Federal Court Cour fédérale

Date: 20210122

Docket: T-1834-17

Citation: 2020 FC 1166

Ottawa, Ontario, January 22, 2021

PRESENT: Mr. Justice Pentney

BETWEEN:

CONCORD PREMIUM MEATS LTD.

Applicant

and

CANADIAN FOOD INSPECTION AGENCY AND THE ATTORNEY GENERAL OF CANADA

Respondents

PUBLIC JUDGMENT AND REASONS

(Confidential Judgment and Reasons issued December 18, 2020)

[1] Concord Premium Meats Ltd. (Concord) applies under section 44 of the *Access to Information Act*, RSC 1985, c A-1 [*Act*] for judicial review of the decision by the Canadian Food Inspection Agency (CFIA) to release certain records. The records relate to a study done of the contents of sausages sold by various companies in Canadian stores, and the CFIA's follow-up on the results.

[2] Concord argues that the information should be protected because it is confidential commercial or technical information supplied by Concord to the CFIA, and that the disclosure of these records could reasonably be expected to cause Concord material losses and interfere with its negotiations with grocery stores that carry its products. Concord says that the *Act* specifically provides for the protection of this sort of information, and that the records relating to it satisfy the legal requirements.

[3] Concord's fear of harm arises because an article published about the study made certain allegations that it says were unfounded, which in turn resulted in negative press reporting. This negative coverage was repeated when an update to the first study was published. Concord has not been connected with the results of this study yet, but the CFIA proposes to disclose documents that would make that link. Concord submits that releasing these records will inevitably lead to negative reporting, thereby causing it material harm.

[4] The CFIA argues that much of the information that Concord is complaining about is either already in the public domain or should be disclosed because Concord's evidence does not meet the stringent threshold for non-disclosure established by the case law. It says that this Court has never prevented disclosure of regulatory inspection reports, including prior cases involving food inspections conducted by the CFIA.

[5] Subsequent to the hearing, the CFIA accepted to redact further information based on information provided by Concord. It also proposed to include an explanatory note with the documents in order to address certain other concerns expressed by Concord.

[6] The CFIA argues that Concord has not established that its commercial interests are likely to be harmed, and therefore the public interest in disclosure should prevail.

[7] For the following reasons I am dismissing this application.

I. Background

[8] In January and February 2016, samplers hired by CFIA collected a total of 100 sausages from various retail stores in Montreal, Toronto, and Calgary. They only collected sausages labeled as containing a single ingredient: pork, beef, chicken, or turkey. The purpose of the study was to examine whether a particular testing methodology could accurately determine the contents of the sausages and, in particular, whether any other meat products were included beyond what was stated on the label.

[9] The abstract of an article that was later published in the *Food Control* journal (Amanda M Naaum et al, "Complementary molecular methods detect undeclared species in sausage products at retail markets in Canada" (2018) 84 *Food Control* 339, Applicant's Record at 237) summarizes the background and main results of this study:

> Accurate food labelling is of utmost importance for food safety and consumer choice in the food chain. Complete or partial substitution, whether intentional or unintentional, may introduce food pathogens or allergens to a product or affect personal or religious beliefs. Several studies around the world have reported different degrees of species substitution in meat products but no similar studies have been conducted in the Canadian market for sausage products.… All samples contained the predominant species matching the label species except for five turkey sausages which contained chicken as the predominant species. Second, this analysis showed that 6% of beef sausages also contained pork, 20% of chicken sausages contained turkey while 5% contained beef, and 5% of pork sausages also contained beef.… The overall

> mislabeling rate detected in this study was 20% and the results provide a baseline for assessing species mislabeling in processed meat products in Canada.

[10] The authors explain that "the increased and improved testing for horse in meat products throughout Europe has brought light to, and helped mitigate, one of the largest food scandals in recent history" (Confidential Certified Tribunal Record (CCTR) at 237). The authors note that horse meat was detected in one sample of pork sausage among the 100 sausages sampled in the study. It was subsequently revealed that the CFIA was not able to follow up on the horse meat issue, because the company that produced it had voluntarily ceased operations. It should be noted here that Concord had absolutely no association with the horse meat contamination, and none of the records suggest otherwise.

[11] The publication of this article on July 31, 2017, generated some media coverage, which will be described in more detail below. A few days later, on August 4, 2017, the CFIA received the following access to information request under the *Act*:

> I am seeking records relating to a study commissioned by the CFIA and performed by Assistant Professor Robert Hanner of the University of Guelph about the speciation of sausages. I am requesting the identities on [*sic*] of the companies who manufactured the 100 sausages, the sausages [*sic*] brand names, which retail locations they were bought from and CFIA investigation records related to the 20 sausages that contained undeclared meat, including but not limited to the company that voluntarily shut down that had made a pork sausage that included horse meat. I would like the records in electronic form.

[12] The CFIA searched its files and identified 177 pages of records relating to Concord arising from this request (it also identified records relating to other producers, but these are not before the Court). On October 13, 2017, the CFIA sent a letter to notify Concord of the request

and to seek its input on the preliminary decision to disclose the records. Unfortunately, it appears that this letter was misplaced within the company; in any event, no response was provided.

[13] On November 3, 2017, the CFIA sent a letter to Concord indicating that it was going to disclose the records to the requester since no reply had been received to its earlier correspondence, and noting that Concord could apply to this Court for judicial review within 20 days of the notice. Upon receipt of this letter, the Chief Executive Officer of Concord immediately contacted the CFIA Access to Information officer to explain that he had not seen the earlier correspondence, and the parties agreed that Concord would have a further period to provide its response.

[14] Concord retained legal counsel and provided its response on November 24, 2017, setting out the basis for its concerns about disclosure of some of the records and proposing further redactions to protect certain commercially sensitive information, as well as personal information relating to Concord employees.

[15] On November 27, 2017, the CFIA made its final decision regarding disclosure, accepting some of Concord's proposed redactions. It agreed not to disclose: personal information about Concord employees; the names and contact information of suppliers and clients; internal company documents; references to testing done by Concord at specific establishments; and the amount of meat product received in relation to the amount of meat product traced through the production cycle.

[16] On November 29, 2017, Concord filed its application for judicial review of this decision. Originally, Concord also sought interlocutory relief because the CFIA had taken the position that

it was going to disclose the records on December 2, 2017. This was resolved prior to the hearing of that request and the CFIA agreed not to make any disclosure until the application for judicial review was determined.

[17] Subsequent to the hearing, it was confirmed that certain records are no longer in dispute. At the hearing, Concord had expressed concerns regarding some inconsistencies in the CFIA's redactions relating to customer information and certain references to Concord's Hazard Analysis Critical Control Point (HACCP) system, a highly confidential internal document that is essentially Concord's blueprint for plant safety. Following the hearing, the CFIA accepted that these records would not be disclosed.

[18] In addition, following the hearing the CFIA undertook that it would include an explanatory note seeking to explain and clarify aspects of the records in order to mitigate certain of the harms feared by Concord. This will be explained in greater detail below.

[19] A final procedural point – on November 2, 2018, Justice Richard Southcott issued a Protective and Confidentiality Order pursuant to Rules 151 and 152 of the *Federal Courts Rules*, SOR/98-106, and subsection 47(1) of the *Act*, to preserve the confidentiality of information in documents filed in these proceedings. This Order was extended at the hearing to protect that information pending the issuance of this decision.

[20] In view of the nature of the case, and the Confidentiality Order, confidential reasons were released to the parties and they were given an opportunity to propose redactions for consideration by the Court. The public version of these reasons reflect the Court's consideration of that input, consistent with the open courts principle.

II. Issues

[21] Although the parties express them somewhat differently, there is general agreement that this case raises the following issues:

A. What is the appropriate standard of review?

B. Are the records exempt from disclosure pursuant to any of the provisions of subsection 20(1) of the *Act*?

III. Legislative Framework

[22] It will be helpful to set out the key elements of the legislative framework before entering into an analysis of the issues.

[23] The starting point is section 2 of the *Act*, the purpose clause:

Purpose of Act	**Objet de la loi**
2 (1) The purpose of this Act is to enhance the accountability and transparency of federal institutions in order to promote an open and democratic society and to enable public debate on the conduct of those institutions.	**2 (1)** La présente loi a pour objet d'accroître la responsabilité et la transparence des institutions de l'État afin de favoriser une société ouverte et démocratique et de permettre le débat public sur la conduite de ces institutions.
Specific purposes of Parts 1 and 2	**Objets spécifiques : parties 1 et 2**
(2) In furtherance of that purpose,	**(2)** À cet égard :
(a) Part 1 extends the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary	**a)** la partie 1 élargit l'accès aux documents de l'administration fédérale en consacrant le principe du droit du public à leur communication, les exceptions indispensables à ce droit étant précises et limitées et les décisions quant à la communication étant

exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government; and	susceptibles de recours indépendants du pouvoir exécutif;
(b) Part 2 sets out requirements for the proactive publication of information.	**b)** la partie 2 fixe des exigences visant la publication proactive de renseignements.
Complementary procedures	**Étoffement des modalités d'accès**
(3) This Act is also intended to complement and not replace existing procedures for access to government information and is not intended to limit in any way access to the type of government information that is normally available to the general public.	**(3)** En outre, la présente loi vise à compléter les modalités d'accès aux documents de l'administration fédérale; elle ne vise pas à restreindre l'accès aux renseignements que les institutions fédérales mettent normalement à la disposition du grand public.

[24] The *Act* establishes a general right of access "to any record under the control of a government institution" (subsection 4(1)) and a corresponding responsibility on a government institution to make every reasonable effort to assist the person who requested information to obtain access (subsection 4(2.1)). The legislation provides a number of limited and specific exemptions to disclosure.

[25] The exemption that is of interest in this case relates to third party information:

Third party information	**Renseignements de tiers**
20 (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Part that contains	**20 (1)** Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :
(a) trade secrets of a third party;	**a)** des secrets industriels de tiers;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;	**b)** des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;
…	[…]
(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or	**c)** des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;
(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.	**d)** des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

[26] Disclosure of such information is permitted if the third party that supplied it to the government institution consents (subsection 20(5)), or if the government institution determines that revealing it is in the public interest (subsection 20(6)). Disclosure of part of the requested information may also be permitted if the exempt portions can reasonably be severed from the remaining information (section 25).

[27] Where a government institution intends to disclose a record that may contain third party information of the sort described in subsection 20(1), it must make every reasonable effort to give the third party notice of the request (section 27) and to provide that party the opportunity to make representations as to why any part of the record should not be disclosed (section 28). Upon receipt of any representations by the third party the government institution is to make a final

decision regarding disclosure, inform the third party of its final decision, and advise that party of its entitlement to request a review of the decision under section 44 of the *Act* (section 28).

[28] Section 44 of the *Act* provides that a third party who is given notice by a government institution of its intention to disclose a record may "apply to the Court for a review of the matter" (subsection 44(1)). Such proceedings are to be heard and determined in a summary way (section 45), and the Court is required to take precautions to avoid disclosure of the third party's information during its proceedings (subsection 47(1)). The *Act* specifies the powers of the Court in relation to such proceedings:

Order of Court not to disclose record	**Ordonnance de la Cour obligeant au refus**
51 Where the Court determines, after considering an application under section 44, that the head of a government institution is required to refuse to disclose a record or part of a record, the Court shall order the head of the institution not to disclose the record or part thereof or shall make such other order as the Court deems appropriate.	**51** La Cour, dans les cas où elle conclut, lors d'un recours exercé en vertu de l'article 44, que le responsable d'une institution fédérale est tenu de refuser la communication totale ou partielle d'un document, lui ordonne de refuser cette communication; elle rend une autre ordonnance si elle l'estime indiqué.

[29] Having completed this brief review of the legislative framework that governs this case, we turn to a consideration of the issues.

IV. Analysis

A. *What is the appropriate standard of review?*

[30] The question is whether the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] changed the prior

law governing the approach to a section 44 review. It will be helpful to outline the prior law on this issue before considering the impact of *Vavilov*.

[31] In *Merck Frosst Canada Ltd v Canada (Health)*, 2012 SCC 3 at para 53 [*Merck Frosst*], the Supreme Court of Canada affirmed the approach that had been long adopted by this Court in regard to the standard of review in determining whether information is exempt from disclosure under subsection 20(1) of the *Act*:

> Under s. 51 of the Act, the judge on review is to determine whether "the head of a government institution is required to refuse to disclose a record" and, if so, the judge must order the head not to disclose it. It follows that when a third party, such as Merck in this case, requests a "review" under s. 44 of the Act by the Federal Court of a decision by a head of a government institution to disclose all or part of a record, the Federal Court judge is to determine whether the institutional head has correctly applied the exemptions to the records in issue. This review has sometimes been referred to as *de novo* assessment of whether the record is exempt from disclosure. The term "*de novo*" may not, strictly speaking, be apt; there is, however, no disagreement in the cases that the role of the judge on review in these types of cases is to determine whether the exemptions have been applied correctly to the contested records. Sections 44, 46 and 51 are the most relevant statutory provisions governing this review.
>
> [Citations omitted.]

[32] This approach sought to give effect to Parliament's institutional design choices reflected in the purpose and structure of the *Act*. The purpose clause (section 2) expresses three core principles: "that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government" (paragraph 2(2)(a)). As stated in *Canada (Information Commissioner) v Canada (Commissioner*

of the Royal Canadian Mounted Police), 2003 SCC 8 [*Information Commissioner 2003*] at paragraph 17:

> In my opinion, this purpose is advanced by adopting a less deferential standard of review. Under the federal scheme, those responsible for answering access to information requests are agents of a government institution. This is unlike the situation under many provincial access to information statutes, where information requests are reviewed by an administrative tribunal independent from the executive. A less deferential standard of review thus advances the stated objective that decisions on the disclosure of government information be reviewed independently of government. Further, those charged with responding to requests under the federal Access Act might be inclined to interpret the exceptions to information disclosure in a liberal manner so as to favour their institution. As such, the exercise of broad powers of review would also advance the stated purpose of providing a right of access to information in records under the control of a government institution in accordance with the principle that necessary exceptions to the right of access should be limited and specific.

[33] The summary proceeding under section 44 has been described as a "hybrid" because it proceeds by way of application and involves a review of a decision that is, in some respects, similar to a traditional judicial review. However, it is also a type of *de novo* hearing because new evidence can be filed in the court, little or no deference is owed the government institution's decision-maker, and the court is required to decide whether records should be disclosed in the form proposed by the government institution (*Les viandes du Breton Inc v Canada (Canadian Food Inspection Agency)*, 2006 FC 335 at paras 30-31.

[34] In December 2019, the *Vavilov* decision was released by the Supreme Court of Canada, in which the majority expressly set out to "chart a new course forward for determining the standard of review that applies when a court reviews the merits of an administrative decision" (*Vavilov* at para 2). The parties in this case had filed their written submissions before *Vavilov*

was released and they were invited to make further submissions on the application of this decision to the standard of review prior to the hearing. Concord filed supplementary written submissions in response to the Court's invitation, while the CFIA addressed the matter in oral submissions at the hearing. They both submit that *Vavilov* has not altered the standard of review and that correctness still applies.

[35] The CFIA pointed out that this is not, strictly speaking, identical to the usual standard of review of an administrative decision because the question before the Court is not whether the agency's decision is correct. Rather, the Court is required to assess the records in light of the evidence and decide whether the government's decision to disclose them should be upheld (see *Air Atonabee Ltd v Canada (Minister of Transport)* (1989), 27 FTR 194, [1989] FCJ No 453 (QL) (FC TD) [*Air Atonabee*]; *Aliments Prince Foods Inc v Canada (Department of Agriculture and Agri-Food)* (1999), 164 FTR 104 at paras 24-25, [1999] FCJ No 247 (QL) (FC TD)). It was acknowledged that in practice this may well be a distinction without a difference and nothing turns on this question in the case at bar.

[36] For the following reasons, I agree that *Vavilov* has not changed the approach to section 44 proceedings established by prior jurisprudence.

[37] In *Vavilov*, the Supreme Court established a revised framework for determining the standard of review where a court reviews the merits of an administrative decision. As set out in paragraph 17, the starting point is a general presumption that reasonableness is the standard of review that applies in all cases, subject to two exceptions: "The first is where the legislature has indicated that it intends a different standard or set of standards to apply.… The second situation

in which the presumption of reasonableness review will be rebutted is where the rule of law requires that the standard of correctness be applied."

[38] The Court's discussion of when the presumption will be rebutted by a clear expression of legislative intent focuses on two situations: when a legislature includes a specific appeal provision in the legislation governing an administrative decision-maker (see *Vavilov* at paras 36-54), or when the legislature has prescribed the applicable standard of review, for example, as has been done in British Columbia in the *Administrative Tribunals Act*, SBC 2004, c 45, which established the applicable standards of review that apply across a range of administrative bodies (see *Vavilov* at paras 34-35).

[39] The rationale for this approach is explained in the following way in *Vavilov*:

> [33] This Court has described respect for legislative intent as the "polar star" of judicial review. This description remains apt. The presumption of reasonableness review discussed above is intended to give effect to the legislature's choice to leave certain matters with administrative decision makers rather than the courts. It follows that this presumption will be rebutted where a legislature has indicated that a different standard should apply. The legislature can do so in two ways. First, it may explicitly prescribe through statute what standard courts should apply when reviewing decisions of a particular administrative decision maker. Second, it may direct that derogation from the presumption of reasonableness review is appropriate by providing for a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards.
>
> [Citations omitted.]

[40] Applying this guidance to the case at bar leads to the conclusion that the standard established by the prior case law should continue to apply. This is a situation in which Parliament has explicitly described the standard to be applied to review under section 44. A

recent amendment to the *Act* added section 44.1, which the parties agreed applies to the instant case:

***De novo* review**	**Révision *de novo***
44.1 For greater certainty, an application under section 41 or 44 is to be heard and determined as a new proceeding.	**44.1** Il est entendu que les recours prévus aux articles 41 et 44 sont entendus et jugés comme une nouvelle affaire.

[41] If respect for legislative intent is the "polar star" of judicial review, the message could not be clearer: a section 44 review is meant to be a *de novo* examination by the court of the decision to disclose.

[42] Therefore, the only conclusion that is consistent with the legislative intent, as expressed by section 44.1, and that continues to give effect to the purpose of the legislation set out in section 2 is to continue to apply the correctness standard through a *de novo* consideration of the decision to disclose third party documents in the context of a section 44 application. The third party can file new evidence on the issues before the court and little or no deference is due to the decision to disclose made by the government institution.

[43] For the foregoing reasons, I conclude that *Vavilov* has not altered the previous jurisprudence on the proper approach to a section 44 application. The framework established by *Merck Frosst* continues to apply and I will therefore conduct a *de novo* examination of the evidence submitted by the parties to determine whether the CFIA's determination about which records can be disclosed is correct, giving no deference to the decision made by CFIA.

B. *Are the records exempt from disclosure pursuant to any of the provisions of subsection 20(1) of the Act?*

[44] Concord's primary argument was that the records should be exempt pursuant to paragraph 20(1)(c) of the *Act* because their disclosure could reasonably be expected to cause it financial harm in the very competitive Canadian market.

[45] Concord also put forward an alternative argument that the records should be exempt from disclosure pursuant to paragraphs 20(1)(b) and (d) of the *Act*. These will be dealt with following the analysis of Concord's argument on paragraph 20(1)(c).

(1) Legal framework

[46] The onus on the party opposing disclosure pursuant to paragraph 20(1)(c) is to demonstrate a "reasonable expectation of probable harm" (*Merck Frosst* at para 192). As Justice Rennie noted in *Porter Airlines Inc v Canada (AG)*, 2014 FC 392 at paragraph 80 [*Porter Airlines*], this standard of proof is "somewhat unique" and therefore it must be described with "the greatest possible precision."

[47] The Supreme Court described the standard in the following way, at paragraphs 196 and 199 of *Merck Frosst*:

> However, I conclude that this long-accepted formulation is intended to capture an important point: <u>while the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless do more than show that such harm is simply possible.</u>
>
> …
>
> I would affirm the *Canada Packers* formulation. <u>A third party claiming an exemption under s. 20(1)(*c*) of the Act must show that</u>

> the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur. This approach, in my view, is faithful to the text of the provision as well as to its purpose.
>
> [Emphasis added.]

[48] As noted by Justice Rennie in *Porter Airlines* at paragraph 83:

> [83] In essence, the Supreme Court's statement above draws the boundaries within which a "reasonable expectation of probable harm" is situated: above the lower bound of "a mere possibility" and below the upper bound of "on a balance of probabilities." The Supreme Court of Canada provided further precision by adding that these boundaries outline "a standard considerably higher than mere possibility, but somewhat lower than 'more likely than not'". Further, the Supreme Court elaborated on the substance of these upper and lower bounds. It described "a mere possibility of harm" as based in a fear of harm that is "fanciful, imaginary or contrived" rather than based on reason, and it described a balance of probabilities as "prov[ing] that harm is more likely than not".
>
> [Citations omitted.]

[49] In assessing this question, the Court is inevitably drawn into an exercise about the future, with all of its attendant uncertainties. Justice Michael Phelan provided useful guidance on this point in *AstraZeneca Canada Inc v Health Canada*, 2005 FC 1451 at paragraph 90 [*AstraZeneca*]:

> [W]hile there is an element of forecasting and speculation inherent in this criterion, there are methods of establishing the reasonableness of the expectation. Mere recitation of the fear by an officer of the company is not sufficient. The Court requires specific evidence that those outcomes are reasonably probable.

[50] Justice Phelan cited with approval the admonition of Justice MacKay in *SNC-Lavalin Inc v Canada (Minister of Public Works)* (1994), 79 FTR 113, 49 ACWS (3d) 211 (FC TD) that it is not sufficient to merely affirm in an affidavit that harm will "undoubtedly occur" from

disclosure, since this is the very determination the Court is called upon to make. Instead, what is required is evidence to support the conclusion that such harm is a reasonably probable consequence of releasing the records.

[51] The anticipated harms under paragraph 20(1)(c) are disjunctive, meaning that it is sufficient for Concord to show either that the disputed information will result in "material financial loss" or "prejudice its competitive position" (*Merck Frosst* at para 212; *Canada (Office of the Information Commissioner) v Calian Ltd*, 2017 FCA 135 at para 40 [*Calian*]).

[52] In addition, the case law is clear that anticipated negative or inaccurate media reporting about the information will not be sufficient to meet the test. As stated in *Merck Frosst*, the point of the *Act* "is to give the public access to information so that they can evaluate it for themselves, not to protect them from having it. In my view, it would be quite an unusual case in which this sort of claim for exemption can succeed" (at para 224). In part, this is because a third party concerned about unfair negative media coverage has other remedies to address such questions (*Burnbrae Farms Ltd v Canada (Canadian Food Inspection Agency)*, 2014 FC 957 at paragraphs 112-113 [*Burnbrae Farms*] citing with approval *Les Viandes du Breton Inc v Canada (Department of Agriculture)* (2000), 198 FTR 233 at para 23, 2000 CanLII 16764 [*Les Viandes du Breton 2000*].

(2) The records in question

[53] The records in issue can be grouped into three categories:

a) Information about CFIA's initial investigation into Concord's plant, following the study;

b) Internal e-mails exchanged between CFIA employees relating to the follow-up to the study; and

c) Information about the Corrective Action Plan that the CFIA required Concord to develop following the study.

[54] Some of these records involve material generated by the CFIA and provided to Concord; others relate to information provided by Concord to the CFIA; still others relate to internal exchanges between CFIA officials.

(3) Position of the parties

[55] Concord submits that its evidence meets the threshold outlined above, and that unlike previous cases there is no need to engage in any speculation about what the likely result of disclosure will be because the journal article and media coverage provide tangible proof of precisely that.

[56] Concord argues that the impact of disclosure of these records must be assessed in the context of the evidence about its place in the Canadian market, in particular:

- It sells its products directly to Canadian supermarkets under several brand names. [redacted]
- It also provides products under labels for other companies (referred to as “private label” products); [redacted]
- [redacted]

- [redacted]

[57] Concord submits that the CFIA itself recognized the potential harm that could result from any association between the study and Concord when it launched the investigation following the study. It points to an internal CFIA e-mail that states "inspection staff were requested to follow-up discretely" (CCTR at 541) as an indication that the CFIA recognized the potential damage that could be done to Concord if it was linked to the study.

[58] On the issue of the harm that would flow from disclosing the disputed records, Concord submits that the incorrect and misleading statements already published support a finding in its favour. It notes that one of the co-authors of the article published about the study was a CFIA official from the Food Safety Science Directorate in Ottawa, Ontario, and that this article contains several incorrect statements. In particular, Concord objects to the following suggestion:

> [A] third of turkey products were found to be wholly substituted with chicken. The price of ground turkey in Canada for 2016 was more than that for ground chicken (Agriculture and Agri-Food Canada, 2016), suggesting that these instances of substitution may be economically motivated or that a gross mislabeling event occurred during production or packaging.

[59] Concord says that this statement is especially troubling because the records indicate that prior to the publication of the article the CFIA investigation had concluded that Concord did not deliberately substitute chicken for turkey in these sausages, but rather the issue arose largely because of the way the meat had been labelled and recorded when it was received at Concord's facility. In addition, Concord submits that the statement is factually wrong because at the time there was not any difference in the price of chicken and turkey.

[60] Turning to the media coverage following publication of the article, Concord argues that the nature of the reporting provides tangible proof of the likely impact of the release of the disputed records. It describes the news coverage as negative and sensationalist and points to the following specific examples from the initial reporting in 2017: many stories refer to the detection of horse meat in some sausages, generally in sensationalist language and often immediately mentioning the turkey sausages that contained chicken meat; several of the stories discuss the turkey sausage error in the context of "food fraud" where producers deliberately substitute a cheaper product to increase their profits and some of these repeat the assertion in the journal article that the producer of the turkey sausages may have been motivated by economic considerations.

[61] Concord also notes that the publication of another study in February 2019 reignited media interest in the issue. Like the first study, the CFIA collaborated with the University of Guelph to obtain 100 sausages from Canadian retail stores to determine if the meat used in the sausage matched the meat listed on the label. News coverage of this study often mentioned the turkey sausage error discussed in the 2017 articles.

[62] Concord argues that the records that CFIA proposes to release identify it as the producer of the turkey sausages that contained chicken and makes clear that this happened at one of Concord's meat production facilities. Some of these sausages were sold under Concord's brand Marcangelo, and one was a private label product Concord produced for another company. Any press reporting linking Concord and these brands to the previous stories would have an immediate and significant impact, in particular because of the prior negative stories that insinuated that the meat substitution was deliberately done for economic reasons.

[63] In its written submissions Concord sets out the basis for its concerns in the following way:

> 99. The reality is that the media will continue to publish sensationalistic articles, which will unfairly link Concord and the Marcangelo brand to the horse meat issue and the problem of "food fraud". The news coverage will continue repeating the false suggestion that CFIA made in the 2017 Article, that Concord deliberately substituted chicken for turkey for economic reasons.
>
> 100. If CFIA, a government regulator, is unwilling to characterize Concord's conduct accurately, there is little reason to believe that the media will be more fastidious on this point. The unfair manner in which the media will publish the Identifying Information will exacerbate the economic harm suffered by Concord.

[64] Concord argues that under paragraph 20(1)(c) it need only demonstrate that disclosing this information could reasonably be expected either to cause it material financial loss or to prejudice its competitive position (*Merck Frosst* at para 212). It submits that the evidence easily satisfies either branch. [redacted]

[65] In response, the CFIA argues that Concord failed to establish a reasonable expectation of probable harm because the evidence it filed is lacking in specifics and amounts to speculation. Furthermore, the CFIA submits that prior case law has cautioned against applying the financial harm exemption based on the potential for public misunderstanding. Rather, the onus is on the

party seeking to prevent disclosure to go well beyond speculation and to demonstrate through specific evidence that it is likely to suffer material financial harm.

[66] The CFIA contends that the Concord evidence is speculative, and that it is rooted in a fear of a possible misunderstanding of the records. It argues that the case law is unanimous in finding that this type of evidence does not support non-disclosure, in particular given the nature of CFIA's role in food inspection and ensuring public safety.

[67] Further, the CFIA points out that several of Concord's objections relate either to information already in the public domain or that which has been long known, including the fact that its processing plant was assigned a particular number by CFIA and that it produces the Marcangelo brand of products. In addition, in its written submissions the CFIA makes the following point:

> 63. The Applicant argues that Concord has not yet been publicly identified as the producer of the turkey sausage containing chicken meat, but resists disclosure as the decisions [*sic*] threatens to do just that. However, the Applicant placed this information in the public domain when it filed the Notice of Application in 2017. There is no evidence establishing that any harm occurred following public disclosure in 2017, by the Applicant, that it was a producer of turkey sausages containing chicken meat.

[68] This submission is based on the following statement in Concord's Notice of Motion launching this proceeding:

> 5. The Responsive Records relating to Concord had nothing to do with the issue of horse meat in sausages, but the broad wording of the Request encompassed some general CFIA investigation records relating to Concord turkey sausages which mistakenly contained some chicken meat – an error that was quickly corrected by Concord.

[69] The CFIA submits that Concord's fears are based largely on the potential for public misunderstanding, but this is misplaced and has consistently been rejected in prior jurisprudence. It argues that in similar cases involving inspections of food production facilities, the courts have consistently favoured disclosure, and the same result should follow here.

(4) Discussion

[70] The touchstone for the application of the exemption in paragraph 20(1)(c) is rooted in the purposes of the *Act*, which reflect the need to strike a balance "between the important goals of disclosure and avoiding harm to third parties resulting from disclosure" (*Merck Frosst* at para 204). In striking this balance, it is important to recall that the *Act* is about public access to information held by government institutions, which serves important public purposes in a democratic society, subject to specified limitations needed to protect other important interests (*Merck Frosst* at paras 1-2; and see *Bombardier Inc v Canada (Attorney General)*, 2019 FC 207 at paras 35-38).

[71] One reason that courts have required evidence of anticipated harm that goes beyond speculation and is not founded on a risk of misunderstanding or inaccurate reporting is that fear of such risks would too easily defeat the public's right to access. This is affirmed in *Merck Frosst*:

> [204] This interpretation also serves the purposes of the Act. A balance must be struck between the important goals of disclosure and avoiding harm to third parties resulting from disclosure. The important objective of access to information would be thwarted by a mere possibility of harm standard. Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason. The words "could reasonably be expected" "refer to an expectation for which real and

> substantial grounds exist when looked at objectively". On the other hand, what is at issue is risk of future harm that depends on how future uncertain events unfold. Thus, requiring a third party (or, in other provisions, the government) to prove that harm is more likely than not to occur would impose in many cases an impossible standard of proof.
>
> [Citations omitted.]

[72] Applying this test to the case at bar, I agree with Concord that its evidence in this case goes beyond the type of affirmation or speculation that has been found insufficient in previous cases. Concord does not merely state that it fears financial harm from disclosure. It points to negative and inaccurate statements in a published article, which lists a senior CFIA official as one of the co-authors, and the media coverage that followed, as support for its fears of material financial harm. Concord argues that this is more than mere speculation about anticipated negative coverage. I agree that Concord has demonstrated that its fear of financial harm is based on more than mere speculation.

[73] However, I am not persuaded that Concord has demonstrated a reasonable expectation of probable harm flowing from disclosure of the records in dispute. Following a careful review of the records in light of the further redactions that CFIA has undertaken to make and those that are ordered below, and considering the clarification that CFIA will provide to the requester, I am not persuaded that the risks Concord fears are demonstrated with evidence that meets the stringent threshold established in the case law. Several factors lead to this conclusion.

[74] First, the potential harm to Concord must be assessed with reference to the records as they will actually be made public. This entails taking account both of the further redactions that the CFIA has accepted to make, as well as the other redactions ordered below. In addition, it is

important to consider the impact of the explanatory note the CFIA will issue when the records are provided to the requester.

[75] At the hearing, Concord argued, rightly, that certain of the CFIA redactions were inconsistent with its statement that it had accepted several of Concord's proposed changes. For example, in a few documents the CFIA had not redacted the references to Concord's customers; in addition, although the CFIA had redacted most of the references to Concord's confidential internal HACCP plan, there remained some references to it in the records. The CFIA has now agreed to make these redactions.

[76] In addition, a careful review of the individual records and the letter provided by the CFIA subsequent to the hearing reveals certain further redactions or corrections that are needed in order to ensure consistency. These are explained below.

[77] The CFIA has also now committed to including the following paragraph in its letter to the requester that will accompany the disclosure:

> Please note that the 2017 investigation by the CFIA into potentially mislabelled sausage revealed issues with respect to various manufacturers' systems, which were subsequently corrected by the manufacturers. The 2017 investigation did not reveal any issues of economically-motivated food fraud. The horse meat found in one sausage identified in the study could not be investigated because the company had voluntarily ceased operations. Therefore, the enclosed records do not contain CFIA investigation reports for that company.

[78] The question of whether the CFIA would issue any sort of explanatory note to clarify what the records did – and did not – include was discussed during oral submissions. In several previous cases, this Court has noted the utility of such statements in addressing potential harms

associated with disclosure (*Air Atonabee* at 4 and 44; *Les Viandes du Breton 2000* at paras 18-19; *Gainers Inc v Canada (Minister of Agriculture)* (1988), 87 NR 94, 11 ACWS (3d) 151 (FCA)). As Justice Phelan explained in *Air Canada v Canada (Attorney General)*, 2018 FC 378:

> [32] Some of the potential for misunderstanding can be ameliorated by the very kind of explanation and context found in the Applicants' Memorandum of Fact and Law. One would expect a responsible organization such as [Transport Canada] to be prepared to issue an explanatory note upon release of the information. If it cannot or will not, the parties may make submissions before the Court issues its final order.

[79] That is somewhat similar to what happened in this case. During the hearing a number of questions and concerns were expressed that could not be addressed immediately and the parties were given time to address these following the hearing. It was in that context that the CFIA provided an undertaking to include the paragraph cited above in its letter to the requester.

[80] On the basis of these developments, certain of Concord's anticipated harms are significantly diminished. The references to its confidential internal plant safety plan and to its customers will be redacted pursuant to the undertaking provided in the CFIA's letter dated February 17, 2020. However, one correction is required because there is an apparent typographical error in the letter. The CFIA agreed to redact references to Concord's HACCP plan but one of the references to specific pages contains an obvious error. The CFIA is, therefore, ordered to redact the reference to Concord's HACCP plan contained in disclosure page A0121575_13 (CCTR at 440), which has been erroneously referenced as A01215715_23 (a page that does not exist in the record).

[81] Concord's substantial and understandable concern that it may be wrongly associated with the horse meat issue or with food fraud is addressed by the explanatory note, which makes plain

that Concord has no association with the horse meat contamination in the tested sausages. It also makes clear that the problem that lead to the chicken meat appearing in five turkey sausages has been corrected, and was not related to food fraud.

[82] A second important consideration is the passage of time since the original study. While the importance of this factor obviously depends on the nature of the information in the records, I am persuaded that it weighs in favour of disclosure here, as it has in previous cases (*Canada Packers Inc v Canada (Minister of Agriculture)*, [1989] 1 FC 47 at 60, 53 DLR (4th) 246 (FCA); *Les Viandes du Breton 2000* at para 12, citing *Canada (Information Commissioner) v Canada (Prime Minister)*, [1993] 1 FC 427, 57 FTR 180 [*Information Commissioner 1993*]); see also *Coopérative fédérée du Québec v Canada (Agriculture and Agri-Food)* (2000), 180 FTR 205 at paras 9-11, 2000 CanLII 14811 (FC TD)).

[83] In this case, the original study was conducted in January and February 2017, and its results were made public in July 2017. Certain media coverage followed (discussed in more detail below). As Concord underlines, this media coverage was to some degree repeated when the results of a follow-up study were published in February 2019. I agree with Concord that both time-periods must be considered in assessing its risk of financial or competitive harm.

[84] Against this, however, several factors relating to the passage of time tend to diminish the objective basis for a fear of harm flowing from disclosure of these records. First, the original study is now quite dated and the media coverage is stale. There is no evidence of ongoing public controversy about production and sale of tainted meat in Canada, which is a testament both to the efforts of the producers and the inspection regime.

[85] Related to this, the passage of time helps to put the information in the records into its proper context. For example, the evidence demonstrates that since the original investigation the CFIA has inspected Concord's facilities hundreds of times and has not found any problems similar to the turkey sausage error (Applicant's Record at 226). If Concord continues to anticipate a negative reaction to disclosure of the results of the 2017 study it will have to decide whether to make this type of information public in order to set the record straight (see *Air Atonabee* at 36).

[86] A further relevant consideration is the nature of the press coverage on this issue. Having reviewed the media reports in the record, I am unable to agree with Concord that they are uniformly negative, sensationalist, or unbalanced. Several of the media stories that mention the turkey sausage error state that the problem that caused it has since been corrected (Applicant's Record at 250, 255). Moreover, the media stories reporting on the follow-up study that was done in 2019 consistently reported the improved overall results found in that study, and of particular significance for Concord, these articles all note that there were no turkey sausages containing chicken and the study's author is quoted saying "[t]hat problem seems to be resolved."

[87] To the extent that Concord has expressed a concern that the negative and inaccurate reporting will be reignited by the release of these documents to a member of the media, I am not persuaded that this is a significant concern based on the reporting following the second report.

[88] Concord points to the earlier media coverage and notes that the CFIA has identified the requester as a member of the media, and thus the purpose of the request is clear. I am not persuaded. First, subsection 4(2.1) of the *Act* and the jurisprudence indicate that the law is to be administered without regard to the identity of the person making the request (*Les Viandes du*

Breton Inc v Canada (Canadian Food Inspection Agency), 2006 FC 1075 at paras 11-13 [*Les Viandes du Breton 2006*], citing *Information Commissioner 2003* at para 32). The fact that there has been media coverage of the information contained in the records is a relevant consideration (*Les Viandes du Breton 2000* at para 12, citing *Information Commissioner 1993*). However, the nature of the coverage must be considered and in light of the analysis above, I am not persuaded that the potential for further coverage is sufficient to establish a reasonable expectation of probable harm.

[89] I agree with Concord that the issue of horse meat contamination figured prominently and often in rather colourful language in the initial media reporting about the 2017 study. If there remained any ambiguity about the fact that Concord is not in any way connected with this problem, I may well have been persuaded that its fears of financial harm were well founded. However, there is nothing in any of the records that will be disclosed that draws any such connection and the explanatory note that the CFIA will issue to the requester also confirms that such a link should not be drawn. Concord's fears on that account must now fall into the category of speculation about inaccurate media coverage and I find that it has other legal avenues available if such reporting occurs.

[90] Finally, a careful review of the records shows several things that tend to diminish any anticipated risk to Concord's financial or competitive position. First, the records contain statements by CFIA officials that the mistake happened in part because of the way in which Concord's suppliers packaged and labelled the turkey and chicken and that this problem has been fixed. Second, the records demonstrate that Concord developed and implemented a Corrective Action Plan to address issues relating to Concord's practices regarding tracing the product from

its receipt to final production that was identified by the inspectors. This plan was approved by the CFIA. Third, although there are some references to other issues relating to the meat production facility identified by the inspectors, the records show that these were addressed in the Corrective Action Plan and the problems have been resolved.

[91] In sum, the records do not contain any particularly damaging information and they show that Concord has taken steps to fix the issues that were identified to the satisfaction of CFIA officials.

[92] I would note here that I am not persuaded by the CFIA's argument that the reference in Concord's Notice of Motion to the findings that some of its turkey sausages mistakenly contained chicken is sufficient to bar it from seeking to protect the information. On the one hand, it is troubling that Concord did not take any steps to obtain a confidentiality order to protect this information, particularly considering that it did seek and obtain such an Order in regard to other material that was filed in this matter. On the other hand, I agree with Concord that including this one reference in its Notice of Motion is significantly different than disclosing it to the requester, who it is acknowledged is a member of the media.

[93] Overall, I am not persuaded that Concord has demonstrated a real risk of probable harm to either its financial or competitive position in accordance with the test set out in the jurisprudence cited earlier. Several of Concord's concerns have been addressed by the CFIA's further redactions as well as certain other redactions that will be ordered, and by the explanatory note it will issue to the requester when it sends the records. Others are based on anticipated negative, inaccurate, or unfair media coverage, which cannot be accepted as a basis for refusing

disclosure. A careful review of the records in their totality does not support a conclusion that material financial harm is a reasonably expected result of disclosure.

[94] For these reasons, I do not accept that disclosure of the records should be refused pursuant to paragraph 20(1)(c) of the *Act*.

[95] As noted above, Concord put forward an alternative argument that certain of the records should be exempt from disclosure pursuant to paragraphs 20(1)(b) or (d) of the *Act*.

[96] At the outset, it is important to distinguish between the class-based exemption relating to disclosure of "financial, commercial, scientific or technical information" that is confidentially supplied to a government institution set out in paragraph 20(1)(b), and the harm-based exemption set out in paragraphs 20(1)(c) and (d) (*AstraZeneca* at para 41). If a record falls within the class of confidential records set out in paragraph (b) no further analysis of harm flowing from disclosure is required and the record is exempt. However, under paragraphs (c) or (d), proof of a reasonable expectation of harm must be demonstrated. This has already been discussed in relation to paragraph (c); the reasonably anticipated harm under paragraph (d) relates to interference with contractual or other negotiations.

[97] In *Air Atonabee*, this Court established the framework for analyzing a claim under paragraph 20(1)(b); the party seeking to block disclosure must demonstrate that the information is:

a) financial, commercial, scientific or technical information as those terms are commonly understood;

b) confidential in its nature by some objective standard which takes account of the information, its purposes and the conditions under which it was prepared and communicated;
c) supplied to a government by the third party; and
d) treated consistently in a confidential manner by the third party.

(See *Air Atonabee* at 19, see also *Burnbrae Farms* at para 66; *AstraZeneca* at para 79; *Merck Frosst* at para 133; *Calian* at para 51.)

[98] Concord claims that records containing references to (i) its HACCP plan, (ii) its Corrective Action Plan, and (iii) the data that shows the deviation between the amount of meat received at its facility and the amount actually produced (deviation data) should be exempted under paragraph 20(1)(b). It argues that this information is treated in a confidential manner by Concord and was supplied to the CFIA in confidence, and it therefore falls under this exemption.

[99] The first category of information can be dealt with quickly. As noted previously, the CFIA has agreed to redact any references to the HACCP plan so those records are no longer in issue. As noted earlier, in the CFIA letter proposing these redactions there appears to be a typographical error that should be corrected, and the CFIA will be ordered to redact the correct page.

[100] In regard to the deviation data, the CFIA has agreed to redact the actual weight of the meat but not the percentage of product traced because this information was considered to be factual information determined during the course of an inspection, and once separated from the

exact kilogram amount it no longer reveals confidential business information. Again, there are further redactions that will be ordered to ensure consistency on this.

[101] The only question, therefore, is whether the percentage values calculated by CFIA officials should also be exempted. This is a question of fact and what matters is the content of the records, not their form: "[t]he exemption must be applied to information that reveals the confidential information supplied by the third party, as well as to that information itself. Judgments or conclusions expressed by officials based on their own observations generally cannot be said to be information supplied by a third party" (*Merck Frosst* at para 158).

[102] Concord argues that the decision to redact the actual weight but not the percentages is illogical because the percentage figures are nothing more than a function of the kilogram figures. If the kilogram figures are exempt pursuant to section 20 then the percentage figures ought to be protected as well. The CFIA submits that the percentages are information and analysis it generated and not material provided to it by Concord; therefore they do not qualify under paragraph 20(1)(b).

[103] I am not persuaded by Concord's argument that the percentage calculations should not be disclosed. While it is true that the percentages are a function of the kilogram figures, that in itself does not lead to them all being treated the same. Similarly, the fact that the percentages were calculated by a CFIA official is not determinative. Rather, what is required is an assessment of whether the information falls within paragraph 20(1)(b) in that it – in a substantive sense – reveals confidential information supplied by Concord to the CFIA.

[104] It appears that the deviation data was generated by Concord pursuant to either a general regulatory requirement or as a follow-up to the issues identified during the investigation. The record is not entirely clear on this point but in my view nothing turns on this question.

[105] There is no dispute that the percentage calculations were done by the CFIA. It is also clear that the deviation data relates to the concerns that the CFIA identified regarding Concord's traceability policies, procedures, and practices. In simple terms, one of the ways of assessing traceability is to measure the amount of a particular product (for example, turkey meat) being delivered to the production facility as against the amount of turkey product that is eventually produced. One would expect some of the meat to be lost during production but a significantly different weight may point to a concern about the mixing of different batches of product or to other problems in tracing the product through the production cycle. That is a theme that runs through the records in this case.

[106] The CFIA has accepted Concord's request that it redact the specific kilogram figures – although as noted below some further redactions are needed in order to accomplish this. It did not accept the request to redact the percentage calculations because these were done by the CFIA based on its observations of the records produced by Concord. I find that this is a correct interpretation of the law in relation to the facts of this case.

[107] Many of the cases that address this question relate to inspection or other reports prepared by the government institution. In this case, it is not so clear-cut; the kilograms of product that are the basis for the percentage calculations were supplied by Concord and compiled by a CFIA official who then prepared the percentage calculations. The CFIA has accepted that the actual kilogram figures reveal confidential information and therefore should be redacted, apparently on

the basis that this would reveal to competitors the amount of a particular meat that Concord was receiving – and therefore the amount of that product that was being processed at this particular facility.

[108] To the extent that this is the basis for the conclusion that this is confidential information, I find that the CFIA has correctly determined that the percentage figures do not reveal confidential information once they are severed from the kilogram amounts. Based on the percentages alone no one can determine whether the figures relate to 100 kg of product or 10,000 kg of product, and that is the confidential information that Concord seeks to protect. Furthermore, once the percentage figures are severed from the kilogram amounts it is not possible to "reverse engineer" the calculation to derive the actual weight of meat to those percentages.

[109] Second, the percentages amount to regulatory observations based on information supplied by Concord. As noted above, the deviation data was relevant to the CFIA's concern regarding Concord's traceability practices and procedures. The table displaying the percentage calculations was prepared by a CFIA official in the context of the investigation and follow-up on Concord's Corrective Action Plan. This information was not supplied by Concord to the CFIA and it is rather more in the nature of the type of regulatory analysis or conclusions that the jurisprudence has consistently found should not be redacted (*Merck Frosst* at para 156, citing *Air Atonabee* at 275; *Porter Airlines* at paras 22-23; *AstraZeneca* at paras 74 and 103).

[110] For all of these reasons, I find that the percentage calculations do not fall within paragraph 20(1)(b) (see *Burnbrae Farms* at para 90). As will be noted below, however, certain further redactions are required in order to ensure that the kilogram amounts are not disclosed.

[111] This leaves for consideration the records relating to the Corrective Action Plan. These must be put into their proper context. The CFIA required Concord to develop this plan following its investigation; it was not a purely voluntary endeavour by the company. The records relate to deficiencies in the operation of the plant that were identified, and as noted previously the records also indicate that the CFIA officials were satisfied with both the plan and its implementation by Concord.

[112] Whether the information is considered confidential is a question of fact to be determined in light of the evidence. The mere fact that a third party treated certain information as confidential is not determinative. It also bears repeating that the records relating to the Corrective Action Plan were not voluntarily provided by Concord to the CFIA. On the contrary, it was required to generate such a plan if requested to do so. The CFIA also had access to the Concord facility and documents within that establishment as part of its regulatory authority. It has consistently been found that information generated in the course of regulatory inspections is not confidential according to an objective standard (*Les Viandes du Breton 2006* at para 28; *Burnbrae Farms* at paras 84-85). As noted above, I do not find that the fact that the Corrective Action Plan was prepared by Concord to be determinative to the extent it was demanded by the CFIA, reflects many of the observations and findings of the CFIA investigation, and then addresses these concerns.

[113] In my view, it is important to note that there is no evidence in the record to show that Concord communicated its desire to keep the Corrective Action Plan confidential to the CFIA. Unlike certain other records in the package (which are redacted), the Corrective Action Plan is not marked as confidential and there is no correspondence or other communication from

Concord to CFIA indicating that it is to be treated as such. The CFIA required Concord to produce the document pursuant to its regulatory authority. The focus of the document is on the operation of the facility rather than the quality of the product. It reflects to a large extent the findings of the CFIA's investigation and the corrective actions are meant to satisfy the concerns that the CFIA identified.

[114] I find that the Corrective Action Plan document is not confidential, according to an objective standard, and therefore these records do not fall within paragraph 20(1)(b).

[115] Concord's final argument is that certain records fall within the exemption under paragraph 20(1)(d), which relates to disclosure "which could reasonably be expected to interfere with contractual or other negotiations of a third party." [redacted]

[116] The jurisprudence of this Court has consistently found that this exemption requires proof of obstruction of ongoing current negotiations; hypothetical risks to future business opportunities do not suffice (*Burnbrae Farms* at paras 124-125; *Canada Post Corporation v National Capital Commission*, 2002 FCT 700 at para 18; *Canadian Broadcasting Corporation v National Capital Commission* (1998), 147 FTR 264 at para 29, 79 ACWS (3d) 1093).

[117] In my view, Concord's evidence falls short because it does not demonstrate a real risk of obstruction of actual negotiations arising from the disclosure of the records as they will be redacted, and in light of the explanatory note that the CFIA will provide to the requester.

V. Corrections and Further Redactions

[118] This Court is required to conduct a record-by-record review of the disclosure package to ensure that the CFIA's proposed redactions are correct and to determine whether the "head of a government institution is required to refuse to disclose a record or part of a record" (section 51). As noted above, during the course of this review one correction and several further redactions were identified.

[119] The correction relates to the further redaction that the CFIA agreed to subsequent to the hearing. Among these redactions, the CFIA agreed not to disclose references to Concord's HACCP plan but in the letter setting this out there is an apparent typographical error that must be corrected. Therefore, the CFIA is ordered to redact the reference(s) to Concord's HACCP plan on page A0121575_13 (CCTR at 440).

[120] In addition, during the course of my review of the records other inconsistencies emerged. Accordingly, pursuant to the authority set out in section 51 of the *Act*, the CFIA is ordered to redact certain other information in the records, as follows:

- The CFIA agreed to redact the name of laboratories, as well the lot and job numbers related to certain testing, but this information still appears in some records. The CFIA is, therefore, ordered to redact the lot and job numbers on pages A0121582_7 (CCTR at 473) and A0121585_7 (CCTR at 500).
- The CFIA agreed to redact kilogram figures but not percentages; however, the kilogram figures appear in some records. The CFIA is, therefore, ordered to redact the kilogram figures that appear on pages A0125715_22 (CCTR at 601) and A0125715_23 (CCTR at 602).

VI. Conclusion

[121] For the reasons set out above, I am dismissing this application pursuant to section 44 of the *Act*.

[122] I am not persuaded that Concord has demonstrated a reasonable expectation of probable harm flowing from the release of the records as they will be redacted, and in light of the explanatory note that the CFIA will provide to the requester; therefore the records are not exempted pursuant to paragraph 20(1)(c). Furthermore, Concord has not shown that records relating to the Corrective Action Plan or deviation data fall within the exemption for confidential information set out in paragraph 20(1)(b). Finally, Concord has not demonstrated that release of this information will obstruct or prejudice contractual or other negotiations, and therefore the exemption in paragraph 20(1)(d) cannot be relied upon.

[123] In addition, I find that certain other redactions are required in order to ensure consistency. These are set out above and also reflected in the Court's Order.

[124] Following the hearing, the parties made joint submissions on costs. Having considered their submission and in exercise of my discretion pursuant to Rule 400, I find the costs proposal to be reasonable. In accordance with the parties' joint submissions the CFIA is entitled to its costs in the amount of $6,704.55, but this amount is to be off-set and reduced by costs incurred by the Applicant in bringing its motion for interlocutory relief in the amount of $1,050.00. Therefore, Concord shall pay to the CFIA the all-inclusive amount of $5,654.55.

[125] As noted earlier, in light of the Confidentiality Order and the nature of the issue in this case, a confidential version of the decision was released to the parties and they were provided an

opportunity to propose redactions. In addition, Concord requested that the Confidentiality Order be extended during the appeal period and in the circumstances I find this to be a reasonable request, and so order.

[126] In closing, I will make one additional observation, by way of *obiter dicta*. When this matter was argued before the Court there was no explanatory note provided by the CFIA. Although it indicated its willingness to work with Concord to develop such a document, no draft had been provided to Concord and none was therefore before the Court. As noted earlier, the media coverage that had caused Concord to fear for its reputation related to an instance of horse meat being found in sausages, a matter which was in no way related to any Concord operation, and to allegations of food fraud. The fears expressed by Concord are easily understood. As it turns out, they are also equally easily addressed by the type of explanatory note that the CFIA eventually provided.

[127] In future, government institutions should provide such explanatory information in advance of the hearing both so that the third party can consider whether they wish to continue with their claim under section 44 and so that the Court will be in a better position to consider the anticipated harm flowing from disclosure.

VII. Postscript

[128] Further to paragraph 125, above, the Applicant filed submissions with proposed redactions. The Respondent did not object. I find the proposed redactions to be appropriate in the circumstances because they pertain to confidential information and the few relatively minor redactions do not impede public understanding of the case.

JUDGMENT in T-1834-17

THIS COURT'S JUDGMENT is that:

1. The application pursuant to section 44 of the *Access to Information Act* is dismissed.

2. The Respondent Canadian Food Inspection Agency is ordered to redact:

    a. any reference(s) to Concord's HACCP plan on page A0121575_13 (CCTR at 440);

    b. the lot and job numbers on pages A0121582_7 (CCTR 473) and A0121585_7 (CCTR at 500);

    c. the kilogram figures that appear on pages A0125715_22 (CCTR at 601) and A0125715_23 (CCTR at 602).

3. The Applicant shall pay to the Respondents their costs in the amount of $5,654.00, inclusive of fees and disbursements.

4. The Confidentiality Order dated November 2, 2018, is hereby extended during the appeal period from this Judgment.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1834-17
STYLE OF CAUSE:	CONCORD PREMIUM MEATS LTD v CANADIAN FOOD INSPECTION AGENCY AND THE ATTORNEY GENERAL OF CANADA
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