



OFFICE OF THE
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Order F11-11

MINISTRY OF AGRICULTURE

Jay Fedorak, Adjudicator

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Summary: The applicant requested data from the Ministry relating to information gathered from fish farms under the Sea Lice Program and Fish Health Program. The Ministry refused the request on the basis that disclosure could deprive researchers of priority of publication under s. 17(2) of FIPPA. The Ministry demonstrated that two experienced researchers were writing scientific papers for peer-reviewed journals and disclosure of the data could result in the papers not being published. The Ministry was authorized under s. 17(2) to withhold the data. The applicant also argued that s. 17(3) of FIPPA required the disclosure of the data as it consisted of the results of product testing. Section 17(3) found not to require disclosure of information subject to 17(2).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1), 17(2) and 17(3).

Authorities Considered: **B.C.:** Order F10-06, [2010] B.C.I.P.C.D. No. 9; Order 00-36, [2000] B.C.I.P.C.D. No. 39; Order F07-06, [2007] B.C.I.P.C.D. No. 8; Order F10-43, [2010] B.C.I.P.C.D. No. 64. **Ont.:** Order P-236, [2005] O.I.P.C. No. 5; Order P-2166, [2003] O.I.P.C. No. 152; Order M-444 Appeal M-9400406, [1995] O.I.P.C. No. 17.

Cases Considered: *British Columbia (Ministry of Labour and Citizens' Services) v. British Columbia (Information and Privacy Commissioner)* 2009 BCSC 1700.

1.0 INTRODUCTION

[1] The TBuck Suzuki Environmental Foundation ("Foundation") requested sea lice and disease data from the Sea Lice Monitoring and Audit Program ("Sea Lice Program") and from the Fish Health Audit and Surveillance Program ("Fish Health Program") of the Ministry of Agriculture ("Ministry") for a five-year

period. The Ministry responded by withholding records under ss. 17(1) and 21 of FIPPA. The Foundation was dissatisfied with this response and requested a review from the Office of the Information and Privacy Commissioner ("OIPC").

[2] During mediation, the Ministry informed the Foundation that it would cease to rely on s. 21 of FIPPA, but would add s. 17(2) to its initial application of s. 17(1). The Ministry also disclosed an electronic copy of the Fish Health Program data for the first 17 months of the period of the request. It continued to withhold the remainder of the records on that program and all of the records from the Sea Lice Program and the Fish Health Program, under s. 17(2) of FIPPA, on the grounds that the records constitute research information and their disclosure could reasonably be expected to deprive the two researchers of priority of publication. The Ministry indicated that, once the papers were published, it would release all of the information to the Foundation.

[3] Mediation failed to resolve the matter further and the Foundation requested that the matter proceed to inquiry. An inquiry was held under Part 5 of FIPPA.

[4] It appears that, during mediation, the Ministry ceased to rely on s. 17(1) of FIPPA, as the notice for this inquiry and the investigator's fact report state that only the application of s. 17(2) is in issue. Moreover, the Ministry's initial submission only addresses s. 17(2).

2.0 ISSUE

[5] The issue in this inquiry is whether the Ministry is authorized to withhold the records under s. 17(2) of FIPPA. Under s. 57(1), the Ministry has the burden of proof.

3.0 DISCUSSION

[6] **3.1 Background**—The Foundation describes itself as a non-profit organization and registered charity whose purpose is to educate the public on issues relating to the protection and conservation of wild fish stocks. The requested records consist of data on the incidence of disease and sea lice collected from fish samples at various fish farms, under the Fish Health Program and the Sea Lice Program. The Foundation made a similar request to the Ministry that resulted in Order F10-06.¹

[7] **3.2 Financial or Economic Harm**—The Ministry relies on s. 17(2) to justify its decision to refuse to disclose the disputed records to the Foundation. The relevant provisions read as follows:

¹ [2010] B.C.I.P.C.D. No. 9.

Disclosure harmful to the financial or economic interests of a public body

- 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information: ...
- (2) The head of a public body may refuse to disclose under subsection (1) research information if the disclosure could reasonably be expected to deprive the researcher of priority of publication.
- (3) The head of a public body must not refuse to disclose under subsection (1) the results of product or environmental testing carried out by or for that public body, unless the testing was done
- (a) for a fee as a service to a person, a group of persons or an organization other than the public body, or
- (b) for the purpose of developing methods of testing.

[8] In Order 00-36², Commissioner Loukidelis considered s. 17(2) in the context of an application for access to a research protocol for a publicly-funded study of possible human health effects of aerial spraying for European gypsy moth. In that order, the Commissioner explained what a public body needs to do to establish that this exception applies:

... In order to rely on s. 17(2), a public body must establish a number of things. It must establish that the requested information is “research information”. It must then establish that there is a reasonable expectation that disclosure of that information could deprive a specific researcher, who is connected in some rational way with the research information, of priority of publication of the research information itself or, in my view, of the research that uses the research information or proceeds from it.

[9] Senior Adjudicator Francis considered the interpretation of “research information” in Order F07-06.³ Based on dictionary definitions of “research” as “the systematic investigation into and study of materials, sources etc., in order to establish facts and reach new conclusions”, she concluded the following:

Considered in the context of s. 17(2), and in particular the reference to priority of publication, I think that “research information” encompasses the product of, or information relating to, the investigation or study by experts in a field as a scholarly or scientific pursuit.⁴

² [2000] B.C.I.P.C.D. No. 39.

³ [2007] B.C.I.P.C.D. No. 8.

⁴ Order F07-06, para. 52.

[10] Based on findings in several Ontario Orders, Commissioner Loukidelis and Senior Adjudicator Francis have also found that, for s. 17(2) of FIPPA to apply, the public body must be able to identify specific researchers preparing specific research papers for publication.⁵

[11] I take the same approach here.

[12] **3.3 Is It “Research Information”?**—In support of its position that the information at issue is “research information”, the Ministry provided affidavit evidence from the two Ministry employees who are writing research papers based on the two data sets at issue. The Provincial Fish Health Veterinarian (“Veterinarian”) is the researcher working on the data from the Sea Lice Program. The Provincial Fish Pathologist (“Pathologist”) is the researcher working on the data from the Fish Health Program. The Ministry submits that both researchers have appropriate academic credentials to be considered “researchers” for the purpose of s. 17(2) of FIPPA.⁶

The Veterinarian

[13] The Ministry said that the research purpose of the Veterinarian is:

to provide for an accurate statistical analysis to support an evaluation of the regulatory threshold of sea lice on farmed Atlantic salmon. Specifically, [he] wanted to publish the results of such an analysis using generalised linear modeling methods and to introduce “tote adjusted” variance to sea lice abundance (i.e. lice found loose in the counting totes after the lice had abandoned their initial fish hosts).⁷

[14] The Ministry submits that, as it is responsible for regulating the fish farm industry, it is interested in the results of scientific studies on the risk posed by sea lice to wild and farmed fish stocks. The data the Sea Lice Program collects supports these types of studies.⁸ The Ministry also asserts that the Sea Lice Program monitors the fish farming industry’s compliance with reporting requirements and verifies reported sea lice incidence. It argues that this program is intended to facilitate scientific analysis that would be suitable for peer-review publication.⁹

[15] The Veterinarian has experience teaching at university as a research scientist. He has published five papers and a book chapter on animal diseases, including sea lice on farmed salmon. He plans to publish a research paper on

⁵ Order 00-36; Order F07-06; Ontario Order P-2361, [2005] O.I.P.C. No. 5; Ontario Order P-2166, [2003] O.I.P.C. No. 152.

⁶ The Ministry’s initial submission, para. 4.18. According to their respective affidavits, the Veterinarian and the Pathologist both have doctorates in veterinary medicine.

⁷ Ministry’s initial submission, para. 4.23.

⁸ Ministry’s initial submission, paras. 4.21-22.

⁹ Ministry’s initial submission, paras. 4.21.

the subject of sea lice on farmed Atlantic salmon in British Columbia entitled “Analytical assessment of mobile stages of sea lice, *Lepeophtheirus salmonis* to evaluate regulatory thresholds, on farmed Atlantic salmon (*Salmo salar L.*) in British Columbia”.¹⁰ The purpose of the research is to “assess the risk posed by sea lice to wild and farmed fish stocks”.¹¹ The Veterinarian deposes that the decision to conduct this research study was his alone and he began the planning of the project two years prior to the Ministry receiving the applicant’s request.¹² He is writing the article in collaboration with a Professor of Biostatistics at the University of Prince Edward Island. The Veterinarian has worked on this project outside of work hours, including taking two months leave without pay for this purpose, and he has personally paid for travel to Prince Edward Island to meet with his collaborator.¹³ The Veterinarian requires all of the Sea Lice Program information to complete his study.¹⁴

The Pathologist

[16] Turning to the Fish Health Program, the Ministry asserts that one of its objectives is to inform the public about fish health and disease. It argues that this type of reporting includes having its professionals publish peer-reviewed research papers in scientific journals.¹⁵

[17] One of the responsibilities of the Pathologist is to provide fish pathology diagnostic services to the Ministry with respect to the fish farm industry. His other responsibilities include writing investigation reports and research proposals. He argues that “preparing a case report for publication in a peer reviewed scientific journal outlining all Atlantic salmon findings from the B.C. Fish Health Auditing and Surveillance Program” is consistent with his job description.¹⁶ The Ministry notes that it was also the Pathologist’s idea to change the manner in which the Ministry reported the results of the Fish Health Program in order to facilitate publication.¹⁷ He has experience teaching at university as a research scientist and is currently an Affiliate Faculty in the School of Fisheries and Ocean Sciences at the University of Alaska, Fairbanks and a Research Associate in the School of Veterinary Medicine at the University of California, Davis.¹⁸ He is an expert in the field of fish health analysis and has published 46 peer-reviewed scientific papers, including twelve as an employee of the Ministry.¹⁹ He began the research project three years prior to the Ministry

¹⁰ Ministry’s initial submission, affidavit of Veterinarian, paras. 3-6 and 16.

¹¹ Ministry’s initial submission, affidavit of Veterinarian, para. 12.

¹² Ministry’s initial submission, affidavit of Veterinarian, para. 17.

¹³ Ministry’s initial submission, affidavit of Veterinarian, paras. 19-22.

¹⁴ Ministry’s initial submission, para. 4.17.

¹⁵ Ministry’s initial submission, para. 4.19.

¹⁶ Ministry’s initial submission, affidavit of Pathologist, paras. 2-4.

¹⁷ Ministry’s initial submission, affidavit of Pathologist, para. 38.

¹⁸ Ministry’s initial submission, affidavit of Pathologist, para. 11.

¹⁹ Ministry’s initial submission, affidavit of Pathologist, paras. 6-14.

receiving the applicant's request.²⁰ His research paper will consist of an analysis of the fish health information that the Fish Health Program collected from individual salmon farms.²¹ His Research Paper will address the following issues and report several findings:

- Prevalence, seasonality, and geographic distribution of common pathogens: VHSV, *Renibacterium salmoninarum*, *Piscirickettsia salmonis*, *Microsporidium cerebralis*.
- What is the effect of postmortem interval (autolysis) on diagnosis of the pathogens listed above? [In the face of a fish health event, should I be sampling moribund fish, or will "fresh silvers" provide an accurate diagnosis?]
- What is the effect of postmortem interval (autolysis) on other microscopic lesions? [e.g., Will I lose diagnostic information if I submit "fresh silvers" instead of moribund fish?].
- How often do Audit fish have microscopic lesions consistent with foreign animal diseases like ISAV and "Heart and Skeletal Muscle Inflammation"?²²

[18] A university research scientist with a PhD in epidemiology will be assisting the Pathologist with the analysis of the data to ensure it is interpreted correctly.²³

[19] The Pathologist requires the information from 49 of the 56 fields of data collected under the Fish Health Program.²⁴ This leaves seven of the fields, which the Pathologist does not require for his research. Of that seven, there is one, the Ministry argues, that, if disclosed, could enable a reader to infer information from one of the 49 fields the Pathologist is using, and, therefore, s. 17(2) of FIPPA must also protect that field.²⁵ The Ministry asserts that the remaining six fields of information cannot reasonably be severed from the rest of the data. It states that the production of a record with these fields would take:

a contractor approximately two months, at a cost to the Ministry of approximately \$12,000.00 to produce such information. Four data sets would need to be filtered.²⁶

²⁰ Ministry's initial submission, affidavit of Pathologist, para. 40.

²¹ Ministry's initial submission, affidavit of Pathologist, paras. 33 and 37.

²² Ministry's initial submission, affidavit of Pathologist, para. 63.

²³ Ministry's initial submission, affidavit of Pathologist, para. 47.

²⁴ Ministry's initial submission, para. 4.15 and affidavit of Pathologist, paras. 29 and 43.

²⁵ Ministry's initial submission, para. 4.16.

²⁶ Ministry's initial submission, para. 4.16.

[20] The Ministry concludes:

that the evidence in this case clearly demonstrates that the Fish Health Information (with the exception of the information referred to in paragraph 4.15 of these submissions) and the Sea Lice Information constitutes information relating to the investigation or study by experts in a field as a scholarly or scientific pursuit. That information has been used, and is still being used, by qualified scientific researchers for research purposes. That research is integral to the publication of upcoming scientific papers. On that basis, the Ministry submits that the information at issue in this inquiry clearly qualifies as “research information” for the purposes of s. 17(2) of the Act.

The Foundation’s arguments

[21] The Foundation disagrees that the information at issue constitutes “research information”. It argues that the information found to be “research information” in previous orders was information that was created for the purpose of a research study. In this case, the information was “generated as part of compliance and enforcement activities”.²⁷

[22] The Foundation submits that the information is not connected to planned research; it is “information required to be collected under aquaculture facility authorizations and Ministry policy”.²⁸ It says that some of the information existed prior to the decision to study it. In the Foundation’s opinion, s. 17(2) was intended to “protect the interests of a researcher who has compiled the information for research purposes”.²⁹

[23] The Foundation asserts that it is not seeking any information that the researchers have created.³⁰ The Foundation suggests that, if the meaning of “research information” is expanded to include information that was not originally collected for a research purpose, it would render s. 17(2) of FIPPA open to abuse. Public bodies could “circumvent the purpose of the Act” merely by assigning a researcher to “study” the information, it argues.³¹

Analysis

[24] I think that the Foundation’s interpretation of “research information” is overly narrow. The Senior Adjudicator’s descriptions of such information as “relating to the investigation or study by experts in a field as a scholarly or scientific pursuit” fit this case. The researchers are two scientists analyzing biological data for a “scientific” purpose. In addition, the research is a “scholarly pursuit”, as the goal of the researchers is to publish their findings in scholarly

²⁷ Foundation’s initial submission, paras. 8-14.

²⁸ Foundation’s reply submission, para. 13.

²⁹ Foundation’s initial submission, para. 16.

³⁰ Foundation’s reply submission, para. 12.

³¹ Foundation’s initial submission, para. 17.

journals. The information at issue relates to, that is, it is “necessary for” that research. In conclusion, I find that the information at issue is “research information” for the purposes of s. 17(2) of FIPPA.

[25] I take seriously the applicant’s concern that s. 17(2) of FIPPA could present an opportunity for public bodies to assign staff as “researchers” to study sensitive information to obstruct access requests. Nevertheless, I can find no evidence in this case. I have considered the following criteria for determining whether the research is *bona fide*:

1. Whether the researchers have demonstrated an ability to conduct research projects and publish their findings;
2. Whether they are experts in the field in which they are conducting the research;
3. Whether there is demonstrated academic or scientific interest in the subject of the research;
4. Whether the research has anticipated completion timelines;
5. Whether the idea for the research project originated with the researchers; and
6. Whether the research began prior to the Ministry receiving the access request.

[26] It is clear from the Ministry’s submissions that conducting this type of research is part of the researchers’ job duties. There is ample evidence that the researchers are experts in their fields and have a proven record of publishing research findings. The researchers have established that there is scholarly interest in the subject of the research. The Ministry has satisfied me that the idea for these two research projects originated with the researchers and the research began prior to the receipt of the Foundation’s request for the data. The Veterinarian planned to submit his paper for publication in February 2011 and the Pathologist his in March 2011.³² Therefore, in this case, it is reasonable to conclude the research is *bona fide*.

[27] **3.4 Would Disclosure Deprive the Researchers of Priority of Publication?**—The Ministry also submits that disclosure of the information at issue could reasonably be expected to deprive the researchers of priority of publication. The Ministry notes that the editor of the *Journal of Fish Diseases* has told the Pathologist that the journal would be interested in publishing his research paper.³³ The Ministry asserts that scientific journals would also be

³² Ministry’s initial submission, affidavit of Veterinarian, para. 23; Ministry’s initial submission, affidavit of Pathologist, para. 51.

³³ Ministry’s initial submission, para. 4.29.

interested in publishing the Veterinarian's paper. Given the recent publications on sea lice in the Broughton Archipelago, scholars would be interested in data from other parts of British Columbia, according to the Ministry.³⁴

[28] The danger in disclosing the data at this time, the Ministry argues, is that peer-reviewed, scientific journals would no longer be interested in publishing the papers. According to the Ministry, these journals are only interested in publishing original research. Disclosure of the data under FIPPA could lead to other individuals publishing papers using the same data. The Ministry submits that even the mere publication of the data in its present form would have the same result. The Pathologist informed the editor of the *Journal of Fish Diseases* that the data was the subject of an access request. The editor responded as follows:

The Journal of Fish Diseases only publishes original scientific papers, data sets and reviews. These must be original in the fullest sense, and must not have been published in any format previously. ... We only publish papers on the understanding that the paper is completely original, and that the Journal has priority of publication of the document. ...

While we would be pleased to publish the work you have outlined, subject to its being satisfactorily peer reviewed and would be happy to host the data set online, we cannot do this if it has been published previously in any way, such as on a public internet site or as a Departmental document released in the form of a press release etc.

We acknowledge that authors may wish to release a *precis* of information from the work at *bona fide* scientific conferences or Departmental seminars, once it has been peer reviewed, in advance of its appearance in the Journal, but no other form of publication, before the paper is published by the Journal, is acceptable.

Should this requirement be invalidated we would reserve the right, as Editors, not to publish the paper, even if it has been formally accepted for publication.³⁵

[29] The Foundation denies that it is reasonable to conclude that disclosure of the information to it would threaten the researchers' priority of publication. It seeks the information to measure the environmental impact of salmon farming and to measure the truthfulness of statements of industry representatives. It states that it has no intention to publish a research paper on the subject. It says that it has similar data from a previous time period and has not published the data or a research paper based on it.³⁶

³⁴ Ministry's initial submission, para. 4.30.

³⁵ Ministry's initial submission, affidavit of Pathologist, para. 59.

³⁶ Foundation's initial submission, paras. 18-21.

[30] The Foundation argues further that a recent federal commission of inquiry (“Cohen Commission”) is relevant to the application of s. 17(2) of FIPPA in this case. It notes that the Cohen Commission has demanded that the government of British Columbia produce all records, including the information at issue in this request.³⁷ The Foundation concludes:

Given the deadline for the report of the Cohen Commission, the public hearings regarding aquaculture—including discussions of the information provided by the Ministry—will happen well before this date. In other words, it is necessary to evaluate whether the Ministry has lost the ability to control this information to protect priority of publication.³⁸

[31] The Foundation also suggests that it is unlikely that anyone receiving the data could produce a paper and publish it in advance of the researchers in this case. It argues that the topic of the research is highly complex and has been debated for years. It does not expect that a journal would be interested in publishing the raw data only.³⁹

Analysis

[32] The Ministry has identified the two scientists who are currently analyzing the two data sets (with the exception of the six fields of data on fish health that the Pathologist is not using) and indicated the nature of the research papers they are working on. Both are trained research scientists with experience in post-secondary teaching and research. The two scientists have demonstrated the ability to successfully publish scientific research papers in peer-reviewed journals in the field of fish health. One of the scientists has a peer-reviewed journal interested in his research paper; the other has identified journals to which he plans to submit his paper. There is a reasonable expectation that they will both be able to publish their papers.

[33] I am not able to determine whether the Cohen Commission will affect the ability of the Ministry to ensure priority of publication as the Foundation asserts. To do so, I would need confirmation that the Ministry has disclosed the data to the Cohen Commission and that the Commission has made the data public or will do so. I see no evidence of this before me. Therefore, I find that the Cohen Commission does not affect the application of s. 17(2) of FIPPA in this case.

[34] Although the Foundation asserts that it has no intention of harming the ability of the scientists to publish their papers, the Ministry is correct that it should treat disclosure of this type of information to the Foundation as “disclosure to the world at large”.⁴⁰ Therefore, this consideration is not relevant to the application of s. 17(2) of FIPPA.

³⁷ Foundation’s initial submission, paras. 24-27.

³⁸ Foundation’s initial submission, para. 28.

³⁹ Foundation’s initial submission, paras. 29-30.

⁴⁰ Ministry’s reply submission, para. 18.

Conclusion on s. 17(2)

[35] Given that:

1. the Ministry has identified the two scientific researchers currently drafting research papers based on the information at issue;
2. these researchers have demonstrated that they are capable of publishing scientific papers in the field of aquaculture and that there is a scholarly interest in the subject of their research; and
3. they have presented evidence that public disclosure of even the raw data could put the publication of their papers at risk,

the Ministry has satisfied me that it has met the test of s. 17(2) of FIPPA. Therefore, I find that s. 17(2) applies to the information that the researchers are using for their research.

[36] **3.5 Does s. 17(3) Override s. 17(2)?**—In its reply submission, the Foundation belatedly raised the application of s. 17(3) of FIPPA. Under the OIPC Instructions for Written Inquiries, parties are not normally permitted to raise new issues in their reply submissions: they may only reply to issues raised in the initial submissions of the other parties.⁴¹ In this case, the OIPC accepted the Foundation's submission on s. 17(3) and granted the Ministry an opportunity to reply to it.

[37] The Foundation submits that “the information in the database is information that consists of testing information of both a product (salmon raised for sale to the public) and the environment (conditions of open net salmon pens testing).⁴² According to the Foundation, the affidavits of the two researchers support its position: they demonstrate that the programs that produced the data are responsible for monitoring industry compliance with aquaculture regulations and reporting on the status of fish health and sea lice abundance.⁴³

[38] The Foundation argues that, in essence, s. 17(3) overrides both ss. 17(1) and 17(2). This is because s. 17(3) stipulates that public bodies must not refuse to disclose, under s. 17(1), the results of environmental testing. As the authority to withhold the research information outlined described in s. 17(2) is vested in s. 17(1), the Foundation argues that the Ministry must not withhold information that constitutes product or environmental testing.⁴⁴

⁴¹ *Instructions for Written Inquiries—Office of the Information & Privacy Commissioner for BC*, URL: http://www.oipc.bc.ca/pdfs/Policy/WrittenInstructions_FIPPA_JUNE_2010.pdf, p. 5.

⁴² Foundation's reply submission, para. 10.

⁴³ Foundation's reply submission, paras. 8 and 9.

⁴⁴ Foundation's reply submission, para. 17.

[39] The Ministry's submission is silent on the issue of the interrelationships between ss. 17(1), 17(2) and 17(3).

Analysis

[40] The Foundation's argument rests on the assumption that s. 17(2) is, in effect, an extension of s. 17(1). Previous orders on the application of s. 17(2) make no reference to subjecting s. 17(2) to the financial harms test. The equivalent provision in the Ontario legislation is drafted differently, so there are no orders from Ontario to provide guidance either. Neither are there any orders from Alberta.

[41] It is a well established rule of statutory interpretation that a statutory provision should not be interpreted in isolation. Its words are to be read in their grammatical and ordinary sense, but they must also be considered and interpreted in their entire context, harmoniously with the statute's scheme and objects, and the Legislature's intention: *British Columbia (Ministry of Labour and Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*.⁴⁵ This requirement to interpret legislation in a purposive and contextual manner is reflected in s. 8 of the *Interpretation Act*. Therefore, s. 17(2) should be considered, not in isolation, but within the entire context of s. 17 and having regard to the legislative scheme as a whole.

[42] In my view, s. 17 provides for two discrete situations where the Ministry is given discretion to refuse to disclose information. The first situation, s. 17(1), is when: (1) the information at issue falls into s. 17(1), including any of subparagraphs (a) to (f); (2) its disclosure could reasonably be expected to harm the financial or economic interests of a public body or the government or the government's ability to manage the economy; and (3) it is not information that must be disclosed under s. 17(3). The second situation, s. 17(2), is where the information is research information which, if disclosed, could reasonably be expected to deprive the researcher of publication.

[43] The qualification in s. 17(3) relates specifically to disclosure under s. 17(1) and requires a public body to disclose the results of product or environmental testing in certain circumstances, regardless of whether it could otherwise be withheld under s. 17(1). In other words, financial harm is not an appropriate justification for withholding information about possible harm to the public, but the ability to decline to disclose research information to protect a researcher's priority of publication remains intact. Section 17(2) enables a public body to postpone the disclosure of the information until it is made publicly available, along with the scientific analysis of the test results, through formal publication. At that point, the

⁴⁵ 2009 BCSC 1700 at paras. 27 and 38.

test results also become available to individual requesters under FIPPA. In cases where the interests of the public require the test results to be made publicly available without delay, s. 25 of FIPPA will require the disclosure.

[44] My interpretation is reinforced by other provisions of FIPPA relating to research information, such as s. 3(1)(e). Section 3(1)(e) excludes from FIPPA's scope the research information of employees of a post-secondary educational body. In Order 00-36, Commissioner Loukidelis found that this provision is intended to protect individual academic endeavour by protecting research information from disclosure to those who might exploit it to the disadvantage of the researcher (such as by depriving the researcher of the ability to assert and verify priority when publishing or otherwise disseminating the research results). Adjudicator McEvoy noted, in Order F10-43,⁴⁶ that there is great intellectual property value in research for an individual who is the "first to report a novel methodology or result". The purpose of s. 3(1)(e), he explained, was to "preserve and enhance this incentive, thereby encouraging research that may benefit society as a whole".⁴⁷ Section 3(1)(e) provides another indication that the Legislature intended to protect the interests of researchers, including a researcher's priority of publication.

[45] Moreover, if s. 17(2) were merely an extension of s. 17(1), it would be necessary in every case to demonstrate that the harm from disclosure would also have to result in financial or economic harm to a public body or the government of British Columbia. It is difficult to envisage a circumstance where depriving a researcher of priority of publication would result in financial or economic harm to a public body to the extent where s. 17(1) would apply. There might be financial harm to the individual researcher involved in some cases, but my understanding is that scientific and academic journals generally do not pay researchers for publishing articles. Therefore, the effect of subjecting s. 17(2) to the harms test under s. 17(1) would be to prevent it from ever applying, which would be an absurd result. As Adjudicator Higgins noted in Ontario Order M-444, Appeal M-9400406, "it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention".⁴⁸ Consequently, it is reasonable to conclude that s. 17(2) of FIPPA should be interpreted on its own, independently of s. 17(1).

[46] I have determined that s. 17(3) of FIPPA only overrides s. 17(1) and not s. 17(2). I have also determined that s. 17(2) should be interpreted independently of the requirements of s. 17(1). Therefore, I find that s. 17(3) does not override s. 17(2).

⁴⁶ [2010] B.C.I.P.C.D. No. 64.

⁴⁷ [2010] B.C.I.P.C.D. No. 64, para. 24.

⁴⁸ [1995] O.I.P.C. No. 17, p. 3.

[47] **3.6 Summary**—The Ministry has demonstrated that the research is *bona fide*. These researchers have recognized records of successfully publishing research papers in the field of study of aquaculture and fish health. The Ministry has also established that the public disclosure of the information can reasonably be expected to deprive the researchers of priority of publication, in accordance with s. 17(2) of FIPPA. Therefore, I find that s. 17(2) applies to the information that the researchers are using and the Ministry may refuse to disclose the information until the priority of publication for the two researchers is no longer an issue. The Ministry will disclose the data to the applicant at that point.

[48] By contrast, I find that s. 17(2) of FIPPA does not apply to the six fields that the Pathologist is not using in his research and that could be released without disclosing information to which s. 17(2) applies. The Ministry's argument that the six fields cannot reasonably be separated from the rest is not relevant to the application of s. 17(2) of FIPPA. It is a severing issue and is not before me. The Ministry must complete the processing of the Foundation's request with respect to this information, if the Foundation is interested in receiving it in advance of the remainder of the information.

4.0 CONCLUSION

[49] For the reasons given above, under s. 58 of FIPPA, I make the following order:

1. Subject to para. 2 below, I confirm that s. 17(2) of FIPPA authorizes the Ministry to withhold the requested information.
2. I find that s. 17(2) of FIPPA does not apply to the information from the Fish Health Program outlined in the first six bullets in para. 4.15 of the Ministry's initial submission. I require the Ministry to complete the processing of the request with respect to this information and provide a response to the Foundation.
3. I require the Ministry to respond to the Foundation within 30 days of the date of this order, as FIPPA defines "day", that is, on or before June 16, 2011 and, concurrently, to copy me on its cover letter to the Foundation.
4. Under s. 58(4), I specify that the Ministry is to report back to me on the progress of the publication of each of the two research papers within six months, that is, on or before November 4, 2011, or whenever either has been published, whichever comes first, and periodically after that, if either paper remains unpublished.

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5. I require the Ministry to disclose all of the data from each data set, once the corresponding paper has been published.

May 4, 2011

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

OIPC File No.: F09-40778