Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 220-2023

Ministry of Environment

December 21, 2023

Summary: Nutrien (Canada) Holdings ULC (formerly Nutrien AG Solutions (Canada) Inc.) (Nutrien), a third party, requested that the Commissioner review the Ministry of Environment's (Environment) decision to disclose records to an Applicant in response to access to information request under *The Freedom of Information and Protection of Privacy Act* (FOIP). Nutrien claimed that the records were exempt pursuant to subsections 19(1)(b), (c)(i), and (c)(iii) of FOIP. The Commissioner found that the records were not exempt pursuant to subsections 19(1)(b), (c)(i) or (c)(iii) of FOIP. The Commissioner recommended that Environment release the records to the Applicant, subject to any information that it withheld pursuant to subsection 29(1) of FOIP, within 30 days of issuance of this Report.

I BACKGROUND

[1] On May 29, 2023, the Applicant submitted the following access to information request to the Ministry of Environment (Environment):

> From May 2022 to present, all environmental records for the following Highway #10 E properties : Nutrien Ag Solutions - Highway #10 E, L & V Enterprises Ltd., [Name], Imperial Oil Ltd - Highway #10 E, [Name], Quance Development Ltd., RM of Wallace

[2] On July 27, 2023, in the course of processing the access request, Environment sent a written notice to a third party, Nutrien (Canada) Holdings ULC (formerly Nutrien AG Solutions (Canada) Inc. (Nutrien), pursuant to section 34 of *The Freedom of Information and Protection of Privacy Act* (FOIP). Environment indicated it identified records responsive to the access request and intended to give the Applicant access to the records. However, it

invited Nutrien to make representations as to whether the records should be exempt from access pursuant to subsection 19(1) of FOIP.

[3] In a letter dated August 20, 2023, Nutrien responded to Environment. Nutrien indicated that it did not object to certain portions of the records being disclosed. However, it asserted that the records should not be disclosed, in whole or in part, pursuant to subsections 19(1)(b) and (c) of FOIP.

[4] In a letter dated August 29, 2023, Environment responded to Nutrien. Environment indicated that it found that Nutrien did not establish that subsections 19(1)(b) or (c) of FOIP applied to the record. Environment indicated it would deny access to portions of the records pursuant to subsection 29(1) of FOIP but release the remainder.

[5] On September 18, 2023, Nutrien requested a review by my office.

[6] On October 17, 2023, my office notified Environment, Nutrien and the Applicant that my office would be undertaking a review.

[7] On December 18, 2023, both Environment and Nutrien provided a submission to my office. The Applicant did not provide a submission.

II RECORDS AT ISSUE

[8] At issue are the following five records:

- Record 1 – 2022 Groundwater Monitoring Summary Report dated March 2023.
- Record 2 – 2022 Groundwater Monitoring Summary Report dated November 2022.
- Record 3 – Letter dated October 31, 2022, from Nutrien's legal counsel to Environment.
- Record 4 – Letter dated November 30, 2022, from Nutrien's legal counsel to Environment. This letter is a cover letter. Enclosed with this letter was Record 1.

- Record 5 – Letter dated March 31, 2023, from Nutrien's legal counsel to Environment. This letter is a cover letter. Enclosed with this letter was Record 2.

[9] Nutrien's position is that the records are exempt from access pursuant to subsections 19(1)(b), (c)(i) and (c)(iii) of FOIP.

[10] Environment proposed to withhold portions of the records pursuant to subsection 29(1) of FOIP. Those withheld portions are not at issue in this Report as the Applicant did not also request a review of subsection 29(1) of FOIP.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[11] Environment qualifies as a "government institution" pursuant to subsection 2(1)(d)(i) of FOIP. Nutrien is a "third party" pursuant to subsection 2(1)(j) of FOIP. Therefore, I find that I have jurisdiction.

2. Does subsection 19(1)(b) of FOIP apply to Records 1 and 2?

[12] Nutrien's position is that subsection 19(1)(b) of FOIP applies to Records 1 and 2. Specifically, it asserts that:

- The contents under the headings, "1. Introduction" and "2. Site Description" at a pages 1 and 2, and Figures 1 and 2, of Records 1 and 2 contains commercial information.

- The contents under the headings, "1.1 Objectives and Scope of Work" and "3. Field Methods" at pages 1 and 2, the testing results at pages 3 to 8, as well as Appendices A and B, as well as Tables 1 through 4b of Records 1 and 2 contains scientific information.

- The test results on pages 3 to 8 of Records 1 and 2 contains technical information.

[13] Subsection 19(1)(b) of FOIP provides:

> **19**(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:
>
> ...
>
> (b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;

[14] Section 19 of FOIP is a mandatory, class-based and harm-based exemption, meaning, it contains both class and harm-based exemptions. The provision is intended to protect the business interests of third parties and to ensure that government institutions are able to maintain the confidentiality necessary to effectively carry on business with the private sector (*Guide to FOIP*, Chapter 4, "Exemptions from the Right of Access", updated October 18, 2023 [*Guide to FOIP*, Ch. 4], p. 196).

[15] Pages 201 to 205 of the *Guide to FOIP*, Ch. 4, outlines the following three-part test my office uses to determine if subsection 19(1)(b) of FOIP applies:

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?
2. Was the information supplied by the third party to a government institution?
3. Was the information supplied in confidence implicitly or explicitly?

[16] All three parts of the test must be met for the exemption to apply.

[17] In my office's Review Report 209-2023, also concerning Nutrien and Environment, I also considered subsection 19(1)(b) of FOIP. In that report, I began my analysis by considering the second and third parts of the test, which I will do in this matter as well.

2. Was the information supplied by the third party to a government institution?

[18] "Supplied" means provided or furnished (*Guide to FOIP*, Ch. 4, p. 203).

[19] In its submission, Nutrien asserted that it "is indisputable that the Records were supplied by Nutrien to the Ministry within the meaning of this section."

[20] Records 1 and 2 were prepared by an engineering company retained by Nutrien. In order for the records to have been in Environment's possession or control, the records must have been supplied by Nutrien to Environment, which is the case here. I find that the second part of the three-part test is met.

3. Was the information supplied in confidence implicitly or explicitly?

[21] Page 205 of the *Guide to FOIP*, Ch. 4 provides:

- "In confidence" usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained in confidence means that the supplier of the information has stipulated how the information can be disseminated. In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the government institution and the third party providing the information.

- "Implicitly" means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential.

- "Explicitly" means that the request for confidentiality has been clearly expressed, distinctly stated or made definite. There may be documentary evidence that shows that the information was supplied on the understanding that it would be kept confidential.

[22] Nutrien asserted that Records 1 and 2 were provided to Environment implicitly in confidence. Nutrien said:

> The Reports were requested, created and issued during the span of the Litigation. Nutrien issued the Reports, by way of the Letters, to the Ministry on the basis that they were to be kept confidential; particularly from other parties to the Litigation. The Ministry was aware of the nature of the Litigation when it made the request for the Reports in August 2022 and, therefore, that any provision of information from Nutrien to the Ministry would necessarily be done on a confidential basis.

[23] In contrast, Environment asserted that there was no implicit understanding of confidentiality. It asserted that it required Nutrien to provide Records 1 and 2 pursuant to subsection 13(1) of *The Environmental Management and Protection Act, 2010* (EMPA).

As such, Environment asserted that there would not have been an implicit understanding that it received the reports in confidence from Nutrien.

[24] Nutrien acknowledges in its submission that Environment requested Records 1 and 2 from it pursuant to the EMPA. It also acknowledged that the EMPA provides that information required under the EMPA is "public information". However, it argued that in the midst of litigation, there is an "implicit cloak of confidentiality":

> Nutrien further recognizes the unique set of facts at issue: there is an interplay of environmental reports expressly requested by the Ministry pursuant to the EMPA but in the midst of complex litigation regarding allegations of contamination stemming from the very lands under discussion in those same reports. Reports that are required to be provided to the Ministry under the EMPA might be categorized as "public information" *in certain circumstances*; however, in this situation, there is an implicit cloak of confidentiality protecting the Records as a result of the extant, complex multi-party Litigation.
>
> [Underline and italics in original]

[25] Page 207 of *Guide to FOIP*, Ch. 4 defines "compulsory supply" as follows:

> "Compulsory supply" means there is a compulsory legislative requirement to supply information. Where supply is compulsory, it will not ordinarily be confidential. In some cases, there may be indications in the legislation relevant to the compulsory supply that establish confidentiality The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence. Where information is required to be provided, unless otherwise provided by statute, confidentiality cannot be built in by agreement, informally or formally.

[26] I note that section 83 of the EMPA provides that information provided to Environment pursuant to the EMPA is deemed to be public information:

> **83**(1) Subject to subsections (3) to (11), all applications, information, data, test results, reports, returns and records and responses to a direction of the minister submitted to the minister pursuant to this Act, the regulations, the code or an accepted environmental protection plan are deemed to be public information.

[27] Subsections 83(3) to (11) of the EMPA provides a procedure where a person may request certain records to be kept confidential for up to a period of 5 years. The Minister must still

approve the request. Nutrien asserted that it plans to submit a request to Environment for Records 1 and 2 to be kept confidential:

> Moreover, it is anticipated that Nutrien will also be submitting a request to the Ministry pursuant to section 83(1) of the EMPA requesting that the Records be kept confidential.

[28] However, Nutrien's plan to submit a request to Environment for Records 1 and 2 to be kept confidential under the EMPA has no bearing on whether subsection 19(1)(b) of FOIP applies to the records or not.

[29] Based on the above, I find that there was a compulsory supply of Records 1 and 2 by Nutrien to Environment. There was no implicit understanding of confidentiality at the time that Records 1 and 2 were supplied to Environment. The third part of the three-part test is not met. I find that subsection 19(1)(b) of FOIP does not apply to any part of Records 1 and 2.

3. Does subsection 19(1)(c) of FOIP apply to Records 1 and 2?

[30] Nutrien's position is that subsection 19(1)(c) of FOIP applies to the records at issue. In its submission, Nutrien asserted that subsections 19(1)(c)(i) and (iii) of FOIP applies to the records at issue.

[31] Subsection 19(1)(c) of FOIP provides:

> **19**(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:
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> ...
>
> (c) information, the disclosure of which could reasonably be expected to:
>
> (i) result in financial loss or gain to;
>
> (ii) prejudice the competitive position of; or
>
> (iii) interfere with the contractual or other negotiations of;
>
> a third party;

[32] Subsection 19(1)(c) of FOIP is a mandatory, harm-based provision. It permits refusal of access in situations where disclosure could reasonably be expected to result in the harms outlined at subclauses (i), (ii) and (iii). Government institutions and third parties should not assume that the harms are self-evident. The harm must be described in a precise and specific way to support the application of the provision (*Guide to FOIP*, Ch. 4, pp. 212-213).

[33] I will first consider subsection 19(1)(c)(i) of FOIP. Then, I will consider subsection 19(1)(c)(iii) of FOIP.

i. Subsection 19(1)(c)(i) of FOIP

[34] Page 211 of the *Guide to FOIP*, Ch. 4, outlines the following two-part test my office uses to determine if subsection 19(1)(c)(i) of FOIP applies:

1. What is the financial loss or gain being claimed?
2. Could the release of the record reasonably be expected to result in financial loss or gain to third party?

[35] Page 211 of the *Guide to FOIP*, Ch, 4, provides the following definitions:

- "Financial loss or gain" must be monetary, have a monetary equivalent, or value (e.g. loss of revenue or loss of corporate reputation).
- "Could reasonably be expected to" means there must be a reasonable expectation that disclosure could result in financial loss or gain to a third party.

[36] Furthermore, page 215 of the *Guide to FOIP*, Ch. 4, provides that the harm must be described in a precise and specific way in order to support the application of the provision. The expectation of harm must be reasonable, but it need not be a certainty. The evidence of harm must:

- Show how the disclosure of the information would cause harm;
- Indicate the extent of harm that would result; and

- Provide facts to support the assertions made.

[37] In its submission, Nutrien said it was a part of ongoing litigation. It provided three arguments as to how the disclosure of the records at issue would result in financial loss. First, it said the disclosure of the records would result in "additional legal fees in order to provide explanations and further detail to the other parties regarding the findings in the Reports….". Second, it also said it would incur "increased expenses" for negotiating and settling various claims in the litigation as the premature disclosure of the records at issue to the other litigants without context. It said the explanation would make it more difficult to negotiate an agreement with respect to various issues and claims in the actions. Finally, it said that if the "broader public" becomes aware of the contents of Records 1 and 2 before it had an opportunity to properly address the findings and/or obtain additional information from its environmental consultants during further monitoring and assessment of a site located at the "Yorkton site", it will suffer "loss of corporate reputation and revenue".

[38] In contrast, Environment asserted that there is no financial loss or gain that can be established.

[39] Regarding Nutrien's first two arguments, it appears that Nutrien is averse to having the records disclosed due to ongoing litigation that it is involved in. However, as part of its arguments for why subsection 19(1)(c)(iii) of FOIP (which I will discuss later in this Report), Nutrien noted the litigation will be proceeding shortly to the document production stage. It asserted that the disclosure of records now would "circumvent the courts" and records should only be provided "through the document discovery process, in accordance with the specific rules on relevant and lawful exemptions for production." The fact that records at issue may be disclosed in the course of the litigation undermines Nutrien's first two arguments as to how the disclosure of records will result in a financial loss. Whether the records are disclosed by Environment to the Applicant in the context of a formal access request under FOIP or the records are disclosed through the court process, Nutrien will need to deal with the consequences of the disclosure of the records.

[40] Regarding Nutrien's third argument regarding the loss of corporate reputation and revenue if the "broader public" becomes aware of Records 1 and 2 before Nutrien has an opportunity to properly address Environment's findings and/or obtain additional information from its environmental consultants, I refer to section 83 of the EMPA. As noted earlier, section 83 of the EMPA provides that information provided to Environment pursuant to the EMPA is deemed to be public information. I should also note that subsection 83(2) of the EMPA provides that it is the Minister, and not Nutrien, that may determine if and when information submitted to Environment pursuant to the EMPA is disclosed:

> **83**(2) The minister may disclose to the public any application, information, data, test result, report, return or record or response to a direction of the minister mentioned in subsection (1) at any time and in any manner that the minister considers appropriate.

[41] So, while it is Nutrien's preference to delay the disclosure of records, it is not up to Nutrien to determine if and when records are disclosed by Environment. Furthermore, its assertion that the release of the records in the context of an access to information request under FOIP result in the "loss of corporate reputation and revenue" is merely an assertion. It has not demonstrated how the release of Records 1 and 2 (which is public information) will result in the loss of corporate reputation and revenue.

[42] I find that subsection 19(1)(c)(i) of FOIP does not apply to the records at issue.

ii. Subsection 19(1)(c)(iii) of FOIP

[43] My office uses the following test to determine if subsection 19(1)(c)(iii) of FOIP applies.

1. Are there contractual or other negotiations occurring involving a third party?
2. Could release of the record reasonably be expected to interfere with the contractual or other negotiations of a third party?

(*Guide to FOIP*, Ch. 4, pp. 221-222)

[44] Page 224 of *Guide to FOIP*, Ch. 4, defines a "negotiation" as follows:

> A "negotiation" is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings conducted between two or more parties for the purpose of reaching an understanding. It connotes a more robust relationship than "consultation". It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion.

[45] Regarding the first part of the two-part test, Nutrien noted in its submission the ongoing litigation. It indicated the parties have attended at mediation in an attempt to resolve certain issues. It said it expects that the parties will be "engaging in further settlement discussions in the future regarding liability, causation and quantum of any damages."

[46] Based on the above, I am satisfied there are negotiations involving Nutrien.

[47] Regarding the second part of the two-part test, Nutrien provided arguments as to why the disclosure of a record – which is not a part of the records at issue – would interfere with the negotiations involving Nutrien. Since that particular record is not a part of the records at issue, I will not consider these arguments in this review.

[48] In its submission, Nutrien asserted that records should be disclosed in accordance with the rules of court and the directions of the court. Otherwise, the disclosure of the records would provide other parties to the litigation an unfair advantage. It said the following:

> A further issue with disclosing the Records at this time is that the Litigation will be proceeding shortly to the document production stage, and the involuntary disclosure of the Records by the Ministry could reasonably be expected to prejudice Nutrien's ability to resist similar demands in the future for the production of further documents from the various litigants as part of the ongoing Litigation. The other litigants may cite these circumstances to support that they should also be entitled to other confidential records and communications as well. In any event, these are legal issues that may involve claims of litigation or solicitor-client privilege that will need to be determined by the Court. It is imperative that these issues not be effectively pre-determined through the disclosure of the Records at this stage. Disclosing the Records would provide the other parties to the Litigation with an unfair advantage and would circumvent the courts, as this information should only be provided through the document discovery process, in accordance with the specific rules on relevance and lawful exemptions for production.
>
> Nutrien submits that the Records ought to be withheld until conclusion of the Litigation or, alternatively, until the Records (or any portions thereof) are at least finalized and

> required to be provided to the other parties in the Litigation during the appropriate document production stage in accordance with the *Rules of Court* and any directions of the court.

[49] Nutrien argued that the disclosure of the records at issue at this time would allow the other litigants to cite the disclosure to support that they should be entitled to "other confidential records and communications" as well, which would give other parties to the litigation an unfair advantage.

[50] Nutrien should take note that individuals are indeed entitled to records in the possession or control of Environment pursuant to section 5 of FOIP. As I have said in Review Report 223-2015, 224-2015 at paragraph [19], the discovery and disclosure provisions of rules of court operate independent of any process under LA FOIP. Similarly, the discovery and disclosure provisions of the rules of court operate independent of any process under FOIP. Furthermore, Environment's obligations under FOIP to provide access to records in Environment's possession or control are not suspended simply because Nutrien is a party to litigation.

[51] Therefore, I do not accept Nutrien's argument that the release of records under FOIP would interfere with the negotiations. Given that the formal access to information process set out in FOIP existed prior to Nutrien being involved in the ongoing litigation as well as Records 1 and 2 being deemed to be public information pursuant to section 83 of the EMPA, Nutrien should expect that such information be available to the public, which would include the other parties to the litigation.

[52] I find that subsection 19(1)(c)(iii) of FOIP does not apply to the records at issue.

IV FINDINGS

[53] I find that I have jurisdiction.

[54] I find that subsection 19(1)(b) of FOIP does not apply to any part of Records 1 and 2.

[55] I find that subsection 19(1)(c)(i) of FOIP does not apply to the records at issue.

[56] I find that subsection 19(1)(c)(iii) of FOIP does not apply to the records at issue.

V RECOMMENDATIONS

[57] I recommend that Environment release the records at issue to the Applicant, subject to any information that it withheld pursuant to subsection 29(1) of FOIP, within 30 days of issuance of this Report.

Dated at Regina, in the Province of Saskatchewan, this 21st day of December, 2023.

Ronald J. Kruzeniski, K.C.
Saskatchewan Information and Privacy Commissioner