



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 046-2018

Ministry of Energy and Resources (formerly the Ministry of the Economy)

January 28, 2019

Summary: The Ministry of Energy and Resources (the Ministry) received an access to information request for records relating to a Husky pipeline. The Ministry withheld the record pursuant to subsections 15(1)(a), (c), (d), (j) and (k) of *The Freedom of Information and Protection of Privacy Act* (FOIP) because there was an active prosecution related to the pipeline. The Commissioner found that subsections 15(1)(a), (c), (d), (j) and (k) of FOIP did not apply and recommended release of the records.

I BACKGROUND

- [1] On November 10, 2017, the Ministry of the Economy received an access to information request for “Pipeline inspection reports for the Husky 16TAN pipeline, Timeframe: Jan 1, 2010 to July 20, 2016”.
- [2] On November 30, 2017, the Ministry of the Economy responded to the Applicant. It indicated that access to the records were refused pursuant to subsections 15(1)(a), (c), (d), (j) and (k) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [3] On March 12, 2018, the Applicant requested a review by my office. On March 15, 2018, my office notified the Ministry of the Economy and the Applicant that my office would undertake a review.

[4] At the time of the access to information request, the Ministry of the Economy was a single ministry. However, at the time of the review, the Ministry of the Economy had split into three ministries: the Ministry of Energy and Resources, the Ministry of Trade and Export Development and the Ministry of Immigration and Career Training. My office has been advised that the records involved in this review are with the Ministry of Energy and Resources (the Ministry).

II RECORDS AT ISSUE

[5] The Ministry identified 26 pages of inspection reports. The Ministry noted that there are 13 different inspection reports within the record. The Ministry withheld the entire record pursuant to subsections 15(1)(a), (c), (d), (j) and (k) of FOIP.

[6] I note that in Review Report 223-2016, I considered whether subsections 15(1)(a), (b) and (c) of FOIP applied to the same records. A different Applicant has requested the records in this case.

III DISCUSSION OF THE ISSUES

1. Does my office have jurisdiction in this matter?

[7] The Ministry qualifies as a government institution pursuant to subsection 2(d)(i) of FOIP. Therefore, my office has jurisdiction in this matter.

2. Does subsection 15(1)(a) of FOIP apply to the record?

[8] Subsection 15(1)(a) of FOIP provides:

15(1) A head may refuse to give access to a record, the release of which could:

(a) prejudice, interfere with or adversely affect the detection, investigation, prevention or prosecution of an offence or the security of a centre of lawful detention;

- [9] The Ministry has applied this exemption to the entire record. It submits that release of the record could adversely affect a prosecution of an offence.
- [10] A prosecution in this context refers to proceedings in respect of a criminal or quasi-criminal charge laid under an enactment of Saskatchewan or Canada and may include regulatory offences that carry true penal consequences such as imprisonment or a significant fine.
- [11] The phrase “adversely affect” refers to hurt, injury or impairment to prosecution of an offence.
- [12] In this case, the prosecution relates to an oil spill. In its submission, the Ministry indicated that the Public Prosecutions branch of the Ministry of Justice and Attorney General is currently prosecuting Husky on charges under *The Environmental Management and Protection Act, 2010* (EMPA). Section 84 of the EMPA provides for substantial fines when someone is convicted of an offence. The Ministry provided my office with a news release from Environment and Climate Change Canada, dated March 26, 2018, that stated:
- The Government of Saskatchewan also filed a charge under the *Environmental Management and Protection Act, 2010*. These charges result from a 19-month joint federal-provincial investigation.
- [13] In Review Report 223-2016, when I considered whether subsection 15(1)(a) of FOIP applied to these records, there was no prosecution taking place; however, an investigation was ongoing. The Ministry of the Economy did not provide any indication that a prosecution was going to occur. As such, I found at that time that subsection 15(1)(a) of FOIP did not apply to the record. I note that in response to my office regarding Review Report 223-2016, the Ministry of the Economy indicated on January 19, 2017 that it “will release the records upon completion of the investigation”.
- [14] However, there is now a prosecution in progress and I must consider whether release of these records could adversely affect the prosecution.

[15] The Ministry's submission indicates that the release of the records could adversely affect the prosecution in three ways: it could affect the admissibility of evidence, it may sway public opinion and it could impair the accused's right to a fair and impartial trial.

[16] With respect to the Ministry's concerns that release of the records could affect the admissibility of evidence, it submitted that the case might be dismissed due to the public release of evidence before a charge is laid. It noted that this result would be more than trivial or inconsequential, as the penalties for an offence under the EMPA are substantial.

[17] The Ministry did not offer examples where this has occurred in the past or details regarding any past decisions to dismiss cases where evidence has been disclosed. It did not note any legal rules that would make evidence inadmissible if it has been disclosed.

[18] I also note section 45 of *The Evidence Act*, which provides:

45(1) A copy of an entry in a record kept by a department of a province or territory of Canada or the Government of Canada shall be received as evidence of the entry and of the matters, transactions and accounts recorded in it if it is proved, by the affidavit of an officer of the department, that:

(a) at the time of the making of the entry, the record was one of the ordinary records kept by the department;

(b) the entry was made in the usual and ordinary course of business of the department; and

(c) the copy is a true copy.

(2) Where a record is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other statute exists that renders its contents provable by means of a copy, a copy of it or an extract from it is admissible if it is proved that it is a copy or extract purporting to be certified to be true by the custodian of the original record.

[19] I am not persuaded that release of these records could adversely affect a prosecution by resulting in the dismissal of the case.

[20] The Ministry also submitted that media coverage, or other public statements about the record, and the evidence contained in the report, could also affect the perception of potential witnesses and a judge or jury.

[21] I considered similar concerns in Review Report 223-2016. I noted that the record was factual information. I also noted that there are many examples of publicity occurring prior to a trial but the Court proceeds to try the case and reach its conclusion based on the facts in front of the Court. I am not persuaded that any publicity around the release of these records would adversely affect a prosecution.

[22] Finally, the Ministry submitted that the release of the record could either impair the accused's right to a fair and impartial trial. Further, the Ministry submitted that the accused might convince the Court that release of the record has affected its right to a fair and impartial trial, resulting in dismissal of the case. It did not explain further how the release of the record could cause these results. I am not persuaded that the release of the records in question could produce these results.

[23] I am not persuaded that subsection 15(1)(a) of FOIP applies to the record.

3. Does subsection 15(1)(c) of FOIP apply to the record?

[24] Subsection 15(1)(c) of FOIP provides:

15(1) A head may refuse to give access to a record, the release of which could:

...

(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;

[25] My office has established the following test for subsection 15(1)(c) of FOIP:

1. Does the public body's activity qualify as a "lawful investigation" under the Act?
2. One of the following must exist:
 - a. The release of information would interfere with a lawful investigation; or
 - b. The release of information would disclose information with respect to a lawful investigation.

[26] First, I must determine if there is a lawful investigation. A lawful investigation is an investigation that is authorized or required and permitted by law.

[27] The Ministry's submission explained that, because of the pipeline spill that occurred in Saskatchewan, the Ministry initiated an investigation into the spill. The Ministry indicated that this investigation was launched pursuant to subsection 23(1) of *The Pipelines Act, 1998* which states:

23(1) The minister may, on the minister's own motion or on the application of any person, order the board to hold a hearing, investigation or inquiry with respect to any matter related to this Act, the regulations or a directive and make recommendations to the minister.

[28] Section 2(a) of *The Pipelines Act, 1998* points to *The Oil and Gas Conservation Act* to define "the board". Some of the relevant sections are as follows:

7.2(1) The minister may direct an official of the ministry to do any of the things mentioned in subsection 7.11(1) if:

- (a) a board has not been established pursuant to section 7; or
- (b) the minister considers it advisable.

(2) For the purposes of carrying out a minister's direction pursuant to subsection (1), the official has all the powers conferred on the board pursuant to sections 7 to 7.9 and is subject to all of the duties imposed on the board pursuant to these sections.

- [29] The Ministry's submission indicated that the Assistant Deputy Minister, Petroleum and Natural Gas Division had been appointed to investigate pursuant to subsection 7.2 of *The Oil and Gas Conservation Act*. The Ministry had previously provided us with a copy of the Minister's Order regarding this investigation signed on August 15, 2016. I am persuaded that this qualifies as a lawful investigation.
- [30] The Ministry's submission indicated that release of the records would disclose information with respect to a lawful investigation.
- [31] The Ministry indicated that these records are part of the investigation. However, the records, created in 2014, pre-existed the investigation which commenced on August 15, 2016. The records were created for another purpose and not for this investigation. I must consider whether the investigation should preclude access to these records created at a different time and for a different purpose.
- [32] The wording "disclose information with respect to a lawful investigation" is unique to Saskatchewan. No other access to information statutes across Canada include this phrase.
- [33] In Review Report 2001/029, the view of past Saskatchewan Information and Privacy Commissioner Gerald Gerrand, Q.C. was that subsection 15(1)(c) of FOIP relates to "methods or techniques that might be employed for the purpose of carrying out" an investigation.
- [34] This is also my view. Records caught by this exemption should relate to the process of the investigation itself, not records that existed before the investigation commenced such as regular reporting records.
- [35] The Ministry noted the case *Evenson v. Saskatchewan Ministry of Justice*, 2013, Sk QB. This case considered subsection 15(1)(k) of FOIP, which is similar to subsection 15(1)(c), and whether release of records could "disclose information with respect to a law enforcement matter". The case noted the exemption gave "the right to ensure witnesses and informants of complete confidentiality and secrecy".

[36] I note that the record was not provided by an informant or witness. The information was routinely collected by the Ministry before the incident which prompted the investigation.

[37] As noted, On January 19, 2017, the Ministry committed to releasing the record once the investigation had been completed.

[38] I am not persuaded that subsection 15(1)(c) of FOIP applies to the record.

4. Do subsections 15(1)(d), (j) or (k) of FOIP apply to the record?

[39] Subsections 15(1)(d), (j) and (k) of FOIP provide:

15(1) A head may refuse to give access to a record, the release of which could:

...

(d) be injurious to the Government of Saskatchewan or a government institution in the conduct of existing or anticipated legal proceedings;

...

(j) facilitate the commission of an offence or tend to impede the detection of an offence;

(k) interfere with a law enforcement matter or disclose information respecting a law enforcement matter;

[40] The Ministry raised these exemptions but did not address them in its submission to my office. Government institutions should not assume that it is self-evident on the face of the record that an exemption applies to a record. Section 61 of FOIP provides as follows:

61 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[41] I am not persuaded that subsections 15(1)(d), (j) or (k) of FOIP applies to the record.

IV FINDING

[42] I find that subsections 15(1)(a), (c), (d), (j) and (k) of FOIP do not apply to the record.

V RECOMMENDATION

[43] I recommend that the Ministry release the records to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 28th day of January, 2019.

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