



## Request for an interim report into a Chinook salmon mortality event in the Pelorus Sound

<b>Legislation:</b>	Official Information Act 1982, ss 9(2)(b)(ii), 9(2)(ba)(i) and 9(2)(d) (See appendix for full text)
<b>Requester</b>	Andrew Caddie, Kenepuru and Central Sounds Residents' Association
<b>Agency:</b>	Ministry for Primary Industries
<b>Ombudsman:</b>	Professor Ron Paterson
<b>Reference number:</b>	339333
<b>Date:</b>	March 2014

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## Summary

Mr Andrew Caddie, on behalf of the Kenepuru and Central Sounds Residents’ Association, made a request to the Ministry for Primary Industries for reports held in respect of a mortality event in a salmon farm operated by the New Zealand King Salmon Company in Pelorus Sound. The Ministry disclosed to Mr Caddie part of its Interim Report on its investigation into the event, but withheld parts of it under sections 9(2)(b)(ii), 9(2)(ba)(i) and 9(2)(d) of the Official Information Act 1982 (OIA). These sections protect information respectively:

- where disclosure would be likely unreasonably to prejudice the commercial position of the supplier of the information;
- where information is subject to an obligation of confidence or statutory requirement for provision and disclosure would be likely to prejudice the supply of similar information in the future and it is in the public interest that it should continue to be supplied; and
- where it is necessary to withhold in order to avoid prejudice to the substantial economic interests of New Zealand.

Based on the information before me, I have concluded that section 9(2)(b)(ii) provides good reason to refuse to release the last two lines of paragraph 32 from the Interim Report, all of paragraph 33 except for the first sentence, all of paragraph 34, and the contents of the appendix. I have also formed the opinion that sections 9(2)(b)(ii) and 9(2)(d) do not apply to the remaining information that the Ministry refused to disclose, and that even if these grounds were to apply, the public interest in disclosure outweighs the need to protect the information at issue.

## My role

1. As an Ombudsman, I am authorised to investigate and review, on complaint, any decision by which a Minister or agency subject to the OIA refuses to make official information

available when requested. My role in undertaking an investigation is to form an independent opinion as to whether the request was properly refused.

## Background

2. The New Zealand King Salmon Company operates a Chinook salmon farm at Waihinau Bay in Pelorus Sound. The company detected excess mortalities in fish at the farm and notified the Ministry for Primary Industries (MPI) on 1 March 2012. The MPI investigated the mortalities as it has biosecurity responsibilities. The investigation by MPI demonstrated a peak in mortalities during March. It also ruled out significant exotic diseases of salmon. However, no specific cause of the excess mortalities was identified.
3. During the course of the MPI investigation, the New Zealand King Salmon Company (NZKS) instituted voluntary controls relating to the affected farm. These were in place for several months. During this period, the MPI drafted a summary of progress with the investigation titled *“Salmon Mortality 2012 – Interim investigation report into a Chinook salmon mortality event in Pelorus Sound”* (the Interim Report).
4. On 17 July 2012, Mr Andrew Caddie, a committee member of the Kenepuru and Central Sounds Residents’ Association (the KCSRA), made a request for official information in the form of an email to MPI. His request was expressed in the following terms:

*“a copy of any reports you have received from King Salmon as to this outbreak or any external or internal Ministry reports you have prepared or commissioned in respect of this outbreak. Once we have this information to hand our team will review it, and, as appropriate, question the King Salmon executives and their consultants at the Board of Inquiry.”*
5. At the time of Mr Caddie’s request a Board of Inquiry was considering a proposal from NZKS for two plan change requests to the Marlborough Sounds Resource Management Plan and applications for resource consents for salmon farms and salmon farming at nine sites in the Marlborough Sounds.<sup>1</sup>
6. The Ministry discussed the scope of his request with Mr Caddie on 6 August 2012. It was agreed that Mr Caddie would narrow the scope of his request to a summary report on the material captured by his request.

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<sup>1</sup> Details of the Board of Inquiry, including written evidence and transcripts of the hearings, may be accessed at: <http://www.epa.govt.nz/Resource-management/previous/king-salmon/Pages/default.aspx>

7. The Ministry responded to the narrowed request on 16 August 2012, advising:

*“The following information is released to you under the Official Information Act 1982:*

- *Salmon mortality 2012: interim investigation report into a Chinook salmon mortality event in Pelorus Sound.*

*Please note that some information is withheld under Section 9(2)(b)(ii), Section 9(2)(ba)(i) and Section 9(2)(d) of the Official Information Act 1982.”*

8. The Ministry’s letter also provided Mr Caddie with an overview of the investigation process and preliminary findings.
9. On behalf of the KCSRA, Mr Caddie made a complaint to the Ombudsman on 21 August 2012 about the Ministry decision to refuse part of his request. In his complaint, Mr Caddie commented:

*“By way of background, we note that New Zealand King Salmon (NZKS) is currently seeking access to prohibited public space for the purposes of implementing a massive increase in its salmon farm operations. In recent times, there has been media coverage of a significant mortality event in an existing NZKS salmon farm operation in the Pelorus Sound. Within a few kilometres of the operation which suffered the unexplained mortality event, NZKS proposes to install five new salmon farms. NZKS’s proposal has generated significant public opposition and disquiet. A Board of Inquiry has been established to hear evidence for and against the proposal and make a determination.*

*The Association approached the Ministry for information as to the cause of this mortality spike. We made the request in order to assess whether, among other things, the mortality spike indicated that the proposed new salmon farm operations in the immediate vicinity would suffer similar mortality spikes and how this might impact on the sustainability of the NZKS proposal.*

*Unfortunately, the Ministry has seen fit to redact large portions of its investigative report. This prevents both the Association and the Board of Inquiry being better informed as to the sustainability of the NZKS proposals.*

*We submit that the public interest in having access to the full report outweighs the reasons given by the Ministry as to withholding the redacted information.”*

## Investigation

10. The complaint was notified to MPI on 20 September 2012. It was asked to supply a copy of the information at issue and a report explaining the reasons for withholding the information redacted from the disclosed Interim Report.
11. On 19 October 2012, the Ministry responded, enclosing the information and report. It also advised that it was preparing a further report on the investigation, a Final Report, which would be published on the Ministry's website.
12. On 15 April 2013, the Ministry was asked whether the Final Report on the Pelorus Sound Chinook Salmon mortality event had been completed and published. The Ministry advised that it had not yet done so, but expected this would occur by the middle of May 2013.
13. On 30 July 2013, the Ministry informed me that its Final Report (MPI Technical Paper 2013/19) had been completed and published on its website.
14. On 9 October 2013, I consulted NZKS to obtain its views on disclosure of the information at issue.
15. On 22 October 2013, I sought further information and explanation from the Ministry regarding its claim that prejudice to the substantial economic interests of New Zealand would result from disclosure of some of the information at issue. The Ministry provided this information on 25 October 2013.
16. After considering the information at issue, the MPI's reasons for withholding it, the views of NZKS, and other relevant material, I formed a provisional opinion on the complaint and provided this to the Ministry and Mr Caddie for comment.
17. I received comments from Mr Caddie on 23 January 2014. On 5 February 2014 the Ministry indicated that it accepted my provisional opinion. On 30 January 2014, I invited the Ministry to respond to Mr Caddie's comments. I received its reply on 17 February 2014.
18. After considering these further comments and responses, I have formed my final opinion on the complaint.

## Analysis and findings

### Information at issue

19. The information at issue is the material redacted from the Interim Report by MPI. The table below lists the redacted parts of the report, and the grounds under the OIA that the MPI relied upon.

Information redacted from the Interim Report	Section of the OIA relied upon
Contents page listing of the appendix	No section cited, but 9(2)(ba)(i) cited for the appendix itself
Paragraphs 11 to 24	9(2)(b)(ii), 9(2)(d)
Last two lines of paragraph 32	9(2)(b)(ii), 9(2)(ba)(i)
Last two sentences of paragraph 33	9(2)(b)(ii), 9(2)(ba)(i)
Paragraph 34	9(2)(b)(ii), 9(2)(ba)(i)
Paragraph 37	9(2)(b)(ii), 9(2)(d)
Paragraph 44	9(2)(b)(ii), 9(2)(d)
Appendix	9(2)(ba)(i)

## Withheld information now in the public domain

### Contents page

20. The contents page of the Interim Report lists an appendix. The copy of the report provided to me does not indicate the basis upon which this reference was redacted, but since the appendix itself was withheld under section 9(2)(ba)(i), I have assumed that this was the basis of the Ministry's decision. I do not consider that this provides a reason for withholding this information, as the existence of the appendix containing mortality data is referenced in paragraph 29 of the Interim Report, which was disclosed to the requester. If its existence is in the public domain, it cannot be 'necessary' to withhold this information.

### Information contained in the Final Report

21. Some of the information redacted from the Interim Report by MPI was subsequently disclosed by it in the Final Report, as set out in the following table.

Information redacted from the Interim Report	Where the information appears in the Final Report
Paragraph 11	Information from the first sentence, the first half of the second sentence, and the third sentence of paragraph 11 appears in the fourth paragraph of page 3.
Paragraph 12	Information from the first sentence, and the first half of the second sentence of paragraph 12 appears in the fourth paragraph of page 3.

Information redacted from the Interim Report	Where the information appears in the Final Report
Paragraph 13	The first half of the first sentence of paragraph 13 is repeated in the penultimate sentence of the fourth paragraph on page 3. The information in the last sentence of paragraph 13 regarding the location of the OIE laboratory accredited to test for ISAV appears in the first paragraph on page 4.
Paragraph 21	The first half of the second sentence of paragraph 21 appears in the last sentence on page 3. The third sentence of paragraph 21 contains information about the number of samples sent to the laboratory in Norway that appears in the first and third paragraphs on page 12.
Paragraph 22	Paragraph 22 summarises the detailed information that appears on page 12.
Paragraph 24	Paragraph 24 summarises the final sentence of the eighth paragraph on page 11, and the detailed information that appears on page 12.

### Heading on Page 4 and Parts of Paragraphs 11-13

22. This material was withheld under sections 9(2)(b)(ii) and 9(2)(d). I do not consider that these claims for withholding can be sustained, as much of the information has now been placed in the public domain by MPI, on pages 3-4 of its Final Report. There are three exceptions to this, where the information is nevertheless in the public domain:
- a. the reference in the final sentence of paragraph 11 to the occurrence of Infectious Salmon Anaemia Virus (ISAV) in Chile;
  - b. the comparison of ISAV to influenza viruses in paragraph 12;
  - c. the reference in the final sentence of paragraph 13 to the existence of a laboratory for ISAV testing in Canada.
23. It is not necessary to withhold the reference to the existence of ISAV in Chilean farmed salmon; this information is in the public domain.<sup>2</sup>
24. A brief search of the World Wide Web reveals that the viral characteristics of ISAV and the comparison to influenza viruses is also in the public domain.

<sup>2</sup> See, for example, *Marlborough Express*, 9 July 2012, 'Disease ruled out as cause of salmon deaths'. Source: <http://www.stuff.co.nz/marlborough-express/news/7243989/Disease-ruled-out-as-cause-of-salmon-deaths> accessed on 7 August 2013.

25. The location of OIE accredited laboratories is published on the website of the OIE World Organisation for Animal Health.<sup>3</sup> The laboratories are listed by the condition they are accredited to test for.<sup>4</sup> NZKS published a press release on its website on 14 August 2012 mentioning that tests were undertaken in Canada.<sup>5</sup> The testing in Canada is also referred to in an article in the *Marlborough Express* of 19 July 2012.<sup>6</sup> The fact that the OIE had accredited a laboratory in Canada to test for ISAV is clearly in the public domain.

### Second and third sentences of paragraph 21; paragraphs 22 and 24

26. This material was withheld under sections 9(2)(b)(ii) and 9(2)(d). I do not consider that these claims for withholding can be sustained, as this information has been publicly released by MPI in the Final Report. The reference in the second sentence of paragraph 21 to MPI's Animal Health Laboratory (AHL) establishing the capability to undertake testing for ISAV appears in the last sentence of page 3 of the Final Report. The information about the samples sent to the Norwegian Veterinary Institute for testing appears in the first and third paragraphs of page 12 of the Final Report. The Norwegian and New Zealand laboratory results set out in paragraphs 22 and 24 of the Interim Report are included on pages 11 and 12 of the Final Report. I also note that page 2 of MPI's letter to the requester of 16 August 2012 informed him that testing at the AHL and overseas had ruled out ISAV. It is therefore not 'necessary' to withhold this information.

### Unnecessary to consider further these parts of the Interim Report

27. In these circumstances, I do not intend to consider further the withholding of these parts of the redacted report. It is my opinion that they should be released, accompanying the other information I discuss in paragraphs 46 to 92 below.

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<sup>3</sup> The World Organisation for Animal Health was originally known as the Office International des Epizooties, and has retained 'OIE' as its acronym, in spite of the change to its name. Source: <http://www.oie.int/about-us/> accessed on 1 October 2013.

<sup>4</sup> OIE World Organisation for Animal Health, List of Laboratories. Source: <http://www.oie.int/our-scientific-expertise/reference-laboratories/list-of-laboratories/> accessed on 1 October 2013.

<sup>5</sup> New Zealand King Salmon Company Ltd, 'Salmon farm cleared of known diseases', 14 August 2012. Source: [http://www.kingsalmon.co.nz/salmon\\_farm\\_cleared\\_of\\_diseases/index.html](http://www.kingsalmon.co.nz/salmon_farm_cleared_of_diseases/index.html) accessed on 7 October 2013.

<sup>6</sup> *Marlborough Express*, 19 July 2012, 'Niwa: NZ Salmon free of significant diseases'. Source: <http://www.stuff.co.nz/marlborough-express/news/salmon-farms/7309580/Niwa-NZ-salmon-free-of-significant-diseases> accessed on 6 August 2013.

## **Withheld information: claim for withholding under section 9(2)(b)(ii) sustained — unreasonable prejudice to commercial position of NZKS**

### Information at issue

28. The parts of the Interim Report that I consider in this part of my opinion are:
- the last two lines of paragraph 32;
  - paragraph 33, except for the first sentence;
  - paragraph 34; and
  - the appendix.
29. The Ministry refused to disclose this information under both section 9(2)(b)(ii) and section 9(2)(ba)(i) of the OIA.

### General approach to section 9(2)(b)(ii)

30. The full wording of section 9(2)(b)(ii), which provides good reason for the withholding of information in certain circumstances, can be found in the Appendix to this opinion.
31. Generally speaking, this section may apply if:
- a prejudice can be identified to the commercial position of a third party that supplied information to the agency responding to the request; and
  - the predicted prejudice is likely to occur if the information is disclosed, and such prejudice would be unreasonable.

### Application of section 9(2)(b)(ii)

32. The third party whose commercial position is relevant to this withholding ground is the New Zealand King Salmon Company.
33. As noted in paragraph 7 of the Interim Report, this information comprises: *“Current and historical mortality data provided by NZKS [that] was examined for patterns to gain insight into the cause(s) of the event.”*
34. The information includes data on the operations at other salmon farms operated by NZKS, including mortality events.
35. The Ministry has stated in its report to me:

*“Competitors of New Zealand King Salmon would gain advantage from the details described in these paragraphs in itself, and within their context in the report. Management and husbandry practices provide significant competitive advantage in a still developing technical field.”*

36. I consulted NZKS on this matter, and it confirmed MPI's claims in relation to the effect of disclosure.
37. In light of the nature of the information supplied by NZKS, the result of my consultation with the company, and the Ministry's statement in its report to me, I formed the provisional opinion that disclosure of this information would unreasonably prejudice the commercial position of NZKS.
38. In response to my provisional opinion on this aspect of the complaint, Mr Caddie commented:
- *“Your opinion notes that the subject information comprises current and historical salmon mortality data from the affected salmon farm and other NZKS salmon farms. From the evidence presented at the Board of Inquiry, it is clear that salmon farming operations experience mortality events throughout the growing cycle. This is not a secret. Accordingly it seems difficult to see how a competitor would gain an insight or an advantage into NZKS's management or husbandry practices from an analysis of past mortality rates.*
  - *NZKS is the dominant and virtually the sole producer of sea-pen farmed Chinook salmon in New Zealand. Accordingly it is unclear as to exactly who the competitors are that MPI suggests exist.*
  - *MPI seems to lay great store on the fact that NZKS was cooperative in both reporting the mortality spike and supplying information in relation to the same. As far as I can ascertain from the Biosecurity Act, it places a duty on the likes of NZKS to both report and supply relevant information in relation to events of this nature (section 43 and 44). So accordingly for MPI to suggest that it would have been unable otherwise to obtain the information unless it was to be treated as confidential, does not seem to reflect the law or indeed the sweeping powers given to the likes of MPI under the Act. In any event, can you confirm if the relevant information was in fact labelled confidential by NZKS?*
  - *I note also MPI's references to having built into the Biosecurity Act a compensation measure to encourage disclosure of information relating to pests and diseases. A review of that Act shows up many references to compensation but as far as I can ascertain there is nothing specific relating to the Crown being able (or required) to compensate for the disclosure of information as opposed to, say, compensation for stock lost in the course of testing. Do you know the provision that MPI claims to have inserted into the Biosecurity Act?*
  - *By way of general comment, I am left with the feeling that MPI is becoming confused between its role as an advocate of primary*

*industries to the extent it is reluctant to see adverse publicity/information about the operations of the likes of NZKS, and its role as a regulator of the sector. Accordingly, the public interest would be satisfied by the release of the redacted information.”*

39. I invited MPI to respond to Mr Caddie’s comments. MPI responded as follows:

*“In the communication received from ... the Ombudsman’s Office, the main points raised by Mr Caddie consist of five bullet points. These traverse matters already treated in detail by the Ministry for Primary Industries (MPI) during the investigation of this case. As we indicated in our letter of 3 February 2014 to Professor Paterson, MPI concurs with the provisional opinion of the Ombudsman.*

*In relation to the additional commentary, MPI replies as follows.*

*MPI’s initial early summary of the disease investigation was released under the Official Information Act. Some parts of the report were withheld because they contained information that was commercially sensitive, and if disclosed, would likely prejudice the availability of similar information in the future. It is of utmost importance to the public interest that private citizens, farmers, commercial operators and others are confident to share potentially sensitive information to assist biosecurity responses.”*

40. I have considered Mr Caddie’s comments, but am not persuaded to alter my provisional opinion that disclosure would unreasonably prejudice the commercial position of NZKS.

41. Although general information about mortality events throughout the growing cycle of farmed salmon may have been presented at the Board of Inquiry, the information at issue here is specific to particular sites, months and husbandry practices. In terms of competitors to NZKS’s business, although NZKS is the dominant producer of farmed Chinook salmon in New Zealand, it is not the only one. There are Chinook salmon farms in Southland and Canterbury, which the industry body, the NZ Salmon Farmers Association, estimates produces up to 36% of the country’s total farmed salmon.<sup>7</sup> Chinook salmon are also farmed in Chile and Canada. Furthermore, I consider that prejudice to a company’s commercial position can also arise from lowering barriers to entry, and not only from providing information to existing competitors.

42. Mr Caddie is correct to state that NZKS has a duty to report and supply relevant information in relation to events of this nature (sections 43 and 44 of the Biosecurity Act 1993). However, information does not have to be supplied voluntarily for section 9(2)(b)(ii) of the OIA to apply, and neither does it have to be labelled ‘confidential’.

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<sup>7</sup> Source: <http://www.salmon.org.nz/new-zealand-salmon-farming/farming-regions/> accessed on 24 February 2014.

43. In relation to Mr Caddie's comment about a compensation measure in the Biosecurity Act relating to disclosure of information relating to pests and diseases, I note that section 48(2) of that Act makes provision for reimbursement of the "*reasonable expenses of a person who supplied information to a chief technical officer*".
44. As required by section 9(1) of the OIA, I have considered whether, in the circumstances of the particular case, the withholding of the information sought is outweighed by public interest considerations that favour disclosure. (The public interest factors are addressed below, in paragraphs 93 to 107.) In my opinion, the public interest in disclosure does not outweigh the need to protect NZKS from the commercial prejudice that would result. I consider this particularly to be the case given that NZKS provided commercially sensitive information to MPI – albeit under a statutory obligation – swiftly and fully, to assist with the Ministry's investigation. The company should not then be penalised, through release of this information, for its proactive and co-operative stance.

### Section 9(2)(ba)(i)

45. As a consequence of my opinion that this information may be withheld under section 9(2)(b)(ii), it is not necessary for me to consider the application of section 9(2)(ba)(i).

## **Withheld information: claim for withholding not sustained under either section 9(2)(b)(ii) or 9(2)(d)**

### Information at issue

46. The parts of the Interim Report that I consider in this part of my opinion are:
  - the reference in the second sentence of paragraph 11 to Australian government concerns;
  - the Ministry's motivation for testing for ISAV in paragraph 12;
  - the explanation of why the Ministry did not have ISAV testing capability, found in the second half of the first sentence of paragraph 13;
  - the 'standard practice' of contracting testing overseas when the MPI's Animal Health Laboratory (AHL) does not have the capability in the second sentence of paragraph 13;
  - paragraphs 14 to 20;
  - the first sentence and the second half of the second sentence of paragraph 21;
  - paragraph 23;
  - paragraph 37; and
  - paragraph 44.

47. These paragraphs address what prompted MPI to test for Infectious Salmon Anaemia, the testing done by, and the results obtained from, the Atlantic Veterinary College laboratory in Canada. They also relate to MPI's concerns with the Canadian laboratory.
48. The Ministry refused to disclose this information under both section 9(2)(b)(ii) and section 9(2)(d) of the OIA. I consider each of the withholding grounds in turn.

### Application of section 9(2)(b)(ii)

49. The Ministry's report to me on its detailed reasons for withholding the information at issue states (paragraph 9) that information was withheld under section 9(2)(b)(ii) because:

*"If consideration of Infectious Salmon Anaemia were disclosed publicly, there would be a high likelihood of export markets for New Zealand salmon products closing. This would primarily impact the New Zealand King Salmon Company, but also possibly other salmon producing companies outside the Marlborough Sounds. The commercial position of New Zealand King Salmon would undoubtedly be prejudiced."*

50. The report continues (paragraph 14) to explain why the Ministry holds the view that the prejudice to the commercial position of NZKS would be unreasonable:

*"As the diagnosis of Infectious Salmon Anaemia is therefore erroneous, it would be completely unreasonable for New Zealand King Salmon's enterprise to be associated with this disease, and the consequential stigma of such a diagnosis. There would be a loss of reputation for very high standards of animal health."*

51. However, the Ministry had, in its covering letter of 16 August 2012, and in the redacted version of the Interim Report that it had disclosed to Mr Caddie, already disclosed that part of the first objective of its investigation was to determine whether the mortality event was associated with Infectious Salmon Anaemia Virus (ISAV), and that some testing had been undertaken by the OIE-accredited laboratory in Norway. The Ministry had therefore already disclosed that "*consideration*" had been given to whether ISAV might be the cause of the spike in salmon mortalities. I also note that, in addition to the disclosures made to Mr Caddie in August 2012, when the Ministry published its Final Report on its investigation, two paragraphs on pages 3-4 of the report are dedicated to explaining why it tested for ISAV and the results.
52. In light of this, I do not consider that it is necessary to withhold the reference to Australian government concerns in paragraph 11 of the Interim Report; they would be expected in light of the media reporting and public speculation about the causes of the mortality event. Nor do I consider that disclosure of the fact that the Ministry received an enquiry from its Australian counterpart would prejudice the commercial position of NZKS.

53. Paragraph 12 of the Interim Report explains that the Ministry's motivation for testing for ISAV was *"Increasing international interest and the potential reputational and trade impacts on New Zealand as a producer of salmon"*. This is shortened in the third sentence of the fourth paragraph on page 3 of the Final Report to testing being commissioned as *"a risk reduction measure"*. I do not consider that disclosure of the more explicit statement of the Ministry's motivation would prejudice the commercial position of NZKS.
54. The second half of the first sentence of paragraph 13 of the Interim Report explains why MPI did not have ISAV testing capability at the AHL. Although the reason is not stated in the Final Report in the same terms, the second sentence of the fourth paragraph on page 3 of the Final Report states: *"ISAV has not been reported in the scientific literature to cause disease in Chinook salmon."* Since this is the type of salmon farmed in New Zealand, it would not be unreasonable for a reader to conclude that this is why the AHL did not have the capability to test for ISAV. More importantly, I do not believe that disclosure of this information would prejudice the commercial position of NZKS.
55. The second sentence of paragraph 13 of the Interim Report states that it is MPI's *"standard practice"* to contract testing to an international reference laboratory when it does not have the capability at the AHL. It could be argued that is clearly implied by the Ministry's media statement of 10 August 2012, where it stated:<sup>8</sup>

*"The following broad screening techniques were completed by the MPI Animal Health Laboratory (AHL), with referral to New Zealand specialists and overseas laboratories where specialized testing methods or expertise were required."*

56. However, since the material available on MPI's website does not state unequivocally that it is the Ministry's standard practice to contract testing overseas when it does not have the capability at AHL, I have considered whether disclosure of this sentence would unreasonably prejudice the commercial position of NZKS. I do not consider that it would.
57. In relation to the remaining information redacted from the Interim Report under this section, I accept that disclosure may result in adverse publicity for NZKS in the short term. However, I am not convinced by the Ministry's claim that such prejudice is sufficient to meet the threshold of 'unreasonably' prejudicing the commercial position of NZKS.
58. The Ministry bases its claim that the prejudice would be 'unreasonable' on the basis that NZKS and its products would be stigmatised by association with ISAV, given that the subsequent testing demonstrated that the test results from the Canadian laboratory were erroneous. I consider that this underestimates the ability of the public — and biosecurity and food safety regulators overseas — to comprehend the information if it were disclosed, particularly since the Ministry's final report states conclusively that *"ISAV*

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<sup>8</sup> MPI, 'Pelorus Sound Salmon Mortality Investigation', 10 August 2012. Source: <http://www.fish.govt.nz/en-nz/Commercial/Aquaculture/Investigations.htm> accessed on 6 August 2013.

*need not be considered further as a causative agent in this case*". Any risk of prejudice to the commercial position of NZKS could be mitigated if the disclosure of the information at issue were accompanied by a contextual statement from the Ministry. Confidence in NZKS and its produce could be shown to be merited by the company's swift notification of the mortality event to MPI. This, in turn, enabled the Ministry to act promptly. NZKS also put in place a containment strategy (which could be detailed in the contextual statement), which would also build consumer confidence in the measures designed to ensure the safety of their food.

59. It appears that the current approach of the Ministry is to withhold any aspect of the Canadian laboratory's involvement in its investigation, as disclosure of this will inevitably lead to people asking about the results of testing at the Canadian laboratory. This position is less sustainable in light of the fact that New Zealand King Salmon has stated in a press release published on its website that tests were undertaken in Canada.<sup>9</sup> It is quite possible that the requester has noted this reference to testing in Canada. It is also possible that he may have also noted the reference to the possibility that *"King salmon may harbour ISA-like viruses in the carrier state"* contained in evidence submitted by Dr Diggles, in support of the company's application, to the Board of Inquiry that considered NZKS's application to expand its operations in the Marlborough Sounds.<sup>10</sup> In these circumstances, continued withholding of the information at issue may contain greater risks for the commercial position of the company, as accusations of a 'cover up' of the evidence from the Canadian testing may be levelled at it and the Ministry.
60. In conclusion, section 9(2)(b)(ii) provides a basis for withholding the requested information if the prejudice to the commercial position of NZKS would be unreasonable. The Ministry has argued that any association of the company and its products with this disease would be unreasonable. However, given that the overall test results showed that the disease was not present in Chinook salmon, I consider that any association would be minor and that any adverse implications would be readily rebutted, so that there would not be likely to be any unreasonable prejudice to the company's commercial position.
61. However, even if I were persuaded that the section 9(2)(b)(ii) withholding ground applied, I am nevertheless required, by section 9(1) of the OIA to consider whether, in the circumstances of the particular case, the withholding of the information sought is outweighed by public interest considerations that favour disclosure. I consider these issues in paragraphs 93 to 107 below.

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<sup>9</sup> New Zealand King Salmon Company Ltd, 'Salmon farm cleared of known diseases', 14 August 2012. Source: [http://www.kingsalmon.co.nz/salmon\\_farm\\_cleared\\_of\\_diseases/index.html](http://www.kingsalmon.co.nz/salmon_farm_cleared_of_diseases/index.html) accessed on 7 October 2013.

<sup>10</sup> Environmental Protection Authority, 'Statement of evidence of Benjamin Keith Diggles in relation to risks from disease for the New Zealand King Salmon Co. Limited', paragraph 23. Source: <http://www.epa.govt.nz/Publications/18%20Benjamin%20Keith%20Diggles%20-%20Risks%20from%20Disease%20-%20v1.pdf> accessed on 2 October 2013.

## General approach to section 9(2)(d)

62. The full wording of section 9(2)(d), which provides good reason for the withholding of information in certain circumstances, can be found in the Appendix to this opinion.
63. The wording of the section requires that the 'economic interests of New Zealand' involved in the particular case must be identified. It must also be shown that these economic interests are 'substantial', which means that the interests must constitute a real and demonstrably significant part of the country's economy. It is not necessary for an Ombudsman to specify a general threshold, either in terms of monetary amount or proportion of some economic indicator, such as Gross Domestic Product, above which an economic interest is deemed to be 'substantial'. Nevertheless, agencies seeking to rely upon this withholding ground may wish to consider these factors when considering whether this section provides good reason to withhold the requested information. Doing so assists an investigation and review of a decision to refuse a request on this basis.
64. This withholding ground seeks to protect the collective economic interests of New Zealand. While it may potentially apply in relation to information relating to an individual company, this is likely to be the case only in circumstances where that company's performance would have a major influence on the national economy.
65. There must also be a genuine link between disclosure and the prejudice this section seeks to avoid, ie, prejudice to New Zealand's substantial economic interests. Such prejudice cannot simply be a remote or hypothetical possibility. The likelihood of the prejudice occurring must be sufficient for it to be necessary to withhold the information at issue. Obviously, if the Government asserts that there is a credible risk of harm, the Ombudsmen consider this carefully when forming an opinion on the necessity test.

## Application of section 9(2)(d) to this case

### The Ministry's claim

66. The Ministry considers that the economic interests of New Zealand involved in this case are the totality of the country's food exports, not just aquaculture produce as a whole, or salmon in particular.
67. Statistics published by the Ministry indicate that in the year ending 30 June 2011, the export value of agricultural and seafood products was \$27,002 million.<sup>11</sup> This accounted for 61% of total merchandise exports from New Zealand (\$44,234 million).

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<sup>11</sup> Ministry of Primary Industries, 'Primary sector export values for the year ending June 2011'. Source: <http://www.mpi.govt.nz/news-resources/statistics-forecasting/international-trade.aspx> accessed on 24 October 2013. The seafood component of this was valued at \$1,561 million, which was 3.53% of total merchandise exports.

68. ...<sup>12</sup>
69. I sought clarification from the Ministry of the notification requirements, particularly in relation to the obligation to notify the OIE if there was a ‘suspicion’ of Infectious Salmon Anaemia (ISA). I also asked why, if the Canadian laboratory had provided “*early advice*” of its findings, this had not triggered the obligation to notify the OIE.
70. The Ministry explained that there may be various stages in an investigation into an animal health<sup>13</sup> issue. At each stage, the investigator has to assess whether the results of any testing that has been conducted indicate the ‘possibility’ of a particular disease (such as ISA) or the ‘suspicion’ of that disease. If the results at any stage suggest only that there is a possibility of the disease, there is no obligation to notify the OIE, and the investigation continues until there is a clearer picture of the issue in question, and a fresh assessment can be made of whether the obligation to notify the OIE has been triggered. If, however, the results suggest that there is a ‘suspicion’ of a notifiable disease, the OIE must be notified.
71. In email advice of 25 October 2013, the Ministry provided further detail on this distinction and how it applied in relation to the Waihinu mortality event. It explained:
- “The early advice from the Canadian lab relates to initial testing information supplied. Given the unusual conjunction of host species and lack of distinctive clinical signs, the initial testing information supplied by the Canadian laboratory did not meet the requirements of suspicion. This is a professional technical evaluation guided by the criteria set out in the diagnostic manual:*
- [http://www.oie.int/fileadmin/Home/eng/Health\\_standards/aahm/current/2.3.05\\_ISA.pdf](http://www.oie.int/fileadmin/Home/eng/Health_standards/aahm/current/2.3.05_ISA.pdf)*
- Section 7.1 sets out the grounds for suspicion would be at least one of clinical signs consistent, or isolation in cell culture, or virus demonstrated in two independent tests. We consulted in confidence whether the information received would oblige us to notify on this basis, and were advised there was not grounds for suspicion.”*
72. ...
73. ...
74. ...
75. ...
76. ...

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<sup>12</sup> Paragraphs 68 and 72-77 are omitted from this publication version of the Ombudsman’s opinion to avoid any prejudice to New Zealand’s relationship with the OIE.

<sup>13</sup> Subsequent to the provision of this opinion to the Ministry, it clarified that its investigation related to animal health concerns, rather than food safety.

77. ...
78. The Ministry has also advised a wider concern regarding *“the strategic position of aquaculture and the objective of growing it to a billion dollar industry”*. I am aware that the Government has a strategy to increase the size of the aquaculture sector to NZ\$1 billion by 2025.<sup>14</sup> The *Aquaculture Strategy and Five-year Action Plan to Support Aquaculture* states that New Zealand’s *“environmental and food safety credentials are second to none”* and that growth of the sector will *“leverage off our clean green reputation; world-leading environmental, food safety, animal health and welfare standards; and biosecurity management to secure premiums and market share”*. The same document notes that amongst the country’s advantages for increasing market share in higher-value markets is that: *“We have world-leading food safety, animal health and animal welfare standards. International markets want to do business with us because their people demand safe food.”*
79. In summary, the Ministry’s claim for withholding is that disclosure of the information at issue will:
- a. reveal that it commissioned testing from the (then) OIE accredited laboratory in Canada;
  - b. reveal that it had doubts about the results from this accredited laboratory, such that it did not immediately respond in what might be perceived by others to be the prescribed manner to the information that suggested that a notifiable disease had been detected;
  - c. create the impression that New Zealand is undermining the international food safety standards and the mechanisms that it has previously championed; and
  - d. have such a significant detrimental effect on New Zealand’s reputation for compliance with, and credibility for upholding, the regulatory frameworks designed to protect food safety and biosecurity that there would be a major impact on food exports from the country in general, and the growth prospects of the aquaculture sector in particular.

## Analysis of the Ministry’s claim for withholding

### IS IT AN ECONOMIC INTEREST?

80. The first issue to examine is whether there is an economic interest of New Zealand involved.

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<sup>14</sup> Ministry of Primary Industries, ‘Aquaculture Strategy’. Source: <http://www.fish.govt.nz/en-nz/Commercial/Aquaculture/Aquaculture+Strategy/default.htm> accessed on 7 October 2013.

81. The MPI has asserted that the economic interest in question is New Zealand's food exports. There can be little doubt that exporting food is an economic interest of the country.

#### IS IT A 'SUBSTANTIAL' ECONOMIC INTEREST?

82. This being the case, the second question is whether the economic interest involved is large enough to be described as 'substantial'.
83. The total value of New Zealand's food exports undoubtedly constitute a 'substantial' economic interest. As previously noted, in the year ending 30 June 2011, the value of agricultural and seafood products exported from New Zealand was \$27,002 million,<sup>15</sup> which constituted 61% of total merchandise exports from the country.
84. It is less clear whether the whole aquaculture industry, or salmon farming on its own, would constitute a 'substantial economic interest'. Information published by the Ministry indicates that in 2011, the export value of aquaculture products was \$301 million. Aquaculture was therefore 1.11% of the value of total food (agricultural and seafood) exports, and 0.68% of the value of total merchandise exports. The trade body, Aquaculture NZ, has reported that sales of salmon in 2011 generated export revenue of \$63.4 million.<sup>16</sup> Salmon exports therefore constituted approximately 0.23% of agricultural and seafood exports, and 0.1% of the value of total merchandise exports from New Zealand.

#### CAN ALL NEW ZEALAND'S FOOD EXPORTS BE INCLUDED?

85. Is it reasonable to include *all* of New Zealand's food exports when considering whether substantial economic interests are at risk? The Ministry argues that the possible prejudice that might be caused by disclosure spreads beyond salmon exports to include not just all aquaculture exports, or even all seafood exports, but *all* food exports from the country. I am not fully convinced that this is the case, but I am willing to proceed on that basis and to consider the nature of the claimed prejudice.

#### IS THERE A REAL RISK OF 'PREJUDICE' TO SUBSTANTIAL ECONOMIC INTERESTS?

86. Assuming that all New Zealand food exports can be treated as the relevant economic interest, it is clear that this is a substantial economic interest. I must then consider the nature and likelihood of the claimed prejudice.

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<sup>15</sup> Ministry of Primary Industries, 'Primary sector export values for the year ending June 2011'. Source: <http://www.mpi.govt.nz/news-resources/statistics-forecasting/international-trade.aspx> accessed on 24 October 2013. The seafood component of this was valued at \$1,561 million, which was 3.53% of total merchandise exports.

<sup>16</sup> Aquaculture New Zealand, 'New Zealand Aquaculture: A sector overview with key facts, statistics and trends'. Source: <http://aquaculture.org.nz/wp-content/uploads/2012/05/NZ-Aquaculture-Facts-2012.pdf> accessed on 24 October 2013.

87. In relation to the fact that it did not immediately notify the relevant agencies that the initial Canadian test results suggested there was suspicion of Infectious Salmon Anaemia, the Ministry has provided a reasonable explanation. Although the information at issue in the Interim Report does not touch on the question of notifying the OIE, the Ministry would be able to advise, in a contextual statement accompanying release, that the threshold for formal notification was not reached. I note that MPI's Final Report states unambiguously: *"At no time were the OIE criteria for confirmation of infection fulfilled."*
88. Further — as MPI indicated in paragraph 19 of its report to me — the Ministry mitigated the possible effect of the event on salmon exports by reassuring its counterparts in trading partners such as Australia, Canada and the United States, that *"competent interim measures were in place"*.
89. I accept the possibility that disclosure of the Ministry's reservations regarding the testing undertaken by the Canadian laboratory may stimulate discussion at meetings of the World Organization for Animal Health or bilaterally with overseas counterparts. However, I note that the relevant laboratory is no longer accredited to test for Infectious Salmon Anaemia. I anticipate that MPI would be able to answer any potential criticism.
90. It might be expected that the harm envisaged by MPI would already have occurred following the initial news reports and the release of the Final Report. MPI has not advised of any such harm, nor have I seen any critical media coverage.
91. Overall, I am not persuaded that disclosure of the information at issue would have the breadth and severity of impact suggested by the Ministry. Nor am I convinced that the prejudice envisaged by the Ministry is so likely to occur as to make withholding 'necessary'.
92. Even if I were to be persuaded that section 9(2)(d) provided good reason to withhold the information at issue, section 9(1) of the OIA requires consideration of whether, in the circumstances of the particular case, the withholding of the information is outweighed by public interest considerations that favour disclosure. I consider these issues below.

### **Public interest — section 9(1)**

93. The full wording of section 9(1) can be found in the Appendix to this opinion.
94. Section 9(1) of the OIA requires that the agency responding to a request for official information *must*, if it believes one of the withholding grounds described in section 9(2) provides good reason to withhold some or all of the information sought, consider whether, in the circumstances of the particular case, the withholding of the information is outweighed by public interest considerations that favour disclosure. An agency must consider whether the balance of public interest favours withholding or disclosure, before making its decision on a request.
95. I note that neither the Ministry's letter to Mr Caddie of 16 August 2012, nor its report to me on its decision on the request, indicates that the Ministry has considered whether the public interest in disclosure might outweigh the reasons for withholding.

96. In this instance I consider the public interest in release of the information at issue, identified in paragraphs 20-22 and 46 above, to be strong, and to outweigh the withholding grounds. I have identified several public interest factors favouring disclosure of the information at issue.
97. First and foremost is the contribution that disclosure would make to public confidence in food safety and prevention of biosecurity incursions. There can be no doubt of the significant public interest in this matter, given the substantial statutory framework on this issue, and the swiftness with which the Ministry acted once it had been notified of the mortality event by NZKS.
98. The Interim Report (at paragraph 5) notes that domestic and international stakeholders “*expect competent and demonstrably thorough investigation*”.
99. I consider that there is a significant public interest in the public knowing the full picture of how the Ministry prudently carried out its regulatory functions in the area of food safety and disease control. The public, as the ultimate consumers of food products, has a legitimate interest in knowing about the testing in the Canadian laboratory commissioned by the Ministry, why the Ministry had doubts about the test results, and what it did to put those doubts to rest.
100. Disclosure of the information relating to the testing undertaken by the Canadian laboratory would also remove any unfounded suspicion that the Ministry in some way favoured NZKS (or the aquaculture sector more broadly) over its food safety and biosecurity responsibilities. It would present the full picture of the Ministry’s investigation. There is already a limited amount of information in the public domain relating to the testing in Canada (the NZKS press release) and concerning Canadian research which might indicate that Chinook salmon may carry “*ISA-like viruses*” (eg, Dr Diggles’ evidence to the Board of Inquiry). Withholding the information at issue, in relation to what is already in the public domain, may serve to exacerbate any concerns regarding the Ministry’s role. Disclosure of the information relating to the Canadian testing for ISAV — particularly if accompanied by a statement from the Ministry that appropriately contextualised the material in the Interim Report — may help allay any unfounded concerns.
101. I note the following statement by the Information Commissioner of Ireland, in a decision made in 2000 relating to the food safety and disease control responsibilities of the Department of Agriculture and Food:<sup>17</sup>

*“I consider that there is a significant public interest in the public knowing how the Department carries out its regulatory functions in the area of hygiene and food safety and the control of disease. I consider that the public, as the*

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<sup>17</sup> Office of the Information Commissioner, ‘ABC Ltd and DEF Ltd and the Department of Agriculture and Food’, Case 98198. Source: <http://www.oic.gov.ie/en/Decisions/Decisions/ABC-Ltd-and-DEF-Ltd-and-the-Department-of-Agriculture-and-Food1.html> accessed on 29 October 2013.

*ultimate consumers of food products, has a legitimate interest in knowing information of the nature that is contained in these records.”*

102. Broadly speaking, these two factors are related to the accountability purposes of the OIA, identified in section 4(a)(ii).
103. A separate public interest in disclosure arises from the timing of Mr Caddie’s request to the Ministry for the Interim Report and the context in which it was made.
104. At the time that the request was made to the Ministry, the process for considering the New Zealand King Salmon Company’s request for changes to the Marlborough Sounds Resource Management Plan was well under way, and the Board of Inquiry public hearings were to begin the following month. As the Ministry notes in paragraph 11 of the Interim Report, the mortality event in the Pelorus Sound was public knowledge. The combination of the event and the application for expansion of NZKS operations in the Sounds meant that there was public curiosity about the event and discussion of its possible implications for the company’s application.
105. It is well established that public curiosity is not the same as public interest. However, as Mr Caddie made clear in his request to the Ministry of 17 July 2012, he was making his request on behalf of a community association making a submission to the Board of Inquiry, and his interest in the information related to the association’s intention to put questions to NZKS and its consultants during the hearings. This is undoubtedly a public interest activity. In spite of the subsequent laboratory testing demonstrating that the Canadian results were erroneous, disclosure of the information about the testing in Canada would have enabled the community association to question the company’s consultant on marine biosecurity and disease issues, Dr Diggles, more effectively on his evidence. It would also have contributed to the quality of public debate on a matter of public interest — particularly if the Ministry had accompanied disclosure of the information with an explanatory statement. ‘More effective’ public participation in the making and administration of laws and policies is described in section 4(a)(i) of the OIA as being one of the purposes of the Act.
106. I consider that there was a strong public interest in making the information available so as to enable the association — and the public more broadly — to more effectively participate in those ongoing matters.
107. In short, I consider that the significant public interest in the public knowing how the Ministry discharged its regulatory functions in the area of food safety and biosecurity outweighs the public interest in withholding this information.

## Ombudsman's opinion

108. For the reasons set out above, I have formed the opinion that:

- a. the reference to the appendix from the contents page, the heading at the top of page 4 of the Interim Report, paragraphs 11, 12, 13, the second and third sentences of paragraph 21, and paragraphs 22 and 24 are information that is in the public domain and consequently there is no good reason to continue to withhold them;
- b. section 9(2)(b)(ii) provides good reason to withhold only the last two lines of paragraph 32, all of paragraph 33 (except for the first sentence which has already been released), all of paragraph 34, and the contents of the appendix, and that the public interest in disclosure does not outweigh the reasons for withholding this information; and
- c. sections 9(2)(b)(ii) and 9(2)(d) do not provide good reason to refuse to disclose paragraphs 14-20, the first sentence of paragraph 21, and paragraphs 23, 37 and 44 of the Interim Report, but even if I were to be persuaded that this were the case, the public interest in disclosure outweighs interests in withholding.

## Appendix — Relevant statutory provisions

### Official Information Act 1982

#### 4. Purposes

The purposes of this Act are, consistently with the principle of the Executive Government's responsibility to Parliament,—

- (a) to increase progressively the availability of official information to the people of New Zealand in order—
  - (i) to enable their more effective participation in the making and administration of laws and policies; and
  - (ii) to promote the accountability of Ministers of the Crown and officials,—  
and thereby to enhance respect for the law and to promote the good government of New Zealand:
- (b) to provide for proper access by each person to official information relating to that person:
- (c) to protect official information to the extent consistent with the public interest and the preservation of personal privacy.

#### 5. Principle of availability

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act otherwise expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is good reason for withholding it.

#### 9. Other reasons for withholding official information

- (1) Where this section applies, good reason for withholding official information exists, for the purpose of section 5, unless, in the circumstances of the particular case, the withholding of that information is outweighed by other considerations which render it desirable, in the public interest, to make that information available.
- (2) Subject to sections 6, 7, 10, and 18, this section applies if, and only if, the withholding of the information is necessary to—
  - (b) protect information where the making available of the information—
    - (i) would disclose a trade secret; or
    - (ii) would be likely unreasonably to prejudice the commercial position of the person who supplied or who is the subject of the information; or

- (ba) protect information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information—
  - (i) would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied; or
  - (ii) would be likely otherwise to damage the public interest; or
- (d) avoid prejudice to the substantial economic interests of New Zealand.