



REVIEW REPORT 087-2015 and 088-2015

Ministry of Environment

July 28, 2015

Summary:

The Applicant requested from the Ministry of the Environment two reports supplied by a Third Party. The Ministry applied subsections 19(1)(a), (b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP) and withheld both records in their entirety. The Commissioner found that subsection 19(1)(b) of FOIP applied to the records and subsection 19(1)(c) only applied to portions of the records. He also found that subsection 19(3) of FOIP applied to portions of the record to which subsection 19(1)(c) did not apply. He recommended release of those portions.

I BACKGROUND

[1] On February 13, 2015, the Ministry of Environment received two access to information requests from the same Applicant as follows:

1. All plans [name of Third Party] has submitted aimed at reducing fugitive and/or other emissions from 2009 to 2014
2. A copy of a Report entitled [Major Hazards Risk Assessment Report]

[2] The Ministry identified that a Third Party may have business interests in the responsive records and took the necessary steps to notify it that the access requests had been made pursuant to Part V of *The Freedom of Information and Protection of Privacy Act* (FOIP). On April 16, 2015, the Ministry informed the Applicant that the records responsive to the request were being withheld pursuant to subsections 19(1)(a), (b) and (c) of FOIP.

[3] The Applicant was dissatisfied with the response and requested reviews by my office on April 27, 2015. On April 30, 2015, my office provided notification of our intention to undertake the reviews to the Ministry, the Applicant and the Third Party.

[4] The Ministry, Third Party and Applicant have provided submissions. The Ministry's submissions, in both cases, rely heavily on arguments made by the Third Party. It does not address the specific tests for each exemption in detail. Both submissions state: "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."

II RECORDS AT ISSUE

[5] The record for file 087-2015 is entitled *Atmospheric Emissions Reduction Plan 2012* (AERP) for the Third Party. It is 60 pages. Both the Ministry and the Third Party believe the whole report should be withheld pursuant to subsections 19(1)(a), (b) and (c) of FOIP.

[6] The record for file 088-2015 is entitled *Major Hazards Risk Assessment Report* (MHRAR). It is 186 pages long. Both the Ministry and the Third Party believe the whole report should be withheld pursuant to subsections 19(1)(a), (b) and (c) of FOIP.

III DISCUSSION OF THE ISSUES

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

[7] Subsection 19(1)(a) of FOIP states:

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;

- [8] Trade Secret is defined as information, including a formula, pattern, compilation, program, device, product, method, technique or process:
- i) that is used, or may be used, in business or for any commercial purpose;
 - ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use;
 - iii) that is the subject of reasonable efforts to prevent it from becoming generally known; and
 - iv) the disclosure of which would result in significant harm or undue financial loss or gain.
- [9] 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 (i.e. license agreement).
- [10] Both the Ministry and the Third Party have stated that the records contain trade secrets and that both documents should be withheld in their entirety. However, the Ministry has not considered section 8 of FOIP which states:
- 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.
- [11] Upon review of the record, I am not persuaded that the entire record would constitute a trade secret. Neither the Ministry nor the Third Party has identified which parts of the records would be trade secrets. The Third Party's submission is general and vague. It states: "[The Third Party] employs a unique configuration of process equipment as well as processing methods in order to produce high quality petroleum products. The Records include descriptions of the process equipment and processing methods employed by CRC to produce its end products."
- [12] The third part of the test noted above is whether the information is the subject of reasonable efforts to prevent it from becoming generally known. My office has given the opportunity to both the Ministry and the Third Party to persuade me that this exemption applies. In this context, it would be reasonable for the Third Party to clearly identify any trade secrets within the document. Because the Third Party has not done so, I find that

the third part of the test is not met. Therefore subsection 19(1)(a) of FOIP does not apply.

2. Does subsection 19(1)(b) of FOIP apply to the records?

[13] 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, implicitly or explicitly, to a government institution by a third party;

[14] Both the Ministry and the Third Party have indicated that subsection 19(1)(b) of FOIP applies to both records in their entirety.

[15] 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?

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

[16] The Third Party's submission has indicated that the entire report qualifies as technical, commercial, scientific and financial information.

[17] My office has previously defined technical information as follows:

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.

[18] The Third Party argues the entire documents would qualify as technical information. I agree that the records in their entirety qualify as technical information as they describe the construction or operation of a process or equipment. This part of the test is met.

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

[19] This part of the test is satisfied as the Third Party supplied the two records to the Ministry pursuant to Part IV of *The Environmental Assessment Act*.

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

[20] 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.

[21] Both the Ministry and the Third Party's submissions indicate that the information was supplied in explicit confidence. Upon review of the material provided, it is evident that the Third Party explicitly communicated that these records were to be held in confidence. Therefore, this part of the test is met.

[22] Subsection 19(1)(b) of FOIP applies to the record in its entirety.

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

[23] Subsection 19(1)(c) of FOIP states:

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;

[24] The Third Party and the Ministry have indicated that they believe that subsections 19(1)(c)(i), (ii) and (iii) apply to all portions of the records.

[25] 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.

[26] 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?

[27] The Third Party has not specifically identified which portions of the record would qualify under subsection 19(1)(c) of FOIP. However, it has identified four general types of information that would qualify under this exemption.

[28] The first type is information that describes “existing and proposed process equipment and processing methods”. This includes “proposed projects aimed at improving [the Third Party’s] operations, processes and equipment.” The Third Party’s submission contends that if this information was released “competitors would be able to replicate the quality of petroleum products that [the Third Party] is producing. This is particularly critical for [the Third Party’s] petroleum products which are established as superior quality products in the marketplace.” Its submission argues that if this were to occur it would result in financial loss or gain to or prejudice the competitive position of the Third Party.

[29] I agree that a cause and effect relationship between release of the information described above and the harms contemplated in subsection 19(1)(c). However, only portions of the records would qualify as the description above. Since the Third Party has not identified these portions, I have identified them as follows:

AERP		MHRAR	
Pages 13-20	Sections entitled: <ul style="list-style-type: none"> • “Unit description” • “Project Objectives” • “Project Costs” and photographs and diagrams.	Pages 4-7	Information regarding production/facilities
Page 24	Expenditures	Appendix V	Vessel Risk Calculation Spreadsheet
		Appendix VIII	Summary of Effects Distances
		Appendix IX	Heat Radiation and Explosion Overpressure Effects

[30] I note that part of the record describes the Third Party’s air monitoring processes. I do not see how release of this information relates to the production of petroleum and could result in financial loss or gain to or prejudice the competitive position of the Third Party. Therefore a cause and effect relationship does not apply to the information describing the air monitoring process.

[31] The second type of information the Third Party has identified is “process equipment and processing methods are protected under third party licensing agreements and non-disclosure or confidentiality agreements.” It indicates that the release of this information could result in financial loss or gain to or prejudice the competitive position of other third parties. The Third Party has not identified which parts of the records or which third parties would be relevant. From review of the record, I cannot identify what portions might require protection. Therefore, I do not see a cause and effect relationship.

[32] The third type of information identified in the Third Party's submission is detailed information regarding the volumes of inventory maintained by the Third Party. The Third Party has indicated that this information is found in Appendix V of the MHRAR. It further argued that "An understanding of the volume of inventory maintained by [the Third Party] at any time will directly impact [its] bargaining position, and will enable competitors to alter their own pricing practices, based on their knowledge of the inventory that [the Third Party] has available." I agree there is a cause and effect relationship.

[33] Finally, the last type of information identified by the Third Party is information produced by engineering and risk assessment professionals that refers to possible or hypothetical risks. The Third Party has said release of the information would negatively impact its brand and reputation. The Third Party's submission noted that the public may not understand the technical conclusions of the report and have a negative view of the company and in turn reduce public consumption of its goods. However, earlier in its submission the Third Party stated that its "petroleum products... are established as superior quality products in the marketplace". The Third Party has not persuaded me that, in the petroleum industry, the public's negative view would cause them to choose inferior products. Therefore, I see no cause and effect relationship.

[34] In summary, there is cause and effect relationship between release of information and alleged harm in the following cases:

- the release of the information that describes existing and proposed process equipment and processing methods that could result in financial loss or gain to or prejudice the competitive position of the Third Party as noted in the table above; and
- the release of inventory information and potential interference with contractual or other negotiations.

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

[35] 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?

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

[37] Subsections 19(1)(c)(i), (ii) and (iii) of FOIP apply to certain portions of the record as noted above.

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

[38] 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.

[39] 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, subsection 19(1)(b) of FOIP applies to both records in their entirety. Subsections 19(1)(c)(i) and (ii) of FOIP apply to certain parts of the record as noted above.

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

[40] Upon review of the records, I have determined that they relate to both the public safety and the protection of the environment. My office has established the following test to determine whether disclosure of information would be in the public interest:

1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it? The following may be relevant:

- Have others besides the Applicant sought or expressed an interest in the records? Are there other indicators that the public has or would have an interest in the records?
2. Is the Applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public? The following may be relevant:
 - Do the records relate to a personal conflict between the Applicant and the government institution? What is the likelihood the Applicant will disseminate the contents of the records in a manner that will benefit the public?
 3. If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government? The following may be relevant:
 - Do the records contain information that will show how the government institution reached or will reach a decision? Are the records desirable for the purpose of subjecting the activities of the government institution to scrutiny? Will the records shed light on an activity of the government institution that have been called into question?

[41] The Applicant, who is a journalist, has addressed this test in his submission. He contends that release of this information will contribute to the public understanding of a matter or issue that is of concern to the public. He is interested in investigating whether the Ministry is holding the Third Party to regulations. He stated “We know from countless stories that the protection of public health and safety is of utmost concern to Canadians. For example, Lac Megantic, Mad Cow Disease, Listeria etc. Railway regulation wasn't much of a concern until the Lac Megantic disaster, but now the intricacies of this sort of regulation is top of mind for the public. That's because people have a real world example of how a lack of regulation, or a lack of observation of regulation, can lead to disaster.” He also referred to comparable news stories about the Third Party that have garnered attention. This meets the first part of the test.

[42] As noted, the Applicant is a journalist. This does not appear to be motivated by private interests. He called to attention the journalistic standards of his news organization that states “Our mission is to inform, to reveal, to contribute to the understanding of issues of public interest and to encourage citizens to participate in our free and democratic

society.” The Applicant is very likely to disseminate the information in a manner that will benefit the public. The second part of the test is met.

[43] Finally, the Applicant has indicated that he is concerned about the decision to create a new residential area near the Third Party. Upon review of the records, I agree that their release will contribute to open, transparent and accountable government.

[44] Therefore, disclosure is in the public interest as it relates to public safety and protection of the environment.

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

[45] As noted above, subsection 19(1)(b) of FOIP applies to both records in their entirety. However, subsection 19(1)(c)(i) and (ii) apply only to certain portions. There is nothing to persuade me that public interest would outweigh any financial loss or gain to or prejudice to the competitive position of the Third Party. Therefore, portions to which subsection 19(1)(c)(i) and (ii) of FOIP apply should continue to be withheld. However, even though subsection 19(1)(b) applies to the rest of the record, as previously discussed, the rest of the information could not reasonably be expected to result in financial loss or gain to prejudice the competitive position of a third party. Therefore, subsection 19(3) would apply and that information should be released.

IV FINDINGS

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

[47] I find that subsection 19(1)(b) of FOIP applies to the entire records.

[48] I find that subsections 19(1)(c)(i), (ii) and (iii) of FOIP apply to portions of the records.

[49] I find that subsection 19(3) of FOIP apply to the portions of the records to which subsections 19(1)(c)(i) and (ii) do not apply.

V RECOMMENDATIONS

[50] I recommend that the Ministry release the records to the Applicant with the following exceptions:

AERP		MHRAR	
Pages 13-20	Sections entitled: <ul style="list-style-type: none"> • “Unit description” • “Project Objectives” • “Project Costs” and photographs and diagrams.	Pages 4-7	Information regarding production/facilities
Page 24	Expenditures	Appendix V	Vessel Risk Calculation Spreadsheet
		Appendix VIII	Summary of Effects Distances
		Appendix IX	Heat Radiation and Explosion Overpressure Effects

[51] I recommend that release occur 30 days after the Ministry gives its written decision to the Third Party pursuant to sections 56 and 57 of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 28th day of July, 2015.

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