



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
— for —  
British Columbia

Order 01-52

**MINISTRY OF WATER, LAND AND AIR PROTECTION**

**\*\*\*\* This Order has been subject to Judicial Review \*\*\*\***

David Loukidelis, Information and Privacy Commissioner  
December 3, 2001

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**Summary:** Applicant conservation groups requested access to records disclosing the geographic locations of grizzly bear kills since the Ministry began keeping such records. One applicant sought only hunting kill locations. The other applicant sought both hunting and non-hunting kill locations. The Ministry disclosed the Ministry's geographic wildlife management units in which each kill occurred, as well as the date and type of kill, and the sex, maturity and age of the animal, where recorded, but concluded that, if the Ministry could not ensure the confidentiality of more specific kill location data, hunting regulations and grizzly bear management strategies could be compromised and hunters would no longer provide detailed kill data. The Ministry is not authorized by s. 18(b) to refuse to disclose more specific kill location data as it has not established that disclosure could reasonably be expected to damage grizzly bears or interfere with their conservation.

**Key Words:** vulnerable species – endangered species – threatened species – damage to – interfere with conservation.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 18(b); *Wildlife Act*, ss. 30, 80 and 82; Designation and Exemption Regulation, B.C. Reg. 168/90; Hunting Regulation, B.C. Reg. 190/84, s. 16; Management Unit Regulation, B.C. Reg. 64/96.

**Authorities Considered: B.C.:** Order No. 56-1995, [1995] B.C.I.P.C.D. No. 29; Order 01-11, [2001] B.C.I.P.C.D. No. 12; Order 01-20, [2001] B.C.I.P.C.D. No. 21.

**Cases Considered:** *R. v. Davis*, [1999] 3 S.C.R. 759; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Novak v. Bond*, [1999] 1 S.C.R. 808; *R. v. McLeod*, [1999] B.C.J. No. 1264; *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Canada Packers Inc. v. Canada*

(*Minister of Agriculture*) (1988), 53 D.L.R. (4<sup>th</sup>) 246 (F.C.A.); *Fletcher Challenge Canada Ltd. v. British Columbia (Information and Privacy Commissioner)*, [1996] B.C.J. No. 505 (S.C.).

## 1.0 INTRODUCTION

[1] The decision of the provincial government to reverse the grizzly bear hunting moratorium announced by the previous government shortly before the election in May of 2001 rekindled the dispute over grizzly bear hunting in British Columbia. This controversy – which has attracted attention internationally – is not new. Various conservation groups and wildlife experts have long argued that the government has overstated the grizzly bear population and is allowing kill-levels that are not sustainable. They argue that continued hunting of grizzly bears in British Columbia threatens the viability of this species in the province. The Ministry of Water, Air and Land Protection (“Ministry”) – formerly the Ministry of Environment, Lands and Parks – vigorously disputes these claims. It contends that current kill-levels are sustainable and do not threaten the grizzly bear population in British Columbia. The government has, however, recently appointed a panel of wildlife experts to study, and make recommendations to it about, grizzly bear hunting in the province.

[2] The focus of this inquiry under Part 5 of the *Freedom of Information and Protection of Privacy Act* (“Act”) is whether two conservation groups must be given access to geographic grizzly bear kill location data recorded by the Ministry on the basis of descriptive information provided by hunters. On April 10, 2000, the Raincoast Conservation Society (“Raincoast”), a British Columbia organization with a purpose of protecting coastal temperate rain forest ecosystems, made an access to information request to the Ministry in the following terms:

We are requesting a list of the actual physical locations, valley by valley, of each and every grizzly bear killed by legal sport hunting in the province since the Ministry of Environment (Wildlife Branch) began keeping such records.

[3] A few days later, on April 14, 2000, the Environmental Investigation Agency (“EIA”), a conservation organization based in England, asked the Ministry for access to

... a full break down of the kill data for grizzly bears in BC, whether hunting/non-hunting for the period that the BC Wildlife Branch has kept records, including:

- Date of deaths/discovery
- Location of kill including identifying grizzly bear management unit, and most importantly geographic location as precisely as possible, including actual name of valley etc.
- Whether male/female
- Cause of death – hunting or non-hunting with any further detail recorded
- Approximate age or adult/juvenile and whether any orphaned cubs were reported

I would also like a breakdown of the officially allowable kills both from hunting and non-hunting causes for individual management units over the period for which the above information is available.

[4] According to the EIA's request, detailed breakdowns of geographic kill locations are

... vital to allow the public to assess the scientific validity of both the Ministry's case to maintain the hunt, and that of the conservation groups currently calling for a suspension of the hunt. A climate where information is withheld merely sends the message that there is something to hide.

[5] The Ministry responded to both requests on May 18, 2000. Kill locations at a Ministry Management Unit ("MU") level were disclosed, but more detailed kill location information was refused on the basis of s. 18(b) of the Act. The Ministry's responses stated:

Detailed harvest location of any species is protected under Ministry of Environment, Lands and Parks policy as well as under section 18 of the Freedom of Information and Protection of Privacy Act (the Act). Section 18 of the Act states, "The head of the public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of, (b) an endangered, threatened or vulnerable species, subspecies or race of plants, vertebrates or invertebrates." Grizzly bears are listed as Vulnerable species nationally and have the equivalent status provincially of being Blue-listed.

Section 18 is a discretionary exception and used in this case to protect detailed kill location data which if released has the potential to increase hunter success, may increase poaching kills above rates presently experienced and could in some cases affect the conservation of individual populations. Regulations now set to control hunting pressure as well as management strategies now in place to assure safe harvest could be compromised with the release of detailed harvest information. Hunter confidence is also an important consideration and currently hunters are assured that the data they provide to the Ministry is confidential. Accurately reported data is vital to careful management and conservation of a species.

We are providing you with the requested kill data derived from compulsory inspection from 1975 to 1999 which gives the Management Unit (MU) in which the grizzly was killed, the year and month of kill, the type of kill, sex, whether adult or juvenile and the age where this was determined. ...

[6] Each applicant then requested, under Part 5 of the Act, a review of the Ministry's decisions to refuse disclosure. Since the requests for review did not settle in mediation, I held a written inquiry, under Part 5 of the Act, respecting both requests.

## 2.0 ISSUES

[7] The following issues are raised in this inquiry:

1. Is the Ministry authorized by s. 18(b) of the Act to refuse to disclose the disputed information?

2. Is the Ministry required by s. 25 of the Act to disclose the disputed information?

[8] Section 57(1) of the Act provides that the Ministry bears the burden of establishing that it is authorized by s. 18 to refuse to disclose the disputed information. Previous orders have established that the applicants bear the burden of showing that s. 25 requires the Ministry to disclose the disputed information.

### 3.0 DISCUSSION

[9] **3.1 Evidence Provided by the Parties** – It is useful in this case to list the affidavits provided by the Ministry and by Raincoast – the EIA relied on Raincoast’s affidavits – and generally describe the background or qualifications of each deponent:

#### *Ministry Affidavits*

- Affidavit of Doug Dryden sworn November 16, 2000. Dryden has been the Director of the Ministry’s Wildlife Branch since 1998. He began working with the Ministry in 1981, as a Senior Biologist. He holds an Honours B.Sc. in Biology.
- Affidavit of Matt Austin sworn November 16, 2000. Austin is the Large Carnivore Specialist for the Ministry. He has a B.Sc. in Zoology and a Master’s of Environmental Design degree in Environmental Science.
- Affidavit of Ian Hatter sworn November 20, 2000. With the Ministry since 1984, Hatter has a B.Sc. in Biology and a Master’s degree in Wildlife Resources. His specialty is hoofed mammals, which in British Columbia includes deer, elk, caribou, moose, mountain sheep, mountain goats and bison.
- Affidavit of Doug Walker sworn November 10, 2000. He has been Executive Director of the BC Wildlife Federation (“BCWF”) for the past five years. The BCWF has roughly 35,000 members and is described by Walker as “the largest conservation organization representing hunters and anglers in British Columbia.”
- Affidavit of Dale Drown sworn November 10, 2000. He has been the General Manager of the Guide Outfitters Association of British Columbia (“Guide Outfitters”) for the past five years.
- Affidavits of Susan Butler sworn November 9 and December 8, 2000. She is the Manager of Information and Privacy at the Ministry.

#### *Raincoast Affidavits*

- Affidavits of Dr. Brian Horejsi sworn November 9 and December 6, 2000. Horejsi holds a doctorate in Behavioral Ecology and Mammology and has worked in the field of grizzly bear conservation and management for over 20 years.
- Affidavit of Wayne McCrory sworn November 14, 2000. McCrory holds an Honours degree in Zoology. He is a Registered Professional Biologist specializing in grizzly

bears and has worked in the field of grizzly bear conservation and management for over 25 years. From 1995 to 1998, McCrory was a member of the British Columbia government's Grizzly Bear Science Advisory Panel, comprised of 12 scientists with expertise in the field of bears and carnivore biology.

- Affidavits of Ian McAllister sworn November 1 and December 5, 2000. He is a Raincoast employee.
- Affidavit of Chris Genoali sworn December 6, 2000. He is also a Raincoast employee.

[10] **3.2 Procedural Objections** – Before turning to the merits, I will deal with several objections raised by the Ministry and one made by the EIA. The Ministry objects to my considering communications that occurred in the course of my staff's efforts to mediate, under s. 55 of the Act, a settlement of this matter. The Ministry specifically objects to my considering the contents of a September 5, 2000 letter signed by Doug Dryden and communications concerning the willingness of the applicants to keep the disputed information confidential. I agree that these communications occurred in a without prejudice context, during attempts to mediate a resolution of the matter, and I have disregarded any reference to them in this inquiry. The discussion below, about whether disclosure in response to the applicants' access requests is to be regarded as disclosure to the public, is based only on argument and non-mediation information provided by the parties in this inquiry. It does not reflect communications that may have occurred during mediation.

[11] The Ministry also objects to my considering the affidavits provided with Raincoast's reply submission, *i.e.*, the Horejsi affidavit sworn December 6, 2000, the Genoali affidavit sworn December 6, 2000 and the McAllister affidavit sworn December 5, 2000. It also objects to my considering parts of the EIA reply submission (pp. 4, 6, 9, 10 and 15). The basis for the objection is that the applicants' reply materials include "new facts ... relating to issues they raised in their initial submissions."

[12] The second affidavits of Horejsi and McAllister are, in my view, fairly characterized as responsive to affidavits provided with the Ministry's initial submission (specifically, the Austin and Butler affidavits). While it might have been possible for Raincoast to provide some or all of the information in those affidavits with its initial submission, the burden of proof in this inquiry is on the Ministry respecting s. 18(b). I find no fault in Raincoast providing affidavit evidence in response to facts sought to be established by the Ministry through the affidavits that accompanied its initial submission. It is not clear to me, for example, how Raincoast's initial submission could be expected to directly answer the Austin affidavit, when that affidavit was only provided to Raincoast with the Ministry's initial submission. Further, the second affidavits of Horejsi and McAllister respond to the first Butler affidavit, which was provided with the Ministry's initial submission and which addressed the public availability of kill location data in other jurisdictions. I note that the second Butler affidavit, provided with the Ministry's reply submission, adds further evidence on that very issue. The Ministry's

objection to evidence in the second affidavits of Horejsi and McAllister about the accessibility of kill location information in other jurisdictions is difficult to reconcile with the fact that the Ministry has itself tendered a second affidavit from Susan Butler on that very point.

[13] For its part, the Genovali affidavit only introduces in evidence a 1998 report, prepared by Horejsi and others, called “Grizzly Bear Conservation Strategy – An Independent Review of Science and Policy”. This report is referred to in Raincoast’s initial submission. Horejsi also refers to it, in his second affidavit, as detailing his reasons for disagreeing with estimates of grizzly bear populations provided in the Austin affidavit, which accompanied the Ministry’s initial submission. I see the Genovali affidavit as an extension of Raincoast’s response, in Horejsi’s second affidavit, to the Austin affidavit. I see no unfairness to the Ministry in permitting Raincoast to provide affidavits in response to affidavits submitted by the Ministry with its initial submission, particularly in light of the additional evidence provided by the Ministry with its reply submission.

[14] I have also reviewed the pages in the EIA reply submission to which the Ministry takes exception. Pages 4 and 6 contain, in part, argument flowing from and relating to the second McAllister affidavit and the release of kill data in other jurisdictions. As with the McAllister affidavit, this responds to the first Butler affidavit, provided by the Ministry with its initial submission. Part of p. 4 responds to the assertion, found in para. 4.06 of the Ministry’s initial submission, that its practice has been to keep information concerning kill locations confidential. The passage in the EIA reply submission describes press releases said to have been issued by the Ministry, from August to November 2000, in which descriptive kill location data and dates of illegal kills were disclosed by the Ministry. In my view, the EIA should be entitled to respond in this way to the Ministry’s initial submission and the fact that the press releases referred to by the EIA are publicly available on the Ministry’s own website does not diminish the importance of copies being exhibited to an affidavit for the purposes of this inquiry.

[15] Page 6 of the EIA’s reply submission refers to the September 5, 2000 Dryden letter. I have already decided that this letter was delivered in a mediation context and, again, I have disregarded it for purposes of this inquiry. The rest of p. 6 of the EIA’s reply submission contains argument about the Ministry’s grizzly bear harvest strategy. To the extent that factual elements may also be included in that portion of p. 6, the absence of sworn evidence goes to weight, but it does not preclude any consideration of the EIA’s position.

[16] Page 9 of the EIA’s reply submission responds to concerns, expressed in the Ministry’s initial submission, about increased poaching pressure stemming from disclosure of the information. It does so by referring to Ministry press releases about individuals charged under the *Wildlife Act*. I fail to see how it is improper, or unfair to the Ministry, for the EIA to be permitted to respond in this way. Pages 9 and 10 of the EIA’s reply submission also respond to the Ministry’s argument, advanced in its initial submission, about the risk of hunter harassment. The EIA responds by referring to a

hunting lodge website and to text said to appear on that website, in order to demonstrate that information about the location of lodges and hunt dates and areas is already readily available to the public. I find somewhat surprising, and do not accept, the Ministry's objection to this aspect of the EIA's response regarding risk of hunter harassment, especially when one considers that the Ministry has itself tendered evidence on this point in the form of 38 pages of newspaper clippings, which are simply attached as an appendix to its initial submission.

[17] The balance of p. 10 of the EIA's reply submission responds to Exhibit "A" of the Drown affidavit, *i.e.*, a copy of a 1999 press release issued by PATH, a self-described "radical environmental organization". The EIA's response consists of information the EIA says it learned directly from PATH. The information is unsworn and hearsay, which goes to its weight, but it does not make it unfair to the Ministry that the EIA has been given an opportunity to respond to the contents of the Drown affidavit, which was part of the Ministry's initial submission.

[18] Page 15 of the EIA reply submission responds to para. 25 of the Dryden affidavit, again provided by the Ministry with its initial submission. The EIA's response is a narrative criticism of Dryden's evidence and it refers to an Alberta map of kill distributions that is said to be publicly available (and a copy of which is appended to the EIA reply submission). Again, the fact that the EIA seeks to introduce unsworn statements of fact, or opinions that are not demonstrated to derive from a qualified expert, goes to the weight to be given to such information. It does not, however, mean that it is unfair or improper for the EIA to be permitted to respond to evidence in the Dryden affidavit.

[19] Last, the Ministry objects to what it considers unfair and prejudicial attacks by the applicants on the professional qualifications of Ministry deponents. An example of material to which the Ministry objects is the following passage from Raincoast's reply submission, at pp. 3 and 4:

... The Public Body has not provided any credible evidence that the release of this information poses a danger of harm to grizzly bears due to the risk of poaching. The Public Body has failed to provide any studies, reports or even anecdotal evidence that support its position. The Public Body's position is based solely on the opinions expressed in the Affidavits of Messrs. Austin, Drown, Dryden, Hatter and Walker. The determination of whether grizzly bear kill data would assist a poacher in finding live grizzly bears cannot be made without an understanding of the habits and characteristics [of] grizzly bears themselves. The Affidavits of Drown, Dryden, Hatter and Walker disclose no expertise or experience which would allow them to give opinions related to grizzly bears (Drown and Walker have no scientific credentials whatsoever). The Austin Affidavit does include one article related to bears, but this article simply communicates the British Columbia government position as to the status of bears in the province and does not attribute any of the research or population estimates referenced in the article to be the work of Mr. Austin. Simply put, there is no basis for giving any weight to the opinions expressed in the Affidavits of Austin, Drown, Dryden and Walker.

Raincoast, however, has provided the opinions of two eminently qualified scientists, Dr. Brian Horejsi and Wayne McCrory, who have 45 years of direct experience as bear

biologists and who have extensive lists of peer reviewed publications regarding bears. It is the uniform and unequivocal opinion of both these scientists that the release of the requested records will not pose any risk to grizzly bear populations. As Wayne McCrory (who has experience as a big game hunter and guide outfitter as well as experience as a bear biologist) states in paragraph 15 of his Affidavit, grizzly bear kill information provides little or no benefit to a poacher and is far less valuable than other types or readily available information.

Given that there appears to be a difference of opinion regarding the value of grizzly kill mortality data to poachers, deference must be paid to more qualified opinions. Given the superior qualifications and experience of Dr. Horejsi and Mr. McCrory, their opinions are entitled to considerably more weight than those opinions provided by the Public Body.

[20] In its affidavits, the Ministry has adduced various individuals' opinions about the behaviour of bears, hunters, poachers and activists and has supported those opinions by referring to the academic and professional qualifications and experience of its deponents. Raincoast, for its part, has offered the opinions of Horejsi and McCrory, which it supports by referring to their academic and professional qualifications and experience. To my mind, it was foreseeable that the applicants' reply submissions would compare and challenge the qualifications and experiences of the various deponents. In fact, it was virtually inevitable that this would happen, given the content and approach of both the Ministry's and the applicants' initial submissions. I find nothing unfair about allowing the applicants to challenge the qualifications and experience of those who, on the Ministry's behalf, have given opinion evidence and have offered up their qualifications and experience to legitimize and bolster the validity and credibility of that evidence. In my view, the Ministry got as good as it gave here and it should not expect to tender opinion evidence without facing the risk that the qualifications and experience of its deponents, and the validity of their opinions, may be scrutinized and challenged, even severely.

[21] I note that the Ministry has, in any event, responded to the applicants' challenges by providing further argument and information about the knowledge of its deponents, particularly Austin. I consider that it was also fair game for the Ministry to challenge the credentials of Horejsi and McCrory. The Ministry has in fact done that to some degree. At p. 5 of its supplemental submission, it says that Dryden and Austin "have as much, if not more, direct scientific experience and expertise as the Applicant's experts do with respect to the management of grizzly bears."

[22] In my view, it is more to the point to assess the relevance, and weigh the validity, of the opinion evidence before me than to lodge procedural objections to the fact that the applicants have, predictably, challenged the credentials and experience of Ministry deponents who have offered opinion evidence.

[23] Last, the EIA asks me to draw an adverse inference from the fact that the Ministry has not provided evidence from Tony Hamilton, who the EIA claims is the "only acknowledged trained professional bear biologist working for the Public Body." The Ministry objects to this and claims, without offering evidence from him, that Hamilton actually supports its position. I decline to draw any inferences about whether Hamilton

supports or does not support the Ministry's position in this inquiry, or about his qualifications as a bear biologist.

[24] **3.3 Requirements of Section 18** – Section 18 of the Act protects information the disclosure of which could reasonably be expected to cause damage to or interfere with the conservation of certain things and resources. The section reads as follows:

**Disclosure harmful to the conservation of heritage sites, etc.**

18. The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of,
- (a) fossil sites, natural sites or sites that have an anthropological or heritage value,
  - (b) an endangered, threatened or vulnerable species, subspecies or race of plants, vertebrates or invertebrates, or
  - (c) any other rare or endangered living resources.

[25] This inquiry is concerned with only s. 18(b). The Ministry does not rely on s. 18(c) on the basis that grizzly bears are a living resource. The only order in which s. 18 has figured prominently is Order 01-11, [2001] B.C.I.P.C.D. No. 12. At para. 30 of that decision, I discussed the s. 18 harm test, for the purposes of s. 18(a), in the following terms, the emphasized portions of which are equally applicable to this case:

Section 18(a) identifies two kinds of harm, either of which can justify the withholding of information. The first kind of harm is a reasonable expectation of “damage to” a site having anthropological or heritage value. The second type of harm is a reasonable expectation of interference with the conservation of such a site. The City argues that there “must be a direct linkage between the disclosure and the anticipated harm” and that it must establish that “certain individuals have a *motive* to loot, vandalize, or otherwise harm sites of anthropological or heritage value”, and that “disclosure of the List supplies these individuals with an *opportunity* they would not otherwise have” (emphasis in original). **As I have said in other cases, the reasonable expectation test under the Act is satisfied where a public body provides evidence the clarity and cogency of which is commensurate with a reasonable person's expectation that disclosure of the disputed information could lead to the harm specified in the relevant exception under the Act. While it is not necessary to establish certainty of harm, there must be a rational connection between the feared harm and disclosure of the specific information in dispute.** [bold emphasis added]

***No Balancing of Interests Under Section 18***

[26] Having noted that, under s. 18(b), the Ministry has a discretion to release information to which this exception applies, Raincoast argues (at p. 2 of its initial

submission) that I should consider the following factors in deciding whether s. 18(b) can be applied to withhold the disputed information:

- 1) Would release of the information pose a significant risk to conservation efforts?
- 2) Do the interests served by withholding the information outweigh any public interests served by releasing the information?

[27] This is not the test under s. 18(b). On the first point, the section on its face does not require there to be a “significant risk” to conservation efforts before information can be withheld. On the second point, the applicants believe the Ministry has mismanaged grizzly bear conservation by permitting over-harvesting. They also believe the disputed kill location data would enable them to properly assess the state of this resource and contribute to conservation decisions in particular areas. They oppose the Ministry’s claims that disclosure would cause damage to grizzly bears or interfere with their conservation. They also ask me, in effect in the alternative, to weigh the Ministry’s claims against the positive contributions to grizzly bear conservation that the applicants say would flow from release of the disputed information.

[28] Such an analysis would have me assess the risk of damage to grizzly bears or their conservation against the conservation benefits the applicants say could be accomplished through disclosure of the disputed information. In my view, s. 18(b) does not permit me to balance public and other interests in this way. The applicants are asking me, in effect, to engage in a risk-benefit analysis by balancing disclosure and non-disclosure interests. This would involve my assessing the validity of the applicants’ contentions that controlled hunting is damaging to grizzly bears and interferes with their conservation and that fully-informed participation by the applicants and the public is necessary to ensure the responsible management and conservation of the grizzly bear population.

[29] Section 18(b) requires me, rather, to ask if disclosure could reasonably be expected to damage an endangered, threatened or vulnerable species or to interfere with its conservation. For this purpose, “conservation” includes action, by legal or practical means (or both), to safeguard something – including a species or its habitat – from damage or degradation or actions by such means to promote or enhance the continued existence of that thing. The benefits to grizzly bears and their conservation that the applicants say will arise from disclosure of the disputed kill location data do not have a direct connection to the Ministry’s s. 18(b) concerns about the consequences of disclosure, which are: (a) increased hunting and poaching success; (b) vague or inaccurate reporting of kill locations by hunters; and (c) harassment of hunters and grizzly bears. I do not consider that the benefits alleged by the applicants can be properly used to diminish or eliminate the s. 18(b) considerations advanced by the Ministry.

### *Legislative History of Section 18*

[30] I will also deal, at this point, with the Ministry’s appeal, in para. 4.19 of its initial submission, to the “legislative history” of s. 18 as a tool for determining the Legislature’s

intention in enacting the provision. Citing the Supreme Court of Canada decision in *R. v. Davis*, [1999] 3 S.C.R. 759, the Ministry quotes and relies on the following statement about s. 18 – apparently made by the Attorney General of the day – during legislative debate on the Act (no date or Hansard citation was given):

C. Serwa: ... It seems to me, if there was concern about a specific area, species or archaeological site or something, that one could restrict access until certain steps were taken, but to deny information pertaining to a species of plant or animal or something like that doesn't seem appropriate to me...It is an unusual exception to the freedom-of-information legislation. Perhaps the minister could indicate to me the justification for this particular section.

Hon. C. Gableman: If you release the information as to site location, you'd have to have an army of police to prevent people from destroying it by going to it, and then it's too late. Our view is that if there was a reasonable expectation that a site or species could be damaged by the release of information *about the location*, we would not release the location. If you do, and it's damaged, you can't retroactively fix that up; but you can by preventing a release of the location. I appreciate that it's not very free, but it certainly protects these sites and species. [Ministry's emphasis]

[31] The Ministry says, at para. 4.19 of its initial submission, that this statement makes it clear that s. 18 was intended to “protect precisely the type of information at issue in this inquiry, namely, information concerning the location of a vulnerable species”. The Ministry contends that disclosure of kill locations will enable someone to locate living bears – a proposition that is discussed below. The Ministry also emphasizes the Attorney General's statement that harm to a vulnerable species “cannot be repaired retroactively”. This means, the Ministry argues, that s. 18 contemplates a public body being able to prevent such harm by withholding information as to the location of a species, as in this case.

[32] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, Iacobucci J. approved the following statement of principle in E. Driedger, *Construction of Statutes*, 2nd ed. (Butterworths: Toronto, 1983), at p. 87:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[33] In citing this passage from *Rizzo*, the British Columbia Court of Appeal noted, in *R. v. McLeod*, [1999] B.C.J. No. 1264, that one also must have regard to s. 12 of the *Interpretation Act*, which reads as follows:

Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[34] A provision's legislative history – including what was said during legislative debates – can be a useful guide to its interpretation. In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, the Supreme Court of Canada was required to interpret provisions of the federal *Access to Information Act* and *Privacy Act*. At para. 49, La Forest J. said the following:

This interpretation is buttressed by the legislative history of the Acts. As this Court has recently confirmed, evidence of a statute's history, including excerpts from Hansard, is admissible as relevant to the background and purpose of the legislation, provided, of course, that the court remains mindful of its limited reliability and weight; see *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 483-85.

[35] Quite apart from, as La Forest J. put it, the “limited reliability and weight” of what is said in legislative debate, I consider that what the Attorney General said in debate merely accords with the interpretation of s. 18 that flows from the principle in *Rizzo*. As such, what that minister said in debate does not contribute in any significant sense to a determination of the Legislature's intention in enacting s. 18(b).

[36] I also disagree with the implication in the Ministry's submission that the Attorney General, by his statement, endorsed the view that specific location information regarding an endangered species would *always* meet the test in s. 18(b). It must be remembered that the Attorney General, quite properly in the context of the wording of s. 18(b), expressly referred to the requirement for a reasonable expectation that a site or species would be damaged by disclosure. The need for a reasonable expectation of damage or interference with conservation is a threshold that cannot, as the Ministry appears to suggest, be avoided or overcome by adoption of a general presumption about the effect of disclosing wildlife kill locations.

[37] **3.4 “Endangered, Threatened or Vulnerable” Species** – The s. 18(b) disclosure exception can apply only if the grizzly bear is shown to be an “endangered, threatened or vulnerable species” or subspecies. The grizzly bear is not, as far as my research indicates, designated as “endangered” or “threatened” in the Designation and Exemption Regulation, B.C. Reg. 168/90, made under the *Wildlife Act*. Indeed, my research disclosed no designation by regulation of any “vulnerable” species or subspecies for the purposes of the *Wildlife Act*. If a species or subspecies is designated as vulnerable, threatened or endangered under the *Wildlife Act*, it will likely have the same status under s. 18(b). Because this is a question of fact, however, the absence of a *Wildlife Act* designation does not, in my view, preclude a species from fitting under s. 18(b).

[38] The Ministry says the grizzly bear qualifies as “vulnerable” under s. 18(b) because it has been designated, since 1991, as a species of ‘Special Concern (Vulnerable)’ by the Committee on the Status of Endangered Wildlife in Canada (“COSEWIC”). COSEWIC was, the Ministry tells me, created in 1977 for the purpose of designating each year the status of Canadian species, subspecies and separate populations that are suspected of being at risk to some degree. Similarly, the Ministry says, the

British Columbia Conservation Data Centre (“CDC”) assesses which species are at risk in British Columbia and has ‘blue-listed’ the grizzly bear. A CDC blue-listing, the Ministry tells me, denotes indigenous species or subspecies that are considered to be vulnerable in the province. The Austin affidavit indicates, at para. 4, that blue-listing as a vulnerable species signifies that the grizzly bear is sensitive to human impact and natural events. The criteria for blue listing are described as: (a) animals that could become candidates for ‘red-listing’ (endangered); or (b) animals generally suspected to be vulnerable because information is too limited to allow designation in another category. A November 2000 article by Austin, attached as Exhibit “A” to his affidavit, indicates that some grizzly bear populations in British Columbia are also threatened:

For management purposes the occupied range of grizzly bears in B.C. has been divided into 60 populations; nine of these populations have been designated as “threatened” under the provincial Grizzly Bear Conservation Strategy. Grizzly bear hunting is not permitted in threatened populations and the first pilot recovery plan for a threatened population – the North Cascades – is currently being developed.

The other 51 grizzly bear populations in B.C. are designated as “viable” and, while strictly regulated hunting is allowed, included are many large areas where hunting is closed such as national parks, some provincial parks and grizzly bear sanctuaries such as the area surrounding the Khatzeymateen.

[39] Later in the same article, Austin also said the following:

... while there are populations we recognize as being threatened and grizzly bears are a sensitive species requiring careful management throughout their range, the majority of the grizzly bear populations in B.C are healthy and are not threatened by recreational hunting as it is currently managed.

The status of the bear populations in B.C. – particularly grizzly bear populations – varies dramatically across the province. The reasons for the status of each population are as varied as the ecosystems they inhabit and requires a flexible management approach that recognizes this simple fact.

[40] The proposition that the grizzly bear is an endangered, threatened or vulnerable species evidently underpins the urgency of the applicants’ conservation purposes in relation to the grizzly bear. They also contend, however, that the Ministry has justified the controlled hunting of grizzly bears on the basis that, where hunting has been permitted, the populations were healthy enough to support it. Raincoast says the following in its initial submission, at p. 15:

... MELP’s [the Ministry’s] reliance on section 18 is undercut by its own actions: it is refusing to release information about grizzly kill data, citing vulnerability of the species, at the same time it is issuing permits for the killing of several hundred of these “vulnerable” animals per year. It is incongruous (to be generous) that the distribution of information poses a significant risk to a grizzly bear population that can purportedly withstand a hunt of the magnitude of that allowed by MELP.

[41] EIA says the following at pp. 2 and 3 of its initial submission:

Before examining more detailed reasons for releasing the data, it is worth noting that in trying to withhold the requested information, MELP wants to hold incompatible positions:

- On the one hand MELP [the Ministry] claim publicly that whilst there are areas where the grizzly is classed as threatened and no hunting is allowed, in areas where hunting does occur, the general public has nothing to worry about, because MELP are managing the grizzly superbly. MELP population estimates are claimed to be incredibly conservative, with numbers healthy and growing. Furthermore, MELP claim that the hunting of 2-300 grizzlies a year combined with other mortalities results in a total death rate far below the level that could threaten the population, and there is therefore a huge safety margin resulting in no possible risk to the grizzly anywhere in BC from hunting, poaching or mismanagement.
- On the other hand, MELP now claim that the requested information cannot be released on grizzly kills anywhere in the Province (even in hunted populations) because this species is so fragile and close to the brink the data could lead to its devastation.

Both scenarios cannot be true. If the first is correct, there is no argument against releasing the data (at least in hunted areas) because the grizzly is completely secure, and the conservation concerns that are the reason for section 18 of the FOI are not relevant. Release of the data can only improve public understanding and support for necessary management actions, demonstrate the good management and resource use that MELP claims is happening, and allow scientists to augment the work of government biologists at no expense to the taxpayer.

If the second argument is true, then the public is being deliberately misled by MELP about the status of the grizzly and the threat posed by the hunt and other causes of mortality, and it is therefore crucial that data that demonstrates this is available. This would allow the public to be made aware of what is happening, and help build the support needed to rectify the situation. This would clearly be of benefit to the long-term conservation of the species, again negating the argument for failure to disclose under section 18 of the FOI. In any case as detailed later in this submission, EIA dispute strongly that release of the data would pose any conservation threat.

[42] Stated simply, the applicants consider it a contradiction in terms to permit the controlled hunting of an endangered, threatened or vulnerable species. They say the Ministry should not be allowed to argue both that the grizzly bear is vulnerable for the purposes of withholding the disputed information under s. 18(b) and that this vulnerable species is healthy enough to support hunting in some areas. This position is forcefully stated at p. 3 of Raincoast's reply submission:

Given the nature of the records requested – which exist only because the Public Body chooses to allow the killing of grizzly bears – it should not be open to the Public Body to rely on section 18 of the Act. Incredibly, the Public Body allows the killing of a vulnerable species and then claims that the risk to the species arises not because of the actual killing of the species, but from the public knowing details about the killing of the species. Where the Public Body chooses to allow activities

that cause the mortalities of a species at risk, it should not be allowed to shield that decision from public scrutiny.

[43] I do not agree with the applicants on this issue. Section 18(b) requires a determination of whether the grizzly bear is endangered, threatened or vulnerable. This question must be addressed without confusing it with the questions raised by the applicants about whether the Ministry has pursued programs that are inconsistent with the sound management or conservation of an endangered, threatened or vulnerable species. I make no comment at all on the applicants' contentions about the Ministry's programs or policies.

[44] As I noted above, the Ministry has presented evidence that the grizzly bear is a vulnerable species. The Ministry has itself also classified some grizzly populations as threatened. The applicants agree that the grizzly bear is endangered, threatened or vulnerable. I consider that, in the absence of evidence to the contrary, a species designated as vulnerable by COSEWIC or blue-listed by CDC would qualify as vulnerable for the purposes of s. 18(b). The grizzly bear fits this description and I therefore find that the grizzly bear is a "vulnerable species" for the purposes of s. 18(b).

[45] In light of this finding, I need not discuss differences in meaning between the words endangered, threatened and vulnerable in s. 18(b). Nor is it necessary or appropriate for me to resolve, in relation to this issue under s. 18(b), whether it has been sound wildlife management policy or practice for the Ministry to permit controlled hunting of grizzly bears.

[46] **3.5 Damage to or Interference with the Conservation of Grizzly Bears** – The Ministry's arguments on damage to, or interference with the conservation of, grizzly bears track the reasons for refusing access given in its responses to the applicants' access requests. The Ministry has also added points about the disclosure of kill locations in other jurisdictions – most notably Alaska and Alberta, which also permit the legal hunting of grizzly bears – and about harassment of hunters and animals. The Ministry's arguments can be summarized as follows:

- Alaska and Alberta wildlife authorities do not, for the same or similar reasons as the Ministry, disclose detailed grizzly bear kill locations. The practice of other United States jurisdictions to disclose such information is not relevant because the hunting of grizzly bears is prohibited in those jurisdictions.
- Public disclosure of detailed kill locations would affect live grizzly bears by increasing hunter success and incidents of poaching. This will result, in the short term, in the killing of more grizzly bears than the legal harvest levels contemplate.
- Public disclosure of detailed kill locations would assist activists in attempts to interfere with lawful hunting and would also result in disruption of live grizzly bear populations by those intent on viewing them.
- Public disclosure of detailed kill locations would result in hunters providing inaccurate or overly vague kill location data in the future. This will undermine the

Ministry's ability to conserve other vulnerable species (specifically, vulnerable ungulate species) and to identify and respond to over-harvesting within individual MUs.

[47] In order to fully assess the parties' arguments on the question of damage to, or interference with the conservation of, grizzly bears, it is necessary to first describe the disputed kill location data in more detail and then to discuss the significance, if any, of the applicants' stated intention to use that information responsibly.

### ***Origins and Precision of the Disputed Information***

[48] As I have already noted, the Ministry has disclosed some kill data to the applicants. It has disclosed the MU in which each kill occurred, the kill date and type, and the sex, maturity and age of the animal, where that information has been recorded. According to the Ministry, it collects kill data by the means, and for purposes, that I will now outline.

[49] The Ministry says its Wildlife Branch works to maintain and manage wildlife and its habitat and the sustainable "uses of" wildlife, while attempting to achieve an appropriate balance between human use of wildlife and wildlife conservation. Its conservation efforts include the development of harvest strategies – using information such as that in dispute here – and the implementation of those strategies through licensed hunting and trapping in accordance with the *Wildlife Act* and regulations made under it.

[50] At para. 4.02 of its initial submission, the Ministry says it "collects detailed harvest information from hunters via the Provincial Compulsory Inspection System, including the information at issue". It refers to "[s]ection 16 of the *Wildlife Regulations*". This appears to refer to s. 16 of the Hunting Regulation, B.C. Reg. 190/84 ("Hunting Regulation"), made under the *Wildlife Act*. Section 16(1) of the Hunting Regulation provides that it is an offence to kill a grizzly bear unless the hunter "submits the prescribed parts of the animal to an officer for inspection and measurement" within 15 days after the date of the kill or before exporting it from the province. Grizzly bear hunters are also required, under s. 16(4), to submit the animal's skull and "the hide that bears either a testicle or a part of the penis of the male or a portion of the teats or mammary gland of a female." Section 16(5)(a) requires the hunter to report the killing to a conservation officer within 15 days after the kill. Section 16(5)(b) prescribes the contents of the mandatory report. It reads as follows:

- (b) For the purpose of this subsection, report means providing the following information:
  - (i) the location of the kill;
  - (ii) the date of the kill;
  - (iii) the hunter's or taker's name, address and telephone number;
  - (iv) the species and sex of the animal taken or killed;

- (v) the licenses and Limited Entry Hunting authorizations which authorized the taking or killing.

[51] The Dryden affidavit, at para. 3, describes the disputed information as “the UTM [Universal Transverse Mercator] zone, the UTM East and North coordinates and a further description of the kill location.” He explains, at para. 24, that the Ministry has divided the province into 228 MUs and says that the number of kills, annually, in each MU has been disclosed to the applicants. He describes the compulsory system for reporting kill locations as follows, at para. 9:

Typically, when hunters are under a legal obligation to report information to the Public Body, they will come into a Public Body office and answer questions asked by a Public Body employee. A standard form is then filled out by Public Body staff according to information provided by the hunter. The hunter is asked to point to a map to locate the site of the kill location. The method of mapping used by the Public Body is called “Universal Transverse Mercator System”. A grid is placed on the map and, using the location identified by the hunter, the Public Body is able to identify the precise co-ordinates of the kill location.

[52] The Ministry also collects data from randomly-selected hunters through its annual harvest questionnaire, participation in which is voluntary. The Ministry says the questionnaire states at the top that it is “confidential when completed”. (The Ministry says, at para. 4.06 of its initial submission, that, as provided in its internal policy manual, information concerning kill locations is kept confidential. This Ministry policy cannot, of course, override the Act.) At para. 4.03 of the Ministry’s initial submission, the Ministry says hunters are asked to disclose the following:

- the MU where they hunted,
- the zone where they hunted,
- the nearest watershed or landmark (i.e. kill location),
- the number of days they hunted in that location,
- whether this was a limited entry hunt,
- if they killed an animal, they are asked whether the animal was male, female, a young animal and the date of the kill.

[53] The Ministry says, at para. 4.04 of its initial submission, that it needs grizzly bear kill locations

... not to initially assess the health of the given population, but to be able to remedy any situations where the Public Body finds that there is over hunting of a given grizzly bear population (i.e. to close an area within the population unit to hunting) and for other management purposes.

[54] At para. 4.05 of its initial submission, the Ministry says the information collected through the compulsory reporting system and the voluntary harvest questionnaires has been valuable “in its efforts to ensure the long-term sustainability of wildlife resources in the province.”

[55] What emerges from this material is that, in order to fulfill its wildlife management responsibilities, the Ministry collects kill data, including kill locations, on the basis of both general and more specific location descriptions. Moreover, much of the kill information – including kill locations at a MU level – can be and has been released to the applicants under the Act without damaging grizzly bears or interfering with their conservation.

[56] The Management Unit Regulation, B.C. Reg. 64/96 (“Management Unit Regulation”), made under the *Wildlife Act*, divides the province into 225 MUs and indicates that a map showing their boundaries can be inspected at Ministry offices in Victoria. It is not clear why the Management Unit Regulation refers to 225 MUs province-wide, while the Dryden affidavit refers to 228 units, but I attach no significance to the discrepancy for the purposes of this inquiry. The Ministry has not provided a map or other detailed information revealing the size of MUs. However, there is evidence in the first Horejsi affidavit that MUs are not uniform in size and evidence as to the limits of their size range. At para. 12, he deposed that the smallest MUs are about 888 square kilometres and the largest are about 2,640 square kilometres. The Ministry did not object to these figures.

[57] I have examined a copy of the Ministry’s record of the kill location data that has been withheld from the applicants. The data span the period from 1976 to 2000. For each kill, the MU has been disclosed, but location data appearing under the following headings have been withheld: UTM Zone, UTM East, UTM North and Kill Location. Where they are present, the UTM entries are numbers. For some kills, the only data entry is for Kill Location and no data are entered under UTM Zone, UTM East or UTM North. In such cases, the Kill Location entry is a description of a landmark or other geographic marker, usually a named creek, river or lake. In the data for earlier years, especially, a few of these entries include references to mileage, *e.g.*, ‘ABC Creek, Mile 31’ or ‘Mile 53, XYZ River’. It is not apparent in such cases what point of departure was used by the hunter or the Ministry’s employee in providing the mileage reference.

[58] At para. 5 of its reply submission, the Ministry says the following:

Scale maps with UTM grids are currently available for purchase by the public at Crown Publications stores and many outdoor stores. Once a hunter or poacher obtains the UTM coordinates for kill locations, all they need to do is locate the coordinates on such commercially available maps to find the locations. UTM coordinates can lead someone to find a location within one meter. Another tool commercially available to hunters and poachers are GPS (global positioning system) devices. Such devices are becoming quite common. For example, one can purchase a watch that includes a GPS function for a couple of hundred dollars. Someone can enter UTM coordinates into a GPS device and it will direct the individual directly to the exact location of the inputted UTM coordinates. In

addition, anyone with knowledge of Geographic Information Systems could make use of UTM co-ordinates to locate bears. As such, the Public Body submits that the potential that members of the public, other than the Applicants, can potentially make use of the requested data in order to locate exact kill locations is not as remote as the Applicants indicate.

[59] I acquired a sample of a map with UTM grids from a Crown Publications store, *i.e.*, the Energy, Mines and Resources Canada 1:50,000 scale topographic map entitled 'Flathead Ridge' (map 82 G/7, Edition 3). The area that map covers is in UTM Zone 11. It bears UTM grid-lines, shown in blue ink, at intervals of 1,000 metres. The East grid lines on the map begin just short of 646,000 metres East (at the map's southernmost edge) to just short of 682,000 metres East (again at the southernmost edge). The North grid lines range from just short of 5,457,000 metres North (at the map's westernmost edge) to just above 5,484,000 metres North (again at the westernmost edge).

[60] The 60 UTM zones in the world run from north to south. As they are of a uniform size, each zone is 6 degrees of longitude wide at all points. These zones are obviously very large areas, far larger than the MUs for which the Ministry disclosed kill location data. In her first affidavit, at para. 9, Butler deposed on information and belief from Dana Hayden, a Ministry Assistant Deputy Minister, that, in deciding to withhold the disputed information, the Ministry considered that "[t]here is no reason to think that a compromise can be reached on severing some of the information while releasing other parts." The Ministry has not provided other evidence or argument as to why kill data at the UTM zone scale has been withheld from the applicants. It may be that, because UTM East co-ordinates are always east of a UTM zone reference line, the Ministry withheld the UTM zone data in conjunction the UTM East co-ordinates. Nonetheless, the perspective on severance expressed in para. 9 of the first Butler affidavit is not sustainable in relation to the UTM zone data. That data are readily severable from the Ministry's record of the disputed information and identifies kill location less precisely than the information that has already been disclosed to the applicants.

[61] The UTM East data, where it appears in the Ministry's record, is expressed in three digits. This is a partial easting because it does not include the last three digits necessary to complete the full description of the number of metres east of the reference line for the UTM zone involved. The result is that the Ministry has recorded UTM East data in the disputed record on the basis of 1,000 metre increments. The UTM North data, where it appears in the disputed record, is expressed in four digits. This is a partial northing, because it does not include the last three digits necessary to complete the full description of the number of metres north of the equator. As with the UTM East data, the result is that the Ministry has recorded UTM North data on the basis of 1,000 metre increments.

[62] Paragraph 5 of the Ministry's reply submission, quoted above, leaves the impression that the information in dispute here consists of UTM co-ordinates that identify locations to within one metre. UTM easting and northing co-ordinates certainly can record information to the level of refinement described in the last sentence of this passage. As I have explained, however, both the UTM East and UTM North data

withheld by the Ministry are set out in the disputed record only to a refinement of 1,000 metres, or one kilometre. It is incorrect, therefore, to suggest that the disputed information identifies locations to within one metre.

[63] Although the Dryden affidavit refers to the recording of “precise” UTM co-ordinates for kill locations, it is apparent from the information collection process he describes that Ministry staff establish and record UTM co-ordinates on the basis of geographic descriptive information about kill locations that is provided by hunters. Whether the UTM co-ordinates are recorded accurately and on a scale that meaningfully or precisely pinpoints kill locations depends on: (a) the quality and precision of the descriptive information provided by the hunters, (b) the accuracy with which various Ministry staff translate and interpret that descriptive information into UTM co-ordinates, and (c) the refinement of the co-ordinates recorded by Ministry staff.

[64] Consistent with the Ministry’s description of the information collected from hunters, as required by the Hunting Regulation or voluntarily, the information withheld under the Kill Location heading describes a watershed (such as ‘Black Creek’) or landmark (such as ‘White Mountain’) as the kill location. Other geographic location descriptions, such as specific lakes or inlets, are also used. I have already noted that, in a minority of cases, geographic location descriptions appear with a mileage reference, with no point of departure for measurement being expressed.

[65] As with the UTM co-ordinates, the accuracy of the data recorded under Kill Location will depend on the quality of the descriptive geographic information provided by hunters. The precision of the geographic location identifiers will also depend on the size of the watershed or landmark involved. It is entirely possible, for example, for a river or even a creek to be 10 to 15 kilometres long and to drain many kilometres of area on either side. Further, the Ministry’s evidence about its data collection system indicates that the Kill Location description elicited from hunters is a point of nearest geographic reference to the kill site, as opposed to a record of the actual site. Finally, in the cases where only geographic kill location data have been recorded, and UTM co-ordinates are not given, there may be more than one location with the same name. For example, there is more than one Harvey Creek in British Columbia so that, in the absence of UTM reference points, which creek is being referred to would have to be speculated on or deduced from other information.

[66] To summarize, the UTM co-ordinates found in the record in dispute have a 1,000 metre range, both east and north. Co-ordinates have not been recorded to a refinement of one metre. The co-ordinates are, moreover, vulnerable to error or imprecision because the reporting system relies on the quality of the descriptive information provided by each hunter and on the interpretation and translation of that information by various Ministry employees. Descriptive location information, by its nature, will always have weaknesses, even when hunters try to be helpful and accurate in the information they provide. This observation applies also in the minority of cases where descriptive location information is accompanied by some sort of mileage reference. The process of interpreting, or translating, descriptive geographic information will also be vulnerable to error or imprecision despite the best efforts of the Ministry’s employees.

[67] In other words, the UTM system may be a precise geographic location system, but whether the UTM co-ordinates recorded by the Ministry are accurate and precise indicators of grizzly bear kill locations is another matter. Further, for some kills, no UTM co-ordinates have been recorded. Only descriptive kill locations are recorded. As with UTM co-ordinates, the Ministry depends on the quality of the information provided by hunters in recording such kill location data. The descriptive information under the Kill Location heading is collected on the basis of the geographic point of reference nearest to the kill site. It also denotes geographic markers that may cover large areas – such as a body of water or a watershed – or exist by the same name in more than one place in British Columbia.

[68] It should be said here that, as regards the Ministry’s submission, set out above, about use of GPS to find “exact kill locations”, such devices are only as accurate as the data entered into them. Again, the disputed UTM data are not – even if one ignores the influences on accuracy noted above as (a) through (c) – precise to within one metre. The possible use of a GPS device does not, in this light, matter. This is not a case in which precise locators have been recorded by hunters in a GPS device at the kill location and then reported to the Ministry. What significance the disclosure of such information might have under s. 18(b) is not in issue before me.

#### *Applicants’ Intended Use of the Disputed Information*

[69] The Ministry says disclosure to the applicants should be treated as disclosure to the public generally. At paras. 4.20 and 4.21 of its initial submission, it argues that, although the applicants are non-profit organizations “dedicated to the protection of grizzly bears”, their identity and activities are irrelevant to the s. 18(b) analysis. It follows, according to the Ministry, that I must consider the consequences of the kill location data “being publicly available to the public generally, including to hunters and poachers.”

[70] The applicants emphasize that their goal is to ensure the viability of grizzly bears. They say they would only use information identifying precise kill locations in a manner consistent with that objective. They stress that they seek this information for research purposes, so that scientists independent of government can study it and be in a better position to contribute to the management of the grizzly bear. There is ongoing debate about the management of grizzly bears in scientific communities and amongst the public. The applicants therefore believe it is in the interest of grizzly bears that the debate not be limited, in terms of the information available for that purpose, to circles within or controlled by the Ministry. Raincoast explains, in some detail, the reasons behind the applicants’ apparent lack of confidence in the Ministry’s management efforts and behind their insistence that the grizzly bear management data available to government should be reviewed by scientists who are independent of government. That story is told principally through the McCrory affidavit, at paras. 2 to 12, which merit full quotation here:

2. In 1995 I was invited by the British Columbia government to sit as a member on its Grizzly Bear Science Advisory Panel. The Panel was composed of 12

scientists with expertise in the field of bears and carnivore biology. The Panel was to report directly to the B.C. Minister of Environment, Lands and Parks (“MELP”) and the Panel members were guaranteed academic freedom and independence from political interference. A “Terms of Reference” document set out the roles & functions of the Panel. The Panel was to meet four times a year to make recommendations and decisions related to the implementation of the 1995 grizzly conservation strategy, and about the grizzly bear management and conservation in British Columbia in general.

3. In 1996 the Scientific Panel was asked by the MELP to comment on the proposed Jumbo Glacier ski resort, planned for the Jumbo Valley near Invermere, and its potential impact on grizzly bear populations in the region. Our subsequent response to the then Minister of Environment, Lands and Parks Moe Sihota is attached as Exhibit “B” to this, my affidavit. Our response made it clear that the proposed resort would have a significant detrimental effect on grizzly bear populations in the area. However, the agency has never published or released our determination, and it was subsequently removed from the working package that was supposed to be circulated at every meeting. No reason was given for the failure to release the letter. Instead, the Panel was told to “smarten up.” Tony Hamilton, the government grizzly bear biologist on the Panel, told other Panel members that he was reprimanded, his job was threatened, and that he had been subject to a gag order never to discuss Jumbo again.
4. Between 1995 and 1997 a major project of the Panel was to design for the Kootenay Region a conservation network to protect grizzly bears based upon the province-wide grizzly bear strategy. This project also included other interior areas such as Wells Grey Provincial Park. This was within the stated tasks assigned to the Panel according to the “terms of reference” planning document. After about two years of scientific work, the Panel was nearly ready to present to the Minister a specific mapping model. This model included grizzly bear benchmark areas with no hunting (usually centred on protected areas), and the designation of accompanying hunted land areas with activity guidelines. As per the 1995 Grizzly Bear Conservation Strategy, the Panel recommended that no hunting occur within the benchmark areas. There were about eight such large areas delineated on the map overlays for the East and West Kootenays. The Panel was unanimous in its confidence that this would provide an excellent model for British Columbia. In my professional opinion, it was a landmark piece of scientific work. However, before the final mapping could be completed, the government representative to the Panel announced that we were to terminate our work and that we were to develop only provincial guidelines based on our mapping exercise. This was contrary to our original “terms of reference.” The Panel was informed by Tony Hamilton, the government representative on the Panel, that our map work was no longer necessary as the government would be developing its own maps for benchmark, linkage areas and so on following the Panel’s guidelines. The majority of the Panel acquiesced to this, but decided to at least complete the Kootenay Maps. However, at the next meeting the Panel was informed that all their maps had been “lost” during an office move. Attempts to redo them proved futile due to the large amount of work entailed in repeating two years work. During the duration of the Panel’s term to 2000, no maps were completed by government that in any way resembled the Kootenay mapping

design done by the 12 Panel biologists, many of whom were very familiar with the Kootenay Region. After five years, no Official Grizzly Bear Benchmark Areas in which grizzly hunting is disallowed have been designated by government, for the Kootenays or elsewhere in the Province.

5. Subsequently, MELP refused to provide me, as a Panel member, the detailed mortality data including kill locations. The MELP biologist, Mr. Matt Austin, told me he had been reprimanded for releasing some information to the Panel and that (as a Panel member) I would have to apply through FOI to obtain that information.
6. The Panel met with the then Honourable Minister of the Environment, Lands and Parks, Cathy McGregor, in the fall of 1998 to voice their concerns about the level of government interference with their work and the lack of government implementation. Ms. McGregor explained that there had been resistance from the hunting community to benchmark areas with no hunting, and that the time was not right to pursue other recommendations. She also explained that the failure to implement adequate guidelines for the Forest Practices Code under the Identified Wildlife guidelines was due to conflicts with the forest sector. Finally, she stated that as Minister of Environment, she had comparatively little influence in the matter.
7. In October 1998, the Panel decided to produce a three-year “report card” on the performance of the Minister and MELP on the protection of grizzly bears and the implementation of an effective grizzly bear management strategy. A copy of the report card is attached as Exhibit “C” to this, my affidavit. The report card was highly critical of the Minister and the performance of the Ministry, and awarded five ‘F’s and four ‘D’s. I was the only member present who did not sign the report card. I did not sign it because I felt that the grades given in a number of areas, including population estimation, were too generous.
8. Shortly after the release of the report card, the funding to the Scientific Advisory Panel was cut. Two of the MELP biologists sitting on the Panel, Sean Thorpe and Tony Hamilton advised the Panel that they had been officially reprimanded for signing the report card, and that their jobs had been threatened. I resigned from the Panel shortly after.
9. In March 2000, I wrote to the Minister of Environment outlining my concerns about the treatment of Wildlife Branch biologist Dionys DeLeeuw by MELP. Mr. DeLeeuw had written a report which cast doubt on the grizzly bear population estimates of the government, and recommended a moratorium on grizzly bear hunting. Mr. DeLeeuw was subsequently suspended without pay for ten days, and was required to comply with a gag order forbidding him to make any comments to anyone regarding grizzly bears. All copies of his report – which had been circulated only to other biologists within the Ministry – were collected and destroyed. A copy of my letter is attached as Exhibit “D” to this, my affidavit.
10. In September 2000, I received a letter from the Minister of Environment, Lands and Parks Joan Sawicki inviting me to return to the Science Advisory Panel. My letter of October 3, 2000, in reply is attached as Exhibit “E” to this, my affidavit.

11. In September 2000, I received a request from Mr. Charles Daphine, of the Canadian Wildlife Service of Environment Canada, asking me to comment on a B.C. Wildlife Branch's report that found that the export of grizzly bears from British Columbia would not be detrimental to grizzly bear populations. My letter of October 3, 2000, is attached as Exhibit "F" to this, my affidavit.
12. In December 1999, the Valhalla Wilderness Society circulated a petition among biologists familiar with the grizzly bear situation in British Columbia. The petition, attached as Exhibit "G" to this, my affidavit, received 68 signatures including myself, and called upon the government to:
  - a) Enact a 2-year moratorium on road-building in all intact grizzly bear habitats over 2000ha and implement immediately, without constraints, the grizzly bear habitat protection guidelines under the Identified Wildlife section of the Forest Practices Code
  - b) Enact a 5 to 10-year moratorium, depending on the area, on all sport hunting of grizzly bears pending completion of 10-year, comprehensive population studies and analyses in the 6 different bioregions to determine whether bear populations can sustain hunting.

[71] McCrory's October 3, 2000 letter, a copy of which forms Exhibit "F" to his affidavit, is highly critical of what he describes as government interference with the work of the Grizzly Bear Scientific Advisory Committee. The letter concludes with McCrory's statement that he would be willing to serve on a future advisory panel, but only if the government is committed to truly meaningful changes to conserve the grizzly bear and appoints a panel of bear scientists who are independent of government. McCrory's letter of October 10, 2000, a copy of which is Exhibit "G" to his affidavit, strongly disagrees with a Ministry report that said the export of grizzly bears is not detrimental to the province's grizzly bear populations. He describes the Ministry document as "misleading" and is highly critical of virtually all aspects of the government's management of grizzly bears.

[72] The Ministry responds briefly to the mis-management issues raised by McCrory's affidavit as follows, at para. 24 of its reply submission:

Both Applicants make a number of allegations concerning the actions of the Public Body and its representatives, in the context of the BC Grizzly Bear Science Advisory Panel, the Grizzly Bear Conservation Strategy and otherwise. The Public Body fails to see the relevance of such allegations. Let us not lose sight of what is at issue in this inquiry, namely, whether section 18 authorizes the Public Body to withhold precise kill location data and whether section 25 requires disclosure of such information. Such submissions may seem relevant to the overall objective of the Applicants, namely, that there be a moratorium on grizzly bear hunting, but they are of no assistance to the Commissioner in this inquiry. In the event that the Commissioner decides to consider such allegations the Public Body hereby requests additional time in order to gather evidence and reply to those allegations.

[73] It seems from the McCrory affidavit that there are credible scientists, within and outside government, who strongly disapprove of the government's performance with respect to the management of grizzly bears. Indeed, this disapproval is a strong

undercurrent of the access requests behind this inquiry. Nonetheless, the quality of the government's management of the grizzly bear is not an issue to be determined in this inquiry. Further, despite the good faith and legitimacy of the applicants' intentions, I consider that, as in Order 01-11, the s. 18(b) analysis should be approached on the working assumption that disclosure to the applicants amounts to public disclosure. With the exception of access by individuals to their own personal information, Part 2 of the Act is an instrument for public access to information and is not an instrument for selective or restricted disclosure. The idea of an applicant being bound to make only restricted use of non-personal information disclosed through an access request under the Act is inconsistent with the objective of public access articulated in s. 2(1) of the Act.

[74] In its initial submission, the EIA alleges that the Ministry has provided kill location information to at least one bear biologist. The Ministry responds to this, at para. 17 of its reply submission, as follows:

In 1998 the Public Body provided kill location data to Bryon Benn, a Masters student working under Dr. Herrero's supervision. Such information was shared on the understanding that the kill location information would remain confidential.

[75] The EIA's allegation is an example of a tendency to lose sight of the fact that public bodies can release non-personal information, restrictively or publicly, outside of the Act, as s. 2(2) of the Act confirms. That section provides that

... this Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

[76] The reality is that, acting outside of the Act, the Ministry could release non-personal information to the applicants for restricted purposes such as research (and s. 35 of the Act allows disclosure of even personal information, in restricted cases, for research purposes). I do not know if the applicants have requested, outside of the Act, access to detailed kill locations for research purposes. I would think that a commitment from the applicants of confidentiality or restricted use would be a relevant consideration for the Ministry in considering such a request outside the Act. There may also be other considerations for the Ministry to weigh in assessing such a request.

[77] When it comes to assessing, under s. 18(b), the risk of harm from disclosure, I do not think the applicants' stated intentions to make responsible scientific and conservation use of the disputed information warrant an assumption that, if they are given access, it will not be public access. Indeed, it is clear from the applicants' submissions in this inquiry that their intended scientific and conservation use of the disputed information merges with their participation in the public debate about grizzly bear management issues. This is a factual observation, not a criticism. I accept that the applicants have good intentions and that their proposed uses of the disputed information are legitimate. Opinions may differ on whether, outside of the Act, the applicants ought to be given restricted or conditional access to grizzly kill locations for research purposes. That would, however, be a matter for the Ministry's judgement outside of the Act. It is not

part of the right of public access to information under the Act, the determination of which is the purpose of this inquiry.

[78] I should note here that, at the same time it argues that disclosure of the disputed information under the Act must be regarded as public disclosure, the Ministry emphasizes the importance to it of the disputed information, while challenging the legitimacy of the applicants' requests for the same information. An example of this is in paras. 7 to 10 and 15 to 18 of the Austin affidavit, which bear full quotation here:

7. The Public Body relies upon resident hunters and guide outfitters to provide accurate information regarding kill locations for grizzly bears. The purpose of such data collection is to enable the Public Body at a later time to consider such information for ongoing research and management purposes. Though the Public Body does not use information to determine if grizzly bears are being over harvested (to determine that we look at the harvest in relation to overall population units), there are some useful ways the Public Body can use such information. For instance, if someone wanted to look at establishing a bear viewing site the Public Body would need to look at whether bears had been hunted in that area before. The Public Body's policy is that once bear viewing sites are approved the area will be closed to hunting. However, if that same area is popular for hunting, this is a factor the Public Body would want to consider in deciding whether to approve the area for a bear viewing operation.
  8. The Public Body needs to collect kill location data in the event that it determines that a certain population of grizzly bears is being over harvested. As mentioned, one looks at the population unit level to determine if there is such over harvesting. If there is, then kill location information could be looked at to determine if there are specific locations that should be closed (i.e. locations with a number of kills). The Public Body could then consider closing that specific area within the management unit to hunting. Anything that would undermine the Public Body's ability to collect accurate kill location data would deprive the Public Body of a means of identifying potential areas for spot closures where population level information indicates that such closures may be beneficial for conservation purposes.
  9. An example of a spot hunting closure by the Public Body is the case of Glendale Cove, where there is a fishing weir. Bears have significant success finding salmon at that location. Because of the fact that bears are frequently found at that location the Public Body closed that location to hunting. Such spot closures do not happen frequently, but they do happen.
  10. The Public Body uses kill location to conduct research of factors that influence grizzly bear mortality such as distance to roads. Anything that would undermine the Public Body's ability to collect accurate kill location data would deprive the Public Body of the information needed to conduct research on grizzly bear mortality patterns and therefore to the results which could have important implications for grizzly bear conservation.
- ...
15. I believe that the harvest information already disclosed to the Applicants (including Management Unit of each kill) is sufficient for them, or anyone else, to be able to adequately scrutinize the conservation efforts of the Public Body,

- i.e. to determine whether there have been appropriate allowable harvest levels in the past. That information should be sufficient in order to demonstrate to the Applicants that the Public Body is ensuring that there is no over-hunting of grizzly bears. Kill locations would not give the Applicants any additional information concerning harvest levels. They already know the harvest levels.
16. One determines whether grizzly bears are being properly conserved by considering the rate at which grizzly bears in a specific Grizzly Bear Population Unit (GBPU) are killed, not identifying particular locations within those GBPUs where the bears have been hunted. A GBPU is an area that encompasses a population or sub-population of grizzly bears. The boundaries are formed by natural or human caused barriers to grizzly bear movement or ecological transitions.
  17. It is generally accepted amongst bear experts that knowing where bears are killed is not a significant factor in assessing the sustainability of harvest levels. As mentioned, it can be useful in dealing with situations where it has already been determined that there is over-harvesting. However, such information does not assist someone in determining whether existing harvest levels are sustainable.
  18. If the Applicants really wanted to ensure the conservation of grizzly bears they should understand that any decision that kill locations are publicly available under the *Freedom of Information and Protection of Privacy Act* would result in damage and interfere with the conservation of grizzly bears.

[79] Evidence relevant to this point is also found in paras. 7, the second of two paragraphs numbered 22, 23 to 28 and 31 of the Dryden affidavit, which read as follows:

7. ... Accurately reported harvest data is vital to the careful management and conservation of any harvested species, including grizzly bears ...
- ...
22. I believe that from a scientific/conservation perspective it is not important for the Applicant to have access to specific kill locations concerning grizzly bears. The information that is relevant from a conservation/scientific perspective is the total number of a given animal population and the number of animals killed on a year-by-year basis in that given population.
23. I believe that the harvest information already disclosed to the Applicants is sufficient for them to be able to adequately scrutinize the conservation efforts of the Public Body. That information should be sufficient in order to demonstrate to the Applicants that the Public Body is ensuring that there is no over-hunting of grizzly bears.
24. There are 228 Management Units (MU) in British Columbia. The Public Body has already provided to the Applicants information concerning how many bears are killed each year in each MU.
25. By way of example, let us suppose there are 100 bears in a Grizzly Bear Population Unit (GBPU). The GBPUs are generally composed of several MUs which, in total, make up a logical area for managing grizzly bears. The Public Body may allow 4 bears to be hunted in such an area, and most of those 4 bears may very well be killed on one part of the GBPU. The applicants contend that

the number of bears killed in that part of the GBPU is a factor they need to consider in determining whether the species is being properly conserved. I disagree. Keeping in mind that conservation is about sustainability of a species, so long as the Public Body ensures that only 4 bears in the GBPU are hunted (regardless of where they are hunted in that GBPU), the Public Body will be successful in ensuring the ongoing conservation and viability of the grizzly bears in that GBPU.

26. The most important issue with respect to conservation of species is the rate at which animals in a specific animal population are killed, not identifying particular locations within those populations units where bears have been hunted. The Applicants have already been provided with all the information required for them to assess for themselves the adequacy of grizzly bear population management.
  27. I believe the Applicants may want the Information to publicly criticize the Public Body by saying there are certain spots where there have been multiple kills of grizzly bears. The Public Body closely monitors the hunting of specific grizzly populations. Keeping in mind the total population of grizzlies in a certain area, the Public Body determines what number of grizzlies can be safely hunted within a GBPU. It is often the case that grizzlies will be concentrated in certain areas within a region because of the availability of food. As such, there are likely to be more kills in such locations, but that does not mean (as the Applicants imply) that the overall population is threatened in any way. Quite simply, I do not believe that the specific location of kills is required for an analysis of harvest sustainability.
  28. Where the Public Body has conservation concerns in a particular area, it will close a MU, or Zone within a MU, to grizzly bear hunting. Regardless of where animals are killed within a MU or Zone, if too many are being killed in a GBPU, the Public Body will shut down or reduce harvest levels for the whole area. Using the logic of the Applicants, it would be sufficient to only implement closures in “sink” locations, i.e. areas where harvest has been concentrated. However, such targeted closures would only have a minor effect on the hunting of grizzly bears in the broader GBPU because hunters will simply shift their efforts to other areas, resulting in a continuing harvest from the population. So from a conservation purpose, I believe that any emphasis on particular kill locations by any applicant is not relevant for the purposes of examining whether grizzly bear hunting in British Columbia is resulting in unsustainable impacts to one or more populations.
- ...
31. The Public Body anticipates that the Applicants may argue that kill location information is important in order for them to deal with the conservation issue. If that were the case, the Public Body would expect that the Applicants would understand that publicly disclosing such data will more likely than not result in (1) additional grizzly bears being killed and (2) hunters refusing to provide such accurate data in the future, given their concerns concerning poaching, harassment by activists and the potential for vulnerable species to be over-hunted. Hunters also have an interest in the preservation of the species. If hunters feel that disclosure of information will result in damage to or interfere with the conservation of grizzly bears, they will see that as a significant reason to not provide accurate kill location data to the Public Body in the future.

[80] Evidence on this issue is also found in the first Horejsi affidavit, at paras. 7 to 9, where he attested to the importance of precise mortality locations for purposes of conservation, management and research reasons. It is also found in the McCrory affidavit, at para. 19, where he deposed that, in his opinion,

... a scientifically sound understanding of grizzly bear mortality, including precise mortality locations, plays a critical key role in the design of effective bear conservation and management strategies.

[81] Raincoast also responds, at p. 2 of its reply submission, as follows:

Both the Public Body and Raincoast agree that the grizzly bear location data is important for conservation purposes. The Public Body does take the position that kill location data is not necessary to determine whether grizzly bears are over-harvested in British Columbia, but this position misapprehends why Raincoast has made its request. Based upon the grizzly bear population estimates of independent scientists, Raincoast has already concluded that grizzly bears are over-harvested in British Columbia. Raincoast requires the requested records so that it may effectively participate in decisions about whether grizzly bear hunting should continue in any particular area. The release of the requested records is necessary to enable public scrutiny of and participation in decisions about grizzly bear hunting in problem areas.

[82] In its reply submission, at pp. 14 to 18, the EIA discusses, at some length, its perception that the Ministry's evidence and argument on this point amount to a contradictory claim that kill location data are useful for the Ministry's conservation, management and research purposes, but is not necessary so that others (including the applicants) can judge the Ministry's efforts.

[83] The Ministry's challenge to the legitimacy of the applicants' access request is puzzling in relation to the exception on which it has relied to refuse to disclose the information. It is not a general pre-condition to the right of access to information under the Act that an applicant must establish that the requested information is useful in some way. Further, the burden of establishing the s. 18(b) disclosure exception is on the Ministry and that burden cannot be discharged by challenging the usefulness of the requested information for assessing the quality of the Ministry's management and conservation of grizzly bears.

[84] For this reason, I agree with the applicants that the Ministry's evidence and argument are contradictory in contending that kill location data are useful to conservation, management and research by the Ministry, but irrelevant to outside scientists, observers and critics. This is the case regardless of whether the applicants' or the Ministry's deponents have superior scientific or other technical expertise regarding grizzly bears.

[85] 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”. I also consider the Ministry’s concern with showing that the disputed information is not really useful to the applicants is at odds with its position that disclosure through these access requests must be regarded as public disclosure. If the latter proposition is correct, as I agree it is, the Ministry’s emphasis, in the context of s. 18, on whether the applicants have a use for the disputed information is all the more misconceived.

[86] Last, I am driven to observe that para. 18 of the Austin affidavit and para. 31 of the Dryden affidavit, quoted above, are unhelpful and, it has to be said, inappropriate. As I have already noted, the burden of proving that s. 18 applies is on the Ministry. The Austin and Dryden affidavits have been submitted on behalf of the Ministry and those witnesses speak for the Ministry. Austin and Dryden have also been held out as offering professional expertise respecting grizzly bears and their management. The Ministry’s case is not, however, enhanced by thinly veiled accusations, in the above-noted paragraphs, about the competence and sincerity of the applicants, and their motives and evidence, apparently because they do not agree with the Ministry’s perspective.

[87] There is nothing wrong with a public body, and its representatives, expressing a forceful – even uncompromising – position about the applicability of a disclosure exception under the Act. The above-described statements, however, are argumentative and do not assist in resolving the merits of the Ministry’s reliance on s. 18. They also suggest some antagonism towards the applicants. Contempt, and perhaps even prejudice, by a public body towards an applicant – or by an applicant towards a public body – about the merits of the other’s perspective are not persuasive of the validity of the positions taken. The desirability of avoiding such attitudes, and approaches, to issues under the Act only becomes more acute when access requests touch on difficult and long-standing issues of public responsibility, as well as scientific and technical matters.

### *Disclosure of Kill Locations in Other Jurisdictions*

[88] The affidavits and arguments of the Ministry and Raincoast make a great deal of the status of grizzly bear kill location data in other jurisdictions, principally Alaska and Alberta. Because of the contentiousness of this case and the degree to which the parties have relied on seemingly conflicting information relating to other jurisdictions, I consider it desirable to examine the evidence on this issue in some detail. Before explaining the difficulties I have encountered in reconciling that evidence, however, I will discuss its relevance in this inquiry.

[89] First, I would be reluctant to attach weight to the mere existence of a certain law or policy in another jurisdiction – or to bald statements of opinion offered by wildlife officials in another jurisdiction – in relation to questions of fact or mixed fact and law in this inquiry. This is not to say, however, that sufficiently grounded and detailed evidence

of the wildlife management experience in other jurisdictions could not be relevant. In other words, the fact that another jurisdiction may have a law or policy regarding the public disclosure of grizzly bear kill locations will not drive the interpretation or application of s. 18 of the Act, but concrete evidence justifying or explaining the experience of the law or policy of another jurisdiction could be pertinent. Similarly, a wildlife official in another jurisdiction could be shown to be qualified to offer an expert opinion on a scientific question relevant to this inquiry, but there would be no significant evidentiary value in the fact that such an official – or the department for which the official works – simply has an opinion or position about what should be the outcome of this inquiry or what would be the outcome of a similar inquiry in that jurisdiction.

[90] In Order 01-20, [2001] B.C.I.P.C.D. No. 21, a decision concerning ss. 17 and 21 of the Act, I considered evidence of the U.S. experience relating to public disclosure of exclusive supply agreements between U.S. universities and cold beverage companies. In that case, I decided that the U.S. evidence was relevant to showing that – regardless of the similarity or dissimilarity of U.S. access to information statutes – the absence of confidentiality for 11 exclusive supply agreements provided to me in evidence had not prevented the U.S. universities and cold beverage companies from entering into exclusive sponsorship agreements. I found this was relevant to the question of whether disclosure of the exclusive agreement in question in that inquiry gave rise to a reasonable expectation of harm to the interests of the public body or of the third party under ss. 17 and 21 of the Act.

[91] I also referred in Order 01-20 to the decision of the Federal Court of Appeal in *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4<sup>th</sup>) 246. That case involved the question of whether disclosure of government inspection reports containing negative assessments of meat-packing plants posed a sufficient risk of harm to the business interests of a third party meat-packer. Similar reports were publicly available in the U.S. and had previously also been available in Canada. Evidence was presented of negative publicity surrounding product safety issues discussed in U.S. government reports unrelated to meat-packing plants or their inspection. The third party meat-packer's position in *Canada Packers* was that its interests would be harmed by unfavourable press coverage if the inspection reports were disclosed. The Federal Court of Appeal found this to be the "sheerest speculation". It found that the third party's position was not established by remote evidence about experience in the U.S. with publicity surrounding product safety issues in government reports. If that evidence had any relevance, it was outweighed by the fact that meat-packing plant inspection reports were publicly disclosed in the U.S. and had until recently also been publicly disclosed in Canada, yet no evidence had been adduced of unfavourable publicity associated with those disclosure practices.

[92] In my view, it makes sense – and it is instructive to observe for the purposes of this inquiry – that a party bearing the burden to establish risk of harm from the disclosure of information (whether a public body or a third party) cannot discharge that burden through assertions of risk of harm that are merely speculative or that are based on circumstances that are only remotely relevant to the circumstances at hand. As the *Canada Packers* decision demonstrates, such an approach will be particularly

unsuccessful when the party bearing the burden of proof has also failed to adduce evidence of risk of harm from immediately relevant circumstances.

[93] Returning to the evidence before me, at para. 10 of the first Butler affidavit, Susan Butler deposed, on information and belief from “Steve Schwartz of Alaska Fish & Wildlife”, that “Alaska only discloses harvest information by game management unit” and does “not disclose detailed kill locations.” At para. 11, Butler also deposed – again on information and belief, from “Tim Waters of the Washington State Dept. of Fish & Wildlife” – that Washington State does not allow the hunting of grizzly bears and, when a grizzly bear is killed, “it is publicized in order to reinforce to the public that it is against the law to kill a grizzly bear in Washington State.”

[94] By contrast, the first Horejsi affidavit indicates that in Alaska and Alberta more detailed kill location data are made publicly available than is made available in this province. Horejsi deposed as follows at paras. 10 to 12 of his affidavit:

10. In the lower 48 of the United States, the location of grizzly bears killed is made publicly available by the Universal Transverse Mercator grids (UTM's) or by watershed name (or both). It is important to note that grizzly bears are a protected species there, and so grizzly bear kills are either accidental or for safety reasons. The identity of those who kill bears is also made available.
11. In Alaska, the Fish and Game Branch codes black, grizzly and brown (same as grizzly, but coastal geographic location) bear kill location to small, identifiable, relatively precise parts of each drainage. In the five (5) wildlife management units in the Alaska panhandle there are about 900 such subunits, known as Uniform Coding Units. This area covers the equivalent of about six (6) wildlife management units in northwest British Columbia. The geographic information available in Alaska is therefore approximately 150 times more detailed than the information provided to British Columbians. In spite of this, in September 1999, a Brown Bear Management Team reviewing bear conservation relative to guided hunting in Alaska's Unit 4 (part of the Alaska panhandle) recommended in a report to the Fish and Game Department that the department “manage human use by smaller subunits, if necessary and workable, to minimize use conflicts, promote research, or respond to management, bear population or overcrowding issues.”
12. Alberta routinely releases grizzly bear kill location data to at least a township level; an area 88km<sup>2</sup> in size. This is about one tenth (1/10) of the smallest wildlife management units in British Columbia and about 1/30 the size of the average small wildlife management unit in B.C. In many cases, the names of specific locations (eg. campgrounds, townsites) is also made public. Alberta also releases the names of people that kill grizzly bears, and recently has begun releasing the names of people who buy a license to hunt grizzly bears.

[95] The second Butler affidavit, which accompanied the Ministry's reply submission, responds to paras. 11 and 12 of the first Horejsi affidavit. In this regard, Susan Butler had sent a letter dated November 30, 2000 to Wayne Regelin, Director, Division of Wildlife Conservation, Alaska Department of Fish and Game, and a letter dated December 1, 2000, to Harold Carr, Provincial Big Game Specialist, Alberta

Environment/Resource Development. The letters are similar. They ask whether Regelin and Carr agreed with the Ministry's position that public disclosure of precise grizzly bear kill locations could reasonably be expected to result in increased hunter success and poaching, as well as in the inaccurate or overly vague reporting of kill locations by hunters. The letter to Regelin also asked him to confirm whether the average size of Alaska's Uniform Coding Units is 200 to 300 square miles. Finally, both letters asked for confirmation of agreement with the Ministry's position that "in order for someone to [be] able to adequately scrutinize whether government is properly managing wildlife it is sufficient to have harvest information by management unit" and not necessary to know precise kill locations. Regelin replied on the same day that Butler wrote to him, saying the following:

In Alaska, state statutes prohibit the release of hunters' names and specific location where the animal was killed. We do provide summary information about general location of harvest. The most specific information we provide is a summary of harvest by uniform coding unit. These areas are about 200-300 square miles in size. Grizzly bears are managed over large blocks of land that include several uniform coding units. Harvest levels with these large blocks of land are the appropriate way to evaluate management programs. Specific kill site information is not relevant to determine if the rate of harvest is appropriate.

I agree with the statements in your November 30 letter.

[96] Carr replied on December 4, 2000, saying he agreed with the two questions posed in Butler's letter.

[97] The second Horejsi affidavit, which was included with Raincoast's reply submission, responded to the information in the first Butler affidavit that was said to be based on information and belief from Steve Schwartz, of Alaska Fish & Wildlife, as follows at paras. 6 and 7:

6. Over the last two weeks, I have had several extended communications with members of the Alaska Fish and Game department. The use of kill location data by the Alaska Fish & Game department was discussed at length. From these conversations, I am confident in stating that detailed grizzly bear kill location data in Alaska is assembled according to Uniform Coding Units (UCUs), which are small areas of land considered important from a bear mortality and land use management perspective. The restricted nature of a UCU is designed to assist with access management, environmental impact assessments, land-use decision making and bear mortality management, all issues directly related to the conservation of grizzly bears in B.C.
7. In 2000 the entire southeast Alaska brown (grizzly) and black bear kill location data file was provided to me in electronic format after I requested it from the Alaska Fish & Game Department. Attached as Exhibit "A" to this, my affidavit is a printed copy of the Uniform Coding Unit map for Alaska, and a sample printout of one page of the database provided to me. There are well over 10,000 entries in the database.

[98] Exhibit “A” to the second Horejsi affidavit is a two-page document. The first page is a map entitled “Game Management Units and Uniform Coding Units, Alaska Panhandle”. The Game Management Units appear to be nine larger blocks denoted by number/letter codes, while the Uniform Coding Units appear to be many smaller blocks (varying in size) within the Game Management Units. I cannot, from the evidence before me, relate the five “wildlife Management Units” in the Alaska panhandle referred to in the first Horejsi affidavit with what appears to be nine “game management units” in Exhibit “A” to the second Horejsi affidavit.

[99] The second page of Exhibit “A” has a hand-written title, “Alaska Kill Record Sample Page Black Bears”, and appears to locate each kill by Game Management Unit, by group of Uniform Coding Units and by single Uniform Coding Unit. Horejsi concludes in his second affidavit that he is unable to reconcile the information from “Steve Schwartz of Alaska Fish & Wildlife”, given in the first Butler affidavit, with his own conversations with Alaska Fish & Game personnel or with the fact that he has been provided “detailed kill location data by the Alaska Fish & Game department.”

[100] The second McAllister affidavit was included with Raincoast’s reply submission. In it, McAllister deposed as follows, at paras. 2 to 7:

2. On November 2, 2000 I spoke by telephone [*sic*] Steve Schwartz, Information Management Officer with the Division of Wildlife Conservation of the Alaska Department of Fish and Game. I read to Mr. Schwartz paragraph 10 of the affidavit of Susan Butler. . . .
3. I asked Mr. Schwartz if this was an accurate recounting of the conversation he had with Ms. Butler. He replied that it was substantially accurate, however, he pointed out that the kill location data provided by Alaska Fish and Game Department is available by Uniform Coding Units as well as game management units. Mr. Schwartz also noted that, when he stated to Ms. Butler that Alaska does not disclose detailed kill locations to the public, he was in fact referring to exact kill locations. He noted that kill location data by Uniform Coding Unit is publicly accessible information.
4. On December 1, 2000 I spoke by telephone with Kim Titus, Regional Supervisor of the Division of Wildlife Conservation of the Alaska Department of Fish and Game.
5. I asked Mr. Titus if Alaska F&G had any concerns that the release of this detailed kill location data might increase poaching of grizzly bears. He replied, “no, absolutely not.” He said that it is common knowledge where brown bears are and that the Department was required under State Public Acts law to provide this information and to further release it to the public when requested.
6. I asked Mr. Titus if the publicly accessible nature of the information has reduced the willingness of hunters to provide the detailed kill location data. Mr. Titus replied that this has not happened. He pointed out that every hunter knows the estuaries, salmon rivers and other key habitats are where the bears are, and that it is not a secret. He also noted that a resident hunter only has to ask the local game managers where good places to hunt exist and they will be told. Hunters understand that good conservation is based on good information so it would not be in their interest to not disclose this information.

7. I asked Mr. Titus if the Fish & Game Department possessed more refined location kill data than *[sic]* Uniform Coding Unit breakdowns. Mr. Titus replied that no more refined hunter kill location data is in existence because there is no reason to collect and store it. He stated that the UCU's are so small and so accurate that Alaska knows within about three miles of where a bear has been killed. He said, for example, an UCU does not just cover one bay at the head of an inlet but separates the north side from the south side, and in some cases provides even more detail.

[101] It seems clear from the second Butler affidavit and from the Horejsi and McAllister affidavits that in Alaska – contrary to the first Butler affidavit, which left the impression that grizzly bear kill locations were publicly disclosed only at the Game Management Unit level – kill locations are also recorded and publicly disclosed on the basis of smaller Uniform Coding Units. In its reply submission, at para. 10, the Ministry continues to maintain that

... Alaska does not normally disclose kill location by Uniform Coding Units. Rather Alaska normally releases aggregated kill data according to game management units.

[102] This position is not supported by the evidence. Indeed, it is contradicted by Ministry and Raincoast-adduced evidence. Horejsi's second affidavit and the exhibits attached to it demonstrate that Alaska does release kill locations down to Uniform Coding Unit resolution. The letter from Regelin that is exhibited to the second Butler affidavit also states that "[t]he most specific information we provide is a summary of harvest by uniform coding unit."

[103] From the evidence before me, it is difficult to reconcile the information in Horejsi's and McAllister's second affidavits – that Uniform Coding Units are areas of land in the order of three square miles – with the information in the second Butler affidavit that they are areas of land in the order of 200 to 300 square miles. The larger range of sizes is mentioned in Regelin's letter, a copy of which is exhibited to Butler's second affidavit. This inconsistency is troubling. I have no reason to doubt the veracity of Butler, Horejsi, McAllister or the Alaska officials with whom each of them spoke or corresponded. Given Horejsi's scientific credentials and ongoing professional experience with grizzly bears, I have reason to expect that his evidence on this point would be informed and accurate. The situation is not quite the same with respect to the information in Butler's affidavits. There is, first, the inaccuracy of the statement in her first affidavit, made on information and belief from Schwartz, that "Alaska only discloses harvest information by game management unit and they do not disclose detailed kill locations." Further, Horejsi has, as a bear scientist, studied the kill location data available in Alaska. In the absence of evidence of similar expertise or experience by Butler, I would not expect her, as the Manager of Information and Privacy at the Ministry, to have a professional familiarity or fluency with such data.

[104] On the other hand, although the error in Butler's first affidavit, based on information and belief from Schwartz, potentially undermines the accuracy of her information-gathering on this point, it does not resolve the fact that her second affidavit is

supported by the letter from the Alaska official to whom she spoke, which states that Uniform Coding Units are *about* 200 to 300 square miles in size. It is not clear whether this is an expression of *average* size, in which case some units might be larger and others smaller than this range. I also do not know anything about the expertise, experience or job functions of Regelin, to whom Butler spoke, or Titus, to whom McAllister spoke. I must also consider Exhibit “A” to the second Horejsi affidavit, which – while not entirely clear or even to scale – does suggest that the Uniform Coding Units in the Alaska panhandle are small, as argued by Raincoast, and not large, as implied by the Ministry.

[105] Given Horejsi’s credentials and his direct professional experience in dealing with the Alaska bear kill location data, I am inclined to accept his evidence on this issue over the evidence of Butler. It also seems impossible from the geographic size of the Alaska panhandle that the many small blocks shown on Exhibit “A” to the second Horejsi affidavit could be 200 to 300 square miles in size. The area of the entire Alaska panhandle is less than 50,000 square miles. Further, Horejsi’s evidence is that there are some 900 Uniform Coding Units in the panhandle. If each of these units averaged only 200 square miles, all 900 would cover an area of some 180,000 square miles. That said, I remain troubled by the letter from Regelin. One way to reconcile, at least to some degree, the evidence about the size of Uniform Coding Units might be to infer that the 200 to 300 square mile figure given by Regelin is not restricted to the Alaska panhandle and could reflect a range throughout Alaska, with small unit sizes in the panhandle and much larger unit sizes elsewhere in the state.

[106] Rather than providing evidence of its own on the public disclosure of kill locations in other jurisdictions, the EIA has relied on Raincoast’s evidence. The EIA has also made arguments, which I find useful, about the apparent discrepancies between the evidence adduced by the Ministry and by Raincoast. In a further submission dated July 19, 2001, relating to the import of Order 01-11, the EIA observes that the release of kill location data in Alberta at a resolution of 88 square kilometres represents a square of approximately 5.8 miles on each side. The EIA then makes the following related points, at p. 4:

By going to the centre of a location unit as released in Alaska and Alberta someone could expect to be within about 2-3 miles of the actual kill location, and in all probability would be closer than that, particularly when excluding obviously inaccessible areas. All that would be required would be to hike around a bit within one of these UCUs and the hunter would be confident of coming close to the kill location.

So how precise are the actual reported kill locations in BC? Hunters do not use GPS technology to identify kill locations. Most grizzly kills take place in heavily forested and/or mountainous areas. Converting the memory of such physical locations from the field when pointing at a two dimensional map (as Doug Dryden’s affidavit indicates is done) will not reliably give a degree of accuracy to within more than a couple of miles of the actual site at best. This is particularly the case given most of these rugged areas lack detailed maps in the first place, and the width of a finger tip could easily be 2 miles difference.

Or in other words, when comparing the size of the smallest units data is released at elsewhere with the degree of inaccuracy inherent in the recording process in BC, there is no significant difference between the level of resolution requested by EIA and the most precise already released elsewhere.

This is also likely to be another reason why Alaska states there is no point collecting data any more precisely than within 3 miles or so they currently gather and release it – even if they asked for it the responses would not be accurate enough to warrant recording.

In terms of conservation analysis however, precision of within 2-3 miles is far more useful than the Management Unit level currently made available in BC, as long as it takes into account which valley etc. kills occurred in – something hunters would be able to remember when reporting. That is why in Alaska the edges of the Uniform Coding Units are generally designated along natural barriers to grizzly movement such as valley ridges, watercourses etc. that are also of interest in conservation and management.

[107] From this, I observe that, if Horejsi's and McAllister's evidence is correct, Uniform Coding Units in the Alaska panhandle are comparable to the 88 square kilometre resolution in Alberta. If the intended inference of the Ministry's evidence is that Uniform Coding Units in the Alaska panhandle have an approximate range in size of 200 to 300 square miles, this would equate, approximately, to a range in size of 518 to 777 square kilometres. I have already referred to Horejsi's evidence of a range of 888 to 2,640 square kilometres in area for MUs in British Columbia. I conclude, therefore, that MUs are larger than Uniform Coding Units in the Alaska panhandle, regardless of whether the evidence of Horejsi and McAllister or Butler is right about the size of Alaska's Uniform Coding Units.

[108] I agree with the EIA that the precision of the system for recording kill data are a factor that has to be taken into account in weighing the Ministry's contention that the disputed information truly does pinpoint actual kill locations. I have already noted above, under the heading describing the disputed information, some of the limitations inherent in the Ministry's data collection processes. This is not a factor that can be ignored or assumed as, with the greatest respect, the Ministry's witnesses and submissions in this inquiry appear to have done.

[109] Finally, as I indicated at the beginning of this discussion, I am not inclined to attach significant evidentiary value to bald statements by wildlife officials in other jurisdictions in support of the Ministry's position in this inquiry or statements by such officials predicting what would or should be the outcome of a similar inquiry in another jurisdiction. Further, the existence of requirements prescribed by an access to information law in another jurisdiction will not constitute evidence of harm in the context of this inquiry.

### ***Increased Hunter Success or Poaching***

[110] The Ministry's evidence on the issue of increased hunter success or poaching is found for the most part in the affidavits of Dryden, Austin and Walker, as follows:

**Dryden Affidavit, paras. 16, 18 to 21**

16. I believe that disclosure of the Information will have serious negative implications for grizzly bear conservation. I further believe that disclosure of the Information will result in an increase in incidences of poaching of grizzly bears. I believe that individuals will use the Information to identify areas in which to concentrate their efforts, based on previous harvest patterns. Access to the Information will enable someone to learn where there are seasonal concentrations of grizzly bears...
- ...
18. Disclosure of the Information will result in the disclosure of the locations that bears are known to be frequently present. Generally, grizzly bears go to where the food is. Their movement patterns are fairly consistent from year to year. Considering the fact that the Applicant already has some harvest data, including the date of the kill, disclosure of the precise location of the kill will enable people to determine at which time and at what location bears generally will be found. Thus, the conservation concerns of the Public Body are heightened in this case because of the fact that information with respect to the dates of kills has already been disclosed to the Applicant.
19. Limited entry hunting authorizations designate on what dates and in what areas hunters can hunt a particular species. Generally, there is an approximately 2-month period that a particular hunter is allowed to hunt for a particular animal in a particular area. An authorization for grizzly bears, for instance, does not entitle a hunter to hunt other animals in that area or grizzly bears in areas not designated in the authorization. The Public Body determines which hunters are entitled to limited entry hunting authorizations for grizzly bear by conducting a lottery. This is done for all regions of the province where grizzly bear hunting is allowed.
20. In British Columbia, grizzlies may only be hunted where someone obtains a limited entry hunt authorization. Such authorizations are issued by the Public Body with the assumption, based on past data, that there will be a given success rate on the part of resident hunters. Province wide the average success rate for resident grizzly bear hunters is approximately 11%. In other words, the Public Body expects that only approximately 11% of the resident hunters who are issued permits will actually successfully hunt a grizzly bear. In determining the numbers of authorizations to be issued, the Public Body first determines how many grizzly bears can safely be hunted while ensuring the on-going health and viability of a given population. I believe it is more likely than not that any public disclosure of the Information will increase the success rate of grizzly bear hunters by providing them with detailed information on previous harvest patterns, resulting in additional grizzly bears (i.e. in excess of the allowable harvest) being killed. I further believe that any public disclosure of the Information will possibly result in sustainable harvest levels of grizzly bears being exceeded over the short term. These results, I believe, will interfere with the conservation of grizzly bears.

21. If hunters learn of the location of grizzly bears that have been killed, it is more likely than not that hunters will concentrate their efforts in those locations. The Public Body would expect that since the Applicants have expressed concerns over any concentration of harvest that they would understand that disclosing the Information would reasonably be expected to concentrate it further.

**Austin Affidavit, paras. 11, 13, 14 and 19**

11. I believe that disclosure of the Information would more likely than not result in increased hunter success and increased incidences of poaching, both of which would lead to more grizzly bears being killed. This would result in damage to or interfere with grizzly bears, which are vulnerable species. Despite the fact that the Public Body does find kill location information in relation to grizzly bears useful, I think the disadvantages of disclosing such information in relation to grizzly bears publicly outweigh the advantages of the Public Body collecting that information in the first place. That is the extent to which I am concerned about such information being disclosed.

...

13. If hunters learn of the location of grizzly bears that have been killed, it is more likely than not that hunters will seek out those locations in order to hunt grizzly bears. If the Applicants are concerned with the concentration of grizzly bear mortality, the Public Body would expect that they would understand that the disclosure of the Information will result in further concentrating grizzly bear mortality in areas of past harvest success.

14. Disclosure of the Information will result in the disclosure of the locations that bears are known to be frequently present. Generally, bears go to where the food is. Their movement patterns are fairly consistent from year to year. Considering the fact that the Applicants already have been provided with harvest data, including the date of the kill, disclosure of the precise location of the kill will enable people to determine at what time and at what location bears generally will be found. Thus, the conservation concerns of the Public Body are heightened in this case because of the fact that information with respect to the dates of kills has already been disclosed to the Applicants.

...

19. I believe it is more likely than not that any public disclosure of the Information will increase the success rate of grizzly bear hunters by providing them with detailed information on previous harvest patterns, resulting in additional grizzly bears (i.e. in excess of the allowable harvest) being killed in the short term. At this time it is impossible to predict with certainty the precise extent of any such over harvest. As such, the Public Body will only be able to alter the number of grizzly bear permits issued to effectively deal with any such resulting over harvest of grizzly bears, at the earliest, in the hunting seasons (i.e. one or more season) following any such over harvesting. I further believe that any public disclosure of the Information will possibly result in sustainable harvest levels of grizzly bears being exceeded over the short term.

**Walker Affidavit, paras. 18, 19, 21 to 23**

18. If grizzly bear kill locations are made public, you might as well put up big signs across [sic] the province saying “Grizzly Bears Here”. This would effectively give poachers a road map to harvest areas which would, I believe, more likely than not result in additional grizzly bears being killed and would thus be a significant threat to these animals. I further believe that such disclosure would also result in increased success rates by hunters engaged in the legal hunting of grizzly bears. I believe that this would also result in additional grizzly bears being killed.
19. If the Information were to get into the hand [sic] of poachers, I believe this would sound a death sentence to hundreds of grizzly bears across the Province.
- ...
21. If the Information is disclosed, this will break the trust that has developed between the Ministry and hunters. Hunters have, in my view reasonably, a concern that any public disclosure of kill locations could result in harassment of them or will otherwise threaten wildlife (i.e. by increasing hunting success levels and/or poaching). As soon as such data is disclosed, other people will be able to easily locate areas where grizzly bears are known to frequent. They can then use such information as a road map to locate grizzly bears.
22. Grizzly bears generally have predictable patterns in relation to where they are situated at particular times of the year, i.e. specific bears are known to be located in certain valleys or watersheds at certain times of the year.
23. I believe that disclosure of the Information publicly would be significantly detrimental to the management of grizzly bears. To disclose such specific kill locations will enable people to determine where specifically they are likely to find grizzly bears at a certain time of the year. Grizzly bears have specific areas where they tend to stay at certain times of the year, mainly because of the availability of food. Grizzly bears are territorial. Although they inhabit large areas, patterns can be determined over a number of years in order to predict the likelihood of bears being at a specific location at a certain time of the year. By looking at kill location data over several years, one can see a pattern wherein bears tend to concentrate in specific spots at certain times of the year. By correlating kill location data with road maps, one can easily figure out where one could easily locate and hunt for grizzly bears.

[111] All of this evidence can be summarized as follows. Grizzly bears tend to concentrate seasonally in certain areas within a region because of the availability of food in those areas. Their movement patterns are fairly consistent year-to-year. As a result, there are likely to be more kills in seasonal concentration areas. Known or estimated hunter success rates are a factor in the Ministry’s issuance of grizzly bear hunting authorizations. Disclosure of the disputed information, combined with kill date information already disclosed to the applicants, will enable people to locate areas of grizzly bear seasonal concentrations. Hunters and poachers will focus their efforts on those locations. This will increase hunter success in the short term on the basis of the number of Ministry-issued hunting authorizations and will increase poaching levels, resulting in more kills and thereby damaging grizzly bears or interfering with their conservation.

[112] As for the Ministry's concern that legal hunting or poaching pressures will increase if the kill location data are disclosed, McCrory deposed, at para. 13 of his affidavit, that, as a professional wildlife scientist, he has

... never encountered any scientific evidence or reference to scientific evidence demonstrating that the public disclosure of mortality locations poses any threat to grizzly bears or their populations.

[113] He also deposed, without (of course) knowing some of the elements of imprecision in the disputed information – which I have been able to determine by examining a copy of the Ministry record – as follows, at paras. 14 to 16:

14. Early in my career (1966), I had a hunting guide licence and a hunting area for grizzly bear hunters etc. I have also in the past hunted for bears, and was a big game hunter for over 20 years. In my experience, poachers, and guides for non-resident hunters have intimate knowledge of the best locations to kill bears, which is why kills are often concentrated. Moreover, such information is usually readily available from local sources including residents who do not hunt bears, but who know where most of the bears are hunted.
15. Unlike locally available anecdotal information, grizzly kill location data is not presented in a form that is readily useful to those intent on illegal hunting. Kill location data must be converted to a grid, which must then be superimposed over maps containing landscape data. This requires technical expertise and access to mapping resources. Moreover, kill location data does not contain the information about access trails, landmarks, local feeding areas and animal habits that is important for a hunter.
16. In my professional opinion, the release of this grizzly bear kill information would not pose a risk to grizzly bear populations . . . .

[114] For his part, Horejsi, after describing the public availability of kill location data in other jurisdictions, deposed at para. 13 of his first affidavit that he has never encountered any scientific evidence, or any reference to such evidence, “demonstrating that the public disclosure of mortality locations poses any threat to grizzly bears or their populations.”

[115] It is significant, in my view, that the Ministry's position – and the opinions of its witnesses – assume that the disputed information accurately and precisely identifies kill locations. There is no indication in the Ministry's evidence or argument that any imprecision or weaknesses in the kill data collection process have been recognized or taken into account. Moreover, disclosure of the disputed information is globally addressed in the Ministry's material. No distinction is made between the consequences of disclosing UTM co-ordinates and of disclosing geographically descriptive kill location data. This is a real shortcoming in the affidavits of the Ministry's officials. It is even more unsettling in the Walker affidavit. He is not a Ministry official and there is no indication that he has been privy to the disputed information, yet he offers seemingly definitive opinions about how that information could and would be used to locate grizzly bears.

[116] On a related point, Raincoast’s access request was for kill data relating to legal hunting, whereas the EIA access request was broader and included both hunting and non-hunting kill data. The Ministry does not address, however, the question of whether the consequences of disclosure could be expected to be different for the disclosure of kill location data in established parks or in areas in which the Ministry does not permit hunting because it has formally acknowledged the grizzly bear is “threatened”. There is no potential for increased hunter success in such areas; only the potential for increased poaching success might exist. It is useful to reproduce here para. 11 of the first Butler affidavit, provided with the Ministry’s initial submission, and para. 13 of the Ministry’s reply submission. Both passages concern public disclosure of kill location data in non-hunting U.S. jurisdictions:

**First Butler Affidavit, para. 11**

13. On November 7, 2000, I spoke with Tim Waters of the Washington State Dept. of Fish & Wildlife. Mr. Waters advised me, and I believe to be true, that Washington State does not allow the hunting of grizzly bears. In fact, he further advised me that Washington State has a grizzly bear recovery program in order to increase the numbers of grizzly bears in that state. Mr. Waters advises me, and I believe to be true, that when a grizzly bear is killed in Washington it is publicized in order to reinforce to the public that it is against the law to kill a grizzly bear in Washington State.

**Ministry’s Reply Submission, para. 13**

13. Raincoast makes reference to the fact that in the lower 48 states of the United States the location of grizzly bear kills is made publicly available. The Public Body replies that the circumstances in the lower 48 states are distinct from the current situation in British Columbia. Any comparison is meaningless. Grizzly bear hunting is illegal in the lower 48 states. Those states, unlike British Columbia, do not have to worry about disclosure of kill location information resulting in an increase of legal hunting success levels or the harm caused by hunters being unwilling to provide accurate kill location data to government.

[117] The gap, or flaw, in the Ministry’s evidence and reasoning about illegal kill location data that is evident from these extracts is also pointed out in the EIA’s reply submission. At para. 4, the EIA observes that “the Public Body regularly publishes Press Releases with kill location data of far higher precision than management unit level along with dates of illegal kill”. It cites five examples of this between August and November 2000. It does not sit well for the Ministry to advance a global claim that disclosure of any or all of the disputed information would result in increased hunting success and poaching, without acknowledging the Ministry’s own regular release of location data for illegal kills and without addressing the question of whether increased hunter success or poaching has or has not been encountered in light of the Ministry’s public information releases.

[118] It is fair, I think, to describe the Ministry's contentions about the risk and implications of increased hunter success or poaching, if the disputed information is disclosed, as sweeping and generalized. This might be tenable if there were concrete

evidence in support. But there is not. The particulars of the applicants' access requests and the evidence in this inquiry, including the record containing the disputed information, actually dispel the validity of the Ministry's reasoning and, with deference, compel a more subtle analysis of the risk of damage to grizzly bears or their conservation if some or all of the disputed information is disclosed.

[119] With great respect, and acknowledging the good intentions of the Ministry and its wildlife officials, it appears that, on this issue at least, they may have reached a conclusion about the consequences of disclosure and then worked backward to justify their conclusion. Such an approach tends to yield results that do not stand up to rigorous scrutiny. In my view, the Ministry has not established that the disputed information identifies kill locations with the accuracy or precision it claims, or that release of the information would truly enable people to pinpoint live grizzlies at all or in any degree that could be reasonably be expected to damage grizzly bears or interfere with their conservation.

### ***Hunter Harassment and Disruption of Grizzly Bears by Observers***

[120] According to the Ministry, at para. 4.07 of its initial submission, a "concern of hunters is that any disclosure of kill locations could be used to assist activists in further attempts to interfere in lawful hunting." The Ministry supports this argument with various newspaper articles regarding interference with lawful hunting, which is an offence under s. 80 of the *Wildlife Act*. The articles concern a variety of incidents: 1996 incidents in which an animal rights group called, rather perversely, the "Justice Department", mailed razor blades to guide outfitters in British Columbia and Alberta; a 1995 incident where another group called "Bear Watch" followed black bear hunters' vehicles with a view to getting between hunters and prey or scaring off bears; 1998 accounts about a U.S. activist who, in the late 1980s and early 1990s, sabotaged various wild animal hunts and bombed a U.S. university research laboratory; a 1998 account about sabotage methods such as graffiti, fire bombing and tree spiking; and 1995 to 1996 incidents where activists released mink from fur farms in Aldergrove and Chilliwack. The Ministry's affidavits – most notably, paragraphs in the Dryden, Walker and Drown affidavits – also speak to the issues of hunter harassment and the disruption of grizzly bears by those intent on viewing them, as follows:

#### **Walker Affidavit, paras. 16, 24 and 25**

16. Hunters have, to date, been confident in the Ministry's ability to keep specific kill locations confidential. A key concern of hunters is that disclosure of specific harvest locations could lead to interference or harassment by members of environmental activist groups, increased competition from other hunters or commercial ventures and increased poaching.

...

24. Hunters have concerns about potential harassment by environmental groups while they are hunting. For instance, there have been numerous accounts in the media in recent years regarding representatives of an environmental organization called "Bear Watch" attempting to interrupt hunts. Such activists

have been known to meet or to follow people engaged in legal hunting in the hopes of interrupting the hunts. I believe that if environmental groups obtain access to the Information there is a very good chance that they will use that information in order to interrupt legal hunting.

25. I am concerned about any disclosure of information that will result in identifying the exact locations where grizzly bears, or any other species, have been killed. The disclosure of such information would more likely than not have a detrimental impact on grizzly bears, as the bears would be potentially subject to any number of individuals or groups arriving at those locations and thereby interfering with the normal habitat and range movements of the bears, which in turn would result in damage to the bears.

**Dryden Affidavit, paras. 12, 13, 16, 32 and 33**

12. Hunters have, to date, been confident in the Public Body's ability to keep specific kill location data confidential. A key concern of hunters is that disclosure of specific harvest locations could lead to interference or harassment by members of environmental activist groups, increased competition from other hunters due to increased knowledge of areas where animals have previously been successfully harvested, and increased poaching, also due to increased knowledge. Any such resulting increase in hunter success and poaching would, in my view, result in damage to or interfere with grizzly bears, which are a vulnerable species.

13. According to media reports, which I believe to be true, several years ago, in Campbell River, anti-hunting activists met hunters arriving in a plane in order to publicly demonstrate against their hunting. The name of the anti-hunting group was reported to be "Bear Watch". According to media reports, which I believe to be true, those activists further harassed the hunters, tried to block the hunters from hunting and, on one occasion, threatened a guide outfitters' [sic] family. The activists continually harassed the hunters in the woods.

...

16. ...I further believe that disclosure of the information will result in unregulated commercial and non-commercial bear viewing to focus on areas of grizzly bear seasonal concentrations which could result in disturbance to grizzly bear populations i.e. grizzly bears will be displaced from these areas and possible bear/human conflicts will likely result. Such bear/human conflicts often end up in grizzly bears being destroyed.

...

32. The applicants publicly oppose any hunting of grizzly bears. They have gone on record as saying that an immediate moratorium on the killing of grizzly bears must be implemented. I suspect that the Applicants, if the Information is disclosed, will publicly disclose that information if they are of the view that there are too many kills at a certain location. Based on the past practice of conservation groups, I believe that disclosure will more likely than not result in conservation groups targeting guide outfitters at the locations in question.

33. Another concern of the Public Body relates to persons who do not necessarily want to hunt bears, but instead want to view bears. They too would be interested in finding out the locations of grizzly bears. Increasing human traffic in such areas will, I believe, increase the risk of human disruption to

grizzly bear populations. Such disruptions can result in bears being displaced or in an increase of bear – human conflicts. In such human – bear conflicts, bears often end up being shot. As such, that is another way in which disclosure of the Information will more likely than not result in damage to and interfere with the conservation of the grizzly bears.

**Drown Affidavit, paras. 12, 14 and 16**

12. A serious concern amongst hunters is the potential use of harvest information by individuals who are opposed to hunting. Despite section 80 of the *Wildlife Act*, serious incidences of hunter harassment has [*sic*] occurred in British Columbia and most hunters are well aware of such incidences. I personally have knowledge of situations where the lives of guide outfitters and hunters have been threatened by individuals opposed to hunting. Disclosure of kill locations will enable activists and others to learn where hunters typically hunt. Disclosure of such information would effectively be a road map to finding hunters and grizzly bears in the woods. I believe that providing kill location information to outside interests may result in the further harassment of hunters and guide outfitters and put their lives at risk. This is why I believe that disclosure of the Information will result in many hunters refusing to provide any harvest information where such disclosure is voluntary or in accurate or overly vague information (including kill locations) being provided by hunters where reporting is mandatory. This is what, in my view, would cause damage to and interfere with the conservation of grizzly bears and other vulnerable species.

...

14. Resident hunters and guide outfitters have, to date, been confident in the Ministry's ability to keep specific kill location data confidential. My belief, and a concern amongst hunters, is that disclosure of specific harvest locations could reasonably be expected to result in interference or harassment by members of environmental activist groups.

...

16. In January 1996, I received a razor blade in the mail from an environmental organization called the "Justice Department". Twenty-six guide outfitters in the province also received razor blades in the mail at that time. I am also aware of situations where the cabins of hunters have been intentionally burned. For instance, in 1995 a guide outfitter in Revelstoke had his cabin burned down. I am not saying the applicants in this case intend to take such actions. I am merely explaining why hunters are extremely concerned about the disclosure of any information that would serve as a road map to locate hunters, and often their cabins, in the woods. Management units are big enough that knowing that grizzly bears have been shot in a certain management unit will not enable someone to locate a hunter or their cabin. However, disclosure of precise kill locations will increase the risk that extremists intent on harassing hunters, or worse, will be able to locate hunters and guide outfitters in the woods. Now shown to me and marked as Exhibit "A" to this affidavit is a press release from an organization called "Peoples Action for Threatened Habitat".

[121] The press release attached as Exhibit “A” to the Drown affidavit is dated May 12, 1999, and includes the following passages:

In their effort to eradicate trophy hunting of Grizzly Bears, one of BC’s most radical environmental organizations, Peoples Action for Threatened Habitat, has chartered an 11 metre protest boat for Saturday May 15 and expects to be tracking Grizzly Bear hunters by Sunday evening. “We fully expect to disrupt any Bear hunters who come across our “Operation Grizzly” expedition,” said PATH spokesperson, Evelyn Kirkaldy.

...

On Saturday, May 15, the PATH boat will be leaving Vancouver with the tide, at 2:20 a.m. The plan is to travel up to the Great Bear Rainforest where trophy hunting and poaching are currently taking place. We will be filming and scouting the inlets and estuaries. Be assured that if we come across a hunter, we will not stand by idly and watch him kill a Grizzly Bear. PATH refuses to watch quietly as BC’s Grizzly Bears travel down the road to extinction.

[122] Raincoast takes the position that nothing in s. 18(b) supports the invocation of this exception on the basis of hunter harassment. I agree. Unless the Ministry’s contention about hunter harassment can be tied to a reasonable expectation of damage to grizzly bears or of interference with their conservation, it is not a consideration under s. 18(b). In its reply submission, at pp. 6 and 7, Raincoast also challenges the proposition that disclosure of the disputed information could reasonably be expected to result in hunter harassment:

A review of the articles submitted indicates that while hunter harassment may occur, the data contained in the requested records is not of assistance given the methods employed by these individuals (which include following guide outfitters from their places of business and mailing contraband articles). As stated in the Dryden Affidavit, grizzly bear hunting permits are issued for a two-month period. It is simply unreasonable to conclude that individuals would go deep into the woods and wait for two months in an attempt to disrupt a hunt, let alone take the chance of confronting armed hunters deep in the woods and far from the protection of public or media scrutiny. Raincoast is not seeking the names of hunters or guide outfitters involved in past grizzly bear hunts nor is Raincoast seeking information about hunting permits issued for hunting to be conducted in the future which might be useful for hunter harassment.

[123] In its reply submission, at pp. 9 and 10, the EIA also takes aim at the reasonableness of the Ministry’s claim that disclosure of the disputed information would pose a risk of hunter harassment. It says many guided hunts involve fly-in lodges and are too remote to be targets of harassment. The Ministry’s material refers to protests at airports, the mailing of razor blades to guide outfitters and the following of hunters’ vehicles to see where they go to hunt. None of these activities depends on the disputed information. Addresses of guide outfitters are easily acquired, in some cases from websites that may also indicate dates of hunts, maps of hunting areas and information about past successful hunts. Airports likely to be used by hunters and guide-outfitters can

otherwise be identified. Activists intent on disrupting hunting will follow hunters to see where they go, rather than trying to find them by kill location data. As the EIA puts it:

This is surely a far more effective and easy method to locate hunters than analysing masses of technical data, creating grids and overlaying it on maps, then wandering about in the wilderness in these areas hoping to locate hunters in remote valleys that are hard to find or reach, and with hunters moving quietly and out of sight to avoid being seen by bears. This is particularly the case given guide outfitters presumably do not wait in exactly the same locations within a general area. Examination of maps showing the hunter kill location data from Alberta (see Appendix I) show even what amounted to clustered kills in terms of grizzly territories, are often spread over considerable areas were anyone to be searching for individual groups or hunters, especially without having knowledge of access tracks, river crossing points and so on. Following hunters from their point of origin also ensures protestors do not arrive after a grizzly has been shot, rather than before.

[124] The Ministry's arguments are not entirely clear on how concerns of hunter harassment by activists connect to s. 18(b) of the Act. As I have said, this disclosure exception is not directed to harm to hunters; the risk of harm involved must relate to damage to grizzly bears or interference with their conservation. It would appear that the connection, if any, is an indirect one, *i.e.*, because hunters are concerned about harassment by activists if kill locations are disclosed, they will not report such information in an accurate or precise way publicly. The resulting impaired collection of kill location data would also, the Ministry apparently believes, impair the Ministry's ability to manage and conserve grizzly bears. Viewed in this light, the Ministry's contention that hunters will be subjected to harassment, if the disputed information is disclosed, is only relevant to s. 18(b) in conjunction with a contention that disclosure will impair the collection of kill location data from hunters. This issue, and the evidence in relation to it, is discussed below.

[125] I will observe here, however, that the assertion (or the fact) that hunters believe disclosure of the disputed information will result in their harassment by activists does not preclude or remove the need for an examination of the reasonableness of that belief. In other words, I fail to see how a reasonable expectation of hunter harassment – if that was a relevant consideration under s. 18(b) – could be established on the basis of unfounded, or unreasonable, hunter beliefs, however sincerely they may be held. In this regard, the articles and fears about hunter harassment that the Ministry has presented to me are speculative and remote. I am not satisfied the Ministry has shown that the disputed information would be useful, or would be used by activists, to find and harass hunters. It is also relevant that more obvious and certain means of finding hunters already exist. I agree with Raincoast and the EIA that a spectre of hunter harassment cannot be built on activities – *i.e.*, mailing razor blades or following hunters from their hunting lodges or other points of departure – that are not connected to access to the disputed information.

[126] The Ministry's argument about interference with bears by people trying to view them is similar to its argument about increased hunter success and poaching, *i.e.*, because the disputed information accurately and precisely discloses bear kill locations, people intent on viewing live grizzly bears will be led to them by the disputed information and

this will result in disruption and harassment that damages bears or interferes with their conservation. As with the increased hunter success and poaching issue, I am not satisfied the Ministry has established that the disputed information identifies kill locations with the accuracy or precision it claims, or that release of the information would truly enable people to pinpoint live grizzlies at all or to any degree that could be reasonably be expected to damage grizzly bears or interfere with their conservation.

***Impaired Collection of Kill Location Data***

[127] The Ministry says, at para. 4.05 of its initial submission, that, if it is required to “publicly disclose kill location data” under the Act, “many hunters” will refuse to voluntarily provide information to the Ministry and, in the case of compulsory reporting, will “provide inaccurate or overly vague data in the future.” This, the Ministry says, will “seriously undermine” its harvest reporting system and will, in turn, “result in damage to and interference with the conservation of vulnerable wildlife species in the province.”

[128] The Ministry emphasizes assurances that have traditionally been given to hunters that harvest data collected from them will be used only for Ministry purposes. It would appear that the Ministry’s practice of offering such assurances pre-dates the coming into force of the Act in 1993. As I have already noted, such assurances do not override access rights in the Act. The applicants add that s. 21 of the Act creates a disclosure exception for certain kinds of information supplied in confidence to a public body by a third party. This exception has not been relied on by the Ministry, but its requirements would be not be satisfied here in any event. One reason is the decision in *Fletcher Challenge Canada Ltd. v. British Columbia (Information and Privacy Commissioner)*, [1996] B.C.J. No. 505 (S.C.). That decision upheld the previous Commissioner’s determination, in Order No. 56-1995, [1995] B.C.I.P.C.D. No. 29, that the consideration in s. 21(1)(c) of the Act, of whether disclosure could reasonably be expected to result in similar information no longer being supplied to the public body when continued supply is in the public interest, was not satisfied where the information could be required to be supplied by law.

[129] The Ministry also says that hunters’ failure to provide kill location data, at all or accurately and precisely, will go beyond information about grizzly bears and will include information about species outside the scope of this inquiry (*i.e.*, information about vulnerable ungulate species). The Ministry’s position on the risk of impaired collection of grizzly bear kill location data are addressed in the affidavits of Walker, Drown, Dryden and Austin. The relevant passages in those affidavits are somewhat lengthy, but I set them out below in the interest of giving the fullest consideration to the Ministry’s evidence on this issue. Passages from the affidavits of Walker and Drown are set out first because their evidence represents the perspective of senior officials of hunter and guide outfitter organizations:

***Walker Affidavit, paras. 10, 13 to 15, 17, 20 and 26 to 29***

10. Hunters clearly see the benefit of sharing wildlife harvest data with the Ministry. They are aware that such sharing of information helps to ensure the on-going sustainability of wildlife. Hunters do not want to see any species

threatened. Quite simply, they want to be able to hunt in the future. Harvest information has been given freely by hunters to date because it does assist the Ministry in ensuring the conservation of wildlife. However, as soon as they perceive that such data, if supplied to the Ministry, will threaten species then they will stop providing such data, or where required by law to continue providing data, I believe that hunters will often provide inaccurate data.

...

13. Hunters tend to return to locations where they have previously had success. Where they have had success in a specific location they will return to that same location in subsequent years. Their success rates are generally increased by virtue of such past experiences. They generally believe that they are more likely to find bears at those same locations than at other locations.
14. Hunters do not generally like to give information with respect to kill locations to anyone, including other hunters. Hunters generally believe that sharing such information will likely result in more people hunting in the same area. Hunters are a lot like fishermen in that respect. Fishermen don't generally tell people where their favorite fishing hole is. Similarly, hunters do not like to divulge where they have previously had success hunting. Where disclosure of harvest information is voluntary, the only reason that hunters generally agree to provide harvest information to the Ministry is because of the expectation that the Ministry will treat such information confidentially.
15. The Information was provided to the Ministry by British Columbia's resident hunters and by licenced guide outfitters. The understanding of hunters is that such information would be confidential and would not be available for anyone's private use, with the exception of authorized Ministry staff for statistical and management purposes. Hunters have been told in the past that kill location data would be treated confidentially and would only be available to Ministry staff.

...

17. If the Commissioner were to order that the Information be disclosed, the BCWF would immediately notify its membership through its website and newsletter in order to advise them that the Ministry will no longer be able to keep such information confidential. Whether or not that legally sets a precedent with respect to other wildlife harvest information collected by the Ministry from hunters (whether relating to grizzly bears or other species) will be seen as irrelevant. Once the existing trust is broken with hunters, I believe that they will no longer provide harvest information to the Ministry on a voluntary basis. They will be concerned that such disclosure will negatively impact on the conservation of wildlife, i.e. the concern that disclosure of kill location data could result in increased poaching and increased hunter success, thereby causing harm to the species.

...

20. I believe that if the Information is disclosed publicly hunters will immediately stop providing harvest information, including detailed kill locations, to the Ministry where there is no mandatory requirement to do so. Where there is a mandatory reporting requirement, I believe that disclosure of the Information will result in hunters giving inaccurate or overly vague data with respect to kill locations.

...

26. I believe that if the information is disclosed, the message will quickly go out to hunters that the Ministry is not able to ensure the confidentiality of any harvest data, not just exact kill locations. Once hunters hear of that, they will not voluntarily cooperate with the Ministry in the future.
27. If the Information is disclosed, hunters will be reluctant to provide harvest data to the Ministry. Where hunters are legally required to give information, I believe that they will probably provide only inaccurate and overly vague information. When the BCWF initially learned about requests under the *Freedom of Information and Protection of Privacy Act* for kill location data, a number of hunters advised me, and I believe it to be true, that if kill location data is disclosed they will either not cooperate with the Ministry in providing information where such collection is voluntary or they will give very vague information where it is mandatory to report information, i.e. the information will be so vague that it will not lead one to learn of the precise location of the kill and will probably be of little use to the Ministry. I believe that if the Information is disclosed the Ministry might as well scrap the current voluntary system of hunter reporting for certain species.
28. Even where there is a mandatory reporting requirement, as there is in the case of grizzly bears, I believe that disclosure of the Information will more likely than not result in hunters being vague as to where they shot animals, whether it be a grizzly bear or another animal. Right now the information regarding kill locations that they give to the Ministry is very specific, i.e. "I shot the bear by this creek" or "I shot the bear in this particular valley". I believe that disclosure of the Information will more likely than not result in hunters only giving the general vicinity of a kill location, i.e. refer to an area 5 to 10 kilometers wide. For instance, a hunter may say, "I shot it in this area, but I cannot recall the exact location".
29. I believe that disclosure of the Information will also result in the loss of valuable anecdotal evidence often supplied to the Ministry regarding grizzly populations when harvest locations are reported. Incidental or defence kills would go unreported and this information would be lost to the Ministry.

**Drown Affidavit, paras. 8 to 12**

8. For the last 40 years, hunters have provided much of the wildlife data gathered by the Ministry. Over that time the Ministry has been able to rely on the accuracy of such data. I believe that disclosure of the Information will more likely than not compromise the ability of the Ministry to continue to collect such accurate harvest data. That, in turn, will impede the Ministry's ability to ensure the conservation of grizzly bears and other vulnerable species in the province.
9. The Ministry's collection of accurate harvest information is dependent on the continued cooperation of hunters. The purpose of such data collection is to assist the Ministry in managing wildlife. If the Information is disclosed I believe that the current excellent process of data collection from resident hunters will be compromised because some hunters will be reluctant to be accurate in their reporting.

10. Hunters are very secretive about where they hunt. Hunters do not like to divulge to others where they have previously had success hunting.
11. I believe that if the Information is disclosed, the message will quickly go out to resident hunters that the Ministry is not able to ensure the confidentiality of all harvest data, not just exact kill locations. I believe once hunters hear of that, they will be concerned about harvest information being released publicly and will not voluntarily cooperate with the Ministry in the future.
12. A serious concern amongst hunters is the potential use of harvest information by individuals who are opposed to hunting. Despite section 80 of the *Wildlife Act*, serious incidences of hunter harassment has occurred in British Columbia and most hunters are well aware of such incidences. I personally have knowledge of situations where the lives of guide outfitters and hunters have been threatened by individuals opposed to hunting. Disclosure of kill locations will enable activists and others to learn where hunters typically hunt. Disclosure of such information would effectively be a road map to finding hunters and grizzly bears in the woods. I believe that providing kill location information to outside interests may result in the further harassment of hunters and guide outfitters and put their lives at risk. This is why I believe that disclosure of the Information will result in many hunters refusing to provide any harvest information where such disclosure is voluntary or inaccurate or overly vague information (including kill locations) being provided by hunters where reporting is mandatory. This is what, in my view, would cause damage to and interfere with the conservation of grizzly bears and other vulnerable species.

[130] Walker refers to hunters supplying information on compulsory and voluntary terms. I have already described how the Ministry collects harvest information from hunters through a compulsory system under s. 16 of the Hunting Regulation and through voluntary annual harvest questionnaires. These two methods overlap considerably in the data they collect, including information about kill locations. The kill location data in dispute in this inquiry are within the compulsory reporting requirements of s. 16 of the Hunting Regulation. This information may also be gathered by voluntary questionnaires, but the fact remains that hunters are required by law to report it. The Ministry's collection is properly characterized as compulsory, not voluntary. It is not accurate to describe hunters' participation, in compliance with s. 16 of the Hunting Regulation (or other relevant legal requirements associated with hunting or guide outfitting), with reference to conditions of confidentiality that hunters impose on the Ministry and, indirectly in the context of this inquiry, on the applicants, who have requested access to information under the Act.

[131] Walker is the Executive Director of the BCWF. Drown is the General Manager of the Guide Outfitters. The message in their affidavits is that hunters will cease to properly and meaningfully comply with *all* harvest reporting requirements imposed on them by law for *all* species if the grizzly bear kill location data in dispute in this inquiry are disclosed to the applicants under the Act.

[132] One premise of this contention is that the disputed information accurately and precisely reflects kill locations. This is particularly evident in Walker’s evidence, as I indicated earlier. He believes the descriptions of kill locations at present given by hunters, such as ‘by this creek’ or ‘in this particular valley’, are “very specific”, but if the disputed information is disclosed to the applicants hunters will respond by providing only “the general vicinity of a kill location”, in the order of “an area 5 to 10 kilometers wide.”

[133] As I have already discussed, there are significant limitations on the accuracy and precision of the Ministry-recorded kill location data in dispute in this inquiry. The UTM East and North co-ordinates recorded by the Ministry identify locations to a refinement of 1,000 metres, not one metre as implied by the Ministry. Not all kills that are recorded include UTM co-ordinate data. There is clearly room for material error and imprecision in the process in which a hunter points to a spot on a map and a Ministry employee then determines and records what he or she considers to be the related UTM co-ordinates. Further, the geographic descriptive kill location information recorded by Ministry employees is similar to the examples given by Walker – ‘this creek’ or ‘that mountain’ – and this information already identifies areas commensurate in scale to (or larger than) what Walker considers to be only a “general” description of kill locations.

[134] The proposition that hunters will, if they learn that the disputed information has been disclosed to the applicants under the Act, lose trust in confidentiality of all harvest information for all species and will respond by not co-operating in providing such information, whether by compulsory or voluntary means, is further undermined because Walker’s and Drown’s evidence fails to reflect the fact that most of the harvest information requested by the applicants has been released by the Ministry. Only the disputed kill location data has been withheld. If hunters are destined to behave as Walker and Drown say they will, one has to wonder why they apparently have not been incited to do so already because of the harvest information that has been released.

[135] There is also the fact that the hunter conduct predicted by Walker and Drown would contravene the *Wildlife Act*. Section 38 of the *Wildlife Act* makes it an offence for a person to fail on the request of an officer to “correctly state the locality where and the date on which” wildlife in the person’s possession was killed. Section 82(1) of the *Wildlife Act* also makes it an offence to knowingly make false statements:

- (a) in order to obtain a licence, permit or limited entry hunting authorization,
- (b) on a licence or permit issued by him or her under this Act or the regulations,
- (c) in a book, record, certificate, report or return made, kept or furnished under this Act or the regulations, or
- (d) to an officer engaged in the discharge of his or her duties under this Act or the regulations, if the person is required to provide information under this Act or the regulations.

[136] At p. 6 of its reply submission, Raincoast says it is “improper” for the Ministry to rely on the argument that hunters will cease to comply in a proper or meaningful way with all reporting requirements imposed on them by law, for all species, if the disputed

grizzly bear kill location data are disclosed to the applicants under the Act. Raincoast says this, in part, because the Ministry's position "has the effect of restricting the legal rights of law-abiding citizens based on the threats of others to engage in illegal activities". It elaborates on this submission as follows, at p. 6 of its reply submission:

Simply put, the threat of illegal conduct by third parties cannot be the basis for denying access to information under the Act. That the Office of the Attorney General, who is charged with upholding the law, would make such arguments on behalf of the Public Body is, in the submission of the Applicants, appalling.

[137] Similar concerns are voiced by the EIA, at p. 13 of its initial submission:

If BC MELP, the Guide Outfitters Association or the BC Wildlife Federation believe that grizzly hunters would break the law and lie rather than provide honest information that might demonstrate their sport is unsustainable, it is not a very flattering assessment. It would, however, be a damaging indictment of current grizzly management in the province if the future of BC's wilderness symbol were to depend on information received from people whose own representatives do not trust [them] to be honest.

Given that reporting kill data is compulsory, if grizzly hunters are law-abiding citizens who genuinely care about grizzly conservation, then this is a non-issue. If grizzly hunters are not to be trusted to provide accurate information, then MELP faith in the current data may well be misplaced, leading to poor management decisions already being made. Analysis of the data by independent scientists can help reveal this.

If grizzly hunters believe withholding the data would somehow benefit conservation, then they are clearly misinformed, and a public information programme directed at all who receive a grizzly hunting licence should correct this problem.

Any threats by the leadership of grizzly hunting groups claiming their members will break the law and withhold data are surely not the way to decide this issue, and could set a very dangerous precedent. Rewarding one such instance of blackmail would surely encourage similar events in the future, damaging the ability of MELP to provide the public with other data they need, with harmful knock on effects to building public support for conservation initiatives for other species too. Indeed, if such a threat were being made it would on its own constitute a powerful reason to release the data to head off the risk of repetition of this kind of behaviour. . . .

Were MELP to be actually soliciting or encouraging these threats to withhold data, it would be an altogether more serious situation. Such actions would be highly irresponsible given they might encourage and legitimize the illegal activities concerned in the eyes of the hunting groups. It would also demand the question, what is MELP so desperate to cover up that they would encourage illegal activity in this way, and in so doing be themselves acting in a way that would surely also be illegal?

Presumably, such threats do not apply to releasing kill locations from non-hunting causes, which have no connection with the hunting lobby anyway, but are still not made available. This points toward this argument being an excuse invested for convenience, and not the real reason for withholding the data.

...

EIA does not believe that the hunters themselves would lie, and that comments to the contrary are defamatory. The only scenario in which this illegal behaviour might become significant would be if hunters were encouraged to break the law by the behaviour of MELP, or if advised to do so by the Guide Outfitters Association or the leadership of the BC Wildlife Federation, in which case the proper course of action would be to call in the RCMP, not accede to their demands.

[138] Risk of unlawful activity can certainly be relevant under s. 18(b) of the Act where it is sufficiently connected to public access to the information in dispute and to damage to or interference with the conservation of a vulnerable, threatened or endangered species or subspecies. In Order 01-11, for example, I confirmed the public body's reliance on s. 18(a) to withhold a list of the street addresses of 125 archeological sites in the City of Vancouver, because disclosure could reasonably be expected to enable pot-hunters to loot and vandalize the sites. In that case, I had before me evidence of the illegal disturbance of other Vancouver archeological sites by pot-hunters. The risk at stake was that pot-hunters who got access to the list of street addresses would use that information to unlawfully disturb sites.

[139] In this inquiry, by contrast, the issue is the risk that the hunters from whom harvest information is collected will disobey the legal authority under which they are permitted to hunt if that information is disclosed under the Act. I am asked here to accept that a reasonable expectation of damage to grizzly bears, or of interference with their conservation, is established because those who hunt legally – and who are required by law to properly report the details of their wildlife kills – will disobey the law and fail to comply with terms and requirements of their authority to hunt if the harvest information they are required by law to provide is disclosed. This proposition is quite different from what I decided in Order 01-11.

[140] I do not draw the inference, suggested by the applicants, that the Ministry's argument on this issue constitutes wrongdoing itself or warrants suspicion of wrongdoing, on the part of the Ministry or the Ministry of Attorney General. I am also not prepared to infer that Walker and Drown, or the organizations they represent, actually intend to incite hunters to break the law. Nor am I inclined to attribute any intent to the Ministry or its witnesses to "blackmail" me or my Office by arguing as the Ministry does.

[141] At the same time, however, it is not tenable for the application of the Act to be determined by the possibility that persons given a legal authority – in this case, the legal authority to hunt grizzly bears – will act outside that authority if access to information is granted under the Act. To accept this message in the Walker and Drown affidavits – and in the position taken by the Ministry – would in my view both subvert the rule of law and the purposes of the Act. In Order 01-20, at para. 112, I remarked, in the context of s. 17(1) and s. 21(1) of the Act, that it would upend the reasonable expectation of harm

requirement in those disclosure exceptions to permit the harm requirement to be defined by a third party's own resistance to the public accessibility of its negotiations and contracts with a public body. I said the reasonable expectation of harm had to flow from disclosure of the information in question, not solely from a public body's or third party's opposition to disclosure. In my view, the expectation of harm contemplated in s. 18(b) of the Act is not satisfied because some of those who hold licenses, permits or authorizations to hunt under the *Wildlife Act* may be willing to break the law if they cannot impose disclosure limitations or conditions on the harvest information that the law requires them to provide to the Ministry. The answer to this issue is not to find that the s. 18(b) disclosure exception applies, but rather, if necessary, to grant licenses, permits or hunting authorizations only to those who in some way demonstrate that they will comply with all associated legal requirements.

[142] Finally, it should not be a critical consideration in this inquiry that some hunters may believe release of the disputed information, or even of any harvest data collected from hunters, will result in increased hunter success or poaching or in hunter or bear harassment. It is desirable, and should be quite possible, to establish such risks of harm on the basis of evidence that can be assessed and countered. It is not sufficient, and is little different qualitatively from suspicion and speculation, to resort in this context to alleged group beliefs as evidence of a reasonably expected result if disputed information is disclosed.

[143] I will now turn to Hatter's evidence regarding the Ministry's claim that disclosure of the disputed information would impair collection of kill location data for vulnerable ungulate species and the evidence of Dryden and Austin on the issue of risk of impaired collection of harvest data:

**Hatter Affidavit, paras. 21 to 24 and 26**

21. In the event that the Commissioner orders the disclosure of the Information I believe that hunters in the province will see this as a precedent, and will assume that ungulate harvest information they provide to the Public Body will similarly not be kept confidential. Hunters will then not feel confident in the Public Body's ability to maintain the confidentiality of kill location data.
22. If hunters believe that disclosure of the Information will limit their hunting opportunities or interfere with the conservation of Vulnerable Ungulates they will see that as a significant reason to not provide accurate kill location data for such species to the Public Body in the future.
23. I believe that disclosure of the Information will result in some hunters providing inaccurate kill location data with respect to Vulnerable Ungulates. I believe that hunters will believe that it is in their self-interest (i.e. to decrease competition from other hunters) to provide inaccurate or overly vague data with respect to those species. Hunters will believe, and I believe reasonably so, that disclosure of kill location data will be used effectively as a road map by hunters and poachers to locate animals. This will result in increased numbers of Vulnerable Ungulates being killed.

24. I believe that disclosure of the Information will more likely than not undermine the Public Body's ability to collect complete and accurate kill location data with respect to Vulnerable Ungulates. The Public Body would then be unable to effectively monitor the harvesting of discrete populations. This would impair the ability of the Public Body to ensure that the harvesting of such species is sustainable. This would, in turn, more likely than not interfere with the conservation of the Vulnerable Ungulates.

...

26. If hunters feel that disclosure of the Information will limit their hunting opportunities or interfere with the conservation of the Vulnerable Ungulates, they will see that as a significant reason to not provide accurate kill location data to the Public Body in the future.

**Dryden Affidavit, paras. 14, 15, 17, 22 and 31**

14. For a number of wildlife species, there is no mandatory requirement to report harvest information to the Public Body, including kill locations. With respect to those species, the Public Body sends out voluntary hunter surveys to hunters who have hunted such animals. To date the response rate to such surveys has been good, and currently is approximately 70%. I believe that if the Information is disclosed, this will reduce substantially the amount of information we receive from hunters where there is currently no mandatory reporting requirement. I further believe that disclosure of the Information will result in hunters providing inaccurate kill location data with respect to species where there is a mandatory reporting requirement. I further believe that such disclosure will result in hunters not feeling confident that the Public Body will be able to maintain the confidentiality of the information they provide and will result in them believing it is in their self-interest and the interests of the conservation of wildlife to either not provide harvest information where such disclosure is voluntary or provide inaccurate or overly vague data where there is a mandatory reporting requirement.

15. There are clearly competing interests between grizzly bear hunters and environmental groups that oppose grizzly bear hunting. In the event that the Information is disclosed to the Applicants, hunters will quickly become aware of this and they will anticipate that any information about their kills (concerning grizzly bears and any other species) that they provide to the Public Body will likely be disclosed to environmental groups or others. I believe that this, in turn, will result in hunters being unwilling to provide such kill location information in the future to the Public Body or providing information which is inaccurate or overly vague. In my view, such a result would seriously undermine the Public Body's ability to collect complete and accurate kill location data (concerning grizzly bears and any other species) and would more likely than not cause damage to and interfere with the conservation of grizzly bears and other vulnerable species.

...

17. I believe that disclosure of the Information will hinder the Public Body's ability to enforce regulations governing grizzly bear harvest, i.e. hunters will likely provide inaccurate or overly vague kill locations in the future, which will

limit the ability of the Public Body's Conservation Officers to concentrate their monitoring in areas where harvest is actually concerned. I further believe that disclosure of the information will reduce the ability of the Public Body to conduct research on grizzly bears where kill locations are required for research purposes. In my view, such consequences will directly damage and interfere with the conservation of grizzly bears.

...

22. The British Columbia Wildlife Federation and the Guide-Outfitters Association of British Columbia have advised the Public Body that disclosure of the Information will result in hunters only being willing to provide vague or inaccurate data with respect to kill locations in the future.

...

31. The Public Body anticipates that the Applicants may argue that kill location information is important in order for them to deal with the conservation issue. If that were the case, the Public Body would expect that the Applicants would understand that publicly disclosing such data will more likely than not result in (1) additional grizzly bears being killed and (2) hunters refusing to provide such accurate data in the future, given their concerns concerning poaching, harassment by activists and the potential for vulnerable species to be over-hunted. Hunters also have an interest in the preservation of the species. If hunters feel that disclosure of information will result in damage to or interfere with the conservation of grizzly bears, they will see that as a significant reason to not provide accurate kill location data to the Public Body in the future.

**Austin Affidavit, para. 12**

12. I believe that disclosure of the Information will more likely than not result in hunters not feeling confident that the Public Body will be able to maintain the confidentiality of the information they provide and will result in them believing it is in their self-interest and the interests of the conservation of wildlife to provide inaccurate or overly vague data with respect to kill locations.

[144] In my view, this evidence from Hatter, Dryden and Austin does not add materially to the evidence of Walker and Drown, which I have already examined on this point. Hatter's perspective that disclosure of the disputed information can reasonably be expected to damage vulnerable ungulates or interfere with their conservation because hunters will conclude, wrongly, that disclosure that may be required in this case constitutes a blanket rejection on my part of s. 18 of the Act, for wildlife harvest information of any kind, is particularly remote and speculative. Further, Dryden and Austin are likely to have less direct or informed knowledge of the attitudes and intentions of hunters than Walker and Drown.

[145] **3.6 Public Interest Disclosure** – Before the close of the inquiry, the Ministry wrote to this Office's Acting Registrar of Inquiries and said it suspected there was a "good chance that one of the applicants will raise section 25 of the Act as an issue in the

inquiry”. This supposition was based, it appears, on Raincoast’s May 15, 2000 request for review, which said “the Ministry did not consider or did not adequately consider the public interest in this matter.” As a result, the Notice of Written Inquiry was amended to include s. 25 as an issue.

[146] As it turned out, neither Raincoast nor the EIA has expressly advanced s. 25 as a basis for disclosure of the disputed information. They instead have referred more generally to the public interest in disclosure as a factor under s. 18(b) of the Act, as discussed above. The Ministry, for its part, addresses s. 25 in its reply submission. It argues that the public interest does not clearly require disclosure under that section. It says there is no urgent or compelling need here to disclose the information in the public interest, which means s. 25(1)(b) does not apply. Indeed, the Ministry contends that the public interest would be harmed by disclosure, given the consequences that the Ministry foresees for grizzly bear conservation. In the circumstances, bearing in mind that it is a mandatory provision, I have decided to briefly address s. 25 as an issue, while recognizing that the applicants did not directly address this provision in their submissions.

[147] Section 25 of the Act reads as follows:

**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.
- (3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify
- (a) any third party to whom the information relates, and
  - (b) the commissioner.
- (4) If it is not practicable to comply with subsection (3), the head of the public body must mail a notice of disclosure in the prescribed form
- (a) to the last known address of the third party, and
  - (b) to the commissioner.

[148] As I have observed in other cases, the language of s. 25(1)(b) sets a fairly high threshold for compulsory disclosure of information, without delay, on the basis that disclosure is clearly in the public interest, despite any other interests protected by the Act's exceptions to the right of access.

[149] Certainly, something more is required than interest by the public in a matter. The public, or elements of the public such as scientific or conservation communities, may be keenly interested in information that could show whether the Ministry is doing enough to protect grizzly bear populations in British Columbia. That does not mean, however, that there is a clear public interest in immediate public disclosure of that information despite any other interests that may be protected under the Act, including under s. 18(b). Although the language used in s. 25(1)(b) potentially has a broad meaning, the explicit requirement that immediate disclosure must "clearly" be in the public interest – despite any other interests protected under the Act – requires an urgent and compelling public interest in disclosure. The burden was on the applicants to establish the urgent and compelling nature of the public interest in disclosure of the disputed information. The focus of their evidence and arguments was on s. 18(b). I find that the Ministry is not required by s. 25 of the Act to publicly disclose the disputed information.

#### **4.0 CONCLUSION**

[150] For the reasons given above, I find that the Ministry has not established that disclosure of the disputed information could reasonably be expected to result in damage or interfere with conservation under s. 18(b) of the Act. The Ministry is therefore not authorized to refuse to disclose the disputed information. Under s. 58(2)(a) of the Act, I require the Ministry to give the applicants access to the disputed information.

December 3, 2001

#### **ORIGINAL SIGNED BY**

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David Loukidelis  
Information and Privacy Commissioner  
for British Columbia