



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 163-2016, 166-2016, 167-2016 & 168-2016

Ministry of Environment

September 7, 2016

Summary: The Ministry of Environment made a decision to release annual landfill reports to the Applicant. The Third Party requested a review by my office on the basis that subsection 19(1)(a), 19(1)(b) and 19(1)(c)(ii) of *The Freedom of Information and Protection of Privacy Act* (FOIP) applied to the record. The Commissioner found that these exemptions did not apply and recommended release of the entire record.

I BACKGROUND

[1] The Ministry of Environment (the Ministry) received four access to information requests for annual Landfill Reports for four different landfill sites. The requests asked for the annual reports for 2013, 2014 and 2015. Each landfill is managed by the same Third Party business.

[2] On May 4, 2016, pursuant to section 34 of *The Freedom of Information and Protection of Privacy Act* (FOIP), the Ministry notified the Third Party that it intended to release responsive records that may affect its interests. It invited the Third Party to make a submission as to why records should be withheld. The Third Party made a submission to the Ministry.

[3] On June 6, 2016, the Ministry notified the Third Party that it intended to release records to the Applicant pursuant to section 37 of FOIP despite its objections. It also notified the Third Party of its right to request a review of its decision to release records by my office.

[4] On June 27, 2016 my office received requests for review from the Third Party. On June 28, 2016, my office notified the Ministry, the Third Party and the Applicant of our intention to undertake the reviews.

II RECORDS AT ISSUE

[5] The record is annual reports for four landfills operated by the same Third Party. They are similar to each other and are described with more detail in the table below.

Year	Number of pages
Landfill A	
2013	462
2014	587
2015	832
Landfill B	
2014	766
2015	761
Landfill C	
2015	556
Landfill D	
2013	2658
2014	2499
2015	703

[6] The Third Party provided me with copies of the record and indicated which portions it wanted withheld. It contends that subsections 19(1)(a), 19(1)(b) and 19(1)(c)(ii) apply to all of these portions.

[7] The portions of the record that the Third Party would like withheld can generally be placed in three categories. The first category would contain forms that describe clients of the Third Party, the waste that has been accepted in to the landfill and routine descriptions of the landfill. The Ministry has indicated that it is mandatory that the Third

Party submit these forms for its permit to operate. The second category is information about each landfill such as aerial maps, site descriptions and safety reports. The last category is excerpts from each landfill's operations plan. The Third Party must submit any changes to its operations plan to the Ministry each year.

III DISCUSSION OF THE ISSUES

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

[8] 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;

[9] My office has defined trade secrets 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.

[10] 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.

[11] The Third Party has indicated that subsection 19(1)(a) of FOIP applies to hundreds of pages in these reports that it believes should be withheld. It has not specifically identified any trade secret within these pages.

[12] Much of the information in category one of the record are forms that describe clients of the Third Party and the waste that enters the landfill. Further, the province mandates what needs to be reported. In category two, there are some aerial maps and descriptions of the sites. This information does not qualify as formulas, patterns, compilations, programs, devices, products, methods, techniques or processes.

[13] Upon review of the third category of records, there are portions of the record that includes methods, techniques or processes. However, many of these are general or vague. Others simply say that the landfill site must meet provincial regulations. Further, any client of the Third Party would have knowledge of some of the processes as it would follow these processes when dumping the waste. I am not persuaded that this information would meet any of the criteria described above. I am not persuaded that the record contains trade secrets.

[14] Subsection 19(1)(a) of FOIP does not apply to the record.

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

[15] 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;

[16] 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?

[17] The Third Party has indicated that subsection 19(1)(b) of FOIP applies to all the pages it wishes to withhold. It contends that the material qualifies as commercial information.

[18] Commercial information is information relating to the buying, selling or exchange of merchandise or services. Types of information included in the definition of commercial information:

- business plans,
- past history and references,
- insurance policies and pricing structures;
- customer records;
- offers of products and services a third-party business proposes to supply or perform;
- a third-party business' experiences in commercial activities where this information has commercial value;
- terms and conditions for providing services and products by a third party;
- lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises - such lists may take time and effort to compile, if not skill;
- methods a third-party business proposes to use to supply goods and services; and
- number of hours a third-party business proposes to take to complete contracted work or tasks.

[19] I agree that some of the information would qualify as commercial information because the material contains business plans, customer records and past history. The first part of the test is met for some of the information. I also agree that the information was supplied to the Ministry by the Third Party which meets the second part of the test.

[20] The Third Party's submission suggests that the information was supplied implicitly in confidence. 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. However, the Ministry has notified my office that "information provided to [the Ministry] under the permitting approval is not implied as confidential, and that this information will become accessible to the public." The information was not supplied in confidence and the third part of the test is not met.

[21] Subsection 19(1)(b) of FOIP does not apply to the record.

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

[22] Subsection 19(1)(c)(ii) 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:

...

(ii) prejudice the competitive position of;

...

a third party;

[23] For this provision 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.

[24] The following criteria are used to determine whether disclosure of records or information could reasonably be expected to cause the harm alleged:

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.

[25] The Third Party indicated that subsection 19(1)(c)(ii) applied to all of the portions of the records in question. However, in its submission it stated that “the redacted information would provide [the Third Party’s] competitors with a competitive advantage by providing them with express policies and procedures that they could use to (re)structure their own competitive operations.”

[26] Not all of the portions of the record in question would qualify as “policies and procedures” as described in the Third Party’s submission. Further, upon review of the record what would qualify as policies and procedures are general and appear to reiterate

regulatory requirements. My office has not seen similar landfill records. However the Ministry's submission confirmed my view that the policies and procedures were general in nature. It stated that the Third Party's "operational plan is conducted in the same general business standards as other operators across Saskatchewan."

[27] I am not persuaded that there is a clear cause and effect relationship between the disclosure and the prejudice alleged by the Third Party. As such, subsection 19(1)(c)(ii) of FOIP does not apply to the record.

IV FINDING

[28] I find that subsection 19(1)(a), 19(1)(b) and 19(1)(c)(ii) of FOIP do not apply to the record.

V RECOMMENDATION

[29] I recommend that the Ministry of Environment release the record in full to the Applicant once the 30 day period described in section 57 of FOIP has expired.

Dated at Regina, in the Province of Saskatchewan, this 7th day of September, 2016.

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