



Yukon
Information
and Privacy
Commissioner

INQUIRY REPORT

File ATP20-06R

Pursuant to section 52 of the

Access to Information and Protection of Privacy Act

Diane McLeod-McKay, B.A., J.D.

Information and Privacy Commissioner (IPC)

Department of Environment

March 22, 2021

Summary

In December of 2019, an applicant made a request to the Department of Environment (Department) for access to “[a]ll GPS, VHF and satellite collar relocation data, in entirety, for the caribou/caribou herds in Yukon and including trans-boundary movements into neighbouring jurisdictions” from 1980 to the present. The Department refused the Applicant’s access request in full, citing as its authority for refusal: subsection 24 (1) together with its subparagraph (a)(ii), paragraph (b) and subparagraph (c)(ii) (disclosure harmful to business interests of a third party); subsection 17 (1)(b) (disclosure harmful to the financial or economic interest of a public body); and subsection 21 (b) (disclosure harmful to the conservation of heritage sites, etc). The Applicant requested the Information and Privacy Commissioner (IPC) to review the refusal. Settlement of the review failed, and the matter went to Inquiry.

The IPC found that the Department is required to refuse certain information requested by the Applicant about the Fortymile caribou herd. She further found that the Department did not have authority to rely on the provisions cited for some of the information requested about the Fortymile caribou herd and for all the information requested about the other herds, which are: Porcupine caribou herd; Chisana caribou herd; Carcross, Ibex, Atlin and Laberge (‘Southern Lakes Caribou’) caribou and the Liard Plateau, Little Rancheria and Swan Lake caribou herds; and the Finlayson, Aishihik, Bonnet Plume, Clear Creek, Coal River, Ethel Lake, Hart River, Klaza, Kluane, Labine, Moose Lake, Pelly, Redstone, South Nahanni, Tatchun, Tay River, Burwash, Little Salmon, and Wolf Lake caribou herds.

She recommended the Department provide access to the information about these herds that the applicant is entitled to.



Table of Contents

Summary	2
Statutes Cited.....	4
Cases Cited	4
Explanatory Note	5
I BACKGROUND	5
II INQUIRY PROCESS	6
III ISSUES.....	6
IV RECORDS AT ISSUE	7
V JURISDICTION	7
VI BURDEN OF PROOF	7
VII SUBMISSION OF THE PARTIES	8
VIII ANALYSIS	8
IX FINDINGS	849
X RECOMMENDATIONS.....	87
Public Body’s Decision after Review	89
Applicants’ Right of Appeal.....	89



Statutes Cited

Federal

Species at Risk Act, S.C. 2002, c. 29

Saskatchewan

Freedom of Information and Protection of Privacy Act, SS 1990-01, c F-22.01

Yukon

Access to Information and Protection of Privacy Act, RSY 2002, C.1.

Interpretation Act, RSY 2002, c.125

Wildlife Act, RSY 2002, c.229

Cases Cited

Court

Dagg v. Canada (Minister of Finance), 1997 CanLII 358 (SCC)

Merck Frosst Canada Ltd. V. Canada (Health), 2012 SCC 3 (CanLII)

Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC)

Information and Privacy Commissioners

British Columbia

Ministry of Water, Land and Air Protection, Re, 2001 CanLII 21606 (BC IPC)

Saskatchewan

Saskatchewan (Environment)(Re), 2015 CanLII 29849 (SK IPC)

Yukon

Inquiry Report ATP13-037AR, Department of Community Services, August 11, 2014 (YT IPC)

Inquiry Report ATP18-16R, ATP18-17R and ATP18-38R, Department of Environment, July 26, 2019 (YT IPC)

Inquiry Report ATP15-055AR, Department of Justice, June 8, 2016 (YT IPC)

Explanatory Note

All sections, subsections, paragraphs and the like referenced in this Inquiry Report are to the *Access to Information and Protection of Privacy Act* (ATIPP Act) unless otherwise stated.

I BACKGROUND

[1] On November 25, 2019, the Applicant requested the following information from the Department of Environment (Department):

All GPS, VHF and satellite collar relocation data, in entirety, for the caribou/caribou herds in Yukon and including trans-boundary movements into neighbouring jurisdictions. This data may span 1980 to present. This should include collar fix data for any caribou, over the herd's entire range. The Information is contained by the Department of Environment in two to four excel spreadsheets, in two to 20 excel workbooks. I am requesting these spreadsheets in full. Fulfillment of this request should include any data that was provided from the collar through Argos, Iridium or other remote transmission, as well as through manual download. This will include but not be limited to the following fields: LOC_NUM, NAME, PTT_ID, YT_DATE, YT_TIME, CODE, LATITUDE, LONGITUDE, BEST, MONTH, DAY, JDAY, YEAR, SEAS_NUM, SEASON, CONSEC_SEAS_NUM, CA_YEAR, HERD, SESSION. Depending on the collar model, the fields may also be similar to: POPULATION, LOC_ID, ANIMAL_ID, ANIMALNUM, YEAR, DATE_YT, TIME_YT, HOUR, DATE_TEXT, YR_MONTH, MONTH_NUM, MONTHNAME, WEEK_NUM, SERIALDAY, DAY_NUM, FUNCTION, Best Daily Location LATITUDE, LONGITUDE. Data for all herds previously was stored in one excel workbook. However, current data may have to be downloaded from the collar company's servers to provide up-to-date Information. This is a quick exercise (e.g., minutes) and generally results in one excel workbook .csv file per herd. It is OK to provide redundant Information (e.g., the same Information in one excel file as in another excel file), if this makes provision of the information quick. Please provide record of all transmissions and attempted transmissions, even if data were not obtained. If other fields are available, please include those in this information request. I am requesting the information in electronic format (e.g., the excel spreadsheets). Timeline: January 1, 1980 to present.

[2] The Records Manager activated the request and assigned it file number #A-8076 (Access Request).

[3] On December 17, 2019, the Records Manager responded to the Access Request and advised the Applicant that the Department refused access in full to the Records requested citing the following provisions of the ATIPP Act as its authority for its refusal:

17 (1)(a) and (b)
20 (1)(a)(i),(iii),(iv), and (c)
21 (b)
24 (1)(a)(i)(ii), (b), and (c)(ii)(iii)

[4] On January 10, 2020, the IPC received a request for review under paragraph 48 (1)(a) of the ATIPP Act. The IPC authorized settlement under section 51 of the ATIPP Act. Settlement was not successful, and the IPC agreed to conduct an Inquiry as part of her review of the refusal by the Department to provide the Applicant with the information requested in the Access Request.

[5] During settlement, the Department added the provisions 24 (1)(a)(ii), (b) and (c)(ii) that it is relying on to refuse the Applicant with access to the Records for seven caribou herds: namely, the Carcross, Ibex, Atlin, Laberge, Liard, Horseranch/Rancheria, and Swan Lake herds.

[6] As the added provision is a mandatory exception to the right of access under the ATIPP Act, I take no issue with the addition of this provision by the Department to the information subject to the Access Request.

II INQUIRY PROCESS

[7] The Notice of Inquiry was delivered to the parties on May 5, 2020, wherein the issues for Inquiry were set out. Each party made submissions in regard to the issues identified. All submissions were received by the parties and exchanged by the June 19, 2020 deadline indicated in the Notice of Inquiry.

III ISSUES

[8] The issues in this Inquiry are as follows.

Issue One: Is the Department required by subsection 24 (1) together with its subparagraph (a)(ii), paragraph (b) and subparagraph (c)(ii) of the ATIPP Act to refuse the Applicant with access to the Records for all caribou herds, excluding the Nelchina herd?

Issue Two: Is the Department authorized by subsections 17 (1)(a) of the ATIPP Act to refuse the Applicant with access to the Records for all caribou herds, excluding the Nelchina herd?

Issue Three: Is the Department authorized by subsections 21 (b) of the ATIPP Act to refuse the Applicant with access to the Records for all caribou herds, excluding the Nelchina herd?

IV RECORDS AT ISSUE

[9] The records are spreadsheets that are in the custody or control of the Department.¹ The records are stored in multiple databases within the Department. The information in the databases is stored using 'Microsoft Access', a database management tool similar to Excel, designed to store information for reference, reporting, and analysis. The records at issue in this Inquiry are those containing the information requested by the Applicant in the Access Request (Records).

V JURISDICTION

[10] My authority to review the Department's decision to refuse to provide an applicant with access to the records is set out below.

48(1) A person who makes a request under section 6 for access to a record may request the commissioner to review

(a) a refusal by the public body to grant access to the record;

VI BURDEN OF PROOF

[11] Paragraphs 54 (1)(a) and (b) set out the burden of proof relevant to this Inquiry and identify that the burden is on the Department to prove that an applicant has no right to the records, or to the information separated or obliterated from the records.

54(1) In a review resulting from a request under section 48, it is up to the public body to prove

(a) that the applicant has no right of access to the record ...

VII SUBMISSION OF THE PARTIES

[12] The parties provided extensive submissions on the issues. The evidence of each party will be set out in the analysis portion of this Inquiry Report as may be relevant to each issue.

¹ Fact Report, at p. 1.

VIII ANALYSIS

NELCHINA HERD

[13] The Fact Report agreed on by the parties indicates that “[s]ubsequent to informal case resolution, the information in the records pertaining to the Nelchina Caribou herd is no longer at issue.” The Department’s submission included its reasons for the application of subsection 24 (1), together with its subparagraph (a)(ii), paragraph (b) and subparagraph (c)(ii) to the information requested by the Applicant for this herd. Given the evidence in the Fact Report, I will not address the Department’s submissions on the application of these provisions to this herd.

[14] I will address each issue by herd, beginning with the Fortymile caribou herd.

FORTYMILE CARIBOU HERD – ISSUE ONE

Is the Department required by 24 (1)(a)(ii), (b), and (c)(ii) of the ATIPP Act to refuse the Applicant access to the Records for the Fortymile caribou herd?

[15] The Department is relying on subsection 24 (1), together with its subparagraph (a)(ii), paragraph (b), and subparagraph (c)(ii) to refuse the Applicant access to the information requested about the Fortymile caribou herd.

[16] Subsection 24 (1) is a mandatory exception to the right of access to information under the ATIPP Act. If the Department meets its burden of proving these provisions apply, then it is prohibited from providing the Applicant with access. These provisions are as follows.

24(1)A public body must refuse to disclose to an applicant information

(a) that would reveal

(i) ...

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(i) ...,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) ...

[17] As indicated, the Department has the burden of proving that the section 24 exception to the right of access applies. Subsection 24 (1) contains a three-part test. All the requirements in the provisions relied on in paragraphs (a) through (c) must be met, as signalled by the “and” in paragraph 24 (1)(b). If the provisions are met, then the Department is prohibited from disclosing to the Applicant any information to which these provisions apply.

24 (1)(a)(ii)

Is the information requested by the Applicant, commercial, financial, labour relations, scientific or technical information of a third party that would be revealed by disclosing the information in the Records to the Applicant?

Applicant’s submissions on subparagraph 24 (1)(a)(ii)

[1] The Applicant made a number of submissions on the application of section 24 to ‘business interests’. I assume that the heading of section 24, which is “[d]isclosure harmful to business interests of a third party”, is the basis for their submissions.

[2] Yukon’s *Interpretation Act*² states at subsection 9 (2) that “...headings in an enactment, other than the headings identifying the Parts and Divisions into which an enactment is divided, form no part of the enactment but shall be deemed to have been inserted for convenience only.” The heading above referenced, is a section heading. Given this, I have not addressed the Applicant’s submission on the meaning of ‘business interest’.

[3] The remainder of the Applicant’s submissions on this subparagraph are as follows.

Section 24 can apply to any party that meets the third party test, including non-profit organizations, but because of the element of finance, commerce or revenue generation that must present in the type of harm, and the general requirement for withheld information to relate to the financial information of a third party [Economic Development and Tourism (Re), 2019 CanLII 32851 (PE IPC), paragraph 26] many of the third parties contemplated for protection by subsection 24 will be commercial interests that have supplied information about private sector enterprises to government. Accepting that a business interest is different than an economic interest, an internet search of uses of the British Columbia and Alaska caribou data suggests that the sole uses of the data have been for research relating to management and conservation of the species, with provision of the data to academic institutions, non-profits, and other organizations generating no revenue, or being freely provided (i.e., without cost

² RSY 2002, c.125 (as amended).

recovery). No profit, commerce, cost recovery, or revenue motives are evident, and there is no evident business model applied to the programs tasked with caribou collar data collection, analysis and information dissemination.

[4] In their reply submissions, the Applicant's submissions for the application of subsection 24 (1) are to paragraph (a)(i) of this subsection. The Department is not relying on this provision to refuse access. Given this, I have not addressed those submissions.

Department's submissions on the application of subparagraph 24 (1)(a)(ii)

[5] The Department did not provide any submissions on the application of this subparagraph to the Records. Despite this, and the fact it has the burden of proving that this subsection applies, subsection 24 (1) is a mandatory exception. Because it is a mandatory exception to the Applicant's right of access, I must go on to determine as best I can whether it applies to the information requested by Applicant. Should I determine it does, then the Department is prohibited from disclosing the information to the Applicant.

[6] I will begin by determining if the information in the Records qualifies as commercial, financial, labour relations, or scientific or technical information.

[7] The Department did not provide me with a copy of the Records requested by the Applicant. What it provided was a sample of the Records containing fields of the information associated with collared caribou.

[8] The rationale for providing a sample is contained in the Fact Report. It states "[t]he Records at issue are spreadsheets stored in multiple databases within the Department. The information is stored using 'Microsoft Access' a database management tool similar to excel, designed to store information for reference, reporting, and analysis. Because the responsive records consist of millions of data points stored in multiple databases, the Department provided a sample of the database 'headers' for the review, as opposed to providing the records in full..." A sample of the Records is contained in the Fact Report. The same sample was appended to the Department's submissions as Appendix S.

[9] The tables in Appendix S contain three columns. The first is 'Field Name' and contains numerous fields that identify the kind of information collected about collared caribou. An example of this information is animal ID, sex, temperature, latitude, and longitude. The second column is 'Data Type'. This column contains information collected from the collar of each collared caribou. For example, it would contain each caribou's animal ID, their sex, their temperature, latitude, and longitude. The third column is 'Description (optional)'. In the sample provided, this column appears to provide the parameters of the information that is entered in column two. For example, the 'ANIMAL_ID' in column one is generated as a 'Number' in

column two and column three identifies that the data in column two is an 'Animal ID generated by the system in ArgosDB'.

[10] The substance of the Applicant's Access Request is that they want "[a]ll GPS, VHF and satellite relocation data, in entirety, for the caribou/caribou herds in Yukon" that is in the custody or control of the Department for the period between January 1, 1980 to the present, which would be November 25, 2019, the date of the Access Request. To clarify, they indicate that the information is contained in "two to 20 excel workbooks" and that they want access to the spreadsheets 'in full'. They add that "the "[d]ata for all the herds previously was stored in one excel workbook...[h]owever, current data may have been downloaded from the collar company's servers to provide up-to-date information."

[11] I assume that the samples provided in Appendix S comprise the information that is responsive to the Applicant's Access Request and that the information described in paragraph 10 above is the extent of the information that the Applicant would receive if they were to receive all information requested in the Access Request. The Applicant received a copy of both the Fact Sheet and Appendix S and did not raise an objection to the data presented in the Sample as it pertains to their Access Request.

Is the information requested in the Access Request commercial, financial, labour, or scientific or technical?

[12] In Inquiry Report ATP18-16R, 17R and 38R, I defined the terms "commercial" and "financial" information.³

'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.

[13] The information requested in the Access Request is not commercial or financial information. Nor is it labour relations information.

[14] As I have not defined the terms "scientific" or "technical" information in subparagraph 24 (1)(a)(ii), I will do so now.

³ Department of Environment, July 26, 2019 (YT IPC), at paras 83 and 88.

[15] In *Merck Frosst Canada Ltd. V. Canada (Health)*,⁴ the Supreme Court of Canada clarified that these terms, which appear in paragraph 20 (1)(b)⁵ of the federal *Access to Information Act*, should be given their ordinary dictionary meaning.⁶

[16] ‘Scientific’ is defined in the Oxford online dictionary as “[b]ased on or characterized by the methods and principles of science.”⁷ ‘Science’ is defined in this dictionary as “[t]he intellectual and practical activity encompassing the systematic study of the structure and behaviour of the physical and natural world through observation and experiment”.

[17] ‘Technical’ is defined in the same dictionary as “[r]elating to a particular subject, art, or craft, or its techniques”.⁸

[18] Saskatchewan’s Information and Privacy Commissioner had occasion to consider the meaning of these terms when interpreting paragraph 19 (1)(b) of Saskatchewan’s *Freedom of Information and Protection of Privacy Act*⁹ which states...“a head shall refuse to give access to a record that contains...financial, commercial, scientific, technical or labour relations information that is supplied in confidence...” He found the meaning of these terms to be as follows.

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be 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 organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics...it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information.¹⁰

⁴ [2012] 1 SCR 23, 2012 SCC 3 (CanLII) (Merck Frosst), at paras. 109 and 112 interpreting provisions of the federal *Access to Information Act*.

⁵ This paragraph exempts access to a third party’s financial, commercial, scientific or technical information in the custody or control of a government institution that is confidential information supplied to the government institution by a third party and is treated consistently in a confidential manner by the third party.

⁶ Merck Frosst, at para. 139.

⁷ <https://www.lexico.com/definition/scientific>.

⁸ <https://www.lexico.com/definition/technical>.

⁹ SS 1990-01, c F-22.01.

¹⁰ 2015 CanLII 29849 (SK IPC), at para 10.

[19] When interpreting provisions of the ATIPP Act, I must consider the words therein, together with its purposes and its scheme and intention of Parliament.¹¹ I must also interpret it in such a manner that best insures the attainment of its objects.¹²

[20] One of the purposes of the ATIPP Act is to make public bodies more accountable by providing the public with a right to access information in the custody or control of a public body, here the Department. Part 2 of the ATIPP Act (access to information provisions) sets out these rights. Another purpose is to limit the exceptions to the right of access. Within Part 2 are several exceptions to the right of access. Some are discretionary and others mandatory. The exception in subsection 24 (1) is mandatory. It prohibits the disclosure of certain kinds of information where harm will occur to a third party from disclosure of the information in response to an access request.

[21] The purpose of subsection 24 (1) is to protect certain kinds of confidential information that, if disclosed in response to an access request, will result in certain kinds of harm to a third party. The harms are identified in paragraph 24 (1)(c). This subsection is a mandatory exception to an applicant's right of access to information under the ATIPP Act and exists to ensure that harm does not occur because of a person's ability to exercise their right of access to public records.

[22] Taking this into account, together with the purpose of the ATIPP Act and the intent of Parliament, the interpretation of subsection 24 (1) requires that I balance the right of access to information against harm that may result to a third party from a disclosure of confidential information. To do so, the words in this subsection must be interpreted broadly enough to achieve the purpose but not so broadly as to undermine the right of access established by the ATIPP Act.

[23] Applying this analysis to the meaning of the words "scientific information" and "technical information", I find their meanings to be as follows.

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences. In addition, for information to be characterized 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 organized field of knowledge that is prepared by a professional or expert in the field that relates to their field of

¹¹ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC), at para. 21.

¹² *Interpretation Act*, RSY 2002, c125, at section 10.

knowledge. Technical information does not include information that is scientific. Examples of these fields of knowledge are architecture, engineering or electronics.

[24] It is clear from the Records that the information contained therein has been identified as that which is necessary to carry out the activities associated with the conservation of the caribou herds. This information would qualify as scientific or technical information.

Is the information “of a third party”?

[25] In order for subsection 24 (1) to apply to the information in the Records, the information has to be information ‘of a third party’.

[26] The Department provided the following submissions about this herd.

The Fortymile Caribou Herd is a migratory, transboundary caribou herd which inhabits Yukon and Alaska. The Fortymile Caribou Herd collars are purchased by the Department of Environment, ADF&G and the Alaska Bureau of Land Management (BLM). The location data for the Fortymile Caribou Herd is shared between and jointly managed by the Department of Environment, ADF&G and the Alaska Bureau of Land Management (BLM). The parties have a history of cooperative management of the Fortymile Caribou Herd and contribute resources individually towards shared and individual uses of data to achieve responsive stewardship and conservation for the benefit of the public.

In 2016 the Department of Environment, ADF&G and BLM entered into a Data Sharing Agreement (Interagency Agreement For Sharing Of Fortymile Caribou Herd VHF And Satellite Location Data For Research And Management Purposes - see Appendix E.) Each party individually purchases collars and each party shares collar location data with the parties for the purpose of monitoring caribou movements, migration, range use and expansion to facilitate the cooperative management of the herd.

The data owned and shared by ADF&G and BLM is governed by the Alaska Statute 16.05.815(d) (Appendix B), which prohibits ADF&G from disclosing specific locations of fish and wildlife. The law allows the release of such information to parties that have been authorized by ADF&G to perform specific activities, as long as the parties agree to use the information only for purposes as provided under an agreement with the department.

Processes involving third party access to shared location data are outlined on pages 3-4 of the Data Sharing Agreement (Appendix E). The requirements include but are not limited to, a project proposal submission from the third party, a 30 day or more review period by all parties, approval by all parties and the third party entering into a Data

Sharing Agreement with all parties. The Department of Environment therefore refuses in full the release of the Fortymile Caribou collar location data according to s.24(1)(a)(ii), s.24(1)(b), and s.24(1)(c)(ii) of the ATIPP Act.

[27] Appendix E is an “Interagency Agreement for Sharing of Fortymile Caribou Herd VHF and Satellite Location Data For Research and Management Purposes” (Agreement). The Agreement is between the Alaska Department of Fish and Game (ADFG), the U.S. Bureau of Land Management, and the Department. The purpose of the Agreement, as indicated therein, is to “enable and facilitate sharing of any Fortymile Caribou Herd [,] animal location data for research and management purposes between Environment Yukon [,] the U.S. Bureau of Land Management [,] and the [ADFG]”.

[28] The Agreement identifies that “animal location data” is confidential under Alaska state law and U.S. federal policy. It clarifies that “Alaska Statute 16.05.815(d)” prohibits the ADFG from releasing the specific location of ‘wildlife species’. ‘Animal location data’ is defined in the Agreement as “all telemetry data from VHF observations and satellite (e.g., Argos) or Global Positioning System Transmitters [,] derived from collared [Fortymile] caribou”.

[29] The Agreement allows the sharing of the collared caribou information between and among the parties for specified purposes associated with herd management and states:

Although each Party is ultimately responsible for the location data from collars they purchase, each Party knowingly contributes collar location data and metadata to the common use of the Parties for the management of the herd. This Agreement in no way diminishes or precludes any of the Parties from using or sharing their location data for any purpose, or from archiving data they receive and analyze. Nothing in this Agreement alters or supersedes the authorities and responsibilities for the Parties on any matters under their respective jurisdictions.

[30] It also states that the parties agree to “[m]ake available data collected by one Party to the other Parties for internal use...” and to “[a]ssure that location data will not be released to anyone except the Parties to this Agreement”, unless as agreed to by the Parties. The Agreement then sets out the how third-party requests for data are to be addressed and the circumstances in which a request would be considered. None of the circumstances include release of the animal location data to an individual who requests access to it under the ATIPP Act.

[31] A copy of an Alaska statute was provided, Title 16. FISH AND GAME., Chapter 16.05. FISH AND GAME CODE DEFINITIONS., Article 16.05.06. MISCELLANEOUS PROVISIONS, Section 16.05.815, Confidential nature of certain reports and records, which states the following in section (d) (AK Confidential Information Statute):

(d) Except as otherwise provided in this section, the department shall keep confidential...(2) the records of the department that concern (A) telemetry radio frequencies of monitored species;...(E) the specification location of fish and wildlife species. The department may release records and information that are kept confidential under this subsection if the release is necessary to comply with a court order, if the requester is a state or federal agency, if the requester is under contract with a state or federal agency to conduct research on a fish or wildlife population, or if the requester has been authorized by the department to perform specific activities and agrees to use the records and information only for the purposes as provided under a contract or agreement with the department. After 25 years, the records or information that are kept confidential under this subsection become public records subject to inspection and copying under AS 40.25.110 -40.25.140 unless the department determines that the release of the records or information may be detrimental to the fish or wildlife population.

[32] The Alaska Admin Code, 5 AAC 93-040. Radio Telemetry frequencies states that “[e]ach radio telemetry frequency used by the department for a telemetry study of game is confidential. Neither the commissioner nor any other department employee will release a frequency except: (a) to a government agency doing a wildlife study approved by the commissioner; or (2) to another state agency if the commissioner finds the agency has a legitimate need to know the frequency”.

[33] I am satisfied from the evidence, that *some* of the information requested by the Applicant that is in the custody or control of the Department was originally ADFG’s information. This information would be that gathered by ADFG from the collars it purchased. The Applicant requested all the information generated by the collars that is in the custody or control of the Department. In the Applicant’s submissions, they highlight that the Department has spent its own money on the purchase of collars and that the amount of money spent suggests that the Department holds the majority of collar data for most transboundary herds.¹³

[34] The information gathered from collars purchased by the Department does not belong to the ADFG. The Agreement expressly states that “each Party is ultimately responsible for the location data from collars that they purchase” and that “[t]his Agreement in no way diminishes or precludes any of the Parties from using or sharing their location data for any purpose”.

[35] Subsection 24 (1) does not apply to any information that the Department collected from collars that it purchased. For the collar information that belongs to the ADFG, I will go on to assess if the information was supplied to the Department by the ADFG.

¹³ Applicant’s submissions at pp. 3 and 4.

Was the information requested by the Applicant that belongs to the ADFG, supplied by ADFG to the Department on the basis that it would be held in confidence by the Department?

[36] In Inquiry Report ATP13-37AR, I determined that for the purposes of paragraph 24 (1)(b), “supply” means to “provide or furnish.”¹⁴

[37] The terms of the Agreement between the Department, ADFG and the other party, make it clear the information gathered about the Fortymile caribou from collars that ADFG purchases is its own and that the information is made available to the Department on the terms specified in the Agreement. Based on this evidence, I am satisfied that the ADFG supplied the information from its collars to the Department for the purposes set out in the Agreement.

[38] To make out paragraph 24 (1)(b), the information must also have been supplied explicitly or implicitly in confidence.

[39] In Inquiry Report ATP18-16R, 17R and 38R, I stated that there must be objective evidence that when the information was supplied by the third party to a public body, there was a reasonable expectation on the part of the third party, either implicitly or explicitly, that the Department would keep it confidential.¹⁵

[40] The Agreement expressly states that the “animal location data” is confidential under Alaska state law and U.S. Federal Policy, noting that Alaska Statute 16.05.815(d) prohibits the ADFG from releasing the specific location of “wildlife species.” As indicated, the meaning of “animal location data” is “all telemetry data from VHF observations and satellite (e.g., Argos) or Global Positioning System Transmitters [,] derived from collared [Fortymile Caribou Herd] caribou.” The Applicant’s access request is for all GPS, VHF and satellite collar relocation data, in entirety, for the caribou/caribou herds in Yukon, which would include the “animal location data” supplied by ADFG to the Department.

[41] The Agreement prohibits the Department from disclosing any of the ‘animal location data’. The Agreement clarifies that the ADFG provides the ‘animal location data’ to the Department for co-management of the Fortymile caribou herd. The Agreement contains provisions that authorize the disclosure of the information for specified purposes that involve all the parties in deciding about whether the information will be disclosed. As indicated, there is no authority for the Department to disclose the information in response to an access request under the ATIPP Act. The Agreement was signed by all the parties in February and March of

¹⁴ Inquiry Report ATP13-037AR, Department of Community Services, August 11, 2014 (YT IPC), at para. 103.

¹⁵ Inquiry Report ATP18-16R, 17R and 38R, Department of Environment, July 26, 2019 (YT IPC), at para 128.

2016, with the Department signing on March 1, 2016. The Agreement is in effect until December 31, 2020.

[42] Based on this evidence, I am satisfied that there was a reasonable expectation on the part of ADFG that the collar information that was supplied to the Department for the Fortymile caribou herd was done so explicitly under the terms of the Agreement that require the Department to keep the information confidential in accordance with those terms.

[43] To make out the requirements of subsection 24 (1), the Department must also establish that one of the harms in paragraph (c) of this subsection will occur if the ADFG collar information is disclosed to the Applicant. The Department's position is that harm will occur if it discloses the information sought by the Applicant, the nature of which is set out in subparagraph (c)(ii) of subsection 24 (1).

If ADFG's collar information is disclosed to the Applicant, then is it reasonable to expect that similar information will no longer be provided by the ADFG to the Department when it is in the public interest that similar information continue to be supplied?

[44] In Inquiry Report ATP15-055AR, I 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)* which said the following about how these words are to be interpreted.

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. 40.¹⁶

¹⁶ 2014 SCC 31 (CanLII), at para. 54.

[45] For subparagraph 24 (1)(c)(ii), this would mean that where it is determined that provision of ADFG's collar information to the Applicant by the Department will cause probable harm to the ADFG, the provision is made out.¹⁷

Similar information will no longer be provided

[46] ADFG is prohibited by law from disclosing the telemetry radio frequencies of monitored species. It is clear from the evidence that the Fortymile caribou herd is a species that is monitored by the ADFG. However, the Applicant is not seeking this information. They are seeking the information derived from the collars, not the frequencies themselves. As such, this prohibition does not apply to the information sought by the Applicant.

[47] ADFG is also prohibited by law from disclosing the specific location of wildlife species. The Fortymile caribou are a wildlife species. Among the information sought by the Applicant is the specific location of the Fortymile caribou that are collared. The collared data includes the location of collared caribou at specific points in time. If the Department were to disclose the specific location of collared caribou to the Applicant, then it would cause the ADFG to violate provision (E) of the AK Confidential Information Statute.

[48] The Agreement entered between the ADFG and the Department establishes a process to routinely share the location information of collared Fortymile caribou. The purpose of the routine sharing is to allow the parties to jointly manage the Fortymile caribou herd. As indicated, the Agreement sets out the terms of sharing that enables the ADFG to comply with the AK Confidential Information Statute. Specifically, it sets out the prohibition on the ADFG to share the specific location information of wildlife, its authority to share this information with the Department for management of the herd, and the terms for any requests for access to this information.

[49] In a letter received from the ADFG dated March 10, 2020, from the Commissioner of the ADFG, it states that "[i]f Alaska's law (Alaska Statute 16.05.815 (d)) about the confidentiality of data is not protected and honored, [then] it will prevent [the ADFG] from sharing information in the future". This letter makes it clear that the ADFG cannot share information with the Department where doing so may cause it to violate the AK Confidential Information Statute (Sharing Prohibition).

[50] The foregoing evidence supports that it is reasonable to expect that if the Department discloses ADFG's collar information to the Applicant, then it would suffer probable harm because it would be in violation of the AK Confidential Information Statute. It follows from this that the ongoing risk of ADFG violating the AK Confidential Information Statute, because its

¹⁷ Inquiry Report ATP15-055AR, Department of Justice, June 8, 2016 (YT IPC), at para 116.

collar information is accessible under the ATIPP Act, would require that it discontinue its supply of location information of collared Fortymile caribou to the Department as provided for in the Agreement.

Exceptions to the Sharing Prohibition

[51] The prohibition on disclosure of the specific location data of a wildlife species in provision (E) of the AK Confidential Information Statute has an exception. Specifically, records that are 25 years or older that contain this information become public subject to inspection and copying, “unless the [AFGD] determines that the release of the records or information may be detrimental to the wildlife population”.

[52] There is no evidence that the ADFG has determined that the release of the records requested by the Applicant that are 25 or more years old that contain the specific location of collared caribou would be detrimental to their population. The Sharing Prohibition is limited to sharing the specific location of wildlife species in a manner that would violate the AK Confidential Information Statute.

[53] The Applicant’s timeline for the information requested is from January 1, 1980, to November 25, 2019. As such, the Sharing Prohibition does not apply to the specific location information of collared caribou from January 1, 1980, to November 25, 1994.

[54] The Applicant’s access request is for *all* information about collared caribou, including their specific location. The AK Confidential Information Statute does not prohibit the sharing of all information derived from the collars of caribou; it only prohibits the disclosure of a caribou’s specific location. The Sharing Prohibition does not extend to information other than the specific location of wildlife species.

[55] The purpose of information sharing provided for in the Agreement is as follows.

The purpose of this data sharing agreement (Agreement) is to enable and facilitate sharing of any Fortymile Caribou Herd (FMCH) animal location data for research and management purposes between Environment Yukon (YDE) the U.S. Bureau of Land Management (BLM) and the Alaska Department of Fish and Game (ADF&G), hereafter referred to as the Parties. The Parties have a history of cooperative management of the FMCH and contribute funds and in-kind services individually towards shared and individual uses of telemetry data to achieve responsive stewardship and conservation of the FMCH for public benefit. Analyses of these data are expected to provide a better

*understanding of factors influencing caribou movements, migration, range use and expansion and thus facilitate better management.*¹⁸

[56] In light of the foregoing, in my view, because of the need for the ADFG and the Department to share information gathered about the Fortymile caribou for the joint management of the herd as provided for in the Agreement, there is no reasonable probability that the AFDG would cease sharing information derived from collared caribou where the following information is accessible under the ATIPP Act:

- a. the specific location of the caribou contained in records that are 25 years or older and that are publicly available under the AK Confidential Information Statute; and
- b. information about collared caribou that is not prohibited from disclosure under the AK Confidential Information Statute.

Public interest in the supply

[57] The significance and importance of the need to manage the Fortymile caribou herd is set out in several documents.¹⁹ A number of groups have a stake in ensuring that the Fortymile caribou herd population is maintained, including First Nations and hunters. The documents clarify that increasing the population of the herd, which was nearly decimated in the 1970s, is the focus of the management plan.²⁰

[58] While I am not an expert in the conservation of caribou, it is reasonable to conclude from the evidence that without access to the specific location of collared Fortymile caribou that is supplied by the ADFG to the Department, the Department will be unable to carry out its role in the conservation of and joint management of the herd.

[59] On this basis, I am satisfied that there is a public interest in the ADFG continuing to supply the specific location information of collared Fortymile caribou to the Department.

¹⁸ Agreement, at p. 1.

¹⁹ See, for example, Three Decades of Caribou Recovery Programs in Yukon: A Paradigm Shift in Wildlife Management, section on Fortymile Caribou Herd Recovery Program (1994) beginning at p. 6, and numerous documents about the Fortymile caribou herd on the ADFG's website at: <https://www.adfg.alaska.gov/index.cfm?adfg=search.main&q=fortymile+caribou&ie=UTF-8&oe=UTF-8>. See also Forty Mile Caribou Herd, on the Tr'ondëk Hwëch'in Heritage Sites website at: http://trondekheritage.com/images/pdfs/forty_mile_caribou_0411.pdf.

²⁰ Three Decades of Caribou Recovery Programs in Yukon: A Paradigm Shift in Wildlife Management, section on Fortymile Caribou Herd Recovery Program (1994) beginning at p. 6 and the Forty Mile Caribou Herd, at p. 1, Tr'ondëk Hwëch'in Heritage Sites website at: http://trondekheritage.com/images/pdfs/forty_mile_caribou_0411.pdf, at p. 1.

Findings on Issue One – Fortymile Caribou Herd

[60] On the application of subsection 24 (1) of the ATIPP Act to the information derived from collared Fortymile caribou, I find that subsection 24 (1), together with its subparagraph (a)(ii), paragraph (b), and subparagraph (c)(ii), apply to the specific location information that is derived from collars purchased by the ADFG and supplied to the Department, and that is less than 25 years old. Therefore, the Department must refuse to disclose this information to the Applicant.

FORTYMILE CARIBOU HERD – ISSUE TWO

Is the Department authorized by paragraph 17 (1)(a) of the ATIPP Act to refuse the Applicant access to the Records for the Fortymile caribou herd?

[61] The Department is also relying on paragraph 17 (1)(a) to refuse the Applicant access to the information requested about the Fortymile caribou herd in the Access Request.

[62] This provision states 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

(a) trade secrets of a public body or the Government of the Yukon;

[63] The submission from the Department on the application of paragraph 17 (1)(a) to the information requested by the Applicant is as follows.

The Department of Environment received a letter dated March 10, 2020 from the Office of the Commissioner, Alaska Department of Fish and Game (Appendix C). The letter states that disclosure of data, including data collected by cooperative or direct funding by Alaska, would prevent the ADF&G from sharing information with the Department of Environment in the future. This would present a loss of financial, logistical and staff partnership with ADF&G. This loss of scientific information used in the Department of Environment's business would prevent the Department of Environment from effectively managing the Fortymile Caribou Herd. Further, release could result in hunters obtaining improper economic benefit from a harvest successful due to knowledge of collar location data. The Department of Environment therefore refuses in full the release of the Fortymile Caribou collar location data according to s.17(1)(a) of the ATIPP Act.²¹

²¹ Department's submissions, at p. 3.

[64] In the Applicant's submissions, they cite the meaning of 'trade secret' as provided for in the ATIPP Act and state their views on whether the information requested qualifies as a trade secret.

I believe the Yukon public and many of Environment Yukon's partners (e.g., Indigenous partners) would be unhappy to learn that Environment Yukon considers location information of caribou as a trade secret and considers that the information provides a business or commercial advantage – particularly given that caribou locations, migratory paths, calving grounds, winter ranges, and other key habitat information have been known for generations by Indigenous elders.

To satisfy use of this exception, the information that I have requested must meet all of the conditions associated with being a trade secret. Perhaps one of the harder conditions to meet is (b), as wildlife location data is freely available on many apps, websites and individuals that access the data about wildlife locations do not have to pay for this service.

Caribou locations are often generally known by the public, independent researchers or other agencies, and do not represent information unique to the government. Academic institutions and non-government organizations have collared caribou throughout Canada, including herds in the Yukon, collected significant pools of location data, and provided this information on public websites (e.g., Atlin herd, see Movebank example below). Caribou location information is published freely on websites like iNaturalist. To convert the caribou location information into a formula, pattern, compilation, program, device, product, method, technique or process, something must actually be done with the location information (e.g., analysis, etc...), but the information on its own does not represent a trade secret.

[65] Subsection 17 (1) is a general provision that authorizes 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 Department or the Yukon government, or the ability of the Yukon government to manage the economy. The paragraphs under subsection 17 (1) clarify the kinds of information in paragraphs (a) through (f) that are included in the meaning of 'information' in the subsection. The harm that must be established under subsection 17 (1) is that which is 'probable'.²²

²² Inquiry Report ATP15-055AR, Department of Justice, June 8, 2016 (YT IPC), at para 116.

[66] The Department is relying on paragraph (a) of subsection 17 (1). For this paragraph to apply, the Department will need to establish that the information requested by the Applicant qualifies as a trade secret.

[67] As I have determined that subsection 24 (1) applies to the specific location information of collared Fortymile caribou derived from collars purchased by the ADFG that it supplied to the Department that is less than 25 years old, I need not consider whether paragraph 17 (1)(a) applies to this information. My analysis of whether this paragraph applies is limited to the remaining information requested by the Applicant in their access request. This information consists of the following:

- a. the specific location information of collared caribou in records supplied by the ADFG to the Department that is 25 years or older;
- b. information other than the specific location information of collared caribou in records supplied by the ADFG to the Department; and
- c. information about the caribou derived from collars purchased by the Department.

(Remaining Information).

[68] I will begin my analysis to determine if subsection 17 (1) applies to the Remaining Information requested by the Applicant. If there is no reasonable expectation of probable harm that could occur to the financial or economic interests of the Department or the Yukon government, or the ability of the Yukon government to manage the economy from disclosure of the Remaining Information to the Applicant, then it does not matter if the information is a kind described in paragraphs (a) through (g).

If the Remaining Information is disclosed to the Applicant, then is it reasonable to expect that it will cause probable harm to the financial or economic interests of the Department or the Yukon government, or the ability of the Yukon government to manage the economy?

[69] The Department's evidence is that it will suffer financial harm if the ADFG stops sharing the collar information from collars it purchases. Its submission on this point is that the letter from the Commissioner of the ADFG "states that disclosure of the data, including data collected by cooperative or direct funding by Alaska, would prevent the [ADFG] from sharing information with the Department [...] in the future". The Commissioner's letter does not say that the ADFG will be prevented in the future from sharing *any* information about collared Fortymile caribou; what it says is that the ADFG will be prevented from sharing information with the Department where doing so might cause it to violate the AK Confidential Information Statute.

[70] I have already found that the specific location information of collared caribou supplied to the Department by the ADFG that is contained in records and is less than 25 years old is subject to subsection 24 (1). It is this information that the ADFG is prohibited from disclosing. It is not prohibited from disclosing other information derived from its collars or specific location information in records that are 25 or more years old.

[71] Furthermore, I determined that, because of the need for the ADFG and the Department to share information gathered about the Fortymile caribou herd for its joint management, as provided for in the Agreement and that it is in the public interest to do so, it is unlikely that the ADFG would stop sharing information derived from collared caribou where information, other than specific location information, is accessible under the ATIPP Act.

[72] The Department also submitted that disclosure of the information to the Applicant “could result in hunters obtaining improper economic benefit from a harvest successful due to knowledge of collar location data”. Whether or not this is the case is irrelevant, unless the competitive advantage causes harm to the financial or economic interests of the Department or Yukon government, or the ability of the Yukon government to manage the economy. The Department did not provide any evidence to support an assertion that any economic advantage that might be gained by hunters who have access to the Remaining Information will cause the Department or the Yukon government any harm.

Findings on Issue Two – Fortymile Caribou Herd

[73] Based on the foregoing, I find that the Department has not met its burden of proving that subsection 17 (1) applies to the Remaining Information.

ISSUE ONE – PORCUPINE CARIBOU HERD

Is the Department required by 24 (1)(a)(ii), (b), and (c)(ii) of the ATIPP Act to refuse the Applicant with access to the Records for the Porcupine caribou herd?

[74] The Department is relying on subsection 24 (1), together with its subparagraph (a)(ii), paragraph (b) and subparagraph (c)(ii), to refuse the Applicant with access to the collar information requested for the Porcupine caribou herd.

[75] The Department’s submissions about the application of these provisions to the information requested by the Applicant is as follows.

The Porcupine Caribou Herd (PCH) is a Barren-Ground, migratory, transboundary caribou herd which inhabits Yukon, Alaska and The Northwest Territories. PCH is managed internationally by several Agreements and a board. PCH collars and data are purchased by all parties noted in the below agreements while Yukon Government is mostly

responsible for the placement of the collars on the caribou. The location data from the collars is shared and jointly managed by the parties who are signatories of the following agreements:

- *The Agreement Between the Government of Canada and the Government of United States of America on the Conservation of the Porcupine Caribou herd (1987) (Appendix F);*
- *The Porcupine Caribou Management Agreement (PMCA) (Appendix G) between the Government of Canada, Government of Yukon, Government of Northwest Territories, The Council of Yukon Indians, The Inuvialuit Game Council, The Dene Nation and the Metis Association of the Northwest Territories and;*
- *The Porcupine Caribou Herd Canadian Range-Wide Native User Agreement (Appendix H) between the Vuntut Gwitchin First Nation, Tr'ondëk Hwëch'in First Nation, Na-Cho Nyak Dun First Nation, Inuvialuit Game Council and Gwich'in Tribal Council.*

The agreements share a common objective: the acknowledgement of a migratory, transboundary caribou herd which requires sharing information to cooperatively manage, while focusing on conservation efforts to ensure an irreplaceable natural resource that is available to future generations, particularly subsistence harvesters.

The Alaska Statute 16.05.815(d) (Appendix B) prohibits ADF&G from disclosing specific locations of fish and wildlife. The law allows the release of such information to parties that have been authorized by ADF&G to perform specific activities, as long as the parties agree to use the information only for purposes as provided under an agreement with the department. The Department of Environment therefore refuses in full the release of the Porcupine Caribou collar location data according to s.24(1)(a)(ii), s.24(1)(b), and s.24(1)(c)(ii) of the ATIPP Act.²³

[76] The Applicant's submissions on the application of subsection 24 (1) to the Porcupine caribou herd are the same as provided for the Fortymile caribou herd. I will not repeat them here. The Applicant did, however, provide the following submissions specific to this herd. They are as follows.

... Alaskan Statutes cannot apply to the Porcupine Caribou herd location data because the acquisition of this data was paid for by the Canadian Federal government (i.e., CWS) and Yukon Government. The Canadian Government has no provisions within its access

²³ Department's submissions, at pp. 3 and 4.

*to information act to withhold location data for any species. The State of Alaska's contribution to management of this herd primarily comes in support for photo census work, not for collaring caribou.*²⁴

[77] The letter from the Commissioner of the ADFG contains information that is relevant to determining if subsection 24 (1) applies to the collared information of the Porcupine caribou herd. Although some of the information has already been outlined above, I am repeating it again here due to its relevance in determining whether subsection 24 (1) applies to collar information concerning this herd.

Thank you for the notice of the Access to Information and Protection of Privacy Act (ATIPP) inquiry received by the Yukon Department of Environment for data associated with the Porcupine, Fortymile, Nelchina, and Chisana caribou herds. As these herds occupy both the Yukon Territory and the State of Alaska, and both jurisdictions have mandated responsibilities for their management, the sharing of data is important for both management agencies to be able to effectively and responsibly manage the herds. Data for these herds are collected together to ensure robust management regimes are in place, and this work has always been done with mutual respect between our agencies. We have been informed that under the current ATIPP that Yukon may not be able to honor previously agreed upon data sharing stipulations. If Alaska's law (Alaska Statute 16.05.815(d)) about the confidentiality of data is not protected and honored, it will prevent Alaska Department of Fish and Game (ADF&G) from sharing information in the future.

With respect to the Porcupine caribou herd, we note that the language of the Agreement Between the Government of Canada and the Government of the United States of America on the Conservation of the Porcupine Caribou Herd indicates an intent to develop and maintain a relationship across the border that would uphold the more restrictive laws of each party. Concepts of this agreement include the following:

- *"Understanding that the conservation of the Porcupine Caribou Herd and its habitat requires goodwill among landowners, wildlife managers, . . .",*
- *". . . co-operation and co-ordination under this Agreement should not alter domestic authorities . . .", and*
- *". . . encourage co-operation and communication among governments . . .".*

²⁴ Applicant's submissions, at pp. 5 and 6.

These concepts form the underpinning of the management relationship between Alaska and Yukon caribou managers. The words indicate an intent to respect and comply with Alaska laws (impacting our domestic authority). Without that, it will be difficult to maintain goodwill, or cooperation, or communication that involves data sharing. If the goal is for both Alaska and Yukon to manage for conservation of the Porcupine herd, disclosure of data, including data collected by cooperative or direct funding by Alaska, would be contrary to that goal.²⁵

24 (1)(a)(ii)

[78] I have already found that the information in the Records is scientific or technical information. There must also be evidence that the information is of a third party.

[79] The Department submits that the “PCH collars and data are purchased by all parties noted in the below agreements”.

[80] The Applicant’s submission suggests that some of the information about the Porcupine collared caribou, that originally belonged to the ADFG, was purchased by the Canadian government.

[81] Although it is not clear in any of the evidence presented, including the agreements referred to by the Department, I accept that some of the Porcupine caribou collar information that is in the custody or control of the Department may have originated with the third parties referenced in the agreements.

24 (1)(b)

[82] In order to make out paragraphs 24 (1)(b), there has to be evidence that a third party supplied the information to the Department implicitly or explicitly in confidence. To prove the latter portion of this provision, there must be objective evidence that, when the information was supplied by the third party to a public body, there was a reasonable expectation on the part of the third party, either implicitly or explicitly, that the Department would keep it confidential.

[83] There is no evidence that any of the third parties referenced above, supplied collared Porcupine caribou information to the Department, although, as indicated, I accept that this may have occurred. There is also no evidence, in the timing and supply of this information to the Department, there was a reasonable expectation on the part of any of the third parties, either implicitly or explicitly, that the Department would keep it confidential.

²⁵ Appendix C to the Department’s submissions, at p. 1.

[84] To address Porcupine caribou collar information that may have been supplied by the ADFG, as implied by the letter from the Commissioner, there is no evidence that any collar information, including specific location information, was supplied by the ADFG to the Department. Even if this were the case, there is no evidence to support that the information was supplied, implicitly or explicitly, in confidence by the ADFG to the Department 'when' the information was supplied. There is no agreement concerning the collar data of the Porcupine caribou herd similar to that of the Fortymile caribou herd. The passages referred to in the agreement by the Commissioner do not, in my view, provide sufficient evidence to support an assertion that information provided by the ADFG to the Department about the Porcupine caribou herd was supplied by it to the Department in confidence.

[85] Based on the foregoing, I find that paragraph 24 (1)(b) does not apply to the Porcupine caribou collar information. As such, I need not go on to consider if subparagraph 24 (1)(c)(ii) applies.

[86] The Department and the Applicant both mention that some of the collar information about the Porcupine caribou herd was purchased by the Department or Yukon government. It is unlikely that subsection 24 (1) would ever apply to the transfer of information from one party to another through sale of the information. In my view, this provision would not apply because it is unlikely that the seller of the data could ever impose confidentiality restrictions on information purchased by a third party that would have any application post-sale. It is also unlikely that any of the harms in paragraph 24 (1)(c) could be made out.

Findings on Issue One – Porcupine Caribou Herd

[87] Based on the foregoing, I find that the Department has not met its burden of proving that subsection 24 (1), together with its subparagraph (a)(ii), paragraph (b), and subparagraph (c)(ii) of the ATIPP Act applies to the information requested by the Applicant for the Porcupine caribou herd.

PORCUPINE CARIBOU HERD – ISSUE TWO

Is the Department authorized by paragraph 17 (1)(a) of the ATIPP Act to refuse the Applicant with access to the Records for the Porcupine caribou herd?

[88] The Department made the same submission in support of its position that paragraph 17 (1)(a) authorizes its refusal to provide the Applicant with the Porcupine caribou collar information as it did for the collar information of the Fortymile caribou herd. The Applicant's submissions about the application of this paragraph are also the same as submitted for the Fortymile caribou herd. I will not repeat these submissions here.

[89] For subsection 17 (1) to apply to the information requested by the Applicant, the Department must establish that it is reasonable to expect that probable harm will occur to the financial or economic interests of the Department or the Yukon government, or the ability of the Yukon government to manage the economy if the information is disclosed to the Applicant.

[90] To make out subparagraph (a), the Department will need to establish that the information requested by the Applicant qualifies as a trade secret.

[91] The Department's submissions suggest that if the ADFG stops providing the Porcupine collar caribou information to the Department, then it will suffer financial harm in addition to other harms, including loss of logistical and staff partnership with the ADFG, and loss of scientific information necessary for effective management of the herd. I accept that if the Department is receiving information about collared Porcupine caribou from ADFG for the purposes of conservation and management of the herd, then it may suffer financial consequences if it is required to obtain the information independently of the ADFG.

[92] The ADFG is required by provision (E) of the AK Confidential Information Statute to keep confidential the specific location of wildlife, which would include the specific location of collared Porcupine caribou. If disclosure of this information to the Department caused the ADFG to violate provision (E), then it is likely that it would be required to discontinue the disclosure.

[93] The only way for the ADFG to violate the provision is if it fails to maintain the confidentiality of the specific location of wildlife species as required. However, the ADFG is authorized to disclose the specific location of wildlife species to a third party in two circumstances.

- 1) The ADFG can enter a contract with a state or federal agency wherein it authorizes the sharing of the specific location of wildlife species, as necessary, to conduct research on a wildlife population, so long as it imposes confidentiality restrictions on the use and disclosure of the specific location of wildlife species.
- 2) The ADFG can enter a contract with a third party wherein it authorizes the sharing of the specific location of wildlife species with the party who is authorized by the ADFG to perform specific activities, and who agrees to use the records and information only for purposes as provided for under a contract or agreement with the ADFG, and who also agrees to the confidentiality restrictions imposed on the specific location of wildlife species in the agreement.

[94] As previously indicated, the ADFG would not be in violation of provision (E) of the AK Confidential Information Statute for disclosing the specific location of collared caribou that has been made publicly accessible under that provision. Nor would it be in violation of the provision if it disclosed collar information, other than specific location information, in records more than 25 years old.

[95] There is no evidence that ADFG is providing the specific location of the collared Porcupine caribou to the Department. If it were, then there would be a contract or agreement entered into between ADFG and the Department that meets the requirements of provision (E). The ADFG would be in violation of the AK Confidential Information Statute if it disclosed this information to the Department without meeting the contract requirements of provision (E).

[96] Given that the evidence suggests that the Department is not receiving the specific location of collared Porcupine caribou from the ADFG in accordance with provision (E), the Department cannot suffer the financial consequences that would flow from the ADFG refusing to provide the Department with this information.

[97] The Department did not submit any other evidence to suggest that it or the Yukon government will suffer the harm described in subsection 17 (1) if any of the parties involved in the Porcupine caribou herd conservation effort refuse to provide their Porcupine caribou collar information to the Department.

[98] Because no harm will be suffered under subsection 17 (1) from disclosing the information requested by the Applicant about the Porcupine caribou, whether the information requested qualifies as a trade secret is irrelevant.

Findings on Issue Two – Porcupine Caribou Herd

[99] Based on the foregoing, I find that the Department has not met its burden of proving that subsection 17 (1) applies to the information requested by the Applicant for the Porcupine caribou herd.

PORCUPINE CARIBOU HERD – ISSUE THREE

Is the Department authorized by subsection 21 (b) of the ATIPP Act to refuse the Applicant with access to the Records about the Porcupine caribou herd?

[100] The Department is relying on subsection 21 (b) to refuse the Applicant access to the information about collared Porcupine caribou. This provision states as follows.

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

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

[101] The Department's submissions on the application of subsection 21 (b) to the Porcupine caribou herd collar information is as follows.

The Porcupine Caribou Management Board (PCMB) is an advisory board established under the PCMA that is responsible for communicating information about the herd through recommendations to all agencies responsible for managing the herd. The PCMB is comprised of members of the Gwich'in Tribal Council, Na-Cho Nyak Dun First Nation, Vuntut Gwitchin First Nation, Tr'ondëk Hwëch'in First Nation, Inuvialuit Game Council, Government of Northwest Territories, Government of Yukon, Government of Yukon [sic].

The PCMB website discusses the use of satellite collars to collect location data and states, "The map below is made available to the public as an educational tool and to assist community members to generally identify if Porcupine caribou are in their area. A 15-km buffer has been added to caribou locations in an attempt to strike a balance between the community requests for location information and conservation concerns related to potential increased harvesting pressure. These maps will be delayed or discontinued if their release results in a conservation concern for the Porcupine Caribou herd." See Appendix I.

The PCH are a part of the Barren-ground populace that has been designated "Threatened" according to the Committee on the Status of Endangered Wildlife in Canada (COSEWIC) please see Appendix D. A "Threatened" wildlife species is considered likely to become endangered if limiting factors are not reversed. The COSEWIC Technical Summary states that the most sub-populations of the Barren-ground caribou have declined dramatically and available data indicate that no sign of rapid recovery at this time and that cumulative threats are without historical precedent. Therefore, the release of collar location data for the Threatened PCH may result in unsustainable harvest by licensed or unlicensed hunters, which would have a significantly negative impact on the population of the species. The Department of Environment therefore refuses in full the release of the Porcupine Caribou collar location data according to s.21(b) of the ATIPP Act.²⁶

²⁶ Department's submissions, at pp. 4 and 5.

[102] The Applicant made lengthy submissions on the application of subsection 21 (b). I will address them in my analysis that follows about whether subsection 21 (b) applies to the information they requested.

[103] In order for the Department to be able to rely on this provision to refuse the Applicant access to the information requested about the Porcupine caribou herd, it will have to prove that:

- a. disclosure of this information could reasonably be expected to result in 'probable' damage to, or interfere with the conservation of;
- b. a species of...animals that is endangered, threatened or vulnerable in Yukon or in any one or more regions of Yukon; and
- c. that upon determining that subsection 21 (b) applies to the information, that it exercised its discretion in deciding to refuse the Applicant with access to the information they requested.

[104] I will begin with determining part b of the test. Porcupine caribou are a species of animals.

Are Porcupine caribou endangered, threatened or vulnerable in Yukon or in any one or more regions of Yukon?

[105] The Department submitted that the Porcupine caribou herd is threatened according to the 'Committee on the Status of Endangered Wildlife in Canada' (COSEWIC), and points to Appendix D as evidence in support of this assertion.

[106] Appendix D is the Government of Canada's 'Species at Risk' public registry that contains information about the 'Caribou (*Rangifer tarandus*), Barren-ground population'. Under the heading 'range', Yukon is included in the list. The date of assessment on the document states 'November 2016' as the date of last assessment and status change.

[107] The 'status criteria' states that the Porcupine caribou herd "[m]eets Endangered...but designated as Threatened because it does not appear to be facing imminent extinction or extirpation." The 'status history' states that the caribou were '[d]esignated Threatened' in November of 2016.

[108] The Applicant made the following submissions on the designation of Porcupine caribou herd as endangered, threatened or vulnerable.

One of the first tests for Section 21(b) is to establish if caribou are endangered, threatened or vulnerable. When interpreting this subsection, I noticed that other jurisdictions in Canada use a legal status designation. I make no recommendations on what the standard should be for assessing if a species or subspecies is endangered, threatened or vulnerable, but just suggest that some consistent threshold for acceptability must be used. Caribou herds in the Yukon have individual status that has been assessed by their biologists, have status that has been provided in their management plans, have independent status assessments from academics, traditional knowledge status assessments, status assessments by ecotype, status assessments by herds, status assessments by recommending bodies, status assessments by non-government organizations, and then legally binding assessments that come through SARA and the Yukon Wildlife Act. Are all these acceptable, especially as there is considerable incongruence?

For instance, COSEWIC, an independent body (not affiliated with government), makes recommendations to the federal government on the status of species. In 2004 and 2013 COSEWIC made recommendations to the federal government that plains bison should be designated as threatened (<https://wildlife-species.canada.ca/species-risk-registry/species/speciesDetailse.cfm?sid=805>). The federal government reviewed COSEWIC's recommendations but rejected them because the majority of plains bison populations in Canada were protected by National Parks.

(<https://www.sararegistry.gc.ca/default.asp?lang=En&n=2776CFC1-1>). In this case, COSEWIC and the Federal Species at Risk Act (SARA; public body's exhibit P) do not agree. SARA carries legal weight. COSEWIC does not. Which is the acceptable designation for this application?

An added complexity for Yukon is that the ATIPP Act states that the status is:

"in the Yukon or in any one or more regions of the Yukon."

This is different from freedom of information acts in other jurisdictions which do not geographically limit the scope of the status assessment. Intentional or not, this recognizes the independence established under SARA and the Species at Risk Accord to allow provinces and territories to autonomously assess and list species at risk.

In 1996, the Federal Government Created the Species at Risk Act (SARA; Appendix P from the public body's exhibits). The Act allowed for species to be federally listed by status assessments, with recognition that prohibitions only applied to populations of that species on federally managed lands and waters (e.g., national parks, wildlife refuges, oceans). COSEWIC was designated as the body that would make status

recommendations to the federal government, but the status of a species would not be official unless the federal government accepted the recommendation.

COSEWIC's recommendations are advisory only; however, it is the only recognized advisory body under SARA. NatureServe or other organization may provide status rankings as well but are not recognized by and do not contribute to the status assessment under SARA. Under Section 27 of SARA, if the recommendation is accepted, the status would then be listed in SARA.

In 1998, the wildlife ministers for provinces and territories signed an agreement known as the Species at Risk Accord. This Accord represented an agreement with the federal government to limit the applicability of SARA to federal lands, in exchange for each province and territory developing its own legislation or system for designating the status of a species and providing protection to that species. While most jurisdictions have developed legislation independent of their respective wildlife acts, over the last 22 years, Yukon has relied on its Wildlife Act to serve the role of species at risk legislation. The general prohibitions of this Act are similar to those in SARA. While other independent, non-government organizations (e.g., NatureServe, CPAWS) have contended that this is inadequate, and have developed their status ranking system, the status offered by these organizations carries no legal weight and no legal protection. The official status of species in Yukon still defaults to the Wildlife Act and the protections afforded by that Act (section 8) and associated regulations:

Specially protected wildlife

8 (1) A person shall not hunt or trap specially protected wildlife.

(2) A person shall not possess specially protected wildlife.

(3) Subsections (1) and (2) do not apply to an Inuvialuk who hunts or traps specially protected wildlife in accordance with an allocation under section 207.

(4) Subsection (2) does not apply to a person issued a permit in the circumstances prescribed by the regulations. S.Y. 2002, c.229, s.8

As an example, because boreal caribou do not occur on federal lands in Yukon and therefore, none of the legal prohibitions under SARA can apply without an Order in Council. No order has ever been issued for caribou in Yukon. Further, because boreal caribou are not specially protected in Yukon, none of the prohibitions under the Wildlife Act apply.

Once the criteria are set for establishing if a species is endangered, threatened or vulnerable, the next step is to determine if the various subspecies of caribou meet those criteria. If any status assessment may be considered:

Yukon government biologists have offered the following assessment of each Northern Mountain Caribou herd in Table 1 of Hegel, T., and K. Russel. Status of Northern Mountain Caribou Herds in Yukon. Rangifer (<https://www.researchgate.net/publication/287431774StatusofnorthernmountaincaribouRangifertaranduscaribouinYukonCanada>).

Barren-ground caribou have been designated as Threatened by COSEWIC, but they are not legally listed as Threatened under SARA. The Porcupine herd has an independent status evaluation that is identified in the Porcupine Caribou Harvest Management Plan (<https://www.pcmb.ca/documents/Harvest%20Management%20Plan%202010.pdf>). This Plan has 4 zones – red, orange, yellow and green (<https://www.pcmb.ca/harvest>). Currently, under this status assessment, the herd is at its highest numbers since monitoring began (<https://www.pcmb.ca/herd>). It is currently in the green zone (i.e., > 115,000 caribou) which means licensed hunters can harvest two bulls and Indigenous hunters can take as many as they want. There is no conservation concern regarding the Porcupine Caribou Herd.

Barren-ground caribou stretch across all of Yukon, Northwest Territories, and Nunavut. The status of herds in the eastern Arctic do not reflect the current state of the Porcupine herd, nor the status of barren ground caribou in Yukon. The 2017 estimate of the Porcupine herd was 217,000 animals. The Chair of COSWEIC acknowledged that the Porcupine Caribou herd is in a different state than the rest, and it was the Porcupine Caribou herd's condition that prevented all of barren-ground caribou being designated as endangered, a more severe category (<https://www.yukon-news.com/news/national-committee-says-barren-ground-caribou-are-threatened/>).

The independent status of this herd from other herds, which then relates to the status of this subspecies in Yukon, as per the requirement of the ATIPP Act, quickly demonstrates the complexity of how status is considered under the section 21 exception.

[109] For section 21 to apply, there must be species of animals that is endangered, threatened or vulnerable in the Yukon or in any one or more regions in the Yukon. Subsection 21 (b) does not specify who is responsible for determining if an animal species is endangered, threatened or vulnerable.

[110] The meaning of the terms ‘endangered, threatened or vulnerable’ in subsection 21 (b) are not defined in the ATIPP Act and they have not been interpreted by the IPC. As such I will do so now.

[111] As indicated, when interpreting provisions of the ATIPP Act, I must consider the words therein, together with its purposes and its scheme and intention of Parliament.²⁷ I must also interpret them in such a manner that best insures the attainment of its objects.²⁸

[112] The purposes of the ATIPP Act are set out in subsection 1 (1). The purposes relevant to the matter under review are those that relate to the right to access information held by public bodies, specifically to “make public bodies more accountable to the public...by (a) giving the public a right of access to records and (c) specifying limited exceptions to the rights of access”.

[113] The right of access is set out in subsection 5 (1), which provides a person with the “right to access any record in the custody or under the control of a public body”. Subsection 5 (2) clarifies that the right is not absolute. It states that “[t]he right of access to a record does not extend to information that is excepted from disclosure under [Part 2 – the access to information provisions]...”

[114] The exceptions to the right of access are contained in sections 15 to 25 of Part 2. Some are mandatory. Most are discretionary. The exception to the right of access in section 21 is discretionary. This means that even if a public body determined that the exception applies, it has discretion about whether to disclose information requested by an Applicant.

[115] The right of access to information has been held by our highest court as essential to facilitate democracy by helping citizens to have the information required to participate meaningfully in the democratic process, and to hold public officials accountable.²⁹

[116] The purposes of the ATIPP Act make it clear that exceptions to the right of access are *limited* so as to preserve the right of access to the degree possible, which, as indicated, are to enable a person to exercise their democratic rights and hold government to account.

[117] The interpretation of subsection 21 (1)(b) must occur within the foregoing context.

[118] The terms ‘endangered, threatened or vulnerable’ are qualified in subsection 21 (1) 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

²⁷ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837 (SCC), at para. 21.

²⁸ *Interpretation Act*, RSY 2002, c125, at section 10.

²⁹ *Dagg v. Canada (Minister of Finance)*, 1997 CanLII 358 (SCC), [1997] 2 S.C.R. 403, at para. 61.

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.

[120] The Applicant points out in their submission that there are numerous government and non-government organizations that classify animal species, and that there is not one standard approach to classification. They also highlight that Porcupine caribou are not classified as a 'species at risk' under the federal *Species at Risk Act*³⁰ (SARA). Moreover, they are not designated as 'specially protected wildlife' under the *Wildlife Regulation (Regulation)*³¹ pursuant to Yukon's *Wildlife Act*.³²

[121] The Applicant is correct that Porcupine caribou are not designated as a 'species at risk' under SARA, nor identified as 'specially protected wildlife' under the Regulation.

[122] As indicated, the Department relies on the COSEWIC designation, which classifies "caribou (*Rangifer tarandus*), Barren-ground population" as threatened. Porcupine caribou are included in this population.

[123] COSEWIC was established in 1977 because of a decision made at the 'Conference of Federal-Provincial-Territorial Wildlife Directors'. It arose from the need for a single, official, scientifically sound, national classification of wildlife species at risk.³³

[124] COSEWIC is made up of 31 voting members. There is one member for each of the 13 provincial and territorial government wildlife agencies, one member from each of four federal agencies (Canadian Wildlife Service, Parks Canada, Department of Fisheries and Oceans and the Canadian Museum of Nature), three non-government science members, 10 co-chairs for each species specialist subcommittee, and a co-chair for the 'Aboriginal Traditional Knowledge' subcommittee.³⁴ COSEWIC includes scientific experts in conservation biology, ecology, taxonomy, wildlife management, stock assessment, population biology, Aboriginal [Indigenous]

³⁰ S.C. 2002, c. 29.

³¹ O.I.C. 2012/84.

³² RSY 2002, c.229.

³³ COSEWIC website, <https://cosewic.ca/index.php/en-ca/about-us/brief-history>.

³⁴ *Ibid.*, <https://cosewic.ca/index.php/en-ca/about-us/organizational-structure>.

or community knowledge, and related fields. Experts include those from the provinces and territories.³⁵

[125] SARA was brought into force in 2002.³⁶ It recognizes that “responsibility for the conservation of wildlife in Canada is shared among the governments in this country and that it is important for them to work cooperatively to pursue the establishment of complementary legislation and programs for the protection and recovery of species at risk in Canada”.³⁷ Among other things, SARA establishes a process for involvement of provinces and territories to enter into joint management agreements to protect species at risk. It also designates certain species at risk³⁸ as ‘extirpated’,³⁹ ‘endangered’,⁴⁰ and ‘threatened’.⁴¹

[126] Within SARA, COSEWIC is identified as an advisory body to the Government of Canada, to ensure that wildlife species will continue to be assessed using the best available scientific and ‘Aboriginal Traditional Knowledge’.⁴² Under SARA, the federal government will take COSEWIC’s classification into consideration when establishing the legal list of wildlife species at risk.⁴³

[127] COSEWIC is obligated to report on its determination of classification to several bodies, including the Minister responsible for SARA. Following their review of the COSEWIC report, the Minister may recommend that the Governor in Council, through regulation, designate a species at risk according to COSEWIC’s reported classification. There are certain caribou herds designated at risk in the SARA regulations, but the Porcupine caribou herd is not one of them.

[128] Designating a species at risk under SARA as ‘endangered’ or ‘threatened’ has consequences. Subsection 32 (1) of SARA prohibits a person from killing, harming, harassing, capturing or taking an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species. Subsection 32 (2) of SARA prohibits a person from possessing, collecting, buying, selling or trading an individual of a wildlife species that is listed as an extirpated species, an endangered species or a threatened species, or any part or derivative of such animal.

³⁵ *Ibid.*, <https://cosewic.ca/index.php/en-ca/about-us/terms-of-reference>.

³⁶ SARA’s provisions were brought fully into force in 2004.

³⁷ SARA preamble.

³⁸ “[A]n extirpated, endangered or threatened species or a species of special concern.” SARA definition.

³⁹ “[A] wildlife species that no longer exists in the wild in Canada, but exists elsewhere in the wild.” SARA definition.

⁴⁰ “[A] wildlife species that is facing imminent extirpation or extinction.” SARA definition.

⁴¹ “[A] wildlife species that is likely to become an endangered species if nothing is done to reverse the factors leading to its extirpation or extinction.” SARA definition.

⁴² *Ibid.*, <https://cosewic.ca/index.php/en-ca/about-us/brief-history>.

⁴³ SARA, at subparagraph 15 (1)(a)(i).

[129] The agreements submitted by the Department demonstrate that the ability to harvest Porcupine caribou has cultural and nutritional significance to First Nations and others. Designating this herd as a species at risk under SARA would prevent harvest of the caribou.

[130] The Department included with its submissions several agreements between all levels of government, including First Nations, for conservation of the herd.⁴⁴ There is also a 'Harvest Management Plan'.⁴⁵

[131] In COSEWIC's assessment report on the 'Caribou, barren-ground population', it states the following about the population.

Most subpopulations have declined dramatically, but two are increasing, including the Porcupine Caribou Herd... Evidence from both local Aboriginal people and scientific studies suggests that most herds have undergone natural fluctuations in numbers in the past; however, available demographic data indicate no sign of rapid recovery at this time and cumulative threats are without historical precedent. Status meets criteria for Endangered because of a reduction in numbers of $\geq 50\%$, but Threatened is recommended because, overall, this population does not appear to be facing imminent extinction at this time. Despite worrisome declines across most of the range, the current numerical abundance of the Porcupine Caribou Herd and the initiation of numerous management actions by governments, wildlife management boards, and communities support Threatened as a more appropriate conservation status.

[132] The COSEWIC assessment recognizes that the Porcupine caribou herd is increasing and that there are extensive conservation efforts in place to protect the herd. The conservation efforts and the importance of caribou harvesting to the people of the north may be the reason that the Porcupine caribou herd is not identified as a species at risk under SARA. However, whether I am correct is irrelevant in my view.

[133] COSEWIC is recognized in Canada as the body with the necessary expertise to classify the risk level of animal species and it has classified the 'Caribou, barren-ground population' that includes the Porcupine caribou herd, as 'threatened'. It is not necessary, in my view, for the purposes of subsection 21 (b), that this herd be designated as 'endangered, threatened or vulnerable' under federal or territorial legislation.

⁴⁴ 'Agreement Between the Government of Canada and the Government of the United States of America on the Conservation of the Porcupine Caribou Herd', Appendix F of the Department's submissions; 'Porcupine Caribou Management Agreement', Appendix G of the Department's submissions; 'Porcupine Caribou Herd Canadian Range-Wide Native User Agreement'.

⁴⁵ Applicant's submission: <https://www.pcmb.ca/documents/Harvest%20Management%20Plan%202010.pdf>.

[134] For the purposes of subsection 21 (b), I find, based on the 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.⁴⁶

'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.⁴⁷

[135] COSEWIC does not define 'vulnerable'. 'Vulnerable' is defined in the Oxford online dictionary as "[e]xposed to the possibility of being attacked or harmed..."⁴⁸ COSEWIC defines a species of 'special concern' as '[a] wildlife species that may become threatened or endangered because of a combination of biological characteristics and identified threats.'⁴⁹

[136] Based on the foregoing, I find that the meaning of 'vulnerable' for the purposes of subsection 21 (b) is an animal species that may become threatened or endangered because of a combination of biological characteristics and identified threats.

[137] The Applicant points out that subsection 21 (b) contains the words 'in the Yukon or in any one or more regions of the Yukon'. The inclusion of these words limits the applicability of the exception to information in the custody or control of a public body that is about species found in Yukon. For animal species, it would be those species whose habitat includes lands within the geographical bounds of Yukon. The provision would not apply to information in the custody or control of a public body that is about a species 'endangered, threatened or vulnerable' beyond those boundaries. The COSEWIC assessment identifies that the designation applies to the 'Caribou, barren-ground population in Yukon'.

[138] In my view, the foregoing interpretation accords with the purpose of the ATIPP Act, its scheme and intention of Parliament, and insures the attainment of its objects.

[139] Based on the foregoing, I find that the Porcupine caribou herd is a threatened animal species in Yukon.

⁴⁶ COSEWIC definitions and abbreviations, <https://cosewic.ca/index.php/en-ca/about-us/definitions-abbreviations#T>.

⁴⁷ *Ibid.*

⁴⁸ <https://www.lexico.com/definition/vulnerable>.

⁴⁹ *Ibid.*

[140] Now that I have determined that the information requested by the Applicant about the Porcupine caribou herd is about an animal species that is threatened in Yukon, I must go on to determine if disclosure of the information to the Applicant will result in probable damage to, or interfere with the conservation of the Porcupine caribou herd.

Will disclosure of the information requested by the Applicant result in probable damage to, or interfere with the conservation of the Porcupine caribou herd?

[141] The meaning of the term ‘conservation’ is relevant here. The term is not defined in the ATIPP Act or the *Interpretation Act*. I could not locate a definition of ‘conservation’ in any of the documents accessible through the Species at Risk public registry or on the COSEWIC website. As such, I will turn to its dictionary meaning.

[142] In the online Oxford dictionary, the term is defined as the “[p]reservation, protection, or restoration of the natural environment and of wildlife.”⁵⁰

[143] Former Information and Privacy Commissioner Loukidelis defined ‘conservation’ for the purposes of section 18 of BC’s *Freedom of Information and Protection of Privacy Act* (BC FIPPA)⁵¹, as follows.

*... “conservation” includes action, by legal or practical means (or both), to safeguard something – including a species or its habitat – from damage or degradation or actions by such means to promote or enhance the continued existence of that thing.*⁵²

[144] For the purposes of section 21, I find that ‘conservation’ means an action, by legal or other means, that is taken to preserve, protect or restore any of the things identified in subsections (a) through (c) of section 21 to promote or enhance the continued existence of that thing. In my view, this interpretation accords with the purpose of the ATIPP Act, its scheme, object, and intention of Parliament.

[145] As indicated in the Department’s submissions (above), it is of the view that it must refuse to disclose to the Applicant the collar location data for Porcupine caribou. It added that “release of the collar location data for the Threatened PCH may result in an unsustainable

⁵⁰ Online Oxford Dictionary, ‘conservation’, locate at: <https://www.lexico.com/definition/conservation>.

⁵¹ Section 18 of BC FIPPA together with its subsection (b) state that “[t]he head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to result in damage to, or interfere with the conservation of (b) an endangered, threatened or vulnerable species, subspecies or race of plants, vertebrates or invertebrates...”

⁵² *Ministry of Water, Land and Air Protection, Re*, 2001 CanLII 21606 (BC IPC), at para. 29.

harvest by licensed or unlicensed hunters, which would have a significantly negative impact on the population of the species".⁵³

[146] The Applicant's submissions on this part of the analysis of subsection 21 (b) are as follows.

*Section 21 uses several terms that I believe are important to define. I consider "damage," as used by the Yukon ATIPP Act to refer to harming a habitat, or impairing the health or safety of a **population** of an endangered, threatened or vulnerable animal or plant species or subspecies. This is an important distinction from harming an individual within a population.*

...

Hunters (legal or illegal) have not used the data to their advantage, and if they have, they have not achieved any results greater than prior to the release of the data. Harvest quotas have not been adjusted to reflect increased hunter success and there has been no evidence of increased poaching incidents associated with release of this data. If increased harvest success or poaching were to occur, it would occur within a proximal time window to the release of the data because as time passes the probability the data represents an animal's location decreases.⁵⁴

...Each species comes with different, non-trivial, ecologies that are relevant to how the harms test might apply, and the variation in the application of the harms test to various species is evident in British Columbia's policy. It does not have blanket application across all species at risk. Caribou populations in central and southern British Columbia have a sensitive conservation status, yet British Columbia has recognized that the release of data is not a risk to their viability. Every caribou herd in the Yukon is more secure than those in central and southern British Columbia.⁵⁵

While a species must be present to harvest, and hence there is a correlation between species presence or density and hunting activity, the primary factor that drives the intensity of legal or illegal harvest across North America is road access. Wildlife populations that have limited road access into their ranges experience very little harvest pressure, regardless of availability of information on their location. Caribou herds in Yukon that experience higher harvest pressure are those that have roads through their ranges, and for which critical habitat is intersected by human access features (e.g.,

⁵³ Department' submissions, at pp. 4 and 5.

⁵⁴ Applicant's submissions, at p. 20.

⁵⁵ *Ibid.*

Porcupine Caribou and the Dempster Highway, Finlayson and the Robert Campbell, Carcross and many roads in the Southern Lakes Region). For these herds, the time of year that they cross or are on the roads is already known by the public, without the publication of collar data.⁵⁶

Most of the Yukon is roadless. While the number of cases is very limited, all cases of poaching in Yukon have occurred relatively close to access points. Consequently, Yukon has significantly fewer cases of illegal harvest, where the animal was killed with intent, from an area where harvest was not allowed, than other jurisdictions in Canada. I searched all illegal harvesting cases (where a harvester took an animal without a tag) and found only four cases in Yukon over the last 30 years. A search for the same case type produced over 200 cases in British Columbia over the same time period. Notably, the case load for both jurisdictions is still low in comparison to other regions of the world where motivations for illegal harvest are high because species have high economic value, the species range over small areas, communities live in poverty, it is worth risking jail sentence or even death for small amounts of money, there are large markets for the specific wildlife species, and/or there is limited enforcement.⁵⁷

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 populations is high, and there are enforcement measures in place that prevent the illegal harvest of animals. Enforcement measures go beyond the presence of enforcement officers, and include requirements for hunters to provide taxidermists with tags and information to demonstrate that the animal was harvested legally, if a species is listed under CITES Appendix 2 there must be a transport permit linked to the animal parts for transport in and out of the territory. If the animal or animal parts are being sold, there is a legal requirement for there to be a tag number associated with the animal parts. It is also very hard to sell an illegally harvested animal. These measures have reduced the opportunity for black markets to form in North America.⁵⁸

...

Most caribou herds in Yukon are under a permit hunt regime (i.e., there is a restriction on harvest). Yukon's recently released "Licensed Harvest Trends in Yukon: 1980-2014" (Report MR-18-05: page 20) indicated that for 12 northern mountain herds (presumably on which there was a licensed harvest) the licensed harvest rate was 0.5%. The maximum recommended harvest rate for a stable herd is 2%. Therefore, there would

⁵⁶ *Ibid.*, at pp 20 and 21.

⁵⁷ *Ibid.*, at p 21.

⁵⁸ *Ibid.*

have to be a 400% increase in licensed harvest before the quota was met, and an even higher increase before there was harm to Northern Mountain caribou. The current licensed harvest rate for the Porcupine Caribou herd is also 0.5%. The herd is 100,000 animals greater in size than the threshold for it leaving the Green zone (which is 115,000 animals) and having more restrictive harvest measures in place. With the current herd size of 218,000 animals, that is a substantial increase (over 3000 animals) in harvest that must happen before the quota can be reached, and an even greater increase in harvest before the population would go into decline. Given that licensed harvest of caribou is generally restricted to Yukon residents, in a population of less than 40,000 people, and given that there are individual bag limits, it would be impossible for licensed harvest to go above quotas, and this level of poaching has never been seen in North America. In fact, throughout North America, poaching cases where the number of illegally harvested animals of one species exceeds one or two are extremely rare.⁵⁹

Similarly, the public body argues that release of the information will result in increased licensed harvest. In order for that to occur, there must be a licensed harvest. However, throughout Yukon, there is no licensed harvest on many herds. Many of the herds (e.g., Carcross, Boreal, Ibex, Chisana) are closed to licensed hunters. Licensed harvest cannot increase where legal harvest is prohibited.⁶⁰

The timeframe for fair chase is already well defined in the Yukon Wildlife Act for the Yukon as 48 hours after knowing the exact location of an animal [Section 24, subsection 2(a), (b), and (c)]. That is, if the concern is that knowledge of an animal's precise location will result in increased harvest success, as identified by Environment Yukon, a 48-hour window between knowing the location and seeking the animal for harvest mitigates the increased window for hunting success. All the data that I am requesting is well outside of this 48-hour window.⁶¹

Even if collar location data offered some advantage, to be successful a hunter must:

- a) know how to use GIS software to map data and make sense of the GPS collar data,*
- b) have the financial resources to harvest an animal. For Inquiry ATP20-07R, the public body provides Appendix C, which illustrates this point. The first email in this string, dated March 18, 2015 at 2:38PM, is from the Aklavik HTC to the WMAC and the local Conservation Officer. The resource person for the Aklavik*

⁵⁹ *Ibid.*, at p. 22.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

HTC states that the HTC and Community Corp were in the process of trying to secure funds to allow them to go on an annual musk ox hunt. She notes that lots of funds are needed. Hunting is not cheap, involves acquisition of hunting gear, including firearms, clothing, all terrain vehicles, travel expenses, and many other costs. Many areas are remote and require fixed-wing access, hence there are charter costs. If an aircraft must be chartered that creates a witness to illegal harvesting crimes. If a poacher is motivated to use a fixed-wing aircraft they can easily find animals from the air and don't need collar data. Post hunting there may be costs associated with butchering meat [sic]. Overall costs can be so high that it can be cheaper to purchase meat from a commercial outlet, and the incentive to illegally harvest is very low. This is especially true in more remote regions.

c) have some understanding of the ecology of the caribou to know where they might be given variation in weather, human activity, and changes in vegetation or forage supply. Variation in snow melt patterns and the timing and location of plant growth on the calving grounds determine where the cows choose to have their calves each year. If caribou reliably returned to the same areas, year after year, there would be no need to annually maintain collars on herds.⁶²

d) The data are not real time and so cannot guide a hunter directly to an animal, but rather give the hunter a general sense of where an animal may be (which is already available through numerous other resources). Therefore the hunter must know how to track an animal, how to be stealthy, what calibre of rifle to use, how to skin out an animal, and in harsh environments - how to handle themselves in the outdoors. People who have these skills spend significant time on the land, and generally already know where to find caribou.⁶³

This raises another issue related to the granularity of the information. The information being requested represents long term data of multiple populations. While this is true, it does not provide any better information for a harvester than what is already available. That is, if I were interested in hunting a caribou, what does all this information get me that I don't already have? Caribou do not repeatedly use the exact same spot (i.e., meter) at the exact same time each year. Caribou may use different areas from years [sic] to year. There is significant variation in the timing of when they arrive to calving grounds and winter ranges. The variation can be hard to predict and the species are wide ranging. Because the collar data are not real time, regardless of the amount of

⁶² *Ibid.*

⁶³ *Ibid.*

data, there is no greater insight into the potential location of an animal than information currently supplied by Environment Yukon, or many of the other readily available data sources... There is no guarantee that an animal will be in the location it last stood, or in the 'estimated' area. An animal may use a general area, but this can be deduced from information that is already publicly available.⁶⁴

*Having access to historic data is very different than having access to real time data. Keep in mind many of the animals that are represented by the data are dead. Historical location data, even recent data, and even precise data, can only allow a hunter to **guess** where a wide-ranging animal may be. Given enormous variation in annual habitat use and movement, it gives a hunter a predictive tool. It is not a real time tool. This is different than having real-time data, which allows a harvester to track to the animal. Tools that allow a hunter to guess/predict/estimate where a wide-ranging animal would be are already available, now published by government agencies, academics in publications, and non-government organizations, and available as local and traditional knowledge. Collar data no longer adds any information to increase a hunter's knowledge of predictable location for an animal. Further, numerous areas in Yukon where animals locations are somewhat predictable are promoted as wildlife viewing locations. The government does not try to hide information about where to find caribou because there is tourism value in promoting public viewing opportunities. None of this has changed harvest success rates (legal or illegal).⁶⁵ [Bolding in original]*

[147] In their submissions, the Applicant set out how the courts have interpreted the words 'reasonably be expected to' in access to information legislation in Canada, recognizing that the word 'probable' should be read in to ensure there is some middle ground between a mere possibility and the standard of probable. I have already addressed this interpretation above and agree with the Applicant that, to prove that subsection 21 (b) applies to the information requested by the Applicant, the Department has the burden of proving on the balance of probabilities that there is a reasonable expectation of probable damage to or interference with the conservation of the Porcupine caribou herd if the collar information is disclosed to the Applicant.

[148] 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 Inquiry is contextual and how much evidence and the quality of evidence needed to meet this standard

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*, at pp. 23 and 24. The Applicant included in their submissions several links showing the publicly available data about caribou populations.

will ultimately depend on the nature of the issue and inherent probabilities or improbabilities or the seriousness of the allegations or consequences.⁶⁶

[149] The only evidence put forth by the Department is an assertion that disclosure of the collar data to the Applicant will result in unsustainable harvest by licensed or unlicensed hunters without any evidence to support the assertion of harm.

[150] In contrast, the Applicant provides a significant amount of evidence to support that disclosure of the Porcupine caribou collar information to them will not result in the harm alleged. Specifically, they highlight that:

- a. Hunting in Yukon is regulated by the *Wildlife Act* and its regulations. Hunters must be permitted and are allotted quotas. There is little incentive to hunt illegally due to the regime set under the *Wildlife Act*. Hunting is restricted to residents of Yukon, which has a small population.
- b. The number of cases of illegal harvesting in Yukon is low; just 4 cases in 30 years.
- c. Use of collar data to hunt is only valuable to a hunter within a specific period because the probability of a herd's location reduces as time passes.
- d. Having access to the location of caribou in Yukon is unlikely to increase hunting, legal or illegal, because hunting locations of the Porcupine caribou herd have very limited road access, and the ability to access the caribou in other ways is very costly. In addition, there are rules in the *Wildlife Act* that prevent certain types of hunting.
- e. The rules for fair chase in the *Wildlife Act* require a hunter to refrain from hunting within 48 hours of knowing the location of an animal. Even if a hunter knows the location of a herd, then they must know how to use GIS software to map data and make sense of it, have the financial resources to harvest the animal, and have some understanding of the ecology of the animal to know where they might be in given circumstances, as well as recognizing that, at best, the data can only give them a general sense of where the herd might be, and that most of the requested data requested is historic, therefore having limited value to them.

⁶⁶ See paragraph 44 of this Inquiry Report.

[151] The Applicant has requested collar data for Porcupine caribou spanning 39 years. While they highlight that the data is unlikely to disclose the location of a collar caribou at any specific point in time, I accept that this data will provide hunters with their patterns and could provide hunters with the general location of caribou at certain times.

[152] The Applicant raises several points worth considering. Specifically, they are correct that road access in Yukon is limited and the ability to access the herd for hunting could be quite challenging and costly. The ability to hunt by air is prohibited under the *Wildlife Act*. The Act requires hunters to be permitted and establishes outfitting guides who hunt commercially under a license.⁶⁷ Non-residents of Yukon are only allowed to hunt if guided by an outfitter or a hunter with a special guide license. Each hunter is allotted a quota to harvest a specific type of animal species. The quotas are determined through several factors. Quotas for the Porcupine caribou herd are determined according to the agreements mentioned above. There are bag limits that prohibit the harvesting of a particular type of species other than as permitted. Harvest data must be reported to the Department. There is little incentive for guides to violate the Act. There are substantial penalties for doing so. The enforcement officers have a significant amount of power to enforce the Act. Outfitters, who likely have the most knowledge about harvesting in their outfitting zones, would have no incentive to violate the Act as doing so could result in their license being cancelled or suspended.

[153] In a document 'Licensed Harvest Trends in Yukon 1980 to 2014'⁶⁸, it states the following about hunting activity in Yukon.

From 1980 to 2014, the number of people obtaining hunting licences has remained fairly constant despite an increase in Yukon's population (Figure 1). The proportion of Yukon's public that obtained a big game hunting licence was highest in 1981 at 17% and has been stable at around 10% since 1991. On average, 3,844 big game hunting licences were purchased each year with Yukon residents obtaining 3,265 licences (85%) and non-residents obtaining 579 licences (15%). The majority of non-resident hunters were guided by outfitters (511 of 579, or 88%), and the remaining non-resident hunters were guided by a Yukon resident with a special guide licence (68 of 579, or 12%).⁶⁹

⁶⁷ There are exceptions for members of Yukon First Nations and Inuvialuit to hunt for food without a hunting license in parts of Yukon as determined by Final and Self-Government agreements (at p. 17) and Aboriginal persons (certain groups) persons are entitled to hunt for Porcupine caribou without a hunting license. Members of First Nations not identified in the groups must have permission to hunt caribou (at p. 18), Yukon Hunting 2020-2021, Regulation Summary, located at: https://yukon.ca/sites/yukon.ca/files/env/env-yukon-hunting-regulations-summary_en.pdf.

⁶⁸ Located on the Department's website at: <https://yukon.ca/sites/yukon.ca/files/env/env-licensed-harvest-trends-yukon.pdf>.

⁶⁹ At p. 8.

[154] This shows that the majority of permitted hunters in Yukon are residents. It also shows that most non-residents were guided by outfitters. As indicated, there is no incentive for guides to violate the *Wildlife Act*.

[155] This document also states the following about the caribou hunt in Yukon.

*The majority of barren-ground caribou harvest (86%) occurred in October and November, when the Porcupine caribou herd is accessible from the Dempster Highway. The harvest of Northern Mountain caribou herds occurred primarily in August (38%) and September (51%). The most recent caribou hunter effort survey supported the trends seen in Northern Mountain caribou harvest, with the majority of hunts occurring in August and September (Environment Yukon, unpublished data). This hunter effort survey was conducted in 2010, which was a year when few Porcupine caribou were accessible from the Dempster Highway.*⁷⁰

[156] Adding that:

*Changes to hunting regulations over the years have been implemented to address conservation concerns, including varying season dates and bag limits, placing game management subzones on permit, and closing hunting in certain areas to allow for the recovery of specific herds. In the 1990s, hunting was closed for several Northern Mountain herds in southern Yukon (Chisana Caribou Herd Working Group 2012, Southern Lakes Wildlife Coordinating Committee 2012). By 1987, licensed hunting of female Northern Mountain caribou was closed for all herds. Licensed cow hunting for the Porcupine caribou herd closed in 2010. Licensed hunters are limited to a territory-wide bag limit of two bull caribou each year, they can harvest one Northern Mountain caribou and one Porcupine caribou, or two Porcupine caribou.*⁷¹

[157] On the harvest success rate, it states:

*On average, 13% of resident hunters and 37% of non-resident hunters with a caribou seal were successful in harvesting a caribou (Figure 13). The success rate of resident hunters varied from year to year, whereas the success rate of non-resident hunters declined from 50% in the early 1980s to 25% in the early 2010s.*⁷²

⁷⁰ At p. 10.

⁷¹ At p. 16.

⁷² At p. 19.

[158] Adding that:

Licensed harvest rates are below 0.5% for the Porcupine caribou herd. A Harvest management plan for the Porcupine caribou herd in Canada (Porcupine Caribou Management Board 2010) coordinates management actions for the Porcupine caribou herd's conservation. In recent years, the Porcupine caribou herd was not easily accessible to many communities in its range.⁷³

[159] The Applicant also indicated that illegal harvest activity in Yukon is low, having determined that there were just four cases in Yukon in 30 years. This information is based on the Applicant's search parameters that "the animal was killed with intent, from an area where harvest was not allowed" and involved a harvester taking an animal without a tag.

[160] There is no information about illegal harvests that I could locate on the Department's website. As such, I conducted a search in CanLII. I searched the term 'wildlife act', 'wildlife' and 'game ordinance'. The searches returned 132 cases with some duplicates. Of those cases, 32 involved hunting violations of the *Wildlife Act*, *Wildlife Ordinance*, or the *Game Ordinance*. The dates of the cases range from 1969 to 2016. Of those cases, there were 13 that are relevant to this Inquiry, hunting without a permit (four), hunting with a permit but no tag (two), and hunting in a location where not authorized (six). One case involved hunting without a permit and in a restricted area. Of those cases, two involved hunting caribou – one hunting where not allowed, and the other hunting without a permit and in a restricted area.

[161] What this information shows is that illegal harvesting occurs. It is notable that there are few cases, just 13 involving hunting violations and of those, just two involving caribou over a span of 47 years. I recognize that there are illegal harvests that occur in Yukon that do not make their way to the courts. As such, the above information does not provide the full picture of the amount of illegal harvesting that may occur in Yukon.

[162] The foregoing evidence, however, suggests to me that there are low numbers of illegal harvesting activities in Yukon. The regulatory framework that governs hunting activity acts as a significant deterrent to illegal hunting activity. As indicated, there are many controls in place to deter this activity, including significant penalties for hunting violations. While there are only a limited number of conservation officers (COs) in the territory (just 15 reported in 2003), I anticipate the COs are strategic in their work, situating themselves near hunting corridors to monitor activity. The case law that I reviewed also demonstrates strong public support for the preservation of animals in Yukon and respect for the hunting laws. Some of the cases involved members of the public alerting COs to suspected illegal activity. These factors, together with those mentioned above, support that it is unlikely that illegal hunting activity could reasonably

⁷³ At p. 20.

be expected to result in probable damage to or interfere with the conservation of the Porcupine caribou herd if the information requested by the Applicant is disclosed to them.

[163] In terms of the legal hunting activity, quotas for harvesting Porcupine caribou are determined by the Department in collaboration with several other groups. If there is a risk of greater success in hunting because of increased knowledge of the location of Porcupine caribou during hunting season that is gained from disclosure of this information to the Applicant, then I am confident that the groups that authorize the quotas would reduce them.

[164] Because of the reporting requirements in the *Wildlife Act* and Regulation, the Department has knowledge about the number of caribou harvested each year.

[165] As reported in 'Licensed Harvest Trends in Yukon 1980 to 2014', "[t]he majority of barren-ground caribou are harvested in October and November, when the Porcupine caribou herd is accessible from the Dempster Highway."⁷⁴ It also reported the following about conservation efforts associated with hunting caribou.

Changes to hunting regulations over the years have been implemented to address conservation concerns, including varying season dates and bag limits, placing game management subzones on permit, and closing hunting in certain areas to allow for the recovery of specific herds. In the 1990s, hunting was closed for several Northern Mountain herds in southern Yukon (Chisana Caribou Herd Working Group 2012, Southern Lakes Wildlife Coordinating Committee 2012). By 1987, licensed hunting of female Northern Mountain caribou was closed for all herds. Licensed cow hunting for the Porcupine caribou herd closed in 2010. Licensed hunters are limited to a territory-wide bag limit of two bull caribou each year, they can harvest one Northern Mountain caribou and one Porcupine caribou, or two Porcupine caribou.⁷⁵

[166] Adding the following about success rate.

On average, licensed hunters purchased 2,576 caribou seals each year (Figure 9). Eighty-three percent (83%) of those seals were obtained by resident hunters. The number of obtained seals remained relatively the same since the mid-1980s. Based on the 2010 hunter effort survey, 30% of resident caribou seal holders actively hunted caribou (Environment Yukon, unpublished data).⁷⁶

⁷⁴ *Ibid.* 65, at pl. 10.

⁷⁵ *Ibid.*, at p. 16.

⁷⁶ *Ibid.*

[167] On the success rate of harvesting barren-ground caribou, the report states as follows.

On average, 178 barren-ground caribou were harvested each year; 160 (90%) by resident hunters and 18 (10%) by non-resident hunters. The number of harvested caribou has fluctuated between years based on the accessibility of the Porcupine caribou herd (Figure 12). The smallest number of caribou harvested in any year by licensed hunters occurred in 2014 (4 caribou) and the largest harvest occurred in 1985 (418 caribou).⁷⁷

[168] The foregoing demonstrates that the amount of harvesting allowed each year is a controlled process. It also demonstrates, as indicated by the Applicant, and based on the evidence set out above about the difficulty of accessing the herd in remote Yukon areas, as well as the rules that prevent use of aircraft, etc., to locate the herd, that the success rate of hunting the Porcupine caribou herd is based on knowledge that hunters already have about when the herd is accessible from the Dempster highway. From this, I am satisfied that disclosing the information requested by the Applicant will not likely increase the hunting success rate of this herd. Should success rate increase, I am confident that the quotas would be reduced as necessary to support conservation efforts of the herd, such that any risk of overharvesting that may result from more specific knowledge of the location of this herd will not cause damage to or interfere with the conservation of this herd.

Findings on Issue Three – Porcupine Caribou Herd

[169] On Issue Three, I find that the Department has not met its burden of proving that subsection 21 (b) applies to the information requested by the Applicant for the Porcupine caribou herd.

CHISANA CARIBOU HERD – ISSUE ONE

Is the Department required by 24 (1)(a)(ii), (b), and (c)(ii) of the ATIPP Act to refuse the Applicant with access to the Records for the Chisana caribou herd?

[170] The Department is relying on subsection 24 (1), together with its subparagraph (a)(ii), paragraph (b) and subparagraph (c)(ii), to refuse the Applicant with access to the information requested about the Chisana caribou herd.

[171] In its submissions, it provided the following general information about this herd.

The Chisana Caribou Herd is a migratory, transboundary caribou herd which inhabits Yukon and Alaska. The Chisana Caribou are the Woodland Caribou sub-species and part of the Northern Mountain Caribou sub-population. As stated on page 21 of the

⁷⁷ *Ibid.*, at p. 18.

Management Plan for the Chisana Caribou Herd (Appendix J), the Department of Environment and ADF&G have a history of cooperation to monitor the Chisana Caribou Herd. This included a recovery plan in the early 2000s that was initiated following a sharp decline in population numbers beginning in the 1990s. Upon completion of the recovery plan a working group was established to develop a management plan for the Chisana Caribou Herd. The working group includes Department of Environment, ADF&G, White River First Nation, Kluane First Nation, United States National Park Service and the United States Fish and Wildlife Service. Under the Umbrella Final Agreements, the Department of Environment is also required to consult with First Nations and the Yukon Fish and Wildlife Management Board on management decisions related to harvest.

[172] The Department's submissions on the application of this provision to the information requested by the Applicant about the Chisana caribou herd is as follows.

The collar location data owned and shared by ADF&G is governed by the Alaska Statute 16.05.815(d) (Appendix B), which prohibit ADF&G from disclosing specific locations of fish and wildlife. The law allows the release of such information to parties that are authorized by ADF&G to perform specific activities, as long as the parties agree to use the information only for purposes as provided under the authorization of the department. The Department of Environment therefore refuses in full the release of the Chisana Caribou collar location data according to s.24(1)(a)(ii), s.24(1)(b), and s.24(1)(c)(ii) of the ATIPP Act.

[173] The Applicant's submissions on the application of this provision are the same as provided for the Fortymile and Porcupine caribou herds set out above. As such, I will not repeat them here.

[174] I have already found that the information requested by the Applicant is technical or scientific information. As such, subparagraph 24 (1)(a)(ii) has been made out by the Department.

[175] The information relied on by the Department for paragraph 24 (1)(b) is the AK Confidential Information Statute. The Department is not bound by this statute and there is no agreement between the Department and the ADFG that requires the Department to maintain the confidentiality of any information that it may supply to the Department about the location of the Chisana caribou herd, as opposed to the Fortymile caribou herd. There is also no evidence that the ADFG supplies any collar location data about the Chisana caribou herd to the Department, noting here that the Applicant has requested information about this herd other than just collar location data.

Findings on Issue One – Chisana Caribou Herd

[176] Given the foregoing, I find that the Department has not met the burden of proving that the information requested by the Applicant about the Chisana caribou herd was supplied in confidence. As such, the Department cannot rely on subsection 24 (1), together with its subparagraph (a)(ii), paragraph (b), and subparagraph (c)(ii), to refuse to disclose the information requested by the Applicant about this herd.

CHISANA CARIBOU HERD ISSUE TWO

Is the Department authorized by paragraph 17 (1)(a) of the ATIPP Act to refuse the Applicant access to the Records for the Chisana caribou herd?

[177] The Department is also relying on paragraph 17 (1)(a) to refuse the Applicant with access to the information requested by the Applicant about the Chisana caribou herd. Its submissions on the provision of this paragraph are as follows.

The Department of Environment received a letter dated March 10, 2020 from the Office of the Commissioner, Alaska Department of Fish and Game (Appendix C). The letter states that disclosure of data, including data collected by cooperative or direct funding by Alaska, would prevent the ADF&G from sharing information with the Department of Environment in the future. This would present a loss of financial, logistical and staff partnership with ADF&G. This loss of scientific information used in the Department of Environment's business would prevent the Department of Environment from effectively managing the Chisana Caribou Herd. Release could also result in hunters obtaining improper economic benefit from a harvest successful due to knowledge of collar location data. The Department of Environment therefore refuses in full the release of the Chisana Caribou collar location data according to s.17(1)(a) of the ATIPP Act.

[178] Based on the evidence provided by the Department, there is no indication that the ADFG is providing any information about the location of Chisana caribou to it. The letter received from the ADFG mentions the Chisana caribou herd but does not indicate that it is providing information to the Department about this herd. There is no agreement between the Department and the ADFG about the provision of location data or any other data about this herd. The 'Management Plan for the Chisana Caribou Herd, 2010 -2015',⁷⁸ provided by the Department, sets out the roles and responsibilities of numerous bodies, including the ADFG, to conserve the herd but does not indicate that the ADFG is supplying the information requested by the Applicant about this herd.

⁷⁸ Prepared by: Chisana Caribou Herd Working Group, October 2012 > FINAL.

Findings on Issue Two – Chisana Caribou Herd

[179] Given the foregoing, I find that the Department cannot suffer the harm identified in subsection 17 (1) because there is no evidence that the ADFG is supplying the information requested by the Applicant to the Department. As such, it has not met the burden of proving that subsection 17 (1) or its paragraph (a) apply to the information requested by the Applicant for the Chisana caribou herd.

BC & YUKON CARIBOU HERDS⁷⁹ – ISSUE ONE

Is the Department required by 24 (1)(a)(ii), (b), and (c)(ii) of the ATIPP Act to refuse the Applicant with access to the Records for the BC & Yukon Caribou Herds?

[180] The Department is relying on subsection 24 (1), together with its subparagraph (a)(ii), paragraph (b) and subparagraph (c)(ii), to refuse the Applicant with access to the information requested about the BC & Yukon Caribou Herds.

[181] The Department submitted the following about why the provisions cited under subsection 24 (1) apply to the BC & Yukon Caribou Herds.

Carcross, Ibex, Atlin, Laberge, Liard Plateau, Little Rancheria, and Swan Lake caribou herds are transboundary caribou herds that inhabit Yukon and British Columbia. These herds are the Woodland Caribou sub-species and members of the Northern Mountain Caribou sub-population...

These herds are cooperatively managed by the Department of Environment and the Government of British Colombia [sic]. Collars are individually purchased and the data is shared between the Department of Environment and the Government of British Colombia[sic]. The Government of British Colombia[sic] is subject to the Freedom of Information and Protection of Species Act [sic⁸⁰] (FOIP). The Act provides for the disclosure of information and species and ecosystems except where such disclosure could reasonably be expected to result in damage to, or interfere with the conservation of the species or ecosystem. The Department of Environment and the Government of British Colombia[sic] are entered into a Data Sharing Agreement (see Appendix L).

The Terms and Conditions of the Data Sharing Agreement state that the custodian of all data and information must maintain the security and confidentiality of the data and information and ensure the Terms of Conditions of Access are upheld, prior to any

⁷⁹ These herds are composed of the Carcross, Ibex, Atlin and Laberge ('Southern Lakes Caribou') caribou and the Liard Plateau, Little Rancheria and Swan Lake caribou.

⁸⁰ There is no such law in BC. The reference here should be to BC's *Freedom of Information and Protection of Privacy Act*.

disclosure of the data and information to a third party. Terms and Conditions of Access include but are not limited to, meeting the Need-to-Know criteria, signing a Confidentiality and Non-Reproduction Agreement with the Province and completing the Access to Secure Species and Ecosystems Data and Information Training Module. The Department of Environment therefore refuses in full the release of the Carcross, Ibex, Atlin, Laberge, Liard Plateau, Little Rancheria, and Swan Lake Caribou collar location data according to s.24(1)(a)(ii), s.24(1)(b), and s.24(1)(c)(ii) of the ATIPP Act.⁸¹

[182] The Applicant submitted the following about the application of the provisions cited by the Department under subsection 24 (1).

The public body provides a letter from Troy Larden, as evidence that there would be business harm if data were provided from herds that are transboundary with British Columbia. Mr. Larden is the Head of Fish and Wildlife for the Skeena Region. This is important because the public body claims that this letter represents all transboundary herds, including those that are outside of the Skeena Region. For instance, this public body suggests Mr. Larden's letter represents British Columbia Government views on the Liard Plateau herd, which is outside of the Skeena Region and is in the Northeast Region...

Further, several of the herds that the public body claims are covered by Mr. Larden's letter never cross into British Columbia (e.g., Ibex and Laberge), and British Columbia does not contribute any resources, fiscal or in-kind, to obtaining or managing these data. It is unclear as to why a British Columbia government manager would even refer to caribou herds for which British Columbia has no management jurisdiction. This suggests that the public body is over-reaching the application of Mr. Larden's letter. In fact, British Columbia's contribution for collar data is limited to negligible for most of the herds that are transboundary with Yukon.

An interesting point about Mr. Larden's letter to the Department is that he states that British Columbia has policies about public access to caribou data. However, upon consulting with those policies, all caribou data from the province of British Columbia must be provided to the public if an access to information request is made [three links to webpages on the Government of British Columbia's website] for the list of species for which data must be provided). Caribou are excluded from any exemption under British Columbia's FOIPPA. Therefore, it seems unlikely that British Columbia would withdraw their working relationship with Environment Yukon for providing information to the

⁸¹ Department's submissions, at pp. 6 and 7.

public, when they are beholden to provide it to the public and equally subject to an access request.

[183] I have already found that the information requested by the Applicant about all the caribou herds is scientific or technical information. As such, the Department has made out subparagraph 24 (1)(a)(ii). Before moving on to determine if paragraph 24 (1)(b) is met, I must determine if the information requested by the applicant is 'of a third party'.

Is the information 'of a third party'?

[184] Subsection 24 (1) only applies to information that is 'of a third party'. The third party identified by the Department is the BC Government. For the information to be of the BC Government, there must be evidence that the information requested by the Applicant about the BC & Yukon Caribou Herds originated with the BC Government. It is clear from the evidence submitted by the Department that not all the information requested by the Applicant about these herds originated with the BC Government. Subsection 24 (1) does not apply to any information that did not originate with a third party.

[185] Before I begin my analysis to determine if any of the information requested by the Applicant originated with the BC Government, I will address the Department's comments about the application of BC's *Freedom of Information and Protection of Privacy Act* (BC FIPPA). This Act is similar to our ATIPP Act. Under the access to information provisions of BC FIPPA (Part 2, Division 1), a person has the right to access any information, personal or otherwise, if they make a formal request for access under the Act. The process to make a formal request is set out in section 5 of BC FIPPA. Subsection 2 (2) of BC FIPPA states "[t]his Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public".

[186] Unless a person makes a formal access request, as required by section 5 of BC FIPPA, the exceptions to the right of access do not apply. This means that a public body that is subject to BC FIPPA can disclose any information, other than personal information, as it so chooses and is only required to apply the exceptions to the right of access when it receives a formal access request.

[187] What this means in the context of this matter is that the provision cited by the Department and referred to by the BC Government in both its letter and the 'Confidentiality and Non-Reproduction Agreement Terms and Conditions Relating To Access to Secure Species and Ecosystem Data and Information between the Province of BC and the Department' (BC Agreement)⁸², which provision I assume is subsection 18 (b) of BC FIPPA, has no application.

⁸² Department's submissions, Appendix L.

This is because the Department did not request access to this information using the BC FIPPA formal access request process. I would add here that even if it had, the provision is discretionary, which allows BC Government public bodies the ability to disclose the information to which subsection 18 (b) applies at its discretion. As such, applying the provision as though it is mandatory would be an incorrect application of this provision in BC FIPPA.

[188] The Applicant indicates in their submissions that the information requested about the BC & Yukon caribou Herds did not, for the most part, originate from the BC Government or any of its public bodies, noting that in their view, “[BC Government’s] contribution for collar data is limited to negligible for most of the herds that are transboundary with Yukon.”⁸³

[189] The Applicant’s request for information about the BC & Yukon Caribou Herds includes collar location and other data as identified above. Having reviewed the submissions and documents provided in support of the Department’s position that this information is of a third party, in this case the BC Government, it is unclear if any of the information requested by the Applicant is from the BC Government.

[190] The BC Agreement is a standard template agreement prepared by the BC Government that establishes the terms and conditions of sharing certain information with other bodies.⁸⁴ The information that the BC Agreement applies to is “Secure Species and Ecosystems Data and Information including, but not limited to, email correspondence, reports, maps and spatial files.”⁸⁵ I accept that the definition can encompass the information requested by the Applicant, inclusive of the collar location information. However, there is nothing in the BC Agreement that identifies whether it provided the information requested by the Applicant to the Department.

[191] The letter authored by a Mr. Larden, Head, Fish and Wildlife Skeena Region for the BC Government, states the following about the Applicant’s request for information.

Thank you for informing the BC Government of your access to information request for caribou collar and location data that would cover portions of British Columbia (BC). We have considerable concern that data BC provided to Yukon Government under a Data Confidentiality Agreement (DCA), (see attached) would be shared publicly. This data was shared with the Yukon Government with an understanding, and written agreement, that the data would not be shared. This scenario was not identified the in [sic] DCA, or

⁸³ Applicant’s submissions, at p. 7.

⁸⁴ The template for this agreement is contained in Appendix 3. Confidentiality And Non-Reproduction Agreement of the BC Government Species and Ecosystems Secure Data and Information Procedures from the Ecosystems Program, dated April 8, 2015.

⁸⁵ BC Agreement at p. 1.

discussions prior to the signing of the DCA. If it had it may have changed the decision to share data between agencies.

Additionally, we have concerns of Yukon Government sharing data you have collected from the BC side of the border through GPS collars or surveys, especially during the fall season when licensed hunting occurs. This data shared at high resolution could result in licensed and unlicensed hunters using the data to target animals during vulnerable times of the year (winter, breeding) in areas that individuals or groups of animals have high fidelity to. The Province of British Columbia has established policy to prevent the disclosure of point location data.

Yukon Government sharing this data through your ATIP process, or any other means contrary to the data confidentiality agreement would negatively impact the BC Government's willingness to share data with the Yukon in the future and could damage the working relationship we have established through many collaborative projects.⁸⁶

[192] This letter suggests that BC does provide GPS collar data and information about 'animals' to the Department. There is no mention of the BC & Yukon Caribou Herds in this letter, but I accept that the BC Government may provide information about these caribou to the Department and that this information may form part of the Applicant's access request. If I am correct, then this information would qualify as information of the BC Government. I will go on to assess if any of this information was supplied in confidence, as is required by paragraph 24 (2)(b).

Is the information requested by the Applicant about the BC & Yukon Caribou Herds supplied in confidence by the BC Government to the Department?

[193] The BC Agreement requires the Department to maintain the confidentiality of any information it provides to the Department about the BC & Yukon Caribou Herds that fits within the definition of 'Secure Species and Ecosystems Data and Information' that is referred to in the BC Agreement as 'Data and Information'.

[194] The requirement by the Department to maintain confidentiality of the 'Data and Information' under the BC Agreement is not absolute. The Department is authorized to prepare, display or make known the Data and Information at a scale or detail that the BC Government releases publicly, or with the approval of the data contacts identified in the BC Agreement who appear to be employees of the BC Government. The Department is also authorized to share the Data and Information only if the party seeking access to the Data and

⁸⁶ Department's submissions, Appendix M.

Information enters a confidentiality agreement with the BC Government and undergoes training.

[195] The BC Agreement stems from the policies and procedures identified by the Applicant in their submissions.

[196] The policy is a BC Government policy 'Species and Ecosystems Data and Information Security Policy', dated April 8, 2015, and is identified as being from the 'Ecosystems Program' (BC Policy).⁸⁷ The purposes of the BC Policy, as identified therein, are as follows.

1. *To identify circumstances when the province will accept and release secure species and ecosystems data and information;*
2. *To identify categories of species and ecosystems data and information that would be deemed secure;*
3. *To provide open, transparent, and accountable policy on the management of species and ecosystems data and information.*

[197] The meaning of 'Secure Data and Information' in the BC Policy is defined in Part A thereto. Part A states that "[t]he species and ecosystems data and information categorized as secure under this policy includes data and information that: pertains to Species and Ecosystems Susceptible to Persecution or Harm; is Proprietary in nature; is protected by Federal and/or Provincial Statute; or whose disclosure poses a risk to Government Interests".

[198] The first category sets out the rules regarding the release of 'species and ecosystems susceptible to persecution or harm'. For these rules to apply, the species must be designated to fit within this category. The list of these species and ecosystems that was approved by a committee in April of 2015, and which refers to the policy, lists the species and ecosystems that fit within this category. There are no caribou on this list.⁸⁸

[199] The second category is 'proprietary interests'. These interests are defined as "pertinent to private or First Nations lands, where collection of that data has required access to those lands and where the landowners or First Nations have specifically requested the data and information not be distributed; or Data and information whose distribution is restricted on a time-limited basis".

⁸⁷ The policy, dated April 8, 2015, is located on the BC Government's website at: https://www2.gov.bc.ca/assets/gov/environment/plants-animals-and-ecosystems/ecosystems/secure-data-policy-and-procedures/secure_data_and_information_policy_v20_2015-04-08.pdf.

⁸⁸ This list of species is located on the BC Government's website at: https://www2.gov.bc.ca/assets/gov/environment/plants-animals-and-ecosystems/ecosystems/secure-data-policy-and-procedures/list_of_species_and_ecosystems_susceptible_to_persecution_or_harm_logo_2015-10-15.pdf.

[200] The third category is 'statutory constraints', defined as "Data and information that cannot be publicly released due to federal or provincial statute".

[201] The fourth category is 'government interests', defined as "Data and information whose disclosure poses a substantive risk to government programs and activities".

[202] The procedures 'Species and Ecosystems Secure Data and Information Procedures' that is also dated April 8, 2015 (BC Procedures), sets out the procedures associated with the categories identified in Part A of the policy. There are several procedures set out in the BC Procedure. I will address those that are relevant to the matter before me.

[203] There are rules about acceptance of species and ecosystems data and information. Specifically, those submitting the data or information may only do so upon receiving verification from the submitter of the relevant authority.⁸⁹ Data and information templates are to contain language that clarifies, among other things, that "the collection and collation of the data and information did not violate any provincial or federal statutes, and that when data and information is being submitted that has been collected on private lands that has required access to those lands the submitter can demonstrate that they have the landowner's permission to submit the data".⁹⁰ A check box will be used to verify the appropriate authority and "Data and information will not be accepted without this verification".⁹¹

[204] "The province will designate the [four categories previously mentioned] as secure."⁹²

[205] "The Ministry will mark all species and ecosystems records and documents managed in provisional government data and information systems that pertain to the above 4 categories as secure and manage their distribution in accordance with the [BC Procedures]."

[206] There are criteria for designating species and ecosystems susceptible to persecution or harm. These are not relevant to the matter before me.

[207] There are criteria for designating species and ecosystems data and information as 'proprietary'. The relevant criteria to the matter before me are set out below.

5.2. Unless specifically requested not to do so, the Ministry will make public all otherwise non-secure species and ecosystems data and information pertinent to private and First Nations lands.

⁸⁹ Procedure, at section 1.1.

⁹⁰ *Ibid.*, at section 1.2.

⁹¹ *Ibid.*, at section 1.3.

⁹² *Ibid.*, at section 2.1.

5.3. *The province will respond to all requests by private landowners and First Nations to secure species and ecosystems data and information pertinent to their properties.*

5.4. *Requests to secure data and information pertaining to private or First Nation's land must be made in writing (by mail or electronically) by the property title owner or the decision authority (in the case of First Nations) to the appropriate Data Custodian.*

5.5 *The province will only secure data and information on private or First Nation's lands where access to that land has been required to collect the data and information. Data and information that can be collected remotely (e.g. does not require physical access to the private land) will not be secured as proprietary.*

5.7. *The province will strive in all cases to enter into Data and Information Sharing Agreements (DISA) with private landowners and First Nations requesting that data and information be secured which would outline the procedures and conditions by which such data and information are made public (if at all).*

5.8. *The province will respond to all requests by data and information holder(s)/owner(s) to secure species and ecosystems data and information. Requests must indicate the reasons for the requested security and a defined time limit or condition after which the data and information would be made public. Requests must be made in writing (by mail or electronically) by the data and information owner to the appropriate Data Custodian.*

5.9. *Species and ecosystems data and information secured due to a request by the data and information holder/owner(s) will be done so on a time limited basis and their distribution will be managed through the establishment of a DISA between the requestor(s) and the province.*

5.10. *Any release of data and information under the terms of a DISA will be done so conditional to the requester for that data and information signing a Confidentiality and Non-reproduction Agreement.*

5.11. *Requests for data and information secured as for these purposes will be evaluated against the terms of the DISA and under the criteria of Need-to-Know.*

[208] The procedures associated with provincial or federal statute prohibit the release of information where doing so would violate the law, and any release of this information will only be authorized on a 'need-to-know basis' and subject to a 'Confidentiality and Non-reproduction Agreement'.⁹³

⁹³ *Ibid.*, at section 6.

[209] Section 7 of the Procedure sets out the rules to designate a secure species and ecosystems information as 'category four' information where disclosure would pose a risk to government programs and activities. An employee with the BC Conservation Data Centre in an email addressed to me dated November 3, 2020, confirmed that "there is no list for government interest at this time".⁹⁴

[210] Based on the foregoing, there is no evidence that the information requested by the Applicant about the BC & Yukon Caribou Herds is subject to the confidentiality requirements in the BC Agreement. As indicated, caribou are not listed in the document identifying species and ecosystems susceptible to persecution or harm. There is no evidence that any of the information requested by the Applicant is proprietary, as defined in the BC Policy or BC Procedures. If there were, then Mr. Larden would have indicated as such. Because of the rigour outlined in the BC Procedures around identifying secure species and ecosystems data and information under the 'proprietary' category, he certainly would have knowledge if any of the information requested by the Applicant fell into this category. The category of 'government interests' cannot apply to any of the information requested by the Applicant because no such identification has been made as of November of 2020 identifying government interests. Lastly, there is no law, including BC FIPPA, that prevents the BC government or any of its public bodies from disclosing the information requested by the Applicant about the BC & Yukon Caribou Herds in their Access Request.

[211] Added to the foregoing, the BC Policy expressly states its position about the accessibility of species and ecosystems data as follows.

It is the Policy of this province:

- 1. To make data and information as freely and openly available as possible, consistent with government's Open Data and Information Policy. ("Ministries must take steps to expand public access to government data by making it available online unless restricted by law, contract or policy" Premier Christy Clark, Open Information and Open Data Policy, version 1.0, July 2011).*
- 2. To accept species and ecosystems data and information only where its collection is consistent with federal and provincial statutes and regulations, and appropriate documented permissions are obtained and submitted to the province.*
- 3. To routinely disclose species and ecosystems data and information held under the custodial responsibility of the Executive Directors - Ecosystems Branch - Ministry of Environment, Knowledge Management Branch - Ministry of Environment, and Fish &*

⁹⁴ Email from Katrina Stiepec, BC Conservation Data Centre to the IPC dated November 3, 2020 at 10:10 AM.

Wildlife Branch - Ministry of Forests, Lands and Natural Resource Operations **except** those portions of the data and information categorized as Secure Data and Information as described in Part A below...⁹⁵ [My emphasis]

[212] The only thing the evidence provided supports is that the Department is bound to maintain the confidentiality of information in the BC Agreement that falls under one of the four categories identified in the BC Policy and Procedure. There is no evidence that any of the information requested by the Applicant falls into any of these categories.

[213] Based on the foregoing, I find that the Department has not made out that the information requested by the Applicant was supplied in confidence by the BC Government or any of its public bodies. As such, I need not go on to consider if subparagraph 24 (1)(c)(ii) applies.

Findings on Issue One – BC & Yukon Caribou Herds

[214] Given the foregoing, I find that the Department has not met its burden of proving that subsection 24 (1), together with its subparagraph (a)(ii), paragraph (b), and subparagraph (c)(ii), applies to the information requested by the Applicant about the BC & Yukon Caribou Herds.

BC & YUKON CARIBOU HERDS – ISSUE TWO

Is the Department authorized by paragraph 17 (1)(a) of the ATIPP Act to refuse the Applicant access to the Records for the BC & Yukon Caribou Herds?

[215] The Department submitted the following about why the provisions cited under paragraph 17 (1)(a) authorize it to refuse to disclose the information requested by the Applicant about the BC & Yukon Caribou Herds.

The Department of Environment received a letter dated March 2, 2020 from the Government of British Columbia[sic], Ministry of Forests, Lands, Natural Resource Operations and Rural Development regarding the release of collar location data to a third party (see Appendix M). The letter states that disclosure of data, including data collected by cooperative or direct funding by British Columbia, would conflict with the Terms and Conditions of Access in the Data Sharing Agreement will negatively impact the prevent the Government of British Columbia's[sic] willingness to share data with the Department of Environment in the future and may damage the working relationship that has been established through many collaborative projects. This would present a loss of financial, logistical and staff partnership with the Government of British Columbia[sic]. This loss of scientific information used in the Department of Environment's business

⁹⁵ BC Policy, at p. 2.

would prevent the Department of Environment from effective management of the Carcross, Ibex, Atlin, Laberge, Liard Plateau, Little Rancheria, and Swan Lake Caribou Herds. Release could also result in hunters obtaining improper economic benefit from a harvest successful due to knowledge of collar location data. The Department of Environment therefore refuses in full the release of the Carcross, Ibex, Atlin, Laberge, Liard Plateau, Little Rancheria, and Swan Lake Caribou collar location data according to s.17(1)(a) of the ATIPP Act.⁹⁶

[216] The Applicant made the same submissions for this herd as they did for the other herds identified above. I will not repeat them here. However, they added the following information to support their assertion that the BC Government would not refuse to provide the information requested by the Applicant to the Department in the future about the BC & Yukon Caribou Herds if it were to disclose the information requested by the Applicant that originated with the BC Government. On this point, the Applicant states as follows.

British Columbia must provide any collar location data for caribou to the public. Under their policy (and evaluation of the applicability of Section 18(b) of FOIPPA), the British Columbia government is tied to release location data to the public (see [BC Policy and BC Procedures]) for the list of species for which section 18(b) of FOIPPA applies). Caribou are excluded from this exemption. It seems unlikely that British Columbia would withdraw their working relationship with Environment Yukon for providing information to the public, when they are also beholden to provide it to the public and equally subject to an access request.

[217] The Department's reliance on the application of paragraph 17 (1)(b) is based on the contents of the BC Agreement and the letter received from Mr. Larden with the BC Government, as well as its position that if required to disclose the information requested by the Applicant, it would violate the BC Agreement and negatively impact the BC Government's willingness to provide it with information about the BC & Yukon Caribou Herds in the future.

[218] I already determined in my analysis above that the information requested by the Applicant does not fall under the BC Agreement. While the letter from Mr. Larden refers to GPS collars or surveys, he goes on to indicate that any sharing of this data by the Yukon government through the ATIPP Act process, "or any means contrary to the data confidentiality agreement" ... "would negatively impact the BC Government's willingness to share data with Yukon in the future and could damage the working relationship we have established through many collaborative projects".

⁹⁶ Department submissions, at p. 7.

[219] Given that the information requested by the Applicant does not fall under the BC Agreement, and that the BC Government is committed to making species and ecosystems information publicly accessible that is not within one of the four categories identified as secure in the BC Policy and BC Procedure, I cannot see how disclosure of the information requested by the Applicant about the BC & Yukon Caribou Herds, including the collar location data, would have the affect indicated by Mr. Larden.

Findings on Issue Two – BC & Yukon Caribou Herds

[220] Based on the foregoing, I find that the Department has not met its burden of proving that subsection 17 (1) or its paragraph (a) apply to the information requested by the Applicant about the BC & Yukon Caribou Herds.

BC & YUKON CARIBOU HERDS – ISSUE THREE

Is the Department authorized by subsection 21 (b) of the ATIPP Act to refuse the Applicant access to the Records about the BC & Yukon Caribou Herds?

[221] The Department submitted the following about why it is relying on subsection 21 (b) to refuse to disclose the information about the BC & Yukon Caribou Herds requested by the Applicant.

Further, the Southern Lakes Caribou Herd has been in recovery for 27 years. The Southern Lakes Caribou Recovery Program was developed in 1993 (see Appendix N) in response to rapidly declining caribou populations. Biologists determined the cause was over harvesting by licensed and unlicensed hunters and the mitigation focused on halting the harvest of caribou from the Carcross, Ibex, Atlin and Laberge Caribou Herds through public awareness and support.

The Northern Mountain Caribou sub-population are designated as “Special Concern” by COSEWIC (Appendix K). A “Special Concern” wildlife species may become threatened or endangered because of a combination of biological characteristics and identified threats. Therefore, the release of collar location data for the “Special Concern” Carcross, Ibex, Atlin, Laberge, Liard Plateau, Little Rancheria and Swan Lake Caribou Herds may result in unsustainable[sic] harvest by licensed or unlicensed hunters, which would will [sic] have a significantly negative impact on the population of the species. The Department of Environment therefore refuses in full the release of the Carcross, Ibex, Atlin, Laberge, Liard Plateau, Little Rancheria and Swan Lake Caribou collar location data according to s.21(b) of the ATIPP Act.⁹⁷

⁹⁷ Department’s submissions, at p. 7.

[222] The submissions made by the Applicant about subsection 21 (b) for these herds is the same as indicated above, with the exception of the following information that is specific to the BC & Yukon Caribou Herds.

The Government of British Columbia undertook a thorough analysis to determine which species could be harmed by release of location information. This process involved the following:

1) Formation of a Committee that included legal experts and biological experts to undertake an analysis of applicability of section 18 (b) and (c) and other aspects of the Freedom of Information and Privacy Protection Act.

2) Consultation with biologists on what data were available to reveal animal location, and what species would be considered sensitive. An exhaustive list of species and data types was created.

3) An evaluation of each species by the Committee, establishment of criteria for status, and determination of whether the species were endangered, threatened or vulnerable.

4) A thorough evaluation of each species by the Committee to determine if harm would come to the conservation of the species if location data of any kind were released. The Committee considered each type of location data (kill data, den data, telemetry data, etc...).

5) The Committee subsequently produced policy documents (<https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/laws-policies-standards-guidance/data-information-security>) with a list of species and data types that should not be provided to the public. All other species (not on the list) and data types (not on the list) could be provided to the public without harming the conservation of the species.

6) This list excluded ALL caribou data from British Columbia. Even grizzly bear location data that were not from the threatened sub-management units (<http://www.env.gov.bc.ca/soe/indicators/plants-and-animals/grizzly-bears.html> - color coded yellow on the map) have to be provided to the public if requested. Most comparably to musk ox (a bovid), it also excluded Plains and Wood Bison (also bovids). The list of species and data types for which the British Columbia FOIPP Act section 18 (b) exemption would apply can be viewed here: <https://www2.gov.bc.ca/assets/gov/environment/plants-animals-and-ecosystems/ecosystems/secure-data-policy-and->

[procedures/listofspeciesandecosystemssusceptibletopersecutionorharmlogo2015-10-15.pdf](#).⁹⁸

[223] As indicated previously, in order for the Department to rely on subsection 21 (b) to refuse the information requested by the Applicant for the BC & Yukon Caribou Herds, it will need to prove that:

- a. disclosure of this information could reasonably be expected to result in 'probable' damage to, or interfere with the conservation of;
- b. a species of...animals that is endangered, threatened or vulnerable in Yukon or in any one or more regions of Yukon; and
- c. that upon determining that subsection 21 (b) applies to the information that it exercised its discretion in deciding to refuse the Applicant access to the information they requested.

[224] The caribou in this herd are an animal species. The COSEWIC designation for this species, referred to by them as the 'Caribou, Northern Mountain Population', is 'special concern'. This designation was made in May of 2014. Based on my determination of the meaning of 'vulnerable' as indicated above, I am satisfied that the BC & Yukon Caribou Herds are vulnerable.

[225] The Applicant points out that the BC Government has not classified any caribou as a species susceptible to persecution or harm. They are correct. However, subsection 21 (b) only applies to animals that meet the criteria of 'endangered, threatened or vulnerable in Yukon or any of its regions' (my emphasis). Given this, whether the BC Government has identified these species as at risk within its own jurisdiction or not is irrelevant to the application of subsection 21 (b). The Department has met the second part of the subsection 21 (b) test. I will now go on to determine if it has met the first part of the test.

Could disclosure of the information requested by the Applicant reasonably result in probable damage to, or interfere with the conservation of the BC & Yukon Caribou Herds?

[226] To meet the first part of the test, the Department must prove on the balance of probabilities that there is a reasonable expectation of probable damage to or interference with conservation of the BC & Yukon Caribou Herds if the information requested by the Applicant is disclosed to them.

⁹⁸ Applicant's submissions, at pp. 16 and 17.

[227] Recall that I determined that ‘conservation’ means an action, by legal or other means, that is taken to preserve, protect or restore any of the things identified in subsections (a) through (c) of section 21 to promote or enhance the continued existence of that thing.

[228] As indicated, 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 Inquiry is contextual. How much evidence, including the quality of evidence, needed to meet this standard will ultimately depend on the nature of the issue, as well as the inherent probabilities or improbabilities and the seriousness of the allegations or consequences.⁹⁹

[229] The evidence provided by the Department about the application of this part of the subsection 21 (b) test is that the release of the information requested by the Applicant about the BC & Yukon Caribou Herds “may result in unsustainable harvest by licensed or unlicensed hunters, which would will [sic] have a significantly negative impact on the population species.”¹⁰⁰ It points to Appendix N as evidence to support its position.

[230] Appendix N is the document ‘Three Decades of Caribou Recovery Programs in Yukon: A Paradigm Shift in Wildlife Management’.¹⁰¹ It states the following about the risks to the population of woodland caribou herds in Yukon, and what is necessary to ensure population stability.

*Systematic inventory studies to obtain vital data on range use, population, and physical characteristics of Yukon’s woodland caribou populations began in 1980. By 2008 a total of 23 relatively discrete herds ranging wholly or in part within Yukon had been identified. During this period, the numbers of caribou in some herds were estimated to be declining sharply from causes that were not well understood. It was thought that the manageable factors of human hunting made possible by ease of access through roads and off-road vehicles and predation—principally by wolves—were the driving forces behind these declines. While other potential caribou-limiting factors such as range condition, forage/nutritional status, and climatic affects were known to play a role in population dynamics they were considered realistically unmanageable factors. Hence, the basic premise of past caribou recovery planning was to relieve human-caused and natural predation, anticipating that these measures would be followed by sound regulation and mitigation of human activities to maintain stability in the long-term.*¹⁰²

⁹⁹ See paragraph 44 of this Inquiry Report.

¹⁰⁰ Department’s submissions, at p. 7.

¹⁰¹ ‘Three Decades of Caribou Recovery Programs in Yukon: A Paradigm Shift in Wildlife Management’, Richard Farnell, 2009, ©2009 Department of Environment, Government of Yukon, Appendix N of the Department’s submissions.

¹⁰² *Ibid.*, at p. 1.

[231] A section of this document discusses the ‘Southern Lakes Herds Recovery Program’ (SLR Program). It states the following about the SLR Program.

During January 1993, representatives from six First Nations, local residents, and biologists gathered in Carcross, Yukon to formally discuss what could be done about diminishing caribou numbers in the Southern Lakes area. From these discussions came the Southern Lakes Recovery Plan (O’Donoghue 1996), then conceived as a five-year plan designed to restore caribou numbers.

Southern Lakes caribou consist of three small and fairly distinct herds—the Ibex herd, the Carcross herd, and the Atlin herd (which ranges across the Yukon/ BC border). Over-hunting was thought to play the primary role in caribou declines. For example, population trend counts from 1983 to 1992 detected very high average calf survival (55 calves/100 cows) in the Ibex herd (unpublished data, Yukon Department of Environment). Given this level of productivity the herd should have been doubling in size every four years over this period. Instead, the herd remained static at about 150 animals. Biologists suspected that the growth increment in this and the other Southern Lakes herds was being cropped by hunters. This view was supported by residents of Carcross and Tagish, [sic] Yukon who reported excessive shooting of animals in their area by poachers and both local and non-resident First Nation hunters.¹⁰³

[232] Additional information in the section described several other factors contributing to the decline of the population in the Southern Lakes herds, including loss of habitat, human disturbance caused by increasing levels of linear development, landscape change, timber harvest, residential growth, industrial development, recreational use, wildfires, and fire suppression.¹⁰⁴ To address the risks, a management strategy was developed. It was to increase public awareness, use local knowledge, eliminate harvest, discourage human developments that are detrimental to caribou, monitor predator abundance and harvest, and monitor caribou and alternate prey population patterns.¹⁰⁵

[233] The measures that were identified to address harvest issues were to prohibit harvesting, voluntary cessation of harvesting by First Nations, hire First Nation ‘game guardians’ to patrol the district during winter, and use signage to stop human harvest.¹⁰⁶ A number of other measures were adopted to address the other identified risks. It is noted that the “management actions culminated in fairly continuous population growth in the herds”.¹⁰⁷ It also noted that

¹⁰³ *Ibid*, at p. 4.

¹⁰⁴ *Ibid*, at p. 5.

¹⁰⁵ *Ibid*, at p. 5.

¹⁰⁶ *Ibid*.

¹⁰⁷ *Ibid*.

“vehicle collisions along the highways are presenting the largest single source of human-caused mortality for Southern Lakes caribou in Yukon”.¹⁰⁸

[234] There is nothing in this document that specifically addresses threats to the population of the other three herds (Liard Plateau, Little Ranchera, and Swan Lake) that make up the BC & Yukon Caribou Herds.

[235] After identifying specific issues associated with certain herds, the document identifies ‘manageable factors’ and addresses the ‘human access threat’.

Manageable Factors

These case histories show that the population dynamics of caribou herds are driven by multiple factors. When those factors are at least in balance or, in the case of the Southern Lakes caribou herds, acting in a positive direction herds remain stable or increase. When these factors are acting in a negative manner however, wildlife managers are faced with few options to change population declines. Caribou habitat is largely at successional climax so there is little that can be done to habitat to change the direction of a population decline, with the exception of wildfire management and effective mitigation of human development activities. Moreover weather conditions that are known to affect caribou population trends are obviously unmanageable factors in caribou management. The experiences in these cases histories show that human harvest is an additive mortality [sic] factor.

Human harvest and predation combine to cause direct attrition of caribou numbers – thus affecting population trends. The above experiences show that human harvest reduction by licensed hunters and First Nation hunters is a viable and effective management tool.¹⁰⁹

Human Access Threat

The case histories presented here show that roads have a detrimental affect on caribou herds by facilitating hunting and road collisions and by causing range avoidance. There is a direct correlation between roads and the status of caribou as these highly accessible herds are the most intensively managed herds in Yukon. Many less accessible herds are quite secure. As such, it is largely the occurrence of roads that have culminated in overexploitation and subsequently very expensive long-term recovery programs. This assessment considers the impacts of numerous small spur roads and trails that stem from major arteries and facilitate off-road vehicle access deep into caribou range. As

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*, at p. 10.

road infrastructure increases, improved access results in further developments, followed by even greater exploitation.

Where winter roads are extended or newly built they should be routed so that somewhere along their course they deadhead at a lake or some other point of difficult passage in summer and fall. This will help prevent off-road ATV access deep into caribou range. Moving equipment and supplies by air transport is preferred and is often a more economical and efficient means. Mainline roads such as mining access roads that bisect important caribou range should be leased and permitted as private industrial roads with a manned gate to prevent unwanted access for both wildlife and project safety and security.¹¹⁰

[236] The document 'Licensed Harvest Trends in Yukon 1980 to 2014' states the following about harvesting trends of the BC & Yukon Caribou Herds.

Changes to hunting regulations over the years have been implemented to address conservation concerns, including varying season dates and bag limits, placing game management subzones on permit, and closing hunting in certain areas to allow for the recovery of specific herds. In the 1990s, hunting was closed for several Northern Mountain herds in southern Yukon... By 1987, licensed hunting of female Northern Mountain caribou was closed for all herds... Licensed hunters are limited to a territory-wide bag limit of two bull caribou each year, they can harvest one Northern Mountain caribou...¹¹¹

On average, 261 Northern Mountain caribou were harvested each year; 125 (48%) by residents[sic] hunters and 136 (52%) by non-residents[sic] hunters (Figure 12). Approximately 70 fewer caribou were harvested per year from 2000 to 2014 compared to 1980 to 1999.¹¹²

Science-based guidelines for management of Northern Mountain caribou in Yukon (Environment Yukon 2016b) specify that a total harvest (including harvest by First Nations) up to 3 to 4% of the estimated population is generally sustainable for herds that are increasing. Harvest rate recommendations are more conservative for Northern Mountain herds with stable (up to 2%) and decreasing (up to 1%) population trends. Harvest rates are below 0.5% for 12 Northern Mountain herds. The hunting of many of these herds is restricted to permits or is closed.¹¹³

¹¹⁰ *Ibid.*, at p. 11.

¹¹¹ 'Licensed Harvest Trends in Yukon 1980 to 2014', Milligan, H, 2018 Yukon Department of Environment, at p. 16.

¹¹² *Ibid.*, at p. 18.

¹¹³ *Ibid.*, at p. 20.

[237] As can be seen from the foregoing documents, licensed harvest management is carefully monitored to conserve the population of caribou herds, including the BC & Yukon Caribou Herds. These documents identify that there are numerous threats to the BC & Yukon Caribou Herds. The documents also highlight that there are several measures that can and have been implemented to address the threats and that the measures taken improved the population numbers.¹¹⁴

[238] The foregoing suggests that while harvesting activity is one factor that can negatively impact the conservation of the BC & Yukon Caribou Herds, there are many. The documents also indicate that harvesting of caribou by hunters is manageable because there are several measures that can be taken to address overharvesting, most of which are enforceable by law.

[239] In addition, as previously mentioned under Porcupine caribou herd Issue Three, there are few instances of illegal hunting activity over the past 47 years. I determined that is, in large part, likely due to the deterrent affects of this activity under the *Wildlife Act* and Regulation, and the public's support for the need to protect caribou.

[240] As well, there are numerous groups that work in collaboration to conserve the caribou populations, including the BC & Yukon Caribou Herds. As part of this work, these groups, together with the Department, establish quotas for hunting based on the population of caribou and this process is controlled.

[241] Finally, the ability to translate the information from the collars of the BC & Yukon Caribou Herds into useable data for the purposes of hunting requires specialized knowledge, which is not easily attainable by the average person. Even if the information could be used to pinpoint the location of certain animals within the herds at specific points in time, there are rules in the *Wildlife Act* and Regulation that limit the ability of hunters to hunt within a specified period of knowing the location of the animal, or to use vehicles or aircraft for hunting.

[242] The combination of the above controls suggests that while the measures taken for the conservation of the BC & Yukon Caribou Herds may need to be adjusted *if* an increase in harvesting occurs because the information requested by the Applicant is disclosed to them, which I have determined is unlikely, the evidence does not support the Department's assertion that release of this information could reasonably be expected to cause probable damage to or interfere with the conservation of the BC & Yukon Caribou Herds.

¹¹⁴ See, for example: 'COSEWIC Assessment and Status Report on the Caribou Rangifer tarandus, Northern Mountain Population, Central Mountain Population, Southern Mountain Population in Canada, 2014' located at: https://www.registrelep-sararegistry.gc.ca/virtual_sara/files/cosewic/sr_Caribou_Northern_Central_Southern_2014_e.pdf;

Findings on Issue Three – BC & Yukon Caribou Herds

[243] Based on the foregoing, I find that the Department has not met its burden of proving that subsection 21 (b) applies to the information requested by the Applicant for the BC & Yukon Caribou Herds.

YUKON CARIBOU HERDS¹¹⁵ – ISSUE THREE

Is the Department authorized by subsection 21 (b) of the ATIPP Act to refuse the Applicant access to the Records about the Yukon Caribou Herds?

[244] The Department is relying on subsection 21 (b) to refuse the Applicant access to the information requested about the Yukon Caribou Herds. Its submissions on the application of this provision are as follows.

The Finlayson, Aishihik, Bonnet Plume, Clear Creek, Coal River, Ethel Lake, Hart River, Klaza, Kluane, Labiche, Moose Lake, Pelly, Redstone, South Nahanni, Tatchun, Tay River, Burwash, Little Salmon, and Wolf Lake Caribou Herds are Woodland Caribou sub-species and members of the Northern Mountain Caribou sub-population. Northern Mountain Caribou sub-population are designated as “Special Concern” by COSEWIC (Appendix K). A “Special Concern” wildlife species may become threatened or endangered because of a combination of biological characteristics and identified threats.

The Finlayson and Aishihik Caribou herds underwent recovery programs in the 1980-1990s. The Finlayson herd underwent a recovery program in 1982 (see Appendix N) to mitigate the effects of wolf predation and over harvest. A comprehensive long-term management plan was not endorsed by the public and the Finalyson[sic] herd continued to decline due to over harvest, until strong conservation measures were implemented in 1998. According to the Science-based Guidelines for Northern Mountain Caribou Management in Yukon (see Appendix O), the Finalyson[sic] Caribou Herd population trend as of 2015, is considered “declining”. The Ashihik[sic] herd underwent a recovery program in 1993 (see Appendix N) to mitigate the effects of wolf predation and over harvest. The recovery program determined that a reduction in harvest contributed to an increase in Ashihik[sic] herd members. It was recommended that a maximum harvest rate be conservatively set at 2%.

The release of collar location data for the above mentioned caribou herds may result in unstainable[sic] harvest by licensed or unlicensed hunters, which would will [sic] have a

¹¹⁵ These herds are composed of the Finlayson, Aishihik, Bonnet Plume, Clear Creek, Coal River, Ethel Lake, Hart River, Klaza, Kluane, Labine, Moose Lake, Pelly, Redstone, South Nahanni, Tatchun, Tay River, Burwash, Little Salmon and Wolf Lake caribou.

significantly negative impact on the population of the species. The Department of Environment refuses in full the release of the Finlayson, Aishihik, Bonnet Plume, Clear Creek, Ethel Lake, Hart River, Klaza, Kluane, Moose Lake, Pelly, Tatchun, Wolf Lake, South Nahanni, Coal River, Labiche, Tay River, Burwash, Little Salmon, and Redstone Caribou collar location data according to s.21(b) of the ATIPP Act.¹¹⁶

[245] The Applicant's submission on subsection 21 (b) for the Yukon Caribou Herds is the same as for the other caribou herds, which I will not repeat. They did not make any submissions specific to the Yukon Caribou Herds.

[246] As indicated previously, in order for the Department to rely on subsection 21 (b) to refuse the information requested by the Applicant for the Yukon Caribou Herds, it will need to prove on the balance of probabilities that:

- a. disclosure of this information could reasonably be expected to result in 'probable' damage to, or interfere with the conservation of;
- b. a species of...animals that is endangered, threatened or vulnerable in Yukon or in any one or more regions of Yukon; and
- c. that upon determining that subsection 21 (b) applies to the information that it exercised its discretion in deciding to refuse the Applicant access to the information they requested.

Are the Yukon Caribou Herds endangered, threatened, or vulnerable in Yukon or in any one or more of its regions?

[247] COSEWIC has identified the Yukon Caribou Herds, a subpopulation of the Northern Mountain population, as 'special concern'. Based on this, I am satisfied that the Yukon Caribou Herds are vulnerable for the purposes of subsection 21 (b). The Department has met the second part of the subsection 21 (b) test. I will now go on to determine if it has met the first part.

Could disclosure of the information requested by the Applicant reasonably result in probable damage to, or interfere with the conservation of the Yukon Caribou Herds?

[248] As indicated, the Department must prove on the balance of probabilities that that there is a reasonable expectation of probable damage or interference with the conservation of the Yukon Caribou Herds if the information requested by the Applicant is disclosed to them. To

¹¹⁶ Department's submissions, at p. 8.

meet this burden, the Department must provide evidence well beyond or considerably above a mere possibility of harm to reach that middle ground. This Inquiry is contextual.¹¹⁷

[249] The only evidence put forth by the Department related to the first part of the subsection 21 (b) test for the Yukon Caribou Herds is that:

- a) the Finlayson and Aishihik herds underwent recovery programs to increase their population;
- b) the Finlayson herd was declining due to overharvest until 1998 when strong measures were implemented to prevent decline;
- c) in 2015, the Finlayson herd was identified as being in decline (no reason provided); and
- d) the Aishihik herd was in recovery in 1993 because of predation and over harvest, but the recovery program increased the herd size and harvest rates were set at 2%.

[250] The Department goes on to say that “[t]he release of collar location data for the above mentioned caribou herds [which I assume is a reference to all the herds of the Yukon Caribou Herds] may result in unsustainable harvest by licensed or unlicensed hunters, which would will [sic] have a significantly negative impact on the population of the species”.

[251] The Department’s evidence about the Finlayson and Aishihik herds is not sufficient to meet the threshold required by this part of the subsection 21 (b) test, as it does not establish on the balance of probabilities that there is a reasonable expectation of probable damage to or interference with the conservation of these herds if the information requested by the Applicant is disclosed. In addition, the Department provided no evidence beyond asserting that if the information requested by the Applicant is disclosed, then overhunting may occur and result in a decline in the population of the remaining herds that comprise the Yukon Caribou Herds. This evidence is not sufficient to meet the burden of proof required by subsection 21 (b).

Findings on Issue Three – Yukon Caribou Herds

[252] Based on the foregoing, I find that the Department has not met its burden of proving that subsection 21 (b) applies to the information requested by the Applicant for the Yukon Caribou Herds.

¹¹⁷ See paragraph 44 of this Inquiry Report.

BOREAL CARIBOU HERD – ISSUE THREE

Is the Department authorized by subsection 21 (b) of the ATIPP Act to refuse the Applicant access to the Records about the Boreal caribou herd?

[253] The Department is relying on subsection 21 (b) to refuse to disclose the information requested by the Applicant about this herd. Its submissions on the application of this provision follow.

Boreal caribou are a Woodland Caribou sub-species but are considered their own designatable [sic] grouping. Boreal caribou are designated as “Threatened” under the Federal Species at Risk Act (SARA), Schedule 1 (Appendix P). A “Threatened” wildlife species under SARA is considered likely to become endangered if limiting factors are not reversed and includes prohibitions on federal lands that impact of critical habitat along with harvest outside the bounds of a First Nation final agreement or section 35 of the Canadian Constitution. Details are included in the federal Recovery Strategy (Appendix Q).

Across Canada, Boreal caribou have been the subject of extensive recovery efforts. The Boreal caribou herd in Yukon is considered part of a larger population that is shared with the Northwest Territories (NT1 conservation unit). As such, this herd is cooperatively managed. In 2019, the Government of Yukon, along with the Government of Canada, the First Nation of Na-Cho-Nyak Dun, and the Gwich’in Tribal Council entered into a conservation agreement as per Section 11 of SARA to protect Boreal caribou including its range in Yukon (Appendix R). The Government of Yukon is required to report all conservation actions taken to protect or enhance Boreal caribou and their habitat. Reports are annually provided to the Government of Canada.

The release of collar location data for Boreal caribou in Yukon is inconsistent with the terms of the section 11 agreement as per section 9.2 which states the following: “Some data and information may require confidentiality, or may have been obtained with an understanding of confidentiality, for reasons including but not limited to ensuring safe and effective implementation of conservation measures. Data and information so identified by a party, or a collaborator in programs and activities related to this agreement, will be held confidential by the parties to the extent permitted by their respective legislation and related policies, procedures, and agreements.” The release of collar location data for the Boreal caribou herds may result in unsustainable harvest by licensed or unlicensed hunters, which would will [sic] have a significantly negative impact on the population of the species. The Department of Environment refuses in full

*the release of Boreal Caribou collar location data according to s.21(b) of the ATIPP Act.*¹¹⁸

[254] The Applicant's submissions on subsection 21 (b) for the Boreal caribou herd are the same as for the other caribou herds, which I will not repeat. They did not make any submissions specific to the Boreal caribou herd.

[255] As indicated previously, in order for the Department to rely on subsection 21 (b) to refuse the information requested by the Applicant for the Boreal caribou herd, it will need to prove on the balance of probabilities that:

- a. disclosure of this information could reasonably be expected to result in 'probable' damage to, or interfere with the conservation of;
- b. a species of...animals that is endangered, threatened or vulnerable in Yukon or in any one or more regions of Yukon; and
- c. that upon determining that subsection 21 (b) applies to the information that it exercised its discretion in deciding to refuse the Applicant access to the information they requested.

Is the Boreal caribou herd endangered, threatened, or vulnerable in Yukon or in any one or more of its regions?

[256] As submitted by the Department, the Boreal caribou herd is designated as threatened under the SARA. This designation is based on the determination by COSEWIC in 2002 that the species is 'threatened'.¹¹⁹ Based on this, I find that the Boreal caribou herd is 'threatened' for the purposes of subsection 21 (b). I will now go on to determine if the Department has met the first part of the test.

Could disclosure of the information requested by the Applicant reasonably result in probable damage to, or interfere with the conservation of the Boreal caribou herd?

[257] Appendix Q is the document 'Recovery Strategy for the Woodland Caribou (*Rangifer tarandus*), Boreal population in Canada'.¹²⁰ The document sets out the strategy for recovery of the Boreal caribou herd and identifies that development of the strategy was a collaborative effort between the federal, provincial and territorial governments as well as many Indigenous communities.

¹¹⁸ Department's submissions, at pp. 9 and 10.

¹¹⁹ Appendix Q of the Department's submissions, at p. vi.

¹²⁰ *Species at Risk Act*, Recovery Strategy Series, Government of Canada, 2012.

[258] The document identifies several factors that led to the decline in this herd's population and notes that [s]ome local populations of Boreal caribou are at risk because of other factors, mainly overharvest."¹²¹ It also states the following as the primary threats to the herd.

*The primary threat to most boreal caribou local populations is unnaturally high predation rates as a result of human-caused and natural habitat loss, degradation, and fragmentation. These habitat alterations support conditions that favour higher alternate prey densities (e.g. moose (Alces alces), deer (Odocoileus spp.)), resulting in increased predator populations (e.g. wolf (Canis lupus), bear (Ursus spp.)) that in turn increase the risk of predation to boreal caribou. This threat can be mitigated through coordinated land and/or resource planning, and habitat restoration and management, in conjunction with predator and alternate prey management where local population conditions warrant such action. In some ranges, over-exploitation through hunting can also be an issue. This threat can be avoided or mitigated through regulations and stewardship.*¹²²

[259] Table 3 of the document contains a threat assessment. Numerous threats are identified as 'high', 'medium', or 'low'. Loss of habitat and predation are listed as 'high', whereas hunting is listed as 'medium'.¹²³ On the specifics associated with the risk of hunting to this herd, the document says the following.

Hunting has and continues to contribute to the decline of boreal caribou (Bergerud, 1967; Kelsall, 1968; Bergerud, 1974; Bergerud, 1978; Courtois et al., 2007; Boreal Caribou ATK Reports, 2010-2011). Both targeted hunting and incidental harvest (when boreal caribou intermingle seasonally with legally hunted migratory caribou ecotypes) of boreal caribou are of concern in several areas, and may be contributing to local population declines and/or preventing recovery (Environment Canada, 2011a).

Although the extent of hunting is poorly understood in most areas, analyses of historical population trends, data from radio-collared animals, and current demographic information suggest that hunting remains a significant component of adult female boreal caribou mortality and hence is a primary threat in some ranges (Dzus, 2001; Schmelzer et al., 2004; Courtois et al., 2007). Hunting of boreal caribou is facilitated by the construction of roads and other linear features and by the use of off-road vehicles that enable access to previously inaccessible areas (Boreal Caribou ATK Reports, 2010-2011). Moreover, Aboriginal Traditional Knowledge indicates that technological advances in hunting tools (e.g. high-powered rifles and scopes) and in methods used to

¹²¹ Appendix Q, at p. vi.

¹²² *Ibid.*, at p. viii.

¹²³ *Ibid.*, at pp. 12 and 13.

locate and access hunting sites (e.g. GPS, satellite tracking, aircraft, snowmobiles, trucks) have facilitated the chase of boreal caribou, resulting in a greater number of caribou being taken (Boreal Caribou ATK Reports, 2010-2011; Environment Canada, 2011a).

[260] One of the 10 actions to meet the strategy objectives identified in the document as already completed or currently underway is “closed, restricted, and/or managed hunting by Aboriginal and non-Aboriginal people, on a voluntary basis or through regulations”.¹²⁴

[261] On the process identified to manage the ‘direct human-caused mortality’, it states the following.

The extent of hunting and its effect on boreal caribou local populations is largely unknown across most of the distribution of boreal caribou. Therefore, it is important to first determine the level of hunting within a range in order to understand the potential impact of hunting on the viability of a local population. Attention should also be given to areas where boreal caribou ranges overlap with legally hunted caribou ecotypes, and hunting regulations for the legally hunted caribou ecotypes should be modified as appropriate. In areas where hunting is shown to have a negative effect on local population viability, harvest strategies should be developed, in consultation with Aboriginal people, to achieve boreal caribou recovery.¹²⁵

[262] The document identifies that one herd of Boreal caribou migrate into just a small portion of Yukon, which as shown on the map (below) is in Yukon’s far north. The herd is identified as ‘NT1’ because its main range is within the Northwest Territories (NWT).¹²⁶



¹²⁴ *Ibid.* at p. 24.

¹²⁵ *Ibid.*, at p. 30.

¹²⁶ *Ibid.*, at p. 7.

¹²⁷ *Ibid.*, excerpt from map on p. 8.

[263] This map shows that Boreal caribou herds span Canada, crossing into seven provinces and the NWT. In Table 4, it shows that each province and the NWT have a management plan for conservation of this herd. Yukon is not included in this table.¹²⁸

[264] The agreement referenced in the Department's submissions, Appendix R, is between the Government of Canada, the Government of Yukon, the Gwich'in Tribal Council, and the First Nation of Na-cho Nyak Dun. The preamble to the agreement sets out the purposes for entering into the agreement, including to address the recovery and protection of wildlife species listed in Schedule 1 of SARA. As indicated, the Boreal caribou herd is included in this list. The agreement is about the conservation of the NT1 Boreal caribou herd in Yukon. Within the preamble, it states the following:

WHEREAS disturbance of boreal caribou habitat in the Yukon is low, with 20% fire and 4% human disturbance, well below the 35% upper limit in the National Recovery Strategy;

WHEREAS the critical habitat of boreal caribou in the Yukon primarily forms part of the area that is subject to the draft Peel Land Use Plan, and the land use designations therein will support conservation actions that are consistent with the National Recovery Strategy if the Peel Land Use Plan does not substantially change during the consultation period;

WHEREAS there is recognition that other Conservation Measures beyond critical habitat protection may be required to support boreal caribou conservation in Yukon, consistent with the National Recovery Strategy;

WHEREAS there is no documented licensed harvest of boreal caribou in the Yukon;

AND WHEREAS no restrictions on harvesting of boreal caribou, including by Indigenous people, are proposed in this Agreement;¹²⁹

[265] The agreement provided is undated and unsigned. A copy of the agreement appears in the Species at Risk public registry under the category 'conservation agreement'. It states therein that the agreement was made on May 23, 2019, although no signatures or other mark indicating that the agreement was signed appears on the agreement.¹³⁰

[266] Having reviewed this agreement, its purpose is to establish a plan to protect the habitat of the Boreal caribou herd in Yukon from the impacts of the implementation of the 'Peel Land

¹²⁸ *Ibid.*, at p. 25.

¹²⁹ Department's submissions, Appendix R, at pp. 1 and 2.

¹³⁰ Conservation Agreement for the Conservation of the Boreal Caribou, located at:

<https://www.canada.ca/en/environment-climate-change/services/species-risk-public-registry/conservation-agreements/woodland-caribou-boreal-yukon.html#toc19>.

Use Plan' and to establish the role of each party toward this objective. Appendix 1 of the agreement sets out the actions for which each party is responsible. The first three actions are to protect critical habitat of the herd. The description associated with these actions is related to mining and oil and gas activity, and the use of land, water and other resources in the Peel Watershed. The next five activities are about monitoring its habitat. The last is protection through measures to address any decline in the population, if detected.

[267] Schedule 1 to the agreement, 'Boreal caribou in Yukon: background and relationship to the Peel Watershed Regional Land Use Plan', identifies the national recovery strategy for the herd, which is based on the national strategy established by Environment Canada in 2012.¹³¹ It sets out the population of the herd, its location in NWT and Yukon, and its location in other parts of Canada. It identifies the following.

- a. The primary threat to most Boreal caribou populations is unnaturally high predation rates resulting from habitat disturbance.¹³²
- b. Yukon's Boreal caribou population is stable or increasing.¹³³
- c. Yukon's Boreal herd is found in the northeast portion of the Peel Watershed region which is slated for management under the Peel Watershed Land Use Plan.¹³⁴
- d. The habitat disturbance for Yukon's Boreal herd is caused by fire (20%) and human activity (4%).¹³⁵
- e. The human activity impacting habitat is primarily from mining and oil and gas activity authorized under the Peel Watershed Land Use Plan.¹³⁶
- f. Caribou harvested in the area are from the Porcupine caribou herd and it is "suggested" that no Boreal caribou were harvested and that "[un]reported harvest of Boreal caribou is considered low/non-existent."¹³⁷

[268] The remainder of the schedule discusses the impact of development in the Peel Watershed area and the anticipated impacts of this development on the Boreal caribou herd habitat.¹³⁸

¹³¹ *Ibid.*, schedule 1, p. 13.

¹³² *Ibid.*, at p. 14.

¹³³ *Ibid.*, at p. 16.

¹³⁴ *Ibid.*, at p. 17.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*, at p. 18.

¹³⁷ *Ibid.*, at p. 23.

¹³⁸ *Ibid.*, at pp. 28 to 32.

[269] As part of the agreement, the federal government is required to provide progress reports on the habitat protection measures for the Boreal caribou herd outlined in the agreement.¹³⁹ No such progress report that I could locate has been prepared for the agreement.

[270] What this agreement indicates is that the risk to the Boreal caribou herd from legal¹⁴⁰ or illegal hunting is minimal or non-existent. As is noted therein, the primary risks to this herd are from loss of or damage to its habitat caused from other forms of human activity, such as fire suppression and development in the Peel Watershed.

[271] In terms of the Department's position that some of the information may have been provided under the agreement on the basis that it would be held in confidence for purposes that include conservation, the Department has not provided any evidence that the information requested by the Applicant was provided in confidence to the Department by any of the other parties to the agreement.

[272] The evidence, as indicated, does not support that disclosure of the information requested by the Applicant will cause an increase in hunting, legal¹⁴¹ or not, such that the risk of overharvest will negatively impact on conservation of the Boreal caribou herd. Given this, the Department's evidence is not sufficient to meet the threshold required by this part of the subsection 21 (b) test, as it does not establish on the balance of probabilities that there is a reasonable expectation of probable damage to or interference with the conservation of these herds caused by overharvest if the information requested by the Applicant is disclosed.

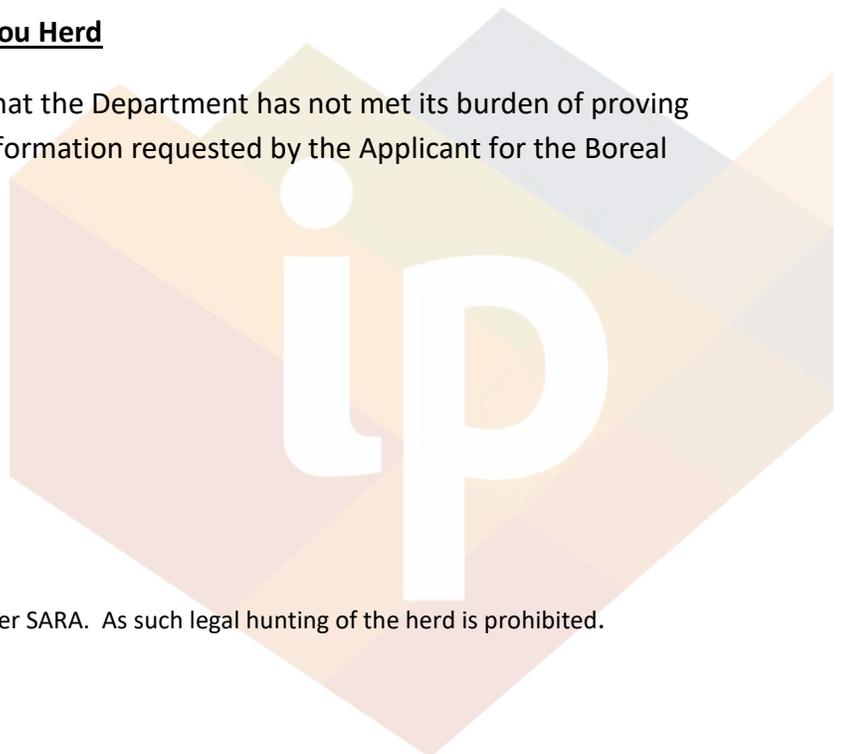
Findings on Issue Three – Boreal Caribou Herd

[273] Based on the foregoing, I find that the Department has not met its burden of proving that subsection 21 (b) applies to the information requested by the Applicant for the Boreal caribou herd.

¹³⁹ *Ibid.*, at section 11.2 on p. 7.

¹⁴⁰ The Boreal caribou herd is 'threatened' under SARA. As such legal hunting of the herd is prohibited.

¹⁴¹ *Ibid.*



IX FINDINGS

[274] My findings on the issues are as follows.

Fortymile Caribou Herd

[275] On Issue One, I find that subsection 24 (1), together with its subparagraph (a)(ii), paragraph (b), and subparagraph (c)(ii):

- a. require the Department to refuse to disclose to the Applicant the specific location information about the Fortymile caribou herd that is derived from collars purchased by the ADFG and supplied to the Department, and that is less than 25 years old.
- b. do not require the Department to refuse to disclose to the Applicant the following information.
 - i. the specific location information of collared caribou in records supplied by the ADFG to the Department that are 25 years or older;
 - ii. information other than the specific location information of collared caribou in records supplied by the ADFG to the Department; and
 - iii. information about the caribou derived from collars purchased by the Department.

[276] On Issue Two, I find that the Department is not authorized to rely on subsection 17 (1) to refuse to disclose the following information requested by the Applicant:

- a. the specific location information of collared caribou in records supplied by the ADFG to the Department that are 25 years or older;
- b. information other than the specific location information of collared caribou in records supplied by the ADFG to the Department; and
- c. information about the caribou derived from collars purchased by the Department.

Porcupine Caribou Herd

[277] On Issue One, I find that subsection 24 (1), together with its subparagraph (a)(ii), paragraph (b), and subparagraph (c)(ii), do not require the Department to refuse to disclose to the Applicant the information requested by the Applicant for the Porcupine caribou herd.

[278] On Issue Two, I find that the Department is not authorized by subsection 17 (1) to refuse to disclose the information requested by the Applicant for the Porcupine caribou herd.

[279] On Issue Three, I find that the Department is not authorized by subsection 21 (b) to refuse to disclose the information requested by the Applicant for the Porcupine caribou herd.

Chisana Caribou Herd

[280] On Issue One, I find that subsection 24 (1), together with its subparagraph (a)(ii), paragraph (b), and subparagraph (c)(ii), do not require the Department to refuse to disclose to the Applicant the information requested by the Applicant for the Chisana caribou herd.

[281] On Issue Two, I find that the Department is not authorized by subsection 17 (1) to refuse to disclose the information requested by the Applicant for the Chisana caribou herd.

BC & Yukon Caribou Herds

[282] On Issue One, I find that subsection 24 (1), together with its subparagraph (a)(ii), paragraph (b), and subparagraph (c)(ii), do not require the Department to refuse to disclose to the Applicant the information requested for the BC & Yukon Caribou Herds.

[283] On Issue Two, I find that the Department is not authorized by subsection 17 (1) to refuse to disclose the information requested by the Applicant for the BC & Yukon Caribou Herds.

[284] On Issue Three, I find that the Department is not authorized by subsection 21 (b) to refuse to disclose the information requested by the Applicant for the BC & Yukon Caribou Herds.

Yukon Caribou Herds

[285] On Issue Three, I find that the Department is not authorized by subsection 21 (b) to refuse to disclose the information requested by the Applicant for the Yukon Caribou Herds.

Boreal Caribou Herd

[286] On Issue Three, I find that the Department is not authorized by subsection 21 (b) to refuse to disclose the information requested by the Applicant for the Boreal caribou herd.

X RECOMMENDATIONS

Fortymile Caribou Herd

[287] On Issues One and Two,

- a. I confirm that the Department *must refuse* to disclose to the Applicant the specific location information for the Fortymile caribou herd that is derived from collars

purchased by the ADFG and supplied to the Department, and that is less than 25 years old.

- b. I recommend that the Department disclose to the Applicant the following information they requested for the Fortymile caribou herd:
- i. the specific location information of collared caribou in records supplied by the ADFG to the Department that are 25 years or older;
 - ii. information other than the specific location information of collared caribou in records supplied by the ADFG to the Department; and
 - iii. information about the caribou derived from collars purchased by the Department.

Porcupine Caribou Herd

[288] On Issues One, Two, and Three, I recommend that the Department disclose to the Applicant the information they requested for the Porcupine caribou herd.

Chisana Caribou Herd

[289] On Issues One and Two, I recommend that the Department disclose to the Applicant the information they requested for the Chisana caribou herd.

BC & Yukon Caribou Herds

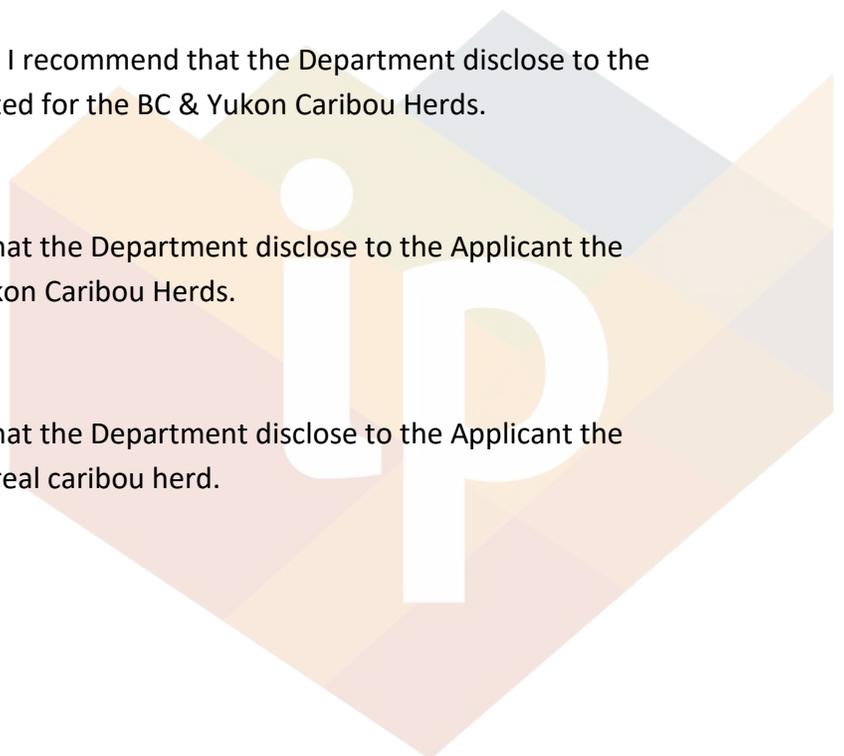
[290] On Issues One, Two, and Three, I recommend that the Department disclose to the Applicant the information they requested for the BC & Yukon Caribou Herds.

Yukon Caribou Herds

[291] On Issue Three, I recommend that the Department disclose to the Applicant the information they requested for the Yukon Caribou Herds.

Boreal Caribou Herd

[292] On Issue Three, I recommend that the Department disclose to the Applicant the information they requested for the Boreal caribou herd.



Public Body's Decision after Review

[293] Section 58 of the Act requires the Department to decide, within 30 days of receiving this Inquiry Report, whether to follow my recommendations. The Department must give written notice of its decision to me and the parties who received a copy of this report, noted on the distribution list below.

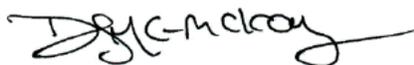
[294] If the Department does not give notice of its decision within 30 days of receiving this report, then it is deemed to have refused to follow my recommendations.

[295] If the Department does not follow my recommendations, then it must inform the Applicant, in writing, of their right to appeal that decision to the Yukon Supreme Court.

Applicants' Right of Appeal

[296] Paragraph 59 (1)(a) gives the Applicant the right to appeal to the Yukon Supreme Court if the Department does not follow my recommendations to give the Applicants access to the information to which they are entitled.

[297] Paragraph 59 (1)(b) gives the Applicant the right to appeal to the Yukon Supreme Court my determination that the Department is required to refuse to disclose the specific location information about the Fortymile caribou herd that is derived from collars purchased by the ADFG and supplied to the Department, and that is less than 25 years old.



Diane McLeod-McKay, B.A., J.D.
Information and Privacy Commissioner

Distribution List:

- Public Body
- Applicant

