



Information Commissioner's final report

Institution: Fisheries and Oceans Canada

Date: 2025-01-28

OIC file number: 5823-01182

Access request number: A-2022-01091

Complaint

The complainant alleged that Fisheries and Oceans Canada (DFO) had improperly withheld information under paragraph 20(1)(b) (confidential third-party financial, commercial, scientific or technical information) of the *Access to Information Act* in response to an access request. The request was for data analysed in the Sea Lice Science Response Report (2022/045) from January 2022 to June 2022. The allegation falls under paragraph 30(1)(a) of the Act.

Investigation

When an institution withholds information related to third parties, the third parties and/or the institution bear the burden of showing that refusing to grant access is justified.

The responsive records are five Excel spreadsheets. Four of the spreadsheets contain only temperature and salinity data. During the investigation, DFO conceded that the temperature and salinity data provided by its Pacific Region office could be disclosed.

DFO also indicated it could release most of the columns in the fifth spreadsheet containing sea lice data (columns A-D, F, H, J and L-AK), other than four columns that would allow for calculation of the number of fish per farm/pen at a given point in time (columns E, G, I and K). Although DFO indicated that it is only maintaining that the requirements for exemption are met for columns E, G, I and K of the fifth spreadsheet, containing sea lice data, DFO has not yet released the other spreadsheets and columns A-D, F, H, J and L-AK. Consequently, my analysis as to

whether the requirements of the exemption are met includes the information which DFO has conceded is not exempt from disclosure.

Three third parties, to whom the information relates, were identified by DFO. Cermaq Canada (Cermaq), Mowi Canada West (Mowi) and Grieg Seafood British Columbia (Grieg Seafood). The Office of the Information Commissioner (OIC) sought representations from the three third parties pursuant to paragraph 35(2)(c). None of the third parties responded to the OIC's requests for representations. The OIC sent notice to all three third parties pursuant to section 36.3, and received a response only from Mowi. The other two third parties did not respond to the notices.

The data related to Mowi and Grieg Seafood is exclusively temperature and salinity data, which DFO conceded could be disclosed.

The population and sea lice data relate only to Cermaq. Cermaq did not provide representations and did not respond to the notice issued under section 36.3. DFO also conceded that, apart from columns E, G, I and K, this data could also be disclosed.

DFO indicated it awaits my decision prior to disclosing any of the information.

Paragraph 20(1)(b): confidential third-party financial, commercial, scientific or technical information

Paragraph 20(1)(b) requires institutions to refuse to disclose confidential financial, commercial, scientific or technical information provided to a government institution by a third party.

To claim this exemption, institutions must show the following:

- The information is financial, commercial, scientific or technical.
- The information is confidential.
- The third party supplied the information to a government institution.
- The third party has consistently treated the information as confidential.

When these requirements are met, and the third party to whom the information relates consents to its disclosure, subsection 20(5) requires institutions to reasonably exercise their discretion to decide whether to disclose the information.

In addition, when the requirements are met, subsection 20(6) requires institutions to reasonably exercise their discretion to decide whether to disclose the information for public health or public safety reasons, or to protect the environment, when both of the following circumstances (listed in subsection 20(6)) exist:

- disclosure of the information would be in the public interest; and
- the public interest in disclosure clearly outweighs any financial impact on the third party, any prejudice to the security of the third party's structures, networks or systems, or competitive position, or any interference with its contractual or other negotiations.

However, subsections 20(2) and 20(4) specifically prohibit institutions from using paragraph 20(1)(b) to refuse to disclose information that contains the results of product or environmental testing carried out by or on behalf of a government institution, unless the testing was done for a fee for an individual or an organization other than a government institution.

Does the information meet the requirements of the exemption?

DFO withheld multiple columns within the responsive records under paragraph 20(1)(b).

I accept that the withheld information is technical and/or scientific in nature, so as to meet the first requirement of the exemption.

With respect to the second requirement, that the information is objectively confidential, the information must be assessed against three conditions for confidentiality:

- The information must not be available from sources otherwise accessible by the public.
- It must originate and be communicated with a reasonable expectation that it will not be disclosed.
- It must be communicated, whether required by law or otherwise, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest. This relationship must be fostered for public benefit by the confidential communication. (see: *Air Atonabee Ltd. v. Canada (Minister of Transport)*, [1989] F.C.J. No. 453).

There does appear to be publicly available data that is similar in nature to the withheld information.

Relevant public information was found on the internet:

- <https://mowi.com/caw/sustainability/wild-salmonid-lice-monitoring/>
- <https://www.cermaq.ca/public-trust/public-reporting>
- <https://www.pnas.org/doi/10.1073/pnas.1009573108#supplementary-materials>

- <http://www.watershed-watch.org/wordpress/wp-content/uploads/2012/07/Exh-1685-BCP001643.xls>

Based on a review of the publicly available information, I accept that the publicly available information is not the same as the withheld information. Since disclosure would reveal information that is not available to the public, the information meets the first condition of objective confidentiality.

DFO has indicated that the information requested was supplied voluntarily by third parties with an expectation of confidentiality. DFO explained that this assertion is based on past consultations with the third parties relating to similar types of information. With respect, I do not accept that reliance on past experience is sufficient evidence to support the premise that the third parties had a reasonable expectation of confidentiality when the requested information was communicated. It appears that such data is regularly published alongside scientific reports. This would seem to diminish the expectation of confidentiality. Mowi indicated that DFO needs Mowi's permission to disclose such information but provided no evidence to support this assertion. Neither Mowi nor DFO have met their burden of providing evidence that there was such an understanding with respect to the withheld information (see: *Brainhunter (Ottawa) Inc. v. Canada (Attorney General)*, 2009 FC 1172 at para. 25).

Turning to the third requirement of the exemption, I am not convinced that all of the information was supplied by third parties to DFO. One of the Offices of Primary Interest at DFO indicated that the temperature and salinity data were measured by DFO employees during site visits. The case law under paragraph 20(1)(b) has repeatedly distinguished between information supplied by a third party and independent observations (see, for example: *Merck Frosst v. Canada (Minister of Health)*, 2012 SCC 3, at paras. 152-158; *Canada (Transport) v. Air Transat A.T. Inc.*, 2019 FCA 286, paras. 71-81). I note that DFO indicated it no longer maintains that the requirements of paragraph 20(1)(b) are met for the temperature and salinity data.

Mowi indicated in its representations that it has consistently treated the withheld information as confidential. Given I found no evidence to the contrary, I accept that the final requirement of the exemption is met for Mowi's information.

Since no representations have been provided to support that the other two third parties have consistently treated the withheld information as confidential, I conclude that the final requirement of the exemption is not met for the information related to Cermaq and Grieg Seafood.

As I have noted, DFO conceded that the temperature and salinity data in the first four spreadsheets and columns A-D, F, H, J and L-AK in the fifth spreadsheet containing

sea lice data could be released. I also conclude that this information does not meet the requirements of paragraph 20(1)(b).

With respect to columns E, G, I and K, which DFO maintains are exempt from disclosure, I do not find that DFO nor the third parties have met their burden. I conclude that the information in columns E, G, I and K of the fifth spreadsheet also does not meet the requirements of paragraph 20(1)(b).

Section 26: information to be published

Section 26 allows institutions to refuse to disclose information the Government of Canada will publish in the near future.

To claim the exemption, institutions must show the following:

- There are reasonable grounds to believe that the information will be published by a government institution, agent of the Government of Canada or minister, other than material proactively disclosed under Part 2 of the *Access to Information Act*.
- The publication will occur within 90 days after the access request is made or within the time that may be necessary for printing or translation to take place.

When these requirements are met, institutions must then reasonably exercise their discretion to decide whether to disclose the information.

Does the information meet the requirements of the exemption?

DFO did not apply section 26 to the records, nor did it provide any representations as to how section 26 could apply to the requested information. Mowi did, however, raise this exemption in its representations. Mowi indicated that it has reason to believe that the withheld data will be published as part of a scientific paper being prepared for publication in Nature Scientific Data Journal.

Section 26 is a discretionary exemption that can be used to protect information intended for publication within 90 days of an access request being made. It is clear that, since the access request was made in 2023, the 90-day timeline for section 26 has already passed, and the records have not been published.

I conclude that the information does not meet the requirements of section 26.

Outcome

The complaint is well founded:

- The information related to third parties was not shown to be objectively confidential or supplied by a third party and/or some of it was not supplied by a

third party and it was not demonstrated that the third parties consistently treated it as confidential.

- It was not demonstrated that the government intended to publish the information within 90 days of the access request being made.

Order

I order the Minister of Fisheries and Oceans to fully disclose the records.

Initial report and notice from institution

On January 20, 2025, I issued my initial report to the Minister of Fisheries and Oceans setting out my order.

On January 22, 2025, DFO's Acting Director, Access to Information and Privacy Division gave me notice that DFO would be implementing my order and fully disclose the information to the complainant.

Review by Federal Court

When an allegation in a complaint falls under paragraph 30(1)(a), (b), (c), (d), (d.1) or (e) of the Act, the complainant has the right to apply to the Federal Court for a review. When the Information Commissioner makes an order(s), the institution also has the right to apply for a review. The complainant and/or institution must apply for a review within 35 business days after the date of this report. When they do not, third parties may apply for a review within the next 10 business days. Whoever applies for a review must serve a copy of the application for review to the relevant parties, as per section 43. If no one applies for a review by these deadlines, the order(s) takes effect on the 46th business day after the date of this report.

Other recipients of final report

As required by subsection 37(2), this report was provided to Mowi.


Caroline Maynard
Information Commissioner of Canada