Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Catherine Tully

REVISED REVIEW REPORT 17-03

April 26, 2017

Department of Fisheries and Aquaculture

Summary: In five separate requests, the applicants applied for access to information concerning fish farm operations. The Department of Fisheries and Aquaculture denied access to the bulk of information relating to laboratory reports and veterinary inspections, claiming that disclosure would cause harm to a third party business. The applicants filed requests for review of those decisions, and the third party made submissions to the review. The third party bears the burden of proving that all three elements of the third party business information exemption are met. The Commissioner found that the third party had not established that veterinary and lab reports were supplied in confidence, and that it had failed to demonstrate that disclosure of cage configurations and restocking plans would cause the type of harms enumerated in the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). Although a new statutory provision is now in place regarding the confidentiality of veterinary reporting, this provision was not in effect at the time of the access request and so did not apply to the information at issue. The Commissioner recommends full disclosure.

Statutes Considered: *Aquaculture Licence and Lease Regulations*, NS Reg 347/2015, ss. 5, 9; *Aquaculture Management Regulations*, NS Reg 348/2015, ss. 21; *Fisheries and Coastal Resources Act*, SNS 1996, c 25, ss. 2, 8, 58; *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 2, 5, 14, 20, 21, 41, 43, 45.

Authorities Considered: Alberta: Orders 97-020, 1998 CanLII 18626 (AB OIPC); **British Columbia:** Orders 56-1995, 1995 CanLII 691 (BC IPC); F08-03, 2008 CanLII 13321 (BC IPC); F10-06, 2010 BCIPC 28 (CanLII); F14-28, 2014 BCIPC 31 (CanLII); F15-23, 2015 BCIPC 25 (CanLII); **Nova Scotia:** Review Reports FI-09-100, 2015 CanLII 70493 (NS FOIPOP); FI-10-59(M), 2015 CanLII 39148 (NS FOIPOP); FI-11-72, 2015 NSOIPC 10 (CanLII); FI-12-01(M), 2015 CanLII 54096 (NS FOIPOP); FI-13-28, 2015 NSOIPC 9 (CanLII); 16-01, 2016 NSOIPC 1 (CanLII), 16-09, 2016 NSOIPC 9 (CanLII); 16-10, 2016 NSOIPC 10 (CanLII); 16-13, 2016 NSOIPC 13 (CanLII); **Ontario:** Orders MO-1770, 2004 CanLII 56211 (ON IPC); P-454, 1993 CanLII 4779 (ON IPC); P-880, 1995 CanLII 6411 (ON IPC); P-1392, 1997 CanLII 11909 (ON IPC); PO-2197, 2003 CanLII 53947 (ON IPC); **PEI:** FI-16-003, 2016 CanLII 48834 (PE IPC).

Cases Considered: *Air Atonabee Ltd. v. Canada (Minister of Transport) (1989), 37 Admin. L.R. 245 (FCTD); Atlantic Highways Corp. v. Nova Scotia (1997) 162 N.S.R. (2d) 27,* 1997 CanLII

11497 (NS SC); *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 FCR 47, 1988 CanLII 1421 (FCA); *Canadian Pacific Hotels Corp. v. Canada (Attorney General)*, 2004 FC 444 Can LII; *Chesal v. Attorney General of Nova Scotia* (2003) 2003 NSCA 124 (CanLII); *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 (CanLII), *Jill Schmidt v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 101 (CanLII); *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36 (CanLII),; *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII); *O'Connor v. Nova Scotia,* 2001 NSCA 123; *Stenotran Services v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15464 (FC); *Stevens v. Nova Scotia (Labour)*, 2012 NSSC 367; *UCANU Manufacturing Corp. v. Defence Construction Canada*, 2015 FC 1001 (CanLII).

Other sources considered: A New Regulatory Framework for Low-Impact/High-Value Aquaculture in Nova Scotia; The Final Report of the Independent Aquaculture Regulatory Review for Nova Scotia [The Doelle-Lahey Panel]: http://0-nsleg-edeposit.gov.ns.ca.legcat.gov.ns.ca/deposit/b10677951.pdf; Auditor General of Nova Scotia, Fisheries and Aquaculture: Aquaculture Monitoring (June 2015): https://novascotia.ca/fish/aquaculture/reference-material/2015-Jun-NSOAG-Full-Report.pdf.

INTRODUCTION:

[1] Two co-applicants made a series of access to information requests for copies of documents relating to aquaculture sites. In total, five access to information requests were made between November 2013 and June 2015. In response, the Department of Fisheries and Aquaculture (Department) withheld portions of the responsive records citing harm to third party business interests, unreasonable invasion of third party personal privacy and non-responsive information as reasons for denying access. The applicants filed requests for review of all five decisions.

[2] While each of the five requests resulted in the Department identifying different responsive records, the nature of the responsive records across the five requests and the issues they raise are similar. As a result, and with the consent of the parties involved, I am considering these five requests for review in one report. I will set out recommendations for each review request at the end of this report.

ISSUES:

[3] There are three issues under review:

(a) Is the Department required to refuse access to information under s. 21 of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?
(b) Is the Department authorized to determine that portions of the responsive records are out of scope of the request and to withhold the portions that it deems non-responsive?
(c) Is the Department authorized to refuse access to information under s. 14 of *FOIPOP* because disclosure of the information would reveal advice or recommendations?

DISCUSSION:

Background

[4] Two applicants with a particular interest in aquaculture sites (also referred to as "fish farms") filed five separate access to information requests in relation to a number of fish farm licenses held by one third party company.[1] The requests were based on the applicants' own observations relating to such things as use of medications, mass fish mortalities and exact location of fish pens relative to leased areas. In response, the Department initially withheld the majority of the information requested. During informal resolution with this office the Department provided an updated release of information on January 13, 2017.

[5] For the most part the Department disclosed email correspondence with third party names withheld under s. 20 of *FOIPOP* (unreasonable invasion of third party personal privacy). The applicants confirmed during the informal resolution process that they were not interested in information withheld under s. 20.

[6] The Department continued to withhold, generally in full, the following types of information citing s. 21 of *FOIPOP* (harm to third party business interests):

- laboratory reports and test results (reviews FI-14-20, FI-14-53, 15-00089 and 15-00090);
- veterinary reports and notes (reviews FI-14-20, FI-14-53, 15-00089 and 15-00090);
- prescriptions, medications and feed rate (review 15-00089);
- stocking plans and cage configuration (review FI-14-60); and
- fish mortality data (review 15-00089).

[7] The Department also withheld one document and a DVD it considered to be "non-responsive." In addition, the Department did not produce a number of email attachments presumably because it believed these attachments were "non-responsive."

[8] The Notice of Formal Review in this matter was issued on December 5, 2016. Following the issuance of the Notice the Department took the unusual step of disclosing more information to the applicants but continued to withhold the information noted above. In the final release on January 13, 2017, the Department, for the first time, applied s. 14 (policy advice) to a small portion of information found in review request FI-14-60. It did so without advising the applicants in the accompanying decision letter although there is an 8-point font stamp on the withheld information indicating that s. 14(1) had been applied. I have therefore added s. 14 (policy advice) as an issue.

Burden of Proof

[9] Section 45 of *FOIPOP* sets out the burden of proof. With respect to the application of s. 14 (policy advice) and the use of "non-responsive" it is the Department who bears the burden of proving that the applicant has no right of access to a record. Where the information being

[1] The requests for review under consideration here are review request FI-14-20 (Department File FIS-13-23), review request FI-14-53 (Department File FIS-14-3), review request FI-14-60 (Department File FIS-14-4), review request 15-00089 (Department File FIS-15-04) and review request 15-00090 (Department File FIS-15-05).

withheld is identified as confidential third party business information (s. 21) it is the third party who bears the burden of proof.[2]

Duty to Sever

[10] In this case, the Department chose to withhold whole documents citing s. 21 (third party business information) as authority for its decision. It is essential to an effective, meaningful and robust access law that public bodies fully appreciate the requirement to selectively sever records. The law does not create whole document carve outs. Rather, the law makes clear that public bodies are only permitted to withhold information exempted from disclosure, everything else must be disclosed.

[11] The Supreme Court of Canada has stated that access legislation creates a presumption in favour of disclosure.[3] How that works in practice in Nova Scotia is reflected in part in s. 5(2) of *FOIPOP*. That provision makes clear that public bodies must only exempt information as authorized pursuant to *FOIPOP* and further, where the information can reasonably be severed, public bodies are obliged to release the remainder of the record to the applicant.

[12] I will discuss the essential nature of this requirement in more detail below.

(a) Is the Department required to refuse access to information under s. 21 of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

General Approach

[13] Nova Scotia's access legislation is unique in that it declares as one of its purposes a commitment to ensure that public bodies are fully accountable to the public.[4] It is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada.[5] *FOIPOP*, and similar access legislation across Canada, strikes a balance between the demands of openness and commercial confidentiality in two ways: it affords substantive protection of information by specifying that certain categories of third party information are exempt from disclosure and it gives procedural protection through the third party notice process.[6]

[14] Section 21 of *FOIPOP* provides in part:

> 21(1) The head of a public body shall refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or

[2] Section 45(3) *FOIPOP*.
[3] *John Doe v. Ontario (Finance)*, [2014] 2 SCR 3, 2014 SCC 36 (CanLII) at para. 41.
[4] See *Freedom of Information and Protection of Privacy Act* s. 2(a). This general approach is one I have taken in previous review reports such as NS Review Report 16-09 at para 14.
[5] *O'Connor v. Nova Scotia*, 2001 NSCA 132 (CanLII) at paras 54 – 57.
[6] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) [*Merck Frosst*] at para 23.

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party;

(iii) result in undue financial loss or gain to any person or organization…

[15] As I have previously discussed, courts have recognized that the important goal of broad disclosure must be balanced against the legitimate private interests of third parties and the public interest in promoting innovation and development.[7]

[16] It is well established in Nova Scotia that in order for the third party business information exemption to apply, the three requirements of s. 21 must be read conjunctively and that the third party has the burden of proving that s. 21 applies to the withheld information.[8]

[17] In order to determine if s. 21 applies, it is necessary to consider three questions:

1. Does the withheld information constitute trade secrets, commercial, financial, labour relations, scientific or technical information of the third party?
2. Was the information supplied implicitly or explicitly in confidence?
3. Would disclosure reasonably be expected to cause harm listed in s. 21(1)(c)?

Step 1: Does the withheld information constitute trade secrets or commercial, financial, labour relations, scientific or technical information of a third party? (s. 21(1)(a)(i) & (ii))

[18] The information at issue here consists of the following types of information:

- laboratory reports and test results;
- veterinary reports and notes;
- prescriptions, medications and feed rate;
- stocking plans and cage configuration; and
- fish mortality data.

[19] The terms commercial, financial, scientific and technical are not defined in *FOIPOP*. It has been generally accepted that dictionary meanings provide the best guide and that it is sufficient for the purposes of the exemption that information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood.[9]

---

[7] NS Review Report FI-10-59(M) paras 9-15, NS Review Report 16-01 para 14 citing *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 (CanLII) at para 67.

[8] *Atlantic Highways Corp. v. Nova Scotia*, 1997 CanLII 11497 (NS SC) [*Atlantic Highways*].

[9] *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD) [*Air Atonabee*] at p. 268 cited with approval in *Merck Frosst* at para 139. As discussed in, for example, NS Review Report 16-09 at paras 19-20 in reference to s. 481 of the *Municipal Government Act*.

[20] Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. I have, in previous reports, determined that such things as expert opinions from individuals with particular technical expertise (engineers and architects for example) and site plans can qualify as technical information within the meaning of the third party business exemption.[10]

[21] In considering the meaning of "scientific or technical" in relation to laboratory test data prepared by a private testing agency from samples provided by the third party, a former Information and Privacy Commissioner for British Columbia concluded that, "the words scientific and technical would surely include information that is the result of scientific environmental sampling at an industrial site and chemical laboratory analysis of the samples collected."[11] That reasoning was applied to veterinary testing of randomly sampled fish carcasses in BC Order F10-06. In that Order an adjudicator determined that the test results constituted "scientific" information for the purposes of the equivalent to s. 20 of *FOIPOP*.[12]

[22] I am satisfied that the veterinary reports, laboratory reports, prescriptions and medication information all contain information that qualifies as "scientific" information.

[23] The nature of the business at issue here is aquaculture. Information relating to feed rates, stocking plans, cage configurations and fish mortality all relate to this organized field of knowledge - the applied science of fish farming. On that basis, I am also satisfied that information in relation to feed rates, stocking plans, cage configurations and fish mortality data all qualify as "technical" information.

[24] The third party argued that the withheld information also qualified as "trade secret" information within the meaning of s. 21(1)(a)(i). Since I have determined that the withheld information qualifies as scientific or technical information I have not considered the application of s. 21(1)(a)(i).

[25] **Finding #1:** I find that the information withheld under s. 21 qualifies as scientific or technical information within the meaning of s. 21(1)(a)(ii).

Step 2: Was the information supplied implicitly or explicitly in confidence (s. 21(1)(b))?

[26] The second requirement of s. 21 is that the information must be supplied in confidence.

[10] See NS Review Report FI-12-01 at paras 58 to 64 which refers to Ontario Order P-454 (as quoted in B.C. Order F09-14 at para 27).
[11] BC Order 56-1995 at p. 5. Applied more recently in BC Order F10-06 at para 35.
[12] BC Order F10-06 at paras 35-36.

"supplied"

[27] In previous review reports I have listed a number of considerations when determining whether or not information has been "supplied" within the meaning of s. 21.[13] In summary those considerations are:

- The public body and third party claiming the exemption must show that the information was supplied.
- Where government officials collect information by their own observations, the information will not be considered as having been supplied.
- Whether or not information was supplied will often be primarily a question of fact.
- The "supplied" requirement can be satisfied where accurate inferences can be made from a negotiated agreement of underlying, supplied confidential information.
- Where information in a negotiated agreement is relatively immutable or not susceptible to change it may satisfy the "supplied" requirement.
- Whether information is "supplied" does not depend on the use that is made of it once it is received.

[28] There are two subtleties to the manner in which provisions equivalent to s. 21(1)(b) have been interpreted that are significant for the cases at issue here. First, it is the content rather than the form of information that must be considered. And so, the mere fact that the information appears in a government document does not resolve the issue.[14]

[29] Second, as noted above, the "supplied" requirement can be satisfied where disclosure of the information would enable accurate inferences about underlying confidential information.[15]

[30] Many of the withheld records consist of reports written by Department employee veterinarians or biologists, or are laboratory reports prepared for the Department. I discuss below a number of decisions across Canada that have considered whether these types of reports can be considered to have been "supplied".

[31] The Federal Court of Canada examined the issue of whether or not meat inspection reports prepared by government inspectors qualified as information "supplied to a government institution" within the meaning of s. 20(1)(b) of the federal *Access to Information Act*. In determining that such reports did not qualify as "supplied" the Court said:

> Paragraph 20(1)(b) relates not to all confidential information but only that which has been "supplied to a government institution by a third party". Apart from the

[13] As noted in NS Review Report FI-09-100 at para 29, NS Review Report FI-10-59(M) at para 83, NS Review Report 16-09 at para 44.
[14] *Merck Frosst* at paras 147-148.
[15] See for example BC Order F14-28 at paras 26-27 and NS Review Reports FI-13-28 at para 29 and FI-09-100 at para 30.

> employee and volume information which the respondent intends to withhold, none of the information contained in the reports has been supplied by the appellant. The reports are, rather, judgements made by government inspectors on what they have themselves observed. In my view no other reasonable interpretation is possible…"[16]

[32] The Office of the Information and Privacy Commissioner of Ontario has also determined that information gathered by government inspectors via their own observation does not qualify as information "supplied". In Ontario Order P1392 the adjudicator was considering a request for copies of inspection reports completed by government veterinarians sent to dog pounds to evaluate animals selected for research:

> When the inspector attends at the premises of the facilities, he makes various observations about their condition pursuant to section 18(3)(a) of the *Animals for Research Act.* The information in the inspection reports dealing with the number and species of animals generally comes from the inspector's observations, i.e. it was collected by the inspector, as opposed to being provided to him by the facility under section 18(3)(c). Therefore, I find that, for the most part, it was not supplied to the Ministry and the second element of the section 17(1) exemption has not been established[17].

[33] An adjudicator with the Office of the Information and Privacy Commissioner for British Columbia also determined that information generated by government inspectors did not qualify as information "supplied" to the public body within BC's equivalent to s. 21(1)(b). In Order F10-06 the adjudicator evaluated the application of s. 21 to veterinarian reports concerning diagnostic test results of fish samples as well as the bacteriology, histology and virology reports relating to the test samples. Third party businesses argued that the fish samples supplied to the veterinarians and upon which the test results were based constituted the information "supplied" to the public body. The adjudicator states,

> In this case, Ministry veterinarians derived the knowledge, such as that concerning bacteriology, from the study of the dead fish. The veterinarians recorded that knowledge and it is contained in the records under heading 3. As the applicant points out, the fish carcases are the things studied, but not the resulting knowledge.
>
> For this reason, it simply cannot be the case that the conveyance of deceased fish by fish farm operators to the Ministry constitutes or equates to a supply of "information" under the second branch of the test of s. 21(1)(b).[18]

---

[16] *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 FCR 47, 1988 CanLII 1421 (FCA) at para 12.
[17] Ontario Order P1392 as cited in Ontario Order PO 2197 at p. 12
[18] BC Order F10-06 at paras 59-60.

"in confidence"

[34] The second part of the test in s. 21(1)(b) is that the information must be supplied in confidence. Factors relevant to determining whether information has been supplied in confidence include:

- The nature of the information: Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?
- The purpose of the information: Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
- Explicit statements: Was the record in question explicitly stated to be provided in confidence? This may not be enough but it is a relevant consideration.
- Voluntary or compulsory supply: Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in the legislation relevant to the compulsory supply that establish confidentiality.
- Agreement or understanding between the parties: Was there an agreement between the parties with respect to confidentiality? Keep in mind that identifying a record as "confidential" does not automatically exempt it from disclosure and that no public body can be relieved of its responsibilities under access legislation merely by agreeing to keep matters confidential. In other words, no municipality or public body can "contract out" of access legislation.
- Actions of the public body and supplier: Do the actions of the parties provide objective evidence of an expectation of confidentiality?

[35] The Federal Court[19] has summarized the meaning of "confidential" in the context of an analysis of s. 20(1)(b) of the *Access to Information Act* (*ATIA*). Section 20 of *ATIA* is the federal third party business information exemption.[20] In summary, the Court states the following with respect to the requirement that information be confidential:

- It is an objective standard.
- It is not sufficient that the third party state, without further evidence, that it is confidential.
- Information has not been held to be confidential even if the third party considered it so, where it has been available to the public from some other source or where it has been available at an earlier time or in another form from government.
- Information is not confidential where it could be obtained by observation albeit with more effort by the requestor.

Analysis

[36] I will now consider the application of the law to each of the categories of records withheld under s. 21.

---

[19] *Stenotran Services v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15464 (FC) at [9] citing *Air Atonabee.*

[20] Section 20 of *ATIA* has several important differences from s. 21 of *FOIPOP*, not the least of which is that the requirements are not conjunctive. However, the discussion of the meaning of "confidential" in the context of a business exemption in access law is still informative.

Veterinary reports and notes

[37] The veterinary reports[21] were completed by government employees on government forms. Despite this, the Department withheld these records in their entirety. There is no doubt that the blank forms themselves contain no third party information. They are forms designed and produced by the Department.[22]

[38] With respect to the content of the forms added by the government veterinarians, information such as the date, location, case number and veterinarian's name is also information that is in no way supplied to the Department. In fact, the identity of the veterinarians and the case numbers are disclosed on other documents released in this matter.[23]

[39] Section 5(2) of *FOIPOP* provides that if information can reasonably be severed from the record an applicant has the right of access to the remainder of the record. I have, on previous occasions, noted that reasonable severing means that after the excepted information is removed from a record, the remaining information is both intelligible and responsive to the request.[24]

[40] I am satisfied that the information on the blank veterinarian report forms and date, location, case number, veterinarian name (all added by the veterinarian) is all intelligible information responsive to the applicants' request and so the Department was required to sever these records and disclose this information.

[41] With respect to the remainder of the information, a careful review of the documents makes clear that the majority of the information contained in the records consists of the observations and professional judgements of government veterinarians or lab technicians hired by the Department to analyze samples provided to them by Department veterinarians. The only information "supplied" by the third party is that sometimes the visits were at the behest of the third party who identified a "chief complaint". This information is recorded on some of the veterinary services forms and in some of the notes.[25]

[42] With respect to the veterinarian case notes,[26] most of the notes record the veterinarian's observations and findings during and after site visits to fish farms. Some of the notes are simply a record of attempts to organize meetings. This type of information is disclosed to the applicants in the email exchanges.[27]

---

[21] By veterinarian reports I am referring to the forms like those found at pp. 2-3 of review request FI-14-20, p. 4, 10, 19 of review request 15-00089, and pp. 22 and 32 of review request 15-00090.

[22] This finding is consistent with the finding of the Supreme Court of Canada in *Merck Frosst* at paras 137-151 where the Court found that "administrative details" such as page and volume numbering, dates and location of information within records are not scientific, technical, financial information.

[23] See for example p. 1 of review request 15-00090.

[24] NS Review Report FI-11-72 at para 23.

[25] There are 11 veterinary reports that contain chief complaints supplied by the third party in the responsive records to review requests 15-00089 and 15-00090. There are 13 pages of veterinary notes that contain information supplied by the third party generally in the history section of the case notes found in the responsive records to review requests 15-00089 and 15-00090.

[26] By "case notes" I am referring to the forms such as those found at pp. 11-12, and pp. 16, 20 of review request 15-00089.

[27] An example of meeting arrangements disclosed in email can be found at p. 9 of review request 15-00090.

[43] I agree with the conclusions of other Information and Privacy Commissioners and courts across Canada that information gathered by government inspectors via their own observations does not qualify as information "supplied" to the public body within the meaning of s. 21(1)(b) of *FOIPOP*.

[44] The veterinary reports responsive to these requests consist of two types of reports – routine investigations and veterinary visits at the request of the third party. The routine visit reports consist entirely of information gathered by government veterinarians via their own observations and so do not qualify as information "supplied" to the public body within the meaning of s. 21(1)(b) of *FOIPOP*.

[45] **Finding #2:** I find that veterinary reports, notes and test results for routine visits do not contain any information supplied to the Department within the meaning of s. 21(1)(b).

[46] But, as I stated earlier, this does not end the matter. Courts and Commissioners across Canada have determined that the "supplied" requirement can be satisfied where disclosure of the information would enable accurate inferences about underlying confidential information.[28]

[47] A small portion of some of the veterinary reports and notes do contain information supplied to the Department by the third party – specifically chief complaint information – that is the reason why the third party was calling the veterinarian. This is significant because disclosure of the veterinarian's observations and conclusions and the tests the veterinarian recommends would allow the reader to draw an accurate inference of the chief complaint information that was supplied by the third party. The s. 21(1)(b) test will apply to this information then if the information regarding the presenting problem was supplied in confidence. I will discuss that issue below.

Laboratory and test reports

[48] There are two types of reports withheld by the Department. First, laboratory reports were commissioned by the Department and received by the Department as part of its review of tissue samples collected during the site visits. These laboratory reports are addressed to the Department and are completed by two different labs. The second type of reports are tests completed directly by government biologists.

[49] The test reports completed by Department biologists are on government issued forms.[29] Once again, there is no doubt that the blank forms themselves contain no third party information and so do not qualify for any severing under s. 21. Despite this, the Department withheld these records in their entirety. The reports also include the biologist's name, date, and case number, all of which are not information of the third party nor is it information supplied to the Department. The remainder of these forms contain the results of the professional observations and conclusions of a government employee.

---

[28] See for example BC Order F14-28 at paras 26-27, *Jill Schmidt v. British Columbia* (Information and Privacy Commissioner), 2001 BCSC 101 (CanLII) at para 32.

[29] There are two types of government issued reports. Examples of the government issued test reports include pp. 21, 25 of review request 15-00089.

[50] The laboratory reports from labs retained by the Department, the identity of the laboratory, the technician who completed the test, the date, and the identity of the Department veterinarian to whom the report was sent, are all clearly not information supplied by the third party. Based on the requirement to sever information, at the very least all of these types of information should have been released as none of it could not reasonably be characterized as information supplied to the Department.

[51] It is only the test results themselves, contained in a distinct section of the reports, that have anything to do with the third party in this case. However, as with the veterinarian observations and professional judgements, test results requested by the Department consist of professional observations and judgements made by experts retained by the Department.

[52] In BC Order F10-06 the adjudicator determined that, "it simply cannot be the case that the conveyance of deceased fish by fish farm operators to the Ministry constitutes or equates to a supply of "information" under the second branch of the test of s. 21(1)(b)."[30] The distinction in this case is that, for some of the tests ordered, the third party supplied information to the Department in the form of the presenting problem. The third party sought the Department's expertise in evaluating the cause of the presenting problem and the disclosure of the test results therefore could allow a reader to draw an accurate inference regarding the presenting problem. The s. 21(1)(b) test will apply to this information then if the information regarding the presenting problem was supplied in confidence. I will discuss that issue below.

Prescriptions, medication and feed rate

[53] There are two types of prescription forms at issue. Two of the prescriptions are contained on government issued forms. Once again, the blank forms contain no third party information. Despite this, the forms were withheld in their entirety. In addition, the forms include the identity and work address of the government veterinarian, dates and case numbers - all information belonging to the Department. The records disclosed to the applicants reveal that a third prescription form used a "CFI Template" supplied by the third party. Once again, the blank form contains no third party business information.[31] It is designed by a feed supplier to ensure that all of the information necessary is contained in the prescription.

[54] On one further document three prescription numbers were withheld. There is no other information associated with the prescription numbers and no evidence was offered to suggest that these numbers were in any way supplied by the third party.

[55] **Finding #3:** I find that there is no evidence to support that prescription forms, identity and work addresses of government veterinarians, dates, case numbers and prescription numbers were supplied within the meaning of s. 21(1)(b).

[30] BC Order F10-06 at paras 59-60.
[31] CFI is a medical feed supplier unrelated to the third party in this matter.

[56] One email is partially severed because it contains prescription-related information. While most of the information withheld consists of recommendations of the government veterinarian, the email does record the feed rate the third party is attempting to achieve.[32] Based on the content of the record it appears that feed rates were part of a veterinarian's evaluation of an appropriate feed rate in relation to a prescription.

[57] The prescriptions are written by government employee veterinarians using their particular expertise. They disclose the professional judgement of the veterinarian who presumably used the various test results and their own observations to make a decision on the appropriate treatment in the circumstances. As with the veterinary and laboratory reports, information gathered by government inspectors via their own observations and expertise does not qualify as information "supplied" to the Department within the meaning of s. 21(1)(b) of *FOIPOP*.

[58] However, once again, I am of the view that the prescription and medication information could allow a reader to draw an accurate inference regarding the presenting problem which was information supplied by the third party. The s. 21(1)(b) test will apply to prescription information if the presenting problem was information supplied in confidence. I will discuss that issue below.

Was the presenting problem/chief complaint supplied in confidence?

[59] I have determined that the information supplied was the presenting problem or chief complaint supplied by the third party to the Department in relation to some of the inspections conducted by Department veterinarians. I have further found that disclosure of the withheld information in some of the veterinary reports, laboratory and test reports, and prescriptions would allow a reader to draw an accurate inference regarding the presenting problem. It is this information that I must now analyze to determine whether or not the second half of the test has been satisfied. That is, was the supplied information supplied <u>in confidence</u>?

[60] There are a number of factors relevant to determining whether or not information has been supplied in confidence within the meaning of s. 21(1)(b) of *FOIPOP*:

- the nature of the information,
- explicit statements of confidentiality,
- the purpose of the information,
- whether the supply was voluntary or compulsory,
- the agreement or understanding between the parties,
- whether information could be obtained by observation, and
- the actions of the parties.

<u>Nature of the information</u>
<u>Explicit statements of confidentiality</u>

[61] The nature of the information is sensitive information in that it discloses concerns the third party had with respect to the health of fish at its aquaculture sites. With respect to the feed rate, I received no submissions directly related to this information although generally the third party

[32] Feed rate supplied by the third party: p. 49, review request 15-00089.

characterized this type of technical information as a component of the commercial processes developed by aquaculture enterprises. There are no explicit statements of confidentiality in the records at issue here with respect to the reporting of chief complaints that in turn resulted in the veterinarian visits and the creation of many of the records at issue.

Purpose of the information

[62] The purposes of the *Fisheries and Coastal Resources Act*[33] provide some assistance in understanding why the Department would set up a veterinary service:

> 2 The purpose of this Act is to
> (b) encourage, promote and implement programs that will sustain and improve the fishery, including aquaculture;
> (c) service, develop and optimize the harvesting and processing segments of the fishing and aquaculture industries for the betterment of coastal communities and the Province as a whole;

[63] In 2014, the Doelle-Lahey Panel conducted an extensive study of Nova Scotia's aquaculture industry and issued its report entitled, *A New Regulatory Framework for Low-Impact/High-Value Aquaculture in Nova Scotia*. The Doelle-Lahey report discussed the significance of animal health to the future of a sustainable aquaculture industry:

> Some of the most persuasive presentations we received argued that the key to aquaculture's future as a sustainable industry that enjoys social licence is a focus on the health and well-being of farmed animals. All of these presentations, which were made from a range of perspectives, recognized that the health of the animals being raised in aquaculture was the ultimate and fundamental barometer of whether aquaculture is or is not being conducted in harmony with its surrounding environment. Put simply, healthy fish mean the health of the surrounding environment is being maintained while sick fish suggest the opposite. Conversely, the nature and extent of the aquaculture industry's use of some of the practices that raise the most concern about the industry's impact on the environment depend very much on the health of the animals raised in aquaculture. When animals are healthy, use of these practices can be reduced or eliminated. When fish are sick or in danger of becoming sick, use of these practices increases.[34]

[64] So it seems that information regarding presenting problems was collected by the Department both to encourage and promote aquaculture and for the betterment of coastal communities and the province as a whole.

Compulsory versus voluntary supply

[65] The third party submits that the information at issue here was supplied in confidence. The third party appears to believe that there was a compulsory legislative requirement to supply information in relation to fish health found in the veterinarian reports, or at least to supply the

[33] SNS 1996, c 25.
[34] A New Regulatory Framework for Low-Impact/High-Value Aquaculture in Nova Scotia; The Final Report of the Independent Aquaculture Regulatory Review for Nova Scotia [The Doelle-Lahey Panel] Doelle Lahey Report at p. 62.

fish carcasses and access to the fish farm sites. The third party does not point to the provision it says was in effect at the time the reports were written mandating their supply. But it notes that where supply is compulsory, the Nova Scotia Court of Appeal in *Chesal v Nova Scotia (Attorney General)*[35] stated that, "Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)"

[66] The third party then goes on to cite the new statutory provision in relation to veterinary reports that says that the reports are to be kept confidential.[36] This provision came into effect on October 26, 2015 after all of the access to information requests at issue here had been received and processed. Despite this fact, the third party argues, "To find that the veterinary records of [the third party] were not supplied in confidence in the face of a clear legislative provision that establishes confidentiality with respect to veterinary records (irrespective of when that provision came into force) is, respectfully, not a defensible position."

[67] At the time of the access to information requests, the legislative foundation for the Department's work in aquatic animal health was limited to ss. 5 and 9 of the *Aquaculture Licence and Lease Regulations*.[37] The Doelle-Lahey study emphasized the limited legislative foundation for the Department's health-related work at the same time as these five access to information requests were being processed.

[68] Sections 5 and 9 of the *Aquaculture Licence and Lease Regulations* required licensees to maintain certain enumerated records in relation to fish health and authorized provincial veterinarians to take certain actions in relation to infected fish. But, for the most part, industry's use of provincial veterinary services was voluntary. The voluntary nature of the veterinarian services during the time period relevant to these access requests was also noted by the Auditor General of Nova Scotia in an audit released in June 2015.[38]

[69] Effective October 26, 2015, the *Fisheries and Coastal Resources Act* was amended to set out clearer regulatory requirements with respect to fish health monitoring by the Department. The new provisions include limitations on the disclosure of a "veterinary medical record". In addition, a new regulation, the *Aquaculture Management Regulations*,[39] provides significantly more guidance on disease surveillance and reporting. Neither were in effect at the time that these access to information requests were received and processed.

[70] Based on the statutory provisions in effect at the time the third party called the Department veterinarians for assistance, the supply of the information was voluntary.

---

[35] *Chesal v. Nova Scotia (Attorney General) et al*, 2003 NSCA 124 (CanLII) [*Chesal*] at para 72.
[36] *Fisheries and Coastal Resources Act*, SNS 1996, c 25, s. 8(4) in effect October 26, 2015.
[37] *Aquaculture Licence and Lease Regulations*, NS Reg 347/2015, ss. 5, 9.
[38] This is also pointed out in a report by the Auditor General of Nova Scotia, Fisheries and Aquaculture: Aquaculture Monitoring (June 2015) at para 3.48 where the auditor states, "While there is significant surveillance of finfish farms in the province through the veterinary program, this surveillance is not required by regulation."
[39] *Aquaculture Management Regulations*, NS Reg 348/2015.

Agreement or understanding of the parties

[71] For its part, the Department points to the Canadian Veterinary Association's Principles of Veterinary Medical Ethics to support its position that veterinarians have an obligation of confidentiality with respect to its clients. It too points to the new statutory provision which it says expressly crystalizes this understanding of confidentiality between the third party and the Department with respect to veterinary records.

[72] Both the Department and the third party assert that there was an understanding of confidentiality between the parties. Both point to the development of the new statutory provision as being evidence of the intentions existing at the time. But the actual law and regulations at the time were such that, at best, the veterinarian's role was unclear and the degree of confidentiality that industry could expect was also, therefore, unclear.

[73] The Doelle-Lahey Panel discussed the dual role of the Provincial Fish Veterinarian (PFV). On the one hand, the PFV provided veterinarian services to the industry and so was, in effect, the industry's veterinarian. On the other hand, the Department relied on the PFV in its application, interpretation and enforcement of regulatory requirements relating to fish health.[40]

Information obtained by observation

[74] The applicants point out that they observed various fish health issues because they saw tonnes of dead salmon being removed from a fish farm site on specific dates. They also observed another mass mortality event with dead fish decomposing and being pumped out of the cages. It was these observations that prompted the access to information requests.

Actions of the parties

[75] The applicants provided a news article dated January 24, 2014 in which Minister Colwell confirmed that a veterinarian had visited one of the sites at issue, confirmed that there were slightly higher mortalities than normal, and stated that it was determined that extreme cold killed the fish. The fact that the Minister confirmed this information was entirely consistent with the law at the time which promoted public disclosure of information under the control of the Department.[41]

[76] I conclude that the evidence does not support a finding that the presenting problem or chief complaint supplied by the third party was supplied in confidence for three main reasons. First, while the supply of the information was voluntary, the veterinarian's role was both to serve as an industry veterinarian and to enforce regulations. There is no evidence that this dual role was not apparent to all parties. This is particularly clear because throughout 2014 there was extensive discussion regarding the adequacy of the regulatory framework governing aquaculture.

[77] Second, the actions of the parties, including public statements of the Minister, reveal that presenting problems, in the form of mass mortalities, were publicly discussed. Such public discussions were certainly consistent with the purposes of the *Fisheries and Coastal Resources Act* which, as noted above, included optimizing the aquaculture industry for the betterment of coastal communities and the province as a whole.

[40] Doelle Lahey Report at p. 64.
[41] *Fisheries and Coastal Resources Act*, SNS1996, c. 25, s. 8(3)(a).

[78] Finally, the presenting problems were easily observed and were actually observed by these applicants. It was the observations of mass mortalities that prompted some access to information requests in the first place.

[79] **Finding #4:** I find that the third party has failed to satisfy its burden to prove that information contained in the veterinary reports, laboratory reports, test results and prescriptions (including feed rate) was supplied in confidence within the meaning of s. 21(1)(b).

Stocking and cage configuration plans

[80] A number of the withheld records under s. 21 related to stocking and cage configuration plans.

Was the stocking of cage configuration information supplied?

[81] The records disclosed to the applicants reveal that there was an early plan to stock one of the sites with trout. That plan never came to fruition. But in the course of the discussion the number of trout that may have been stocked is repeated and withheld in a number of email strings.[42] The content of the email strings suggests that the number was an estimate or that there was some uncertainty as to the number. No evidence was offered either by the third party or by the Department as to the source of this information. The third party bears the burden of proving that s. 21 applies to the withheld information. In this case no evidence was provided as to the source of the trout stocking estimate.

[82] **Finding #5:** I find that the potential number of trout for the earlier trout stocking plan was not information supplied to the Department within the meaning of s. 21(1)(b).

[83] A more detailed site plan, stocking plan and feed plan was partially withheld (subheadings disclosed) in relation to the trout plan.[43]

[84] A second plan, and the one most of interest to the applicants in this case, was a plan to stock the site with salmon. Records relating to this second plan are partially withheld. A technical review discloses some information about the plan but a portion is also withheld because it discloses information clearly taken directly from the restocking plan supplied by the third party.[44]

[85] Based on the cover emails that accompany each of these plans I am satisfied that the information was supplied to the Department within the meaning of s. 21(1)(b).

[42] Pages 1, 4, 6, 18, 20, 33 review request FI-14-60.
[43] Pages 24-27 review request FI-14-60.
[44] Pages 64-65 is the technical review that contains information found in the Restocking Plan at pp. 76-113 of review request FI-14-60.

Was the stocking and cage configuration information supplied <u>in confidence</u>?
[86] As I noted above there are a number of factors relevant to determining whether or not information has been supplied in confidence within the meaning of s. 21(1)(b) of *FOIPOP*:

- the nature of the information,
- explicit statements of confidentiality,
- the purpose of the information,
- whether the supply was voluntary or compulsory,
- the agreement or understanding between the parties,
- whether information could be obtained by observation, and
- the actions of the parties.

<u>Explicit statements of confidentiality</u>
[87] The Department submits that some of the withheld information was supplied to the Department explicitly in confidence as evidenced by the "confidential" stamp on some of the documents.

[88] The Department argues that, "other withheld information, while not explicitly stamped as 'confidential', has been submitted to the Department in confidence implicitly, because the unstamped information falls within a continuum of relevancy to the information that is expressly marked. Only considering documents expressly marked as 'confidential' as falling under the purview of section 21(1)(b) would be an overly restrictive and fallacious approach according to the Department. Further, the Department argues that this approach would, in essence, ignore the intent expressed by the Legislature in section 21(1)(b) through the use of the word 'implicitly.'"

[89] There are several troubling aspects to this submission. First, the fact that a document is stamped confidential does not mean that it necessarily satisfies the test in s. 21(1)(b). A confidential stamp may be evidence of an intention to supply information in confidence but the public body must still review all of the relevant circumstances in relation to the exact information at issue. Further, a public body may not contract out of its obligations under *FOIPOP* and access under *FOIPOP* cannot be dictated by the application of labels to information.[45] The Nova Scotia Court of Appeal has also made it clear that the fact that a public body or third party has used a confidential stamp is not determinative of the issue of whether or not a document is supplied or received in confidence.[46]

[90] Eleven pages of documents are stamped confidential in the response to review request FI-14-60.[47] All of the documents relate to stocking and cage configuration plans. The content of the record itself discloses two things. First, it was the Department and not the third party who stamped the records as confidential and second, the confidential stamp appears to have been

[45] As stated by former Commissioner Loukidelis in Order 07-15 at para 33. Also see the Federal Court Decision in *UCANU Manufacturing Corp. v. Defence Construction Canada*, 2015 FC 1001 (CanLII) at para 33 where the Court stated that express statements of confidentiality are not determinative.
[46] *Chesal* at para 66.
[47] Pages 21-31, review request FI-14-60.

placed on the wrong documents.[48] A careful review of the records disclosed to the applicants reveals that AEG, an expert providing service to the lease holder, asked that material it supplied at the Department's request be held in confidence and not used by any other applicants. In response, the Department stamped material provided by the third party and not AEG. The AEG material was entirely withheld as "non-responsive." Therefore, in this case, the fact that material is stamped as "confidential" provides little assistance in determining this issue.

[91] With respect to the explicit statements of the third party when the cage configuration and stocking plans were supplied, the cover emails sent with the plans have no expression of an expectation of confidentiality.[49] Of course, there may have been an implied expectation of confidentiality.

Nature of the information

[92] The third party says this information was supplied in confidence because the nature of the information is such that a reasonable person would regard it as confidential. The third party asserts that the information was supplied in confidence because stocking and cage configuration plans are closely guarded among competitors as they form a company's "recipe for success." It says that its employment contracts prohibit employees from disclosing this type of information. However, no employment contract was provided as proof of this assertion.

Information available by observation

[93] The applicants say that fish stocking information is publicly available. However, the media report they supplied in support of this position does not include fish stock totals. They further submit that they have received cage configuration information in response to access to information requests in the past. They supplied a copy of a cage configuration plan as evidence of this. Further, they argue that the location and configuration of the cages are observable from shore. In fact, a simple search of Google Earth reveals that the cage configurations are publicly available because the shape and location is visible on the images.

Compulsory versus voluntary supply

[94] The records disclose that stocking and cage configuration information was supplied for two reasons.

[95] First, the disclosed information reveals that the Federal Department of Fisheries and Oceans (DFO) required that the third party provide site plans including cage design, dimensions and geo-referencing, stocking plan, feed plan, feed pellet size and the maximum number of fish that may potentially be stocked at maximum capacity.[50]

[48] See AEG email to Department at p. 36 and the Department's response nine minutes later at p. 21 of review request FI-14-60.
[49] Page 22 and p. 75 of review request FI-14-60.
[50] Disclosed to the applicants at p. 1 of review request FI-14-60.

[96] Similar information was also required before the Department would permit the site to be restocked. This is clear from the Aquaculture License Renewal approval letter dated March 15, 2012:[51]

> Please be advised that you are not permitted to restock the site until we have reviewed and approved a revised stocking and cage configuration plan to address any fish health and environmental management concerns.

[97] In other words, the supply of the restocking and configuration information was mandatory.

[98] The third party points out that the Nova Scotia Court of Appeal in *Chesal v Nova Scotia (Attorney General)*[52] stated that, "Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)"

[99] The mandatory nature of the conditions set out in the license renewal approval letter were apparent from s. 58 of the *Fisheries and Coastal Resources Act* as it existed at the time of the license renewal:

> 58 An aquaculture licence or aquaculture lease issued by the Minister pursuant to this Part may be terminated or revoked if the holder is in breach of this Part of the regulations or any term or condition set forth in the licence or lease.

[100] The third party referenced *Chesal* in relation to veterinary reports and it then pointed to the new provision in the *Fisheries and Coastal Resources Act* that mandates that veterinary medical records be kept in confidence. No party pointed me to any provision in the *Fisheries and Coastal Resources Act* that mandated that stocking and cage configuration information be kept in confidence either under the old or new version of the *Act*.

[101] In summary then, while there is an express "confidential" stamp on some of the cage configuration and stocking information, it was placed there by the Department, likely in error. Even if correctly placed, it is evidence of the Department's expectation but not the third party's. Second, the information was supplied to the Department because it was mandated both by the Federal Department of Fisheries and Oceans and as a condition of the license renewal. Mandatory supply is not confidential in the absence of any statutory provision establishing confidentiality of compulsory supply. Finally, cage configuration information is publicly available because it is observable both from shore and through internet mapping websites.

[102] **Finding #6:** I find that the third party has failed to satisfy the burden of establishing that cage configuration and stocking information was supplied in confidence within the meaning of s. 21(1)(b).

---

[51] Disclosed to the applicants at p. 70 of review request FI-14-60.
[52] *Chesal* at para 72.

Fish mortality data

[103] In June 2015, the third party emailed "Sp'15 morts" to the Department.[53] The attachments to the email, two excel spread sheets, are withheld in their entirety. This information is clearly supplied to the Department by the third party. But was the information supplied in confidence?

[104] The cover email states that the subject is "Privledged (sic) and confidential Sp'15 morts". This is an express expectation of confidentiality from the third party.

[105] The data was supplied at the same time as the third party reported a chief complaint to the Department's veterinarian who in turn conducted the usual series of tests. The purpose for the supply then was likely related to the consultation with the Department's veterinarian. At the time there was no mandatory reporting of mortalities under provincial legislation. Effective October 26, 2015, aquaculture licence holders must immediately report mass mortalities and must provide a number of data elements including the mortality rate and the presumptive diagnosis.[54]

[106] While the applicants were able to observe fish mortalities as the dead fish were removed from cages or washed up on shore, the actual number of fish mortalities could not be obtained by observations and was not otherwise publicly available.

[107] **Finding #7**: I find that the third party has met its burden of establishing that the fish mortality data was supplied in confidence within the meaning of s. 21(1)(b).

Step 3: Would disclosure reasonably be expected to cause harm listed in s. 21(1)(c)?

[108] Only the fish mortality data found in response to review request 15-00089 has satisfied the requirements of s. 21(1)(a) and 21(1)(b) and so I must now determine whether or not the third party has met its burden of proving that disclosure of the fish mortality data could reasonably be expect to cause any of the harms listed in s. 21(1)(c) of *FOIPOP*.

[109] I have, on a number of occasions, reviewed the leading cases in Canada on the issue of how to assess a reasonable expectation of harm.[55] Therefore I will not repeat that analysis here. In summary I have determined that under *FOIPOP*, a reasonable expectation of harm requires evidence well beyond a mere possibility of harm but somewhat lower than harm that is more likely than not to occur. As a practical matter, mere assertions of harm will rarely be sufficient. Independent evidence of expectations of harm or at least evidence of harm from the third party and the public body is helpful. Evidence of previous harm from similar disclosures is also useful and evidence of a highly competitive market would assist in determining whether the test has been satisfied. In all cases it is evidence of a connection between the disclosure of the type of information at issue and the harm that is necessary.

[53] Pages 43-45, review request 15-00089.
[54] Section 21(4)(b) and 21(5) *Aquaculture Management Regulations*, NS Reg. 348/2015.
[55] NS Review Reports 16-01 and 16-13.

[110] The third party submitted that disclosure of fish mortality data posed a significant risk of harm to the competitive position of the third party through misappropriation of the information by competitors. It also submitted that there is a risk of harm to the business interests of the third party through misuse of the information by opponents of the aquaculture industry and/or subsequent misinformation of the public including consumers of the third party's products.

[111] The Department provided no independent evidence or argument in support of its position that s. 21(1)(c) applied to the withheld information. The Department states that it relied on subsections 21(1)(c)(i), (ii) and (iii) which provide:

> 21(1) The head of the public body shall refuse to disclose to an applicant information
> (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,
> (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,
> (iii) result in undue financial loss or gain to any person or organization.

[112] The third party asserts that a competitor could "misappropriate" the fish mortality data and so harm the competitive position of the third party. Misappropriation connotes dishonesty or unfairness. I am uncertain how the disclosure of information through a valid access to information request pursuant to Nova Scotia law could result in misappropriation. There is no prohibition against publicly disclosing information obtained through an access to information request. In fact, such publication is entirely consistent with the purposes of the *Act*.

[113] What evidence is there that a competitor could use fish mortality data in a manner that would harm the competitive position of the third party? Fish mortality is a regular part of aquaculture operations.[56] The fact of fish mortalities is an observable event given that the applicants in this case observed fish mortalities on at least two occasions. So, what will the mortality data give a competitor that it could use to harm the competitive position of the third party?

[114] The third party says the information could create negative connotations and prejudice toward the third party's products. It says competitors could use the information to suggest that their products should be preferred over those of the third party's. In fact, the third party says that in 2013, the release of information in relation to fish health at a third party site caused three of the third party's most significant customers to cancel their purchase orders.

[115] Aside from asserting the fact that a loss previously occurred from the release of information in relation to fish health, the third party provided no independent or objective evidence to support the assertion. It did not identify the type of information, it provided no evidence to connect the disclosure of information to any cancelling of purchase orders and it

[56] I make this observation based on the fact that the old and amended versions of the *Fisheries and Coastal Resources Act* regulated fish mortality. Further, the Doelle-Lahey Report noted that standard reporting requirements should cover fish mortality events (at p. 53) and that fish health program prior to the amendments to the law already deal specifically with fish mortality events.

provided no evidence to support the assertion that any orders were cancelled. I would expect that correspondence or at least some record in relation to the cancellation and the reasons for the cancellation would be easily produced by the third party.

[116] The third party says that competitors will use the information to assert that their products are superior. It is unclear to me why this wouldn't be happening in any event. That is, after all, the nature of competition. It says competitors will misinform the public. Again, this is part of the competitive process and there is nothing to say that the third party could not properly inform the public of the meaning of the data.

[117] Finally, the third party says that if the information under review is released it will feel compelled to limit the amount of detail and access that it currently provides in its regulatory reporting. In this case, the amendments to the *Fisheries and Coastal Resources Act* are relevant since there is now a mandatory requirement to provide mortality data as listed in s. 21 of the *Aquaculture Management Regulations.*

[118] The third party bears the burden of proving that the disclosure of the fish mortality data would result in one or more of the harms listed in s. 21(1)(c). I am not satisfied that there is evidence of a reasonable expectation of any of the harms listed.

[119] **Finding #8**: I find that the third party has failed to satisfy the burden of proving that disclosure of the fish mortality data would reasonably be expected to cause any of the harms listed in s. 21(1)(c).

(b) Is the Department authorized to determine that portions of the responsive records are out of scope of the request and to withhold the portions that it deems non-responsive?

[120] The Department withheld a number of documents and portions of documents it claimed were "non-responsive." Those records consisted of:

- Portions of meeting minutes (pp. 8-16, review request FI-14-60)
- Data and DVD referred to on p. 22 and withheld as pages 35A-AL, (review request FI-14-60)

[121] In addition, it is apparent from the record provided and disclosed that a number of emails had attachments that were not supplied in response to the applicants' request. In particular, the emails make reference to aquaculture licence locations not identified as being of interest to the applicants. Without advising either the applicants or this office, the Department simply did not supply these attachments. Presumably the basis for the failure to provide the complete record (email and all attachments) was that the Department believed these particular attachments were "non-responsive" or "out of scope."

[122] In Review Report 16-10[57] I examined the issue of whether or not public bodies are authorized under *FOIPOP* to determine that portions of responsive records are out of scope of the request and on that basis withhold those portions it deems to be non-responsive. I carefully

[57] NS Review Report 16-10 paras 15-74 (made publicly available on October 31, 2016).

examined all of the current case law on this issue both for and against such a finding and concluded that Nova Scotia's *Freedom of Information and Protection of Privacy Act* does not permit public bodies to withhold information it deems to be "non-responsive."

[123] In its submission, the Department cited only those cases which supported its position that public bodies may use "non-responsive" as an authority for withholding information in a responsive record.[58] I considered all of the cases cited by the Department here in Review Report 16-10 and evaluated why the reasoning did not apply in Nova Scotia. The Department made no attempt to address that analysis and failed to address the current leading cases that have determined that this practice is not authorized.[59] As a result, the submission provided no new information or argument and so it did not require me to revisit this issue.

[124] I made the following observation in Review Report 16-10:

> [73] I acknowledge that there are practical considerations that support allowing non-responsive severing within a responsive record and this does create a challenge for public bodies. But the answer is quite straightforward. If a public body identifies information within a record that it believes is not responsive to the applicant's request they can contact the applicant to see if the applicant is interested in the information. If not, then the information can be withheld on the basis of the applicant's agreement. The applicant would, of course, have the right to request a review should he or she believe, upon receipt of the response, that the information is in fact responsive.

[125] As noted above, shortly after the Notice of Formal Review was issued, the Department re-visited the severing of the records and disclosed some further information to the applicants. As a result of this further disclosure, the general nature of the information withheld as "non-responsive" became apparent to the applicants.

[126] In final preparation for this formal review we took the step I recommended Departments take when they believe information contained in a record may be non-responsive. That is, we asked the applicants to review those portions of the record that related to information the Department said were "non-responsive." Following this review, the applicants agreed that they had no interest in material withheld as non-responsive nor in any attachments that related for aquaculture licenses not specified in the applicants' original access to information requests. This resolved the "non-responsive" issue.

[127] By consulting with applicants at the preliminary stage of the request process to determine whether a record is responsive to the request, Departments can resolve the issue of whether or not information is or is not responsive to an access to information request.

---

[58] Two old decisions from Ontario Order MO 1770 and P-880 and Alberta Order 97-020 and a obiter statement from the Nova Scotia Supreme Court in *Stevens v. Nova Scotia (Labour)*, 2012 NSSC 367 (CanLII).
[59] *Canadian Pacific Hotels Corp. v. Canada (Attorney General)*, 2004 FC 444 Can LII; BC Order F15-23, PEI Order FI-16-003 and NS Review Report 16-10.

(c) Is the Department authorized to refuse access to information under s. 14 of *FOIPOP* because disclosure of the information would reveal advice or recommendations?

[128] On January 13, 2017, for the first time, the Department relied on s. 14 of *FOIPOP* to withhold a small portion of information in response to an access request it originally received on March 25, 2014.[60]

[129] Section 14 provides in part:

> 14(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice, recommendations or draft regulations developed by or for a pubic body or a minister.

[130] This is a discretionary exemption meaning that even if the information meets all of the requirements of the exemption, the head has the discretion to decide whether or not the exemption should be applied.

[131] There are three problems with the application of s. 14 to the information. First, the exemption was applied almost three years after the request was originally received and processed. Second, the exemption was applied without proper notice to the applicants. The cover letter accompanying the January 13, 2017 release makes no mention of s. 14. Third, the exemption was applied after the Notice of Formal Review was issued.

[132] In accordance with s. 7(1) of *FOIPOP*, public bodies have an obligation to respond without delay openly, accurately and completely. Attempting to apply a discretionary exemption three years after the original response was provided is certainly not "without delay" and it means that the original response was neither open, nor accurate.

[133] Further, s. 7(2) requires that in responding to the applicant a public body must respond in writing and, where access to the record or to part of the record is refused, the public body must state the reasons for refusal and the provision of the *Act* on which the refusal is based. The Department wrote the applicants and failed to provide adequate notification of the application of s. 14 to a portion of the record.

[134] Finally, *FOIPOP* provides for a process by which applicants are entitled to a review of the public body's decision. A late application of an exemption such as occurred here clearly prejudices the applicants' right to review. The exemption was added after the informal resolution process had concluded and after the Notice of Formal Review had been issued.

[135] The public body bears the burden of proving that s. 14 applies to the withheld record. The Department provided no submission in support of the application s. 14.

[60] Review request FI-14-60, Department file FIS-14-4.

[136] **Finding #9**: I find that the Department has failed to satisfy the burden of proving that s. 14 applies to the withheld information.

FINDINGS & RECOMMENDATIONS:

[137] In order to avoid inadvertently disclosing information relating to the content of the withheld records I will provide the Department only with the exact page numbers that relate to each of the record types discussed below.

[138] I find that:

1. The information withheld under s. 21 qualifies as scientific or technical information within the meaning of s. 21(1)(a)(ii).
2. Veterinary reports, notes and test results for routine visits do not contain any information supplied to the Department within the meaning of s. 21(1)(b).
3. I find that there is no evidence to support that prescription forms, identity and work address of government veterinarians, dates, case numbers and prescription numbers were supplied within the meaning of s. 21(1)(b).
4. The third party has failed to satisfy its burden to prove that information contained in the veterinary reports, laboratory reports, test results and prescriptions (including feed rate) was supplied in confidence within the meaning of s. 21(1)(b).
5. The potential number of trout for the earlier trout stocking plan was not information supplied to the Department within the meaning of s. 21(1)(b).
6. The third party has failed to satisfy the burden of establishing that cage configuration and stocking information was supplied in confidence within the meaning of s. 21(1)(b).
7. The third party has met its burden of establishing that the fish mortality data was supplied in confidence within the meaning of s. 21(1)(b).
8. The third party has failed to satisfy the burden of proving that disclosure of the fish mortality data would reasonably be expected to cause any of the harms listed in s. 21(1)(c).
9. The Department has failed to satisfy the burden of proving that s. 14 applies to the withheld information.

[139] I recommend that:

[140] **Review request FI-14-20 (Department file FIS-13-23)**

1. All withheld information be disclosed in full.

[141] **Review request FI-14-53 (Department file FIS-14-3)**

1. All information withheld under s.21 be disclosed in full.

[142] **Review request FI-14-60 (Department file FIS-14-4)**

1. All information withheld under s. 21 and s. 14 be disclosed in full.

[143] **Review request 15-00089 (Department file FIS-15-04)**

1. All information withheld under s. 21 be disclosed in full.

[144] **Review request 15-00090 (Department file FIS-15-05)**

1. All information withheld under s. 21 be disclosed in full.

April 26, 2017

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

OIPC Files: FI-14-20, FI-14-53, FI-14-60, 15-00089, 15-00090