ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 98-017

February 25, 1999

ALBERTA ENVIRONMENTAL PROTECTION

Review Number 1441

I. BACKGROUND

[para 1.] On March 28, 1998, the Applicant (who represents unnamed clients and who is the Affected Party in this inquiry) applied to Alberta Environmental Protection (the "Public Body") for access under the *Freedom of Information and Protection of Privacy Act* (the "Act") to a "Phase II Contamination Assessment Report" concerning certain land. An unnamed Third Party, who was represented by a solicitor in this inquiry, had provided that report to the Public Body.

[para 2.] The Public Body decided to disclose the report. The Third Party objected to disclosure, on the grounds that section 26(1)(a) and section 26(2) of the Act (litigation privilege of a third party), and section 15(1) (disclosure harmful to the business interests of a third party) prevented disclosure.

[para 3.] On June 4, 1998, the Third Party asked that I review the Public Body's decision. Mediation was authorized but was not successful. The matter was set down for an oral inquiry on November 26, 1998. I received the Applicant's submission on November 3, 1998, and the Public Body's and Third Party's submissions on November 20, 1998. The Third Party's submission raised the further issue of whether section 5(2) of the Act (paramountcy) applied so that the report was not subject to the Act. The Applicant raised the issue of whether, under

section 31(1) of the Act, the report should be disclosed in the public interest.

[para 4.] At the conclusion of the inquiry, I asked the parties for further information and concluding submissions. In particular, I asked the Third Party's solicitor to provide me with the Third Party's sworn statement as to the applicability of section 26(1)(a) and section 26(2) of the Act (litigation privilege of a third party). I informed the parties that I intended to receive that sworn statement *in camera*, and would not be providing it to the parties, as permitted by section 66(3) of the Act.

[para 5.] I received the further information and the concluding submissions from the Applicant on December 4, 1998, from the Public Body on December 8, 1998, and from the Third Party on December 9, 1998.

[para 6.] I then gave the parties an opportunity to respond to the additional information provided, other than the Third Party's sworn statement. I received a response from the Applicant and the Public Body only, on December 22, 1998.

II. RECORD AT ISSUE

[para 7.] The record at issue is the "Phase II Contamination Assessment Report" concerning certain land. In this Order, I will refer to that record as the "Report".

III. ISSUES

[para 8.] There are four issues in this inquiry:

A. Does section 5(2) of the Act (paramountcy) apply to the information contained in the Report, so that the Report is not subject to the Act?

B. Do section 26(1)(a) and section 26(2) of the Act (litigation privilege of a third party) apply to the information contained in the Report?

C. Does section 15(1) of the Act (disclosure harmful to the business interests of a third party) apply to the information contained in the Report?

D. Is the Public Body required to disclose the Report under section 31(1) of the Act (disclosure in the public interest)?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Does section 5(2) of the Act (paramountcy) apply to the information contained in the Report, so that the Report is not subject to the Act?

[para 9.] Section 5(2) of the Act, referred to as the "paramountcy" provision, allows certain provisions of other legislation (generally, confidentiality or non-disclosure provisions) to prevail over the Act. If section 5(2) of the Act applies, the provision of the other legislation governs the disclosure of the particular information or record; it is not subject to the Act.

[para 10.] Section 5(2) of the Act reads:

> *5(2) If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless*
>
> > *(a) another Act, or*
> >
> > *(b) a regulation under this Act*
>
> *expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.*

[para 11.] The *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95 (the "Regulation"), made under the Act, is relevant. Section 15(1)(e) of the Regulation reads:

> *15(1) The following provisions prevail despite the Freedom of Information and Protection of Privacy Act:*
>
> > *…*
> >
> > *(e) Environmental Protection and Enhancement Act, section 33(4)-(9).*

[para 12.] The Third Party argues that the Report falls within section 33(9) of the *Environmental Protection and Enhancement Act*, S.A. 1992, c. E-13.3 (the "EPEA"), which prevails over the *Freedom of Information and Protection of Privacy Act*; consequently, section 5(2) applies, and the Report is not subject to the Act. Section 33(9) prevents disclosure of the Report, in the Third Party's view.

[para 13.] The Public Body argues that section 33(9) of the EPEA does not apply to the Report.

[para 14.] The following portions of section 33 of the EPEA are relevant:

> *33(1) Subject to this section,*
>
> > *(a) the following documents and information in the possession of the Department that are provided to the Department in the administration of this Act shall be disclosed to the public in the form and manner provided for in the regulations:*
> >
> > > *(i) information in respect of a proposed activity that is provided to the Department for the purposes of Part 2, Division 1 by a proponent within the meaning of that Part;*
> > >
> > > *(ii) documents and information in the register referred to in section 54;*
> > >
> > > *(iii) information that is provided to the Department as part of the application by*
> > >
> > > > *(A) an applicant for an approval, a registration or a certificate of variance;*
> > > >
> > > > *(B) the holder of an approval or registration, in respect of an application to change an activity;*
> > > >
> > > > *(C) the holder of an approval, in respect of an application to amend a term or condition of, add a term or condition to or delete a term or condition from the approval;*
> > >
> > > *(iv) environmental and emission monitoring data, and the processing information that is necessary to interpret that data, that is provided by an approval holder;*
> > >
> > > *(v) any reports or studies that are provided to the Department in accordance with a term or condition of an approval;*

(v.1) any reports or studies that are provided to the Department and are required by the regulations to be disclosed to the public under this section;

(vi) statements of concern;

(vii) notices of appeal.

…

(2) Subsection (1)(a) applies only to documents and information provided to the Department after the coming into force of this section.

(3) The Minister may disclose to the public in the form and manner provided for in the regulations any other information in the possession of the Department that the Minister considers should be public information.

(4) Where information referred to in subsection (1) or (3) is provided to the Department and relates to a trade secret, process or technique that the person submitting the information keeps confidential, the person submitting the information may make a request in writing to the Director that the information be kept confidential and not be disclosed.

…

(9) Information relating to a matter that is the subject of an investigation or proceeding under this Act may not be released under subsection (1) or (3).

[para 15.] In arguments as to whether the Report falls within section 33(9) of the EPEA, the parties focused on whether there was an "investigation" under the EPEA. However, in my view, it is first necessary to determine whether the Report falls within section 33(1) or section 33(3) before determining whether the information contained in the Report relates to a matter that is the subject of an "investigation" or "proceeding" under the EPEA, as provided by section 33(9). I conclude that the kind of information that cannot be disclosed in the circumstances set out under section 33(9) must be the same kind of information or documents that would be disclosed to the public under section 33(1) or section 33(3). I agree with the Public Body that section 33(9) cannot apply to a document that does not appear in section 33(1) or section 33(3).

[para 16.] My view that section 33(9) refers only to the information or documents that would be disclosed to the public under section 33(1) or section 33(3) is reinforced by the Alberta Environmental Appeal Board in *Sawatzky v. Alberta (Department of Environmental Protection)* (1994),

Appeal No. EAB 94-005 (Alberta Environmental Appeal Board). In that case, the Board said that:

> The Board makes no comment at this time regarding: (1)…; (2) the broad wording of s. 33(9) which not only ties the Minister's hands in releasing certain public information [my emphasis] (s. 33(3)) but also makes redundant certain sections of the Act (eg. ss. 33(1)(b)(viii) (ix)), or (3) the Department's assumption that the Board is a member of the "public" to whom information cannot be released under s. 33(9). Certainly, there may sometimes be valid policy reasons for withholding investigation material, but the existence and effect of such a broad exemption during appeal proceedings (where the investigation is in issue) leaves questions in the mind of the Board.

[para 17.] To decide whether the Report falls within section 33(1), I have carefully reviewed the kinds of information or documents that are to be disclosed to the public under section 33(1). I have not considered section 33(3), as that section is not at issue in this inquiry. I have also reviewed the information set out in the *Environmental Assessment Regulation*, Alta. Reg. 112/93, and the *Disclosure of Information Regulation*, Alta. Reg. 116/93, both of which are made under the EPEA and referred to in section 33(1).

[para 18.] The Public Body argues that the Report does not fit within section 33(1). The Third Party says that the Report fits within section 33(1)(a)(iii)(A) (information provided as part of an application for an "approval") and section 33(1)(a)(v.1) (reports or studies that are required by the regulations to be disclosed to the public).

[para 19.] I will first consider whether the Report fits within section 33(1)(c)(iii)(A) (information provided as part of an application for an "approval").

[para 20.] An "approval" is defined in section 1(f) of the EPEA to mean an approval issued under the EPEA in respect of an "activity". "Activity" is defined in section 1(a) of the EPEA to mean an activity or part of an activity listed in the "Schedule of Activities" under the EPEA.

[para 21.] There is no evidence before me that the Third Party received an "approval" for an "activity", as those terms are defined. Therefore, the information contained in the Report cannot relate to an "approval" of an "activity".

[para 22.] The Third Party argues that the Third Party obtained an "approval" under section 113(1)(a) of the EPEA. Section 113(1)(a) reads:

> *113(1) A person responsible for the contaminated site may*

> *(a) prepare for the approval [my emphasis] of the Director a remedial action plan in respect of the contaminated site…*

[para 23.] I note that section 113(1)(a) of the EPEA is contained in that part of the EPEA concerning the designation of contaminated sites. The evidence before me is that the site at issue has not been designated as a contaminated site. Therefore, section 113(1)(a) cannot apply.

[para 24.] Nevertheless, for the sake of argument, I will assume, without deciding, that the Third Party obtained the "approval" of the Director for a remedial action plan under section 113(1)(a) of the EPEA, and that the Report is the remedial action plan. However, the "approval" under section 113(1)(a) is contained in Part 4 of the EPEA, and that "approval" is not the same thing as an "approval" of an "activity" under Part 2 of the EPEA for the purpose of bringing the Report within section 33(1)(a)(iii)(A).

[para 25.] Furthermore, in *Rivard v. Alberta (Department of Environmental Protection)* (1998), Appeal No. 97-038 (Alberta Environmental Appeal Board), the Board had requested copies of all correspondence, documents and materials related to an appeal of an Amending Approval allowed for the construction of a wastewater storage cell and groundwater monitoring wells under the EPEA. That the Department was referring to an "approval" of an "activity" under Part 2 of the EPEA is clear from the Department's response to the Board under section 33(9) of the EPEA, as follows:

> We have been advised by the Pollution Control Division of Alberta Environmental Protection that an investigation is currently ongoing regarding some or all of the grounds for appeal set out by Mr. Rivard in the Notice of Appeal. The complaint to the Pollution Control Division was made by Mr. Maurice Rivard. Therefore, as this matter is the subject of an investigation, we will be unable to provide any further documents, correspondence or materials to the Environmental Appeal Board which may be found in the investigator's file so as not to adversely affect the investigation and ultimately the rights of the approval holder [my emphasis].

[para 26.] The following circumstances under which the Third Party provided the Report to the Public Body are also relevant in deciding whether there has been an "approval" of an "activity".

[para 27.] On July 8, 1997, the municipality's engineering department was excavating near the Third Party's land, in order to repair a water main break. The on-site engineer noticed hydrocarbon contamination, and notified the municipality's fire department. The Public Body's

investigator examined the site and questioned several people in the general area.

[para 28.] The Public Body determined that the Third Party might be responsible for the release of a substance into the environment. The Public Body required the Third Party to report to the Public Body under section 3(1) of the *Release Reporting Regulation*, Alta. Reg. 117/93 (made under the EPEA), and also under the following provisions of the EPEA: section 99(1) (duty to report release), 100 (manner of reporting), and 101 (duty to take remedial measures).

[para 29.] Section 96(2) of the EPEA is particularly significant in these circumstances. Section 96(2) reads:

> *96(2) Sections 99 to 101 apply only to releases of substances that are <u>not authorized by an approval</u>* [my emphasis] *or the regulations.*

[para 30.] Section 1 of the Schedule of Activities under the EPEA lists, as an "activity" for which an "approval" may be obtained, the release of substances that cause or may cause an adverse effect. The fact that the Public Body required the Third Party to report under section 99(1), section 100 and section 101 is evidence that the Third Party did not have an "approval" for the "activity" of releasing substances.

[para 31.] Therefore, I conclude that the Report does not meet the criteria of section 33(1)(a)(iii)(A) of the EPEA, that is, the Report is not information that relates to an "approval" of an "activity", as those terms are defined.

[para 32.] I will next consider whether the Report fits within section 33(1)(a)(v.1) (reports or studies that are required by the regulations to be disclosed to the public).

[para 33.] I have reviewed the regulations under the EPEA, including those cited above, to determine what reports or studies must be disclosed to the public under section 33(1)(a)(v.1). The regulations do not mention any reports or studies such as the Report provided by the Third Party.

[para 34.] Furthermore, the Public Body says that it has never before disclosed such a report, without the consent of the person who provided the report or the person who owned the land for which the report was completed. The Public Body also says that it did not provide the Report to the municipality, and that the municipality did not otherwise receive a copy of the Report.

[para 35.] Therefore, I conclude the Report does not meet the criteria set out in section 33(1)(a)(v.1) of the EPEA, that is, the Report is not a report or study required by the regulations to be disclosed to the public.

[para 36.] Having concluded that the Report is not the kind of information or document that must be disclosed to the public under section 33(1) of the EPEA or under the regulations to the EPEA, I find that section 33(9) of the EPEA does not apply to the information contained in the Report. Having made this finding, I do not find it necessary to decide whether the information contained in the Report relates to a matter that is the subject of an "investigation" or "proceeding" under the EPEA, as provided by section 33(9).

[para 37.] My finding that section 33(9) of the EPEA does not apply means that section 33(9) does not prevail over the Act in relation to the information contained in the Report. The result of my finding is that section 5(2) of the Act (paramountcy) does not apply to the information contained in the Report. Therefore, the Report is subject to the Act.

ISSUE B: Do section 26(1)(a) and section 26(2) of the Act (litigation privilege of a third party) apply to the information contained in the Report?

1. General

[para 38.] At issue is whether the information contained in the Report meets the criteria for "litigation privilege" of the Third Party, as provided by section 26(1)(a) and section 26(2) of the Act. If so, the Public Body must not disclose the Report.

[para 39.] Section 26(1)(a) and section 26(2) read:

> *26(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege.*
>
> *(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.*

2. Application of section 26(1)(a) of the Act

[para 40.] In Order 96-015, I said that "litigation privilege" was a recognized privilege for the purposes of section 26(1)(a) of the Act.

[para 41.] The Public Body says that the information contained in the Report does not meet the criteria for litigation privilege. The Public Body argues that the Report was not produced for the dominant purpose of reasonably contemplated litigation between the Third Party and the Public Body, because the Public Body was not conducting an investigation of the Third Party under the EPEA.

[para 42.] The Third Party maintains that the information contained in the Report does meet the criteria for litigation privilege. The Third Party's sworn evidence is that the Report was produced for the dominant purpose of reasonably contemplated litigation between the Third Party and other third parties.

[para 43.] In Order 97-009, I held that litigation privilege applied to records that were produced when a public body was investigating a third party, or when there was actual or contemplated litigation between a third party and another third party. In either case, for litigation privilege to apply, the following criteria must be met:

> (1) There must be a third party communication, such as a communication between a solicitor and a third party, to assist with the giving of legal advice;
>
> (2) The maker of a document or the person under whose authority a document is made must intend the document to be confidential; and
>
> (3) The "dominant purpose" for which a document was prepared must be to submit it to a legal advisor for advice and use in litigation, whether existing or contemplated. The "dominant purpose" test consists of three requirements:
>
> > (i) the document must have been produced with existing or contemplated litigation in mind,
> >
> > (ii) the document must have been produced for the dominant purpose of existing or contemplated litigation, and
> >
> > (iii) if litigation is contemplated, the prospect of litigation must be reasonable.

[para 44.] To decide whether the information contained in the Report meets the criteria for litigation privilege, I have reviewed not only the Third Party's sworn statement, but also the chronology of events, as determined from the Report and the documentary evidence presented by both the Public Body and the Third Party. The chronology of events is as follows.

[para 45.] In 1991, the Third Party obtained both an initial and a supplementary site assessment report for the land at issue (May 13, 1991 and June 17, 1991, respectively). On April 1, 1993 and again on November 24, 1993, the Public Body sent a letter to the Third Party, asking for the Third Party's consultant's report on the remediation proposal for the land. On November 30, 1994, the Public Body sent a further letter to the Third Party, indicating that the Third Party had not yet responded to the Public Body. That letter said there was no need for the Public Body's further involvement in the issue of the remediation work, and that the Public Body considered the matter to be closed.

[para 46.] On February 3, 1997, the Public Body responded to a question from the Third Party's consultant. On May 27, 1997, the Third Party's solicitor sent a formal letter of authorization to the Third Party's consultant to proceed with the contamination investigation and produce the Report. The solicitor's letter states: "Please note that our client is contemplating commencement of legal proceedings against those parties responsible for the contamination (if any) so as to force those parties to pay for costs to clean-up the contamination." That letter also states that the Third Party may later attempt to subdivide the land, and that the municipality will require a Phase II Environmental Site Assessment Report.

[para 47.] On July 8, 1997, the Public Body became aware of gasoline contamination near the Third Party's land. On July 16, 1997, the Public Body sent a letter to the Third Party's solicitor, requiring that the Third Party

> (i) report to the Public Body, as provided by section 99(1) of the EPEA and section 3(1) of the *Release Reporting Regulation*, Alta. Reg. 117/93, made under the EPEA, and
>
> (ii) undertake a site investigation, as outlined in the Remediation Guidelines for Petroleum Storage Tank Sites, and forward a report of the findings and recommendations on remediation, if required, to the Public Body.

[para 48.] The Third Party's consultant completed the Report on August 12, 1997, but the Report was not forwarded to the Public Body.

On November 17, 1997, the Public Body sent a fax to the Third Party's solicitor, asking when it could expect the environmental assessment report to arrive. On December 19, 1997, the Public Body sent a further letter to the Third Party's solicitor, requiring that the site assessment report be forwarded pursuant to section 100 and section 101 of the EPEA. The Public Body's letter stated that "Failure to submit the report may result in enforcement action."

[para 49.] The Third Party's solicitor sent the Report to the Public Body on February 11, 1998. The solicitor's accompanying letter stated: "Please note that the Report contains confidential information and, as such, please contact this writer for approval before distributing the Report outside your office."

[para 50.] In deciding whether litigation privilege applies, there is no rule that privilege must be proved beyond a reasonable doubt: *Royal Bank of Canada v. Lee* (1992), 3 Alta. L.R. (3d) 187 (Alta. C.A.). After reviewing the preceding chronology of events and the Third Party's sworn statement, I conclude, on balance, that the Report was prepared for the dominant purpose of reasonably contemplated litigation between the Third Party and other third parties.

[para 51.] Having come to this conclusion, I do not find it necessary to decide whether the Public Body was conducting an investigation of the Third Party, and whether the Report was prepared for the dominant purpose of reasonably contemplated litigation between the Third Party and the Public Body.

[para 52.] The privilege for third party communications prepared for reasonably contemplated litigation ends with the litigation for which the communications were prepared: *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.* (May 22, 1998), Edmonton Doc. No. 9601-14674 (Alta. Q.B.). There is no evidence before me as to the status of the litigation between the Third Party and other third parties, for which litigation privilege has been claimed. However, at this early stage in which litigation is reasonably contemplated, there is no requirement that the Third Party provide such evidence.

[para 53.] The Public Body nevertheless says that the Third Party did not claim litigation privilege when it provided the Report. The Public Body maintains that the Third Party should have specifically claimed litigation privilege at that time. I presume that the Public Body is saying that the Report should have been marked "Privileged and Confidential" at the very least, or that the Third Party's solicitor should have used the word "Privileged" in the February 11, 1998 letter to the Public Body.

[para 54.] I have said that one of the criteria that must be met for litigation privilege to apply is that either the maker of a document or the person under whose authority a document was made must have intended the document to be confidential.

[para 55.] In this case, the Report itself is stamped "Confidential". The May 27, 1997 letter from the Third Party's solicitor to the Third Party's consultant states: "[The consultant] will treat all information exchanged or generated in this matter with the strictest confidence and will not reveal same to anyone except insofar as is required for the preparation of the report." Furthermore, the February 11, 1998 from the Third Party's solicitor to the Public Body states: "Please note that the Report contains confidential information and, as such, please contact the writer for approval before distributing the Report outside your office."

[para 56.] Therefore, I find that both the maker of the Report and the person under whose authority the Report was made intended the Report to be confidential. As the criterion has been met in this case, I do not propose to discuss the merits of the Public Body's view about how the criterion should be met.

[para 57.] I find that litigation privilege applies to the information contained in the Report.

3. Waiver of privilege

[para 58.] The Public Body says that it would be prepared to accept that the Report was prepared for the dominant purpose of reasonably contemplated litigation. However, the Public Body maintains that the Third Party waived litigation privilege by providing the Report to the Public Body, when the Third Party was not compelled to do so.

[para 59.] The Public Body maintains that the Third Party was required to provide only that information set out in section 100 of the EPEA and section 3(1) of the *Release Reporting Regulation*. The Public Body's view is that, by providing information the Third Party did not have to provide, the Third Party waived litigation privilege. Consequently, the Public Body believes it can do as it wishes with the Report, such as providing the Report to the Applicant.

[para 60.] The Public Body also cites the following two cases as supporting its position that there can be no confidentiality for the Report because the Public Body is a regulator: *R. v. Chem-Security (Alberta) Ltd.* (1998), Doc. No. 80534464P101-03 (Alta. Prov. Ct.); and *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154 (S.C.C.).

[para 61.] Black's Law Dictionary defines "waiver" as the intentional or voluntary relinquishment of a known right. In this case, the "right" is the ability to maintain the confidentiality of information that meets the criteria for litigation privilege.

[para 62.] In Order 97-009, I reviewed the case law as to waiver of privilege, and concluded that waiver depends on intention: see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 61 Alta. L.R. (2d) 319 (Alta. C.A.). The principle that waiver depends on intention has also been characterized as waiver for a limited purpose ("limited waiver"): see *Interprovincial Pipe Line Inc. v. Canada (Minister of National Revenue)* (October 13, 1995), Doc. No. T-1229-95 (Fed. T.D.*); Western Canadian Place Ltd. v. Con-Force Products Ltd.* (April 11, 1997), Calgary Doc. Nos. 9201-20817, 9301-02968, 9301-12425, 9301-14055 (Alta. Q.B.); *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*, cited above.

[para 63.] Did the Third Party intend to waive litigation privilege? To put it another way, did the Third Party waive privilege for a limited purpose?

[para 64.] The Third Party maintains that, in providing the Report to the Public Body, the Third Party did not intend to waive litigation privilege against the Public Body or anyone else. As the Public Body disagrees with the Third Party, I intend to review the purpose for which the Third Party provided the Report to the Public Body.

[para 65.] I have already said that the Public Body's July 16, 1997 letter to the Third Party's solicitor contained two requirements, namely, that the Third Party (i) report to the Public Body, as provided by section 99(1) of the EPEA and section 3(1) of the *Release Reporting Regulation*, and (ii) undertake a site investigation and forward a report of the findings and recommendations on remediation, if required, to the Public Body. The Public Body cited section 100 and section 101 of the EPEA as its authority for compelling the Third Party to provide a site assessment report.

[para 66.] Section 99(1) of the EPEA is particularly relevant, and reads:

> *99(1) A person who releases or causes or permits the release of a substance into the environment that has caused, is causing or may cause an adverse effect shall, as soon as that person knows or ought to know of the release, report it* [my emphasis] *to*
>
> *(a) the Director*

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

(c) any person to whom the person reporting reports in an employment relationship,

(d) the person having control of the substance, where the person reporting is not the person having control of the substance and knows or is readily able to ascertain the identity of the person having control, and

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

[para 67.] I read the above underlined words in section 99(1) of the EPEA to mean that a person must report a release of a substance. Section 100(1) of the EPEA lists further information that must be reported to the Director under section 99(1)(a). The obligation under section 99(1)(b) to (e) is to report only the release of a substance to persons other than the Director. A report, such as the Third Party's Report, does not have to be provided under section 99(1)(b) to (e).

[para 68.] In effect, the Public Body's argument regarding waiver of privilege focuses only on what is required to be reported to the Public Body under section 3(1) of the *Release Reporting Regulation*, and section 99(1) and section 100 of the EPEA.

[para 69.] In fact, it appears that the reporting requirements under section 3(1) of the *Release Reporting Regulation*, and section 99(1) and section 100 of the EPEA must operate in conjunction with the remediation requirements under section 101 of the EPEA in situations in which the Public Body requires a site assessment report, as here. The Public Body's July 16, 1997 and December 19, 1997 letters to the Third Party's solicitor confirm my view. Therefore, I intend to consider, as a whole, the reporting requirements to the Public Body under the combined effect of section 3(1) of the *Release Reporting Regulation*, and section 99(1), section 100 and section 101 of the EPEA.

[para 70.] I read *R. v. Chem-Security (Alberta) Ltd.* as supporting my approach. That case discusses section 99(1) of the EPEA as being an "immediate reporting" requirement. If section 99(1) alone applied to the Third Party, that section would not allow for the length of time it takes to prepare a site assessment report, as in this case, if there were an urgent reporting requirement.

[para 71.] As to whether privilege would be waived for information provided in the legislative context I have set out above, the case law has this to say: When the law gives someone the authority to do something that might interfere with a privilege, that authority should be interpreted with a view to not interfering with the privilege, except to the extent absolutely necessary to achieve the ends sought by the enabling legislation: see *Descoteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 (S.C.C.); *Interprovincial Pipe Line Inc. v. Canada (Minister of National Revenue)*; *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.* I accept that principle in the present case.

[para 72.] In my view, the ends sought by the combined effect of section 3(1) of the *Release Reporting Regulation*, and section 99(1), section 100 and section 101 of the EPEA include the following: (i) to provide information to the Public Body about an unauthorized release of contaminants (sections 99(1)(a) and section 100); (ii) to warn the Public Body (section 99(1)(a)), so that it may be able to do something or, at the very least, gain knowledge that will help prevent further incidents (*R. v. Chem-Security (Alberta) Ltd.*); (iii) to warn other persons about the release (section 99(1)(b) to (e)); and (iv) to allow the Public Body to ensure that the person responsible for the release restores the environment (section 101). It seems to me that those ends can be achieved without interfering with any privilege that may attach to the information provided.

[para 73.] Therefore, in this case, I interpret the combined effect of section 3(1) of the *Release Reporting Regulation*, and section 99(1), section 100 and section 101 of the EPEA, as not interfering with the litigation privilege that might otherwise attach to the Report. If the Legislature had intended to allow the EPEA to interfere with a privilege for reports such as that which the Third Party provided, it could have said so. The Legislature has clearly allowed the EPEA to interfere with the privilege for information and documents provided under section 33(1) of the EPEA, which must be disclosed to the public.

[para 74.] Furthermore, I do not read *R. v. Chem-Security (Alberta) Ltd.* and *R. v. Fitzpatrick* as interfering with litigation privilege. Both cases concern prosecutions for offences committed under environmental legislation and fisheries legislation, respectively. Neither case discusses litigation privilege.

[para 75.] I find that the Third Party did not intend to waive litigation privilege as against the Public Body or anyone else: see *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.*

[para 76.] To put it another way, I find that the Third Party waived litigation privilege for the limited purpose of complying with the Public Body's requirement to provide a site assessment report, under penalty of enforcement proceedings for non-compliance. That compliance did not constitute a general waiver of litigation privilege for other purposes: see *Interprovincial Pipe Line Inc. v. Canada (Minister of National Revenue)*; *Western Canadian Place Ltd. v. Con-Force Products Ltd.*; *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*

[para 77.] As the Third Party intended to disclose the Report for a limited purpose only, it would be contrary to public policy if this had the effect of removing the privilege otherwise available to the Third Party: see *Interprovincial Pipe Line Inc. v. Canada (Minister of National Revenue)*; *Western Canadian Place Ltd. v. Con-Force Products Ltd.*; *Anderson Exploration Ltd. v. Pan-Alberta Gas Ltd.*

[para 78.] Furthermore, I have found that the Report is not information or a document that would be disclosed to the public under the EPEA. By the Public Body's own admission, it has not previously disclosed a report such as this Report. Therefore, no unfairness arises for the Applicant, as the Applicant would not have received the Report in the normal course under the EPEA. In fact, the Applicant would receive a "windfall" if the disclosure of the Report to the Public Body under the EPEA had the effect of removing the privilege otherwise available to the Third Party: see *Western Canadian Place Ltd. v. Con-Force Products Ltd.*.

4. Application of section 26(2) of the Act

[para 79.] For section 26(2) to apply, there must first be a finding that the information is subject to a privilege under section 26(1)(a), and that the privilege relates to a person other than a public body. If so, then section 26(2) of the Act says that a public body must not disclose the information.

[para 80.] I have found that that the information contained in the Report is subject to litigation privilege, that the Third Party did not intend to waive litigation privilege or waived litigation privilege for a limited purpose, and that the litigation privilege is that of the Third Party. Therefore, as section 26(2) of the Act applies, the Public Body cannot do what it wants with the information contained in the Report. The Public Body must not disclose the information contained in the Report.

[para 81.] In my view, section 26(2) is designed to protect a third party's privileged information in the hands of a public body, provided

that the third party is able to establish that a privilege exists. If section 26(2) did not give that protection, any privileged information that a third party gave to a public body could be disclosed under the Act.

[para 82.] Section 26(2) exists for the very reason that a public body is able to obtain a third party's privileged information. If every time a third party provided privileged information to a public body, the third party was considered to have waived privilege for all purposes, section 26(2) would serve no purpose.

ISSUE C: Does section 15(1) of the Act (disclosure harmful to the business interests of a third party) apply to the information contained in the Report?

[para 83.] Having decided that litigation privilege applies to the information contained in the Report, I do not find it necessary to decide whether section 15(1) of the Act (disclosure harmful to the business interests of a third party) also applies to the information contained in the Report.

ISSUE D: Is the Public Body required to disclose the Report under section 31(1) of the Act (disclosure in the public interest)?

[para 84.] The Applicant says that the Report should nevertheless be disclosed under section 31(1) of the Act. The Public Body maintains that section 31(1) does not require disclosure of the Report.

[para 85.] Section 31(1) and section 31(2) read:

> *31(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, to any person or to an applicant*
>
> > *(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or*
> >
> > *(b) information 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.

[para 86.] The Applicant argues that disclosure of the Report is in the public interest for landowners in the area, and potential buyers. Furthermore, the Applicant believes that landowners in the area have a right to know if they are being exposed to a risk of harm from gasoline migration, and that the information contained in the Report is critical in assessing the risk.

[para 87.] The Applicant also argues that the actual risk of significant harm that could occur to the public in the area of this site is an explosive hazard from gasoline vapours, and cancer and other health effects from inhalation of gasoline vapours or ingestion of gasoline that has entered the water supply.

[para 88.] Finally, the Applicant says that release of the Report would enable the public to more effectively monitor the Public Body's actions in regulating this site. The Applicant thinks that the extensive period of non-compliance of this site suggests that such monitoring is necessary. The Applicant believes that withholding the Report jeopardizes the public's ability to hold the Public Body accountable for its actions and decisions, and unfairly places the burden of proof of harm on neighbouring landowners.

[para 89.] The Applicant maintains that only the disclosure of the Report satisfies the Public Body's obligation under section 31(1). Therefore, I must review the Public Body's decision not to disclose the Report under section 31(1). The parties have not asked that I review the Public Body's decision, if any, not to disclose information under section 31(1).

[para 90.] In Order 96-011, I said that the standard for my review of a public body's decision under section 31(1) would be whether the public body's decision was "rationally defensible" (reasonable), not whether the public body was correct.

[para 91.] Is the Public Body's decision not to disclose the Report under section 31(1) "rationally defensible" (reasonable)?

[para 92.] The Public Body's expert reviewed the Report. The expert said that the Report revealed information about contamination that appeared "routine", and that more information was needed to fully assess the level of contamination. The Public Body argues that the Report did not disclose an immediate or significant risk to the environment or to public health or safety. Therefore, the Public Body concludes that, at

present, there is no evidence of any significant harm posed to the environment or the public.

[para 93.] The Public Body also says that, if there is significant contamination, the Public Body will designate a site as a contaminated site under the EPEA. The Public Body says that this site has not been so designated.

[para 94.] Furthermore, in the Public Body's view, there is no evidence of any other reason why disclosure of the information contained in the Report is clearly in the public interest.

[para 95.] The Public Body also argues that what section 31(1) requires is disclosure of "information about a risk of significant harm", as opposed to disclosure of a record such as the Report.

[para 96.] In Order 96-007, I said that the disclosure requirement under section 31(1) can be satisfied in a number of ways, including disclosure of the actual record, a summary of the record, or a warning of the risk, based on the contents of the record (assuming there is a record; in some cases, there might not be a record). I also said that disclosure of a record would be an unusual outcome of a decision under section 31(1).

[para 97.] In this case, I find that the Public Body's decision not to disclose the Report under section 31(1) is "rationally defensible" (reasonable), for the following reasons:

> (i) the Public Body's expert has reviewed the data contained in the Report, and concluded there is no immediate or significant risk, based on that data;
>
> (ii) there is no evidence of significant harm at present;
>
> (iii) the Public Body has investigated the site;
>
> (iv) the municipality's fire department has investigated the site;
>
> (v) the Public Body is actively taking steps concerning remediation of the site, by requiring that the Third Party provide information concerning remediation.

[para 98.] Therefore, the Public Body is not required to disclose the Report under section 31(1) of the Act.

[para 99.] If the Public Body did have a duty to disclose <u>information</u> under section 31(1), that duty most likely would have arisen on July 8,

1997, when the Public Body first became aware of the gasoline contamination. Presently, the only issue before me pertains to disclosure of the Report, which did not exist on July 8, 1997.

[para 100.] There is no evidence before me to indicate that the Public Body decided not to disclose information under section 31(1) on July 8, 1997 or soon thereafter. If there had been such evidence, my decision under section 31(1) may have been different.

V. ORDER

[para 101.] I make the following Order under section 68 of the Act.

[para 102.] Section 5(2) of the Act (paramountcy) does not apply to the information contained in the Report. Therefore, the Report is subject to the Act.

[para 103.] Section 26(1)(a) and section 26(2) of the Act (litigation privilege of a third party) apply to the information contained in the Report. Therefore, the Public Body must not disclose the information contained in the Report.

[para 104.] I do not find it necessary to decide whether section 15(1) of the Act (disclosure harmful to the business interests of a third party) also applies to the information contained in the Report.

[para 105.] The Public Body is not required to disclose the Report under section 31(1) of the Act (disclosure in the public interest).

Robert C. Clark
Information and Privacy Commissioner