



REVIEW REPORT 223-2016

Ministry of the Economy

December 19, 2016

Summary: The Applicant made an access to information request for results from tests and inspections of Husky pipelines. The Ministry withheld responsive records pursuant to subsection 15(1)(a), (b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that none of the subsections applied and recommended release of the records.

I BACKGROUND

- [1] On July 11, 2016, the Ministry of the Economy (the Ministry) received an access to information request for “All results from on-site tests and inspections of Husky Pipelines since 2011.”
- [2] On September 8, 2016, the Ministry responded to the Applicant indicating that the responsive records were being withheld pursuant to subsections 15(1)(a), (b), (c) and 17(1)(a) and (b) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [3] The Applicant was dissatisfied with the Ministry’s response and requested a review by my office on September 13, 2016. On September 14, 2016, my office provided notification to both the Applicant and the Ministry of my office’s intention to undertake a review.

II RECORDS AT ISSUE

- [4] The record is 26 pages of filled in audit forms. The forms are either a “Pipeline Audit: Pressure Test” form or a “Pipeline Audit: Construction” form. The forms were filled in between June and October 2014.
- [5] In its submission, the Ministry stated that it was no longer relying on subsections 17(1)(a) and (b) of FOIP to withhold the record. However, it maintained that subsections 15(1)(a), (b) and (c) of FOIP apply to the entire record.

III DISCUSSION OF THE ISSUES

- [6] The Ministry qualifies as a government institution pursuant to subsection 2(1)(d)(i) of FOIP.

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

- [7] 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;

- [8] The Ministry has applied this exemption to the entire record. It submits that release of the record could interfere with a potential prosecution.
- [9] 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.

[10] The Ministry's submission explained that, because of the pipeline spill that occurred in Saskatchewan, the Ministry has initiated an investigation into the spill and Husky's "full Integrity Management Programs". The Ministry indicated that this investigation has been launched pursuant to subsection 23(1) of *The Pipelines Act, 1998*.

[11] The Ministry explained that section 28 of *The Pipelines Act, 1998* has an offence provision as follows:

28 Every person who contravenes any provision of this Act, for which no other penalty is provided, or of any regulation or order made pursuant to this Act is guilty of an offence and is liable on summary conviction to a fine not exceeding \$50,000 and in the case of a continuing offence to a further fine not exceeding \$50,000 for each day or part of a day during which the offence continues.

[12] The Ministry's submission explained that once its investigation was completed, it was possible that Husky could be guilty of an offence and liable on summary conviction to a fine. In order to be summarily convicted, a prosecution must take place.

[13] The Ministry also stated that "[w]hile it has not yet been established whether a contravention has occurred, the potential exists until the investigation is completed."

[14] The Ministry has not provided any indication that a prosecution is likely to occur. The Ministry indicated that is not within its power and control to make decisions about prosecutions. It also noted that that decision would only be made once the Ministry's investigation is completed and if any relevant evidence is provided to the Crown Prosecutor's office. It is clear at this point in time that there is no prosecution. As such, I cannot find that release of the records could prejudice, interfere with or adversely affect a prosecution.

[15] Late in the review, the Ministry also stated that release of the records may also interfere with its investigation. It stated that an early release of documents could result in media coverage and other public pressure for government to impose penalties or make decisions

before all of the information is considered. The Ministry also indicated that release of records might interfere with a right to a fair trial if charges are ultimately laid.

[16] The information in the record is factual information. I am not persuaded that an investigator would conclude an investigation based solely on news reports. There are many examples where publicity is given to an incident and after an investigation, charges are laid. Good investigators will not be swayed by publicity but will base their conclusions on facts. Further, I am not persuaded that this would lead to an unfair trial. Again, 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.

[17] Subsection 15(1)(a) of FOIP does not apply to the record.

2. Does subsection 15(1)(b) of FOIP apply to the record?

[18] Subsection 15(1)(b) of FOIP provides:

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;

[19] My office has established the following criteria to determine if this exemption applies:

1. Which Act or regulation is the public body identifying as being engaged?
2. Is this an enforcement matter specific to an Act?
3. Could release of the record injure enforcement under the identified Act or regulation in this matter?

[20] The Ministry has indicated *The Pipelines Act, 1998* is the Act which is engaged for this exemption. The first part of the test is met.

[21] My office has defined enforcement as the act or process of compelling compliance with a law, mandate, command, decree, or agreement. The Ministry's submission states that release of the records could be injurious to the investigation referred to above because Husky may not cooperate with the investigation.

[22] The Ministry also noted that Husky's cooperation in the investigation is not required. I am not persuaded that release of the record could injure enforcement under the identified Act or regulation in this matter. Subsection 15(1)(b) of FOIP does not apply to the record.

3. Does subsection 15(1)(c) of FOIP apply to the record?

[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] The Ministry's submission explained that, because of the pipeline spill that occurred in Saskatchewan, the Ministry has initiated an investigation into the spill and Husky's "full Integrity Management Programs". The Ministry indicated that this investigation has been 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 or the regulations and make recommendations to the minister.

[27] Section 2(a) of *The Pipelines Act, 1998* points to *The Oil and Gas Conservation Act* to define "the board". Some of the relevant sections are as follows:

7.2(1) The minister may direct an official of the ministry to do any of the things mentioned in subsection 7.11(1) if:

(a) a board has not been established pursuant to section 7; or

(b) the minister considers it advisable.

(2) For the purposes of carrying out a minister's direction pursuant to subsection (1), the official has all the powers conferred on the board pursuant to sections 7 to 7.9 and is subject to all of the duties imposed on the board pursuant to these sections.

[28] The Ministry's submission indicated that the Assistant Deputy Minister, Petroleum and Natural Gas Division had been appointed to investigate Husky's full Integrity Management Program pursuant to subsection 7.2 of *The Oil and Gas Conservation Act*. The Ministry has provided us with a copy of the Minister's Order regarding this investigation signed on August 15, 2016. I am persuaded that this qualifies as a lawful investigation.

[29] I must also determine if the release of information would interfere with a lawful investigation or if the release of information would disclose information with respect to a lawful investigation. The Ministry indicates that the release of the records would result in both.

Would release of information interfere with a lawful investigation?

[30] In its submission, the Ministry suggested that Husky might not cooperate with its investigation if the records are released.

[31] I note that section 22 of *The Pipelines Act, 1998* requires a pipeline licence holder to provide the Ministry with information upon request. It provides as follows:

22(1) Every licence holder, and every person who constructs or operates a pipeline for which a licence is not required, must provide the ministry with any information that, in the minister's opinion, is required for the administration of this Act or the regulations.

(2) The information required by this section is to be provided in the form and at the times specified by the minister.

[32] *The Pipelines Act, 1998* requires license holders to provide information to the Ministry upon request. As such, I am not persuaded by the Ministry's assertions that release of the records would interfere with the investigator's ability to pursue the investigation because Husky would stop cooperating.

Would release of information disclose information with respect to a lawful investigation?

[33] The Ministry's submission also submitted that the release of the record could release information pertaining to the investigation.

[34] The Ministry indicated that these records are being examined as part of the investigation. However, the records, created in 2014, pre-existed the investigation which commenced on August 15, 2016. The records were created for another purpose and not for this investigation. I must consider whether the investigation should preclude access to these records created at a different time and for a different purpose.

[35] The wording "disclose information with respect to a lawful investigation" is unique to Saskatchewan. No other access to information statutes across Canada include this phrase.

- [36] In Review Report 2001/029, the view of past Saskatchewan Information and Privacy Commissioner Gerald Gerrand, Q.C. was that subsection 15(1)(c) of FOIP relates to “methods or techniques that might be employed for the purpose of carrying out” an investigation.
- [37] This is also my view. Records caught by this exemption should relate to the process of the investigation itself, not records that existed before the investigation commenced such as regular reporting information.
- [38] The Ministry noted the case *Evenson v. Saskatchewan Ministry of Justice, 2013, Sk QB*. This case considered subsection 15(1)(k) of FOIP, which is similar to subsection 15(1)(c), and whether release of records could “disclose information with respect to a law enforcement matter”. The case noted the exemption gave “the right to ensure witnesses and informants of complete confidentiality and secrecy”.
- [39] The Ministry indicated it was concerned that witnesses and informants may not offer information if they were worried information would be accessible.
- [40] I note that the record was not provided by an informant or witness. The information was routinely collected by the Ministry before the incident which prompted the investigation.
- [41] I am not persuaded that subsection 15(1)(c) of FOIP applies to the record.

IV FINDING

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

V RECOMMENDATION

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

Dated at Regina, in the Province of Saskatchewan, this 19th day of December, 2016.

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