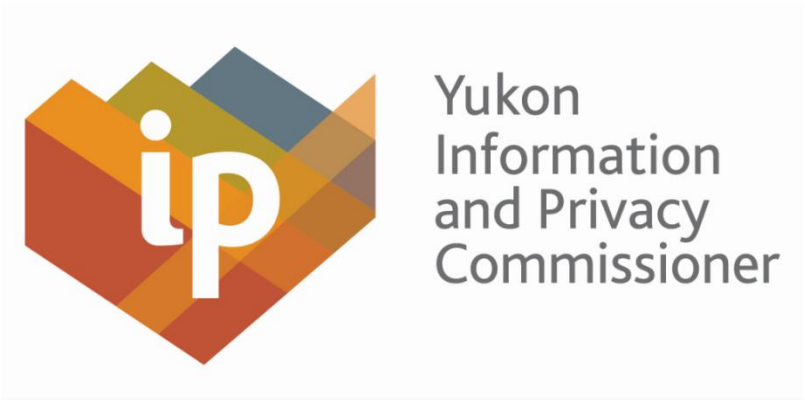

INVESTIGATION REPORT

Pursuant to section 66 of the

Access to Information and Protection of Privacy Act

Department of Environment
File ATP-ADJ-2022-02-053

Rick Smith, Adjudicator
Office of the Information and Privacy Commissioner
August 05, 2022

Summary

Sometime prior to November 8, 2021, the Complainant, as an applicant, made an access request to the Department of the Environment for the following information.

> *All GPS collar data from Yukon North Slope Grizzly Bears, in full, including all data fields (e.g., coordinates, time, PDOP, temperature, motion, accelerometer, etc…). Data range from 2003 to 2011. Data was provided to non-government organizations and contractors in 2015 and 2016. I am requesting the data be sent to me in electronic Excel file format.*

After some communication between the Complainant and the ATIPP Office, the timeframe was adjusted to the period January 1, 2004, and December 31, 2010.

The Department of the Environment refused the Complainant access in full to the responsive records, citing as its authority subparagraphs 75(1)(a)(ii) and (iv) [disclosure harmful to economic or financial interests of public body], subsection 76(1) [disclosure harmful to intergovernmental relations] and paragraph 78(b) [disclosure harmful to conservation or heritage site].

The Complainant requested that the Information and Privacy Commissioner investigate the refusal under the consultation process. Consultation failed to resolve the matter and it went to adjudication.

The Adjudicator found that the Department of the Environment did not have the requisite authority under any of the cited exemption provisions to withhold the information requested by the Complainant. As such, the Adjudicator recommended that it provide this information to the Complainant as entitled.

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Statutes Cited

Access to Information and Protection of Privacy Act, SY 2018, c.9

Interpretation Act, RSY 2002, c.125

Freedom of Information and Protection of Privacy Act, as amended, SS 1990-91, c.F-22.01

Environment Act, RSY 2002, c.76

Wildlife Act, RSY 2002, c.229RSY 2002, c.229

Species at Risk Act, SC 2002, c.29

Freedom of Information and Protection of Privacy Act, RSBC 1996, c.165

Cases and Orders Cited

Cases

Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31 (CanLII)

Orders

BC Order F15-58

BC Order 01-52

BC Order 01-11

Reports

Yukon Inquiry Report ATP15-055AR

Yukon Inquiry Report ATP18-16R, 17R and 38R

Yukon Inquiry Report ATP20-06R

Saskatchewan Review Report 195-2019

Explanatory Note

All sections, subsections, paragraphs and the like referred to in this investigation report (Investigation Report) are to the *Access to Information and Protection of Privacy Act* (ATIPPA), unless otherwise stated.

I BACKGROUND

[1] Sometime prior to November 8, 2021, the applicant made an access request for the following information from the Department of the Environment (Department).

> All GPS collar data from Yukon North Slope Grizzly Bears, in full, including all data fields (*e.g.,* coordinates, time, PDOP, temperature, motion, accelerometer, etc…). Data range from 2003 to 2011. Data was provided to non-government organizations and contractors in 2015 and 2016. I am requesting the data be sent to me in electronic Excel file format.

[2] On November 8, 2021, the ATIPP Office assigned file number '21-0359' to the access request and activated it via an activation letter (ATIPP Office Activation Letter). It included the following information exchange, in addition to the original access request.

> *[Department] Clarification #1*
>
> There is data within this request that may cause harm to the bear population if released. In light of this, the [Department] would like to know if the applicant is willing to narrow the scope of the coordinates field to exclude bear denning locations?
>
> *[Applicant] Answer #1*
>
> I am actually interested in the full data set and concerned that the exclusion of data that might reveal a den location might be liberally applied to any spring and fall location. It would be best if the public body did not exclude this data. The data I am requesting is greater than 10 years old, and given the dynamics of permafrost and the soil in this region, and the denning behaviour of bears, any den locations that can be discerned from this data have no probability of being currently used or used in the future. Hopefully, that ameliorates the public body's concern about implications to conservation of bears.
>
> *[Department] Clarification #2*
>
> We would like to note a few corrections regarding the timeframe for the applicant's consideration. Based on our records, the timeframe for the data are *[sic]* from 2004 to 2011 and this data did not include collar data but rather grid information. The data was released to a third party in 2017. This is just to let the applicant know as this may affect their request. We also would like to confirm if the applicant is looking for data between 01 January 2003 or (2004) to 31 December 2011? Or are they looking for a different

timeframe instead of a full year between the years identified? We received information about bear behaviors regarding den locations. It appears that bear den locations remain fairly consistent and it is expected that den locations from 10 years ago would still be used presently. Considering this new information, we would like to confirm if the applicant would be willing to exclude den locations?

[Applicant] Answer #2

Using GPS collars, the Yukon Government appears to have collared and tracked grizzly bears on Yukon's North Slope between January 1, 2004, and December 31, 2010. I am seeking all the data from these collars. I am not seeking information on a 'grid'. I am not sure what 2017 request the public body is referencing and have no knowledge of this request, nor have I been able to find any information on it. Regardless, the information I am after appears to be different from the information they are referencing. I am requesting all data from this data set, including spring and fall locations of collared bears, or locations that the public body may feel reveals potential den sites.

(collectively, as per paragraphs [1] and [2], the Access Request).

[3] On December 10, 2021, the ATTIP Office Access and Privacy Officer advised the applicant that the Department had identified records responsive to the Access Request but it was withholding them in full in accordance with the following provisions.

- Subparagraph 75(1)(a)(ii);[1]
- Subparagraph 75(1)(a)(iv);[2]
- Subsection 76(1);[3] and
- Paragraph 78(b).[4]

[4] On December 13, 2021, the Information and Privacy Commissioner (IPC) received a complaint from the applicant (Complainant) in accordance with section 66 and assigned an Informal Case Resolution investigator to attempt a settlement through consultation.

[5] On February 11, 2022, the settlement attempt proved unsuccessful. The IPC escalated the matter to a formal investigation and assigned an adjudicator to it.

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[1] Disclosure harmful to economic or financial interests of public body.
[2] *Ibid.*
[3] Disclosure harmful to intergovernmental relations.
[4] Disclosure harmful to conservation or heritage site.

II INVESTIGATIVE PROCESS

[6] On February 17, 2022, the IPC issued a written Notice of Investigation to the parties wherein the issues for the investigation were set out (Investigation).

[7] Also on February 17, 2022, the IPC issued a Notice to Produce Records (NTPR) to the Department. It required the Department to produce a complete, unredacted copy of all records identified as responsive to the Access Request, inclusive of a schedule of records.

[8] On February 28, 2022, the Department deputy head sent a letter to the IPC Registrar advising that the Department had sought legal advice and was requesting that this Investigation into the Access Request refusal be stayed, citing two reasons.

1) The first concerned the fact that the IPC was currently investigating three access request complaints in respect of bear collar data, including the one at hand. While the Department acknowledged that there were some differences as amongst these complaints, there were some notable similarities. As such, the Department was of the view that the IPC should stay the current complaint investigation until the other two were resolved.

2) The second concerned the Department's assertion that a multiplicity of proceedings by the IPC should be avoided.

[9] On March 2, 2022, the IPC Registrar sent the Department deputy head a letter of reply advising that the new ATIPPA did not provide the IPC with the authority to stay a formal investigation, as requested by the Department, once the following had occurred:

- the IPC had exercised her discretion to investigate a complaint informally;
- the matter had proceeded through that process; and
- it remained unresolved as between the parties.

As such, a formal investigate must proceed for reasons of procedural fairness.

[10] On March 17, 2022, the Department Minister (Department Head) sent the IPC a letter confirming that the Department had responded to the IPC's [NTPR] by the specified timeline.

[11] On March 18, 2022, the Department provided its submissions to the IPC in response to the Complainant's complaint. Prior to making it submissions on the relevant ATIPPA provisions, it stated the following concerning 'clarifications' made in the ATIPP Office Activation Letter.

The [Complainant's] *original request included statements that were not part of the request itself. The timeframe involving contractors receiving this information were not accurate according to the*[Department's] *records, and attempts were made to correct any factual errors during the clarification stage. The* [Department] *wrote:*

> *"We would like to note a few corrections regarding the timeframe for the* [Complainant's] *consideration. Based on our records, the timeframe for the data are* [sic] *from 2004 to 2011 and this data did not include collar data but rather grid information. The data was released to a third party in 2017. This is just to let the know as this may affect their request."*

As standard practice, the term "third party" (for anyone or company that is not the applicant or public body) was used in reference to the contractor that the [Complainant] *had previously identified. The disclosure was authorized under a 2017 data sharing agreement. The* [Department] *did not ask to make this correction to the Fact Report. However, the* [Department] *was informed that it would not affect the Fact Report, and we are permitted to make the correction during the Written Submission.*

[12] On April 1, 2022, the Complainant provided the IPC with their submissions.

[13] On April 7, 2022, the Department provided its reply response to the Complainant's submissions.

III ISSUES

[14] There are three issues as follows.

1) Is the Department Head authorised by subparagraphs 75(1)(a)(ii) and (iv) to withhold the information sought by the Complainant in their Access Request?

2) Is the Department Head authorised by subsection 76(1) to withhold the information sought by the Complainant in their Access Request?

3) Is the Department Head authorised by paragraph 78(b) to withhold the information sought by the Complainant in their Access Request?

IV RECORDS AT ISSUE

[15] The records in the custody or control of the Department consist of a spreadsheet containing grizzly bear collar data exported to four PDF-formatted pages. The headings in this spreadsheet are generated from the software that accompanies the GPS collars.

[16] The information from these collars was typically obtained in two ways. One was via emails that were stored for further processing. The second was by downloading collar information (*e.g.,* locations stored on board the collar).

[17] The records contain a specific bear data set (*i.e.,* Yukon North Slope grizzly bears).

[18] The records at issue in this Investigation are limited to those containing the information requested by the Complainant in the Access Request (Records).

V JURISDICTION

[19] The authority of the IPC to investigate a complaint is set out in subsection 91(1). The authority of the IPC to delegate an investigation to an adjudicator is set out in subsection 111(1)(g).

VI BURDEN OF PROOF

[20] Paragraph 102(c) sets out the burden of proof relevant to this Investigation. It states that the burden is on the public body head to prove that a complainant has no right to the records or to the information withheld from the records.

> *102(c) in the case of a complaint made under section 66 that relates to a determination or decision to withhold information or a record under paragraph 64(1)(b), the head who made the determination or decision has the burden of proof of proving that the complainant has no right of access under this Act to the information or record.*

VII SUBMISSIONS OF THE PARTIES

[21] The submissions of the Department and the Complainant are set out in the Analysis sections of this Investigation Report, as may be relevant to each issue.

VIII ANALYSIS

Issue 1 – Is the Department authorised by subparagraphs 75(1)(a)(ii) and (iv) to withhold the Records sought by the Complainant in their Access Request?

[22] The Department is relying on subparagraphs 75(1)(a)(ii) and (iv) to refuse the Complainant access to the Records.

Relevant Law

> *75(1) Subject to subsection (2), the head of a responsive public body may deny an applicant access to information held by the responsive public body that could reasonably be expected to harm the financial or economic interests of the Government of Yukon or of a public body, or the ability of the Government of Yukon to manage the economy, including the following information:*[5]
>
> *(a) information that is*
>
> *(i)…*
>
> *(ii) commercial, financial, scientific or technical information of the Government of Yukon or a public body and that has, or is reasonably likely to have, monetary value,*
>
> *(iii)…*
>
> *(iv) a position, plan, procedure or instruction, or estimates or criteria, developed for the purpose of contractual or other negotiations (including land claims and self-government negotiations, and labour relations negotiations) by or on behalf of the Government of Yukon or a public body;…*

Analysis

Subsection 75(1)

[23] Subsection 75(1) is a discretionary exemption provision, the purpose of which is to protect the Yukon government or the Department. It is both class and harm-based. It authorizes the head of a public body to refuse to disclose information to an applicant if disclosure of the information to them could reasonably be expected to harm the financial or economic interests of the Yukon government or the Department, or the ability of the Yukon government to manage the economy. By including the term 'Yukon government', it allows for the fact that

[5] Subsection 75(2) is irrelevant for purposes of this Report.

public bodies, corporately or individually, may have financial or economic information that the Yukon government uses to advance its interests, manage the economy or both.

[24] While subsection 75(1) uses the term 'information' in a generic, non-exhaustive manner, subparagraphs (a) and (b) set out specific classes of information that are included in this collective term. They are also non-exhaustive.

[25] In Yukon Inquiry Report ATP15-055AR, the IPC stated that whenever the words 'reasonably expected' appear in the ATIPP Act, the word 'probable' should be added to ensure the middle ground between 'that which is merely possible' and 'that which is probable' is achieved. This interpretation is based on a decision by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* [Ontario CSCS]. It stated the following about how these words are to be interpreted.[6]

> *This Court in Merck Frosst adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in Merck Frosst emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This Inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": Merck Frosst, at para. 94, citing F.H. v. McDougall,2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.*

[26] It is unnecessary to show, on a balance of probabilities, that the harm will occur if the information is disclosed.[7] However, a public body must demonstrate that the risk of harm is well beyond the merely possible or speculative. It does not have to demonstrate that harm is probable but there needs to be a reasonable basis for believing that the harm will result.[8]

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[6] 2014 SCC 31 (CanLII), at para. 54.
[7] *Ibid.* at para. 52.
[8] *Ibid.* at para. 59.

[27] When the IPC made these statements, she was interpreting that part of then subsection 17(1) of the former ATIPPA.[9] It stated as follows.

> *17(1) 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 the Yukon or the ability of that Government to manage the economy,* including *the following information…*

[28] Except for the term 'head of a public body', subsection 75(1) of the new ATIPPA is very similar in construct to then subsection 17(1). It follows that where it is determined by the head of a public body that disclosing the requested information to the applicant will cause probable harm to the Yukon government or the public body, the subsection is made out.

[29] The term 'head' of a public body is defined in section 1 as, amongst other things, "in the case of a public body that is a ministerial body, the minister responsible for the public body." 'Public body' includes "a ministerial body." A 'ministerial body' includes (a) "the office of a minister responsible for a department" and (b) "the department over which the minister responsible presides." Schedule 1, Part 1 of the *Access to Information and Protection of Privacy Regulation*,[10] sets out a list of ministerial bodies. The Department is a ministerial body and therefore a public body. The Minister responsible for the Department is the Department Head. As such, subsection 75(1) requires the Department Head to make the disclosure decision, a responsibility that generally falls to the deputy minister.[11]

Subparagraph 75(1)(a)(ii)

[30] The Department provided submissions on subparagraph 75(1)(a)(ii) but the Complainant did not.

[31] This subparagraph sets out information of a class that is commercial, financial, scientific or technical. The following three-part test can therefore be applied, as taken from the provision.

1) Does the information contain 'financial, commercial, scientific or technical' information?

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[9] Section 128 defines 'former [ATIPPA]' to mean the *Access to Information and Protection of Privacy Act*, RSY 2002, c.1. It was repealed and replaced by ATIPPA, RSY, 2018, c.9. This Investigation Report will consequently use the term 'Former ATIPPA' as the case may be.
[10] OIC 2021/25.
[11] Subject to certain restrictions, a minister may delegate in writing any power, duty or function conferred or imposed on them to any person, as set out in subsection 2.4(1) of the *Government Organisation Act*. As such, ministerial powers are normally delegated totally and exclusively to the chief executive of a public body, subject to the delegation of powers to other officials in the public body.

2) Is the information 'of' the Yukon government or the Department?

3) Does the information have 'monetary value' for the Yukon government or the Department, or is it reasonably likely to have such value?

Does the information contain financial, commercial, scientific or technical information?

[32] In Inquiry Report ATP18-16R, 17R and 38R, the IPC defined the terms 'commercial' and 'financial' as follows.[12]

> *'Commercial information'... means "information that relates to the buying and selling or exchange of merchandise or services and includes a third party's associations, history, references, bonding and insurance policies...*
>
> *'Financial information' means "information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.*

[33] In Inquiry Report ATP20-06R, the IPC defined the terms 'scientific' and 'technical' as follows.[13]

> *'Scientific information' is information belonging to an organised field of knowledge in the natural, biological or social sciences. In addition, for information to be characterised as scientific, it must relate to the observation or conclusions derived from a systematic study undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information.*
>
> *'Technical information' is information belonging to an organised field of knowledge that is prepared by a professional or expert in the field that relates to their field of knowledge. Technical information does not include information that is scientific. Examples of these fields of knowledge are architecture, engineering or electronics.*

[34] The Department submitted that it collects grizzly bear collar data (Collar Data), which is composed of scientific or technical data, and uses it to make periodic adjustments to its Yukon-wide conservation plan for grizzly bears. It also uses the Collar Data for grizzly bear scientific research and can disclose it to contractors for scientific research purposes, the disclosure of which only occurs under a data sharing agreement.

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[12] Department of Environment, July 26, 2019 (IPC) at paras. 83 and 88.
[13] Department of Environment, March 22, 2021 (IPC) at para. 23.

[35] The Department also submitted that the Collar Data preserves the integrity of the information used in scientific reports that affect decisions about YNS grizzly bear conservation management plans and provided an attached appendix in respect of how it uses the Collar Data for scientific, research or statistical purposes.[14]

[36] Neither ATIPPA nor the *Interpretation Act* defines the term 'natural science' so I will turn to its ordinary meaning. The Britannica Dictionary defines 'natural science' as "a science (such as physics, chemistry, or biology) that studies the physical and natural world or the events that happen in nature."[15] This definition is similar to that of the Merriam-Webster Dictionary: "any of the sciences (such as physics, chemistry, or biology) that deal with matter, energy, and their interrelations and transformations or with objectively measurable phenomena."[16]

[37] The Department collects and uses Collar Data for purposes of conserving the grizzly bear population in the Yukon. It also uses it for purposes of scientific research. The information referred to in Appendix G shows that this Collar Data is based on empirical evidence. I take from this, and find as such, that the Records fit within the definition of 'scientific information' set out by the IPC in Inquiry Report ATP20-06R.

[38] In making this finding, I note that the Department made no submissions as to what other type of information it may be. However, for purposes of subparagraph 75(1)(a)(ii), it is enough that this information is 'scientific' and I will proceed on that basis.

Is the information of the Yukon government or the Department?

[39] Section 1 defines 'hold', in respect to information, as meaning "to have custody or control of the information." The Department submitted that collects, uses and discloses grizzly bear Collar Data. As such, it holds such data and therefore has a vested interest in it. Whether this vested interest rises to the level of a proprietary interest would depend on whether it was protected, for example, by copyright or against misappropriation by another party. However, subparagraph 75(1)(a)(ii) uses the term "information <u>of</u> the Government of Yukon or a public

[14] Appendix G of the Department's submission entitled, Developing a Conservation Plan for Grizzly Bears (*Urus Arctos*) in Yukon: Supporting Information', July 2019, at pages 0029-0031 and 0036. These pages show YNS maps overlaid with various grizzly bear data, tables with YNS grizzly bear population estimates, graphs with similar information and two PowerPoint-type slides with information on the goals and challenges of Yukon-wide grizzly bear mortality management. It also states, on page 0057, under the subheading 'Radiotelemetry', that "A population estimate can be determined using a mark-capture-resight approach. This involves individuals being captured and collared, and then resighted (traditionally by aircraft) (White and Shenk 2001). The number of bears is estimated from observation rates of collared individuals in the population."
[15] https://www.britannica.com/dictionary/natural-science.
[16] https://www.merriam-webster.com/dictionary/natural%20science.

body" [my emphasis]. This is not narrowed to a proprietary interest; rather, it is a statutory right of use based on custody or control.

[40] I am satisfied that the Collar Data held by the Department is scientific information 'of' the Department and find as such.

Does the information have monetary value for the Yukon government or the Department, or is it reasonably likely to have such value?

[41] In Order F15-58, the British Columbia Information and Privacy Commissioner (BC IPC) reiterated from previous orders that 'monetary value' required the demonstration of a reasonable likelihood of independent monetary value in the information concerned. Information that would be of interest to or benefit others does not mean that it has such monetary value.[17]

[42] I take from this that the information, by its very nature, must have some sort of perceived market value independent of its inherent worth. This could be demonstrated, for example, by evidence of a commercial transaction, a potential financial return, a market-based service cost, a commodity or product price, the expenditure of funds to develop information and so forth. It would, however, be insufficient for purposes of this subparagraph only to provide evidence of the cost associated with creating a record.

[43] In applying this analysis to the term 'monetary value', I find its meaning to be as follows.

> 'Monetary value' means the value in currency that the open market puts on a resource, asset or service for purposes of an exchange between a seller and buyer or a licensor and a licensee.

[44] As such, the Department's scientific data must have, or is reasonably likely to have, objectively ascertainable independent monetary value. In other words, it must be more than information that could be of interest or benefit to another party. This means that the Department must establish that the information has been bought or licensed for a verifiable price or that it is more likely than not that a potential buyer or licensee would be willing to acquire it based on the price that the Department would be willing to sell or licence it.

[45] In returning to the Department's submission, it stated that conducting research on the grizzly bear species is expensive and directed my attention to an attached appendix.[18] It added

[17] Order F15-58, October 13, 2015 (BC IPC), at paras.31-32.
[18] Appendix F of the Department's submission entitled, 'A Conservation Plan for Grizzly Bear (*Ursus Actos*) in Yukon', dated September 16, 2019. The Department referred me to page 0056 but this is the closing cover of the

that researchers are required to be on-site to conduct field research and therefore travel to the Yukon for work. It also stated that the Collar Data reduces the costs to researchers because they are not required to pay for their own collars, an additional expense that would otherwise find its way in the Yukon economy.

[46] The Department further submitted that it and its co-management partners (Co-Management Partners)[19] aimed to increase tourism in the YNS with one of the main attractions being the opportunity to view grizzly bears. It stated that this will increase the financial interests within the local economy. It then stated, however, that the release of YNS grizzly bear Collar Data is expected to result in an increase in YNS grizzly poaching, such that over-harvesting is highly probably given the jurisdictional scans. In its view, poachers will decrease the grizzly bear population in this region, thus causing a reduction in the number of tourists visiting the YNS and a subsequent reduction of money spent, with its concurrent loss to the local economy.

[47] The remaining part of its submission concerned grizzly bear harvesting. The Department asserted that over-harvesting, including illegal harvesting, risks the skewing of harvest data. In turn, this causes inaccurate information to be used in decisions concerning harvest quotas. Such inaccurate information yielding inaccurate decisions will negatively affect grizzly management and affect both the Department and its Co-Management Partners. The Collar Data allows the Department to conserve the harvest numbers. In turn, this allows the Department to issue hunting licenses, noting that the local economy is stimulated by the money spent by hunters and tourists.

[48] That said, subparagraph 75(1)(a)(ii) is quite specific. It is about a certain type of information that has or is reasonably likely to have monetary value. Because the Department is relying on this subparagraph to withhold from the Complainant the Records, it must first meet the subparagraph's test. Only then can it move to the overarching harm components in subsection 75(1).

[49] I have found the Collar Data to be scientific information of the Department. That satisfies the first two components of the test. However, the general and speculative statements submitted by the Department about the value of this information are unsupported by the type

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document and contains a picture of a grizzly bear cub. I note that the only reference in the document to the cost of conducting research on grizzly bears occurs at page 0007. It states, 'Grizzly bears are inherently difficult and expensive to inventory – especially in an area as remote as Yukon – so there have been few field studies on their abundance in the territory."

[19] The Department listed them in its subsection 76(1) submissions, *infra* at para. 74.

of detailed evidence needed to meet the third component; that is, its monetary value or a reasonable likelihood that it has monetary value.

Conclusion

[50] For the reasons given above, I find that the Department cannot rely on subparagraph 75(1)(a)(ii) to withhold the Records by the Complainant.

[51] In view of my finding, it is not necessary to consider the harm component of subsection 75(1).

Subparagraph 75(1)(a)(iv)

[52] In asserting that it is reasonable to conclude that the disclosure of the Records would harm the financial or economic interests of the Yukon government or the Department, or the ability of the Yukon government to manage the economy, the Department also relies on subparagraph 75(1)(a)(iv) to withhold the Records from the Complainant.

[53] Recall that this subparagraph sets out information of a class that is a position, plan, procedure or instruction, or estimates or criteria, any of which is developed for the purpose of contractual or other negotiations (including land claims and self-government negotiations, and labour relations negotiations) by or on behalf of the Yukon government or the Department.[20]

[54] The following two-part test can therefore be applied.

1) Does the record contain positions, plans, procedures or instructions, or estimates or criteria that relate to negotiations?

2) Were the positions, plans, procedures or instructions, estimates or criteria developed for the purpose of contractual or other negotiations by or on behalf of the Yukon government or the Department?

[55] There are no definitions of these six terms in ATIPPA or the *Interpretation Act*. In Review Report 195-2019, the Saskatchewan Information and Privacy Commissioner (SK IPC) considered whether a public body had the authority to withhold information requested by an applicant based on, amongst other sections, paragraph 18(1)(e) of the Saskatchewan *Freedom of Information and Protection of Privacy Act* (FOIP).[21] That paragraph stated as follows.

[20] The information developed for negotiations concerning labour relations is not relevant for purposes of this Investigation Report.
[21] https://oipc.sk.ca/assets/foip-review_195-2019.pdf at paras. 10-18.

> *(e) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Saskatchewan or a government institution, or considerations that relate to those negotiations;…*

[56] In determining if the information at issue fit within one of the terms of the paragraph, the SK IPC used the following definitions, as set out in a SK IPC publication entitled 'Guide to FOIP'.[22]

> *A 'position' is a point of view or attitude. An opinion, stand; a way of regarding situations or topics; an opinion that is held in opposition to another in an argument or dispute.*
>
> *A 'plan' is a formulated and especially detailed method by which a thing is to be done; a design or scheme. A detailed proposal for doing or achieving something; an intention or decision about what one is going to do.*
>
> *A 'procedure' is an established or official way of doing something; a series of actions conducted in a certain order or manner.*
>
> *'Criteria' are standards, rules, or tests on which a judgement or decision can be based or compared; a reference point against which other things can be evaluated.*
>
> *'Instructions' are directions or orders.*
>
> *A 'consideration' is a careful thought; a fact taken into account when making a decision. Thus, a record identifying the facts and circumstances connected to positions, plans, procedures, criteria or instructions could also fall within the scope of this provision.*

[57] I am of the view that subparagraph 75(1)(a)(iv) is very similar in construct to FOIP paragraph 18(1)(e) to the extent that the class of non-exhaustive terms in paragraph 18(1)(e) is developed for the purposes of contractual or other negotiations. As such, I am adopting its relevant definitions for purposes of subparagraph 75(1)(a)(iv) as follows.

> *A 'position' is a point of view or attitude. An opinion, stand; a way of regarding situations or topics; an opinion that is held in opposition to another in an argument or dispute.*
>
> *A 'plan' is a formulated and especially detailed method by which a thing is to be done; a design or scheme. A detailed proposal for doing or achieving something; an intention or decision about what one is going to do.*

[22] *Ibid.* at para. 14.

A 'procedure' is an established or official way of doing something; a series of actions conducted in a certain order or manner.

'Instructions' are directions or orders.

'Criteria' are standards, rules, or tests on which a judgement or decision can be based or compared; a reference point against which other things can be evaluated.

[58] Subparagraph 75(1)(a)(iv), unlike FOIP paragraph 18(1)(e), also uses the term 'estimates' following 'criteria'. The Oxford Online Dictionary defines 'estimate' as "an approximate calculation or judgement of the value, number, quantity, or extent of something."[23] In considering the similar class of terms as between these two provisions, I define 'estimates' as follows.

'Estimates' are guesses or approximate calculations about the value, size, extent, nature or cost of something on which a judgement or a decision can be based or compared; a reference point against which other things can be evaluated.

[59] The Department made submissions on subparagraph 75(1)(a)(iv) but the Complainant did not.

Does the information contain positions, plans, procedures or instructions, estimates or criteria that relate to the negotiations?

[60] The Department submitted that the Collar Data (including other types of information and data) is used for purposes of the YNS Management Plan which was developed as a requirement of the 2005 Inuvialuit Final Agreement (IFA). This plan, together with information used to implement it, is developed for purposes of existing and other negotiations with the Inuvialuit as per the IFA. Any IFA infringements in respect of conservation management will negatively affect the relationship between the Department and the Inuvialuit government. It further stated that the Collar Data and the YNS Management Plan are used together to manage the economic interests of the region by implementing and making necessary adjustments to that plan.

[61] The remainder of the Department 's submission concerns an advisory management mechanism under the IFA, the case for a data sharing agreement and assertions of negative implications concerning socio-economic interest and intergovernmental relations.

[23] https://www.lexico.com/definition/estimate.

[62] However, the Department did not make any submissions on whether the Collar Data was information about positions, plans, procedures or instructions, estimates or criteria that relate to negotiations. It did use the term 'plan' in the context of the YNS Management Plan but differentiated between it and the Collar Data itself. According to the Department, both are used for existing and other negotiations and both are used for purposes of economic interests. However, the fact that the Collar Data is used in tandem with the YNS Management Plan does not answer the question 'does it contain positions, plans, procedures or instructions, estimates or criteria that relate to the negotiations?' The Collar Data itself must constitute a 'plan' as defined.

[63] Because the Department is relying on this subparagraph to withhold from the Complainant the Records, it must first meet the subparagraph's test. Only then can it move to the overarching harm components in subsection 75(1).

Conclusion

[64] For the reasons given above, I find that the Department cannot rely on subparagraph 75(1)(a)(iv) to withhold the Records by the Complainant.

[65] In view of my finding, it is not necessary to consider the second component of the subparagraph 75(1)(a)(iv) test and the harm component of subsection 75(1).

Issue 2 – Is the Department Head authorised by subsection 76(1) to withhold the Records sought by the Complainant in their Access Request?

[66] The Department is relying on subsection 76(1) to refuse the Complainant access to the Records.

Relevant Law

> *76(1) Subject to subsection (2), the head of a responsive public body may deny an applicant access to information held by the responsive public body that a public body has not accepted in confidence in the prescribed manner from a government or organization referred to in subsection 68(1) if the head determines that disclosure of the information could reasonably be expected to harm relations between the Government of Yukon or a public body and the other government or organization.*
>
> *(2) The head of a responsive public body must not deny an applicant access to information referred to in subsection (1) that has been in existence for 15 years or more unless the information is about or related to land claims or self-government negotiations that have not concluded between the Government of Yukon and another government or organization.*

68(1)…

(a) the Government of Canada;

(b) the government of

(i) a province, or

(ii) a foreign state;

(c) a First Nation government;

(d) a municipality;

(e) an organization representing one or more governments; or

(f) an international organization of states.

Analysis

Subsection 76(1)

[67] The Department and the Complainant provided submissions on subsection 76(1).

[68] This subsection recognises that the Yukon government and the Department creates and collects records in their interactions with other governments or organisations, the types of which are listed in subsection 68(1). It is a discretionary exemption provision and its purpose is to protect these relationships in both a formal and working context. As previously mentioned, there must be comprehensive and compelling evidence about the reasonable likelihood of harm because the harm is not self-evident. Moreover, the risk of it occurring must be considerably more probable than merely possible or speculative, and it must be described in an exact manner to support its contention.

[69] The following two-part test can therefore be applied.

1) Did the Department accept the Records in confidence in the prescribed manner from a government or organisation referred to in subsection 68(1)?

2) If no, then could disclosure of the Records reasonably be expected to harm relations between the Yukon government or the Department and the other government or organisation?

Did the Department accept the Records in confidence in the prescribed manner from a government or organisation referred to in subsection 68(1)?

[70] This requires the Department to provide clear evidence that it did not accept the Records in a confidential manner from an entity referred to in subsection 68(1). If it did, then it cannot proceed with a determination based on the harm component in subsection 76(1).

[71] The Department stated elsewhere in its submission that it collected the Collar Data that I have identified as the Records.[24]

[72] The Department did not provide any submissions on whether the Records were provided by a First Nation government, such as that constituted by the Inuvialuit under the IFA and, if so, were also provided in confidence in the prescribed manner. However, it did state in its reply submissions concerning subsection 76(1) that it owned the Collar Data and would provide access to its Co-Management Partners in view of the intergovernmental relationship established by the IFA. Moreover, the Complainant submitted that the Collar Data is solely owned the Yukon government and was not provided by Parks Canada or the Inuvialuit and neither entity has copies of it. The Department, in its reply submissions, did not dispute that contention.

[73] I take from this evidence that the Department did not accept the Collar Data in confidence in a prescribed manner from a First Nation government, as referred to in paragraph 68(1)(c). As such, the issue of confidentiality in the context of another party does not apply. I will now proceed to the second component of the test.

Could disclosure of the Records reasonably be expected to harm relations between the Government of Yukon or a public body and the other government or organization?

[74] The Department submitted that Collar Data and the Inuvialuit government's 'application of Traditional Knowledge' are shared between it and its Co-Management Partners to create a management plan that aligns with IFA requirements.[25] The four Co-Management Partners are the 'Wildlife Management Advisory Council – North Slope' (WMAC-NS), 'Parks Canada', the 'Inuvialuit Game Council' and the 'Aklavik Hunters and Trappers Committee'.

[75] It also provided an attached appendix to illustrate the right of the Inuvialuit to participate directly in the management of wildlife.[26] It further submitted that disclosing the

[24] This is found in the Department's submission for subparagraph 75(1)(a)(ii).
[25] The Department, in its reply submissions, also stated that, although the information is owned by the Department, its Co-Management Partners would have access to it because of what it termed the 'Inuvialuit, Canada, Yukon governmental relationship established by the IFA'.
[26] Appendix K of the Department's submission entitled, 'Aklavik Local and Traditional Knowledge about Grizzly Bears of the Yukon North Slope December 2008', at 0021. A highlighted excerpt on page 0021 states, "The IFA also established the right for the direct participation of the Inuvialuit and the application of Inuvialuit knowledge in the

Records will affect the intergovernmental relationship between the Department and its Co-Management Partners because such partners would no longer provide information critical to the Department's evidence-based decision-making.

[76] The Co-Management Partners are not governments; rather, they are organisations. However, the fact that the Department uses the term 'intergovernmental' to describe its relationship with them is not problematic. Subsection 76(1) allows for both governments and organisations. I am satisfied, therefore, that there is a relationship between the Department and its Co-Management Partners for purposes of subsection 76(1).

[77] That said, the alleged harm of no longer being able to obtain allegedly critical information from the Co-Management Partners, should disclosure of the Records occur, is not supported by the detailed evidence necessary to support that conclusion. The Department does not establish it to be a reasonable outcome as weighed, for example, against any of the Co-Management Partners' need to maintain a relationship with the Department owing to their own management mandates concerning YNS grizzly bears. The Department simply states that it is bound by IFA, the *Environment Act* and the *Wildlife Act*, thus giving it the authority and mandate to protect Yukon's animal and plant life and that, in complying with ATIPPA, it always aims to find a balance between conservation interests (especially that of species at risk) and the provision of access to information. It attached an appendix to illustrate its responsibility.[27]

[78] While these statements demonstrate that the Department has a duty to protect wildlife, such as YNS grizzly bears, they do not bolster its harm assertion should it release the Records to the Complainant.

[79] The Department further submitted that the IFA outlines a strict conservation management scheme for species such as YNS grizzly bears and implements this scheme by means of the WMAC-NS, a counsel that reviews and screens all development proposals and other uses in the YNS to identify any significantly negative impacts to the wildlife, habitat and

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management of wildlife. On the [YNS], Inuvialuit knowledge has played and will continue to play an important role in the management if grizzly bear populations."

[27] Appendix H is entitled, 'Facts for Evidence of Harm' and includes, amongst other things, two partially highlighted bullets under the subheading 'Section 76(1) ATIPP Act evidence' that state as follows at page 0005.

- *Section 3(3) of the IFA states: The Settlement Legislation approving, giving effect to and declaring valid this Agreement shall provide that, where there is inconsistency or conflict between either the Settlement Legislation or this Agreement and the provisions of any other federal, territorial or municipal law, or any by-law or regulation, the Settlement Legislation or this Agreement shall prevail to the extent of the inconsistency or conflict."*
- *The IFA section 12(3)(c) states: "other uses within the [YNS] that may have a significant negative impact on wildlife, habitat or native harvesting shall be permitted if it is decided that public convenience and necessity outweigh conservation or native harvesting interests in the area." (IFA 2005)*

Inuvialuit's harvesting rights that may result from development and other uses. This screening function must weigh whether public convenience and necessity outweigh conservation concerns or Inuvialuit harvesting interests.

[80] The Department, in its reply submissions, also stated that, if the Records were released, something the WMAC (NS) opposes, then the Department's relationship with it will be harmed because it was created under the IFA to make evidence-based decisions and be the voice for the Inuvialuit for YNS conservation management.

[81] While these statements acknowledge the IFA-based role of the WMAC (NS) in helping to manage YNS grizzly bears, as well as its methodology for doing so, they do not address the alleged harm at issue with any specificity. Moreover, ATIPPA applies solely to the Department and not to its Co-Management Partners. The Department may wish to consult with them and abide by their wishes but it must first comply with ATIPPA despite other concerns.

[82] I reiterate that, to meet subsection 76(1), the Department is required to provide comprehensive and compelling evidence about the reasonable likelihood of harm if it releases the Records. The alleged harm cannot be framed as being self-evident simply because an intergovernmental/organisational relationship exists to manage and protect YNS grizzly bears. As stated, the risk of the harm occurring must land at least mid way between the merely possible or speculative and probable.

[83] The only other assertions of harm made by the Department, if the Records were released, concern allegations of harm to the reconciliation steps taken with the Inuvialuit government, an infringement of the IFA and a breach of trust between the Department and its Co-Management Partners.

[84] In making the assertions of reconciliation harm and IFA infringement, the Department stated that it had received multiple responses from its Co-Management Partners in respect of multiple species that the release of information, such as animal locations, would result in these outcomes. It did not, however, elaborate on why this would occur nor tie the alleged responses to YNS grizzly bear Collar Data. Moreover, it did not elaborate on how the release of the Records infringes the IFA.

[85] In making the assertion of a breach of trust between the Department and its Co-Management Partners, it did not provide any substantive evidence to support that contention. Such evidence could include, for example, a contract, a memorandum of agreement or a memorandum of understanding the breach of which would more likely than not result in a loss of trust if the Department released the Records to the Complainant.

[86] In my view, these are general statements unsupported by the type of probative evidence needed to establish a reasonable basis for believing that the harm will result. The Department bears the burden of proving, on a balance of probabilities, how the release of the Records to the Complainant could reasonably be expected to harm relations between the Yukon government or the Department and the other governments or organisations.

[87] From my review of the Records, there is nothing in the Department's submission to substantiate a reasonable belief that the risk of harm the Department envisages will occur if it releases the Records to the Complainant.

Conclusion

[88] For the reasons given above, I find that the Department cannot rely on subsection 76(1) to withhold the Records by the Complainant.

[89] While this finding is enough to dispose of the Department's assertion of harm to intergovernmental relations, the Complainant submitted that some of the Records are more than 15 years old and should be released in any event. Since this assertion is relevant to the issue at hand, I am going to address it.

Subsection 76(2)

[90] The Complainant made submissions on subsection 76(2) as follows.

> [A] *public body must not deny an applicant access to information referred to in subsection 76(1) that is been in existence for 15 years or more. Most of the* [Collar Data] *requested* [by the Complainant] *is older than 15 years.*

[91] The Department provided no submissions.

[92] This subsection provides that information referred to in subsection 76(1) that has been in existence for more than 15 years cannot be withheld unless it is of a certain type, as specified within.

[93] Recall that subsection 76(2) states as follows.

> *(2) The head of a responsive public body must not deny an applicant access to information referred to in subsection (1) that has been in existence for 15 years or more unless the information is about or related to land claims or self-government negotiations that have not concluded between the Government of Yukon and another government or organization.*

[94] The following two-part test can therefore be applied.

1) Have the Records been inexistence for 15 years or more?

2) If yes, then are the Records about or related to land claims or self-government negotiations that have not concluded between the Government of Yukon and another government or organization?

Have the Records been in existence for 15 years or more?

[95] If the Records are not older than 15 years or more, then subsection 76(2) does not apply.

[96] After initial correspondence with the ATIPP Office, the Complainant clarified that they were seeking Collar Data between January 1, 2004 and December 31, 2010.

[97] Using the Access Request date of November 8, 2021 as the starting date and then subtracting 15 years from it, only that portion of the Records from the period January 1, 2004 to November 8, 2006 would apply for purposes of subsection 76(2) (Old Records).

[98] I will now proceed with the second component of the test.

If yes, then are the Old Records about or related to land claims or self-government negotiations that have not concluded between the Yukon government and another government or organization?

[99] If the answer to this question is yes, then the matter is at an end because it would bar the release of the Old Records. If the answer is no, then the Department would be obliged to release them to the Complainant because they would not be restricted by the provision.

[100] The Complainant submitted that most of the Collar Data requested was more than 15 years old, something I have found to apply only to the Collar Data for the period January 1, 2004 to November 8, 2006 (*i.e.,* the Old Records). However, the Complainant made no submissions on whether the Old Records are about or related to land claims or self-government negotiations that have not concluded between the Yukon government and another government or organisation.

[101] Recall that the Department provided no submissions on subsection 76(2).

[102] I therefore have no evidence before me to determine if the Old Records meet or do not meet the second component of the test.

Conclusion

[103] For the reasons given above, I find that the Department is not required by subsection 76(2) to disclose the Old Records.

Issue 3 – Is the Department authorised by paragraph 78(b) to withhold the Records sought by the Complainant in their Access Request?

[104] The Department is relying on paragraph 78(b) to refuse the Complainant access to the Records.

Relevant Law

> *78 The head of a responsive public body may deny an applicant access to information if the head determines that disclosure of the information to the applicant could reasonably be expected to result in damage to, or interference with, the conservation or preservation of*
>
> *(a) …*
>
> *(b) a species of plant or animal that is endangered, threatened or vulnerable;…*

Analysis

[105] The Department and the Complainant provided submissions on paragraph 78(b).

[106] This paragraph is a discretionary exemption provision, the purpose of which is to protect the public's interest in conserving or preserving imperiled or assailable species, in this case, animals. For the provision to apply, there must be species of animals that is endangered, threatened or vulnerable, noting that it does not specify who is responsible for determining if an animal species is endangered, threatened or vulnerable.

[107] As previously mentioned, there must be comprehensive and compelling evidence about the reasonable likelihood of harm because the harm is not self-evident. Moreover, the risk of it occurring must occur on the middle ground between merely possible or speculative and probable, and it must be described in an exact manner to support its contention.

[108] The following two-part test can therefore be applied.

1) Is the species of animal endangered, threatened or vulnerable?

2) If yes, then could disclosure of the Records reasonably be expected to result in damage to, or interference with, its conservation or preservation?

Is the species of animal, in this case YNS grizzly bears, endangered, threatened or vulnerable?

[109] If YNS grizzly bears are not a species of animal that is neither endangered, threatened not vulnerable, then paragraph 78(b) cannot be made out.

[110] The Department attached Appendix A to it submissions. It is entitled, 'SCHEDULE 1 (Subsections 2(1), 42(2) and 68(2)) List of Wildlife Species at Risk'. This schedule is part of the federal *Species at Risk Act* (SARA).[28] Under 'Part 4 Special Concern' of the schedule, it lists, amongst other things, grizzly bears of the Western population.

[111] The Department also attached Appendix B to its submissions. It is entitled 'COSEWIC Assessment and Status Report on the Grizzly Bear *(Ursus Arctos)* Western Population/Ungava Population in Canada: Western population – SPECIAL CONCERN and Ungava population – EXTINCT, 2012'. COSEWIC is the 'Committee on Status of Endangered Wildlife in Canada'.

[112] On page 0003, it states as follows in respect of the Western grizzly bear population.

> ***Occurrence***
>
> *Yukon, Northwest Territories, Nunavut, British Columbia, Alberta, Saskatchewan, Manitoba*
>
> ***Status history***
>
> *…In May 2012, the entire species was re-examined and the Prairie and Northwestern populations were* considered *a single unit. This newly defined Western population was designated Special Concern in May 2012.*

[113] I take from this evidence that grizzly bears of the Western population, inclusive of YNS grizzly bears, are a species of animal for purposes of paragraph 78(b). I will now determine if they are endangered, threatened or vulnerable.

[114] In Inquiry Report ATP20-06R,[29] the IPC examined these three terms in then paragraph 21(b) of the Former ATIPPA, which was very similar in construct to paragraph 78(b).

> *21 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) …*

[28] SC 2002, c.29.
[29] Inquiry Report ATP20-06R at pages 36-41.

(b) a species of plants, animals or invertebrates that is endangered, threatened or vulnerable in the Yukon or in any one of the regions of the Yukon;...

[115] The IPC stated as follows.

[118] The terms 'endangered, threatened or vulnerable' are qualified in [paragraph 21(b)] *by the species that they refer to; in this case, 'animals'. They are further qualified by the words "reasonably be expected to result in* [probable] *damage to, or interfere with the conservation of" in section 21. Taken together, these provisions exist to protect against damage to or interference with the conservation of species that are endangered, threatened or vulnerable, where it is probable that the damage or interference will occur because information about them is disclosed to an applicant.*

[119] The conservation of animal species is a specialized field. It is within this field that animals are classified as endangered, threatened, vulnerable, or otherwise. Based on my review of the evidence, it appears that the classification of an animal species drives conservation efforts. As such, it is within this field that these terms must be defined.

[134] For purposes of [paragraph] 21(b)]*, I find, based on COSEWIC definitions, that for animal species, the meanings of 'endangered' and 'threatened' are as follows:*

'Endangered' means an animal species facing imminent extirpation or extinction.

'Threatened' means an animal species that is likely to become endangered if nothing is done to reverse the factors leading to its extirpation or extinction.

[136] …I find that the meaning of 'vulnerable' for the purposes of [paragraph 21(b) is:

'Vulnerable' means an animal species that may become threatened or endangered because of a combination of biological characteristics and identified threats.

[116] In my view, these two paragraphs are substantively the same for purposes of the three terms. As such, I find that the IPC definitions of the terms 'endangered', 'threatened' and 'vulnerable' in Inquiry Report ATP20-06R can fully be applied to the identical terms in paragraph 78(b).[30]

[117] As previously mentioned, while paragraph 78(b) only applies if a species of animal, such as a grizzly bear, is endangered, threatened or vulnerable, it does not specify who is responsible for determining as such. In Inquiry Report ATP20-06R, the IPC acknowledged that COSEWIC is

[30] These definitions reflect the 'animal species' context in this Investigation Report but they could equally include 'plant species' in a different context.

recognised in Canada as the body with the necessary expertise to classify the risk level of animal species.

[118] The Department submitted that human activity has long been the major threat to grizzly bear survival across their distributional range in North America, something evidenced, for example, in research reports conducted by COSEWIC that identify 'Western population grizzly bears' [inclusive of YNS grizzly bears] as a species of 'special concern'.[31]

[119] The Department further submitted that because grizzly bears are identified as a species of 'special concern', there is a legal requirement to protect the species under SARA. Consequently, the YNS Management Plan was created.[32]

[120] The IPC, again in Inquiry Report ATP20-06R , was of the view that, given her COSEWIC acknowledgement, it was not necessary for a species to be designated as 'endangered, threatened or vulnerable' under federal legislation. However, I find it useful to look at SARA to understand what 'special concern' means as applied by COSEWIC to YNS grizzly bears.

[121] Appendix A, as supplied by the Department, contains the following four parts, the last of which includes grizzly bears.

Part 1 – Extirpated Species;

Part 2 – Endangered Species;

Part 3 – Threatened Species; and

Part 4 – Special Concern.

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[31]As previously stated, the Department submitted in support Appendix B and directed me to page 0003. This page contains, amongst other things, a partially highlighted text table that states, in part, "Grizzly Bear – Western population. … Status: special concern. Reason for designation: The global distribution of this large-bodied carnivore has declined by over 50% since the 1800s, with western Canada representing a significant core of the current North American range. … It is highly sensitive to human disturbance and is subject to high mortality risk in areas of human activity and where roads create access. … [T]here are concerns about unsustainable mortality rates there and in parts of Yukon. … The newly defined Western population was designated Special Concern in May 2012." I note at page 0014 that, under the subheading 'COSEWIC History', SARA establishes COSEWIC as an advisory body ensuring that species will continue to be assessed under a rigorous and independent scientific process.

[32] The Department attached in support Appendix F entitled "A Conservation plan for Grizzly Bears (Ursus Arctos) in Yukon' and directed me to page 0007. This page contains, amongst other things, a highlighted sentence that states "… this is a species that has long been a priority for wildlife management in the territory, and grizzly bear conservation programs are already well underway and ongoing in Yukon. … Importantly, a co-management plan already exists for grizzly bears on Yukon's North Slope."

[122] Subsection 2(1) of SARA defines 'species of special concern as meaning "a wildlife species that may become a threatened or an endangered species because of a combination of biological characteristics and identified threats."

[123] In comparing this definition to the definition of 'vulnerable' as determined by the IPC for then paragraph 21(b) of the Former ATIPPA, something I have found to apply to paragraph 78(b), I am satisfied, in the absence of evidence to the contrary, that the YNS grizzly bear is a 'vulnerable' species for purposes of paragraph 78(b).

[124] In view of this finding, I do not have to consider the differences in meaning between endangered, threatened or vulnerable.

If yes, then could disclosure of the Records reasonably be expected to result in damage to, or interference with, the conservation or preservation of YNS grizzly bears?

[125] As previously stated, the answer must be based on evidence that is sufficient to establish the likelihood of harm. If the answer is yes, then the matter is at an end because it would bar the release of the Records to the Complainant. If the answer is no, then the Department would be obliged to release them.

[126] Section 78, like then section 21 of the Former ATIPPA, sets out two types of harm, either of which could uphold a decision by the head of a responsive public body to deny an applicant access to information. In this respect, the two sections are substantively the same. The first is a reasonable expectation of 'damage' to the conservation of a species of animal that is endangered, threatened or vulnerable. The second is a reasonable expectation of interference with the conservation of this same exposed species of animal.

[127] For this purpose, the IPC, in Inquiry Report ATP20-06R, defined 'conservation' in the context of then section 21 to mean "an action, by legal or other means, that is taken to preserve, protect or restore any of the things identified in subsections 21(a-c) [so as] to promote or enhance the continued existence of that thing."

[128] Given the wording in section 78 in the context of 'conservation, I am of the view that the IPC's above definition can be applied to this provision without any ambiguity or distortion. That said, the IPC had no need to turn her attention in Inquiry Report ATP20-06R to the term 'preservation' because it did not exist in then section 21. Therefore, I will now consider this term for purposes of section 78.

[129] The term 'preservation' in section 78 is connected to the term 'conservation' by means of the conjunction 'or' to create the partial phrase 'the conservation or preservation of…'. What is the effect of this addition?

[130] Ruth Sullivan, in her book, *Statutory Interpretation*, states that 'or' is "always disjunctive in the sense that it always indicates that the things listed before and after the 'or' are alternatives. However, 'or' is ambiguous in that it may be inclusive or exclusive."[33] She provides examples of both. "In the case of an exclusive 'or', the alternatives are mutually exclusive: (a) or (b) but not both … In the case of an inclusive 'or'. The alternatives may be cumulated: (a) or (b) or both…"[34] She then states that "In legislation, 'or' is presumed to be inclusive, but the presumption is rebutted when it is clear from the context that the listed alternatives are meant to be mutually exclusive."[35]

[131] 'Preservation' is not defined in ATIPPA or the *Interpretation Act* so I will look to its ordinary meaning. The Cambridge Online Dictionary defines 'preservation' as "the act of keeping something the same or preventing it from being damaged."[36]

[132] In applying Sullivan's interpretation, 'conservation' and 'preservation' are presumed to be inclusive unless the presumption is rebutted. She provides a *Criminal Code* example of a rebuttal by stating that a person found guilty of an indictable offence can be subject to imprisonment for a specific period or is guilty of an offence punishable on summary conviction, but not both.[37] Substituting the definitions of 'conservation' and 'preservation' (with a slight alteration) into section 78 produces the following.

> *78 The head of a responsive public body may deny an applicant access to information if the head determines that disclosure of the information to the applicant could reasonably be expected to result in damage to, or interference with,*
>
> the action, by legal or other means, that is taken to preserve, protect or restore any of the things identified in paragraphs 78(a-c) to promote or enhance the continued existence of that thing
>
> *or*

[33] Ruth Sullivan, *Statutory Interpretation* 3rd Ed, (Toronto: Irwin Law, 2016) at 94.
[34] *Ibid.* at 94-95.
[35] *Ibid.* at 95.
[36] https://dictionary.cambridge.org/dictionary/english/preservation
[37] *Supra,* note 33 at 95.

> the act of keeping [the things identified in paragraphs 78(a-c)] the same or preventing [them] from being damaged.

[133] In my view, these two substitutions, juxtaposed with one another by means of the conjunction 'or', are inclusive because each is possible at the same time. Choosing one over the other does not create a substantively different path. 'Conservation' and 'preservation' are both mean to protect the 'things' in paragraphs 78(a-c).

[134] In addition, the Complainant in her submission provided some interesting comments on paragraphs 78(a) and (b) that I believe are useful to a definition and application of 'preservation' in section 78.[38] In her view, the resources that fall under paragraph 78(a) are sessile in that they are often singular, one-of-a-kind resources (*i.e.,* a fossil or natural site) whereas the resources that fall under paragraph 78(b) may occur in multiples or in populations (*i.e.,* species of plants or animals). As such, the harm that may occur to each is different and 'motility', in her view, is an important factor to consider when assessing the vulnerability of a resource in respect of conservation.[39] The Complainant concludes by stating that the destruction of a resource in paragraph78(a) may result in the loss of that type of item in their entirety. However, the removal in paragraph 78(b) of an individual of a species from a population and subsequently consumed may not harm the conservation of that species and its population.

[135] While the Complainant's comments are premised on the term 'conservation', I take from them a useful characterisation of paragraphs 78(a) and (b) in that the former is about a fixed thing, such as an embedded fossil or a natural site, and the latter is about a mobile thing, such as an animal species. It follows that the term 'preservation' may more aptly apply to the protection of a paragraph 78(a) resource while the term 'conversation' may similarly apply to the protection of a paragraph 78(b) resource. However. I am of the view that, because of the inclusiveness of these two terms, both are easily interchangeable depending on the context.

[136] As such, for purposes of section 78, I find that 'preservation' means as follows.

> *An action, by legal or other means, to safeguard any of the things identified in paragraphs 78(a) through(c) from damage or degradation by means of promoting or enhancing the continued existence of that thing.*

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[38] Complainant submissions at 2.
[39] The Complainant does not define the term 'motility'. The Cambridge Online Dictionary defines it as meaning "the ability of plants, organisms, and very small forms of life to be able to move by themselves" (see https://dictionary.cambridge.org/dictionary/english/motility).

[137] I will now proceed with determining, based on the evidence provided, if disclosure of the Records could reasonably be expected to result in damage to, or interference with, the conservation or preservation of YNS grizzly bears.

[138] Recall that the Department has the burden of proof. To meet this burden, the Department must provide evidence well beyond or considerably above a mere possibility of harm to reach that middle ground. This Investigation is contextual and how much evidence and its quality needed to meet this standard ultimately depends on the nature of the issue and the inherent probabilities or improbabilities, or the seriousness of the allegations or consequences.

[139] The Department submitted that it refused to disclose the Records to the Complainant because, amongst other things, public bodies must post their final response to a program area access request and the associated records package, if any, online in the Access to Information Registry (Registry). This would increase the risk to grizzly bears because, if the Records were released to the Complainant, then the public would also have access to the Records, thus increasing the chances of hunters and poachers visiting the YNS to search for grizzly bears.

[140] This assertion, with respect, is specious. Paragraph 6(d) states as follows.

> *6 The purposes of this Act are*
>
> *…*
>
> *(d) to require public bodies to make particular types or classes of information openly accessible so that an access request is not required to access those types or classes of information; …*

[141] Subsection 85(1) establishes the access to information registry. Paragraph 85(2)(a) states as follows.

> *(2) The access and privacy officer*
>
> *(a) subject to subsection (3), may deposit into the access to information registry the following information or records:*
>
> *(i) information about each privacy impact assessment conducted by the head of a public body,*
>
> *(ii) each response by a head under section 64 (or if it is impracticable to do so, a summary of the response) together with a summary of the access request for which the response was provided,*

(iii) a protocol, the rules of which are to be binding on public bodies or, if specified in the protocol, a class of public bodies,

(iv) any other information that the access and privacy officer considers would, if made known to public bodies by depositing it into the registry, promote and strengthen public bodies' compliance with this Act;…

[142] Subsection 85(3) states as follows.

(3) Before depositing a record into the access to information registry, the access and privacy officer must remove from the record all information to which access is prohibited under Division 8 of Part 3 or to which the head of a responsive public body may deny access under Division 9 of Part 3.

[143] The Registry, including its content, is a manifestation of the stated purpose in paragraph 6(d) which is to require the Department to make certain information openly available to the public so that an applicant does not have to make an access request for information already publicly posted on it. In addition, the public information in the Registry first had to have met the bar in subsection 85(3) which prevents the posting of information to which access is prohibited or information to which access may and has been denied. As such, the public information in the Registry, whether in detail or in summary, is unfettered and accessible by anyone to any end.

[144] Moreover, information is provided to an applicant through the access to information process on the understanding that the harm contemplated would not arise if the information were disseminated to the public.

[145] The Department acknowledged that the Registry contains public information concerning the Complainant's Access Request. It attached an appendix to that effect.[40] Pages 0001-0002 contain an Access Request summary under the heading ''21-0359 (/access-information/access-summary/21-0359'. It sets out, amongst other things, the Complainant's Access Request and two subsequent statements arising from clarifications sought by the Department prior to issuing the ATIPP Office Activation Letter. It also states that the Department's response was to withhold the Records in full.

[146] Had the Department decided to release the Records in whole of in part, then these Records could also be posted on the Registry.

[40] The Department submitted in support Appendix I entitled "Access Registry 21-359'.

[147] The Department asserted, however, that any such publicly posted information would increase the risk to grizzly bears because, if the Records were released to the Complainant, then the public would also have access to the Records, thus increasing the chances of hunters and poachers visiting the YNS to search for grizzly bears.

[148] The point of the Registry is to provide the public, by virtue of an applicant's access request and its resulting outcome, with this information so that other potential applicants do not have to submit similar requests for what would be duplicate information, including the work required by the Department to identify and release the responsive records.

[149] The Department's assertion, notwithstanding its speculative nature, runs contrary to the reason for the Registry's existence which, in any event, does not include exempted information caught by subsection 85(3). Moreover, it seems to be a policy argument that has already been decided by statutory law.

[150] The Department also submitted that it was prepared to enter an ATIPPA-compliant data sharing agreement with the Complainant concerning the Records but was unsuccessful. The Complainant corroborated this, adding that they declined because researchers also view them as impediments to accountability on government science because they can limit the intellectual value of the data, limit intellectual freedom, put terms on use that prevent 'double-checking' government conclusions about data analyses and tie up the scientific value of the data with one person.

[151] Be that as it may be, the issue before me is whether disclosure of the Records could reasonably be expected to result in damage to, or interference with, the conservation or preservation of YNS grizzly bears. Submission concerning data agreements at this stage of the Investigation are, with respect, irrelevant.

[152] I will now consider the remaining submissions.

[153] The Department submitted that limiting the circulation of the Collar Data requested by the Complainant is imperative because bears and parts of their anatomy (*e.g.*, claws, gallbladders) are sought on the black market, bears are often killed for no reason simply by being in the wrong place at the wrong time, and that both hunters and poachers across Canada and the US have harassed and killed both grizzly and black bears after finding the location of the bears and their dens. It attached several appendices that illustrate these assertions, none of which included Yukon examples.[41]

[41] The Department attached in support Appendices C1-12, L and M. The first appendices set out a Yukon court case and various news stories from across the country and from Alaska detailing instances of human brutality to bears.

[154] The Complainant submitted, amongst other things, that there are limited markets for many of the wildlife species in Canada's north, incentives for illegal harvest relative to penalties for being caught are low, the expense of accessing remote wildlife population is high, there are enforcement measures in place that prevent the illegal harvest of animals and the incentive to harvest a collared animal is even lower than harvesting an animal that has no collar. Moreover, the *Wildlife Act* sets out a 48-hour hunting prohibition after knowing, by means of an aircraft, the exact location of an animal.

[155] The Complainant also stated that the primary factor that drives the intensity of legal or illegal harvest across North America is road access. This is also reflected for bears in the Yukon. They then asserted that the requested Collar Data is from the most remote and completely roadless part of the territory such that removing a poached bear from that type of environment would, in their view, be a massive, logically challenging and costly feat. To illustrate this point, the Complainant submitted that, in searching all illegal harvesting cases in the Yukon over the last 30 years, there were only four cases compared to 200 in BC, all of which occurred relatively close to access points.

[156] The Department submitted in reply that poachers will not require real time tracking of researchers if they have access to GPS coordinates.[42] Yukoners have adapted to travel for hunting by means other than roads. However, it provided no evidence in support of its contentions.

[157] I accept that the Collar Data, if released by the Department, could provide poachers with YNS grizzly bear habitat patterns, as well as their specific locations at certain times. However, I could not ascertain on the Department's website any information about illegal harvests. I also searched Yukon sources in CanLII under 'wildlife act', 'wildlife ordinance', 'wildlife and game ordinance' and 'grizzly bear'. None of those terms yielded any cases about grizzly bear poaching. However, it did net a copy of the *Roadside Hunting of Grizzly Bear Order*[43] which sets out the number of grizzly bears that may be hunted in each licencing year within the part of the Yukon that is within 100m of a highway centreline, as set out in the instrument.

Appendix L sets out three access requests posted in the Registry, including '21-0359', the subject of this Investigation Report. Appendix M consists of another news story of an Alberta hunter illegally killing a collared grizzly bear.

[42] The Department attached in support Appendix C entitled 'Case Studies Den Locations'. It states at page 0001, "…It was not until researchers recovered the remote camera that they realized the crime was caught on camera. Researchers were initially concerned that the [poachers] found the den by following their snow tracks to check the den; however, it was thought that heavy snowfall obliterated those tracks."

[43] MO 2022/27 at https://www.canlii.org/en/yk/laws/regu/ymo-2022--27/latest/ymo-2022--27.html?resultIndex=1.

[158] What the Complainant's information shows, something the Department does not oppose, is that illegal harvesting of grizzly bears occurs in respect of road access points, noting that not all instances of illegal grizzly bear hunting make their way to court and that the above information does not provide a full picture of grizzly bear poaching. However, I infer from this evidence that there are low numbers of illegal grizzly bear harvested in the Yukon and there is nothing to indicate that this has occurred in the YNS.

[159] The Department also submitted that having access to the Collar Data will make it easy to determine a bear's home range (*i.e.*, where it spends its time when it is not hibernating) and its winter den location. Because hunting is all about locating one's quarry, the Department factors hunter 'success', or the lack of it, into its management of big game species. If it released the Records to the Complainant, then this will make it easier for hunters and poachers to succeed, thus severely affecting the Department's wildlife management regime and negatively affecting big game populations, especially species of concern like YNS grizzly bears. In its view, the sustainable harvest rate is a key component in the conservation and protection of grizzly bears, as well as a key component in the strict conservation regime in the IFA.

[160] The Department's submission is speculative. It provides no evidence that released collar data concerning the location of a species, including grizzly bears, has made it easier for hunters and poachers to succeed in their harvesting pursuits. It follows that it cannot reply on such speculation then to assert definitively that this would severely affect the Department's wildlife management regime and negatively affect big game populations, especially species of concern like YNS grizzly bears.

[161] The Complainant submitted that there are at least two examples in which the Department has released specific grizzly and black bear locations. One concerns 'real time' locations, to the meter, of bears seen near residences. This information was released to WildWise which subsequently published it on its website. The other was released to an independent contractor in the form of bear collar locations which was then published, vis-à-vis a report to the Yukon Government, on the City of Whitehorse's website. Moreover, grizzly and black bear location data is provided to the Yukon public at a relatively fine resolution and there is no evidence that the public provision of this data has resulted in increased licensed or unlicensed harvest or any official requests to change the availability of this data on these websites. The Complainant then provided eight website links in support, none of which I could discern as collaborating evidence.

[162] The Department submitted in reply that, amongst other things, the WildWise site states that the locations of black and grizzly bears are identified within urban areas and are not representative of their natural habitat use or quality habitat. Although the icons are shaped like

bears, they do not identity real time bear locations in the wild because all coordinates are approximate and WildWise has scrubbed all identifying data. The Department also submitted that the quality and resolution of the bear assessment maps on the Whitehorse website were not clear, thus making it more difficult to disseminate the exact location of bears.

[163] What I infer from these sets of assertions by the Department and Complainant is that, despite the Complainant's contention that the Department was publicly providing bear location information, the provision was insufficient to aid a hunter or poacher and, in any case, the information concerned geographical locations, such as the City of Whitehorse, in which hunting is prohibited.

[164] The Complainant also submitted that there are no Yukon regulations that prohibit any member of the public from searching for bears or dens. For example, this activity is conducted by environmental consulting firms with no restriction on how that data may then be used, such as conducting aerial surveys to look for bears and dens in respect of the Casino Mine environmental assessment. Under Yukon legislation, and because dens are vacated at survey time, permits are not required to gather this data.

[165] The Department submitted in reply that researchers or organisations must hold a 'Wildlife Research Permit' to conduct research or scientifically monitor animals in the Yukon. It further submitted in reply that there is only one map in respect of the Casino Mine YESAB assessment that includes grizzly bear locations but it combines grizzly bears, moose and caribou in one large area, thus making it more difficult to disseminate the exact location of grizzly bears. It also submitted that the 'Aklavik Grizzly Bear Traditional Knowledge Study' provides maps only show the general location of grizzly bears and not their exact coordinates.

[166] I take from the above evidence that there is publicly-available information that, to some extent, shows the location of bears, including grizzly bears, which may or may not aid a hunter or a poacher in harvesting a grizzly bear. I also take from it that members of the public may legally search for bears or dens, noting that researchers or organisations likely associated with environmental assessment processes can also do so if they hold a permit. However, the issue is whether release of the Records will reasonably be expected to result in damage to, or interference with, the conservation or preservation of YNS grizzly bears. I am not persuaded that any of this evidence supports such a likelihood because, although contextual, it does not contain the specificity required to elevate it from dualling speculations based on the harm being self-evident to the middle ground where it must be clearly established by the Department that the harm will probably occur were the Records to be released.

[167] The Complainant then submitted that the Collar Data, as requested, is not in real time and therefore cannot guide a hunter directly to a grizzly bear except to give the hunter a general sense of where it may be, noting this is already available through numerous other resources. Furthermore, most of the bears represented by the data are dead.

[168] The Complainant also stated that bears does not repeatedly use the exact same spot, to the meter, at the exact same time each year. Females with cubs, which have the least motility amongst bear cohorts, roam over nine square kilometers daily. Bears may use different areas from year to year. There is a significant variation in the timing of when they emerge from a den and where they forage each year. Moreover, dens in the YNS area cannot be reused because the area is fully underlain by permafrost. Once bears exit their dens, 100 per cent of these dens collapse before the next denning season.

[169] The Department provided no evidence to dispute this, other than to state that bears repeatedly return to the same denning areas, as supported by cited literature. The Complainant asserted, however, that no Collar Data was requested on active dens so the potential to disturb a denning bear from the Records, if released, is zero.[44] Moreover, the Records are information that is over 10 years old.

[170] I take from this that the Complainant is of the view that the Records, if released, cannot manifest the harm in paragraph 78(b) because grizzly bear activity is significantly motile in this region and the Collar Data, given its age, cannot provide any 'real time' advantage for harvesting reasons, whether such harvesting is legal or illegal. I also take from this that the Department does not dispute the logic in the Complainant's assertions.

[171] The Complainant also submitted that the Department does not try to hide information about where to find bears because there is tourism value in promoting public viewing opportunities, none of which has changed harvest success rates, legal or illegal.

[172] The evidence supports this assertion in that the Department submitted that it will promote bear viewing as one of the new tourist activities on the YNS but that the Collar Data, if released, would contribute to poaching.[45]

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[44] The Complainant distinguished between an 'active' den (*i.e.*, a den with a bear in it) and a 'previous denning location' (*i.e.*, a bear that has had a bear in it but is no longer occupied).

[45] Recall that the Department submitted in respect of subparagraph 75(1)(a)(ii) that it, along with its Co-Management Partners, want to increase tourism in the YNS and that the opportunity to view grizzly bears will be one of the main tourist attractions. It further stated that, if the Records are released, poachers will decrease the YNS grizzly bear population, such that over-harvesting is highly probably, given the jurisdictional scans, and therefore cause a reduction in the number of tourists visiting the YNS.

[173] However, the Complainant asserts that a viewing opportunity, which gives current information on bears that are alive, would more likely promote poaching and habitat displacement, as well as have negative effects on the population, than would the release of Collar Data that ranges from 12 to 19 years old.[46]

[174] I tend to agree with the Complainant, especially since the Department provided no substantive evidence to the contrary and that the Collar Data, given its temporal context is unlikely to enable any grizzly bear 'real time' pinpointing other that to identify, on an approximate basis, the general area in which YNS grizzly bears may still be found.

[175] The Department submitted that grizzly bears are a species of concern and need to be protected. It further stated, in reply submissions, that there are both spatial and temporal restrictions and these are provided in the annual Hunting Regulations Summary (see Appendix C).[47]

[176] The Complainant submitted, however, that the Department's management practices for grizzly bears are the most liberal in Canada. In their view, this means that there is little concern for the conservation of the species, noting that there are no annual limits in the Yukon as to how many may be killed. That said, the Complainant acknowledged that there is no non-Indigenous harvest of YNS grizzly bears because the Inuvialuit have exclusive/preferential rights to harvest them, as managed by a quota and, moreover, there is no possibility of a harvest increases unless the Department raises the quota.

[177] The Department, in its reply submissions, stated that since the Yukon grizzly bear population is better than those in other jurisdictions, the YNS Management Plan does permit harvesting but that the harvest quota and preferred right of Inuvialuit hunters will be affected as poaching increases. There will also be no 'paper trail' for the Department to track poachers because they have access to computers and websites.

[178] I take from the foregoing evidence that, despite grizzly bears being a species of concern in the Yukon, harvesting is permitted by means of a Department-controlled quota system in collaboration with its Co-Management Partners. However, there is no non-Indigenous harvesting of YNS grizzly bears because the Inuvialuit have the sole right, as per the IFA. If there were a risk to these bears because of increased legal and successful hunting by the Inuvialuit

[46] Recall that the Collar Data at issue comprises the period January 1, 2004 to December 31, 2010. Therefore, the range set out by the Complainant is erroneous and should state "…approximately 11 to 18 years old." However, this does not substantively change the Complainant's assertion.
[47] Appendix C is entitled '2022-2023 Yukon Hunting Regulations Summary' at https://yukon.ca/sites/yukon.ca/files/env/env-yukon-hunting-regulations-summary_0.pdf.

due to the release of the Records, then I am confident that the quotas would be reduced in keeping with conservation management.

[179] I also take from the foregoing evidence that the Inuvialuit's harvest right will be infringed as poaching increases and it will be difficult to track poachers because of their use of technology. While I have no issue with Inuvialuit harvesting rights and their management, the Department has provided no substantive evidence concerning its poaching assertions to persuade me on a reasonable basis that such an outcome is more likely to occur than not.

[180] The Department also asserted, in it reply submissions, that harassment or loss of a single bear or a group of bears will compromise the conservation management of grizzly bears but, once again, it provided no corroborating evidence of probability.

[181] The Complainant submitted that interference with conservation means any activity that might threaten the continued existence of a population. The concept of conservation is important because the harms test is against the conservation of a species as opposed to an individual or some individuals of a species. They further submitted that because there is allowance for the loss of individuals or habitat, the concept of conservation in wildlife management operates because of thresholds (*i.e.,* how many individuals may be removed or how much habitat may be altered/lost before the conservation of the species becomes threatened). This threshold is usually defined by harvest management strategies that set limits for human-caused mortality. Since the harassment or loss of a single grizzly bear, or even a group, cannot be deemed to have compromised the conservation of the species, the onus is to show how the release of historical location information over a decade old would compromise the conservation of the species, especially given the volume of bear habitat information already available.

[182] I agree with this onus. Without comprehensive and compelling evidence about the reasonable likelihood of harm, as opposed to it being merely being possible or speculative, I am not persuaded that the harassment or loss of a single bear or a group of bears will compromise the conservation management of grizzly bears. To take the Complainant's point and given the evidence before me, I concur that the destruction of some individuals within a population, or some habitat, is allowable while recognising that the species may still be conserved.

[183] Because of the reporting requirements in the *Wildlife Act* and the Regulation, the Department has knowledge of the number of grizzly bears harvested annually. It submitted that actual YNS grizzly bear harvest percentages do not exceed the maximum harvest rate of three per cent. In any event, the Department may allow permits/seals for more than what the harvest rate requires. It stated that this process was established by several evidence-based factors such

as the use of game management and the success/failure rate of hunters. Harvest limits are enforced through the 'Permit Hunt Authorisation' lottery. Between 1980-2014, four per cent of resident hunters and 15 per cent of non-resident hunters, accompanied by an outfitter guide, were successful in harvesting a grizzly bear.

[184] Based on both the Department's evidence and the Complainant's submissions, the foregoing shows in summary that the quantity of grizzly bear harvesting allowed each year is a controlled process. There is difficulty in accessing YNS grizzly bears. There are legal limitations of involving an aircraft to locate them. There are various penalties and financial disincentives for poaching them. Moreover, the hunter success rate for YNS grizzly bears is based on knowledge that hunters already have, as opposed to that contained in the Records.

[185] I am satisfied, therefore, that disclosing the Records to the Complainant will not likely increase the hunting success rate or the rate at which poachers harvest YNS grizzly bears, which in this latter case is zero.

[186] Should these rates increase due to the subsequent disclosure of the Records, something which would have to be evidence-based and clearly occupy the middle ground between 'that which is merely possible' and 'that which is probable', I would expect the Department, in consultation with its Co-Management Partners, to reduce the quotas necessary to support YNS grizzly bear conservation efforts, such that any risk of overharvesting that may result from disclosing the Records will not cause damage to nor interfere with their conservation.

Conclusion

[187] For the reasons given above, I find that the Department has not established that disclosure of the Records could reasonably be expected to result in damage or interfere with conservation of the YNS grizzly bear population under paragraph 78(b). The Department is therefore not authorized to refuse to disclose the Records.

IX FINDINGS

Issue 1

[188] I find that the Department Head is not authorised to rely on subparagraphs 75(1)(a)(ii) and (iv) to refuse to disclose the Records to the Complainant.

Issue 2

[189] I find that the Department Head is not authorised to rely on subsection 76(1) to refuse to disclose the Records to the Complainant.

Issue 3

[190] I find that the Department Head is not authorised to rely on paragraph 78(1) to refuse to disclose the Records to the Complainant.

X RECOMMENDATIONS

Issue 1

[191] Since subparagraphs 75(1)(a)(ii) and (iv) do not apply, I recommend that the Department Head disclose the Records to the Complainant in Excel file format, as requested.

Issue 2

[192] Since subsection 76(1) does not apply, I recommend that the Department Head disclose the Records to the Complainant in Excel file format, as requested.

Issue 3

[193] Since paragraph 78(1) does not apply, I recommend that the Department Head disclose the Records to the Complainant in Excel file format, as requested.

Department Head's Response to Investigation Report

[194] Section 104 requires the Department Head to do the following after receiving the Investigation report.

> *104(1) Not later than 15 business days after the day on which an investigation report is provided to a respondent under subparagraph 101(b)(ii), the respondent must, in respect of each recommendation set out in the investigation report*
>
> *(a) decide whether to*
>
> *(i) accept the recommendation in accordance with subsection (2), or*
>
> *(ii) reject the recommendation; and*
>
> *(b) provide*

(i) a notice to the complainant that includes

(A) their decision, and

(B) in the case of the rejection of a recommendation, their reasons for the rejection and a statement notifying the complainant of their right to apply to the Court for a review of the decision or matter to which the recommendation relates, and

(ii) a copy of the notice to the commissioner.

(2) If a respondent accepts a recommendation set out in an investigation report, the respondent must comply with the recommendation not later than

(a) if the respondent is the access and privacy officer, 15 business days after the day on which the notice of acceptance under subparagraph (1)(b)(i) is provided to the complainant; or

(b) if the respondent is the head of a public body

(i) 15 business days after the day on which the notice of acceptance under subparagraph (1)(b)(i) is provided to the complainant, or

(ii) if an extension is granted by the commissioner under subparagraph (4)(a)(i), the date specified in the notice of extension provided under paragraph (4)(b).

[195] Subsection 104(3) authorises the Department Head to seek an extension of the time to comply with a recommendation as follows.

(3) If the head of a public body reasonably believes that the public body is unable to comply with a recommendation in accordance with subparagraph (2)(b)(i), the head may, not later than 10 business days before the end of the period referred to in that subparagraph, make a written request to the commissioner for an extension of the time within which the head must comply with the recommendation

[196] Subsection 104(5) deems the Department Head to have rejected a recommendation if they do not provide notice as required or does not comply with it in accordance with the specified timeframes.

Complainant's Right of Appeal

[197] Subsection 104(5) gives the Complainant the right to appeal to the Yukon Supreme Court if the Department Head rejects a recommendation or is considered to have done so, in accordance with the time limits set out in paragraphs (a) through (c).

ORIGINAL SIGNED

_____
Rick Smith, BA, MCP, LLB
Adjudicator
Office of the Information and Privacy Commissioner

Distribution List:

- Department Head
- Complainant