



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2020-005

April 17, 2020

Department of Fisheries and Land Resources

Summary:

In the late summer and early fall of 2019, a significant salmon mass mortality event occurred at several fish farm locations on the south coast of Newfoundland. This event attracted considerable media attention as well as questions about the potential impact of this event, as well as subsequent clean-up operations, on the local environment and/or the health of people in the area. On October 30, 2019, this Office commenced an own motion investigation into whether section 9(3) (Public Interest) of the *Access to Information and Protection of Privacy Act, 2015* applied and whether the Department of Fisheries and Land Resources was obligated to make public disclosure of information about this mass mortality event. The Commissioner's investigation concluded that the Department did not have information in its possession about a risk of significant harm to the environment or to the health or safety of the public which it would have been obliged to disclose.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, section 9(3); [Freedom of Information and Protection of Privacy Act](#), RSBC 1996, c 165, section 25(1).

Authorities Relied On:

Newfoundland and Labrador OIPC Report [2007-003](#); British Columbia OIPC Investigation Report [F15-02](#); British Columbia OIPC Order [F19-16](#); [Canada Ltée \(Spraytech, Société d'arrosage\) v. Hudson \(Town\)](#), [2001] 2 S.C.R. 241; 2001 SCC 40; [Northern Harvest Sea Farm High Temperature Mortality Event in Fortune Bay North – Interim Report](#), MAMKA, November 29, 2019; [A Review of the 2019 Newfoundland and Labrador South Coast Cultured Atlantic Salmon Mortality Event](#), Fisheries and Marine Institute of Memorial University of Newfoundland, March 16, 2020;

I BACKGROUND

- [1] Sometime in late August, 2019, salmon aquaculture operations on the south coast of Newfoundland, in the Coast of Bays/Fortune Bay area, experienced a mass mortality event. Initially, the company operating the facility – Northern Harvest, a subsidiary of MOWI – advised the Department of Fisheries and Land Resources (the “Department”) that one site was affected. Over the following weeks, it was determined that multiple sites had been impacted and the total mortality amounted to 2.6 million fish, or 5,000 tons. News of the mortality event and remediation efforts attracted considerable public attention and concern about its potential implications for the environment or the health or safety of the public.
- [2] The two main questions posed by the media, members of the public and Members of the House of Assembly were whether the cause of the mortality event might have wider implications for wild fish populations, such as if it were due to disease; and whether the remediation efforts would themselves impact the environment. Images of vessels appearing to pump a slurry of organic material from affected salmon cages were much reported and gave rise to questions about potential harm from introducing 5,000 tons of deceased salmon into the marine environment.
- [3] These questions about harm to the environment or to human health or safety potentially engage section 9(3) of the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)*. This matter was raised by Member of the House of Assembly, James Dinn, in a letter that he wrote to me on October 24, 2019. This provision requires public bodies to disclose information in their custody or control about a potential threat to the environment or human health or safety when it is in the public interest to do so. As such, on October 30, 2019 my Office commenced an own motion investigation in accordance with section 95(1)(a) into the decision of the Department not to apply section 9(3) to this mortality event by proactively disclosing information about it. In notifying the Department of my investigation, I also asked that it coordinate responses from the Departments of Service NL and Municipal Affairs and Environment. Pursuant to section 97(3) of *ATIPPA, 2015*, the three Departments were asked to provide the following:

1. *Records created or received by your Department, including from third parties, describing the impact of the salmon mortality event on the environment;*
2. *Records created or received by your Department, including from third parties, describing the impact of the salmon mortality event on human health or safety;*
3. *Any correspondence to or from the company whose facilities experienced the salmon mortality event which informed you or your officials about the date of the mortality and the scale and scope of the mortality, including any impacts on the environment or human health or safety;*
4. *Your views as to whether information about the salmon mortality incident*
 - a) *meets the threshold of information about a risk of significant harm to the environment or to the health or safety of the public or a group of people,*
 - and b) *whether the disclosure of information, should it be found to meet that threshold, would be clearly in the public interest.*
5. *Any other information you think appropriate to provide in response to this investigation.*

[4] Submissions from all three Departments were received on November 21, 2019. These submissions contained minimal records relating to the impact of the mortality event on the environment or on human health or safety, and several further requests were made for the Department to provide:

- records relating to any consultations between the Minister and senior officials and Department staff, including any memoranda or briefing materials prepared for the Minister, or notes taken in the course of such consultations;
- records relating to Northern Harvest or MOWI's waste management plan submitted to and reviewed by the Department; and
- records relating to any consultation with Fisheries and Oceans Canada; Environment and Climate Change Canada; or Canadian Wildlife Service.

Additional records were received on February 17, 2020. At that time the Department advised that it did not have in its custody or control records relating to any deliberations or consideration within the Department, and between the Minister and staff, regarding the application of Section 9(3) of *ATIPPA, 2015* to this incident, or to the question of public notice generally. A final submission from the Minister was sent to the Office on March 3, 2020.

II PUBLIC BODY'S POSITION

[5] As noted, my Office received submissions from the Department, as well as Service NL and Municipal Affairs and Environment. Municipal Affairs and Environment's involvement in the mortality event was through its Pollution Prevention Division and records were received from that Division. Records disclosed that the Pollution Prevention Division's role was limited to inquiries with the Department to confirm that mortalities would be disposed of at approved facilities. For its part, Service NL advised that its role was limited to Occupational Health and Safety as a result of an incident involving divers which occurred on October 6, 2019.

[6] Therefore, the focus of this investigation is on the Department of Fisheries and Land Resources, which submits that it did not have any information before it in relation to the salmon mortality event that suggested any risk of harm to the environment or to the health or safety of the public or a group of people. Without information suggesting such harms, the Department submits that it was under no obligation to disclose any information pursuant to section 9(3).

[7] In support of this position, the Department cites Newfoundland and Labrador and British Columbia case law which establishes a two-part test for the application of section 9(3), requiring that there be evidence of harm as well as a clear public interest in disclosing information about such harm.

III ISSUES

[8] The core issue for this Report is the application of section 9(3) to the mortality event in order to determine whether the Department was at any time required by this provision of *ATIPPA, 2015* to disclose information to the public. The application of section 9(3) to any event is very fact specific, and the details of how the mortality event progressed, and what information reached the Department and at what time, is of particular relevance.

[9] This investigation has also given rise to a question of whether the Department at any time would have been prevented by any other provision of *ATIPPA, 2015* from disclosing information related to this mass mortality event to the public.

IV DECISION

Application of Section 9(3)

[10] Section 9(3) of *ATIPPA, 2015* provides:

9(3) *Whether or not a request for access is made, the head of a public body shall, without delay, disclose to the public, to an affected group of people or to an applicant, information about a risk of significant harm to the environment or to the health or safety of the public or a group of people, the disclosure of which is clearly in the public interest.*

[11] This Office addressed section 9(3) previously in Report 2007-003 under the former *Access to Information and Protection of Privacy Act*. Section 31(1) of that Act remains unchanged as section 9(3) in the present *ATIPPA, 2015*. As this Office held in Report 2007-003, the language of section 9(3) clearly establishes a two-part test for whether a public body is compelled to disclose information to the public:

[142] *I also note that section 31 contains a two part test. There must first be a risk of significant harm and disclosure of the information must clearly be in the public interest.*

[12] Section 25 of British Columbia's *Freedom of Information and Protection of Privacy Act* ("*FOIPPA*") is similar to section 9(3):

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.*

I note that there is a key distinction between *FOIPPA* and *ATIPPA, 2015* in that section 25 requires only a risk of significant harm OR a public interest in disclosure – the test established by *ATIPPA, 2015* is stricter and requires that both conditions be satisfied.

[13] As a consequence, case law from the British Columbia OIPC is relevant to any application of *ATIPPA, 2015's* section 9(3). In terms of what kinds of records and information may be subject to disclosure under 9(3), BC OIPC Investigation Report F15-02 provides useful guidance:

In Order 02-38, former Commissioner Loukidelis provided examples of information about a risk identified in s. 25(1)(a). Such information could include:

- *information that discloses the existence of the risk;*
- *information that described the nature of the risk and the nature and extent of any harm that is anticipated if the risk comes to fruition and harm is caused; and*
- *information that allows the public to take action necessary to meet the risk or mitigate or avoid harm.*

[14] The Department's submissions are that it did not have before it any such information which suggested that the salmon mortality event, or the subsequent disposal efforts, constituted any kind of risk of harm to the environment or to human health or safety. From the Department's submissions, the Department had knowledge of the following information over the course of this mass mortality event and its own investigation:

- *Initially, MOWI had experienced a mass mortality event at one site on or about August 28, 2019 and Department staff attended at the site soon afterwards to investigate and collect samples;*
- *Later, on September 3, 2019, MOWI further advised that it experienced mass mortality events at a total of six sites. The full scale of the event would not, however, be known to the Department until on or about October 11, 2019;*
- *Throughout its response to this mass mortality event, the Minister was provided with oral briefings from Department staff and no concerns regarding a risk to the environment or human health were raised at any time;*
- *The mass mortality was caused by warming water, which forced fish lower in the pens causing overcrowding and a shortage of oxygen;*
- *That the Canadian Food Inspection Agency requires harvesters to report mortality events involving disease but not those resulting from warm or cold water;*
- *Deceased fish were not disposed of in the ocean. Images of pink slurry being pumped from vessels merely represented excess water (which*

contained some organic material but not all remains) – after fish had been removed from pens;

- *That the removal of deceased fish from pens for disposal on land is standard practice in Canada;*

[15] The Department also submits that throughout its response to this mass mortality event, it was in contact with its federal counterparts to obtain the guidance of Fisheries and Oceans Canada and no concerns were voiced from that organization about a potential risk to the environment or to human health.

[16] My Office has reviewed all of the documents that were provided by the Department. When the documents provided initially did not include any such information, staff asked more specific questions and the Department provided additional documents. Upon review of all of these documents, my Office is confident that the Department's above description of the information it had before it is comprehensive and accurate.

[17] In sum, I find that the Department did not have any information before it which suggested that this mass mortality event posed any significant risk of harm to the environment or to human health or safety. The event was not an unusual event, as similar mass mortality events – though perhaps not of the same scale – have occurred in the Newfoundland and Labrador aquaculture industry in the past. The Minister and other senior officials within the Department received information and guidance from Department staff as well as federal agencies and the Department submits that at no point were concerns raised. As noted above, section 9(3) is a two-part test, and first a public body must have evidence before it of a risk of significant harm. I find that the Department did not have evidence of any risk of harm and therefore the first part of the test has not been met.

Obligation to Seek-Out Information

[18] In the area of environmental law, the precautionary principle – adopted into Canadian law in, for example, *Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)* – provides that environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent

environmental degradation. Thus, while the Department has indicated that it was not aware of any evidence that the mass mortality event or the clean-up posed a risk to the environment or to human health, there is a question whether the Department was obligated to seek-out any further information that would confirm an absence of any such risk. However, BC OIPC Report *Metro Vancouver Regional District 2019 BCOIPC 18* clearly rules-out any such burden on a public body:

[14] . . . therefore, in order for the Ministry to have been in contravention of s. 25(1)(a), it must have had information about the risk of significant present or future harm, before the harm occurred. I also note that this is not a question of whether the Ministry should have had information about such a risk, but whether it actually had such information.

[19] Concurring with the British Columbia Information and Privacy Commissioner, I further note that an obligation to rule-out a risk of harm – while attractive – would be an extremely broad and potentially unending task for a public body.

Hindsight

[20] Since this event occurred, reviews of its causes or impacts have been completed by the Mi'kmaq Alsumk Mowimsikik Koqoey Association (an organization established by the Mi'kmaq First Nation Band (Qalipu) and the Miawpukek First Nation) (“MAMKA”) and Memorial University of Newfoundland’s Marine Institute. MAMKA’s preliminary report dated November 29, 2019 suggests that the impact on the environment was relatively minor, with 3% of the shoreline impacted with the presence of salmon fat deposits. MAMKA’s report does not address whether such fat deposits have a deleterious impact on the environment.

[21] On October 2, 2019, the Department arranged for Memorial University of Newfoundland’s Marine Institute to conduct an independent review of the mass mortality event. The Marine Institute’s report was released March 16, 2020 and addresses the causes of the mortality event and reviews the remediation measures taken. It concludes that “an unusual set of natural environmental conditions triggered a series of events that lead to mass asphyxiation of salmon”.

The environmental factors included:

- Prolonged increase in water temperatures which reduced dissolved oxygen levels and caused crowding at the bottom of cages;
- Stress caused by recent therapeutic treatments for sea lice increased the oxygen needs of fish;
- Dead fish lying at the bottom of the cages collapsed and deformed the pens, further increasing crowding;
- A suspected algae bloom in the area could have removed oxygen from the water and exacerbated conditions.

A key conclusion is that there was no evidence that infectious disease was a contributor to the mortality event, except for one site where infectious salmon anemia had caused an increase in mortality earlier, in July and August, 2019.

[22] As to remediation efforts, the Marine Institute report indicates that deceased fish were removed by divers and seiner vessels and disposed of on land. The majority of the mortalities were rendered at a fishmeal facility in Burgeo. As a precaution, rendering followed a Canada Food Inspection Agency approved process for rendering mortalities caused by infectious salmon anemia. The remaining mortalities were disposed of on land at an anaerobic digestion facility. This account further supports the Department's position, noted above, that aside from some organic material contained in water pumped from seiner vessels, the majority of the deceased salmon biomass was not disposed of in the marine environment.

[23] While these two reports are useful in assessing the causes of this mortality event and its potential impacts on the environment or on human health or safety, it is worthwhile to note that evidence, after the fact, of a lack of harm to the environment or human health does not necessarily lead to the conclusion that a public body has complied with section 9(3). It is conceivable that a public body may have evidence of significant harm at an earlier date but that harm may not necessarily occur, or occur to the degree originally anticipated. To rely solely on later evidence, and exonerate a public body based on the actual occurrence (or non-occurrence) of harm potentially risks creating an incentive for a public body to take a wait-and-see approach and avoid disclosure until harm has actually occurred. However, this does not appear applicable to the present matter or representative of the actions of the Department.

Whether Prevented from Disclosure

- [24] Various provisions of *ATIPPA, 2015* require, permit, or prohibit disclosure of information. Section 9(3) is unique in that it is the only provision of *ATIPPA, 2015* which requires the disclosure of information in the absence of an access to information request made under sections 8 and 11. When a public body is in receipt of an access to information request, it is required to respond, though the exceptions at Part II of *ATIPPA, 2015* – some of which are mandatory – may apply.
- [25] In circumstances where section 9(3) is not applicable, the only information that *ATIPPA, 2015* prevents a public body from disclosing proactively in the absence of an access request is personal information, unless such disclosure is permitted by section 68. Furthermore, the exceptions to disclosure found in Part II of the *Act* are only triggered in response to an access request. In practice, the exceptions tend to reflect how public bodies normally operate, but when considering proactive disclosure, particularly in matters of public interest, public bodies should not view section 9(3) as a threshold that must be met in order to proactively disclose such information, nor should they view the exceptions in *ATIPPA, 2015* (other than personal information) as an impediment to such disclosure.
- [26] In his public remarks on this matter, and in his initial written response to this Office, Minister Byrne indicated that he was considering public disclosure but he decided not to because of *ATIPPA, 2015*. Per the finding above, the information in question was not information subject to section 9(3) because it was not about a significant risk to the environment or public health and safety. While the Minister initially indicated that *ATIPPA, 2015* prevented him from disclosing information about the salmon die-off, he later clarified that his decision not to disclose the information was a policy decision that was guided by the principles in the access section of the *Act*. However, as noted above, the access provisions of *ATIPPA, 2015* only apply when a public body is in receipt of an access to information request, and many of the exceptions to access are merely discretionary.
- [27] Even when section 9(3) does not apply to *require* disclosure, as in this case, a public body would still have the *ability*, if it so chose, to disclose information to the public. Section 9(3) is

of limited application in that it only applies to information about a risk of significant harm to the environment or to human health or safety and, in the present matter, we have found that the Department did not have such information before it. In circumstances where section 9(3) does not apply, and where there has been no access to information request, the only impediment in the *ATIPPA, 2015* to proactive disclosure of information by a public body would be if the information is personal information that a public body is required to withhold. Outside of those considerations, the decision to disclose information proactively would presumably be a political and/or policy decision and involve the weighing of various considerations. Such decisions are outside the scope of *ATIPPA, 2015* and oversight by this Office.

Subsequent Public Notice Measures

[28] Since the die-off event, the Department advises that it has instituted new policies which require companies experiencing a similar die-off event to notify the Department and the public. This is a welcome step by the Department to introduce greater transparency in a major industry.

[29] That said, in the event that the Department is aware of a risk of significant harm to the environment or to human health that meets the test set by section 9(3), the onus would still be on the Department to notify the public in order to discharge its obligation under *ATIPPA, 2015*. A public body should not, and cannot, rely on disclosure by a private party in place of its own mandated disclosure if it has relevant information in its own control or custody. Furthermore, as a matter of general policy and good governance, public bodies are always encouraged to proactively disclose information when it is in the public interest to do so, regardless of whether it is required to disclose that information under section 9(3) or any other legislative provision.

Duty to Document

[30] As noted above, the Department's submissions did not include records relating to any briefings provided to the Minister or discussions between the Minister and senior officials or other Department employees. The Department explained that all such briefings, including those on scientific matters related to the causes of the mortality event and its potential

impacts on the environment or human health or safety (if any), were done verbally and records were not kept.

[31] Our investigation, including our review of those records which the Department was able to provide and the two subsequent studies of the mortality event prepared by MAMKA and the Marine Institute, has found that the Department was not aware of any information suggesting a risk of significant harm to the environment or to human health or safety. We have no reason to believe that, had written briefing materials been prepared for the Minister, or minutes or other notes kept of meetings, that these records would contain any information that would indicate a risk of significant harm to the environment or to human health or safety. However, had the Department better documented its response to the mortality and indeed its decision that public notice under section 9(3) was not required, it would have been much easier to reach our conclusion that the Department had acted properly.

V RECOMMENDATIONS

[32] Having found no evidence that the Department had before it information about a significant risk to the environment or to human health, the test for the application of section 9(3) has not been met. Therefore, I do not have any recommendations to make to the Department.

[33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 17th day of April 2020.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador