Office of the Access to Information and Privacy Commissioner
New Brunswick

Commissariat à l'accès à l'information et à la protection de la vie privée
Nouveau-Brunswick

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2010-105-AP-048
Date August 16, 2012

I N D E X

I N D E X (*Continued*)

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1.0 INTRODUCTION

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the *Act*"). This Report stems from a Complaint of November 29, 2010 in which the Applicant requested that the Commissioner carry out an investigation into the matter and provide recommendations pursuant to the *Act*, if applicable.

2. The Applicant submitted the following request to the Department of Agriculture, Aquaculture and Fisheries ("the Department"), which was received on September 8, 2010:

> …I'm requesting that you provide me with all the data/numbers, reports and related information that your ministry/department have in their custody or control regarding present and past years' reported levels of sea lice outbreaks (or infestations) in caged salmon from/in New Brunswick sites.
>
> I'm specifically seeking and including in this request any and all cage-by-cage, site-specific data, reports and related information on this problem (sea lice in caged salmon in New Brunswick).
>
> There is much speculation around the coast about sea lice, including rumours and estimations regarding the seriousness of the current sea lice outbreak. Especially since salmon aquaculture is conducted in public waters, I think it is incumbent on government to set the record straight by releasing its data and reports about the problem of sea lice in our coastal waters and by informing the public authoritatively and reliably as to the extent and intensity of the sea lice infestation in our province.
>
> ("Request")

3. Upon receipt of the Request, the Department gathered the relevant records it had in its custody and control. After completing the search for records, the Department determined that the only relevant records consisted of sea lice monitoring reports of fish farmers operating in the Province as private companies.

4. Before providing a response, and in considering whether the information could be released to the Applicant, the Department had concerns about the potential impact of disclosing this information for the reason that it considered that information as belonging to the fish farmers. The Department also had concerns that some of the relevant records might contain information that could harm the business or financial

interests of the fish farmers, and determined that this information is excepted from disclosure under paragraph 22(1)(b).

5. As the Department considered the requested information to be third party business information, it decided to initiate the third party notification process as set out in sections 34 to 36 of the *Act*. That process invites third parties, fish farmers in this case, to give representations as to whether they consent to the release of their information or to provide reasons why they do not consent. It is important to note that the decision in regards to disclosure of third party information ultimately remains with the Department.

6. On October 7, 2010, the Department notified the Applicant that third parties were being given an opportunity to make representations about the possible disclosure of this information and that a decision by the Department would be made within 30 days of the notice.

7. None of the fish farmers consented to the disclosure of the requested information. Those who provided written representations explained their objections to the release of that information on the basis of specific exceptions to disclosure in the *Act*, namely:
   a) paragraph 22(1)(b) (information supplied on a confidential basis);
   b) subparagraph 22(1)(c)(i) (disclosure could harm the third party's competitive position); and,
   c) subparagraph 22(1)(c)(iii) (disclosure could result in financial loss to the third party).

8. The Department considered the fish farmers' reasons for objecting to the disclosure of the requested information and ultimately decided to refuse access to all of the relevant records under paragraph 22(1)(b).

9. On November 2, 2010, the Department issued its Response to the Applicant, providing the following explanation:

> Following our notice sent to you on October 7, 2010, we have taken all matters into consideration and reviewed the third party's information as requested as part of the record(s) included in your request for information received on September 8, 2010.
>
> We have come to the conclusion that we will not grant disclosure to this information for the following reason:

> Documents that would reveal scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party are protected from release under paragraph 22(1)(b) of the *Right to Information and Protection of Privacy Act.*
>
> ("Response")

10. The Applicant filed a Complaint with this Office on November 29, 2010 and provided these comments:

> As the owner and ultimate custodian of the marine environment, the public should have an unconditional right to know the scope, extent and magnitude of the infestation of sea lice affecting our region's marine environment and its ecosystems. The only practical way for the public to know the extent of this infestation in its waters is through making the results of sea lice enumerations carried out on caged salmon reasonably and freely available as public information.
>
> ("Complaint")

2.0 BACKGROUND

11. As with all access complaints, it is important to first understand the context in which the relevant records were produced. The Minister of Agriculture, Aquaculture and Fisheries is the Minister responsible for the administration of the *Aquaculture Act*, which regulates the aquaculture industry in New Brunswick. The aquaculture industry operates in the Bay of Fundy and the majority of the industry is focused on Atlantic salmon. The aquaculture industry in New Brunswick is highly profitable, generating millions of dollars in sales.

12. As part of the regulatory framework for aquaculture operations in the Province, the Bay of Fundy is currently divided into six zones called Aquaculture Bay Management Areas, which are designated by the Minister under subsection 5(1) of the *Aquaculture Act*. The objective behind the designation of the Aquaculture Bay Management Areas is to promote sustainable aquaculture development and to manage the health of aquaculture stocks as well as environmental and ecological concerns.

13. Each Aquaculture Bay Management Area contains a number of designated aquaculture sites. Each site is approved by the Department for use by an aquaculture operator through the Provincial aquaculture licensing scheme. Anyone who conducts aquaculture operations in the Province must first be approved for an aquaculture

license and then comply with operational and reporting requirements to the Department as specified in the license conditions.

14. As part of its regulatory role, the Department is mandated to oversee fish health in the aquaculture industry and licensees have a number of operational and reporting requirements relating to fish health as a condition of their licenses. In addition to the requirements as set out in the *Aquaculture Act* and *Regulation 98-158*, the Department has implemented the New Brunswick Marine Aquaculture Finfish Health Policy. This Policy provides that:

> The New Brunswick Department of Agriculture and Aquaculture (NBDAA) is responsible for the effective management of aquaculture fish health within New Brunswick. An effective marine aquaculture finfish health management program is essential to the long-term economic and environmental sustainability of the marine aquaculture industry in New Brunswick. Effective fish health management is also necessary to provide industry, government, the investment community, interest groups, the general public and all other stakeholders with the assurance that finfish health is effectively managed and that the risk of loss due to disease is minimized.

15. Consequently, aquaculture licensees have a number of obligations to fulfill regarding fish health. These include maintaining accurate fish health records, appointing a designated veterinarian to attend to the licensed sites, completing monthly reporting requirements to the Department regarding fish health, and reporting the presence of certain kinds of disease or disease agents.

16. The Request addressed an outbreak of sea lice on farmed salmon. Sea lice are naturally occurring marine parasites which affect both wild and farmed salmon. These parasites attach themselves to fish and feed off their skin, mucous and blood. Farmed salmon are particularly susceptible to sea lice infestations. If sea lice remain attached to the fish for a long period of time and/or are left untreated, they can have a serious negative impact on the affected salmon's health as they weaken the fish's overall condition and make the fish more vulnerable to disease.

17. The fish farmers in New Brunswick monitor sea lice levels in their aquaculture sites of their own accord; however, it is not a condition of their licenses to report sea lice counts to the Department. This is similar to how the aquaculture industry operates in British

Columbia where fish farmers are not required to provide sea lice count information to the Ministry of Agriculture as a licensing condition.[1]

18. In recent years, fish farmers in the Bay of Fundy were able to effectively manage sea lice levels by obtaining a prescription for the use of emamectin benzoate (marketed as SLICE®), which was only available through Health Canada's Emergency Drug Release program.

19. The environmental and ecological impact of the aquaculture industry and, in particular, the chemicals used to combat sea lice outbreaks in aquaculture operations have been a matter of public concern both domestically and internationally. The use of chemical pesticides to combat sea lice outbreaks in aquaculture operations has been questioned by individuals and organizations who are concerned about the potential long-term impact on our waters and marine life. International trends have shown that sea lice are highly adaptable and often develop resistance to measures to control their numbers, especially pesticides.

20. In early 2009, the fish farmers noticed a sharp increase in sea lice counts, indicating that previously effective means of combatting sea lice numbers were no longer working. The fish farmers as a group informed the Department of the situation, prompting the Department to submit an emergency application to the federal Pest Management Regulatory Agency of Health Canada for the acquisition and distribution of Deltamethrin, a pesticide commonly known as AlphaMax®.[2] As AlphaMax® is a federally controlled substance, the fish farmers could not make an emergency application for AlphaMax®; only the Department had the authority to do so.

21. Based on the situation reported by the fish farmers, the Department decided to proceed with an emergency application to the Pest Management Regulatory Agency for the use of AlphaMax®. In May 2009, the Pest Management Regulatory Agency granted the Department authorization for an emergency registration period for a limited number of aquaculture sites in the Bay of Fundy from May 24, 2009 to May 23, 2010. This emergency registration process required the Department to fulfill a number of

[1] Department of Fisheries and Aquaculture of British Columbia, "Sea Lice Monitoring Protocols and Reporting Requirements in British Columbia (for Industry and BCMAL) 2008/09". http://www.agf.gov.bc.ca/ahc/fish_health/Sealice/Sea_Lice_Monitor_reqts_Updated_Oct%20052009.pdf.

[2] New Brunswick Department of Agriculture, Aquaculture and Fisheries, "Monitoring, Surveillance and Research in Support of the Emergency Registration of AlphaMax® (10g/L deltamethrin) for Sea Lice Control in New Brunswick," (January 2011), 3. http://0101.nccdn.net/1_5/148/17c/093/AMX_Report_FINAL_Jan_2011_v7_Wrap_Up_Report_.pdf.

conditions, which include monitoring and surveillance programs and reporting requirements to the Federal Government relating to the administration of AlphaMax® treatments on the approved aquaculture sites.[3]

22. Members of the public have raised concerns that AlphaMax® may be toxic to lobsters and crustaceans and that the current controls on the use of AlphaMax® may not be sufficient to prevent or limit harmful effects to other marine life.[4]

23. It was not necessary for the Department to report sea lice count data in order to meet its monitoring and reporting requirements. Nevertheless, the Department asked the fish farmers to conduct weekly sea lice counts and to submit them to the Department to complement the information gathered as part of the administration of the treatment process. The fish farmers agreed to submit the sea lice monitoring reports to the Department on a voluntary basis and on the understanding that this information would be treated as confidential.

24. As a result of the sea lice outbreak at that time, the aquaculture industry and the respective provincial regulatory departments of New Brunswick, Nova Scotia and Newfoundland and Labrador provided funding to the Atlantic Veterinary College's Centre for Aquatic Health Sciences to conduct a research program on the impact of various pesticides on sea lice and for the development and implementation of an integrated sea lice management program for aquaculture operations in the Atlantic provinces. As part of the research program, the Centre for Aquatic Health Sciences also developed and implemented a web-based Decision Support System program in 2010. The program allows the fish farmers to input sea lice counts and treatment data into a centralized database.[5] The database serves to generate statistical analysis to assist fish farmers in making sea lice treatment decisions. The Department does not audit Aquaculture sites for sea lice counts.

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[3] New Brunswick Department of Agriculture, Aquaculture and Fisheries, "Monitoring, Surveillance and Research in Support of the Emergency Registration of AlphaMax® (10g/L deltamethrin) for Sea Lice Control in New Brunswick" (January 2011), http://0101.nccdn.net/1_5/148/17c/093/AMX_Report_FINAL_Jan_2011_v7_Wrap_Up_Report_.pdf.

[4] See, for example, "Bay of Fundy lobster fishermen concerned about sea lice pesticide," CBC News, June 19, 2009, http://www.cbc.ca/news/canada/nova-scotia/story/2009/06/19/nb-lobster-sea-lice-pesticide.html; Bob Gustafson, "Are salmon pen pesticides killing lobsters?" The Working Waterfront, December 29, 2010, http://www.workingwaterfront.com/articles/Are-salmon-pen-pesticides-killing-lobsters/14157/; Anne Casselman, "Is Salmon Farming Bad for the Oceans?" Atlantic Salmon Federation, November 18, 2010, http://www.asf.ca/news.php?id=608.

[5] Centre for Aquatic Health Sciences, University of Prince Edward Island, "Current Research", http://cahs.upei.ca/research.

3.0 COMMISSIONER'S COMPLAINT PROCESS

25. As with any complaint under investigation by the Commissioner's Office, we first seek to resolve the matter informally, to the satisfaction of both parties, and in accordance with the rights and obligations provided by the *Act*.

26. The informal resolution process provides guidance to public bodies and applicants with a view to acquire a better understanding of the legislation, and it is also intended to encourage a satisfactory outcome to the complaint.

27. If we find that the public body did not fully meet its obligations in responding to a request after completing our initial review of the complaint, we work with the public body and encourage it to provide a "revised response" to the applicant as a means of informally resolving the complaint. The revised response must have all the components of a properly constituted response as per section 14 of the *Act*.

28. The revised response is reviewed by the Commissioner prior to being provided to the applicant and gives the public body a second opportunity to issue a response to the request in accordance with the *Act*. If the revised response satisfies the applicant's concerns, the complaint is successfully resolved. If the revised response does not satisfy the applicant's concerns, the Commissioner reviews the matter again in its entirety and determines what steps are necessary to conclude the matter. (*Note*: A full description of the steps involved in the Commissioner's informal resolution process can be found in **Appendix A** of this Report.)

3.1 INFORMAL RESOLUTION IN THIS CASE

29. The initial steps undertaken to resolve this Complaint through informal means were to review both the Request and the Department's Response and determine whether the Response met the requirements of the *Act*. In doing so, we conducted a thorough review of the relevant records and had several meetings with officials at the Department during the period of December 2010 to July 2011.

30. During our discussions with the Department, we explained our concerns with the Department's decision to refuse access to the sea lice monitoring reports. We raised the question of whether the information sought belonged to the fish farmers or the

Department. We also emphasized that even if some information could be considered third party information, it had been provided in the context of the Department taking action to assist the industry in controlling sea lice levels. As the Department had expended public funds in making the application and undertaking the monitoring and reporting requirements for the emergency registration of a controlled pesticide, we encouraged the Department to reconsider whether the requested information could or should be released.

31. The Department had concerns about releasing the sea lice monitoring reports throughout the informal resolution process. Nevertheless, it agreed that more information about the situation should be made publicly available, particularly in light of the recent industry-wide increase in sea lice levels and the resulting emergency application by the Department for access to AlphaMax®.

32. The Department informed us that in completing the reporting requirements for the Federal Government as part of the emergency registration for the use of AlphaMax®, it had prepared a substantive 115-page report entitled "Monitoring, Surveillance and Research in Support of the Emergency Registration of AlphaMax® (10g/L Deltamethrin) for Sea Lice Control in New Brunswick." The Department completed the report in March 2011 and subsequently submitted it to the federal Pest Management Regulatory Agency. While the report's primary focus was the administration and effectiveness of the AlphaMax® treatments, one section of the report ("Activity 2: Assessment of sea lice management using Deltamethrin (AlphaMax®) through clinical field treatment responses (2009)") contained information relating to sea lice levels in the test sites and sets out comparisons of pre- and post-treatment aggregate counts observed in the test sites at the Bay Management Area. This section of the report was prepared by the University of Prince Edward Island's Centre for Aquatic Health Sciences.

33. The Department proposed that it provide this report to the Applicant as a revised response and possible informal resolution of the Complaint. To this end, the Department provided our Office with a copy of the report for our review and consideration. Given the limited scope of the records the Department had identified as relevant to the Request and its concerns with releasing that information, we reviewed the report and considered whether it contained information that was directly relevant to the Request. The report identified the test sites and provided some aggregate sea lice count information; therefore, our Office accepted that it be provided to the Applicant as a proposed informal resolution.

34. In light of the increase in sea lice levels and the Department's subsequent application for the use of AlphaMax® on behalf of the fish farmers, we were pleased that the Department also decided to make this report available to the public.

35. Given these facts, we invited the Department to provide a revised response to the Request as part of our informal resolution process. To reiterate, the informal resolution process gives a public body a second opportunity to provide a response to the applicant's request with the Commissioner's assistance in ensuring that the "second" response is compliant with the *Act*.

3.2 REVISED RESPONSE - MARCH 2011

36. The Department issued a revised response along with a copy of the report to the Applicant on March 7, 2011. At this time, our Office also invited the Applicant to comment on the revised response as part of this resolution process and these were provided to us on March 10, 2011.

37. While the Applicant was pleased that the Department made this information available to the public, the Applicant did not accept the report as a satisfactory resolution of the Complaint as the information only dealt with the application and effectiveness of the AlphaMax® treatments. The Applicant found this to be an inadequate response as it did not provide any information about the elevated sea lice counts that caused the Department to request the emergency authorization for the use of AlphaMax® in the first place. In addition, the Applicant stated that the efficacy of the treatments was demonstrated as overall percentage changes in sea lice levels, rather than actual counts, and thus it was impossible to determine the extent of the sea lice infestation. As a result, the Applicant did not agree that the report provided the information originally sought as per the Applicant's Request.

38. After reviewing the Applicant's concerns about the revised response, our Office found that the Applicant had raised legitimate reasons for not accepting the revised response as an informal resolution of the Complaint. As a result, our Office decided that further work with the Department was necessary to continue our efforts to informally resolve the Complaint.

3.3 REVISED RESPONSE – OCTOBER 2011

39. The Department maintained its position that the sea lice monitoring reports belonged to the fish farmers, but acknowledged that more information about sea lice levels in New Brunswick could be made publicly available. The Department therefore presented our Office with a second proposed revised response in August 2011. The Atlantic Canada Fish Farmers Association had produced a report entitled "New Brunswick Sea Lice Management 2009-2011," which contained an overview of average sea lice counts on a weekly basis for Aquaculture Bay Management Areas 1, 2A, 2B, 3A and 3B for the years 2009, 2010 and 2011. The Department proposed to release the portions of the report that provided weekly average sea lice levels over a three-year span as a second revised response to the Complaint. The report has since been made available in its entirety on the Atlantic Canada Fish Farmers Association's website.[6]

40. Again, the Department provided the relevant portions of the report to our Office for review as a second proposed revised response. As the document set out average counts on a weekly basis per Aquaculture Bay Management Area dating from 2009, we determined that it contained information that was directly relevant to the Request.

41. We agreed that the Department release this data to the Applicant as a proposed informal resolution of the Complaint. The Department issued the second revised response with the accompanying information on October 13, 2011. At this time, our Office also invited the Applicant to comment on the revised response to determine whether the Complaint could be informally resolved.

42. The Applicant was not satisfied with the second revised response because the excerpts only contained general regional information and not the "cage-by-cage, site-specific" counts requested. As such, the second revised response was not considered by the Applicant to be relevant to the Request. The Applicant emphasized that general regional data and information were neither acceptable nor useful substitutions, and that anything less than the requested cage-by-cage, site-specific information could not be an acceptable resolution of the Complaint. Our Office advised the Department that efforts to resolve the Complaint informally were not successful.

43. It is important to mention that the informal resolution process we undertake in complaint investigations requires input from the applicant before we can proceed to

[6] http://0101.nccdn.net/1_5/17b/26d/0d3/Sea_Lice_Data_Report_for_2009_to_2011Final.pdf.

conclude a complaint matter. If the applicant is not satisfied with the revised response and provides comments to that effect, the Commissioner considers these comments before deciding how best to continue with the investigation of the complaint.

44. In the final analysis, a complaint cannot be resolved informally if the applicant is not satisfied with the revised response provided during the course of our investigation.

45. As a result, in the present case, we proceeded to review the matter in its entirety once again before issuing the present Report of Findings.

4.0 REVIEW AND ANALYSIS OF PUBLIC BODY'S PROCESS AND RESPONSE

4.1 RELEVANT RECORDS

46. The records identified by the Department as relevant to the Request consisted solely of sea lice monitoring reports that were prepared by fish farmers operating in New Brunswick and submitted to the Department during the emergency registration period for AlphaMax®.

47. The Department indicated that it did not require the reporting of sea lice counts as part of its aquaculture licensing conditions, and that it only collected this information for a brief period of time due to the unusual circumstances that saw sea lice counts spike in the spring of 2009, as described above. The Department did not identify any other relevant records.

48. Based on our review, we are satisfied that the sea lice monitoring reports submitted by the fish farmers constitute the only relevant records in the Department's custody or control. We are also satisfied that the Department does not have any relevant records prior to 2009.

4.2 TIME LIMIT FOR PROVIDING A RESPONSE

49. The Department received the Request on September 8, 2010 and, in accordance with subsection 11(1), had 30 days to provide the Applicant with a response. This would require a response no later than October 7, 2010 (as day 30 fell upon a Saturday).

50. In this case, the Department decided to go through the third party notification process with the fish farmers prior to making a final decision about whether to release the

requested information. The Department notified the Applicant of this on October 7, 2010 and that a decision about the release of information would be made within 30 days of the date of that notice.

51. The Department issued its Response to the Applicant on November 2, 2010.

52. We note that the Department did not entirely meet its obligations in processing the Request as it did not extend the time limit to respond to the Request in the manner prescribed by subsection 11(5) when it undertook the third party process. Consequently, the Department technically did not provide a proper response to the Request within the 30-day time limit required by subsection 11(1).

53. It is important to ensure that the time extension provisions found in section 11 are followed whenever processing requests for the reason that an applicant has a right to complain if the time limit is extended without prior authorization of the Commissioner.

54. Having said this, however, the Department's notice to the Applicant regarding the third party process did serve to keep the Applicant informed of when the response could be expected, and this was effectively remedied when the Department provided its Response after completing the third party process.

55. The connection between the 30-day time limit for providing a response under section 11 and the 30-day third party process under sections 34 to 36 has proven somewhat confusing for public bodies in applying the new legislation. The Department was fully aware of the 30-day time limit to respond, but believed that the third party process automatically provided an additional 30 days without the requirement of a time extension under section 11.

56. The Department will ensure that it properly extends the time limit in accordance with section 11 in future cases as necessary.

4.3 CONTENTS OF THE RESPONSE

57. As explained above, the Department followed the third party notification process under sections 34 to 36 of the *Act* in both processing and responding to the Request. The link between these sections and the contents of a response requirements found in section 14 is not clearly laid out in the *Act*, and this has been a point of confusion for public bodies in determining the proper procedure in cases where they notify third parties.

When a public body decides to use the third party notification process as part of the processing of a request, it is important to ensure that the contents of response requirements found in section 14 are followed as well as the notice of decision requirements for the third party notification process found in section 36. The third party notification process does not remove the need to provide a response in accordance with the contents of response requirements found in section 14.

58. In the present case, we note that the Response did not fulfill all of the contents of response requirements as set out in section 14. The Applicant requested "any and all cage-by-cage, site-specific data, reports and related information…" In the Response, the Department indicated that it would not grant access to the requested information and provided the following reason:

> Documents that would reveal scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party are protected from release under paragraph 22(1)(b) of the *Right to Information and Protection of Privacy Act.*

59. While the Response indicated that the requested information relates to third party business interests and cannot be released in accordance with paragraph 22(1)(b), it did not indicate what relevant records the Department had in its custody and under its control. The Applicant specifically requested data, reports and related information. The Response merely referred to "information" and "documents," without providing an explanation as to what information they contained or why the exception provision prevented disclosure.

60. As such, we do not find that the Response complied with the requirements of the contents of response under section 14.

61. Section 14 sets out the requirements for the contents of responses and provides:

> 14(1) In a response..., the head of the public body shall inform the applicant
> (a) as to whether access to the record or part of the record is granted or refused…

62. Paragraph 14(1)(a) refers to a record or part of a record, not to the request for information as a whole. Consequently, merely indicating that access to the requested information or documents is not being granted is not sufficient to meet the requirements of section 14.

63. A response must always identify the relevant records, name the specific exception to disclosure if access to any of the requested information is being refused, and provide a brief explanation as to why the specified exception applies. It is not sufficient to simply re-state the wording of the exception provision as the reason for the refusal; the response must provide substantive reasons for the refusal in order to help an applicant understand why there is no right of access to the requested information. To this end, we encourage all public bodies to consider preparing an index of records as part of the request process. Ideally, an index of records would:

- identify each relevant record or category of relevant records;
- briefly describe the nature of the information contained in the record;
- state whether access to all or part of the record is being granted or refused; and,
- identify any reasons why access to any information is being refused in accordance with specific relevant provisions of the *Act*.

64. Setting out a response in this manner will help an applicant better understand what information is being withheld and why. Where an applicant finds that a public body has been forthcoming and transparent in responding to access requests, he or she may be less likely to file a complaint.

65. In the present case, the Department's Response indicated that it would not grant disclosure of the requested information in accordance with paragraph 22(1)(b). The Response did not identify the relevant records and did not explain why the exception provision applied to these records.

66. We find that the Department could have provided a more detailed and helpful response to assist the Applicant in better understanding what information the Department had in its custody and control and why it was refusing access to this information.

5.0 REVIEW AND ANALYSIS OF PUBLIC BODY'S DECISION

67. The basis of the Complaint is that the Applicant believes that the requested information is public information as it concerns the overall state of the Bay of Fundy and its ecosystems and thus should be part of "the public domain". The Applicant also believes that this information was created and paid for by the Department with public funds, and that the Department is the sole owner of the information. The Applicant challenges the Department's position that this information belongs to the fish farmers.

68. The Department maintained throughout the complaint process that while it has information in its custody and control that directly relates to the Request, its position is that the information belongs to the respective fish farmers. The fish farmers monitored sea lice levels of their own accord and not as a condition of their license. Consequently, the fish farmers collected this data themselves and at their own expense. The Department also maintained that the information was submitted by the fish farmers on the understanding that it would be treated as confidential.

69. For these reasons, the Department concluded that it could not release the requested information as it fell within the scope of the mandatory exception to disclosure found in paragraph 22(1)(b).

70. One of the founding principles of the *Act* sets out a general right of access to information about the public business of the Province in paragraph 2(a) and subsection 7(1):

> 2 The purposes of this Act are
>
> (a) to allow any person a right of access to records in the custody or under the control of public bodies, subject to the limited and specific exceptions set out in this Act…
>
> 7(1) Subject to this Act, every person is entitled to request and receive information relating to the public business of a public body, including, without restricting the generality of the foregoing, any activity or function carried on performed by any public body to which this Act applies.

71. In this case, the Department has records in its custody and control that directly relate to the Applicant's Request. The Department collected the requested information as part of its oversight of the aquaculture industry. In particular, the information relates to the Department's decision to make an emergency application to a federal agency for the use of a controlled substance to combat the sea lice outbreak in early 2009.

72. The requested information relates to the public business of the Department; however, the right to access this information is not absolute.

73. The *Act* sets out a number of exceptions to disclosure that allow information to be protected under specific circumstances. This legislation is meant to provide an appropriate balance between upholding the public's right of access and ensuring that confidential, sensitive, or privileged information remains protected.

74. The Department made a decision to withhold the requested information entirely under paragraph 22(1)(b) on the basis that it is confidential business information belonging to third parties. Whenever a public body withholds information, the *Act* places the burden of proof on the public body to show why the information should not be released. This means the burden is on the Department to establish why the Applicant should not be granted access to the requested information:

> 84(1) In any proceeding under this Act, the burden is on the head of the public body to prove that the applicant has no right of access to the record or part of the record.

75. Accordingly, the central question of the Complaint is whether the Department properly applied paragraph 22(1)(b) as grounds for refusing access to the requested information.

5.1 THIRD PARTY NOTIFICATION PROCESS

76. We first address the matter of the third party process. The Department was not required to undertake the third party process before making a decision about whether to grant access. It considered the requested information to be confidential third party information that fell within the scope of the mandatory exception to disclosure in paragraph 22(1)(b). The Department could have completed the processing of the Request at this point by refusing access based on that exception. Nevertheless, the Department chose to use the third party process to explore the possibility of disclosing the requested information.

77. The third party notification process allows a public body that is considering the release of information that may have an impact on a third party's business interests to notify the third party of the possible disclosure and to invite it to either consent to the disclosure or to explain why the information should not be disclosed. If the third party consents to the disclosure, the public body must disclose the information to the applicant. If the third party does not consent to the disclosure, the third party has the opportunity to make representations.

78. In the present case, the Department issued notifications to the fish farmers regarding the disclosure of the requested information on October 7, 2010. The notice indicated that the Department had received a request for information under the *Act*, the disclosure of which may harm their business or financial interests. The Department

requested that the third parties respond in writing "as to whether or not you agree with the disclosure of all or part of the information."

79. As discussed with the Department, the written notice to the third parties did not meet the requirements of notice as set out in paragraph 35(1)(c) because it did not ask them to make representations explaining why the information should not be disclosed if they did not consent to the disclosure.

80. Having reviewed the submissions of the third parties, we note that some responded to the notice by only indicating that they did not consent to the release of the requested information. Others presented written submissions expressing their concerns about the possible disclosure of the information and relied on a number of the exception to disclosure provisions found in section 22 in support of their position.

81. While the third party notification process in this case was lacking, we do not find that this affected the Department's decision to refuse access. While the process allows third parties to either consent to the disclosure of the information or to provide reasons as to why they object to the disclosure of the information, ultimately, section 36 places the onus on the head of the public body to decide whether to grant access. The relevant provisions are as follows:

> 36(1) Within 30 days after notice is given under subsection 34(1), the head of the public body shall decide whether or not to give access to the record or part of the record, but no decision shall be made the earlier of
>
> (a) twenty-one days after the notice is given, and
>
> (b) the day a response is received from the third party.
>
> 36(2) On reaching a decision under subsection (1), the head of the public body shall give written notice of the decision to the applicant and the third party, including reasons for the decision.
>
> …
>
> 36(5) If the head of the public body decides not to give access to the record or part of the record, the notice under subsection (2) shall state that the applicant may file a complaint with the Commissioner or may refer the matter to a judge of The Court of Queen's Bench of New Brunswick for review under Part 5 within 60 days after the notice is given.

82. In this case, none of the fish farmers consented to the release of the requested information. As the Department was of the opinion that the requested information fell

within the scope of the mandatory exception to disclosure under subsection 22(1), it was of the view that it could not disclose the information and refused the Applicant's Request.

83. The particular exception relied upon in this case was that found in paragraph 22(1)(b), confidential information belonging to the fish farmers. Before we embark on the analysis of that decision, however, it is important that we interpret the mandatory exception of subsection 22(1) generally, i.e., what it means, how it is to be applied and relied upon by public bodies.

5.2 EXCEPTION UNDER SUBSECTION 22(1): "HARM" PRINCIPLE

84. During the course of the investigation, the Applicant raised concerns about whether the information is indeed third party information and, if so, whether the Department had to substantiate how the disclosure of the requested information would be harmful to the third party's business or financial interests. This is often referred to as the "harm" principle.

85. When individuals or companies deal with a public body in a business or commercial capacity, the information generated from these interactions will come under the custody and control of the public body and will be subject to possible disclosure under the *Act*.

86. The general right of access to this kind of information encourages accountability of the public body in conducting business dealings with the private sector. Private sector companies should expect that some information about their dealings with the Province will be made available to the public. We recognize, however, that the *Act* includes provisions which protect some information relating to private companies under certain circumstances.

87. Subsection 22(1) sets out a number of mandatory exceptions to the disclosure of information relating to the business or financial interests of third parties. The mandatory exceptions to disclosure found in subsection 22(1) recognize that third party business information held by a public body may be commercially or financially sensitive in nature and thus afford some protection from disclosure under the *Act*.

88. Upon our examination of the wording of subsection 22(1), we found two important concepts: a) that the harm principle in this Province is set out in separate categories of concern; and, b) that some categories of harm presume the existence of harm while others require validation that harm is reasonably expected if disclosed. We explain below:

> **Disclosure harmful to a third party's business or financial interests**
> 22(1) The head of a public body shall refuse to disclose to an applicant information that would reveal
> (a) a trade secret of a third party,
> (b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party, **or**
> (c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to
> (i) harm the competitive position of a third party,
> (ii) interfere with contractual or other negotiations of a third party,
> (iii) result in significant loss or gain to a third party,
> (iv) 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, **or**
> (v) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.
> (Emphasis added)

89. This exception provides seven situations or categories in which the disclosure of third party information may be detrimental to its business:

- release of trade secrets;
- release of confidential business information;
- release of business information which may affect:
  - competition,
  - negotiations,
  - losses or gains,
  - alter the supply of needed business information, or
  - labour disputes.

90. The use of the conjunction "or" at the end of paragraph 22(1)(b) and after subparagraph 22(1)(c)(iv) means that not all seven categories of harm must be established in order to rely on this exception. The use of "or" in this fashion means that each paragraph and subparagraph must be read as a separate category of harm, and proof under a single category will suffice for the public body to reply upon this exception to refuse access.

91. Therefore, as a first step, whenever deciding to withhold third party information under subsection 22(1), the public body must identify which of the seven categories of harm applies to the information and it must be prepared to substantiate why it relied on that category to refuse access to the relevant third party information.

92. The second step involves proof of the existence, or proof of a reasonable expectation that harm will be placed upon the third party if the information is released. This is based on the notion that public bodies cannot refuse access solely on the basis that the information belongs to third parties, rather, that they must establish the information cannot be released for fear it may cause harm. The refusal to grant access under subsection 22(1) is therefore a reminder that only third party information which falls in the stated seven categories may be withheld.

93. Of the seven categories, harm is presumed to exist for information that falls under the first two categories: trade secrets and the confidential business information. Harm from disclosure is not presumed in the remaining five categories which require the head to bring the necessary evidence to establish that harm can be reasonably expected to occur to a third party if the information was to be released.

94. In other words, the head must be able to provide proof when relying upon any of the seven categories of harm to refuse access to information belonging to a third party in this fashion:

- a trade secret - public body must prove existence of the trade secret in the relevant records, and harm is presumed based on that fact;
- confidential business information - public body must prove that the information was in fact supplied confidentially, and that it was intended to remain confidential, and if so proven, harm is presumed;
- release of business information which may affect:
    - competition – harm is not presumed, and public body will have to bring evidence to show that releasing the information can reasonably be expected to cause harm to the third party's ability to compete;

- negotiations – harm is not presumed, and public body will have to bring evidence to show that releasing the information can reasonably be expected to cause harm to the third party's ability to negotiate a contract, etc.
- losses or gains – harm is not presumed, and public body will have to bring evidence to show that releasing the information can reasonably be expected to cause financial losses to the third party or unfair financial gains to another third party;
- alter the supply of needed business information – harm is not presumed, and public body will have to bring evidence to show that releasing the information can reasonably be expected to harm relations with the third party such that information provided by the third party, not otherwise collected by the public body, may stop;
- labour disputes – harm is not presumed, and public body will have to bring evidence to show that releasing the information can reasonably be expected to cause harm to the third party in its handling of labour matters.

95. To illustrate the application of subsection 22(1) exception, a public body may decide not to release to an applicant the details found in a service contract for a specialized computer program it holds with company ABC by relying upon paragraph 22(1)(a), i.e., that the disclosure would reveal a trade secret belonging to company ABC. In such a case, the public body would have to demonstrate that the service contract does in fact contain trade secrets belonging to company ABC in order to reply upon this exception. Proof of the existence of the trade secret in the service contract presumes the existence of harm to company ABC if that information is released. In other words, it would not have to establish, in addition, that the disclosure of the trade secret may cause harm to company ABC.

96. In another example, where a the public body refuses to disclose to an applicant the details found in a service contract for a specialized computer program it holds with company ABC on the basis of subparagraph 22(1)(c)(i), then the public body must establish that the disclosure could jeopardize the competitive nature of company ABC.

97. Consequently, and in response to the Applicant's question, in New Brunswick, it is not the rule of law under subsection 22(1) that a public body must always establish harm to a third party resulting from the disclosure of its information in order to rely on that

exception; it will depend upon which category of harm the public body refers to in order to refuse access.

5.2.1 Sea lice case in British Columbia

98. While we have explained the application of the harm principle in subsection 22(1) of the Act, our research showed that a similar case involving a request to sea lice third party information was raised with the Information and Privacy Commissioner in British Columbia in 2010 (Order F-10-06). In that case, the harm principle set out in that Province's legislation had a different meaning and therefore produced a different result.

99. An applicant requested access to records held by the Ministry of Agriculture and Lands relating to sea lice monitoring data collected under the Ministry's Fish Health Audit and Surveillance Program. The fish farmers in British Columbia voluntarily allowed the Ministry access to its information in order for the Ministry to verify the accuracy of the information inputted by the fish farmers into a database administered by British Columbia Salmon Farmers Association. The Ministry analyzed and verified the information to ensure the integrity of the reporting structure.

100. In its response, the Ministry refused to disclose the requested information based on third party business interests. After completing the investigation of the matter, the Commissioner's Office disagreed with the Ministry's decision and ordered the disclosure of the requested information.

101. The provision in the British Columbia *Freedom of Information and Protection of Privacy Act* relating to third party business information presents a different harm test than that found in the New Brunswick legislation. Section 21 of the British Columbia law provides:

> 21(1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical
>
> information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, **and**
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

> (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, or
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.
>
> (Emphasis added)

102. The wording of the British Columbia provision creates a substantially different principle for withholding information under this exception due to the use of the conjunction "and" at the end of paragraph 21(1)(b) which creates a three-part test upon which the entire exception is based. In other words, harm is not presumed in certain categories of harm, and all three elements must be present before being able to rely on this exception.

103. In its analysis of the use of the British Columbia exception, the Commissioner's Office found that the Ministry had not established all three elements in order to substantiate its decision to refuse to grant the applicant's request. While it found that the requested information supplied by the third parties was of a scientific or technical nature, the Commissioner's Office found that the Ministry had not substantiated the other two elements of the test in order to rely on the exception, *i.e.*, that the disclosure could reasonably expect to cause harm to the fish farmers. As a result, the Ministry could not rely on the exception and the Commissioner's Office ordered the release of the requested information in that case.

104. On another point of interest, in addition to the difference in wording between these two provisions, we also found that some of the facts between the two cases are dissimilar, particularly in relation to the confidentiality issue. While the British Columbia case did not establish that the information was supplied in confidence, the facts in this Complaint clearly show that the Department gave assurances to the fish farmers that information provided by them would be treated as confidential and that the fish farmers agreed to submit the information based on this understanding.

5.2.2 FINDINGS – Applicability of "harm" principle under subsection 22(1)

105. In New Brunswick's situation, the *Act* has set out a mandatory exception to the disclosure of third party information in subsection 22(1) on the basis of harm to third parties in such a way that a public body need only establish one of seven categories of harm in order for the exception to be applied lawfully.

106. In the present case, the Department relied upon one category of harm to refuse access to the information belonging to fish farmers, that found in paragraph 22(1)(b) regarding confidential business information. It was the only ground claimed for refusing access.

107. To rely upon the exception of confidential business information of a third party, the public body must prove that the information was in fact confidential and then, the harm is presumed. For now, the Department is neither required to establish the other areas of harm to the fish farmers as a result of the disclosure of the site specific sea lice counts in this case before relying on the subsection 22(1) exception.

108. We will now examine whether the Department appropriately applied paragraph 22(1)(b).

5.3 EXCEPTION UNDER PARAGRAPH 22(1)(b): CONFIDENTIAL BUSINESS INFORMATION OF A THIRD PARTY

109. In considering the potential disclosure of the requested information in this case, the Department engaged the third party process in the *Act* to solicit feedback from the fish farmers about the potential disclosure of the information. It is important to reiterate that the head of the public body remains ultimately responsible to decide whether to give access to the requested information, and that decision is reviewable.

110. The Department decided to refuse disclosure of the sea lice monitoring reports to the Applicant on the grounds that it was prohibited under paragraph 22(1)(b):

> 22(1) The head of a public body shall refuse to disclose to an applicant information that would reveal
> …
> (b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or

> implicitly, on a confidential basis and treated consistently as confidential information by the third party…

111. Paragraph 22(1)(b) sets out a three-part test for determining when the disclosure of third party business information is prohibited. In order to establish that information has been properly withheld under that paragraph, the Department must provide facts which support each of these three elements:

a) the information falls within at least one of the protected categories (commercial, financial, labour relations, scientific or technical information);
b) the third party supplied the information to the public body; and
c) the information was supplied in confidence, either explicitly or implicitly, and the third party consistently treated the information as confidential.

In our review of the Department's decision to refuse access to the requested information under this exception, we considered the facts as they related to each of these three elements.

5.3.1 Paragraph 22(1)(b): First element: Scientific information

112. In its Response, the Department refused to disclose the requested information as it constituted scientific information of the third parties. The information contained in the sea lice monitoring reports consists solely of weekly sea lice counts and related information; therefore, we must first consider whether this information can be considered scientific in nature.

113. The **Oxford Dictionary Online** defines "scientific" as meaning:

> …based on or characterized by the methods and principles of science, or relating to or used in science.

114. The meaning of "scientific information" has also been considered by the Ontario Information and Privacy Commissioner in **Order P-454**:

> Scientific information is information belonging to an organized field of knowledge in either natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field.

115. The sea lice monitoring reports contain weekly sea lice counts recorded by the fish farmers on a sampling of individual fish in several cages located on specific aquaculture sites. The fish farmers routinely collect information about the number of sea lice on the salmon as part of their monitoring of overall fish health and to determine whether sea lice levels are effectively managed under current conditions. Veterinarians for the fish farmers may also review and analyze the data to determine whether treatment measures should be implemented or modified.

116. Based on the above, it is our finding that the sea lice counts contained in the sea lice monitoring reports can be considered to be of a scientific nature. We are satisfied that the facts in this case support the first element of the test.

5.3.2 Paragraph 22(1)(b): Second element: Supply of information by the third party

117. The Department indicated that the fish farmers are not obligated to provide sea lice counts or monitoring reports to the Department as a condition of their licenses under the *Aquaculture Act*. Fish farmers have a number of reporting requirements relating to fish health, including the presence of diseases. Fish farmers monitor sea lice levels of their own accord and at their own expense. The Department stressed that it has never been actively involved in conducting or verifying the sea lice counts.

118. The only reason the Department collected the sea lice monitoring reports was the fish farmers' notification to the Department of the elevated levels of sea lice in the spring of 2009, which called for the Department to make an emergency application for the distribution and use of AlphaMax® in May 2009. The Department asked the fish farmers to provide sea lice count information in order to supplement the information that the Department was required to provide to the federal government as part of its reporting obligations. The fish farmers agreed to do so on a voluntary basis.

119. The Department provided us with documentation substantiating that it asked the fish farmers to complete and submit weekly sea lice counts. The documentation indicated that this was done outside the scope of licensing conditions and the submission of the information was encouraged but not mandatory.

120. Given that the Department was not involved in the collection of information relating to sea lice counts aside from receiving the completed sea lice monitoring reports from the

fish farmers, it would not have this information in its possession had the fish farmers not provided it. We are satisfied that the information was supplied to the Department by the fish farmers, thus fulfilling the second element of the test.

5.3.3 Paragraph 22(1)(b): Third element: Confidentiality of the information

121. As the relevant records contain scientific information that was supplied to the Department by the third parties, it is now necessary to consider whether the information was supplied in confidence, either explicitly or implicitly.

122. The Department's position is that while there was no formal agreement or requirement for the fish farmers to submit the information, the fish farmers agreed to provide it on the understanding that it would be submitted in confidence.

123. The Department provided us with documentation substantiating that it assured the fish farmers that sea lice count information would be treated with the same level of confidentiality as is other information regarding fish health in accordance with the *Aquaculture Act*. The Department also provided a template form as a suggested format to submit the information that was clearly marked "confidential." While some fish farmers used this template, others used their own reporting forms, some of which were marked confidential while others were not.

124. In considering the question of confidentiality, the mere fact that a document is marked "confidential" is not conclusive. Certainly, the decision to mark a document confidential may show intent to create an expectation of confidentiality, but that label alone cannot be the sole proof of confidentiality. There must be substantiating reasons as to why the decision was made to treat the information as confidential.

125. In considering the Department's assertion that the information was confidential, we first looked at the confidentiality provisions of the *Aquaculture Act.* [7] These provisions state that:

> 29(1) Subject to subsections (3) and (4), all information, books, records, accounts and documents obtained under section 5, 7, 9, 17, or 22 are confidential.

[7] Today, this same confidentiality provision is found under subsections 38(2) to 38(4) of the *Aquaculture Act*.

> 29(2) Subject to subsections (3) and (4), no person shall disclose or allow to be disclosed any information, book, record, account or document obtained under section 5, 7, 9, 17, or 22.
>
> 29(3) A person may disclose or allow to be disclosed any information, book, record, account or document obtained under section 5, 7, 9, 17, or 22 generally for the purposes of the administration and enforcement of this Act, and may disclose or allow to be disclosed any information, book, record, account or document obtained under section 5, 7, 9, 17, or 22
>
> (a) on a confidential basis to a person employed by the Government of Canada or by a province or territory of Canada,
> (b) in publications and programs in relation to aquaculture if the disclosure does not identify the person to whom the information, book, record, account or document relates,
> (c) to any person when necessary to prevent or combat disease or to maintain genetic standards,
> (d) to members of advisory committees established by the Minister under section 37,
> (e) to any person in the course of consultation, public or otherwise, undertaken in relation to any application under this Act,
> (f) to any person in accordance with the regulations.
>
> 29(4) A person may, with the consent of the person to whom it relates, disclose or allow to be disclosed any information, book, record, account or document obtained under section 5, 7, 9, 17, or 22.

126. Sections 5, 7, 9 of the *Aquaculture Act* relate to information provided by the licensee for the granting, renewing and amending of an aquaculture license. Inspectors appointed under the *Aquaculture Act* have a right of entry and can require licensees to immediately produce any records, books, accounts or other documents (except financial) relating to aquaculture or the aquaculture site (section 22). None of these provisions relate to the information contained in the relevant records as the information does not relate to licensing. Furthermore, the information was not obtained by an inspector pursuant to section 22 of the *Aquaculture Act*.

127. Section 17 of the *Aquaculture Act*[8] provides:

[8] Today, these same provisions are found under subsections 23(1) and 23(2) of the *Aquaculture Act*.

> 17(1) A licensee shall prepare and maintain the books, records, accounts and other documents required by or in accordance with the regulations.
>
> 17(2) A licensee shall forward to the Registrar the information, books, records, accounts and other documents required by or in accordance with the regulations, at the times and in the forms required by the regulations.

128. In reading section 17 in conjunction with the confidentiality provisions found in section 29 of the *Aquaculture Act*, information required of licensees as per the regulations is submitted to the Department in confidence. The Department can only share such information in accordance with subsection 29(3). Regulation 91-158 under the *Aquaculture Act* requires licensees to provide the Department with certain information, including information relating to fish health. It does not, however, specifically require licensees to provide the Department with information relating to sea lice. Thus, the information contained in the relevant records does not fall within the scope of section 17.

129. The fact that the information in question was not provided to the Department pursuant to the above circumstances is not in itself determinative of whether the information was supplied in confidence. The Department presented us with information showing that it had indicated in writing to the fish farmers that the weekly sea lice monitoring reports would be treated with the same confidentiality as fish health assessment reports which licensees are required to submit in accordance with the *Aquaculture Act*.

130. Accordingly, the fish farmers agreed to provide the sea lice monitoring reports on the understanding that this information would only be shared in the limited circumstances as permitted in subsection 29(3) of the *Aquaculture Act*. In addition, some of the fish farmers indicated in their written representations during the third party process that they provided this information on an implicitly confidential basis. They also emphasized that they treated sea lice counts as "highly confidential" and that they did not share this information under any circumstances.

131. The Department further indicated that, in keeping with assurances it gave to the fish farmers, it treated this information as confidential at all times. The Department has only shared the information with federal authorities in the context of the emergency distribution and use of AlphaMax®. Neither the Department nor the fish farmers made the information publicly available in any way.

132. Based on the above, we are satisfied that the information contained in the sea lice monitoring reports was provided by the fish farmers on a confidential basis. Given the Department's written notice to the fish farmers that this information would be treated with the same confidentiality as other fish health information, we are satisfied that the information was submitted on a confidential basis. While fish farmers may share concerns about fish health issues in general, we are satisfied that the fish farmers do not share the specific count numbers amongst themselves or with the public. As a result, we find that the third element of the test has been met.

5.3.4 FINDINGS - Use of exception under Paragraph 22(1)(b): Confidential business information of a third party

133. To summarize, the category of harm to a third party paragraph 22(1)(b) of the *Act* requires the public body to prove a test comprised of three elements that:

a) the information falls within at least one of the protected categories (commercial, financial, labour relations, scientific or technical information);
b) the third party supplied the information to the public body; and
c) the information was supplied in confidence, either explicitly or implicitly, and the third party consistently treated the information as confidential.

134. In this case, we find that the requested information is scientific in nature, that it was supplied to the Department by the fish farmers in confidence, and that the information continued to be treated by the fish farmers as confidential at all times.

135. The three part test for withholding the requested information under this category of harm to a third party has been met.

136. We therefore find that the Department properly withheld the requested information under paragraph 22(1)(b) under this mandatory exception to disclosure.

137. Although a public body may meet the test for refusing access under the mandatory exception found in subsection 22(1), the public body's work is not done at this stage for the reason that the *Act* also provides exceptions to that exception. Other provisions will dictate to the public body that certain types of information cannot be withheld in some cases, such as where there exists a public interest in its disclosure.

138. Some exceptions to the exception will call upon the head of the public body to exercise discretion in making the decision whether to grant access to the otherwise protected

information. Because this extra step in the decision making process will always be required of the public body before issuing its response to an access request, we consider it essential to address how the head should make a discretionary decision under the *Act*.

5.4 EXERCISE OF THE HEAD'S DISCRETION IN ACCESS REQUESTS

139. If the head of a public body is questioning whether to withhold records, the first determination is whether the information fits within one of the exceptions found in Part 2 of the *Act,* and secondly, whether the exception is mandatory or discretionary.

140. There is a central distinction between a mandatory exception and a discretionary one, the former not requiring the head to make any further considerations because it is bound by the law to withhold the requested information.

141. In the case of a discretionary exception, however, the head of the public body is required to take an additional step, that of considering whether to release or to withhold the information notwithstanding the exception. The fact that requested information falls within the scope of a discretionary exception does not automatically create a blanket exception to disclosure.

142. This approach is in keeping with the interpretation of discretionary provisions under the federal *Privacy Act* by Strayer J. in *Kelly v. Canada (Solicitor General),* (1992), 53 F.T.R. 147, aff'd (1993), 154 N.R. 319 (Fed. C.A.), at page 149:

> It will be seen that these exemptions require two decisions by the head of an institution: first, a factual determination as to whether the material comes within the description of material potentially subject to being withheld from disclosure; and second, a discretionary decision as to whether that material should nevertheless be disclosed.

143. The *Act*'s fundamental purpose is to ensure that the public has a right to information about the public business of the Province, and as such, the default principle should always be the release of information unless the information falls within the scope of the limited and specific exceptions to disclosure found in sections 17 to 33.

144. As stated above, some exceptions to disclosure are mandatory, giving the head of the public body no option but to withhold the information sought. Others are discretionary, thereby granting to the head the discretion to allow or refuse to allow access to certain information.

145. In keeping with the spirit and intent of the *Act*, the head of a public body should, wherever possible, exercise his or her discretion in favour of disclosure of as much information as permissible. Such an approach is consistent with the principle enunciated by the Supreme Court of Canada that the "overarching purpose of access to information legislation is to facilitate democracy by helping to ensure that citizens have the information required to participate meaningfully in the democratic process" (see *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358, [1997] 2 S.C.R. 403).

146. Accordingly, the legislation has provided a mechanism to challenge a decision made by the head to refuse to disclose information. In those cases, the head must be able to establish how the decision was arrived at and that the decision was appropriate in the circumstances.

5.4.1 Factors for head to consider in exercise of discretion

147. In an effort to arrive at a decision whether to disclose the information that falls under a discretionary exception, the head must consider all factors relevant at the time the request for information was made because the head must have compelling reasons to refuse access to the requested information. The following comments offered by the Office of the Information Commissioner of Canada provide assistance to public bodies when faced with making such a decision:

> The exercise of discretion allows the head of a government institution to demonstrate that the institution is operating in the spirit of the legislation. It is not simply a formality where the head considers the issues before routinely saying no. The head must show that the relevant factors were considered and, if the decision it is to withhold the information, that there were compelling reasons to support the decision….
>
> The discretion given to the institutional head is not unfettered. It must be exercised in accordance with recognized legal principles. It must also be used in a manner which is in accord with the conferring statute (i.e., in exercising his discretion, the head must be governed by the principles that information should be available to the public and that exemptions to access should be limited and specific). (Source: *Investigator's Guide to Interpreting the Access to Information Act*)

148. Additionally, a list of factors that the head of a public body should consider when applying a discretionary exception has been developed in the field of access to

information jurisprudence. This list is reproduced below but it is not exhaustive. Some factors will play a greater role in some cases and a lesser one in others depending on the circumstances at the time of the request.

149. Factors that the head of a public body should take into account include:

a) the general purposes of the legislation that a public body should make information available to the public and that individuals should have access to personal information about themselves;

b) the specific wording of the discretionary exception and the interests the exception attempts to balance;

c) whether the applicant's request can be satisfied by severing the record and by providing as much information as is reasonably practicable;

d) the public body's past practices regarding the release of similar information;

e) the nature of the record and its significance to the public body;

f) whether the disclosure of the information will increase public confidence in the operation of the public body;

g) the age of the record;

h) whether there is a sympathetic or compelling need to release materials;

i) whether previous orders of the Commissioner have ruled that similar types of records or information should or should not be subject to disclosure;

j) in a case where the "advice or recommendations" exception is claimed, whether the decision to which the advice or recommendation relates has already been made; and,

k) whether the requested information is already publicly available elsewhere.

150. After a careful consideration of the relevant factors, the head must then make a decision about the disclosure of the requested information, remaining mindful of the overarching purpose of the *Act* that favours disclosure in light of the obligation to disclose as much information as possible.

151. In doing so, it is also important for the head to keep in mind the possibility of providing partial access whenever information that needs to be protected can reasonably be severed from a record that can otherwise be disclosed.

5.4.2 Commissioner's review of head's discretionary decision

152. In keeping with the spirit and intent of the *Act*, the head of a public body is accountable for any decision made to refuse access to requested information, by providing an independent review mechanism for a decision to refuse access when a complaint is filed. This accountability is set out in subsection 84(1), which requires the head to substantiate his or her reasoning for refusing access, including providing the factors upon which were relied upon to arrive at the decision.

153. This burden of proof also applies whenever the head of a public body refuses to disclose the information when he or she has discretion to do so.

154. We again refer to the federal Information Commissioner's comments found in the *Investigator's Guide to Interpreting the Access to Information Act* to get an indication of how the Commissioner undertakes the review of a discretionary decision to disclose in access request cases:

> It is squarely within the Commissioner's mandate to look carefully at the manner in which discretion was exercised and to urge a different decision on the institution head where circumstances warrant it…
>
> When reviewing complaints relating to discretionary exemptions, the Commissioner can take the following actions:
>
> - institutions can be required to provide the factors that were considered in the exercise of discretion;
> - the Commissioner can insist that discretion be exercised where there is no evidence that the responsibility was taken seriously;
> - where the head has not properly considered all the factors relevant to the circumstances of the case, the Commissioner may request the head to reconsider his or her exercise of discretion.

155. Therefore, during our investigation of a complaint for refusal of access, we will first consider whether the withheld information falls within the scope of the exception provision claimed by the public body and whether the exception applies to the case. Then, we look at whether the exception was mandatory or discretionary. In the case of

an applicable mandatory exception, we would agree with the decision to refuse access on that basis.

156. If the exception is discretionary, we examine the matter further by looking into whether the decision of head of the public body to refuse access was reasonable in light of the particular circumstances of the case. This will involve a review of the factors identified by the head as relevant considerations, as well as how the head assessed these factors in light of the overall purpose of the *Act* to provide access as well as in light of the specific wording of the exception and the interests the exception attempts to balance. Again, the onus remains on the head of the public body to show why the applicant has no right of access to the requested information.

157. In a case where we find that the head of a public body did not properly exercise his or her discretion in arriving at the decision to refuse access, we will attempt to resolve this issue through discussions and/or written preliminary findings during the informal resolution process of the complaint investigation. If we are unable to resolve an issue of this nature during the informal resolution process, we may recommend that the head of the public body reconsider his or her decision in light of all relevant factors in the case.

158. We also have authority to review a discretionary decision under paragraph 60(1)(h) of the *Act*:

> 60(1) In addition to the powers conferred or duties imposed under Part 5, the Commissioner may
>
> …
>
> (h) make recommendations, on the Commissioner's own initiative or on request, to the head of a public body or the responsible Minister of the Crown about the administration of this Act.

159. Our authority to do so is also in keeping with review standards across Canada that require a public body to provide evidence that the head did in fact exercise her or his discretion to refuse access under the legislation and the basis upon which the decision was made. In most other Canadian jurisdictions, the independent oversight body can refer the matter back to the head to reconsider her or his exercise of discretion where it has been exercised in bad faith, has been exercised perversely or unfairly, where irrelevant or extraneous grounds have been considered, or relevant ones have not been considered. Commissioners have held that a discretionary decision can only be said to have been properly exercised if the head of the public body addressed relevant considerations in the circumstances of the particular request.

160. To summarize, when an exception to disclosure is relied upon to refuse access to information and that decision is challenged in the context of a complaint investigation, we will review:

a) whether the exception relied upon is applicable to the case;

b) whether the exception is mandatory or discretionary; and,

c) if the exception is discretionary, we will examine whether the head of the public body in fact exercised his or her discretion to disclose the information;

(i) where we find the head did not, the Commissioner will recommend that the head do so and that the head render a decision in relation to the exception based on all relevant factors at play; or,

(ii) where we find the head did exercise discretion regarding the exception but did not do so properly, the Commissioner will refer the decision back to the head for reconsideration on the basis of a list of relevant factors.

5.5 OVERRIDE FOR DISCLOSURE "*IN THE PUBLIC INTEREST*"

161. While mandatory exceptions to disclosure require special attention to the existence of supportive evidence, it is important to remember that the *Act* also conveys a main directive to inform the public of information that would otherwise be withheld. In those special cases, the *Act* will dictate to public bodies that the exceptions to disclosure, even mandatory exceptions, must be overridden, because public knowledge of the information is in the public interest.

162. In the present case, the Applicant raised the pertinent consideration of public interest in the disclosure of the requested information. The Complaint is based entirely on the premise that the requested information directly relates to the overall impact of the salmon aquaculture industry on the marine environment in the Bay of Fundy. As the aquaculture industry operates in the open waters of the Bay of Fundy, the Applicant stressed that information relating to the health of public waters should be part of the public domain and not protected by the business or financial interests of private industry.

163. Access to information legislation often contains provisions that are referred to as public interest overrides which allow disclosure of information in the public interest under certain circumstances. In New Brunswick, there are two override provisions, one in subsection 22(5) and that set out in subsection 28(2), which are relevant to the present case.

164. We discuss each below with a view to determine whether the mandatory exception to disclosure of third party information (paragraph 22(1)(b)), which was properly applied to the specific sea lice counts in this case, may nevertheless be overridden by these public interest override provisions requiring the release of the said information.

5.5.1 Subsection 22(5): Public interest override of third party information

165. Subsection 22(5) sets out a public interest override that specifically relates to third party business information that would otherwise be protected from disclosure under subsections 22(1) and (2) in special circumstances. These special circumstances involve cases of public health, public safety, or the protection of the environment:

> 22(5) Subject to section 34 and any other exception provided for in this Act, the head of a public body shall disclose a record that contains information described in subsection (1) or (2) if, in the opinion of the head, the private interest of the third party in non-disclosure is clearly outweighed by the significant public interest in disclosure for the purposes of public health or safety or protection of the environment.

166. In other words, subsection 22(5) is a discretionary public interest override. It has the effect of invoking upon the head of a public body a duty to disclose protected third party business information when, in his or her opinion, there is a significant public interest in the disclosure of the information for the purposes of the protection of the environment or public health or safety. The decision can only be made after weighing two competing interests – the third party's interest in keeping its business information private and the public's interest in knowing about it in special circumstances.

167. The intent of this provision is to ensure that the third party business interests protected by subsections 22(1) and (2) do not serve as a barrier to informing the public about important environmental, public health or public safety concerns.

168. Subsection 22(5) creates a discretionary public interest override to the otherwise mandatory exception to the disclosure of third party business information under subsections 22(1) and (2). Thus when faced with a matter concerning public health, public safety or protection of the environment, the head must weigh the competing interests between protecting the confidential third party business information it has in its records and in serving the public interest by disclosing this information. Where the head concludes there is a significant public interest in the disclosure, the information must be released. In such cases, although the information belongs to a third party, it must nevertheless be disclosed because the public interest supersedes any private interest in keeping it protected, i.e., the public interest is of such significance that it trumps the interests of the private party.

169. It is important to note again that subsection 22(5) grants a discretionary power to the head of the public body to make that determination. As a result, when reviewing a decision to refuse access to information, our Office can look into whether the head should have taken into account the issue of public interest depending on the circumstances, and if so, we would review whether the head properly exercised his or her discretion in arriving at the decision regarding the disclosure of the information.

5.5.2 FINDINGS – Applicability and Decision regarding discretionary public interest override

170. In the present case, the Applicant is seeking information regarding cage-by-cage, site specific counts for sea lice on caged salmon for all fish farmers operating in New Brunswick. It has already been established in this Report of Findings that this information is confidential business information belonging to third parties that falls within the mandatory exception to disclosure under paragraph 22(1)(b).

171. The Applicant believes the sea lice count information should be disclosed because it directly relates to the impact of the aquaculture industry on the Bay of Fundy, particularly because chemical products have been used to control sea lice numbers. In our view, the Applicant therefore raises the issue of protecting the marine environment, which is one of the three circumstances in which the public interest override can be applied.

172. The next consideration is whether the Minister of the Department took into consideration whether there existed in this case a significant public interest in disclosing this information before the Minister arrived at the decision not to release this

information to the Applicant. In other words, did the Minister properly exercise his discretion when he decided not to disclose cage-by-cage, site specific counts for sea lice on caged salmon for all fish farmers in the Aquaculture Bay Management Areas.

173. It is clear from our extensive discussions with the Department that the Minister had much reflection on this very issue before arriving at the final decision not to disclose. Having examined the standard upon which such a decision can be made, we find that the exercise of the Minister's decision in this case was proper for reasons which follow.

174. The wording of subsection 22(5) sets a high threshold in that the subject matter of the information must be of such "significant public interest" that it offsets any consideration to protect the information. While the *Act* promotes greater transparency about the public business of the Province, the fact that the disclosure of the third party business information would contribute to public awareness of a particular issue is not sufficient to merit disclosure.

175. The standard remains that the public interest in disclosure must be "significant" and must "clearly outweigh" any private business interest at play.

176. Consequently, the question becomes whether there is public interest in the disclosure of the information of such significance as to merit its disclosure for the purposes of the protection of the environment in this case.

177. It is not disputed that the disclosure of the requested information may well contribute to the ongoing public debate about the environmental impact of the aquaculture industry and we appreciate the reasons for which the Applicant is seeking this information.

178. In the context of this complaint matter and the application of the *Act*, however, there is no evidence that the disclosure of cage-by-cage, site specific counts for sea lice on caged salmon for all fish farmers in the Aquaculture Bay Management Areas is of such significant public interest that its disclosure is necessary for the protection of the environment.

179. In other words, there is no evidence of significant public interest in obtaining that level of specificity of the information which will assist in the protection of the environment. The existence of some public interest on this issue and the concerns raised by the Applicant about the impact of the aquaculture industry on the environment alone are

not sufficient to establish a significant public interest in the release of the information that would clearly outweigh upholding the fish farmers' interests in keeping the information confidential.

180. Therefore, we do not find that the Applicant's right to access information in this case is based on a situation of such gravity for the protection of the marine environment as to render improper the Minister's discretionary decision not to disclose the cage-by-cage site specific counts for sea lice on caged salmon for all fish farmers in the Aquaculture Bay Management Areas or to require the disclosure of the information based on the principle that the issue is of significant public interest.

5.5.3 Subsection 28(2): Public interest override for risk of harm

181. Our analysis on the public interest override provisions also requires a consideration of the application of that found in subsection 28(2) of the *Act*, that of the public interest override in cases of risk of significant harm.

182. Similarly to that of the application of subsection 22(5) involving the disclosure of protected third party information, the intent of subsection 28(2) is to ensure that the exceptions to disclosure in the *Act* do not serve as a barrier to keep the public informed about serious environmental, public health or public safety concerns.

183. Subsection 28(2) sets out a different standard than the specific public interest override clause found in 22(5): while subsection 22(5) and subsection 28(2) are alike in their goal to make public certain information which concerns the public, these two sections, however, are quite distinct in their construct and their interpretation:

> 28(2) Despite any provision of this Act, whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.

184. Subsection 28(2) places a mandatory duty upon a public body to disclose any information in its custody that points to a risk of significant harm to the health or safety of the public or to the environment. The disclosure of such information is carried out even if the public body has not received an access request. Where these circumstances exist, subsection 28(2) takes precedence despite any other exceptions to disclosure found in the *Act*.

185. While subsection 22(5) concerns information which belongs to a third party and continues to belong to a third party even after the disclosure, subsection 28(2) considers the information found in these records to belong to the public notwithstanding the source from which it was collected based on the element of potential critical harm.

186. Unlike subsection 22(5) which is discretionary and requires the head of the public body to weigh competing interests, the mandatory public interest override makes it very clear that the only consideration is whether there exist facts which point to a risk of significant harm to the health or safety of the public, or which point to significant harm to the environment. There is no weighing of competing interests in such cases. If such facts are present, the head of a public body has no option but to make information relating to that risk public, and to do so without delay because the evidence of risk of significant harm to the public renders the disclosure of the information "clearly in the public interest".

187. In determining what constitutes "a risk of significant harm," we refer once again to British Columbia's *Freedom of Information and Protection of Privacy Act*, which contains a similar mandatory public interest override clause. This clause was considered in the sea lice case mentioned earlier in this Report:

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

188. The British Columbia Commissioner's Office considered the application of that provision in its decision Order F10-06 and found that the public interest override clause did not require the disclosure of the sea lice count information held by the Ministry of Agriculture and Lands:

> Section 25 is reserved for matters of urgency where circumstances of clear gravity and present significance exist to require immediate disclosure of information. The issues underlying this case have been matters of public debate

> for many years, a point evident from the Review. It may be, as the applicant argues, that release of these records would contribute to this ongoing discussion. However, there is no evidence that elevates these matters to meet the criteria of gravity and temporal urgency under s. 25. The applicant's assertion that it might "be very useful" for independent scientists to review the data contained in the records falls short of the urgent and compelling circumstances required for public disclosure under s. 25(1)(b)… I find that s. 25 does not require disclosure of the disputed records.

189. Although the manner in which the public interest override clause in the British Columbia statute was put together is unlike that of subsection 28(2) of the *Act*, its wording and underlying principles are quite similar. A "risk of significant harm" points to a grave matter of urgency that requires immediate attention and action, including informing the public of such a situation without delay.

5.5.4 FINDINGS – Applicability of the mandatory public interest override

190. Throughout our investigation of this matter, we considered whether the mandatory public interest override applied thus requiring the Department to release all the information requested not only to the Applicant, but also to the public.

191. The topic of sea lice in caged salmon, and more specifically the chemical treatments used to combat their presence, is and has been part of the ongoing public debate about the overall impact of the aquaculture industry on the marine environment. This issue directly relates to the environment as the aquaculture industry operates by introducing and maintaining caged salmon stocks in the Bay of Fundy, which has raised concerns about the impact of the presence of caged salmon on the surrounding marine environment, particularly when chemical treatments are required to improve the health of caged salmon. The use of chemicals in a marine environment may also reasonably be considered as a matter of public health. These factors support that there is some public interest in this issue generally.

192. The next question was whether there existed public interest in the disclosure of the requested information, specifically, for the sea lice monitoring reports in the Department's possession. These monitoring reports only date from 2009 and 2010 and were collected after the Department's application to the federal government for the distribution of AlphaMax®. The relevant records do not provide any information about the elevated sea lice levels that caused the fish farmers to approach the Department for

help with the problem in 2009 and therefore would not seem to be helpful for the public in understanding the Department's decision-making process.

193. Further, it is questionable whether it would be in the public interest to make information about the specific sea lice counts found in a particular aquaculture site operated by an identifiable fish farmer. There is a general public interest in having information about sea lice levels on caged salmon and measures taken to combat their presence, but we see no evidence showing that the disclosure of the cage-by-cage, site-specific count information as requested is in the public interest.

194. Nevertheless, the key element under consideration in the mandatory public interest override is whether the information concerns "a risk of significant harm" to the environment, public health or public safety. Subsection 28(2) requires not only that there be an anticipated harm, but that this harm be significant.

195. In the present case, the monitoring reports contain sea lice count numbers from a random sampling of caged salmon at aquaculture sites between 2009 and 2010 that were collected by the fish farmers during the AlphaMax® treatment period. As explained above, this information relates to environmental issues but there is no evidence to suggest that it is "about a risk of significant harm" to the environment, or to public health or safety. The number of sea lice in a particular aquaculture site at any given time does not present a risk of significant harm; however, the actions taken in response to elevated sea lice levels may trigger a risk of significant harm, depending on how the problem is addressed.

196. The data was collected by the fish farmers and voluntarily supplied to the Department in order to supplement the Department's monitoring requirements during the registration period for AlphaMax®. The use of a controlled substance such as AlphaMax® in an open marine environment such as the Bay of Fundy does give rise to concerns about its impact and could be considered to be a risk of significant harm to the environment as contemplated in subsection 28(2).

197. In this regard, it is to be pointed out that the Department made a large of amount of information about the AlphaMax® treatments and results available to the public, along with general information about aggregate sea lice levels from 2009 to 2011. The Department also provided this information directly to the Applicant during the informal resolution process of the investigation of the Complaint. We reiterate that the cage-by-

cage, site-specific sea lice count information remains the only information in the Department's care and control that was not disclosed to the Applicant.

198. We do not find that the facts of this case support the presence of a risk of significant harm to the environment or to the health or safety of the public or a group of people, requiring the Department to release cage-by-cage, site-specific sea lice counts to the Applicant or to the public. As a result, we are not able to recommend that this specific information be released under subsection 28(2).

6.0 COMMISSIONER'S FINDINGS and RECOMMENDATIONS

6.1 Search for relevant records

199. We are satisfied that the Department conducted an adequate search for all records relevant to the Request and that these records were provided for our review. The sea lice monitoring reports submitted by the fish farmers constitute the only relevant records in the Department's custody or control at the time of the request and the Department does not have any relevant records prior to 2009.

6.2 Time limit for providing the Response

200. The Department was fully aware of the 30-day time limit to respond to the Applicant's Request but it believed, in error, that the third party process automatically also provided additional 30 days to the Department without the requirement of a time extension under section 11.

201. We are satisfied that the Department will ensure that it properly extends the time limit in accordance with section 11 in future cases. We also find that the Department's notice to the Applicant regarding the third party process served to inform the Applicant as to when the response could be expected.

6.3 Contents of the Response

202. As per the requirements of sections 14 and 36 of the *Act*, the Department did not identify in its Response the relevant records in its custody. As a result, the Response did not adequately explain to the Applicant the reason why the claimed exception to disclosure applied to the relevant records.

203. Through the extensive discussions and work conducted during the investigation of this Complaint, we recognize that the Department has adopted a format of a response that is in conformity with the *Act* and it has assured us that a list of relevant records will now form part of future responses.

6.4 Application of the exception under subsection 22(1) – harm principle

204. In New Brunswick, the *Act* sets out a mandatory exception to the disclosure of third party business information in subsection 22(1) on the basis of harm to third parties. In order to properly apply this exception, a public body need only establish one of the seven listed categories of harm. Harm is presumed in paragraph 22(1)(b) where a public body discloses information belonging to third parties that is confidential.

205. In the present case, the Department relied upon a single category of harm, that found in paragraph 22(1)(b), for refusing access to the Applicant of the site specific sea lice counts belonging to fish farmers.

206. As a result, the Department was not required to establish any of the other types of harm to rely on the subsection 22(1) mandatory exception.

6.5 Decision to refuse access to remainder of third party information Fish farmers' cage-by-cage, site specific sea lice counts

207. In the present case, while the Department disclosed information belonging to the third party fish farmers in relation to the sea lice problem in their aquaculture sites, the Department relied upon the information being confidential information belonging to third parties as per paragraph 22(1)(b) to refuse access to the remainder of the information belonging to fish farmers, that of cage-by-cage, site specific sea lice counts.

208. As per our analysis of the category of harm found in paragraph 22(1)(b), and in order to establish that information has been properly withheld under that paragraph, a public body must provide facts which support each of the following three elements:

a) the information falls within at least one of the protected categories (commercial, financial, labour relations, scientific or technical information);

b) the third party supplied the information to the public body; and
c) the information was supplied in confidence, either explicitly or implicitly, and the third party consistently treated the information as confidential.

209. In the present matter, we find that the requested information in the form of specific sea lice counts found in the records is scientific in nature, that the counts were supplied by third parties and not through a collection by the Department, and that the counts were supplied by the fish farmers to the Department in confidence and was consequently treated by the third parties as confidential. The Department met the test for withholding the requested information on this basis.

210. Accordingly, the mandatory exception found in paragraph 22(1)(b) was applicable and properly applied in this case.

6.6 Application of the Public interest overrides

211. The facts of this case required the Department to consider the public interest override involving the fish farmers' sea lice counts information, and it did so.

212. The public's interest in this case is not based on a situation of such gravity for the protection of the marine environment as to render improper the Minister's discretionary decision not to disclose the cage-by-cage, site specific counts for sea lice on caged salmon for all fish farmers in the Aquaculture Bay Management Areas or to require the disclosure of the information based on the principle that the issue is of significant public interest.

213. As a result, we find that the Minister's use of discretionary power found in the public interest override regarding third party information set out in subsection 22(5) was proper.

214. The Minister was not required to disclose the information under the mandatory public interest override found in subsection 28(2) as this matter did not present a case of significant risk of harm to the public's health or to the environment which ought to have directed the Department to release the specific sea lice counts.

6.7 No Recommendations

215. Based on all of the foregoing analysis and findings, and keeping in mind the information which was disclosed to the Applicant in the two revised responses provided by the Department in this matter, we have no further recommendations to make with respect to this Complaint.

Dated at Fredericton, New Brunswick, this ____day of August, 2012.

_____

Anne E. Bertrand, Q.C.
Commissioner