



Office of the  
Saskatchewan Information  
and Privacy Commissioner

## **REVIEW REPORT 115-2017**

### **Ministry of Energy and Resources**

**April 20, 2018**

#### **Summary:**

The Applicant made an access to information request to the Ministry of the Energy and Resources (the Ministry). The Ministry responded denying full access to the record pursuant to subsection 14(a) of FOIP. Through the course of the review, the Ministry dropped its reliance on subsection 14(a) of FOIP and advised this office it was now denying access pursuant to subsections 15(1)(d), 19(1)(a), 19(1)(b), 19(1)(c)(i), 19(1)(c)(ii) and 19(1)(c)(iii) of FOIP. The Commissioner found that the Ministry did not meet its mandatory obligations under section 8 of FOIP and recommended it develop a procedure to ensure this obligation is being met. The Commissioner also found that 19(1)(a), 19(1)(c)(i), 19(1)(c)(ii) and 19(1)(c)(iii) of FOIP did not apply to this record. Finally, the Commissioner found subsections 15(1)(d) and 19(1)(b) of FOIP applied to portions of the withheld information and recommended it continue to withhold that information.

#### **I BACKGROUND**

[1] At the time of the access to information request, the Ministry of the Economy was a single ministry. However, during the course of this review, the Ministry of the Economy was split into three ministries: the Ministry of Energy and Resources, the Ministry of Export and Trade Development and the Ministry of Immigration and Career Training. My office has been advised that the records involved in this review are for Energy and Resources. Therefore, this report will refer to Energy and Resources (the Ministry).

[2] The Applicant submitted an access to information request pursuant to *The Freedom of Information and Protection of Privacy Act* (FOIP) which was received by the former Ministry of the Economy (Economy) on May 15, 2017, requesting access to the following for the date range of September 1, 2015 to present:

Records relating to impacts and costs to the province due to forest sector companies benefiting by any imposition by the United States of duties or tariffs on Canadian wood products, including any statistics or data on Canadian softwood lumber companies' profits and analyses of the industry's profitability.

[3] By letter dated June 5, 2017, Economy responded to the request denying access in full pursuant to subsection 14(a) of FOIP.

[4] The Applicant requested a review of this decision by my office on June 6, 2017. My office provided notification to Economy and the Applicant of our intention to conduct the review on June 8, 2017 and invited both parties to make a submission. Later that day, my office advised Economy that as it appeared it applied subsection 14(a) of FOIP to the record in full, it addressed in its submission how obligations under section 8 of FOIP was met.

[5] Economy provided my office with a copy of the record and the index of records on July 25, 2017. Upon review of the record, my office became aware that Economy had raised a number of exemptions it had not raised when it first responded to the Applicant. Economy was now relying on subsections 14(a), 19(1)(a), 19(1)(b), 19(1)(c)(i), 19(1)(c)(ii) and 19(1)(c)(iii) of FOIP.

[6] As Economy was now raising third party exemptions, my office requested the third party information from Economy. My office was provided third party contact information for Edgewood Forest Products Inc., Carrier Forest Products Ltd., L&M Wood Products, NorSask Forest Products, Paper Excellence Canada, Tolko Industries Ltd. and Weyerhaeuser Company Ltd.

- [7] My office provided notification to the third parties of our intention to conduct the review on July 28, 2017 and invited the third parties to each make a submission. My office received submissions from Carrier Forest Products Ltd., Meadow Lake Mechanical Pulp Inc, - a Paper Excellence Company and Weyerhaeuser Company Ltd.
- [8] My office received Economy's submission on July 28, 2017. In its submission, Economy noted that it was no longer relying on subsection 14(a) of FOIP. However, it was now relying on subsection 15(1)(d) of FOIP. My office asked Economy what portions of the information subsection 15(1)(d) of FOIP was being applied to. Economy advised it was being applied to the record in its entirety.
- [9] Therefore, Economy is now denying access to the 54 pages in full under subsections 15(1)(d), 19(1)(a), 19(1)(b), 19(1)(c)(i), 19(1)(c)(ii) and 19(1)(c)(iii) of FOIP.
- [10] Once my office had the opportunity to review the submission and record, it asked Economy if there was anything it wanted to add to the submission or the way in which the record was prepared before continuing with the analysis. Economy responded indicating it did not.
- [11] During the course of this review, Schedule H to Order in Council 48/2018 (dated February 2, 2018) named the responsibilities of the Minister of Energy and Resources, which includes *The Forest Resources Management Act*. As such, the original access to information request and this review now falls under the newly formed Ministry.

## **II RECORDS AT ISSUE**

- [12] The record at issue is 54 pages. This includes 20 pages of spreadsheets provided to the Ministry from the seven third parties and 34 pages of email communications between the Ministry and the third parties.
- [13] I would like to note that the Ministry has applied subsections 15(1)(d), 19(1)(a), 19(1)(b), 19(1)(c)(i), 19(1)(c)(ii) and 19(1)(c)(iii) of FOIP to all of the information contained

within these 54 pages. Therefore, if I find an exemption applies to portions of the information, I will not be considering the other exemptions the Ministry has applied to those same portions of information.

### **III DISCUSSION OF THE ISSUES**

[14] The Ministry is a “government institution” as defined by subsection 2(1)(d)(i) of FOIP.

#### **1. Did the Ministry meet its obligations under section 8 of FOIP?**

[15] The Ministry has fully denied access to the record. When denying access it has applied subsections 15(1)(d), 19(1)(a), 19(1)(b), 19(1)(c)(i), 19(1)(c)(ii) and 19(1)(c)(iii) of FOIP to every piece of information within the 54 page record.

[16] Section 8 is a mandatory requirement imposed on the head under FOIP. Therefore, when providing notice to the Ministry, my office asked it to address how it met its obligations under section 8 of FOIP, which provides:

**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.

[17] *Severing* is the exercise by which portions of a document are blacked out before the document is provided to an applicant. To be compliant with section 8 of FOIP, public bodies should do a line-by-line review of each page and apply severing where appropriate. Each severed item should have a notation indicating which exemption(s) applies in each instance. The act of severing also occurs when a page or a record is being withheld in its entirety.

[18] In its submission, the Ministry argues that while it is the normal practice for it to conduct a line-by-line review of responsive records and provide applicants with as much of a record as is possible under the law, in this case, a line-by-line review would have resulted in full denial.

[19] I disagree with this assertion. The Ministry has applied subsection 19(1)(a) of FOIP fully to the 54 page record. This exemption provides that, "...a head shall refuse to give access to a record that contains trade secrets of a third party." One of the types of information that the Ministry has applied this exemption to is the email addresses and email signature lines of government of Saskatchewan employees. There is no way that the Ministry could successfully argue that an email address or signature line of a Government of Saskatchewan employee could qualify as a trade secret of a third party.

[20] Section 61 of FOIP places the burden on the head of the public body to demonstrate that access to the record may or must be refused:

**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.

[21] The expectation of my office is that public bodies will conduct line-by-line reviews. This is required by section 8 of FOIP. Furthermore, I expect it will clearly identify to the Applicant what exemption applies to each piece of information being withheld. The Ministry did not do this when processing this request. Nor did the Ministry do this when it provided the record and submission to my office.

[22] I find that the Ministry did not meet its mandatory obligation under section 8 of FOIP.

## **2. Does subsection 19(1)(b) of FOIP apply to this record?**

[23] The Ministry applied subsection 19(1)(b) of FOIP to the 54 page record in full.

[24] Section 19 of FOIP is a mandatory exemption and is intended to protect the business interests of third parties and to ensure that public bodies are able to maintain the confidentiality necessary to effectively carry on business with the private sector. Although public bodies need to be open and accountable, they also need to conduct business and enter into business relationships and in doing so they must be able to assure their private sector partners that their trade secrets and commercial and financial secrets

will not be readily disclosed to competitors and the general public. However, this is balanced against the need for public accountability in the expenditure of public funds.

[25] Subsection 19(1)(b) of FOIP provides:

**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 to a third party;

[26] In order for subsection 19(1)(b) of FOIP to be found to apply, the following three part test must be met:

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

[27] I will now assess each part of the test.

***1. Is the information financial, commercial, scientific, technical or labour relations of a third party?***

[28] The Ministry asserted in its submission that the records in question are primarily financial information. In its submission, a third party asserted that the record contains financial and commercial third party information.

[29] FOIP defines a *third party* as a person, including an unincorporated entity, other than an applicant or a government institution.

[30] *Financial information* is information regarding monetary resources such as financial capabilities, assets, liabilities, past or present. Common examples are financial forecasts,

investment strategies, budgets, and profit and loss statements. The financial information must be specific to a third party that must demonstrate a proprietary interest or right of use of the financial information. *Commercial information* is information relating to the buying, selling or exchange of merchandise or services.

[31] Pages 6 to 11, 15 to 18, 24, 25, 32, 33, 40, 41, 45, 46, 53 and 54 are tables of data that appear to have been completed by each of the third parties. The Ministry has outlined in its submission that these records are financial information such as sales costs, recapitalization and investment-related information. From a review of these pages I agree and part one of the test has been met for those pages.

[32] There are portions of information found on pages 1, 12, 26, 42, 43, 47 48 and 49 that would qualify as financial or commercial information. In some instances, a sentence or a paragraph qualifies, but not the full page. These are questions being asked of the third parties about the data being provided or clarification on the data that was provided that could directly connect to the data found in the tables themselves. Therefore, I will also assess the second part of the test for these portions of information.

[33] The Ministry has applied this exemption to the remaining pages of the record, which are email chains between the Ministry officials and the third party representatives, and in some cases internal emails between Ministry officials.

[34] The fact that these parties communicated or that the third parties provided information to the Ministry does not qualify the information under this exemption or any other exemption under FOIP. For subsection 19(1)(b) of FOIP to apply there must be financial or commercial information and in a review of those pages, there is no financial or commercial information. Therefore, subsection 19(1)(b) of FOIP does not apply to these pages.

[35] I will now assess the second part of the test for pages 6 to 11, 15 to 18, 24, 25, 32, 33, 40, 41, 45, 46, 53 and 54 and portions of information found on pages 1, 12, 26, 42, 43, 47 48 and 49.

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

[36] The requirement that it be shown that the information was supplied to a public body reflects the purpose of subsection 19(1) of FOIP of protecting informational assets of third parties. 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.

[37] In its submission, the Ministry asserts that the correspondence, which accompanies the records, clearly demonstrates that the records were supplied to the Ministry by the third parties.

[38] From a review of emails that accompany the tables, I agree. This information was clearly supplied to the Ministry by the third parties. Therefore, the second part of the test has been met for pages 6 to 11, 15 to 18, 24, 25, 32, 33, 40, 41, 45, 46, 53 and 54 and portions of information found on pages 1, 12, 26, 42, 43, 47 48 and 49.

[39] I will now assess if the third part of the test has been met for this information.

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

[40] *In confidence* usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained *in confidence* means that the supplier of the information has stipulated how the information can be disseminated. In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the public body and the third party providing the information. In addition, as outlined in Review Reports 158-2016 and 203-2016, a public body must show that both parties intended the information to be held in confidence at the time the information was supplied.

[41] However, I would like to remind third parties and public bodies that the implicit or explicit expression of confidentiality on its own is not a reason to deny access to



information. The information must meet the threshold of all the parts of the test first before the expectation of confidentiality is considered.

[42] In its submission, the Ministry advised that the material was provided to government with the explicit contemplation that it would be held in confidence. I agree. From a review of the record, it is clear that the third parties supplied this information in confidence to the Ministry. Therefore, the third part of the test has been met.

[43] I find that subsection 19(1)(b) of FOIP applies to pages 6 to 11, 15 to 18, 24, 25, 32, 33, 40, 41, 45, 46, 53 and 54 and portions of information found on pages 1, 12, 26, 42, 43, 47 48 and 49.

### **3. Does subsection 19(1)(a) of FOIP apply to this record?**

[44] The Ministry applied subsection 19(1)(a) of FOIP to the 54 page record in full. However, as I have found subsection 19(1)(b) of FOIP applies to some of the pages as outlined above, I will be considering if subsection 19(1)(a) of FOIP applies to pages 2 – 5, 13, 14, 19 – 23, 27 – 31, 34 – 39, 44, 50 – 52 in full and pages 1, 12, 26, 42, 43, 47 48 and 49 in part.

[45] 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;

[46] As noted above, a *third party* is a person, including an unincorporated entity, other than an applicant or a government institution. *Trade secret* is defined as information, including a plan or process, tool, mechanism or compound, which possesses all 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 that he or 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. and economic interest) worthy of legal protection.

[47] The information I am considering under this exemption does not reveal anything that would constitute a trade secret. I would also like to note that much of what is being considered under this exemption are email chains requesting and receiving the information from the third party and not substantive information.

[48] Therefore, I find that subsection 19(1)(a) of FOIP does not apply.

#### **4. Does subsection 19(1)(c) of FOIP apply to this record?**

[49] I will now consider if subsection 19(1)(c) of FOIP applies to pages 2 – 5, 13, 14, 19 – 23, 27 – 31, 34 – 39, 44, 50 – 52 in full and pages 1, 12, 26, 42, 43, 47 48 and 49 in part.

[50] Subsection 19(1)(c) of FOIP includes three exemption provisions and 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;

[51] The Ministry has applied subsections 19(1)(c)(i), 19(1)(c)(ii) and 19(1)(c)(iii) of FOIP to the pages. As such, there is a separate set of tests for each exemption to assess if they apply.

[52] Each of the three provisions found under subsection 19(1)(c) are harms based provisions. Meaning, for one of the provisions to be found to apply there must be objective grounds for believing that disclosing the information could result in the harm alleged.

[53] In its submission, the Ministry spoke to each of the alleged harms. However, from a review of the record and the Ministry's submission, the arguments relate to the information I have already found that subsection 19(1)(b) of FOIP applies to and not the remaining information.

[54] Therefore, I find subsections 19(1)(c)(i), 19(1)(c)(ii) and 19(1)(c)(iii) of FOIP do not apply.

**5. Does subsection 15(1)(d) of FOIP apply to this record?**

[55] I will now consider if subsection 15(1)(d) of FOIP applies to pages 2 – 5, 13, 14, 19 – 23, 27 – 31, 34 – 39, 44, 50 – 52 in full and pages 1, 12, 26, 42, 43, 47 48 and 49 in part.

[56] Subsection 15(1)(d) of FOIP is a discretionary exemption and provides:

**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;

[57] In order for subsection 15(1)(d) of FOIP to be found to apply, both parts of the following test must be met:

1. The proceedings must qualify as existing or anticipated legal proceedings; and
2. The disclosure of the records could be injurious to the public body in the conduct of the legal proceedings.

[58] I will now assess each part of the test.

***1. Do the proceedings qualify as existing or anticipated legal proceedings?***

[59] *Legal proceedings* are proceedings governed by rules of court or rules of judicial or quasi-judicial tribunals that can result in a judgement of a court or a ruling by a tribunal. To qualify for this exemption, the legal proceedings must be existing or anticipated.

[60] In its submission, the Ministry provided an overview of an anticipated legal proceeding that would involve a quasi-judicial legal tribunal. However, the Ministry did not point to specific parts of the record to outline what information, if released, would relate to the anticipated legal proceeding.

[61] From a review of the record, I am satisfied that portions of information found on pages 3, 4, 13, 22, 30, 35, 38, 50 and 51 could relate to those anticipated legal proceedings. However, the remaining information found on those pages, and pages 2, 5, 14, 19 – 21, 23, 27, 28, 29, 31, 34, 36, 37, 39, 44 and 52 would not.

[62] Therefore, I will now assess if part two of the test is met for the portions of information found on pages 3, 4, 13, 22, 30, 35, 38, 50 and 51.

***2. Could disclosure of the records be injurious to the public body in conduct of the legal proceedings?***

[63] *Injury* implies damage or detriment. The exemption is designed to protect the public body from harm in its existing or anticipated legal proceedings. There must be objective grounds for believing that disclosing the information could result in injury.

[64] From a review of the record, the portions of information I have identified on pages 3, 4, 13, 22, 30, 35, 38, 50 and 51, if released, could be injurious to the Ministry in the conduct of the anticipated legal proceedings. Therefore, the second part of the test has been met for these portions of pages.

[65] I find subsections 15(1)(d) of FOIP applies to the portions of information I have identified on pages 3, 4, 13, 22, 30, 35, 38, 50 and 51.

**6. Is there personal information in the record?**

[66] Although this was not raised by the Ministry, in FOIP there are protection of privacy requirements that must be considered. Subsection 29(1) of FOIP provides:

**29(1)** No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[67] In order for information to be found to be personal information, there must be an identifiable individual and the information must be personal in nature. Subsection 24(1) provides examples of types of information that is considered personal in nature. Subsection 24(1)(k) of FOIP provides:

**24(1)** Subject to subsections (1.1) and (2), “**personal information**” means personal information about an identifiable individual that is recorded in any form, and includes:

...

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual; or

(ii) the disclosure of the name itself would reveal personal information about the individual.

[68] In a review of the record, information that meets the two part test for personal information was identified on pages 2, 19, 21, 29 and 37. First, it is about an identifiable individual as it lists the individuals by name. Secondly, the information is personal in nature, as it would reveal something personal about one of the Ministry employees. It also appears that one of the third party officials used a personal email account once when corresponding with the Ministry, so I would recommend severing the domain name of the

email address. This type of personal information would be captured under subsections 24(1)(k) of FOIP.

[69] Therefore, I find that subsection 29(1) of FOIP applies to portions of information found on pages 2, 19, 21, 29 and 37.

[70] In response to the draft report, the Ministry advised my office that it intends to comply with the recommendations.

#### **IV FINDINGS**

[71] I find that the Ministry did not meet its mandatory obligation under section 8 of FOIP.

[72] I find that subsection 19(1)(b) of FOIP applies to pages 6 to 11, 15 to 18, 24, 25, 32, 33, 40, 41, 45, 46, 53 and 54 and portions of information found on pages 1, 12, 26, 42, 43, 47, 48 and 49.

[73] I find that subsection 19(1)(a) of FOIP does not apply.

[74] I find subsections 19(1)(c)(i), 19(1)(c)(ii) and 19(1)(c)(iii) of FOIP do not apply.

[75] I find subsections 15(1)(d) of FOIP applies to the portions of information I have identified on pages 3, 4, 13, 22, 30, 35, 38, 50 and 51.

[76] I find that subsection 29(1) of FOIP applies to portions of information found on pages 2, 19, 21, 29 and 37.

#### **V RECOMMENDATIONS**

[77] I recommend that the Ministry develop a procedure to ensure that it is meeting its obligation under section 8 of FOIP for every access to information request.

[78] I recommend that the Ministry continue to withhold pages 6, 7, 8, 9, 10, 11, 15, 16, 17, 18, 24, 25, 32, 33, 40, 41, 45, 46, 53 and 54.

[79] I recommend that the Ministry release pages 5, 14, 20, 23, 27, 28, 31, 34, 36, 39, 44, 52 to the Applicant.

[80] I recommend that the Ministry sever the portions of information I have identified on pages 1, 2, 3, 4, 12, 13, 19, 21, 22, 26, 29, 30, 35, 37, 38, 42, 43, 47, 48, 49, 50 and 51 and release the remainder of these pages to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 20th day of April, 2018.

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