

**THE NOVA SCOTIA FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY ACT**

A REQUEST FOR REVIEW of a decision of the **DEPARTMENT OF ENVIRONMENT AND LABOUR** to disclose an environmental assessment report commissioned by an oil company.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **July 30, 2003**

ISSUE: Whether the Department of Environment and Labour is acting in accordance with the **Act** in agreeing to provide an applicant with a copy of an environmental assessment report commissioned by an oil company.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act**, dated March 27, 2003, a third party asked that I recommend to the Department of Environment and Labour that it reverse its decision to disclose to an applicant a copy of an environmental assessment report.

In deciding to disclose the report, and other related documents, the Department was responding to an application for access to:

- environmental reports related to properties in Antigonish;
- remedial action plans of the oil company;
- monitoring, compliance and spill report;
- information related to any contamination;

- information on any enforcement actions;
- approval and registrations for operation at the sites; and
- records required to be in the Environmental Registry.

In accordance with **Section 22** of the **Act** the Department notified an interested third party to offer it an opportunity to consent to the disclosure of the records. Although the third party did not consent to their release, the Department decided to provide the records to the Applicant. The third party has asked for a Review of the decision. Until a third party exhausts all avenues of appeal of a decision (a third party can appeal to the Nova Scotia Supreme Court) a Department cannot provide the related records to the applicant.

The records at issue in this review are:

1. A letter dated January 22, 2003;
2. A soil gas sampling report;
3. The final report on Phase II - Environment Site Assessment; and
4. A Contingency Plan for Petroleum Products Spill.

Background:

The company commissioned an environmental assessment report in conjunction with the dismantling of a former bulk storage plant in an industrial area of Antigonish and provided a copy to the Department. The Department was also provided with a copy of the results of a soil sampling program at the same site.

The third party's submission:

The third party cited the mandatory exemption under Section 21(1) to support its argument that the applicant has no right of access to the four records. The subsections it specifically cited are s.21(1)(a)(ii), s.21(1)(b), and s.21(1)(c)(ii).

Confidential information

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

(a) that would reveal

(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

(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.

The third party, recognizing that all three subsections, (a), (b) and (c) must apply in order for this exemption to stand, said it had met the test of subsection (a)(ii) because the records clearly contain information of a scientific and technical nature.

It also believes that it provided the records to the Department voluntarily with the expectation they were being provided in confidence. He said this is made clear in the final assessment report which contains a notice saying "(t)hese documents and the information contained in them are confidential - the property of (the oil company) and any disclosure of the same is governed by the provision of each of the applicable provincial or territorial Freedom of Information

legislation,” as well as by federal legislation. The third party maintains this notice “serves as an explicit warning that the information supplied was being done so on a confidential basis.”

In a further written submission to the Review, provided at my request, the third party expounded on its arguments that the Department was not at liberty to disclose the environmental assessment report. It also addressed the issue of whether or not statutory obligations under the Province’s *Environment Act* required the third party to provide the report to the Department. Sections 69, 70 and 71 of the *Environment Act* are relevant to this issue.

Duty to report release

69 (1) Any person responsible for the release of a substance into the environment that has caused, is causing or may cause an adverse effect, shall forthwith, as soon as that person knows or ought to know of the release, report it to

(a) the Department at its emergency telephone number;

(b) the owner of the substance, where applicable, if the person reporting knows or is readily able to ascertain the identity of the owner;

(c) the person having care, management or control of the substance, where applicable, if the person reporting knows or is readily able to ascertain the identity of that person; and

(d) any other person who the person reporting knows or ought to know may be directly affected by the release.

(2) Any person responsible for the release of a substance into the environment that is in excess of an amount, concentration, level or rate of release expressly authorized by an approval or regulations, shall forthwith, as soon as that person knows or ought to know of the release, report it in the manner prescribed in the approval or the regulations, as the case may be, to the persons identified in clauses (1)(a) to (d). 1994-95, c. 1, s. 69.

Voluntary submission of information

70 (1) Any person responsible who voluntarily provides the Department with detailed information obtained through an environmental audit or environmental-site assessment about non-compliance with the requirements of this Act by that person, shall not be prosecuted for the non-compliance, if the person complies with

(a) the terms of any agreement negotiated by the Minister and the person; or

(b) any order issued under Part XIII to address the non-compliance by the person.

Subsection (1) does not apply

(2) Subsection (1) does not apply if the Department is independently aware of the non-compliance prior to receiving the information from the person. 1994-95, c. 1, s. 70.

Duty to take remedial measures

71 Any person responsible for the release of a substance under this Part shall, at that persons own cost, and as soon as that person knows or ought to have known of the release of a substance into the environment that has caused, is causing or may cause an adverse effect,

(a) take all reasonable measures to

(i) prevent, reduce and remedy the adverse effects of the substance, and

(ii) remove or otherwise dispose of the substance in such a manner as to minimize adverse effects;

(b) take any other measures required by an inspector or an administrator; and

(c) rehabilitate the environment to a standard prescribed or adopted by the Department. 1994-95, c. 1, s. 71.

The third party does not believe that these sections of the *Environment Act* apply in this case:

“Section 69 sets out a statutory duty to notify the Department of a release by phone. It does not require the filing of any documents. Section 70 limits the Department’s ability to prosecute when a person voluntarily provides information. Section 71 creates a duty to take remedial measures. None of these sections directly or by necessary implication require the filing of information. In any event, the information which (the oil company) states is exempt from disclosure was not filed pursuant to any of these provisions.

In this case the filings were done completely voluntarily, (The company) considered it to be good management practice to submit more information than is statutorily required so that the regulator (the Department) could stay informed and be in a better position to understand the environmental condition of the site. In filing the information (the company) expressly claimed confidentiality with respect to the ADI report and by implication with respect to the others.

The third party believes it is “beyond dispute” that the information was “voluntarily” provided in confidence and should not be distributed by the Department. It concluded that its objections to the disclosure of the report is unconnected to the Department’s obligations to be open and accountable as found in **Section 2** of the **Act** because the third party is not a public body.

With respect to the third part of the three-way test, whether disclosure would result in similar information no longer being provided to a public body, the third party said it had no doubt that promoting and fostering cooperation with the Department was in the public interest and that “disclosure of the voluntarily supplied information would clearly have a ‘chilling effect’ on the future provision of such information.”

The Department's submission:

The Department agrees that the soil assessment report was provided by the company implicitly in confidence [s.21(1)(b)] and it agrees that the report contains technical information [s.21(1)(a)(ii)].

However, it does not accept the argument of the third party [s.21(1)(c)(ii)] applies.

It cites Section 10(2) of the *Environment Act*:

All information under the control of the Department is accessible to the public, subject only to the Freedom of Information and Protection of Privacy Act and, in particular, Section 21 of the Act.

The Department concluded that while it is the practice and procedure that any requests for environmental site assessments or audits are not routinely disclosed outside of the **Freedom of Information and Protection of Privacy Act**, applications for access are processed in keeping with the provisions of this **Act** and the intent of s.10(2) of the *Environment Act*. Both acts have paramountcy over the interpretation of policy.

The Applicant's submission:

The Applicant recognized it was difficult to respond to the arguments of the third party without having seen the information. However, he said

“(I)t is likely that the information is related to the release of a substance into the environment that has caused, will cause or may cause an adverse impact. As such there is a requirement in Section 69 of the Environment Act for the responsible party to report this information to the Department.”

He said Section 70 of that Act, related to “voluntary submissions,” “would not be relevant as this is related specifically to the ability for the department to prosecute the responsible

party on the basis of this information, not related to the Freedom of Information and Protection of Privacy Act.”

With respect to the third party’s argument that disclosure would result in similar information no longer being made available to the Department, he said the information could be required under the *Environment Act*.

Conclusions:

The burden of proof is on the third party to prove that s.21(1) applies to the records at issue and that the Applicant has no right of access to the records [**Section 45(3)(b)**].

The test of “scientific” or “technical” information [s.21(1)(a)(ii)]:

This **Act** does not define scientific and technical information so I will bide by a definition found in an order of the Ontario Information and Privacy Commissioner (P-454):

...scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for the information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally scientific information must be given a meaning separate from technical information.

...(technical information) will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment, or thing.

I am satisfied that the four records at issue contain technical information. The submission of the third party has passed the first part of the three-part test.

The test of confidentiality [s.21(1)(b)]:

“Confidentiality” is not an issue because the Department agrees with the third party that the report was provided in confidence.

However, the Department’s *Policy on Access to Voluntary Environmental Audits and Environmental Site Assessments* (1999) makes it clear that

“Requests for confidentiality, including withholding an audit or assessment for release to a third party, will be recognized by the Department. These records are still, however, subject to the Freedom of Information and Protection of Privacy Act and the release of this material may be compelled by provisions of this legislation.”

In this case the Department did not consider disclosing the soil assessment report until it received an application for access to it pursuant to the FOIPOP Act. It determined that s.21(1) did not apply and agreed to provide a copy to an applicant.

The test of “public interest” [s.21(1)(c)(ii)]

While the oil company provided the assessment report voluntarily, it could have been ordered to do so under the *Environment Act*. Given the requirements of that Act and the powers it gives the Minister, it is reasonable to conclude that the Department will continue to have access to environmental assessment reports, even from this company, if it discloses the assessment report at issue in this Review.

Recommendation:

That the Department disclose the four records at issue to the Applicant.

Section 40 of the Act requires the Department to make a decision on this recommendations within 30 days of receiving them and to notify the Applicant and the Review Officer, in writing, of the decision.

Dated at Halifax, Nova Scotia this 30th day of July 2003.

Darce Fardy, Review Officer