



REVIEW REPORT 048-2018

Ministry of Environment

March 7, 2019

Summary: The Applicant made an access to information request for information related to the clean-up of an oil spill. The Ministry of the Environment (the Ministry) withheld all information pursuant to subsections 15(1)(a), (b), (c), 17(1)(a) and (b) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner did not find that any of the exemptions applied and recommended release of the record.

I BACKGROUND

[1] On November 10, 2017 the Ministry of Environment (the Ministry) received an access to information request for “Reports, including draft reports, and email correspondence on the Husky Maidstone spill recovery effort July 20, 2017 to present.” The Applicant suggested the following keywords for the Ministry’s search: Husky, North Saskatchewan, SCAT, Owens Coastal Consultations, James Smith Cree Nation, Little Pine First Nation, PAH, VOC and hydrocarbons; as well as the name of an individual.

[2] On December 7, 2017, the Ministry responded to the Applicant. It indicated that the Ministry would withhold all of the records pursuant to subsections 15(1)(a), (b), (c), 17(1)(a) and (b) of *The Freedom of Information and Protection of Privacy Act* (FOIP). It also indicated that the Applicant could make another access request after the Ministry had concluded its investigation into the oil spill.

[3] On March 12, 2018, the Applicant requested a review of the Ministry's decision by my office. On March 14, 2018, my office provided notification to both the Applicant and the Ministry of my intention to conduct a review.

II RECORDS AT ISSUE

[4] The Ministry indicated that there were 4,382 pages of records. It did not, however, prepare a detailed index of records as is required in my office's *Rules of Procedure*.

III DISCUSSION OF THE ISSUES

1. Does my office have jurisdiction in this matter?

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

[6] The Ministry has applied subsections 15(1)(a), (b), (c), 17(1)(a) and (b) of FOIP to the entirety of the record.

2. Did the Ministry meet its obligations under section 8 of FOIP?

[7] Section 8 of FOIP provides as follows:

8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

[8] When a government institution receives an access to information request, it must complete a line-by-line analysis of the responsive records to comply with section 8 of FOIP. Through this analysis, the government institution is required to determine where a mandatory or discretionary exemption applies and sever those specific portions of the records. Then, it is to release the remainder of the record to the Applicant.

[9] The Ministry withheld 4,382 pages of records in their entirety. In its section 7 response, the Ministry advised the Applicant “the reason for refusal of any of the requested records is that the Government of Saskatchewan is currently conducting an investigation into the spill involving Husky Oil. Information regarding the records related to this specific incident will not be released until such time as the investigation is complete.” The Ministry’s submission reiterated its point of view stating that since the failure of the pipeline, “the ministry has taken the above noted approach to all related access requests - records will not be disclosed until the conclusion of the investigation and subsequent legal proceedings”.

[10] The Ministry took a blanket approach to withholding the records at issue. In other words, instead of conducting a line-by-line review of each record to apply exemptions to only portions of the records, the Ministry withheld records in full. This approach does not comply with section 8 of FOIP.

[11] The rule is exceptions to the right of access should be limited and specific. This is supported by a number of Supreme Court of Canada and Federal Court of Appeal decisions. In addition, the Saskatchewan Court of Appeal also took a similar approach in *General Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance* (1993), which provides at paragraph [11]:

The Act’s basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. That is not to say that statutory exemptions are of little or no significance. We recognize that they are intended to have a meaningful reach and application. The Act provides for specific exemptions to take care of potential abuses. There are legitimate privacy interests that could be harmed by release of certain types of information. Accordingly, specific exemptions have been delineated to achieve a workable balance between the competing interests. The Act’s broad provisions for disclosure, coupled with specific exemptions, prescribe the “balance” struck between an individual’s right to privacy and the basic policy of opening agency records and action to public scrutiny.

[12] I find that the Ministry has not met its obligations under section 8 of FOIP.

3. Does subsection 15(1)(a) of FOIP apply to the records?

[13] 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;

[14] 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.

[15] 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.

[16] The phrase “adversely affect” refers to hurt, injury or impairment to prosecution of an offence.

[17] 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 indicated that Ministry records have been supplied to federal prosecutors relating to the oil spill for the purposes of the federal investigation. The Ministry of Environment and Environment and Climate Change Canada have a joint investigation agreement where investigations and prosecutions are conducted jointly in relation to environmental offences.

[18] In its submission, the Ministry indicated that it is essential that all documentation be kept confidential until such time as a prosecution and appeals have been concluded. It submitted that the preemptive release of records may sway public opinion in relation to the oil spill and media coverage, or other public statements about the incident, and the evidence

contained in the records, could also affect the perception of potential witnesses and a judge or jury. Finally the Ministry indicated that release may also affect any right to a fair trial or impartial adjudication.

[19] I considered similar concerns in Review Reports 223-2016 and 046-2018. I 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.

[20] With respect to the records, most concern the response to the spill. This generally includes scientific testing information and updates, response plans, information about the Ministry's correspondence with the media and first nations, permit application and permits, best practices, qualified person certificates, corrective action plans and geological reports. This information relates to the response after the spill occurred, not before. I am not persuaded that any publicity around the release of these records would adversely affect a prosecution.

[21] Finally, the Ministry submitted that the release of the record could either impair the accused's right to a fair and impartial trial. 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.

[22] Compounded by the fact that the Ministry took a blanket approach to the application of this exemption, I am not persuaded that subsection 15(1)(a) of FOIP applies to the record.

4. Does subsection 15(1)(c) of FOIP apply to the records?

[23] 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;

[24] 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.

[25] 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.

[26] Because of the pipeline spill that occurred in Saskatchewan, an investigation was initiated into the spill. 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.

[27] In Review Reports 223-2016 and 046-2018, I found that this was a lawful investigation.

[28] The Ministry's submission indicated that release of the records would disclose information with respect to a lawful investigation.

[29] The Ministry has not demonstrated how records regarding the cleanup of the oil spill relates to how the oil spill occurred. Further, the Ministry noted in its submission that "the ministry expects that many of the requested records would have been turned over to Public Prosecutions in the course of their investigation. No ministry official knows exactly which records are tied to the active investigation." It has not done the work to verify or to persuade me that subsection 15(1)(c) applies to the record.

[30] Compounded by the fact that the Ministry took a blanket approach to the application of this exemption, I am not persuaded that subsection 15(1)(c) of FOIP applies to the record.

4. Do subsections 15(1)(b)(i), 15(1)(b)(ii), 17(1)(a) and 17(1)(b)(i) of FOIP apply to the record?

[31] Subsections 15(1)(b)(i) and 15(1)(b)(ii) of FOIP provide:

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

...

(b) be injurious to the enforcement of:

(i) an Act or a regulation; or

(ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada;

[32] Subsection 17(1)(a) and 17(1)(b)(i) of FOIP provide:

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;

(b) consultations or deliberations involving:

(i) officers or employees of a government institution;

[33] 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:

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.

[34] I am not persuaded that subsections 15(1)(b)(i), 15(1)(b)(ii), 17(1)(a) and 17(1)(b)(i) of FOIP apply to the record.

IV FINDING

[35] I find that subsections 15(1)(a), 15(1)(b)(i), 15(1)(b)(ii), 15(1)(c), 17(1)(a) and 17(1)(b)(i) of FOIP do not apply to the record.

V RECOMMENDATION

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

Dated at Regina, in the Province of Saskatchewan, this 7th day of March, 2019.

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