



REVIEW REPORT 084-2017

Ministry of Environment

August 1, 2017

Summary: The Ministry of Environment (the Ministry) intended to release records relating to Cenovus Energy Inc. (Cenovus), which qualifies as a third party pursuant to *The Freedom of Information and Protection of Privacy Act* (FOIP). Cenovus requested a review because it believed that subsections 19(1)(a), (c) and 21 of FOIP applied to the record. The Commissioner found that subsections 19(1)(a) and (c) of FOIP did not apply to the record. He also found that a third party could not apply section 21 of FOIP. He recommended the Ministry release the record to the Applicant.

I BACKGROUND

[1] The Ministry of Environment (the Ministry) received an access to information request dated February 17, 2017 for “Oil spills, water contamination, waste, misc spills, oil wells, stop orders, notices of contravention, compliance undertakings, officer reports or prosecutions, convictions and acquittals, compliant information, inspection reports, etc.” regarding Cenovus Energy Inc. (Cenovus).

[2] The Ministry identified two responsive records that related to Cenovus. The Ministry determined that Cenovus was a third party according to *The Freedom of Information and Protection of Privacy Act* (FOIP). On March 9, 2017, pursuant to section 34 of FOIP, the Ministry contacted Cenovus and indicated that it intended to give the Applicant access to the responsive records and invited Cenovus to make representation as to whether the record should be released.

- [3] On March 28, 2017, Cenovus provided the Ministry with a submission indicating that it had no issues with the release of one of the two records. However, Cenovus objected to the release of the second record on the basis that subsections 19(1)(a), (c) and 21 of FOIP apply to the record.
- [4] On April 4, 2017, the Ministry wrote to both Cenovus and the Applicant indicating that it considered Cenovus' representation and had decided to release the record. The Ministry indicated that, pursuant to subsection 37(3) of FOIP, Cenovus could request a review by my office within 20 days.
- [5] On April 21, 2017, my office received a request for review from Cenovus. On April 27, 2017, my office provided notification to the Applicant, the Ministry and Cenovus of my intention to undertake a review.

II RECORDS AT ISSUE

- [6] The responsive record is a 16 page Spill Summary Report for a certain location. Cenovus submits that subsections 19(1)(a), (c) and 21 of FOIP apply to the record.
- [7] The Ministry submits that these exemptions do not apply to the record.

III DISCUSSION OF THE ISSUES

- [8] The Ministry qualifies as a government institution pursuant to subsection 2(d)(i) of FOIP.

1. Does subsection 19(1)(a) of FOIP apply to the record?

[9] Subsection 19(1)(a) of FOIP provides:

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

(a) trade secrets of a third party;

[10] My office has defined trade secrets as information, including a plan or process, tool, mechanism or compound which possesses each of the four following characteristics:

1. the information must be secret in an absolute or relative sense (is known only by one or a relatively small number of people);
2. the possessor of the information must demonstrate he/she has acted with the intention to treat the information as secret;
3. the information must be capable of industrial or commercial application; and
4. the possessor must have an interest (e.g. an economic interest) worthy of legal protection.

[11] The information must meet all of the above criteria to be considered a trade secret. Further, the Third Party must also be able to prove ownership or a proprietary interest in the trade secret or prove a claim of legal right to the information.

[12] I note that this test for determining a trade secret has been derived from the Supreme Court of Canada decision *Merck Frosst Canada Ltd. v. Canada (Health)* 2012 S.C.C. 3, [2012] 1 S.C.R. 23. which Cenovus also cites in its submission as the test for a trade secret.

[13] Cenovus' submission to my office indicated that site and land use information, soil sampling program and analysis, site soil salinity, site soil chemical composition, treater locations, pipe rack locations and various building locations on the site found in the record all qualifies as trade secrets.

- [14] The site and land use descriptions in the record are very short and general and do not qualify as a plan, process, tool, mechanism or compound. It does not qualify as a trade secret.
- [15] With respect to the treater locations, pipe rack locations and various building locations, my understanding is that Cenovus is referring to three photographs in the record. One is an overhead photograph of the site which includes an overlay. The photograph is quite distorted. The overlay names the buildings in the photograph. It indicates where a spill occurred. It also shows where soil samples were taken and various other environmental components. The other two photographs, taken from the ground, show the spill site. I am not persuaded that these photographs qualify as a plan, process, tool, mechanism or compound. Further, Cenovus did not address the other parts of the test for trade secret identified in the Supreme Court decision. These photographs do not qualify as a trade secret.
- [16] Finally, Cenovus indicated that the soil sampling program and analysis, site soil salinity, and site soil chemical composition contained in the record also qualifies as a trade secret of Cenovus. This type of information forms the majority of the record.
- [17] The Ministry stated that the soil sampling methodologies are publically available and standard. It also stated that the sampling activities are “not linked to the day to day operations of Cenovus.” Therefore, the soil sampling program and analysis is not a trade secret of Cenovus.
- [18] Further, Cenovus has not persuaded me that site soil salinity, and site soil chemical composition is a plan or process, tool, mechanism or compound with industrial or commercial application. Therefore, it is not a trade secret.
- [19] I am not persuaded that any of the information contained in the record qualifies as a trade secret. Subsection 19(1)(a) of FOIP does not apply to the record.

2. Does subsection 19(1)(c) of FOIP apply to the record?

[20] 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:

...

(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;

[21] For these provisions to apply there must be objective grounds for believing that disclosing the information would result in the harm alleged. The parties do not have to prove that a harm is probable, but need to show that there is a “reasonable expectation of harm” if any of the information were to be released. For all of the subsections of this provision, the following three part test can be applied to determine whether disclosure of records or information could reasonably be expected to cause the harm alleged:

1. Is there a clear cause and effect relationship between the disclosure and the harm which is alleged?
2. Is the harm caused by the disclosure more than trivial or inconsequential?
3. Is the likelihood of the harm genuine and conceivable?

[22] Cenovus’ submitted that the release of the record could reasonably be expected to result in financial loss or gain to; prejudice the competitive position of; interfere with the contractual or other negotiations of Cenovus. It further submitted that the success of the facility in question is tied to operations which are predicated on unique infrastructure configuration, design and operation. It stated that such infrastructure configuration, design and operational information can be deduced or readily gleaned from the record.

- [23] Cenovus did not describe how the information that could be deduced or gleaned from the record could result in harm described in subsections 19(1)(c)(i), (ii) and (iii) of FOIP. It did not specify exactly how release of the information could result in financial gain or loss or affect its competitive position. Further, it did not explain what negotiations the release of the information could affect or how the information could interfere with the negotiations.
- [24] Cenovus' submission also stated that subsections 19(1)(c)(i), (ii) and (iii) of FOIP apply to the entirety of the record; however "Cenovus is prepared to limit its objection to the disclosure of" the overhead photograph.
- [25] The Ministry's submission indicated that the photograph in question only provides "high-level details of the surrounding infrastructure". It noted that the record does not provide specific details "that speak to the engineering design or operational components" of Cenovus' operations. As such, the Ministry indicated that it was not persuaded that release of the record would cause potential financial or competitive harm given the level of detail represented.
- [26] I am of the same mind. Cenovus has not described what harm could reasonably be expected from release of the record. Subsection 19(1)(c) of FOIP does not apply to the record.

3. Can a Third Party rely on section 21 of FOIP?

- [27] Section 21 of FOIP provides:

21 A head may refuse to give access to a record if the disclosure could threaten the safety or the physical or mental health of an individual.

- [28] Cenovus submitted that section 21 applies to the record. The Ministry did not claim this exemption and disagrees with Cenovus' assertion.
- [29] Section 21 of FOIP is a discretionary exemption and provides the "head" of a government institution the ability to exercise his/her discretion to deny access or to release a record.

The head of the Ministry did not rely upon section 21 of FOIP. This discretion is solely reserved under FOIP for the head of the government institution for records in its possession and/or control. This section, giving the head discretion, does not apply to a Third Party.

IV FINDINGS

[30] I find that subsections 19(1)(a) and 19(1)(c) do not apply to the record.

[31] I find that a third party cannot rely on section 21 of FOIP.

V RECOMMENDATION

[32] I recommend that the Ministry release the record to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 1st day of August, 2017.

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