



Forest Appeals Commission

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DECISION NO. 2019-WFA-004(a)

In the matter of an appeal under section 40(1) of the *Wildfire Act*, S.B.C. 2004, c. 31.

BETWEEN: J. Sarver Trucking Ltd. **APPELLANT**

AND: Government of British Columbia **RESPONDENT**

BEFORE: A Panel of the Forest Appeal Commission
Darrell LeHouillier, Chair

DATE: Conducted by way of written submissions
concluding on April 24, 2020

APPEARING: For the Appellant: Gregory J. Tucker, Q.C., Counsel
Hailey Graham, Counsel
For the Respondent: Pamela Manhas, Counsel

APPLICATION FOR DOCUMENT DISCLOSURE

THE APPLICATION

[1] This appeal relates to an order for cost recovery related to wildfire #G80046 (the "Wildfire"), which was discovered in the Peace Region of British Columbia on April 18, 2016. The Respondent made an order for cost recovery in respect of the Wildfire and imposed an administrative penalty against the Appellant. The total of the cost recovery and administrative penalty is roughly \$14,000,000.

[2] On April 8, 2020, the Appellant requested an order for the production of several un-redacted documents from the Respondent:

- notes of Investigator Forrest related to wildfire G80114, and
- Fire Origin and Cause Reports for wildfires G70088, G70056, G80066, and G70124.

[3] This request for an order from the Commission followed the Appellant requesting disclosure directly from the Respondent and the Respondent refusing. The refusal was based on privacy interests of third parties referred to in those documents. During the course of submissions, the Appellant abandoned its request

for an order of disclosure for the notes of Investigator Forrest related to wildfire G80114.

THE PARTIES' POSITIONS

Appellant's Submissions

[4] The Appellant notes that the 2016 Wildfire Season Summary describes at least 10 deliberately-set wildfires having started in the Peace Region on April 18, 2016. The Appellant argues that there were numerous fires in and around the Wildfire, including several started by arson. The Appellant's implied argument seems to be that the Wildfire may have also been started by arson, due to the temporal and geographical correlation with non-specified arson-generated fires already evaluated by the province, or else that the requested documents could assist in attacking the quality of the investigation done with respect to the Wildfire.

[5] The Appellant says that this meets the low test for relevance described in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, 2002 BCCA 219, 100 B.C.L.R. (3d) 146 [*Fraser River*], and referenced in other cases. The Appellant argues the documents they seek may directly or indirectly allow the Appellant to advance its case or destroy the case of the Respondent, or may lead to a train of inquiry or disclose evidence.

[6] The Appellant says that the Respondent's refusal on the basis of third party privacy interests is inappropriate. The Appellant argues the third parties are protected by an implied undertaking, on the part of the Appellant, to keep information obtained through discovery confidential and to use it only for the purposes of litigation. This is discussed in *Richard v. British Columbia*, 2009 BCCA 77 and other cases referred to by the Appellant.

Respondent's Submissions

[7] The Respondent states that he provided three of the requested documents in redacted form to the Appellant:

- notes of Investigator Forrest related to wildfire G80114; and
- the Fire Origin and Cause Reports for wildfires G80066 and G70124.

[8] The redactions were of identifying information of landowners, neighbours, and persons who reported the wildfires in question. The Respondent states that this information would be protected from disclosure "in the normal course" by the *Freedom of Information and Protection of Privacy Act*. It is also protected from disclosure if inadmissible or irrelevant by section 34(3)(b) of the *Administrative Tribunals Act*.

[9] The Respondent asserts the personal information redacted in those documents is irrelevant to the appeal and, as it relates to third parties, is not protected by the implied undertaking. Additionally, the implied undertaking only applies unless and until the information was disclosed in the course of litigation. The Respondent was concerned that members of the public would be less likely to

report wildfires and to be candid in doing so if they knew that personal information could be disclosed for the purposes of unrelated litigation.

[10] With respect to the remaining documents, Fire Origin and Cause Reports for wildfires G70056 and G70088, the Respondent says neither is relevant, as neither fire was arson-related and neither was discovered on April 18, 2016. The former was discovered on May 19, 2016 and the latter was discovered on April 20, 2016.

[11] The Respondent also notes that there is no evidence that the Wildfire was caused by arson.

Appellant's Reply

[12] The Appellant replies by providing a summary of the processes that led to the appeal, including the Respondent's repeated denials for disclosure and disclosure in inappropriate form. The Appellant states that it has been forced to rely on requests through the *Freedom of Information and Protection of Privacy Act* to obtain relevant documents and this was inappropriate. The Appellant says the Respondent "... should be prohibited from evading further disclosure to the Appellant."

[13] The Appellant argues that it is entitled to analyze the wildfire investigation data from the region for its analysis of arson, and in assessing the quality of wildfire investigations in the area during the same time period. The Appellant emphasizes the significant amount of the cost recovery and penalty to argue in favour of disclosure.

ISSUE

[14] The sole issue is whether to order the Respondent to disclose certain documents to the Appellant.

DISCUSSION AND ANALYSIS

[15] Section 34(3)(b) of the *Administrative Tribunals Act* allows the Board to order the production of admissible, relevant documents that are in a person's possession or control. This is a distinct procedure from requests filed under the *Freedom of Information and Protection of Privacy Act*. That statute is inapplicable to the question before me.

[16] There is no dispute that the documents are in the Respondent's possession or control. They were generated in the course of wildfire investigations carried out under the auspices of the Respondent, and the Respondent summarized information from those documents to make its submissions on this application for disclosure. I therefore conclude that the documents requested are in the Respondent's possession and control.

[17] I also find that the requested documents, at least in redacted form, meet the threshold of relevance for discovery/disclosure, as set out in *Fraser River*: "Any document which directly or indirectly *may* enable the party to advance his own case

or destroy that of his adversary or which may fairly lead the party to a train of inquiry or disclose evidence which may have either of these consequences must be disclosed". No other standard of relevance was discussed by the parties and I consider that standard to be applicable for the purposes of this pre-hearing request.

[18] Specifically, I consider that the documents will allow the Appellant to compare investigations done in response to other wildfires that were discovered in and around the same time and place as the Wildfire. Attribution of cause to arson is not necessary to establish relevance; it may be that the documents suggest that certain investigatory steps were taken in one case but not in another. The comparison may, at a minimum, provide a line of inquiry for the Appellant to pursue in the appeal, either by experts or by checking the adequacy of the Respondent's investigations or the associated conclusions. Such an investigation may highlight broader concerns in fire investigations generally, in the rough time and place relevant to the Wildfire. Such a train of inquiry may advance the Appellant's case or destroy that of the Respondent.

[19] As a result, I conclude that the Respondent should disclose, at a minimum, the Fire Origin and Cause Reports for wildfires G70088 and G70056, at least in a form redacting the identifying information of third parties. The question arises, whether I should order disclosure of un-redacted copies of the four identified Fire Origin and Cause Reports.

[20] The Appellant has explicitly requested disclosure of the redacted identifying information from Fire Origin and Cause Reports for wildfires G80066 and G70124, but has only generally described a desire to conduct an independent arson analysis to critique the fire investigation carried out with respect to the Wildfire, and generally in the region, in the 2016 wildfire season.

[21] The Appellant has not indicated any need or preference to contact and interview the third parties whose contact information is redacted in the Fire Origin and Cause Reports. I am left to infer that this information would enable the Appellant to conduct an independent arson analysis for the region in 2016, and/or to critique the investigation of the Wildfire or wildfires generally, in the region, in 2016.

[22] At the same time, I have not found the arguments of the Respondent to be persuasive.

[23] The Respondent argued that the personal information redacted from the Fire Origin and Cause Reports was irrelevant. I disagree. Using the same test for relevance of disclosure of documents as set out in *Fraser River*, I conclude that this information should be disclosed. The Appellant may discover information from those named in the reports that assist with undermining the case of the Respondent, particularly insofar as the adequacy or accuracy of wildfire investigations in the area at the relevant time are concerned.

[24] The Respondent has argued there could be a chilling effect on the reporting of wildfires if those reporting them knew they could be contacted with respect to unrelated litigation, but has not provided sufficient support to establish that proposition. I do not accept, on the basis of this concern, that the public would not report suspected wildfires because they would be concerned about being contacted

by parties to a litigation sometime later. Furthermore, the Respondent has not indicated that there was any offer or understanding that the report would be treated confidentially.

[25] There are useful parallels between this analysis and the common law notion of Confidential Informant Privilege, as described in *R. v. Basi*, 2009 SCC 52 (CanLII) [*Basi*]. That case discusses the sorts of third party protections available to those who have reported criminal activity. There are important distinctions between this case and that one.

[26] As the Court notes in *Basi*, Confidential Informant Privilege only arises where the police guarantee protection and confidentiality to an informant, in exchange for useful information. This privilege is "a protective veil", as described by the Court. Here, there was no guarantee of protection and confidentiality. The risk to witnesses here, dealing with questions related to litigation, is less than the risk incurred by those who report criminal matters to the police. I do not consider the level of protection sought by the Respondent, consistent with Confidential Informant Privilege, to be indicated in the circumstances of this case.

[27] Accordingly, as I find the redacted information in the listed reports to be relevant and to not warrant exclusion from disclosure, I order disclosure of un-redacted copies of the Fire Origin and Cause Reports for wildfires G70088, G70056, G80066, and G70124.

[28] It remains within my discretion to make this order on the terms I consider appropriate. Here, the Appellant has suggested maintaining the confidentiality of the contact information, unless and until it is brought forward in the context of a hearing. Whether or not the implied third party undertaking applies, this is a reasonable limit to impose. It is one agreed to by the Appellant. As a result, I order the Appellant, including counsel for the Appellant, to maintain the confidentiality of identifying information from the Fire Origin and Cause Reports and to use it only for the purposes of this appeal.

DECISION

[29] In making this decision, the Panel has fully considered all of the evidence and submissions made, whether or not specifically referred to in this decision.

[30] Based upon the findings above, the Appellant's application for disclosure is granted. The disclosure is to be completed by **May 11, 2020**. The disclosure is subject to the terms ordered in paragraph 28 of this decision.

"Darrell LeHouillier"

Darrell LeHouillier
Chair

April 27, 2020