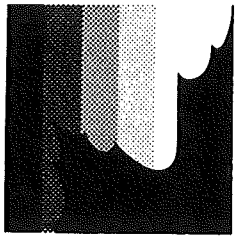

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SUBMISSIONS

by

THE CANADIAN ENVIRONMENTAL LAW ASSOCIATION

on

Draft EPS Policies and Guidelines on
Confidential Business Information (CBI)

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S U B M I S S I O N S

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I. OVERVIEW

The Canadian Environmental Law Association (CELA), since its inception in 1970, has taken an active role in advocating the need for an access to information statute.

In April 1981, CELA filed a written brief and gave oral testimony before the Standing Committee on Justice and Legal Affairs in regard to Bill C-43. Specific amendments were proposed at that time, including changes to section 20.[1]

CELA also made recommendations to the Consultative Committee on IBT Pesticides in April 1982 addressing the need for statutory amendments to the Pest Control Products Act to ensure access to health and safety data on pesticides.[2]

Because CELA and its clients often cannot afford original scientific research, we rely heavily on environmental research and data compiled by the government. We contend that the government should be working under the clear statutory direction that all information submitted to government by industry is public. Any exceptions to the general principle of disclosure should be very narrowly construed. Industry's concerns that disclosure will give competitors an advantage can be addressed by means other than non-disclosure.[3]

It is our submission that the EPS policies and guidelines on Confidential Business Information do not and cannot provide the mechanism for the disclosure of important environmental and health information. Only amendments to the Department's environmental statutes, i.e. the Environmental Contaminants Act, the Fisheries Act, the Clean Air Act, etc. can ensure that the public has full access to information. This is the case due to both the common law and specific statutory constraints present in section 20 of Bill C-43. Specifically, at the very least, amendments should provide for the release of (a) health, safety, and environmental testing data, (b) chemical identity, and (c) pollution emission information.

The following discussion will outline our concerns with DOE's proposed policies and make certain recommendations for consideration.

II. BILL C-43: DISCUSSION OF SECTION 20 AND RELATIONSHIP WITH DRAFT EPS POLICIES

It is our initial concern that section 20, as amended and reported on June 11, 1982 (see attached Appendix A), is subject to a multitude of interpretations and will inevitably come before the Information Commissioner and the courts before a substantial length of time has elapsed.

First, there is no definition of a trade secret in section 20(1)(a). This lack of definition is extremely important as 'trade secrets' are treated differently than "financial, commercial, scientific, or technical information..." and the other types of information supplied by third parties to government as outlined in sections 20(1)(b), (c) and (d).

There is a mandatory exemption from disclosure for all the heads of section 20(1), but in the case of third party information supplied under 20(b), (c) and (d) there is discretion available for the head of a government institu-

tion to disclose this information under the balancing test set out in subsection 20(6). This subsection is, of course, the authority for the development of your policies. What concerns us it that DOE's policies cannot pertain to the release of information that is considered to be a trade secret. Indeed, any disclosure of a trade secret would be considered an offence, and a civil servant could be prosecuted for releasing this type of information.

Whether the Courts will apply a broad or narrow definition of a trade secret is crucial. Canadian courts have tended to accept American definitions of trade secrets,[4] including the very broad definition adopted in the Restatement of the Law of Torts which reads as follows:

> A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.[5]

Under this broad definition, agencies and courts in the U.S. and Canada have treated health and safety tests results as 'trade secrets'.[6] Arguments can be made that this broad common law definition, developed in the private law context of protecting business from breaches of contract and confidence on the part of departing employees, should not be applied in the context of the public interest in disclosure of health and safety data. However, these arguments would ultimately have to be made in the courts.

Notwithstanding the definition of confidential business information found on page 17 of the EPS Policy document, it is far from clear that "health, safety, and efficacy data" would not be argued by industry and upheld by the courts as being "trade secrets" and therefore not releasable.

Both the United States Toxic Substances Control Act (TSCA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) have largely overridden the trade secrets problem by providing in their respective statutes for the release of health and safety data. Compensation schemes or exclusive use provisions are used to protect the initial data submitter.

Further, in 1980, Steven Jellinek, former Assistant Administrator, Office of Pesticides and Toxic Substances, U.S. EPA, testified before a House of Representatives Oversight Committee that in the one and one-half years since the amendments to FIFRA, U.S. EPA had seen no evidence that the pesticide-producing industry was suffering from unscrupulous competition resulting from the new definition of trade secrets.[7]

It is our submission that DOE should take a strong stand on the need for mandatory disclosure of this type of information and propose amendments to the appropriate environmental statutes to provide for the disclosure of (a) health and safety testing data, (b) chemical identity,[8] and (c) pollution emission information.

CELA does not accept the "cost-benefit" approach taken in section 20(6) when information relates to public health concerns.[9]

III. THE ENVIRONMENTAL CONTAMINANTS ACT (ECA): CONFLICT WITH BILL C-43

The EPS policy document does not address what CELA maintains is a conflict between section 4(4) of the ECA and section 20(6) of Bill C-43. Basically, section 4(4) is a "non-disclosure" section for various classes of information received pursuant to the ECA, while section 20(6) is designed to permit disclosure in certain circumstances of

the very same types of information. As the ECA is the more specific statute, it can be argued that it applies rather than the more general provisions of Bill C-43. This would mean that the information obtained by the government under the ECA may only be disclosed "as may be necessary for the purposes of" the ECA; a much more vaguely worded standard.

It is therefore our submission that section 4(4) of the Environmental Contaminants Act should be repealed.

IV. DRAFT EPS POLICIES - SPECIFIC COMMENTS

The following are CELA's comments on specific sections of the EPS Draft policies on Confidential Business Information. They should be read in the context of our overriding concerns with the policies discussed above.

A. Claim of Confidentiality

CELA generally agrees with EPS that business should initially have the responsibility of both indicating what information they consider confidential and what the basis is for their claim. This is the approach taken under the Toxic Substances Control Act (TSCA). The giving of a rationale would at least restrain business from summarily stamping every document "confidential".

The alternative approach would leave to EPS the initial determination of whether information contained confidential or trade secret information. One probable result would be that department employees would be reluctant to release information that they thought in any way would constitute a trade secret or confidential business information.

In addition, the common law presently puts the onus on the person alleging that a breach of confidence has taken place to prove that the information is indeed confidential. This would be a further rationale for having business make the initial confidentiality determination.

B. Confidentiality Determination and Public Requests for CBI

The EPS draft policies envisage a mechanism whereby business would receive notice and be able to make representations regarding public requests for the release of information which had been previously indicated as confidential. After a determination is made, "all parties" are to be notified of the results and the basis of the confidentiality determination. CELA would submit that as an intermediate step, the party requesting the information should receive a summary of the representations made by business and allowed a specified amount of time to reply before a final determination is made.

C. Sharing Confidential Business Information with Other Departments and EPS Contractors

While our focus is on public access, CELA maintains that there should be provisions for the sharing of information between government departments, agencies and other governments and international agencies such as the International Joint Commission. Further, all information given by business to EPS contractors should be available to EPS. To do otherwise would create an absurd situation whereby government departments would not have certain pieces of data upon which their contractors reached their conclusions.

D. Other Matters

CELA notes that on p.ii of the Introduction, it is stated that these policies and guidelines are not intended to apply retroactively to business information already in EPS possession or to information developed by EPS or its contractors. CELA would be interested as to whether other policies will be developed to address these two substantial areas of concern.

CONCLUSIONS

CELA's position has always been that access to information is a necessary component for public initiatives to protect the environment. Bill C-43 unfortunately does not provide a clear direction for the release of crucial environmental information prepared by business for government. The EPS draft policies are not law and therefore cannot compel disclosure.

CELA would therefore urge that EPS should support recommendations contained in this brief and propose:

- amendments to DOE's environmental statutes, i.e. the Environmental Contaminants Act, Fisheries Act, Clean Air Act, etc. to clearly provide release of:
  (a) health, safety and environmental testing data
  (b) chemical identity; and
  (c) pollution emission information.

- the repeal of section 4(4) of the Environmental Contaminants Act.

We also trust that our specific comments on the draft EPS Policies will be considered.

V. NOTES

1. Heather Mitchell, Submissions of the Canadian Environmental Law Association to the Standing Committee on Justice and Legal Affairs with respect to Bill C-43. March 1981. Testimony given before this Committee Wednesday, April 8, 1981.

2. Toby Vigod (CELA) and Anne Wordsworth (Pollution Probe), Captan: The Legacy of the IBT Affair Submissions on Pesticide Law and Policy to the Consultative Committee on IBT Pesticides, February 1982.

3. See discussion in McGarity and Shapiro, "The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies" 93 Harv. L.R. 837 (1980).

4. See, for example, R.I. Crain Ltd. v. Ashton, [1949] 2 D.L.R. 481, at pp. 485, 486.

5. Restatement of The Law of Torts, 1st ed. (St. Paul, American Law Institute publishers. 1931), art. 757, comment b.

6. Supra note 3, at pp. 837-8, McGarity and Shapiro note that in the absence of statutory language calling for disclosure, private regulatees have successfully forestalled most efforts by agencies and interested citizens to disclose various documents by claiming that health and safety data are statutorily protected "trade secrets".

   In Canada, Health and Welfare refused to release any of the animal studies conducted by Industrial Biotest Laboratories (IBT) on the basis of a Department of Justice Department opinion that the information supplied to the Crown under the Pest Control Products Act is confidential and subject to the common law protecting trade secrets and intellectual property. (See telex to West Coast Environmental Law Association (WCELA) from W.P. McKinley, Senior Policy Advisor, Health and Welfare Canada, March 12, 1981.) Ironically, CELA obtained these studies via a California legal group who, in turn, had obtained them under the U.S. Freedom of Information Act.

7. Extension of Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Hearings before the Sub-committee on Department Investigations, Oversight and Research of the Committee on Agriculture, House of Representatives. 96th Congress, 2nd session. April 15 and May 1, 1980 at p. 149.

8. For example, under Japanese law, the chemical structure of all new chemicals must be published. Law No. 117 Concerning the Examination, Screening and Regulation of Manufacture (etc.) of Chemical Substances. October 1973. See also Ministry of International Trade and Industry. The Chemical Substances Control Law in Japan. 1977. Tokyo.

9. For general discussion of CELA's views on the issue of cost-benefit analysis, see J.F. Castrilli, "Toxic Chemicals Control in Canada: An Analysis of Law and Policy", found in CELA/CELRF Roundtable Discussions on Toxic Chemicals Law and Policy in Canada. June, 1981.

APPENDIX A

Bill C-43, Section 20 as amended and reported June 11, 1982 by the Standing Committee on Justice and Legal Affairs.

20.(1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;
(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
(d) information the disclosure of which could reasonably be expected to interfere with contractual or other neogiations of a third party.

(2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a part of a record if that part contains the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee.

(3) Where the head of a government institution discloses a record requested under this Act, or a part thereof, that contains the results of product or environmental testing, the head of the institution shall at the same time as the record or part thereof is disclosed provide the person who requested the record with a written explanation of the methods used in conducting the tests.

(4) For the purposes of this section, the results of product or environmental testing do not include the results of preliminary testing conducted for the purpose of developing methods of testing.

(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

(6) The head of a government institution may disclose any record requested under this Act, or any part thereof, that contains information described in paragraph (1)(b), (c) or (d) if such disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if such public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.