OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order F10-06

MINISTRY OF AGRICULTURE AND LANDS

Michael McEvoy, Adjudicator

March 1, 2010

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Summary: The applicant requested information from the Ministry relating to information gathered from fish farms under its Fish Health Audit and Surveillance Program. The Ministry refused the request on the basis the fish farms supplied the information in confidence and disclosure could subject the fish farms to various harms if disclosed. Disclosure of the information is ordered. Fish carcasses turned over to the Ministry for testing did not constitute the supply of information. The fish farms did not supply other information explicitly or implicitly in confidence and in the event it did, the Ministry failed to prove that its disclosure could reasonably be expected to cause harm.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1)(a)(ii), 21(1)(b), 21(1)(c)(i), 21(1)(c)(ii),21(1)(c)(iii), s. 25(1)(a) and s. 25(1)(b); Aquaculture Regulation 78/2002.

Authorities Considered: B.C.: Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order No. 56-1995, [1995] B.C.I.P.C.D. No. 29; Order No. 26-1994, [1994] B.C.I.P.C.D. No. 29; Order 03-02, [2002] B.C.I.P.C.D. No. 2; Order 04-06, [2004] B.C.I.P.C.D. No. 6, Order F05-29, [2005] B.C.I.P.C.D. No. 39; Order F08-21 [2008] B.C.I.P.C.D. No. 39; Order 03-05, [2003] B.C.I.P.C.D. No. 5; Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order No. 22-1994, [1994] B.C.I.P.C.D. No. 25; Order 01-52, [2001] B.C.I.P.C.D. No. 56; **Ont.:** Order P-454, [1993] O.I.P.C. No. 112; Order PO-2528, [2006] O.I.P.C. No. 210.

Cases Considered: *Fletcher Challenge Canada Ltd. v. British Columbia (Information and Privacy Commissioner)* [1996] B.C.J. No. 505, BCSC; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773.

1.0 INTRODUCTION

[1] This case concerns a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for random audits that the Ministry of Agriculture and Lands ("Ministry") performs on aquaculture facilities, more commonly known as fish farms.

[2] The TBuck Suzuki Environmental Foundation ("applicant') sets out its request for information in its initial submission as follows:[1]

> 1. Sea lice monitoring data (including but not limited to lice abundance, weight, species and monitoring dates and corresponding name [Ministry] reference, or land file number and location) collected by employees of the provincial government under the Sea Lice Monitoring and Audit Program in the Broughton Archipelago (Health Zone 3-3). Specifically sought is an electronic database that was used to generate tables and graphs on sea lice abundance by species and size given to [the applicant] by provincial employees on October, 17, 2003, labelled "Audit Data". We request this data from January 2002 to present with a complete listing of database field headings or descriptions (entities and attributes) for the database where the above-described data is kept; and
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> 2. Monitoring results for pathogens (including name and dates of occurrence) with the corresponding name and location of the salmon farming operation (or [Ministry] reference or land file number) with a complete listing of database field headings or descriptions (entities and attributes) for the database where the above-described data is kept. This data is collected by provincial government officials under the Fish Health Audit and Surveillance Program.

[3] The applicant cited s. 25 of FIPPA as a basis for disclosure of the information. The Ministry provided copies of certain reports, which the applicant said did not contain what it asked for. The applicant complained to this Office that the Ministry failed to perform its duty to assist it under s. 6 of FIPPA. During mediation, the Ministry said it intended to withhold the records under s. 21. The Ministry also indicated, that if the database required severing because of an order under s. 21, this would unreasonably interfere with its operations under s. 4(2) of FIPPA.

[4] Mediation did not resolve the matter, so an inquiry was held under Part 5 of FIPPA.

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[1] Applicant's initial submission, para. 2.

[5] The applicant and the public body agreed that the applicant's request for review respecting ss. 4(2) and 6(2) of FIPPA would not be considered in this inquiry unless:

> (a) the Adjudicator issues an order deciding that s. 21 applies to a portion, but not all, of the records;
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> (b) no application for judicial review has been brought within the time specified under s. 59(1) of FIPPA; and
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> (c) the applicant delivers to this Office's Registrar of Inquiries ("Registrar"), within 45 days (as defined in FIPPA) after the date of the Adjudicator's order, a written request that the Adjudicator consider and decide the application of ss. 4(2) and 6(2).

[6] With regard to the last two sentences of request 1, the Amended Portfolio Officer's Fact Report that accompanied the notice for this inquiry states that:

> The applicant has agreed that this section of the request is not in issue in this inquiry because the database is not in the custody or control of the public body.

[7] Therefore this Order will only consider those matters related to the sea lice data request within the Ministry's custody or control.

[8] This Office invited submissions from the applicant, the Ministry, eleven third-party aquaculture companies and an intervener, the BC Salmon Farmers Association ("Association"). The Ministry, applicant and Association responded and four of the third parties did so: Grieg Seafood Company ("Grieg Seafood"), Mainstream Canada ("Mainstream"), Marine Harvest Canada Inc. ("Marine Harvest") and Creative Salmon Company ("Creative Salmon").

2.0 ISSUES

[9] The issues in this inquiry are as follows:

1. Does s. 25(1)(a) or (b) apply to the records?

2. Does s. 21 require the Ministry to withhold information?

[10] FIPPA is silent with regard to which party has the burden of proof in s. 25 matters, leaving each party responsible for submitting arguments and evidence to support its position.

[11] Under s. 57(1) of FIPPA, the Ministry has the burden of proof regarding s. 21.

3.0 DISCUSSION

[12] **3.1 Background**—The raising of salmon in ocean pens off British Columbia's coastal waters has been a matter of public discussion for over a decade. In 1995, the Minister of Environment, Lands and Parks and the Minister of Agriculture, Fisheries and Food asked the provincial Environmental Assessment Office to conduct a review ("Review") of methods used in the regulation and management of aquaculture operations. The Review recommended measures including "setting high standards for farm operations based on the best available knowledge and rigorously enforcing the implementation of those standards".[2] The Review noted that the approach to disease management was reactive and that more precise information was needed on diseases that affected fish stocks to determine which ones should be identified and reported by farmers. The Review stated:[3]

> For these reasons a comprehensive surveillance program is essential, in order to define all diseases that should be reportable. The program should be carried out by government under legislation (*Animal Disease Control Act*) with the participation of First Nations, industry, community fishers and wild fishery organizations. Currently, salmon farmers are required to take reasonable precautions to control disease. Government should set enforceable standards to establish disease prevention and management protocols, minimum health record requirements, outbreak management protocols, drug use standards and disease reporting requirements.

[13] The Review further stated that the provincial government:

> …should monitor the adequacy of current management techniques through continuous collection and analysis of standardized data.[4]

[14] The provincial government developed a response to the Review designed to improve monitoring and regulation of fish disease. This included the creation of the Ministry's Fish Health Program ("Program").[5] The list of Program objectives includes monitoring, reporting on, and educating the public in relation to fish health, "including in relation to diseases and risks to consumers".[6] The Program seeks to encourage fish farms to minimize risks to farmed and wild salmon. The cornerstone of the Program is the Fish Health Management Plan ("FHMP") requirement. A fish farm must have an FHMP to operate[7] and the Association states that an FHMP is a condition of an aquaculture licence in BC.[8]

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[2] Exhibit A, Sheppard affidavit, p. 4
[3] Exhibit A, Sheppard affidavit, p. 8.
[4] Exhibit A, Sheppard affidavit, p. 13.
[5] Sheppard affidavit, para. 5.
[6] Ministry's initial submission, para. 4.08.
[7] Sheppard affidavit, para. 8.
[8] Association's submission, p. 2.

[15] The FHMP requires that each farm operator record fish health data, including mortality and "fish health event information"[9] as well as sea lice reports. The fish farms are required, as a condition of their licence,[10] to report this information to the Association which then enters the data into its own computer database. I note here that this information, entered into the Association's database, is not the subject of the applicant's request or this inquiry.

[16] Pursuant to a Letter of Understanding ("LOU") between the Ministry and the Association, the Association is required to report the database information to the Ministry in aggregate form, on a quarterly basis for general health event data, and, in the case of sea lice, on a monthly basis. This aggregate data, which does not disclose individual fish farm statistics, is publicly disclosed.

[17] The Ministry has established, as part of the Program, the Fish Health Audit and Surveillance Program ("HASP"). The purpose of HASP is to monitor the health of marine-based salmon and to audit information the Association collects and makes public in order to improve public confidence in the industry.[11] In this regard, Program staff in the Ministry, who are bio-technicians and veterinarians, conduct random audits of fish farms to ensure that each farm establishes and complies with its FHMP.[12] Staff visit fish farms to review logs and collect information concerning fish size, mortality rates, feed records, medication and environmental condition information. Program staff also collect fish carcasses at audited farms so that Ministry veterinarians at the Ministry's Animal Health Centre in Abbotsford can test them. Either a fish farm diver or an airlift pump system retrieves carcasses from the water for testing.[13]

[18] If a farm does not meet requirements of its FHMP

> …then corrective measures are communicated by the Ministry Fish Health Veterinarians to the farm manager and attending Veterinarian. If corrective measures are not taken in due time, then Ministry Fisheries Inspectors of the Fisheries and Aquaculture Licensing and Compliance Branch are requested to become involved in enforcement dialogue. If not corrected, those inspectors will be asked to facilitate compliance. Ultimately, fines and/or non-renewal of an aquaculture license may arise yet this degree of enforcement is rarely, if ever, required.[14]

[9] Sheppard affidavit, para. 10.
[10] Exhibit F, Ackerman affidavit, para. 2.2.
[11] Exhibit E, Ackerman affidavit, p. 2.
[12] Sheppard affidavit, para. 8.
[13] Sheppard affidavit, Reply submission, para. 4.
[14] Sheppard affidavit, para. 8.

[19] In addition to functions carried out by Ministry veterinarians and technicians, inspectors with the Ministry's Licensing and Compliance Branch ("inspectors") perform functions that include reviewing a fish farm's "best management practice" plan, pursuant to the Aquaculture Regulation.[15]

[20] **3.2 Disputed Records**—The Ministry compiled the disputed information pursuant to HASP. The Ministry's submission lists an extensive number of records as the type responsive to the applicant's request.[16] As the Ministry is the public body with custody and control of these records, I rely on this list, attached as Appendix A to this Order, in determining whether records must be withheld or disclosed under s. 21 of FIPPA. To more easily analyze the documents, I have numbered them under four headings rather than the two provided by the Ministry.[17]

[21] The Ministry states the following with respect to underlined information in Appendix A:

> The Information that has been underlined…was derived from the fish samples that were supplied in confidence to the Ministry by fish farms. The sea lice information in the Database was also derived from fish samples that the fish farms supplied to the Ministry.[18]

[22] Besides the Ministry and the applicant, Mainstream was the only other party to detail what it says was the "information" it provided to the Ministry. Mainstream's list of information that it says the applicant seeks mirrors the Ministry's with one exception. Mainstream's list does not refer to the information in Appendix A beginning under heading 3 "Miscellaneous data" and ending with "Farm diagnosis" (just prior to the "Virology heading"). In this regard, I rely on the Ministry's list as the basis for my Order, including its representation that the information in the just-mentioned part of heading 3 derived from fish samples the fish farms provided the Ministry.

[23] **3.3 Public Interest Disclosure—**If s. 25(1) applies in this case, it overrides any other exceptions to the disclosure of the requested records. Section 25 reads as follows:

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[15] B.C. Reg. 78/2002, deposited April 19, 2002.
[16] Ministry's initial submission, para. 4.02.
[17] Number 1 has been assigned to all information under the Fish Mortality Information heading; number 2 has been assigned to all information under the Fish Health Events/Actions heading; number 3 has been assigned to all information under the Miscellaneous data heading; and number 4 has been assigned to all information under the Sea Lice Monitoring and Auditing Data heading.
[18] Ministry's initial submission, para. 4.05.

Information must be disclosed if in the public interest

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people 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.

(2) Subsection (1) applies despite any other provision of this Act.

[24] The applicant argues that the mere existence of the Ministry's monitoring efforts is evidence of the risk of harm of salmon farming. The applicant relies on the affidavit evidence of Dr. Craig Orr, executive director of the Watershed Salmon Watch Society, who states that the requested information

> would be very useful to the scientific community in identifying local trends in sea lice production and in correlating such data to local sea lice infestation levels identified through sampling of wild juvenile salmon.[19]

[25] The applicant submits this matter meets the urgency test under s. 25 because:

> … we are in a critical window where sea lice incidence from salmon farms could result in the extirpation of genetically unique salmon runs. This is a matter of current and intense public interest as reflected in the ongoing public debate in the April 24, 2008 article "Killer Lice" published in the Globe and Mail (attached as Appendix B). This article describes the view of many scientists that sea lice from fish farms caused a "97% population crash" of pink salmon in the Broughton Archipelago. This view is disputed by the farms. Given the environmental interests at stake, the immediate release of this data essential to help clarify this ongoing and urgent debate.[20]

[26] The applicant goes on to state that the inability of independent scientists to review the requested data is fuelling this contentious debate. It submits that the other compelling reason for disclosing the information is that it is "open to question" whether the Ministry is capable of exercising proper regulatory oversight over this industry. In the applicant's view, the Ministry exhibits signs of being a "captured agency" which has prioritized industry interests rather than the public interest. The applicant contends that the Ministry's refusal to exercise its clear legal authority to require the reporting of information it claims is currently

[19] Applicant's reply submission, para. 56.
[20] Applicant's reply submission, para. 58.

submitted on a "voluntary" basis demonstrates its potentially compromised oversight capabilities.[21]

[27] The Ministry argues the applicant's claim of a "97% population crash" is "simply not supported by the evidence" and that the likely source of that claim has been "vigorously challenged".[22] It points to an article from a publication entitled 'Reviews of Fisheries Science' to counter the applicant's claim and notes that many scientists in the field endorsed this article.[23]

[28] The Ministry submits it would be wrong to assume such a population decline had a causal connection with aquaculture operations and that fluctuations in pink salmon returns from year to year are common. The Ministry also speculates that the applicant's claim of a population crash may have come from a Fishery and Oceans "recurring report" in which a bar chart illustrates a sharp decline in pink salmon in 2002 following a record high return in 2000.

[29] Grieg Seafoods submits that Dr. Orr is not a "dispassionate academic" but rather someone advocating a particular position against the salmon industry.

[30] A number of orders have discussed the principles to be applied under s. 25 and I have applied those principles here.[24]

[31] The requirement for public disclosure under s. 25 does not apply to the facts of this case. 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). Similarly, I do not accept the applicant's contention that what it views as the potentially compromised oversight capabilities of the Ministry are, without more, sufficient to engage the disclosure requirements of s. 25(1)(b). I find that s. 25 does not require disclosure of the disputed records.

[32] **3.4 Third-Party Interests**—Section 21(1) of FIPPA protects certain third-party business interests from harm through the disclosure of information under FIPPA. It sets out a three-part test for determining whether disclosure is

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[21] Applicant's reply submission, paras. 60 and 61.
[22] Ministry's further reply submission, paras. 2 and 3.
[23] Ministry's further reply submission, para. 4.
[24] See for example Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 01-20, [2001] B.C.I.P.C.D. No. 21.

prohibited, all three elements of which must be established. Section 21(1) reads as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (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.

[33] I have carefully considered the submissions of all parties in respect of s. 21 and I refer to the most pertinent of those below.

Section 21(1)(a)

[34] The Ministry argues, under the first branch of the test, that the information requested is of a scientific, technical and commercial nature. Mainstream and Grieg Seafoods submit that the information is of a scientific and technical character, while the other third parties and intervener did not address the issue. The applicant rejects the assertion that the records contain commercial information and submits that certain kinds of information, such as the dates of sampling tests, do not fall under any of the definitions of s. 21(1)(a)(i) and (ii). The applicant acknowledges, however, that some "testing" information could properly be characterized as technical or scientific in nature.

[35] Commissioner Flaherty stated in Order No. 56-1995 that the words "scientific" and "technical" would "…surely include information that is the result of scientific environmental sampling…"[25] Ontario Order P-454,[26] referring to legislation similar to our own, stated that "technical information is information

[25] [1995] B.C.I.P.C.D. No. 29.
[26] [1993] O.I.P.C. No. 112.

belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts."

[36] Most of the requested information relates to the Ministry's veterinary testing of randomly-sampled fish carcasses. In addition, items listed under heading 2 in Appendix A relate to treatment programs administered by professionals, *i.e.,* veterinarians. The other items under heading 1 also relate to the sampling of fish for scientific evaluation and information such as the date of the sampling is a matter necessarily incidental to this. I find the information contained in the records is of a "scientific" or "technical" nature as described in s. 21(1)(a)(ii). Given these findings, it is not necessary for me to consider the Ministry's submission that the records contain commercial information.

Section 21(1)(b)

[37] The second branch of s. 21 requires me to consider whether the fish farms supplied the disputed information and, if so, whether that information was supplied implicitly or explicitly in confidence.

Was "information" supplied?

[38] I understand the Ministry to say that the fish farms were responsible for generating information under headings 1 and 2 of Appendix A and then conveying it to the Ministry. The Ministry says the exceptions to this are the "Farm Codes" found in heading 1 (the Ministry assigned these numbers) and recorded observations by the Ministry found "in the drop down comments boxes," also found under heading 1 of Appendix A. The Ministry describes the number of those recorded observations as "minimal."[27]

[39] Mainstream submits that it supplied the information under headings 1 and 2 to the Ministry, either through verbal communications during meetings with the Ministry or by its staff granting the Ministry access to its records on site.

[40] With respect to the information under headings 3 and 4 the Ministry says that much of the information concerns the Ministry's analysis of fish carcasses. The Ministry maintains that this is information the fish farms supplied because they supplied the carcasses on which the Ministry's analysis is based. It cites Ontario Order PO-2528[28] in support of the proposition "that information is [*sic*] derived from samples is protected by s. 21 and that there is an inextricable link between data and samples from which that data is derived, such that the non-disclosure of the latter necessarily means the non-disclosure of the former."[29] The Ministry further submits:

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[27] Ministry's reply submission, para. 3.
[28] [2006] O.I.P.C. No. 210.
[29] Ministry's initial submission, para. 4.38.

> … that the Information that was generated in the [Ministry] lab but was derived from samples supplied by fish farms is still information that was "supplied" for the purposes of s. 21 of the Act. The focus of this part of section 21 is to protect the information of non-government parties. Without the initial provision of the fish samples, the Ministry would not have such information. An analogy can be made with cases where statistics are prepared based on sales data supplied (see Order No. 00-10).[30]

[41] Mainstream says that the information "within the [Ministry's] database" under heading 3 from the topics entitled "Virology" through to "Histology" is derived from fish carcasses the Ministry collected at its fish farm.[31]

[42] With specific reference to the information under heading 4 in Appendix A, the Ministry explains that the sea lice audit program "verifies industry reported results and provides government with information concerning sea lice levels on British Columbia salmon farms."[32] The Ministry refers to its "Fish Health Program" document in respect of procedures for the sea lice audit that, in essence, is similar to the process described by Mainstream below.

> This on-farm, split sample, lice counting procedure and the examination of records represents a compliance audit. The results of the pooled counts, also submitted for the monthly reporting by the farm, are recorded as the audit "snapshot" of the farm.[33]

[43] The Ministry says "no significant difference" was found in comparing the sea lice counts of the Ministry and fish farms.

[44] The Ministry goes on to argue that the fish farms voluntarily provided the fish samples subject to testing. I will not summarize these arguments here because they are not relevant to the question of whether information was supplied.

[45] With respect to the information under heading 4, Mainstream argues that

> … the sea lice and pathogen monitoring data at issue in this inquiry is raw, immutable scientific and technical data, and therefore was "supplied" to the Public Body as required by s. 21(1)(b). We submit that the information derived from fish carcasses and from sea lice removed from live fish as described in paragraph 11 above is "supplied" in the true sense of the word by Mainstream. The data would not be available to the Public Body unless Mainstream provided the fish and carcasses from which the information was extracted. We further submit that even if the Commissioner finds that some of the sea lice and pathogen information sought was in fact "created" or "generated" by the Public Body, the nature of the database (i.e. the use

[30] Ministry's initial submission, para. 4.39.
[31] Mainstream's initial submission, para. 10.
[32] Ministry's further reply submission, para. 1.
[33] Exhibit F, Ackerman affidavit, p. 31.

> of Farm Codes and BCF Numbers discussed above) would inferentially disclose that the underlying information was supplied to the Public Body by Mainstream. Indeed, that is what the Applicant is seeking here: the sea lice and pathogen data for the specific farms listed in the database.[34]

[46] Mainstream also explains the collection of information in respect of sea lice as follows:[35]

> In regards to supply method … the information is derived entirely from sea lice samples that staff from Mainstream and the Public Body handled jointly during sea lice audits. During these audits, 60 live fish are gathered from 3 pens. Mainstream staff assesses the sea lice found on 30 of those fish, and the Public Body's staff assesses the sea lice found on the other 30. Both groups make notes of the information and the Public Body ultimately inputs this information into the database… .

[47] The applicant analyzes the supply issue by first categorizing the responsive information under four headings:

> **Administrative information:** "year and quarter" fields; "farm codes"; "case id number" fields; "date of sampling"; "date submitted"; "number of fish sampled"; "sampled by"; "way bill"; "lab number"; "date received"; "tissue samples collected"; "tests conducted"; "pool ID"; and "fish ID".
>
> **Observations:** "site inventory"; "total mortalities for dive"; "mortality breakdown" (and subheadings); and all the subheadings under "fish number" heading in the "information derived from fish carcasses"; and "open dialogue box".
>
> **Obtained information:** the headings under "Fish Health Events/Actions" and "Health Events" in the "information collected on site" grouping and under the "information derived from fish carcasses" grouping the "farm diagnosis"[36] subheading.
>
> **Testing information:** "virus results"; "pool ID" and subheadings; "bacterial identification" (and subheadings); "histology summaries"; and "morphology".

[48] The applicant then submits:

> The general rule for determining if information was "supplied" by the Third Party is that "the information must be the same as that originally provided by the affected person."[37]
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> …

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[34] Mainstream's initial submission, para. 36.
[35] Mainstream's initial submission, para. 11.
[36] The applicant states that, although it is not entirely clear from the Ministry's submission, it assumes this field relates to the diagnosis given by veterinarians working for the fish farms.
[37] The applicant refers here to Order No. 26-1994, [1994] B.C.I.P.C.D. No. 29.

> [The applicant] submits that the information described above as "Administrative" information (e.g., farm codes, dates of visits, date of sampling, lab number, etc.) [was] not supplied by the Third Parties. This is data that was generated and recorded by the Ministry as part of its functioning.
>
> The information described as "Observations" was not supplied by the Third Parties. This is information that was generated and recorded by the Ministry and was not provided in any way by the Third Parties.
>
> The information described as "Testing" information above was not supplied by the Third Parties. The testing data was generated and recorded by the Ministry (or labs under contract with the Ministry). The Third Parties and the Ministry attempt to equate the provision of a fish carcass with the provision of the testing results generated in a laboratory.
>
> The fish carcasses provided are not the "same information" that exists in the database. Moreover not only is a fish carcass not the same information in the database, it is not "information" at all under the Act.
>
> The "information rights" created under s. 4 of the Act are to "records" existing in the custody and control of public bodies. "Record" is a defined term under the Act:
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> > **"record"** includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;

[49] The applicant argues that a fish carcass is not a "record" under FIPPA and that attempts to equate animal tissue with a "record" should be rejected:

> "Information" is defined as "knowledge obtained from investigation, study, or instruction".[38] The records existing in the database of the Ministry meet this definition. The fish carcasses do not. The fish carcasses are the thing studied, but not the resulting knowledge.
>
> The Ministry and some of the Third Parties (e.g., Mainstream) refer to orders and the intention of the Act to protect "immutable" information (e.g. Orders 01-39, F05-29 and F06-20). "Immutable" is defined as "not capable of or susceptible to change."[39] [The applicant] submits that the relationship between the fish carcass from the farms and information in the Ministry database cannot possibly be described as "immutable".

[38] The applicant's reference here is to the definition of "information" from Merriam Webster dictionary, found online at: www.m-w.com.
[39] The applicant again cites the Merriam Webster dictionary.

Analysis of the supply issue

[50] I will assess the disputed information found under headings 1-4 in Appendix A and determine whether it satisfies the test of being information supplied under s. 21(1)(b).

Heading 1

[51] I understand the Ministry's position to be that heading 1 information was generated by the fish farm and then turned over to the Ministry. Mainstream says that either it turns over its written fish mortality records or it provides the same information verbally. The applicant's position is that Ministry staff observe and then categorize matters such as fish mortality during audit visits. The applicant also suggests that site inventory numbers are based on Ministry staff observation.

[52] Many previous orders have considered and applied the term "supply". Commissioner Loukidelis stated the following in Order 03-02:[40]

> A good number of Federal Court of Canada decisions have dealt with the "supplied" requirement in s. 20(1)(b). Although s. 20(1) of the Federal Act differs from s. 21(1) of the British Columbia, the supply requirement in both statutes is similar enough to warrant review of the federal decisions.
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> The well-known decision of the Federal Court of Appeal in *Canada Packers Inc.* v. *Canada (Minister of Agriculture)* (1989), 53 D.L.R. (4th) 246, [1989] 1 F.C.J. No. 615, clearly established, for the purposes of the Federal Act, that the phrase "supplied to a government institution" in s. 20(1)(b) means exactly that. In that case, a reporter and a consumer researcher had made an access request for federal government meat inspection team audit reports on meat packing plants located in a specific part of the country. The third party, Canada Packers Inc., resisted disclosure because these reports were, it contended, negative and could have serious effects in an industry with little consumer loyalty and consistently low profit margins. MacGuigan J. (as he then was) said the following at para. 12 (F.C.J.):
>
> > Paragraph 20(1)(b) relates not to all confidential information but only to that which has been "supplied to a government institution by a third party". Apart from the employee and volume information which the respondent intends to withhold, none of the information contained in the reports has been supplied by the appellant. The reports are, rather, judgments made by government inspectors on what they have themselves observed. In my view no other reasonable interpretation is possible, either of this paragraph or of the facts, and therefore paragraph 20(1)(b) is irrelevant in the cases at bar.

[40] [2003] B.C.I.P.C.D. No. 2, paras. 71 and 72.

[53] The evidence of those parties present during the fish farm audit process satisfies me that almost all information in dispute under heading 1 was supplied by the third parties to the Ministry, thereby satisfying s. 21(1)(b) of FIPPA. I am satisfied this information was generated by the fish farms and was supplied to the Ministry either in writing or verbally. The minor exception to this are the "minimal" number of comments which the Ministry says its officials made and which appear in the "drop down box" under heading 1. These are the kinds of judgments referred to in *Canada Packers Inc.* which fall outside of information supplied by a third party to a public body.

Heading 2

[54] The applicant concedes the Ministry "obtained" these records from the fish farms. The evidence confirms that the fish farms created and kept these records and then turned them over to the Ministry's audit personnel. I therefore have no difficulty concluding the information in these records was "supplied" by the third parties under s. 21(1)(b) of FIPPA.

Heading 3

[55] The Ministry veterinarians or bio-technicians generated and recorded all of the information under this heading, including descriptions of fish samples, details connected with the testing of the samples (such as the sample lab number and dates of acquisition) and the test results themselves.

[56] Mainstream argues, however, that the information would not be available if Mainstream did not supply the fish carcasses to the Ministry in the first place. In my view, this 'but for' contention does not assist the Ministry and the third parties because, even if it were true, it does not mean a fish farm has supplied "information" to the public body as contemplated by s. 21(1)(b). Rather, the issue is what the fish farms did supply the Ministry and could it be properly defined as information.

[57] What the third parties supplied the Ministry were dead fish.

[58] The Miriam Webster Dictionary definition of "information" provided by the applicant[41] states as follows:

> …knowledge obtained from investigation, study, or instruction.

[59] In this case, Ministry veterinarians derived the knowledge, such as that concerning bacteriology, from the study of the dead fish. The veterinarians recorded that knowledge and it is contained in the records under heading 3. As the applicant points out, the fish carcasses are the things studied, but not the resulting knowledge.

[41] Applicant's reply submission, para. 26.

[60] For this reason, it simply cannot be the case that the conveyance of deceased fish by fish farm operators to the Ministry constitutes or equates to a supply of "information" under the second branch of the test of s. 21(1)(b).

[61] It is also important to note that information rights, created under s. 4 of FIPPA, are for access to "records" in the custody and control of public bodies. The definition of record, again, relates to "information" in that it refers to things such as books, documents and papers "on which information is recorded or stored by…electronic…or other means". It would distort the words of s. 21(1)(b) beyond recognition to find that fish provided to the Ministry by the third parties constitutes the supply of "information" under the section.

[62] I do not accept the Ministry's argument that this case is analogous to Order 00-10.[42] That case involved beer companies providing sales data to the Liquor Distribution Branch. Sales data clearly constitute information. In addition, by virtue of s. 36 of the *Liquor Distribution Act*, the conveyance of the sales data was deemed to be supplied in confidence under s. 21 of FIPPA.

[63] The Ministry's reference to Ontario Order PO-2528[43] also does not assist it. The reasoning of the passage the Ministry cited is premised on the existence of immutable "information", something which dead fish are not.

[64] For all of these reasons, I find that the information under heading 3 was not supplied pursuant to s. 21(1)(b) of FIPPA .

Heading 4

[65] The information under heading 4 concerns the sea lice count data.

[66] As described above, the count is based on gathering 60 live fish, 30 of which are counted for lice by the Ministry while lice on the other 30 are counted by the fish farm. Each group makes notes of its observations and the Ministry ultimately inputs all information into its database.

[67] In my view, the Ministry's recorded observations and count of sea lice were the sole result of its employee's judgment. Therefore, I find that the Ministry's count of sea lice is not information supplied under s. 21(1)(b). For this reason alone, the Ministry cannot withhold this information under s. 21(1).

[68] However the fish farms' observations and count of sea lice were the result of its judgment and, though entered into the databank by the Ministry, the fish farms did supply the information thus satisfying s. 21(1)(b) of FIPPA.

[42] [2000] B.C.I.P.C.D. No. 11.
[43] [2006] O.I.P.C. No. 210.

[69] To summarize, I find that the information under headings 1 and 2 and the sea lice count and comments provided by the fish farms under heading 4 is information supplied under s. 21(1)(b), while the information under heading 3 and the Ministry sea lice count and comments under heading 4 are not. This latter information therefore cannot be withheld under s. 21(1).

Was the information supplied explicitly or implicitly in confidence?

[70] Given the above findings, it is necessary to determine whether the supplied information was supplied explicitly or implicitly in confidence. The Ministry says it was. It argues that the LOU provides that "information gathered through the auditing and surveillance program will also be confidential with no public reporting of the findings for the same period."[44] The Ministry also submits that one of its veterinarians verbally advised fish farm operators that the fish health information provided to the Program would be treated in a confidential manner as part of the Veterinary Code of Ethics and Veterinary-Client-Patient relationship.[45]

[71] The Ministry contends that, even if the information were not explicitly supplied in confidence, the evidence would still support a finding that the information was supplied implicitly in confidence. In addition to relying on the LOU, the Ministry argues that it has consistently treated the information in a confidential manner to the point that it is not even shared with the Ministry's Fisheries and Aquaculture Licensing and Compliance Branch staff or Program staff outside of the Program office in Courtenay. It adds that the information is not disclosed to, or available from, sources to which the public has access. Lastly, the Ministry submits that the information was prepared solely for use by Program staff and not for sharing outside of the Ministry.[46]

[72] Marine Harvest argues that it supplied "site specific" information to the Ministry with the implicit understanding that it would be treated confidentially and that proprietary business information would not be released. An additional part of this understanding, it contends, is the "maintenance of veterinary confidentiality."[47]

[73] Mainstream submits that, although there was no explicit written confidentiality agreement between it and the Ministry, circumstances are such that the information Mainstream supplied can be objectively regarded as having been provided in confidence, with the intention that it be kept confidential. The first circumstance Mainstream notes is that, given the public and

[44] The period being one year from the completion date of the evaluation, Ministry's initial submission, para. 4.31.
[45] Ministry's initial submission, para. 4.32.
[46] Ministry's initial submission, para. 4.34.
[47] Marine Harvest's initial submission, para. 14.

contentious nature of the debate surrounding farmed salmon, it has consistently treated the information in a manner denoting a concern for its protection from disclosure. It ensures, for example, that the information is stored in a safe and secure manner at its offices by restricting access to the server on which the information is stored to a select group of Mainstream employees. Mainstream also points to the LOU and to what it says is the confidential nature of the relationship between the salmon farms and the Association, and the Association and the Ministry. The LOU, it asserts, ensures the confidentiality of individual company data supplied to the Association. It also notes that the LOU provides that information collected "through the auditing and surveillance program will also be confidential with no public reporting of the findings for the same time period."[48]

[74] Grieg Seafoods also argues that information provided through the LOU is confidential. It submits that information provided to the Association in confidence, and information it supplies through Ministry audit, are intertwined. Because of this Grieg Seafoods argues that it is "completely reasonable" for it to conclude that all information it provided, whether to the Association or to the Ministry, was submitted on terms of confidentiality.[49]

[75] The Association argues that, since signing the LOU, it has worked cooperatively with the Ministry to ensure the confidentiality of data. The Association states:[50]

> The LOU was intended to cover aspects of information sharing specific to aggregate data. In addition to data collection, the LOU outlined how the data would be housed and owned by [the Association], therefore making it inaccessible to Freedom of Information requests.

[76] The Association submits that at "some point" the Ministry began taking individual farm and company data annually as a means of auditing the aggregate information provided by those companies to the Association.[51] The Association argues that its members understood, without providing specifics to support the assertion, that the audit was subject to the same confidentiality requirements.

[77] The applicant argues the LOU should not extend to information contained in the database:[52]

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[48] Mainstream's initial submission, para. 29.
[49] Grieg's initial submission, para. 32.
[50] Association's submission, p. 1. I note the Marine Harvest makes a similar claim in its initial submission stating that the LOU "show how the two parties worked co-operatively to ensure confidentiality of data. The LOU outlined how the data would be housed and owned by BCSFA, therefore making it inaccessible to Freedom of Information requests.", para. 9.
[51] Association's submission, p. 3.
[52] Applicant's reply submission, para. 31.

> First, the terms of the confidentiality of the agreement keep data confidential for a period "one year from the completion of the database". The database has been complete for more than one year and the data at issue in the Inquiry is well over one year old …
>
> Second, it is not reasonable to extend confidentiality to the Audit activities where the existence and functioning of the [Association] database did not satisfy public concerns about sea lice problems and Audit activities are undertaken to "enhance public confidence and to validate industry information."

Analysis of the confidentiality issue

[78] There is no evidence in this case of any written confidentiality agreement directly between individual fish farms and the Ministry. The Ministry adduced hearsay evidence that one of its former veterinarians, at some point, verbally advised fish farm operators that information would be treated in a confidential manner as part of the "Veterinary-Client-Patient relationship". The Ministry does not say which operators it advised or when this may have occurred. I can give no substantial weight to this evidence.

[79] The nub of the confidentiality argument proffered by the Ministry, Association and fish farms centers rather on the January 23, 2001 LOU between the Ministry and the Association, of which the fish farms in question are members. The first mention of the Health Auditing and Surveillance Program, to which the requested information relates, is at section 5 of the LOU. That section says nothing about the confidentiality of the information collected under HASP. The final section of the LOU, which first addresses the Association's "Database" not in issue here, states as follows:

> [The Ministry] and the [Association] agree to a period for critical evaluation and assessment of the Database as outlined in Section 4. It is estimated that structuring the Database will take approximately six months; hence the term of the pilot project evaluation and review will be one year from the completion date. Information gathered through the auditing and surveillance program will also be confidential with no public reporting of the findings for the same time period.

[80] I read this to mean that once the [Association's] Database system was completed in approximately June 2001, there would be a trial period of one year in which to evaluate this new system. The Ministry agreed that it would not publicly disclose information gathered through its own audit and surveillance program from fish farms until the one-year trial period was complete. This would be understandable in order to ensure the audit is accurate. The trial period would have completed in June 2002. The Association's submission suggests

the trial completed in October 2002.[53] In any event, it is evident to me that the LOU contemplated that once the pilot project evaluation was complete in June or October 2002 there would be public disclosure of data gathered to that point and afterwards. This finding is also consistent with:

> …one of the main goals of [HASP which] is to validate the information reported by industry and instill public confidence in the results generated…[54]

[81] If the audit data is not publicly disclosed it is difficult to understand how the public could have confidence in it.

[82] Other evidence provided by the Ministry and third parties does little in my view to advance its claim the HASP information was supplied in confidence. I note the "confidentiality" a Ministry veterinarian accorded to Mainstream in an email dated November 21, 2007[55] concerned fish testing that was "independent of [HASP] and the results would not enter the HASP database…". Implicit in this email is that data supplied under HASP would not be subject to the same confidence.

[83] For the reasons stated, I find that the requested information that remains in issue (*i.e.,* the information under headings 1 and 2 and the one category under heading 4, being the counts of and comments on sea lice by the fish farms) was not supplied explicitly or implicitly in confidence.

[84] Though not necessary to do so, for the sake of completeness I consider below whether disclosure of the requested information could reasonably be expected to harm the third parties under s. 21(1)(c) of FIPPA.

Harm to third-parties

[85] The Ministry and third parties advance three arguments under each of paragraphs (i), (ii) and (iii) of the third branch of the s. 21 test.

Significant harm to competitive position

[86] The first argument relates to Ministry and certain third party contentions under s. 21(1)(c)(i) that, if the requested information is disclosed, the competitive position of individual fish farms will be significantly harmed. The Ministry summarizes this position:[56]

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[53] Association's submission, p. 2.
[54] Ackerman affidavit, Exhibit E: "A Review of the British Columbia Ministry of Agriculture and Land's Fish Health Audit and Surveillance Program".
[55] Exhibit A, Leger affidavit,
[56] Ministry's initial submission, para. 4.54.

> The Ministry suspects that Farms monitor the production of fish at other Farms. If medical management is required each company attempts to plan the medication of their fish on the basis of when they want to bring their fish to market. If rival companies have information about a competitor's medications for sea lice, including the timing of such medication, they will know that that company cannot bring their fish to market for a minimum of 68 more days. Such knowledge can therefore give a company a competitive advantage over its competitors. This is another reason that companies desire their fish health information to be treated in a confidential manner.

[87] The delayed harvest time Grieg Seafood cited was "at least 60 days".[57] Marine Harvest also mentions this concern but does not set out any timeline. Marine Harvest also argues that release of its "site specific therapeutic information" would undermine its competitive position.

[88] The applicant contends these arguments should be given no weight because:[58]

- The information at issue in this inquiry dates from 2004. The suggestion that the release of data could somehow be utilized by a competitor to time current harvests – with all due respect – is ridiculous.

- The suggestion that companies will change harvest plans during a 60 day window is inconsistent with the Ministry's submissions, at paragraph 4.53, that: "Harvest scheduling and commitments are based on growth projections and on buyer contracts development months in advance."

- Even theoretically, any request under the Act for information in the nature of the information at issue in this Inquiry would almost certainly result in the targeting of information older than 60 days, meaning that no competitor could adjust harvest to take advantage of a company's inability to harvest. Specifically, public bodies are given 30 days to respond to a request under the Act (assuming no extensions or delays) and additionally there will be another 30 day delay to provide for consultations with third parties. Additionally, given the descriptions of the collection and recording of the data (e.g., interviewing fish farm veterinarians about past events) any information in the provincial database is likely already dated even on the day of entry. In short, even a request for the most contemporaneous data would almost assuredly fall outside the 60 [day] window of concern cited by the Ministry and Third Parties.

[57] Affidavit of Mia Parker, para. 13.
[58] Applicant's reply submission, para. 39.

- Although it is the position of [the applicant] that this concern is not valid (and the other criteria of s. 21 have not been satisfied) if it is determined that there is a risk of a company gaining advantage during the 60 day window, there is always the option of applying section 21 only in relation to information that is newer than a certain date (e.g., 90 days). Again, this responds to a theoretical concern of the Ministry and Third Parties and not the facts at issue here.

- Finally, [the applicant] submits that the assertion that but for the release of this information, competitors would be unable to take advantage of an inability of the company to harvest is farfetched. It lacks credibility to assert that a buyer (such as supply to restaurants) would simply do without salmon during that period. In other words, the market would signal the inability of a supplier to meet existing buyers' demands and other companies would take advantage of that situation regardless of any release of this data.

[89] Establishing a reasonable expectation of harm requires more than speculation or generalization. Many previous orders state what is required is a clear and direct connection between disclosure of the specific information and the harm that is alleged.[59] The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information. The evidence here does not meet this test. I agree with the applicant that the disputed information (*i.e.,* the information under headings 1 and 2 and the one category under heading 4) is beyond any time range asserted by the parties within which harm, let alone significant harm, might occur under the third part of the s. 21 test. For this reason alone, I find the arguments of the Ministry and third parties have no merit. I also find the other four points made by the applicant (as set out above) to be persuasive and supportive of my conclusion that the disclosure of the information cannot reasonably be expected to significantly harm the competitive position of the third parties.

[90] I also reject Marine Harvest's contention that release of "site specific therapeutic information" concerning sea lice would allow competitors to gain a competitive advantage. Marine Harvest offers no supporting evidence for this claim, by way of an *in camera* affidavit or otherwise. The "Fish Health Report,"[60] cited by the Ministry, notes that there is "only one product available" for the therapeutic treatment of sea lice, suggesting that sea lice treatment regimes are limited and are likely already well known in the industry in any case.

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[59] See for example Order 04-06, [2004] B.C.I.P.C.D. No. 6, Order F05-29, [2005] B.C.I.P.C.D. No. 39 and Order F08-21 [2008] B.C.I.P.C.D. No. 39; see also *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773.

[60] Exhibit F, p. 344, Ackerman affidavit,

Information no longer supplied

[91] The Ministry and third parties maintain that disclosure of the requested information could reasonably be expected to result in similar information no longer being supplied to the Ministry when it is in the public interest that similar information should continue to be supplied. The essence of this argument is that the third parties voluntarily supply information on the basis that it would be treated confidentially. If it is disclosed, the third parties say they will refuse to provide the audit data in the future.[61]

[92] The Ministry argues the disputed information is not supplied to it under compulsion by way of an Act, regulation or express licence terms and conditions. Nor, it submits, is there is an existing licence condition requiring fish farm operators to permit the audits that resulted in the collection of the information. Rather, the Ministry contends, the collected information is governed by the LOU, which represents a voluntary arrangement between government and industry.[62]

[93] The Ministry submits that there is no statutory duty on the part of fish farms to provide mortality breakdowns or the information dealing with sea lice monitoring. It contends there is also no obligation on the fish farms to provide divers or boats to bring up fish samples for inspection and analysis.[63] The Ministry does concede, however, that the cumulative effect of the Aquaculture Regulation is that Ministry inspectors, under those regulations, could potentially access certain aspects of the requested information. This information would include the "year and quarter" and site inventory information under heading 1 and the "Fish Health Events/Actions" under heading 2 in Appendix A. The Ministry adds that, although this information could be collected by inspectors under the Aquaculture Regulation, "the fact remains that none of the information at issue in this inquiry was collected by inspectors under such powers."[64]

[94] Mark Sheppard, a Ministry veterinarian and manager responsible for animal aquatic health, summarized the Ministry's general position in the following manner:[65]

> It is in the public interest for the government to understand the health status of fish on farms. The health status of animals must be assessed by specially trained Veterinary professionals licensed to do so. No other individual can make a diagnosis of disease. The Ministry desires access to the Information in order to track and make comparisons for

[61] For example, the affidavit of Mia Parker, Grieg Seafood, para. 30.
[62] Ministry's initial submission, para. 4.40.
[63] Ministry's initial submission, para. 4.41.
[64] Ministry's initial submission, para. 4.45.
[65] Affidavit of Mark Sheppard, para. 34.

> epidemiological purposes to facilitate provincial fish transfers, international and federal animal health expectations as it relates to export and trade. If the Ministry could not agree to receive such information in confidence in the future, Farms would refuse to provide such information, which would harm the Ministry's ability to develop and improve farming strategies and plan and manage both farmed and wild stocks. If the information is not available to the Ministry in the future, in order to assess and audit the fish farming industry, the Ministry's and federal government's ability to meet its fish health objectives will be undermined. This has significant implications to access to export markets where >90% of the farmed salmon are currently sold. It is impossible to plan, adjust and improve its activities without remaining abreast of complete, historical and current fish health information. The goals of the Program are to monitor, report and improve the health management of farmed fish. In order for the public to have confidence that farmed fish are raised with wholesomeness, health, [*sic*] welfare in mind as a result of due care and attention by the farmer and with proper oversight by government.

[95] Mainstream flatly submits that it will not supply similar information when it is in the public interest that similar information continues to be supplied.[66] Mainstream does not explicitly say there is no authority under which it may be compelled to provide data for the audit.

[96] Marine Harvest submits there are "no regulations or laws" which require it to release the information it gives to Ministry veterinarians or designates during on-site visits. It states that release of the requested information would result in Mainstream no longer supplying the requested information.[67]

[97] Creative Salmon argues that it provides audit information on a voluntary basis and if the applicant's access request is granted it will "immediately cease to volunteer further information to the Ministry."[68]

[98] Grieg Seafoods contends there is no statutory requirement that allows the collection of audit data and that it only provides data on the understanding the data would be kept confidential. It states it will no longer submit the data if the applicant's access request is granted.[69]

[99] The applicant argues that a public body cannot refuse to release information on the basis of s. 21(1)(c)(ii) if the third party can be compelled by the public body to provide the information. It points to *Fletcher Challenge Canada Ltd. v. British Columbia (Information and Privacy Commissioner),*[70] where the Court upheld an order of the former Commissioner on the basis that,

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[66] Mainstream's initial submission, para. 37.
[67] Marine Harvest's initial submission, para. 16.
[68] Creative Salmon's initial submission, para. 1.
[69] Grieg Seafoods's initial submission, para. 43.
[70] *Fletcher Challenge Canada Ltd. v. British Columbia (Information and Privacy Commissioner),* [1996] B.C.J. No. 505, BCSC.

because the company could be compelled to supply the information, the refusal to release the information under s. 21(1) of FIPPA was not justified.

[100] In this case, the applicant submits:[71]

- Under the BC *Fisheries Act*, section 12 of the Aquaculture Regulations gives inspectors various powers, including the power to enter a fish farm to investigate compliance with the Act and the terms and conditions of the aquaculture licence.

- The Fisheries Act provides the authority for the Ministry of Agriculture and Lands (MAL) to licence fish farms (s. 13(5)), set the terms and conditions of those licences (s.16(d)), and to regulate on-site activities.

- The Fisheries Act also provides for the power to make regulations for "safe and orderly aquaculture" (s. 26(2)(a)).

- The BC Finfish Aquaculture Licensing Policy contains this provision:

> **13. Reporting and Monitoring**
> MAL Fisheries Inspectors will ensure compliance with the Fisheries Act, Aquaculture Regulation, and terms and conditions of the aquaculture licence through reporting and the conducting of regular inspections and other monitoring activities as appropriate, including spot audits.

- The General Terms of an Aquaculture Licence[72] include the requirements that the licencee:

> 2(9) keep records adequate to allow an Aquaculture Inspector, an Inspector of Fisheries or a Conservation Officer to determine if the holder is complying with the terms of this licence, the Aquaculture Regulation and Fisheries Act;
>
> 2(10) make available to an Aquaculture Inspector, an Inspector of Fisheries or a Conservation Officer, the records referred to in sub-paragraph 2(9);
>
> …
>
> 2(12) deliver to the Branch, in the form and at the interval determined by the Minister, any information required to determine compliance by the holder with the terms of this licence, the Aquaculture Regulation and Fisheries Act;
>
> …

[71] Applicant's initial submission, para. 33.
[72] The applicant noted the Licence is found online at the following government website: http://www.agf.gov.bc.ca/fisheries/Manuals/Licensing/license_terms.pdf.

> 2(15) comply with all laws, bylaws and orders of any competent government authorities which affect the aquaculture facility described herein.

- Section 4(2) of the BC Animal Disease Control Act*,* gives an inspector the power to enter water, onto any land, water structure or premises etc. in the performance of a duty under the act. Section 11 gives the inspector power at any time to inspect an animal for disease. The definition of animal includes aquatic animals that are grown and cultivated for commercial purposes.

[101] The applicant argues the Ministry has already imposed a self-described "mandatory" requirement that all fish farms have an FHMP as a condition of their license. The applicant submits that the FHMP requires that, among other things, each farm site monitor and record mortalities, diseases, sea lice numbers and treatment.[73] This information is conveyed to the Association, which then sends quarterly reports to the Ministry. The Ministry then activates its Sea Lice Monitoring and Audit program to carry out randomly selected spot audits of farms, to ensure compliance with the FHMP. The applicant submits that, while the FHMP is not specified in legislation, a license is a statutory creation and the Ministry has the statutory ability to set terms and conditions required under it. Clearly, the applicant submits, the Ministry has the ability to compel the mandatory production of this information under the FHMP, even if the information is currently filtered through the Association.

[102] The Ministry responds that s. 26(2)(a) of the *Fisheries Act* does not give the Ministry power to make such a regulation but rather, that power has been reserved for the Lieutenant Governor in Council. The Ministry submits that arguing that such a regulation could be made in the future is pure speculation and, in light of that, it submits that the existence of such a power cannot support a finding that information that is similar to the information at issue in this inquiry will be supplied to the Ministry in the future.

[103] The Ministry also argues that ss. 4(2) and 11 of the *Animal Disease Control Act* have no application in this case because fish diseases are not listed under that Act.

Analysis

[104] Previous orders have clearly established the principle that s. 21(1)(c)(ii) of FIPPA does not apply where there is a statutory compulsion to provide

[73] The applicant cites the Ministry's "Required elements of a Fish Health Management Plan for Public and Commercial Fish Culture Facilities in British Columbia, June 2003", p. 3, available online at: http://www.agf.gov.bc.ca/ahc/fish_health/fhmp_Required_Elements_June-03.pdf.

information—or the prospect of compulsion exists—or where there is a financial incentive for doing so.[74]

[105] Insofar as the information under heading 2 is concerned, I have no difficulty finding that this information is subject to compulsory inspection pursuant to the Aquaculture Regulation and the Ministry concedes as much in its submission. I find no merit in the Ministry's submission that there is no compulsory inspection here because Ministry veterinarians were asking for these records rather than "inspectors". At the very least, the Ministry has within its authority the "prospect" of employing compulsion to access these records through its inspectors. The same can be said of the information the Ministry concedes has the potential to be inspected under heading 1, *i.e.*, "Year and quarter" and the site inventory. I find that the balance of the information under heading 1, related to fish mortalities and their breakdown, is similarly subject to regulatory authority. The Aquaculture Regulation states:

> **Inventory records**
>
> 5(1) For each finfish aquaculture facility of a holder, the holder must maintain accurate written records of the following for each containment structure in the aquaculture facility:
>
> …
>
> (b) the weekly finfish mortalities, including the causes of the mortalities and the numbers attributable to each cause of mortality;

[106] Section 12 of the Aquaculture Regulation, in turn, provides that an inspector may attend on the fish farm and require the production of these records. In summary, I find that the information under heading 1 and 2 is clearly the subject of regulatory authority and therefore I reject arguments these records are produced on a purely voluntary basis.

[107] What remains for consideration is the assertion that disclosure of the sea lice data, counted and categorized by the fish farms, would result in similar information no longer being supplied when it is in the public interest that similar information continues to be supplied.

[108] In my view, the position taken by the Ministry and third parties that such information is, in essence, voluntarily provided and would not be provided in future if the applicant's access request is granted, does not accord with the evidence before me.

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[74] See Order 03-05, [2003] B.C.I.P.C.D. No. 5, for example. Also see Order No. 56-1995, [1995] B.C.I.P.C.D. No. 29, upheld on judicial review: *Fletcher Challenge Canada Ltd. v. British Columbia (Information and Privacy Commissioner),* [1996] B.C.J. No. 505 (S.C.).

[109] As noted above, the Ministry provided me with a document entitled "Fish Health Program – 2006" ("Report"),[75] a Ministry publication providing a comprehensive overview of the fish farm industry, including a discussion of FHMPs and the Fish Health and Auditing and Surveillance Program, as well as a synopsis of industry sea lice results for the year.[76]

[110] The Report states:

> Since 2003, all private companies and public fish culture facilities are required to develop and maintain a current FHMP specific to their rearing unit. For private companies and the provincially licensed public facilities, the FHMP is enforceable as a Term & Condition of an aquaculture license.[77] (emphasis added)

[111] This is consistent with the "General Terms of an Aquaculture Licence" cited by the applicant. The license states in part:

> 2. The holder of an Aquaculture Licence shall:
>
> 2(1) comply with each Management or Development Plan;

[112] The License defines these plans as "a plan filed with and approved by the Branch for the species and location specified on the face of the licence."

[113] The Report goes on to explain what an FHMP comprises:

> Three documents comprise a FHMP: *The Required Elements*[78] document provides the guiding principles for the FHMP process; the *Template for Writing a Facility Specific Health Management Plan*, details what is required of operators and lists required Standard Operating Procedures (SOPs) for management of farm activities affecting fish health; and the *Manual of Fish Health Practices* is used by government regulators as a standards document against which the industry SOPs are assessed.

[114] The Ministry referred me to its website in reference to the above FHMP elements, including the Template.[79] The Template begins with the following statement:

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[75] Exhibit F, p. 344, Ackerman affidavit.
[76] Ackerman affidavit, Exhibit F.
[77] Ackerman affidavit, Exhibit F, p. 297.
[78] The italicized phrases are reflected in the original document as hyperlinks to take the reader to the applicable Ministry webpage.
[79] Ministry's reply submission, para. 18. The Ministry stated that what it described as "…non-prescriptive requirements and guidelines" of FHMPs "are posted on the Ministry's website." The Ministry states further that, "[t]he following documents can be found on the Ministry's Fish Health website; a template, describing what information needs to be in a Fish Health Management Plan (FHMP); the need for a FHMP; and how to design a FHMP." The Ministry did not cite a precise website address but I was able to locate the Template at http://www.agf.gov.bc.ca/ahc/fish_health/Template_May2006.pdf .

> The objective of this Fish Health Management Plan is to provide good health conditions for cultured fish owned by operators in British Columbia. All private operators and public fish culture facilities must develop and maintain an up-to-date Fish Health Management Plan (FHMP) specific to their facility(ies). The FHMP is enforced as a condition of an aquaculture license.
>
> This document does not replace the regulatory requirements for a Fish Health Management Plan but is intended to help operators write their own Fish Health Management Plans. Operators licensed to produce salmon in British Columbia are expected to follow the principles described in the template. Applicable legislation and regulations are included in Appendix 3. (emphasis added)[80]

[115] The Template provides the following:

> **Audit of Farm Sites by BC Agriculture and Lands**
> Agriculture and Lands staff will continue to monitor 25% of active Atlantic salmon sites per quarter for Quarters 1, 3, and 4 of each year. During monitoring and surveillance activities at the selected sites, 10 fish will be selected from the 20-fish sample from each of the three sample pens for evaluation by BCMAFF staff. The fish will be systematically examined by the [Ministry] Fish Health Technician and lice numbers enumerated and classified as outlined above.
>
> [Ministry] staff may also collect lice samples from anaesthetized or euthanized fish for periodic evaluation and confirmation of lice species and life-stage. Environmental data (water temperature, salinity at 0 1, 5 and 10m) for the day of the audit will be recorded. During Quarter 2 (April to June inclusive) Ag and Lands audit and surveillance activities will increase to 50% of all Atlantic salmon sites for farms with fish that have been in saltwater for greater than 120 days (based on the date of first pen entered on a site). **For sites that are selected for audit during this quarter, the audit sample will be conducted as a second monthly sample and not as the industry required monthly sample.** Sampling will be conducted as described above. (Bold original)[81]

[116] The only reasoned inference one can draw from these Ministry records is that fish farms must follow the principles in the Template that encompass the Ministry Fish Health Auditing and Surveillance Program. None of the third parties provided me a copy of their FHMP stating otherwise or argued that their FHMPs were in any way inconsistent with the above.

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[80] Template, p. 4.
[81] Template, p. 19.

[117] As noted above, the Ministry's Mark Sheppard states in his affidavit that if fish farms do not meet the requirements of their FHMP and "corrective measures are not taken":

> …, those [Ministry] inspectors will be asked to facilitate compliance. Ultimately, fines and/or non-renewal of an aquaculture license may arise yet this degree of enforcement is rarely, if ever, required.

[118] Whether such enforcement is rare or not, the Ministry's evidence is clear that ultimately, non-renewal of a license is possible. At the very least, this reality provides a financial incentive for the fish farm to ensure its operations are audited in accordance with the FHMP so that it retains its license.

[119] In light of all of the above, it can hardly be asserted that the Ministry's audit concerning sea lice numbers is a truly voluntary act which fish farms have the option of taking or leaving. In reality, these sea lice audits comprise part of a larger scheme to oversee the operations of the fish farm industry. The genesis of the entire scheme, including the FHMP, was the result of the recommendations of the 1997 Environmental Assessment Review of Agriculture as was noted by the Ministry in its submission.[82] The Report states:

> In 1999, [the Ministry] accepted the recommendations, developed a new Salmon Aquaculture Policy and committed to addressing concerns through the staged implementation of a new regulatory and management framework with the major objective to improve fish health. Implementation of the program began in 2001 and for the last six years it has served to better regulate the finfish aquaculture sector.

[120] The Report continues:

> The [FHMP] dictates that all salmon farming companies in British Columbia must monitor their fish and report to the industry database monthly the status of fish health at their farms…To enhance public confidence and to validate industry information, [the Ministry] audits the farm sites sampling specifically for endemic diseases.

[121] I also note the Ministry's argument that a failure by the third parties to continue supplying this information will have "significant implications to access to export markets" where over 90% of the companies' production is sold. I agree with the applicant's observation that, contrary to the Ministry's assertion, this would in fact be a financial incentive for fish farms to continue to supply the information in order to continue to access those export markets.

[122] In light of all of the foregoing I reject the argument of the Ministry and third parties that the test under s. 21(1)(c)(ii) is met in this case.

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[82] Ministry's initial submission, para. 4.08.

Section 21(1)(c)(iii) – disclosure would result in undue financial loss to third parties

[123] The third argument advanced by the Ministry and some, but not all, of the third parties is that disclosure of the requested records will result in the third parties suffering undue financial losses. The following submission by Marine Harvest is reflective of the third party submissions in this case:[83]

> Site specific fish health and sea lice information used out of context and misinterpreted could, and has been used in the past to bring pressure to bear on regulating authorities. This pressure resulted in Marine Harvest Canada having to move one site, twice. The cost to Marine Harvest Canada of this move was $1.0 million. Release of the site specific fish health and sea lice information would only escalate this type of pressure and subsequent cost to Marine Harvest Canada…Marine Harvest is a publicly traded company on the Oslo Stock Exchange and as such, corporate reputation is very important in maintaining share price and shareholder loyalty. Buyers of Marine Harvest Canada salmon have been the targets of campaigns which attempt to taint the corporate reputation of Marine Harvest Canada and convince buyers and consumers to stop purchasing Marine Harvest Canada salmon. Release of the site specific fish health and sea lice information would result in more of these types of attacks. Information would be used out of context and misinterpreted, with the end result that Marine Harvest Canada's reputation could be tarnished and sale volumes reduced.

[124] Marine Harvest also argues that the requested data is only a snapshot and therefore can be easily taken out of context.

[125] Mainstream argues that organizations like the applicant seek to undermine the viability of the salmon farming industry and will use the information to that end if it is disclosed to them. Mainstream submits further that:[84]

> … if the Applicant and groups like it are in possession of information that would suggest or confirm the presence of pathogens and/or sea lice in any quantity, and particularly in significant quantities, it is clear that they would use this information to damage Mainstream's business. The public would not be interested in buying fish that they are told are infected with pathogens or were raised in an environment conducive to the presence of pathogens and/or sea lice or contain carcinogenic material. It is axiomatic that Mainstream's business would suffer as a result.

[126] Creative Salmon argues that information previously released under FIPPA to an anti-salmon farming group led that group to issue a press release.

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[83] Marine Harvest's submission, para. 17.
[84] Mainstream's initial submission, para. 40.

Creative Salmon states that it successfully sued for defamation over the matter.[85]

[127] The applicant argues that the Ministry and third parties have failed to cite any authority for their position that the potential to use disclosed data out of context, or misusing it, is a basis for satisfying the test under s. 21(1)(c)(iii). The applicant says that audits are by their nature "snapshots" and that FIPPA contemplates that this kind of information is disclosable.[86] As for the argument that disclosed information may be used as a weapon by opponents of fish farms, the applicant submits that one of the very purposes of FIPPA is to provide citizens with access to information precisely for the purpose of giving them the ability to oppose government policies and programs on an informed basis.

[128] The applicant rejects the defamation lawsuit argument advanced by the Ministry and third parties. The applicant states neither it nor the information at issue has any connection to that case. Moreover, the applicant argues it is always theoretically possible that someone could engage in defamatory conduct and in spite of this, the legislature chose to create public access rights and did not create a specific exemption for withholding information on the basis that it might be misused. Most importantly, the applicant submits that the defamation case illustrates that the third parties have avenues of legal redress should information obtained under FIPPA be misused.[87] As for Mainstream's claim that it was required to move facilities at a substantial cost, the applicant submits that if there was no sound scientific basis for this relocation, Mainstream had the option of pursuing appropriate legal remedies.[88]

[129] I have carefully considered all of the submissions the parties advanced in relation to this third argument. I conclude that the Ministry and third party submissions are speculative and cannot be sustained under s. 21(1)(c)(iii). In my view it is possible that any information disclosed under FIPPA could, at least in theory, be taken "out of context" by any member of the public. Were this a basis for withholding records, one could easily envision very little information being disclosed by public bodies which are, in many cases, concerned how information might be used and viewed by members of the public. Possible misuse or distortion of material released under FIPPA is not a basis for claiming an exception under s. 21 or any other provision of the legislation for that matter. Commissioner Flaherty addressed a similar argument in Order No. 22-1994:[89]

> With respect, I find this argument especially unpersuasive, not least because it can be used to seek to suppress any kind of data, information, or

[85] Creative Salmon's initial submission, pp. 1 and 2.
[86] The applicant cites s. 13(2)(g) of FIPPA.
[87] Applicant's reply submission, para. 50.
[88] Applicant's reply submission, para. 51.
[89] [1994] B.C.I.P.C.D. No. 29.

> records. I am supported on this point by Ontario Order P-373, at page 9. Companies try to shape their public image by controlling the flow of information they release to the media and the public. Public bodies, like the WCB, have a responsibility to provide the public with the best information available to serve the public interest. This clearly includes information about corporate health and safety records. If a company is concerned about adverse publicity arising from the disclosure of unfavourable information, this is a public relations problem and not an information and privacy problem.
>
> The primary purpose of the *Freedom of Information and Protection of Privacy Act* is to create a more open and accountable society by disclosing records to the public. It will always be a matter of debate how much the public needs to know. But the legislature of this province has clearly set the balance in favour of greater disclosure of non-personal information.

[130] If the Ministry and third parties are of the view that the disclosed information requires further elaboration and "context" then each is capable of expressing those elaborations publicly. If the applicant, or anyone else for that matter, wishes to use accessed information to praise or criticize industry regulation for example that is their prerogative in a democratic society. I note the words of Commissioner Loukidelis in Order 01-52:[90]

> In my view, it does not sit well for the Ministry to object, as its submissions implicitly do, to disclosure under the Act on the basis that the disputed information will be used to publicly criticize the work of the Ministry. It is entirely appropriate for an applicant – and especially public interest groups – to exercise the right of access under the Act in order to obtain information for the purpose of assessing and criticizing the performance of government. An express purpose of the Act, articulated in s. 2(1), is to "make public bodies more accountable to the public … by giving the public a right of access to records".

[131] For all of these reasons I find that the Ministry and third parties have failed to prove that they meet the test set out in s. 21(1)(c)(iii).

4.0 CONCLUSION

[132] For the reasons set out above, I require the Ministry of Lands and Agriculture to give the applicant access to the information requested within 30 days of the date of this order, as FIPPA defines "day", that is, on or before April 12, 2010 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

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[90] Para. 85.

[133] Given the above order, it is not necessary for me to consider those matters referred to at paragraph 3 above.

March 1, 2010

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator

OIPC File No. F07-33524

APPENDIX A

Information collected on site (by checklist and interview)

1. Fish Mortality Information

- Year and quarter;
- Farm Code = coded case number (i.e. A.2.3-34 = Atlantic salmon, sub-zone 2.3, submission group #34)
- Date of sampling;
- Site inventory (i.e. number of fish);
- Total mortalities for dive;
- Mortality Breakdown:
    - Predators;
    - Environment;
    - Non Performers;
    - Old/rotten (i.e. too old to be of diagnostic quality);
    - Silver (i.e. suspected disease/parasite);
    - Other;

2. Fish Health Events/Actions

- Last treatment;
    - Prescription/non-prescription product(s);
    - Start/end date;
    - Husbandry change to manage potential infectious disease;
    - Reason for treatment/husbandry change.

Health Events

- Diagnosis type;
- Diagnosis (e.g. sea lice sampling);
- Action taken (if any);
- Treatment type (e.g. anesthetic);
- Drug product (e.g. TMS anesthetic);
- Start date/end date;
- Or specific prescription information.

Information derived from fish and carcasses supplied by the fish farm:

3. Miscellaneous data

- Number of fish sampled for testing;
- Tissue samples collected;
    - Gill;
    - Heart;
    - Caecae;
    - Kidney;
    - Peritoneal;
    - Liver;
    - Spleen;

- Other;
- Tests conducted;
  - Bacteriology;
  - Histology;
  - Virology;
  - Other;
- Open 'dialogue' box to type comments, clarifications, observations, (i.e. most carcasses had white spots in the gills, last dive was 7 days ago, predation is a problem here…);

Veterinary information concerning diagnostic test results in relation to fish samples provided by fish farms (from the Ministry's AHC Lab in Abbotsford):

Tentative diagnosis.
Farm diagnosis.

Virology

- Year/quarter;
- Case ID number;
- The BC Farm number (based on the company's license) is registered within the fish health database;
- Date Submitted;
- Way Bill;
- Lab number;
- Date received;
- Virus results - all negative OR positive/negative/not tested for:
  - IHNV;
  - IPNV;
  - ISA;
  - VHS;
  - Piscirickettsia.

- Fish ID (i.e. 4th silver carcass collected);
- Pool ID;
  - Pool PCR;
  - Pool cell culture;
  - Individual sample cell culture;

Bacteriology

- Year/quarter;
- Case ID;
- The BC Farm number (based on the company's license) is registered within the fish health database;
- Date Submitted;
- Way bill;
- Lab Number;
- Date Received;

- Number of fish;
- Fish ID;
- Bacterial identification from isolate & drug sensitivities (e.g. Yersinia ruckeri);
    - ERM:R (resistance);
    - FFC:S (sensitivity);
    - SSS:R;
    - SXT:S;
    - TET:S.

Histology

- Year/quarter;
- Case ID;
- The BC Farm number (based on the company's license) is registered within the fish health database;
- Date Submitted;
- Way Bill;
- Lab Number;
- Date Received;
- Histology summaries made by vet histopathlogist (eg. Diffuse peritoneal fibrinour peritonitis, …PVP);
- Comments (e.g. "post vaccination peritonitis")
- Number of fish;
- Morphology (e.g.)
    - Liver/spleen/heart
    - Basophillic cytoplasm/hepatitis/endocarditis

4. Sea Lice Monitoring and Auditing Data

- Farm Code;
- Sampled by;
- Date sampled;
- Pen ID;

Fish number

- Number of gravid female;
- Adult female;
- Adult males;
- Pre-adult males and females;
- Chalimus;
- Caligus spp;
- Comments;
- General comments.