NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Report 12-113

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THE REQUEST FOR REVIEW

This Request for Review arises out of a Request for Information made to the Department of Energy and Natural Resources by a research organization for specific information about polar bear harvesting. In particular, the request was for:

> ...the following data from your Wildlife Export Permit and Hunter Kill Forms for non-subsistence polar bear harvests occurring between January 1, 2002 and the date this request is received, the date of the harvest, the coordinates/location of the harvest, the sex of the bear, the polar bear population, the type of kill (i.e. sport hunt/trophy), the hunter's town and country of residence, and the city and country to which polar bear parts are to be exported, if applicable.

In response, the public body provided records containing some, but not all of the information requested. They refused to disclose the latitudinal and longitudinal information related to bear kills on the basis that it "would identify locations where these animals are found". They relied on the *Species at Risk Act (NWT)*, section 146 which provides that, notwithstanding Part I of the *Access to Information and Protection of Privacy Act*, the Minister may direct that information not be disclosed under that *Act,* if:

> the Minister considers that disclosure of the information could result in an additional risk to, or could be detrimental to, the survival or recovery of a species that SARC has, in an assessment, categorized as a data deficient species, a species not at risk, a species of special concern, a

> threatened species, an endangered species, an extirpated species or an extinct species.

The acronym “SARC” refers to the “Species at Risk Committee” established under the *Species at Risk Act* of the Northwest Territories. The public body goes on to point out that the polar bear has been identified as a species of Special Concern under the federal *Species at Risk Act*.

THE APPLICANT’S POSITION

In submitting their Request for Review, the Applicant addressed the public body’s stated reasons for refusing to disclose the latitudinal and longitudinal information requested.

Firstly, they point out, correctly, that the *Access to Information and Protection of Privacy Act* provides a strong presumption in favour of public access to government records. They refer, in particular to Section 5(1) which provides that every person has a right to access to any record in the custody or under the control of a public body. They further point out that, public bodies are required by Section 7(1) of the Act to “respond to an applicant openly, accurately, completely and without delay” and that section 8(1) provides that the response must be provided within 30 days after the Request for Information is received. Finally, they point out that where the public body refuses to disclose a record or a part of a record, section 33 requires that the public body establish that the Applicant has no right of access to the record.

From this starting point, they then address the Department’s reliance on section 146 of the Northwest Territories *Species at Risk Act* (SARA).

They argue that section 146 of *SARA* cannot apply to the records in question. They say that, while the Committee on the Status of Endangered Wildlife in Canada (COSEWIC), a federally constituted independent committee of wildlife experts and

scientists established to identify species at risk in Canada, has assessed and categorized the polar bear at the federal level, SARC, established under *SARA* has not yet assessed or categorized any species. Because *SARA* only exempts disclosure for species that SARC has already assessed, the disclosure exemption does not apply.

Furthermore, the Applicant argues that it is basic and well accepted polar bear biology that "polar bears travel over exceedingly large areas relative to other terrestrial mammals" and their distribution and movement depends on the seasonal and annual variation of sea ice[1]. For example, they argue, in the Beaufort Sea, total annual movements of radio elementary-tracked polar bears averaged 3415 km and ranged up to 6200 km. Further, while the research shows that polar bears seem to seasonally prefer "core" regions, these home ranges are vast - in the Beaufort Sea region, the annual activity areas for female polar bears averaged 149,000 square km and in the High Arctic, female home ranges can extend up to 964,264 square km. They argue that these facts suggest that it is difficult to imagine how the location of one, or even a number of bears at a specific point in time could identify the location of other polar bears, much less result in any additional risk to polar bear survival or recovery. Consequently, they say, the Department's use of section 146 of SARA is unreasonable, unjustified and lacks scientific support.

Finally, the Applicant advises that essentially the same request for information was made to the Department's counterpart in Nunavut and the public body in that jurisdiction promptly provided all of the requested records, including latitudinal and longitudinal specifics. In fact, the Request for Information in Nunavut was treated as a routine disclosure, not requiring a request under the ATIPP Act, as the information was deemed to be "publicly available".

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[1] COSEWIC Polar Bear Assessment, 2008

THE DEPARTMENT'S ARGUMENT

With respect to the SARC Assessment required by section 146 of the *SARA*, the public body argues that the federal and the territorial legislation in relation to Species at Risk are integrally linked. In 1996, the Minister responsible for wildlife for the Government of the Northwest Territories signed a national accord for the protection of species at risk recognizing commitments to designate species at risk, protect their habitats and develop recovery plans. The accord acknowledges that

> no single jurisdiction can effectively protect species at risk. Partnerships are crucial. Governments have agreed to play a leadership role by developing complimentary legislation, regulations, policies and programs to identify and protect threatened and endangered species and their critical habitats[2]

They go on to say that polar bears are listed as a species of Special Concern by COSEWIC and are listed as a "Species of Special Concern" under the federal *Act Respecting the Protection of Wildlife Species at Risk. This means that it may become a threatened or an endangered species because of a combination of biological characteristics and identified threats, including over-hunting.* The Government of the NWT, they argue, relies on both the federal and territorial Species at Risk Acts to protect vulnerable species in the NWT. These two pieces of legislation are intended to complement one another. The federal law has paramountcy over the NWT law and federally serves as a backstop piece of legislation to ensure protection of species at risk. If the NWT legislation does not protect the species, they argue, the federal legislation does. They admit that the SARC established under the territorial Act has not yet assessed or categorized the polar bear or, in fact, any species, though there are plans to do so this winter. The

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[2] Http://www.sararegistry.gc.ca/approach/strategy/accord_bac_e.cfm #History

public body, therefore, relies on the federal assessment by COSEWIC.

The public body has also referred me to section 124 of the federal *Species at Risk Act*, which provides that "the Minister, on the advice of COSEWIC*,* may restrict the release of any information required to be included in the public registry if that information relates to the location of a wildlife species or its habitat and restricting its release would be in the best interests of the species". They did not provide me with any evidence that the federal Minister was consulted on this issue, or that COSEWIC had provided advice to the federal Minister to restrict access to the records requested.

With respect to the Applicant's argument that the scientific evidence did not justify a refusal to disclose the information/records in question because polar bear movement is so vast, the department disagrees. The Department indicates that polar bear harvest data has been analyzed to assess the risk to polar bears by the disclosure of the longitudinal and latitudinal information requested. To do this, the department plotted polar bear kill sites on a map and analyzed it to determine if there were some sites where one might reasonably determine where polar bears might frequent. Added to this were satellite collar locations of polar bears from 2000 to 2006 to see if patterns of higher density areas were found. Based on this, they concluded that there are areas where hunters could "reasonably assume a live polar bear could be found" and, in particular, areas where higher clusters of successful sports hunts were compared to a high concentration of satellite collar bears in given areas over a period of time. They concluded that polar bears appear more frequently in certain geographic areas and that, given the concentrated areas, it would be reasonable to assume that any other person or persons plotting the data would also be able to identify geographic locations where polar bears could be more likely to be found.

According to the public body:

> It is of significant concern for ENR that the release of information pertaining to this species at risk would ultimately result in a greater

> frequency of harvesting, which would be detrimental to the health of polar bear populations. According to the Species at Risk Register, the main limiting factor affecting the species is hunting. In the NWT all polar bears are found in an area with a wildlife co- management system as set out under the Inuvialuit Final Agreement - a land claim agreement. Under section 14(6) of that Agreement provides that the Inuvialuit have the exclusive right to harvest polar bear throughout the Western Arctic Region. Harvesting is regulated through a tag allocation system which is based on subpopulation polar bear surveys and recommendations by Boards formed under the land claim agreement.

There is some evidence that sport hunters have a lower rate of success than subsistence hunts “because dog teams are used instead of snowmobile”. A study done in 2008 suggested that only 55% of sports hunts were successful. In ENR’s view, the release of harvest information would lead to greater knowledge of the likely location of polar bears adding to their vulnerability by human caused mortality and could lead to increased success rates of harvesting of polar bears among both subsistence and sports hunters, and potential poaching. Therefore, ENR argues that disclosure of this information would interfere with the conservation of polar bear as the information might be used by those harvesting legally and illegally to increase the likely success of a polar bear hunt.

In the event that it is determined that section 146 of the SARA does not apply in this circumstance, the public body relies on section 19 of the *Access to Information and Protection of Privacy Act*. That section reads as follows:

> The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to result in damage to or interfere with the conservation of
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> (a) fossil sites or natural sites;
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> (b) sites having an anthropological or heritage value or aboriginal cultural significance; or

(c) any rare, endangered, threatened or vulnerable form of life.

While there was no reference to this section of the ATIPP Act in the public body's initial response to the Applicant, it did refer to the section in its submissions to my office.

DISCUSSION

The provision of the SARA relied on by the public body to remove the jurisdiction of the Information and Privacy Commissioner is narrowly drafted. Because the rule in access to information matters is always a presumption that a record should be disclosed, it is anticipated that any exemption relied on must fall squarely within the parameters outlined in the legislation. Section 4 of the *ATIPP Act* provides that:

> If a provision of this Act is inconsistent with or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, prevails notwithstanding this Act.

Accordingly, if a provision in another Act does not squarely remove the records in question from disclosure under the ATIPP Act, the ATIPP Act applies. In this case, it is clear that SARA only gives the Minister the discretion to refuse disclosure where there has been an assessment by the Species at Risk Committee established under the auspices of the *Species at Risk Act*. The public body readily admits that there have been no such assessments to date. Section 146 cannot, therefore, apply. It is not sufficient to rely in reference to provisions in another Act or assessments made by another committee to deny access. To do so would require an "and" or an "or" with reference to the federal legislation/regulations. I am satisfied that section 146 of the SARA does not provide the Minister with the discretion to deny access to the records in question.

That said, section 19 of the *Access to Information and Protection of Privacy Act* does apply. Though it was not relied on in the first instance, the Department did make passing mention to the section in its submissions to me, which were provided to the Applicant for their further input, though none was received.

Section 19 of the *Access to Information and Protection of Privacy Act* gives the Minister a discretion to refuse to disclose information where the disclosure could "reasonably be expected to" result in damage to or interfere with the conservation of a rare or endangered, threatened or vulnerable form of life". It is to be noted that this is a discretionary exemption which means that the public body not only has to establish that there is a reasonable expectation that the damage would occur to a vulnerable form of life, but also has to show that it has exercised its discretion, keeping in mind the presumption of disclosure implied by the Act. As noted by the Applicant, the onus is on the public body to establish that the Applicant has no right of access to any given information.

In this case, I have two arguments before me - one which suggests that the longitudinal and latitudinal information could not possibly identify where polar bears might be found and one which suggests that this information is likely to allow a more accurate estimation of where the animals might be. I am not a polar bear expert and am, therefore, not in a position to weigh the efficacy of the two sides of the argument. I am, however, satisfied, based on the information provided by both the public body and the Applicant that the polar bear is a species that has challenges and is at some danger in terms of its survival. This is apparent from the COSEWIC assessment and analysis done by the federal equivalent to the Northwest Territories' SARC. The real question is whether the disclosure of the latitudinal and longitudinal kill sites over the last 10 years will create a clear enough picture of the likely location of polar bears such that the success rate of sport hunts will increase dramatically or, perhaps more importantly, allow for more successful poaching possibilities and illegal harvests. I am mindful of the doubt that the Applicant has cast on the department's argument with its research results from a number of sources indicating that polar bears have a very

large territory and that the disclosure of a single bear's location at harvest does not indicate the location of any other bear at that time, or the location of any bear in the future. On the basis of pure logic, this makes a lot of sense. That said, I am also sensitive to the fact that my understanding of the research is extremely limited, and based only on what each of the parties has argued. I am persuaded, based on the records provided to me for the purpose of this review, that the public body has established that polar bears appear more frequently in certain geographic areas and that, given the concentrated areas, it is reasonable to conclude that a sport hunter seeking a polar bear hunt experience would try to focus on those areas which, while vast, are not so vast as to prevent more accurate guesses about where and how to find a polar bear. Legitimate sport hunters aside, more important perhaps is the possibility that those who hunt polar bear for sustenance and those who hunt illegally might be able to take advantage of this information to focus their hunts more specifically. The legitimate sport hunt can be controlled by the number of licenses awarded each year. Those who ignore the law and those who depend on the polar bear and other traditional foods are harder to monitor and control.

The onus is on the public body to establish that the disclosure could reasonably be expected to result in damage to or interfere with the conservation of the polar bear. While the Applicant may not agree with the analysis provided by the public body, I am satisfied that the public body has raised legitimate and reasonable concerns about the disclosure of the information. It is to be noted that once information is disclosed to the Applicant, there are no restrictions on how that information might be used or further disclosed. The Applicant may well choose to post the information on the internet for all to see. Widespread knowledge of the latitudinal and longitudinal coordinates of kill sites could allow hunters to estimate with far more accuracy where a polar bear might be found. The public body has established that there is a reasonable expectation that further damage to the species could occur.

It is to be noted that the Applicant in this case also raised the issue of the public body's late response to their request for information. Without going into detail, it

appears that the public body missed the 30 day response date by about a week. Because the Applicant did receive the information it requested and I was asked to review the response on a substantive basis, however, I have determined that there is no reason to complete a review of the late response. I would say only, at this point, that it is important that public bodies comply with the response time provided in the legislation and that there should be good procedures in place to ensure that this is done.

CONCLUSIONS AND RECOMMENDATIONS

Based on the above, I am satisfied that the public body has met the onus placed on it pursuant to section 33 of the Act to establish that the Applicant has no right of access to the longitudinal and latitudinal specifics relating to polar bear kill sites. While the Applicant and the public body may disagree on a scientific level as to whether or not this information would constitute a danger to the polar bear population, I am satisfied on a more basic level that the public body has provided enough evidence to support its conclusion that the disclosure of this information would be “reasonably expected” to create dangers for the polar bear population. I therefore recommend that no further information be disclosed.

Elaine Keenan Bengts
Information and Privacy Commissioner