will generate a draft report for review and discussion. The procedures to be followed by Andersen included review of documents and reports in the possession of or prepared by the Province or Skeena. The engagement letter states that the purpose of the Report would be to present various options available to 552 with respect to its investment in Skeena, along with sufficient background to support analysis of the options. Use of the Report was restricted to the Province, 552 and Skeena.

[18] The contract also incorporated a list of 45 standard-form terms, items 8 and 9 of which imposed the following obligations on Andersen:

> You [Andersen] must permit us [552] [*sic*] all reasonable times to inspect and copy all material that has been produced or received by you or any subcontractor as a result of this agreement (collectively the "Material"), including, without limitation, accounting records, findings, software, data, specifications, drawings, reports, and documents, whether complete or not.
>
> You must treat as confidential all Material and not permit its disclosure without our prior consent except as required by applicable law.

[19] The Report in issue here is 96 pages long. It confirms, at p. 13, that the engagement was between Andersen and 552 to develop an inventory of options available to 552 with respect to its investment in Skeena. The contents of the Report are arranged under the following headings (the Ministry disclosed the headings to the Village):

1. Executive summary (pp. 3-12)
2 Engagement mandate and scope of review (pp. 13-14)
3 Restrictions (p. 15)
4 Background (pp. 16-23)
5 Pulp operations (pp. 23-39)
6 Softwood lumber operations (pp. 39-57)
7 Fibre supply (pp. 57-61)
8 Financial position (pp. 61-65)
9 Alternatives available to the Province (pp. 65-88)

[20] The Report also has the following schedules (the titles of which the Ministry also disclosed to the Village):

1 Financial statements of Skeena Cellulose Inc. for the years ended December 31, 1994 to 2000 (pp. 89-90)

2 Preliminary liquidation value estimates as at March 31, 2001 (pp. 91-94)

3 Allocation of estimated liquidation values among secured lenders as at March 31, 2001 (p. 95)

[21] The nature and sources of financial and market information in the Report are described, at pp. 13-14, as follows (again, the Ministry disclosed the following information to the Village):

> In arriving at the comments and calculations contained in this report, we reviewed and relied on the following:
>
> - Internally prepared monthly operating statements for Skeena for the period January 2000 through February 2001;
> - Consolidated forecasted results for Skeena's pulp mill and solid wood division for fiscal year 2001, prepared as at April 4, 2001;
> - Summary of Priority of Debt Repayment, prepared by Borden Ladner Gervais;
> - Information Package, December 2000, prepared by the Ministry of Employment and Investment;
> - Evaluation of Skeena's Forest Industry Assets, September 1999, prepared by Simons Consulting Group (the Simons Report);
> - Report on Assessment of Costs Associated with Potential Contaminated Site Liability, December 1999, prepared by Golder Associates Ltd. (the Golder Report);
> - Draft Letter of Intent between Skeena and Enron/Tembec, December 1999 and April 2000;
> - Preliminary Estimate of Value, June 12, 1999, prepared by Goepel McDiarmid Inc.;
> - Report of Options – Meeting with Shareholders, March 16, 1998, prepared by Skeena management;
> - Information sources for pulp and solid wood data; NLK Monitor, Random Lengths; and
> - BC Forest Industry Study, 1999, prepared by PriceWaterhouseCoopers.
>
> In addition to the above, we had discussions with and relied on representations made by the following individuals:
>
> - Robert A. Allen, CA, Vice-President and Chief Financial Officer, Skeena
> - Peter de Jong, Vice-president Pulp Marketing, Skeena

- Kevin A. Carter, Fibre Supply Manager, Skeena
- Donald M. Shumka, Managing Director Investment Banking, Raymond James Ltd.

> The financial information relied upon in this study has come from various sources, both internal and external to Skeena. We have not audited or otherwise verified the accuracy or completeness of such information. Certain information has been extracted from Skeena's financial projections, which are based on assumptions made by its management. Those assumptions reflect Skeena's planned course of action and management's assessment of the most probable set of future economic conditions. Accordingly, these assumptions may not prove to be correct and actual results achieved by Skeena may vary significantly from its financial operations.

[22] Part 3 of the Report, entitled "Restrictions" and also disclosed to the Village by the Ministry, reads as follows (at p. 15):

> The use of this report is restricted to the Province and 552. Its contents may not be reproduced, quoted, referred to or disclosed to others without our prior consent. We will not assume any responsibility or liability for losses incurred as a result of the use of our report contrary to the provisions of this paragraph.
>
> The sufficiency of the procedures we have been requested to perform is the sole responsibility of the Province and 552 and we make no representation regarding the sufficiency of these procedures. The procedures performed by us in generating options for 552 with respect to its investment in Skeena should not be taken to supplant the additional inquiries and procedures that the province should undertake in consideration of its investment. The Province is solely responsible for actions taken by it as a result of the findings described in the report.
>
> In completing this engagement, we relied upon unaudited financial and other information. We have not performed an audit or other verification of such information and, accordingly, we express no opinion thereon.
>
> Our comments are based on information that has been made available to us. We reserve the right to review all calculations included or referred to in this report and, if we consider it necessary, to revise our calculations and conclusions in light of information existing at the date of this report.

[23] The Ministry withheld information in the Report on pp. 5-13, 21-27, 31-40, 43-58, 60-89 and 90-96. Part 9 of the Report, "Alternatives Available to the Province" (at pp. 65-89), was withheld entirely, as was information from Part 9 that appears in Part 1, "Executive Summary" (pp. 8-13).

[24] The Ministry relied in this inquiry on the following four affidavits:

- Affidavit of Tracy-Jo Reid, Manager of Information Access and Records Services at the Ministry. Her evidence related to the chronology for the process from the Village's access request through to the inquiry and to the Ministry's reasons for exercising discretion to withhold information under s. 13 of the Act.

- Affidavit of Gary Schick, Acting Manager of the Investment and Capital Analysis Branch at the Ministry. He was involved with monitoring and administering the investment and financing provided by the Province with respect to Skeena's restructuring plan.

- Affidavit of Neil Bunker, Senior Vice-President of Deloitte & Touche Inc. He was one of the Andersen employees responsible for preparing the Report for 552.

- Affidavit of John Sparks, Senior Vice-President of Skeena's successor, New Skeena Forest Products Inc. His evidence concentrated on the confidentiality to Skeena of the information that the Ministry withheld from the Report and why its disclosure could be reasonably expected to be harmful to Skeena's business interests.

[25] I will now deal with the Ministry's s. 21 case.

[26] **3.3 Third-Party Business Harm** – Section 21(1) protects certain third-party business interests. It reads 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 of a third party, or
> (ii) commercial, financial, labour relations, scientific or technical information of or about 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.

[27] Many orders have described the principles to be applied in deciding whether s. 21(1) requires the Ministry to withhold information. Most recently, see Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order 03-02, [2003] B.C.I.P.C.D. No. 2; and Order 03-03, [2003] B.C.I.P.C.D. No. 3. For court decisions that have reviewed these principles, see *Jill Schmidt Health Services Inc.* v. *British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101, and *Canadian Pacific Railway* v. *British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603. I will not describe the principles again, but have applied them here.

Commercial or financial information

[28] The first of the three elements of s. 21(1) that must be established is that the disputed information must reveal third-party trade secrets or commercial, financial, labour relations, scientific or technical information of or about a third party.

[29] The Ministry attempted to disclose generic and public information in the Report. Some passages of withheld information incorporate generic data relating to the forest industry, but the data is embedded for comparative purposes in Andersen's analyses and alternatives specific to Skeena and the 552 investment in Skeena. I am satisfied that the information the Ministry withheld from the Report is commercial or financial information of or about Skeena and 552 under s. 21(1)(a) of the Act.

Supplied in confidence

[30] Andersen's engagement to produce the Report was with 552, not with Skeena or the Province or the Ministry. Andersen referred to 552 and only 552 as its client. The contract between 552 and Andersen contemplated Andersen receiving or gathering information from varied sources—which it did—and imposed an express duty of confidentiality on Andersen respecting that information and the work product it generated in connection with the assignment. The Report lists the nature and sources of the information reviewed by Andersen. Most of the information in the Report that relates to Skeena came from Skeena and was communicated to Andersen either directly by Skeena staff or indirectly through Ministry staff monitoring the 552 investment in Skeena.

[31] The Report indicates Andersen contemplated that, in addition to 552, the Report would be used by, and presumably therefore also shared with, the Province. This is not surprising.

[32] The Report was prepared by Andersen for 552 on a confidential basis. The circle of confidentiality included the Province, acting through the Ministry. The objective of maintaining the confidentiality of information in the Report was to serve and preserve the business interests of Skeena and the business interests of 552 and the Province in Skeena.

[33] I conclude that the information in the Report that the Ministry withheld from the Village was not Ministry-generated, -derived, -negotiated or agreed-to information. The information used to generate the Report was supplied to Andersen (acting on behalf of 552) by Skeena (directly and indirectly) and others. In the Report, Andersen compiled, analyzed, distilled and commented on information it had gathered and generated alternatives for 552's investment in Skeena. The Report was provided to Andersen's client, 552, and also found its way to the Ministry, whose officials were monitoring the Province's interests in Skeena.

[34] Paragraph 4.35 of the Ministry's initial submission in the inquiry, referring to para. 5 of the affidavit of Neil Bunker, expresses reservations about whether two types of financial and commercial information relating to Skeena in the Report were directly or indirectly supplied by Skeena to Andersen: (1) information concerning Skeena's

ownership and debt structure and (2) details of prior offers made to the Ministry to purchase either the shares or assets of Skeena. With respect to the first type of information, Skeena's 1997 restructuring and subsequent debt and ownership structures are described in pp. 17-20 of the Report. This information has been disclosed to the Village and is not in issue in this inquiry.

[35] The second type of information is at pp. 20-22 of the Report and was withheld by the Ministry. It relates to the details of 1999-2000 proposed terms of acquisition between Skeena and Enron/Tembec and why those prospects did not bear out. Information in the Report indicates that Andersen's source on this subject was the brokerage firm of Raymond James Ltd., which Skeena's creditors retained to implement the sales efforts that attracted the Enron/Tembec expressions of interest.

[36] I am satisfied that the information in the Report that the Ministry withheld was supplied to the Ministry under s. 21(1)(b) of the Act. I am also satisfied that there are sufficient markers of confidentiality to conclude that the supply was in confidence.

Harm to third-party interests

[37] John Sparks summarized the risk of harm to Skeena's business interests from disclosure of the information withheld by the Ministry as follows at para. 9 of his affidavit:

> Skeena has two primary concerns with respect to release of information contained in the Report:
>
> (a) the first concern is to not provide confidential information to competitors in the forest industry and to Skeena's contractors and suppliers;
>
> (b) the second concern relates to the fact that Skeena is currently in the process of securing financing. The Report contains a critique of Skeena and its operations based on a review of confidential information provided to Arthur Andersen. The purpose of the critique was to provide the majority shareholder an analysis of alternatives for Skeena including what can be characterized as a worst case scenario. The public release of a critical analysis of Skeena's business, based on confidential information, during the time when Skeena is seeking financing could significantly interfere with Skeena's negotiating position with prospective investors.

[38] Paragraph 10 of John Sparks's affidavit, which I received *in camera*, elaborated on the financing efforts that Skeena was in the midst of undertaking. His affidavit also observed that, as a private company, Skeena is entitled to keep information about its affairs confidential and is not governed by the securities law public disclosure requirements that apply to publicly-traded companies.

[39] The Village disagreed that disclosure could harm Skeena under s. 21(1)(c). It argued its position as follows, at p. 2 of its initial submission:

> First, exactly why would disclosure of the severed information prejudice negotiations with prospective investors? Unless the third party is withholding

> information from these investors then it is difficult to see why disclosing information severed from the report could "reasonably be expected to harm significantly" Skeena's negotiating position.
>
> Secondly, how could this severed information reasonably be expected to harm significantly the third party when the significance of releasing the entire report has already been considered by a Supreme Court of B.C. judge who declared all such documents be released to eight Gitxsan hereditary chiefs on behalf of the members of the Gitxsan Houses meaning the document is available to more than 6,000 people?

[40] The Village's first point misconstrues the issue. Section 21(1) requires the Ministry to protect confidentially-supplied third-party commercial and financial information if disclosure could reasonably be expected to harm third-party business interests within the meaning of s. 21(1)(c). Skeena is not required to establish that it "has nothing to hide". If the conditions in s. 21(1) are met, information must be withheld.

[41] The Village's second point was made with reference to the case of *Gitxsan and other First Nations* v. *British Columbia (Minister of Forests)*, [2002] BCSC 1701. That decision was not specific to disclosure of the Report. A further submission from the Ministry in this inquiry indicates that only a severed copy of the Report was disclosed in litigation and that the same information that the Ministry withheld from the Village in connection with its access request was withheld from the severed version disclosed in litigation.

[42] In all the circumstances, I conclude that a reasonable expectation of harm to Skeena's competitive position, and interference with its negotiating position, was present within the meaning of s. 21(1)(c)(i) and find that s. 21(1) required the Ministry to refuse to disclose the information it withheld from the Village.

[43] **3.4 Advice or Recommendations** – Section 13(1) of the Act provides that the head of a public body "may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a Minister". Section 13(2) lists various types of information that a public body cannot withhold under s. 13(1).

[44] At para. 15 of its initial submission, the Ministry contends that all of the information it withheld from the Report

> … constitutes advice to 55[2] and the Ministry (being the provincial ministry responsible for 552) concerning a course of action and the exercise of a power/function. As such, this information is the type of information that was intended to be protected by section 13 of the Act.

[45] I disagree. Section 13(1) applies to advice or recommendations developed by or for a public body or a minister. Andersen prepared the Report, including the generation and analyses of alternatives respecting Skeena, for its client, 552. The Province, on account of its ownership and control of 552, was privy to the affairs of 552, including the Report. But the Province's ownership in Skeena was through 552, which was not

a public body or a minister, and the Report was developed, through Andersen, by and for 552. In my view, s. 13(1) does not apply to information in the Report.

4.0 CONCLUSION

[46] I have found that s. 13(1) did not authorize the Ministry to refuse access to information in the Report, but that s. 21(1) required the Ministry to deny access to the information it withheld from the Report. Accordingly, under s. 58(2)(c) of the Act, I order the Ministry to deny the Village access to that information.

April 1, 2004

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia