OIPC File: F21-88031
Public Body File: FNR-2020-07414

IN THE MATTER OF THE INQUIRY

between

the Applicant

and

the Ministry of Forests

and

the Appropriate Persons

August 24, 2023

MINISTRY'S INITIAL SUBMISSIONS

Troy Taillefer & Laylí Antinuk
Legal Counsel
Legal Services Branch
Ministry of Attorney General
1675 Douglas Street
Victoria, British Columbia

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TAB 1

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Description of the inquiry

1. This is an inquiry under s. 56 of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) respecting the Ministry of Forests' (Ministry) response to the Applicant's access to information request.

2. On December 28, 2020, the Applicant asked the Ministry to provide access to the following information under *FIPPA*:

> *Geospatial data files that show the most current version of Timber Harvesting Land Base mapping for all of BC.*

3. On February 1, 2021, the Ministry responded and provided the Applicant with access to records.

4. On March 4, 2021, the Applicant submitted a complaint to the Office of the Information and Privacy Commissioner (OIPC) that the Ministry failed to make every reasonable effort to assist him as required by s. 6 of *FIPPA*. The OIPC opened file F21-85438 to address this complaint and has since closed the file. This complaint does not form part of this inquiry.

5. On October 25, 2021, the Ministry advised the Applicant that it located additional records, which it had to withhold under s. 21(1) of *FIPPA*.

6. On November 16, 2021, the Applicant requested that the OIPC review the Ministry's s. 21(1) decision. The Applicant also asked the OIPC to add s. 25(1)(b) of *FIPPA* as an issue.

7. Mediation did not resolve the issues and one of the Commissioner's delegates decided to send this matter to inquiry.

8. On May 30, 2023, the OIPC provided the parties with the Notice of Inquiry and the Investigator's Fact Report.

9. The Ministry accepts the facts in the Investigator's Fact Report as accurate but will add the additional relevant steps that have taken place regarding the Ministry's provision of statutory notice to various third parties.

Provision of Notice under s. 23

10. Between May 31 and June 6, 2023, the Ministry sent third party notice letters under s. 23(2) of *FIPPA* to the 20 third parties that created most of the records at issue. It also sent a similar letter to the public body (the City of Mission) that created the balance of the records.

11. As a result of these letters, the City of Mission and two third parties consented to disclosure of their respective records. The Ministry did not receive replies from 11 of the third parties. Seven of the third parties objected to disclosure of their records.

12. The Ministry disclosed the records created by the three groups that consented to disclosure but continued to apply s. 21(1) to the entirety of the records created by the remaining 18 third parties.

Addition of third parties

13. The OIPC has added Interfor, Teal Cedar Products Ltd., and Western Forest Products Inc. (collectively, the Appropriate Persons) as appropriate persons to the inquiry. These Appropriate Persons are three of the third parties that created the records at issue here. The Ministry understands that the other 15 third parties chose not to participate in this inquiry despite receiving an invitation from the OIPC.

14. In addition, on August 22, 2023, the Ministry learned from the OIPC that an additional third party consented to the release of its records after the OIPC invited it to participate in the inquiry. The Ministry is in the process of releasing this third party's records to the Applicant. So, in total, one public body and three third parties consented to the release of their records. This means those records are no longer in dispute and do not form part of this inquiry.

Inquiry issues and burden of proof

15. The inquiry issues follow:

    a) Does s. 25(1)(b) require the Ministry to disclose the information in dispute?
    b) Does s. 21(1) require the Ministry to withhold the information in dispute?

16. Under s. 57(1), the Ministry bears the burden of proving that s. 21(1) applies. However, s. 57 is silent on the burden of proof for inquiries about s. 25. Previous OIPC orders have adopted the following statement from former Commissioner Loukidelis in situations where an applicant raises s. 25, which is the case here:

> … it will be in the applicant's interest, in practical terms, to identify information in support of that contention. For example, although an applicant will not know the contents of requests records, she or he may well be in a position to establish that there is a clear public interest in the matter generally.[1]

Disclosure to the world

17. A public body must assume that access provided under *FIPPA* is access to the world. As former Commissioner Loukidelis has explained:

> With the exception of access by individuals to their own personal information, Part 2 of the Act is an instrument for public access to information and is not an instrument for selective or restricted disclosure. The idea of an applicant being bound to make only restricted use of non-personal information disclosed through an access request under the Act is inconsistent with the objective of public access articulated in s. 2(1) of the Act.[2]

Information in dispute

18. The information in dispute comprises geospatial data files.

19. Geospatial data includes both location information and attribute information about specific lands and the features of that land at the point-in-time the data is gathered. This type of data is gathered from a combination of sources including maps,

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[1] Order F19-16, [2019] B.C.I.P.C.D. No. 18 at paragraph 4.
[2] Order 01-52, 2001 CanLII 21606 (BC IPC) at para. 73.

satellites, and other technical tools. It can be used to create maps and viewing it requires special software.

Affidavit of Tim Salkeld at para. 6

Background

20. The Applicant requested Timber Harvesting Land Base (THLB) geospatial data.

Affidavit of Tim Salkeld at para. 5

21. In February of 2021, the Ministry responded to the request by disclosing a set of geospatial data files to the Applicant in its entirety. This geospatial data is the consolidation of all THLB analysis created for the most recently completed Timber Supply Review for the Province's Timber Supply Areas. The Ministry's response provided the Applicant with the most current version of the THLB in the Ministry's custody and control.

Affidavit of Tim Salkeld at para. 7

22. Following the Applicant's complaint to the OIPC regarding the Ministry's response, the Ministry located the additional geospatial data files at issue here.

Affidavit of Tim Salkeld at para. 8

23. The geospatial data at issue covers Timber Forest Licence (TFL) tenures. It was created by and belongs to TFL holders (TFLs). TFLs create this data as a condition of their TFL to enable the Province's Chief Forester to determine an allowable annual cut at least once every 10 years as required by section 8 of the *Forest Act*.

Affidavit of Tim Salkeld at para. 12

24. The Ministry began acquiring geospatial data from TFLs in 2003 as part of what became known as the Bill 28, *Forestry Revitalization Act* (2003) "take-back" legislation. Bill 28 acquired this name because it provided for a one-time "take-back" of volume from the tenures of larger licensees, with compensation to the licensees.

Affidavit of Tim Salkeld at para. 13

25. As a result of Bill 28, the Executive Director of the Tenure and Revenue Division of the Ministry wrote a letter (Letter) to all TFLs on August 8, 2003, requesting that they provide a data set to the Ministry. The Letter states that that the Ministry will hold the data in confidence. The Letter also states that the Ministry will enter into confidentiality agreements with TFLs that wish to do so.

Affidavit of Tim Salkeld at paras. 14-15

26. In response and as requested by the Ministry, TFLs supplied data to the Ministry. Some of the data at issue comprises TFL data acquired in 2003 because of the Ministry's 2003 request to the TFLs.

Affidavit of Tim Salkeld at para. 16

27. Some TFLs elected to enter into confidentiality agreements with the Ministry in 2003 prior to supplying the data requested by the Ministry.

Affidavit of Tim Salkeld at para. 17

28. In 2013, the Ministry began an examination of available fibre and harvest residue to inform policy on future tenure opportunities for sawmills and wood pellet facilities. To complete this analysis, the Ministry asked the TFLs to provide new geospatial data to the Ministry. The balance of the data at issue comprises TFL data acquired in 2013 because of the Ministry's 2013 request to the TFLs.

Affidavit of Tim Salkeld at para. 18

29. Some TFLs elected to enter into confidentiality agreements with the Ministry in 2013 prior to supplying the data requested by the Ministry.

Affidavit of Tim Salkeld at para. 19

PUBLIC INTEREST DISCLOSURE – SECTION 25

30. Section 25 requires a public body to disclose information without delay despite any other provision of *FIPPA*. OIPC orders have found that s. 25 overrides all the other

sections of *FIPPA*.[3] As a result, it sets a high threshold such that it applies in only the clearest and most serious situations.[4]

31. In a recently decided BC Supreme Court case, Madam Justice Iyer called s. 25 "exceptional", noting that it "differs from the rest of *FIPPA* because it imposes a direct and overriding obligation on public bodies to disclose a narrowly-defined category of information even in the absence of any request for it."[5] She then agreed with prior OIPC orders that have said the threshold for s. 25 disclosure is high.[6]

32. The relevant portions of s. 25 state:

> **25** (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
>
> …
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

33. Disclosure under s. 25(1)(b) requires that the information at issue be "of clear gravity and present significance to the public interest."[7] The duty to disclose under s. 25(1)(b) "only exists in the clearest and most serious of situations where the disclosure is *clearly* (i.e., unmistakably) in the public interest."[8] Former Commissioner Denham clarified that "'clearly' means something more than a 'possibility' or 'likelihood' that disclosure is in the public interest."[9]

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[3] For example, Order F10-09, 2010 BCIPC 14 at para. 14; Order F20-42, 2020 BCIPC 51 at para. 35; Order F16-40, 2016 BCIPC 44 at para. 13; Order F19-49, 2019 BCIPC 55 at para. 10.
[4] For example, Order F15-27, 2015 BCIPC 29 at para. 29.
[5] *British Columbia (Children and Family Development) v. British Columbia (Information and Privacy Commissioner)*, 2023 BCSC 1179 at para. 38.
[6] *Ibid*.
[7] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 65.
[8] *Ibid* at paras. 45-46. Emphasis in original. See also Order F18-26, 2018 BCIPC 29 at para. 14.
[9] Investigation Report F15-02, 2015 BCIPC 30 at p. 28.

34. Further, the BC Supreme Court has said the term "public interest" in s. 25(1)(b) cannot be so broad as to encompass anything that the public may be interested in learning. The term is not defined by the various levels of public curiosity.[10]

35. To determine whether disclosure is clearly in the public interest, one must consider whether "a disinterested and reasonable observer, knowing the information and knowing all the circumstances, would conclude that disclosure is plainly and obviously in the public interest."[11]

36. The OIPC uses a two-part test to determine whether s. 25(1)(b) requires disclosure:[12]

    a) Does the information at issue relate to a matter that engages the public interest?

    b) If so, does the nature of the information at issue meet the high threshold for disclosure?

Does the information relate to a matter that engages the public interest?

37. One must consider the following factors when deciding if the matter engages the public interest:[13]

    a) Is the matter the subject of widespread debate or discussion by the media, the Legislature, Officers of the Legislature, or oversight bodies?

    b) Does the matter relate to a systemic problem rather than an isolated situation?

38. As described above, the information at issue is geospatial data that was created by TFLs and covers TFL tenures. In a general sense, this type of data relates to a

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[10] *Clubb v. Saanich (Corporation of The District)*, 1996 CanLII 8417 (BC SC) at para. 33.
[11] Investigation Report F16-02 at p. 26. Available on the OIPC website at https://www.oipc.bc.ca/investigation-reports/1972.
[12] Order F18-26, 2018 BCIPC 29 at paras. 15-16 and 24-29; Order F20-42, 2020 BCIPC 51 at para. 38; Order F21-08, 2021 BCIPC 12 at paras. 45-46.
[13] Order F20-42, 2020 BCIPC 51 at para. 38.

matter that engages the public interest. This is because the data is used to enable the Province's Chief Forester to determine an allowable annual cut for each TFL.

39. The harvesting of Provincial forests, particularly when it comes to old growth forests, is the subject of widespread debate and discussion by the media. It relates to a systemic issue rather than an isolated situation. Accordingly, the Ministry accepts that the information relates to a matter that engages the public interest. However, that does not end the s. 25(1)(b) analysis.

Does the nature of the information meet the high threshold for disclosure?

40. If the information relates to a matter that engages the public interest, then one must decide whether the nature of the specific information at issue meets the high threshold for disclosure. Factors to consider include whether the information would:[14]

    a) contribute to educating the public about the matter;

    b) contribute in a substantive way to the body of information already available;

    c) facilitate the expression of public opinion or allow the public to make informed political decisions; or

    d) contribute in a meaningful way to holding a public body accountable for its actions or decisions.

41. Consideration of these factors leads to the conclusion that the specific information at issue does not meet the high threshold for disclosure.

42. The Ministry's evidence establishes that the data is either 10 or 20 years old. It is outdated and does not accurately reflect the Province's or the TFLs' current practices or policies. For example, some data shows inclusion of about 170,000 hectares that are now set aside to protect old growth forests. Similarly, some data shows inclusion of areas now set aside for caribou, goshawk, spotted owl, and other

[14] Order F20-42, 2020 BCIPC 51 at para. 40.

species protected under the federal *Species at Risk Act*, provincial *Government Actions Regulation* and agreements made with First Nations.

Affidavit of Tim Salkeld at paras. 29-31

43. Accordingly, disclosure of the information would not contribute to educating the public about the matter. In fact, it would do quite the opposite because it would give an inaccurate and outdated impression of the Ministry's work, priorities, and policies, thereby misleading the public. At worst, disclosure would show land and features of TFL tenures at a specific point-in-time 20 years ago. At best, it would show land and features of TFL tenures at a specific point-in-time 10 years ago. In either case, the disclosure of this data would not educate the public about current forestry harvesting practices or policies.

44. For the same reasons, disclosure would not contribute in a substantive way to the body of information already available, nor would it facilitate the expression of public opinion or allow the public to make informed political decisions. Similarly, it is unclear how the disclosure of such dated, now-inaccurate information would contribute in a meaningful way to holding the Ministry to account.

45. Given the dated nature of the information, the high threshold for disclosure under s. 25(1)(b) has not been met. Disclosure is not unmistakeably in the public interest. Therefore, s. 25(1)(b) does not require disclosure.

46. Notably on this point, disclosure of the data at issue does not actually provide the Applicant with the information he originally requested. As explained above, the Applicant's access request sought geospatial data files that show <u>the most current version</u> of THLB mapping for all BC. The Ministry can understand why the Applicant would argue that s. 25(1)(b) applies to information about the most current version of the THLB mapping for all BC.

47. However, the affidavit evidence shows that the Ministry <u>already disclosed</u> the most current version of the THLB to the Applicant when it first responded to his access request. As noted, the Ministry initially responded to the Applicant's request by

providing a set of data files in its entirety which is the consolidation of all THLB analysis created for the most recently completed Timber Supply Review for the Province's Timber Supply Areas. The remaining data at issue in this inquiry is not the most current data – it is either 10 or 20 years old – and therefore its disclosure would not clearly be in the public interest.

PROTECTING THIRD PARTIES FROM HARM – SECTION 21

48. Section 21(1) of *FIPPA* explicitly recognizes the vital importance of protecting third parties by requiring public bodies to refuse to disclose information if disclosure could reasonably be expected to harm a third party's business interests. It is one of only a few mandatory exceptions to an applicant's access rights. Section 21(1) creates a three-part test for determining whether a public body must refuse disclosure. The Ministry bears the burden of proving that all three parts of this test have been met.

49. The relevant portions of s. 21(1) follow:

> **21**(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> …
>
> (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,
>
> (j) (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,
>
> (k) (iii) result in undue financial loss or gain to any person or organization…

50. Each of subsections (a), (b) and (c) above set out one part of the three-part test. So, the Ministry must provide evidence establishing all the following things:

a) The information at issue qualifies as the type of information described in s. 21(1)(a).

b) The third parties supplied the information to the Ministry in confidence.

c) The disclosure of the information could reasonably be expected to cause one of the harms listed in s. 21(1)(c).

Type of information – section 21(1)(a)(ii)

Commercial information

51. The information at issue fits within the meaning of s. 21(1)(a)(ii) because it is commercial information created by TFLs about land within their respective tenures.

52. As Adjudicator Davis stated in Order F21-12:

> *FIPPA* does not define the terms listed in s. 21(1)(a)(ii). However, previous orders have held that "commercial information" relates to commerce, or the buying, selling, exchanging or providing of goods and services. The information does not need to be proprietary in nature or have an actual or political independent market or monetary value. Past orders have found that commercial information includes information that:
>
> - "reveals something of the way" the third party conducts its business, such as whether they are complying with regulations and bylaws;
> - Relates to the third party's methods of providing services to its clients; or
> - Relates to the third party's performance under a contract, in the context of an ongoing commercial relationship with the public body.[15]

53. The information at issue is point-in-time data that reveals details about how the various TFLs were conducting their business at that time. TFLs create this data as a condition of their TFL to enable the Province's Chief Forester to determine an allowable annual cut for each TFL at least once every 10 years as required by section 8 of the *Forest Act*.

Affidavit of Tim Salkeld at para. 12.

[15]Order F21-12, 2021 BCIPC 16, at para. 23.

54. Given this and considering the factors Adjudicator Davis outlined above, the data is commercial information under s. 21(1)(a)(ii).

55. The Ministry respectfully refers the Commissioner to the Appropriate Persons' submissions for further evidence supporting its position that the information at issue is commercial information.

Technical information

56. Previous orders have defined "technical information" under s. 21(1)(a)(ii) as information belonging to an organized field of knowledge falling under the general categories of applied science or mechanical arts.[16] It usually involves information prepared by a professional with the relevant expertise, and describes the construction, operation or maintenance of a structure, process, or entity.[17]

57. The information at issue was prepared by professionals at the various TFLs using technical tools. As noted, it includes both location information and attribute information about specific lands and land features at a specific point in time. It can be used to create maps, among other things, and viewing it requires special software.

Affidavit of Tim Salkeld at para. 6

58. Given the above, the information fits within the meaning of technical information under s. 21(1)(a)(ii).

59. The Ministry respectfully refers the Commissioner to the Appropriate Persons' submissions as further support for its position that the information at issue qualifies as technical information.

Supplied in confidence – section 21(1)(b)

60. For section 21(1)(b) to apply, the information must be supplied either implicitly or explicitly in confidence. This is a two-step test. The first step is to determine whether

[16] Order F19-11, 2019 BCIPC 13 at para. 13.
[17] *Ibid*.

the information was supplied to a public body. The second step is to determine whether the information was supplied in confidence.[18]

61. Unlike what is often the case in inquiries relating to s. 21(1), the information at issue here does not comprise a contract between a third party and a public body. Instead, it is geospatial data files that various TFLs created and supplied to the Ministry.

62. There is no element of negotiation in the creation of geospatial data files. The files simply are what the various TFLs supplied to the Ministry upon request. As such, the data files are immutable. The Ministry's evidence establishes that the TFLs supplied the data sets to the Ministry in 2003 and 2013.

63. The Ministry's evidence also shows that the TFLs supplied the data in confidence. The Ministry began acquiring TFL data from TFLs in 2003 after sending TFLs a letter that explicitly promised that the Ministry would hold the data in confidence and would enter into confidentiality agreements with any TFLs that wished to do so.

Affidavit of Tim Salkeld at paras. 14-15

64. Some TFLs entered into confidentiality agreements with the Ministry prior to supplying the data in 2003.

Affidavit of Tim Salkeld at para. 17

65. In 2013, the Ministry asked the TFLs to provide new geospatial data. Some TFLs did so only after entering into confidentiality agreements with the Ministry.

Affidavit of Tim Salkeld at paras. 18-19

66. TFLs provided the data to the Ministry on the understanding that the Ministry would keep it confidential, in large part because the Ministry made this assurance to TFLs in its 2003 letter. Although the Ministry does publish numerous data sets, it has

[18] Order F16-39, 2016 BCIPC 43, at para. 19.

never publicly shared this particular data because the Ministry made explicit and implicit assurances of confidentiality to the TFLs.

Affidavit of Tim Salkeld at paras. 20-24

67. Given the above, the Ministry has shown that the first two parts of the s. 21(1) test have been met – the data is commercial, technical information about the third parties that the third parties supplied to the Ministry in confidence.

Reasonable expectation of harm – section 21(1)(c)

68. Like several other *FIPPA* exceptions, s. 21(1)(c) contains the "could reasonably be expected to" language. The Supreme Court of Canada has characterized the standard of proof imposed by this language as "a middle ground between that which is probable and that which is merely possible."[19] Meeting this standard requires proof that disclosure will result in a risk of harm that goes "well beyond the merely possible or speculative, but it need not be proved on the balance of probabilities that disclosure will in fact result in such harm."[20] The BC Supreme Court has articulated the test this way:

> … the public body does not need to prove the harm will *probably* occur if the information is disclosed. However, the mere *possibility* of harm is also not sufficient. Put another way, the test articulated by the Supreme Court of Canada is that the probability of the harm need only be reasonably expected; the test does not require probable or actual harm.[21]

69. To summarize, the courts have made clear that s. 21(1) does not require proof of actual or even probable harm. The Ministry does not need to prove that if the data is disclosed, the third parties will experience harm, nor does the Ministry have to prove that the third parties probably will experience harm.

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[19] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.
[20] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 206.
[21] *British Columbia Hydro and Power Authority v. British Columbia (Information and Privacy Commissioner),* 2019 BCSC 2128 at para. 88.

70. Section 21(1)(c) sets out four types of harm to a third party's business interests. The Ministry's evidence, paired with the evidence provided by the Appropriate Persons, establishes that the harms listed in ss. 21(1)(c)(i), (ii) and (iii) can reasonably be expected to result from disclosure.

71. The Ministry has provided affidavit evidence to assist the Commissioner in understanding how s. 21(1)(c)(ii) applies. The Ministry respectfully refers the Commissioner to the Appropriate Persons' submissions, which show that ss. 21(1)(c)(i) and(iii) also apply.

72. Geospatial data has been valuable to the Ministry for strategic level analysis to support policy decisions for years, from the Timber Reallocation Project in 2003, to the Old Growth Strategic Review work happening now. Receiving this data has been extremely helpful for the Ministry's work and that of other provincial experts tasked with advising senior government executive and cabinet.

Affidavit of Tim Salkeld at para. 26

73. If TFLs refused to provide the Ministry with this, or similar data, the Ministry would have to make policy decisions without full knowledge of possible impacts on 5.1 million hectares of highly productive forest land (roughly 10% of the Province's forested area).

Affidavit of Tim Salkeld at para. 28

74. In short, the Ministry's evidence establishes that it is in the public interest for the Ministry to continue to receive data like this from TFLs.

75. In addition, the Ministry has provided affidavit evidence from Tim Salkeld, who has 44 years of experience working in the forest industry. Mr. Salkeld attests that he believes disclosure of the information at issue could result in similar information no longer being supplied to the Ministry due to a fracture in the trust relationships that would result. This is the type of harm *FIPPA* protects against in s. 21(1)(c)(ii).

Affidavit of Tim Salkeld at para. 27

76. The Ministry's evidence, when considered in combination with the Appropriate Persons' evidence, goes well beyond the speculative or the possible. It establishes to the requisite standard that disclosure "could reasonably be expected to" result in the harms the Legislature intended s. 21(1) to protect against.

77. Taking all this into account, all three parts of the s. 21(1) test have been met. Accordingly, *FIPPA* requires the Ministry to withhold the information at issue.

RELIEF SOUGHT

78. The Ministry has provided clear and convincing evidence to show that s. 25(1)(b) does not require the Ministry to disclose the information in dispute and that s. 21(1) requires the Ministry to continue to withhold this information. Therefore, the Ministry respectfully requests that the Commissioner confirm that s. 25(1)(b) does not apply and that s. 21(1) does.

All of which is respectfully submitted.

Dated: August 24, 2023

Troy Taillefer
Legal Counsel
Legal Services Branch
Ministry of Attorney General

Laylí Antinuk
Legal Counsel
Legal Services Branch
Ministry of Attorney General

TAB 2

Affidavit No. 1
Tim Salkeld
Sworn August 23, 2023
OIPC File F21-88031
PB File FNR-2020-07414

In the Inquiry under the

Freedom of Information and Protection of Privacy Act

between

AN APPLICANT

and

THE MINISTRY OF FORESTS

and

THE APPROPRIATE PERSONS

AFFIDAVIT #1 of TIM SALKELD

I, Tim Salkeld, Manager of Forest Inventory, Forest Analysis and Inventory Branch, Ministry of Forests of Victoria, British Columbia SWEAR AS FOLLOWS:

1. I have personal knowledge of the facts and matters deposed to in this affidavit, except where stated to be on information and belief, and where so stated I believe them to be true.

Background

2. I have worked in the forestry industry for a total of 44 years. I joined the Ministry of Forests (Ministry) in 1992. I have been the Manager of Forest Inventory in the Forest Analysis and Inventory Branch of the Ministry since October 2017.

3. Currently, the Forest Analysis and Inventory Branch contains 62 employees, 28 of whom I manage.

4. My main responsibilities as the Manager of Forest Inventory involve:
    - Leading my team's development, collection, and delivery of a coordinated program for the estimation, projection, and monitoring of provincial forest resources.

- Developing provincial strategies for consistent and accurate inventory data collection, analysis, projection and reporting for all crown lands.
- Ensuring that effective working relationships are established between industry, government, academics, and other co-operators.
- Ensuring that effective government-to-government relationships are established with First Nations.

The Applicant's access request

5. I am advised by Anthony Wan, FOI Specialist at Information Access Operations, and believe it to be true that on December 28, 2020, the Applicant made an access request (Request) to the Ministry seeking:

> *Geospatial data files that show the most current version of Timber Harvesting Land Base mapping for all of BC.*

6. Geospatial data includes both location information and attribute information about specific lands and features at the point-in-time the data is gathered. This type of data is gathered from a combination of sources including maps, satellites and other technical tools. It can be used to create maps and viewing it requires special software.

7. In February of 2021, the Ministry responded to the Request by disclosing a set of geospatial data files to the Applicant in its entirety. This geospatial data is the consolidation of all Timber Harvesting Land Base (THLB) analysis created for the most recently completed Timber Supply Review for the Province's Timber Supply Areas. The Ministry's response provided the Applicant with the most current version of the THLB in the Ministry's custody and control.

8. The Applicant raised concerns about the adequacy of the Ministry's search for records. After further review, the Ministry identified additional geospatial data files, which it withheld under s. 21 of the *Freedom of Information and Protection of Privacy Act* (*FIPPA*).

Notices under FIPPA

9. The additional geospatial data files were created by 20 third parties and one public body that hold one or more Tree Farm Licences (TFL). The Ministry sent all these entities notices under s. 23 of *FIPPA* to offer each of them the opportunity to consent to disclosure or provide written representations as to why the information should not be disclosed.

10. The public body (City of Mission) and two of the third parties consented to the release of their data sets. The Ministry released those data sets to the Applicant.

11. The Ministry continues to withhold the data sets created by the remaining 18 third parties. These data sets comprise the information at issue in this inquiry.

The information at issue

12. The information at issue in this inquiry is THLB geospatial data (the Data) covering TFL tenures. It was created by and belongs to TFL holders (TFLs). TFLs create the Data as a condition of their TFL to enable the Province's Chief Forester to determine an allowable annual cut for each TFL at least once every 10 years as required by section 8 of the *Forest Act*.

How the Ministry acquired the Data

Data acquisition in 2003

13. The Ministry began acquiring geospatial data from TFLs in 2003 as part of what became known as the Bill 28, *Forestry Revitalization Act* (2003) "take-back" legislation. Bill 28 acquired this name because it provided for a one-time "take-back" of volume from the tenures of larger licensees, with compensation to the licensees.

14. As a result of Bill 28, Julian Paine, Executive Director of the Tenure and Revenue Division of the Ministry wrote a letter (Letter) to all TFLs on August 8, 2003, requesting that they provide a data set to the Ministry. A copy of the Letter is attached to my affidavit at **Exhibit A**.

15. The Letter states that the Ministry will hold the data in confidence. The Letter also states that the Ministry will enter into confidentiality agreements with TFLs that wish to do so.

16. In response and as requested by the Ministry, TFLs supplied data to the Ministry. Some of the Data at issue comprises this TFL data acquired in 2003.

17. Some TFLs elected to enter into confidentiality agreements with the Ministry prior to supplying the data requested in the Letter, including Canadian Forest Products and TimberWest.

Data acquisition in 2013

18. In 2013, the Ministry began an examination of available fibre and harvest residue to inform policy on future tenure opportunities for sawmills and wood pellet facilities. To complete this analysis, the Ministry asked the TFLs to provide new geospatial data to the Ministry. Some of the Data at issue comprises TFL data acquired in 2013 as a result of the Ministry's request to the TFLs.

19. Some TFLs provided the data requested in 2013 only after entering into confidentiality agreements with the Ministry. This includes TimberWest, Western Forest Products Inc., and International Forest Products Limited (a.k.a. Interfor).

Confidentiality

20. I believe that TFLs provided the 2003 Data on the understanding that the Ministry would keep it confidential. I say this because, as described above, the Letter explicitly says that the Ministry will hold the data in confidence.

21. Additionally, Julian Paine wrote a letter to all TFLs on January 7, 2004, seeking permission to share their data with a contractor working for the Ministry and re-affirming that the ownership rights of the data remain with the TFLs. A copy of that letter is attached to my affidavit at **Exhibit B**.

22. Also, as noted above, some TFLs entered into confidentiality agreements with the Ministry prior to providing the 2003 Data.

23. TFLs provided their 2013 Data to the Ministry on the understanding that the Ministry would keep it confidential. I know this because I was working for the Ministry at the time and was very involved in the process. For example, I was the Ministry representative that requested and received some of this Data and negotiated the data use agreements in 2013. As noted above, some TFLs entered into confidentiality agreements with the Ministry prior to providing the 2013 Data.

24. The Ministry has never publicly shared the Data provided by the TFLs even though it does publish numerous data sets. For example, I have created and published numerous data sets under the Province's open data license, but these data sets have never included the Data.

Third party representations

25. Some third parties provided written representations in response to the notice the Ministry provided under s. 23 of *FIPPA*, which I described at paragraph 9 above. Those representations confirmed what we at the Ministry understood to be the s. 21 harms associated with disclosure of the Data.

The Data's value to the Ministry

26. The Data has been valuable to the Ministry for strategic level analysis to support policy decisions for years, from the Timber Reallocation Project in 2003, to the Old Growth Strategic Review work happening now. Receiving this Data has been extremely helpful for my team's work and that of other provincial experts tasked with advising senior government executive and cabinet.

27. Based on my 44 years working in the forest industry, I believe that disclosure of the Data could result in similar information no longer being supplied to the Ministry. I say this because the Ministry's Forest Analysis and Inventory Branch has worked with private sector companies, First Nations, and local government to build relationships based on trust. If the Ministry discloses information that these groups provided to the Ministry under the promise of confidentiality, trust will be eroded.

28. If TFLs refuse to provide this, or similar, data to the Ministry in the future, policy decisions will be made without full knowledge of possible impacts on 5.1 million hectares of highly productive forest land (roughly 10% of the Province's forested area).

The Data's age

29. The TFLs supplied the Data to the Ministry at two distinct points over the last 20 years.

30. As described above, the Ministry received the first data set in 2003. This Data is now 20 years old. The Ministry received the second data set in 2013. This Data is now 10 years old.

31. Given this, the Data is outdated and does not accurately reflect the Province's or the TFLs' current practices or policies. For example, some Data shows inclusion of about 170,000 hectares that are now set aside to protect old growth forests. Similarly, some Data shows inclusion of areas now set aside for caribou, goshawk, spotted owl, and other species protected under the federal *Species at Risk Act*, provincial *Government Actions Regulation* and agreements made with First Nations.

32. Given the above and based on my considerable experience working with geospatial data at the Ministry since 1992, I believe disclosure of the Data would mislead the public and give an inaccurate impression of the Ministry's work and the TFLs' work.

33. I swear this affidavit for the Commissioner's consideration in this inquiry.

SWORN BEFORE ME at the City of Victoria, in the Province of British Columbia, this 23rd day of August, 2023.	)	
A Commissioner for taking Affidavits for British Columbia	)	Tim Salkeld, RPF

LAYLI ANTINUK
BARRISTER & SOLICITOR
MINISTRY OF ATTORNEY GENERAL
7th Floor, 1675 Douglas Street
Victoria BC V8W 2G5

BRITISH COLUMBIA

This is Exhibit A referred to in
the Affidavit of Tim Salkeld
Sworn before me at Victoria,
British Columbia, this 23rd day
of August, 2023

A Commissioner for taking Affidavits within British Columbia

File: 22000-20/TRT

August 8, 2003

To: All TFL and Timber License holders affected by Bill 28

The ministry is moving ahead with the *Forest Revitalization Plan* announced on March 26, 2003. A significant component of the Plan is a reallocation of harvesting rights to BC Timber Sales to allow implementation of the market pricing system, to First Nations for new tenure opportunities, and to the small tenures program.

Meetings initiated over the last several months with affected licensees provided an opportunity to explain the reallocation process and gather input. A significant piece of this process, introduced at the June 16th meeting and sent out for comment in early July, was a map of the proposed selection (analysis) units that will be used to identify representative volume/area for the market pricing system. Several comments were received and a final map of the selection units and response to the comments received is attached.

The process for reallocating volume will be handled in two phases. Phase one will establish the volumes required from affected licenses to meet the AAC reductions identified in Bill 28. Phase two will involve identifying areas on the ground that corresponds with the required volume. The effectiveness of this process will depend on the completeness and quality of the inventory attribute information used to assess the cost and value profile in each selection unit. The ministry has developed a database for the required attributes from government repositories, however, current data for TFLs and Timber Licenses (TLs) outside of TFLs is lacking. This data is essential for an assessment of the entire timber harvest landbase prior to any decisions on volume or area reallocation taking place.

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IT'S OUR TIME TO SHINE

To facilitate timely implementation of this process the ministry requests that holders of TFLs and TLs provide a data set based on the attached rationalization document and spreadsheet format. This information is required on or before September 15, 2003. The information provided will be considered single purpose data and will be held in confidence. The ministry will enter into a confidentiality agreement with licensees that feel this is necessary.

Ministry of Forests

Tenure and Revenue Division

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Tel: (250) 387-3656
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Your assistance in this initiative is greatly appreciated. If you have any questions please contact Vera Sit, Reallocation Technical Team Project Leader, at 387-8956.

Julian C. Paine

Julian Paine
Executive Director
Tenure and Revenue Division

Attachment(s): 4

pc: Rick Brand, Strategic Planning Forester,
Strategic Policy and Planning Branch
Vera Sit, Reallocation Technical Team Project Leader,
Forest Analysis Branch

BRITISH COLUMBIA

This is Exhibit B referred to in
the Affidavit of Tim Salkeld
Sworn before me at Victoria,
British Columbia, this 23rd day
of August, 2023

A Commissioner for taking Affidavits within British Columbia

File: 22000-20/TRT

January 7, 2004

To All TFL Holders Affected by Bill 28

Thank you for submitting TFL data for the Timber Reallocation Project.

In preparation for Phase 2, the area-selection phase of the Timber Reallocation project, the Ministry of Forests has set up a contract with Spatial Mapping Ltd. to process TFL data. During the course of this contract, Spatial Mapping Ltd. may contact you regarding the data you have submitted.

While fulfilling this data processing contract, all information received, generated or derived by Spatial Mapping Ltd shall not be:

- disseminated to third parties;
- used for any other purpose other than fulfilling the contract;
- retained beyond termination of the contract, and must be promptly destroyed.

The Ministry of Forests and contractor recognise that ownership rights of the TFL data remain with the licensees.

Thank you for your co-operation. If you have any questions please contact Vera Sit, Reallocation Technical Team, at 250-387-8956.

VANCOUVER 2010

Yours truly,

Julian C. Paine

Julian Paine
Executive Director

pc: Keith Good, President, Spatial Mapping Ltd.
Vera Sit, Reallocation Technical Team, Research Branch

Ministry of Forests | Tenure and Revenue

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