

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 043-2015

Ministry of Environment

Summary: The Applicant made an access to information request to the Ministry of Environment for annual environmental reports from a certain Third Party business. The Ministry and the Third Party indicated that subsections 19(1)(b) and 19(1)(c) of *The Freedom of Information and Protection of Privacy Act* (FOIP) applied to portions of the record. The Commissioner found that subsection 19(1)(b) did not apply but 19(1)(c) did apply. However, he recommended that the Ministry release information that the Ministry required from the Third Party as it was in the public interest pursuant to subsection 19(3) of FOIP. He also recommended that the Ministry develop a strategy to educate Third Party businesses on the requirements of FOIP.

I BACKGROUND

[1] On December 16, 2014, the Ministry of Environment received an access to information request for “2012 and 2013 Water and Air Quality Compliance Report. [Name of Third Party business].” The Ministry responded in a letter dated February 12, 2015 which provided a copy of the responsive record but indicated that portions of the record were being withheld pursuant to subsections 19(1)(b), (c)(i) and (c)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[2] The Applicant was dissatisfied with the Ministry’s response and requested a review by my office on February 26, 2015. On March 10, 2015, my office provided notification of our intention to undertake a review to the Ministry, the Applicant and the Third Party.

II RECORDS AT ISSUE

[3] The record consists of two documents: the 2013 Annual Environmental Report and 2012 Annual Environmental Report of the Third Party.

[4] The 2013 report consists of 986 pages. The Ministry has withheld portions of pages 2 and 3 and Appendices A, F, I and J because they are non-responsive to the Applicant's request. The other withheld portions of this record at issue is summarized in this table:

Page	Portion of 2013 Annual Environmental Report	Exemptions
4	Section 4.1 Turnaround, List of Major Turnaround Units (operational units offline in 2013), including Platformer Regeneration (Section 4.2) dates in paragraph	19(1)(b), 19(1)(c)
42	Volume of spent catalyst recycled	19(1)(b), 19(1)(c)
42	Volume of spent caustic disposed of in 2013	19(1)(b), 19(1)(c)
44	Section 16.0, Table 16.1 – 2013 Sulphur Unit monthly recovery efficiencies,	19(1)(b), 19(1)(c)
45-46	Section 17.0, Table 17.3 and 17.4-2012 and 2013 Monthly Sulphur Dioxide Emissions by Source, including source emission comparison paragraph following Table 17.4	19(1)(b), 19(1)(c)
47	Table 17.5, and 17.6 - Monthly Sulphur Dioxide Emissions by Source, including sources quoted in paragraph on page 47	19(1)(b), 19(1)(c)
48-54	Section 18.0 Flaring Summary, Comment column	19(1)(b), 19(1)(c)
(1 page)	Drawing 75-SFD-006 Simplified Process Flow for Refinery Complex	19(1)(b), 19(1)(c)
(1 page)	Figure 1 Co-op Refinery Complex Water Balance	19(1)(b)

[5] The 2012 report consists of 606 pages. The Ministry has withheld portions of pages 2-8, 45 and Appendices H, K and L because they are non-responsive to the Applicant's request. The other withheld portions of this record at issue is summarized in this table:

Page	Portion of 2012 Annual Environmental Report	Exemptions
49	Table 16.1 – 2012 Sulphur Unit Monthly and Quarterly Sulphur Recovery Efficiencies	19(1)(b), 19(1)(c)
50-51	Table 17.3 and 17.4 – 2011 and 2012 Monthly Sulphur Dioxide Emissions by source, by total Source, including the source referenced in paragraph on page 51	19(1)(b), 19(1)(c)
52	Table 17.5, and 17.6 – Monthly Sulphur Dioxide Emissions by Source, including sources referenced in paragraph	19(1)(b), 19(1)(c)
53-56	Section 18.0 Flaring Summary, comments column	19(1)(b), 19(1)(c)
(1 page)	Drawing 75-SFD-006 Simplified Process Flow for Refinery Complex	19(1)(b), 19(1)(c)
(1 page)	Figure 1 Co-op Refinery Complex Water Balance	19(1)(b)
Appendix F (138 pages)	Source Emission Survey, HDS Stack, SRU, Crud-Vac#2, and FCCU Stack	19(1)(b), 19(1)(c)
Appendix G (25 pages)	Sulphur Recovery Unit Performance Evaluation	19(1)(b), 19(1)(c)

III DISCUSSION OF THE ISSUES

1. Did the Ministry properly apply subsection 19(1)(b) of FOIP?

[6] Subsection 19(1)(b) of FOIP states:

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,

[7] The Third Party and the Ministry have indicated that subsection 19(1)(b) applies to all of the withheld portions of the record as described above.

[8] My office has established a three part test for subsection 19(1)(b) of FOIP as follows:

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

[9] The Ministry's submission relies heavily on arguments made by the Third Party in this case. The Ministry's submission states: "We believe that the arguments presented by the

third party were persuasive enough to satisfy the ministry's burden to prove that the harms were likely to outweigh the applicant's right to know.” The Ministry supplied us with a copy of the arguments the Third Party provided to the Ministry. The Third Party also provided submissions to my office for the purposes of this review.

1. Is the information financial, commercial, scientific, technical or labour relations information?

[10] The Third Party’s submission identifies the withheld material as commercial, scientific and technical information. My office has previously defined these terms as follows:

Commercial information is information relating to the buying, selling or exchange of merchandise or services.

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information.

Technical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics...it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information.

[11] The withheld portions of the record contains information on the maintenance of the Third Party’s equipment, waste of materials, turnaround and recovery of materials, sulphur dioxide emissions and flaring events. They also include diagrams that outline the Third Party’s processes.

[12] The withheld portions do not qualify as commercial information as it does not relate to the buying or selling of merchandise. It only relates to the amount of some product available. That is not specific enough to qualify. Further, the withheld portions do not qualify as scientific information. While the use of science is clearly required to generate

this information, it is not related to the observation and testing of specific hypothesis or conclusions.

[13] The withheld information does fall under the category of technical information. It was no doubt prepared by a professional in the field to which the Third Party belongs and describes the operation and maintenance of its equipment and processes.

2. *Was the information supplied by the third party to a public body?*

[14] In the past, my office has determined that information may qualify as “supplied” if it was directly supplied to a public body by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.

[15] The Third Party’s submission indicates that both the 2012 and 2013 reports were supplied directly to the Ministry. Upon review of the record, I note that the front cover of both reports state “Submitted to the Saskatchewan Ministry of Environment”. I agree that it was supplied by the Third Party to the Ministry.

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

[16] In the past, my office has stated that information supplied in confidence means that the Third Party has stipulated how the information can be disseminated. The expectation of confidentiality must be reasonable and must have an objective basis. Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated.

[17] The Third Party’s submission indicates that the information was supplied to the Ministry in implicit confidence. However, first I must consider whether the information was a “compulsory supply”, or in other words, I must determine if the Third Party was required to supply it to the Ministry.

[18] In the past, my office has stated that compulsory supply means that a statute requires disclosure thereby no voluntariness is said to be present. Compulsory supply of

information will not ordinarily qualify as confidential, but 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).

- [19] The front covers of both 2012 and 2013 Reports state that they were submitted pursuant to “Approval to Operate No. PO12-141”. The Ministry has provided me with a copy of this document. Section 13.3 of this document outlines what must be submitted to the Ministry on an annual basis. The Ministry also provided us with a copy of the Third Party’s “Permit to Operate...” which would apply to the 2012 report only. Subsection 8.4 of this document also lists what information was to be submitted to the Ministry.
- [20] Upon review of these documents, there does not appear to be any confidentiality provisions. The Approval to Operate is authorized by *The Environmental Management and Protection Act, 2002*, *The Clean Air Act* and *The Hazardous Substances and Waste Dangerous Goods Regulations*. The Permit to Operate is authorized by *The Environmental Management and Protection Act, 2002*, *The Water Regulations* and *The Clean Air Act*. These statutes do not have any confidentiality provisions.
- [21] I asked the Third Party to indicate what portions of the record it was required to provide to the Ministry and what was provided voluntarily. It provided me with the following:

Page	Portion of 2013 Annual Environmental Report	Is it an Approval Requirement? (Section 13.3)
4	Section 4.1 Turnaround, List of Major Turnaround Units (operational units offline in 2013), including Platformer Regeneration (Section 4.2) dates in paragraph	13.2, 13.3 (c)
42	Volume of spent catalyst recycled	13.3 (m)
42	Volume of spent caustic disposed of in 2013	No (Ministry of Energy and Resources regulated)
44	Section 16.0, Table 16.1 – 2013 Sulphur Unit monthly recovery efficiencies	13.3 (o)
45-46	Section 17.0, Table 17.3 and 17.4 – 2012 and 2013 Monthly Sulphur Dioxide Emissions by Source, including source emission comparison paragraph following Table 17.4	13.3 (p) monthly totals not required; and 2012 Table 17.4 not required
47	Table 17.5, and 17.6 - Monthly Sulphur Dioxide Emissions by Source, including sources quoted in paragraph on page 47	No
48-54	Section 18.0 Flaring Summary, Comment column	13.3 (q)
(1 page)	Drawing 75-SFD-006 Simplified Process Flow for Refinery Complex	No
(1 page)	Figure 1 Co-op Refinery Complex Water Balance	13.3(j)

Page	Portion of 2012 Annual Environmental Report	Is it a Permit to Operate (2004) requirement?
49	Table 16.1 – 2012 Sulphur Unit Monthly and Quarterly Sulphur Recovery Efficiencies	8.4 (n)
50-51	Table 17.3 and 17.4 - 2011 and 2012 Monthly Sulphur Dioxide Emissions by source, by total Source, including the source referenced in paragraph on page 51	8.4 (p), for current year only, Table 17.3 previous years' info not required, and info not required monthly
52	Table 17.5, and 17.6 - Monthly Sulphur Dioxide Emissions by Source, including sources referenced in paragraph	No
53-56	Section 18.0 Flaring Summary, comments column	8.4 (q)
(1 page)	Drawing 75-SFD-006 Simplified Process Flow for Refinery Complex	No
(1 page)	Figure 1 Co-op Refinery Complex Water Balance	No
Appendix F (138 pages)	Source Emission Survey, HDS Stack, SRU, Crud-Vac#2, and FCCU Stack	8.4 (k), results only, entire report not required
Appendix G (25 pages)	Sulphur Recovery Unit Performance Evaluation	8.4 (n), results only, entire report not required

[22] I accept the Third Party's description.

[23] As there are no confidentiality provisions in the above noted legislation, the portions of the record that was required by the Ministry would qualify as compulsory supply and cannot be covered by subsection 19(1)(b) of FOIP.

[24] The Third Party indicated that portions of the record that were not required and is "excess information" was provided to the Ministry for the purpose of maintaining a cooperative relationship. With respect to this "excess information" that was voluntarily supplied to the Ministry, I must determine if it was done so in confidence. The Third Party has indicated that it has been supplied on an implicitly confidential basis.

[25] My office has said in the past that "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. Factors that my office considers when determining whether a document was supplied in confidence implicitly include:

- Whether the information was communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
- Whether the information was treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body;
- Whether the information was not otherwise disclosed or available from sources to which the public has access; or
- Whether the information was prepared for a purpose which would not entail disclosure.

[26] I have received nothing that indicates that the Third Party communicated the information to the Ministry on the basis that it was confidential and that it was to be kept confidential.

[27] In its submission, the Third Party stated the information "in particular has been treated consistently by [the Third Party] in a manner that indicates concern for its protection and continued confidentiality, even prior to having been disclosed to the Ministry of Environment, particularly given the sensitive and proprietary nature of the information..." I accept the Third Party's assertion.

[28] The Third Party has indicated that it supplied the Ministry with excess information for the purpose of maintaining a cooperative relationship. The Third Party also stated that the information “is not otherwise disclosed further by the Ministry of Environment or available from sources which the public has access to.” This does not contemplate access to information requests. It also stated that the information “was prepared and presented to the Ministry of Environment in a manner which anticipated that such information was to be used internally only by the Ministry of Environment and not in a manner which anticipated further disclosure.” The legislation does not support this assertion.

[29] I accept that the excess information was supplied voluntarily to the Ministry and otherwise would not be made available to the public. However, the Third Party was required to submit the report to the Ministry. There is not enough to persuade me that the Third Party implicitly communicated to the Ministry that the excess information was supplied in confidence.

[30] Therefore, subsection 19(1)(b) of FOIP does not apply to the information in question.

2. Did the Ministry properly apply subsections 19(1)(c)(i) and (ii) of FOIP?

[31] Subsection 19(1)(c)(i) and (ii) state:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(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;

...

a third party;

[32] The Third Party has indicated that it believes that subsection 19(1)(c)(i) and (ii) applies to all portions of the record with exception to a similar figure that appears in both the 2012 and 2013 reports.

[33] For these provisions to apply there must be objective grounds for believing that disclosing the information would result in an undue loss or gain measured in monetary or monetary-equivalent terms (e.g. loss of revenue, loss of corporate reputation or loss of good will) or would prejudice or cause detriment to the competitive position of a Third Party.

[34] To make this determination, my office applies the harms test as follows:

1. There must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
2. The harm caused by the disclosure must be more than trivial or inconsequential; and
3. The likelihood of harm must be genuine and conceivable.

1. Is there a cause and effect relationship between the disclosure and the harm which is alleged?

[35] The Third Party has indicated that the information in question reveals information about its processes, process units, operation, methods and efficiencies. In one example, the Third Party indicated that, should the information be released, competitors will have “access to the locations in the plant where the substances are stored, which in turn would give an indication as to the substances used in a particular process unit, which is specific processing information and information which is proprietary to [the Third Party].”

[36] The Third Party further stated: “The harm that could result is that competitors could then attempt to expropriate such processing methods to the detriment of [the Third Party], and even though [the Third Party] has invested significant time and resources to develop such methods, processes and products.”

[37] I agree there is a cause and effect relationship between the release of the information and the harm. I also agree that this harm can be classified under both subsections 19(1)(c)(i) and (ii) of FOIP.

2. Would the harm caused by the disclosure be more than trivial or inconsequential?

[38] I am persuaded that the harm by the disclosure of portions of the record would be more than trivial or inconsequential.

3. Is the likelihood of harm genuine and conceivable?

[39] I am persuaded that the likelihood of harm would be genuine and conceivable.

[40] Subsection 19(1)(c)(i) and (ii) of FOIP apply to the identified portions of the record.

3. Does subsection 19(3) of FOIP apply to the record?

[41] Subsection 19(3) of FOIP states:

19(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of; a third party.

[42] In order for subsection 19(3) of FOIP to apply to a record, a subsection of 19(1) must apply to the record. In this case, subsections 19(1)(c)(i) and (ii) of FOIP apply to most of the record.

1. Is disclosure in the public interest as it relates to public health, public safety or protection of the environment?

[43] As noted above, the record is an environmental report that the Third Party is required to submit to the Ministry of Environment for the purposes of complying with environmental legislation and regulations. Such legislation has been enacted because to protect the

environment. As such, the record could reasonably be expected to be in the public interests as it relates to the protection of the environment pursuant to subsection 19(3)(a).

2. Would public interest outweigh in importance any financial loss or gain to or prejudice to the competitive position of the Third Party?

[44] As noted under the analysis for 19(1)(b), part of the information that the Third Party supplied to the Ministry was required by the legislation; however, other information was supplied in excess. With that in mind, I believe that all of the information that was required to be supplied by the Third Party to the Ministry would outweigh in importance any financial loss to or prejudice the competitive position of the Third Party as our legislators have determined it is in the public interest to monitor this information. However, the public interest resulting from disclosure of the information supplied in excess to the Ministry would not outweigh any financial loss or prejudice the competitive position of the Third Party.

[45] Subsection 19(3) of FOIP applies to the information that the Third Party was required to supply to the Ministry and should be released.

IV FINDINGS

[46] I find that subsection 19(1)(b) of FOIP does not apply to the record.

[47] I find that subsections 19(1)(c)(i) and (ii) of FOIP apply to certain portions of the record.

[48] I find that subsection 19(3) of FOIP apply to the portions of the record that the Third Party was required to supply to the Ministry.

V RECOMMENDATIONS

[49] I recommend that the Ministry release to the Applicant the portions of the record that the Third Party was required to supply to the Ministry and the portions of the record not captured by subsection 19(1)(c) of FOIP. This should occur 30 days after the Ministry gives its written decision to the Third Party pursuant to section 57 of FOIP.

[50] I recommend that the Ministry create a strategy to educate the public about environmental information that is supplied to the Ministry and the requirements of FOIP. In particular, the education should focus on distinguishing between compulsory supply and voluntary supply; and indicate which can be supplied in confidence.

Dated at Regina, in the Province of Saskatchewan, this 25th day of May, 2015.

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