



REVIEW REPORT 231-2015

Ministry of the Economy

April 6, 2016

Summary: The Applicant requested certain potash royalty records dating back to the 1960s. The Ministry applied subsections 18(1)(f), 19(1)(b), 19(1)(c) and 20 of *The Freedom of Information and Protection of Privacy Act* (FOIP) to the records. The Commissioner found that subsections 18(1)(f), 19(1)(b) and 20(a) of FOIP applied to the record.

I BACKGROUND

- [1] On October 30, 2015, the Ministry of the Economy received an access to information request for specific potash royalty information. On December 3, 2015, the Ministry provided a section 7 response to the Applicant indicating that responsive records were being withheld pursuant to subsections 18(1)(f), 19(1)(b) and 20(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [2] On December 29, 2015, my office received a request for review of the Ministry's decision. On December 30, 2015, my office provided notification to the Ministry and the Applicant of our intention to undertake a review. My office provided notification to the Third Party on January 6, 2016.
- [3] On January 18, 2016, the Ministry informed both the Applicant and my office that it would also apply subsections 19(1)(c)(i), (ii), (iii) and 20(b) of FOIP to the record.

II RECORDS AT ISSUE

[4] The Applicant’s request dates from 1960 to the present. For the purposes of this review, the Ministry provided only a representative sample to my office. The Applicant’s request was broken down as follows:

Request	Title of Representative Samples	Pages	Exemptions
Crown royalty and profit tax audit reports done with respect to Unit #1 and Unit #3 at the Esterhazy potash mine. 1962 – present	Potash Crown Royalty Audit Report: [Name of Third Party] – DA ID 08965	1-70	18(1)(f),19(1)(b), 19(1)(c)(i), (ii), (iii), 20(a) and (b)
	[Name of Third Party] Potash Production Tax Annual Profit Tax and Base Payment Return, P129 – 2009, Audit Report	71-83	18(1)(f),19(1)(b), 19(1)(c)(i), (ii), (iii), 20(a) and (b)
Published list price for Standard Muriate Potash as defined In section 38(3) of the <i>Subsurface Mineral Regulations</i> , 1960, Sask Reg 541/67. 1960 - present	PCS Sales - Muriate of Potash Price List – U.S.A. December 28, 2009	84	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii) and 19(1)(c)(iii)
	Third Party Internal Price List – Effective: August 6, 2013	85	
	Agrium Inc. Potash Reference Price List, 12-12-2014	86	
	Example of a published price list Package, February 2012	87-91	
Copies of Form MR521 submitted each month for production from Unit #1 and Unit #3 at the Esterhazy potash mine. 1962-present (monthly)	Blank MR521 Form (<i>The Crown Minerals Act</i> Potash Royalty Form MR 521)	92	Publically available
	Example of a submission letter for the MR521, February 15, 2012	93	19(1)(b), 19(1)(c)(i) and 19(1)(c)(ii)
	Example of a completed MR521 (The Crown Minerals Act Potash Royalty Form MR 521) from Third Party ·on January 2012	94	19(1)(b), 19(1)(c)(i) and 19(1)(c)(ii)
Potash Production Tax - Monthly Base Payment Returns. A statement submitted each month for production from Unit #1 and Unit #3 at the Esterhazy potash mine. 1962 – present (monthly)	Example of blank "Potash Production Tax Monthly Non- Responsive Base Payment Return"	95	Publically available
	Example of a completed "Potash Production Tax Monthly Base payment Return"	96	19(1)(b), 19(1)(c)(i), 19(1)(c)(ii) and 19(1)(c)(iii)

III DISCUSSION OF THE ISSUES

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

[5] 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;

[6] The Ministry had indicated that subsection 19(1)(b) of FOIP applies to the record in its entirety which includes audit reports, the list price, the MR521 forms and the Potash Production Tax – Monthly Base Payment Returns.

[7] 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?

Published Price Lists

[8] The Ministry has provided my office with four examples of ‘published list prices’ from different third parties for the purposes of this review. The lists specify the price of different types of potash for that point in time. The Ministry has clarified that these lists are not available publically, but rather, are “created and published internally by a potash producer.” The term “published list price” comes from *The Subsurface Mineral Regulations, 1960* and is not defined.

[9] Financial information, for the purposes of subsection 19(1)(b) of FOIP, relates to money and its use or distribution and must contain or refer to specific data. Examples of financial information include cost accounting method, pricing practices, profit and loss

data, overhead and operating costs. Upon review, these lists qualify as financial information as they are examples of pricing practices. The first part of the test is met.

[10] The Ministry has indicated that the Third Party has supplied the information to the Ministry pursuant to subsection 38(3) of *The Subsurface Mineral Regulations, 1960*. The second part of the test is met.

[11] Finally, the Ministry must demonstrate that the information was supplied explicitly or implicitly in confidence. The Ministry has called attention to section 5 of *The Mineral Resources Act, 1985* which states:

5 Except insofar as is necessary to do so for the purposes of this Act, the regulations or any other statute or regulations, information acquired by any officer or employee of the department pursuant to this Act, the regulations or any Crown disposition shall not be communicated or disclosed by him to anyone in such a manner that it is possible from any such communication or disclosure to relate any such information to the person from whom it was acquired, the exploration or development program to which it relates or the specific location within Saskatchewan of any minerals or mineral resources which were identified or evaluated in such information.

[12] The published list prices are acquired by the Ministry pursuant to *The Subsurface Mineral Regulations, 1960* which would qualify as a Crown disposition in the context of this section. The information was supplied explicitly in confidence and the third part of the test is met. Subsection 19(1)(b) of FOIP applies to the published price lists.

MR521 Forms

[13] The Ministry has indicated in its submission that the information in these forms qualify as both financial and commercial information. The forms contain the price the Third Party was selling potash for that month which qualifies as financial information as noted above.

[14] The forms also contain the amount of potash produced by the third party on both unitized and non-unitized land. My office has defined commercial information as information relating to the buying, selling or exchange of merchandise or services. The amount of product produced in a specific timeframe would qualify as commercial information. The

remainder of the forms contain information calculated based on the financial and commercial information of the Third Party. The forms meet the first part of the test.

[15] The Ministry has indicated that the Third Party supplied this information to the Ministry pursuant to subsection 38(1) of *The Subsurface Mineral Regulations, 1960*.

[16] The MR521 forms acquired by the Ministry pursuant to *The Subsurface Mineral Regulations, 1960* which would qualify as a Crown disposition in the context of section 5 of *The Mineral Resources Act, 1985*. The information was supplied explicitly in confidence and the third part of the test is met. Subsection 19(1)(b) of FOIP applies to the MR521 forms.

Monthly Base Payment Return Forms

[17] The monthly base payment return forms contain information similar to the MR521 forms, such as quantity of potash that is sold in a year and the amount in dollars equal to the prescribed percentage of the producer's profits for a year. As described above, this would qualify as financial or commercial information.

[18] The Third Party was required to submit this information pursuant to subsection 16 of *The Potash Production Tax Regulations*. Therefore, the second part of the test is met as the Third Party supplied the information to the Ministry.

[19] Section 25(2) of *The Mineral Taxation Act, 1983* states:

(2) Except insofar as it is necessary to do so for the purposes of this Act or any other Act administered by the department, no person shall communicate or disclose any confidential information acquired under this Act to anyone in such a manner that it is possible from any such communication or disclosure to relate the information to the taxpayer or other person from whom it was acquired.

[20] It is unclear what "confidential information" refers to in this section of *The Mineral Taxation Act, 1983*. My office asked the Ministry to elaborate. The Ministry indicated that financial and commercial information involved is very sensitive. The Third Party is required by law to demonstrate the income that has been earned from potash sales and all

of the numerous deductions that are available under the *The Potash Production Tax Regulations*. With this in mind, the Ministry argues that this information has been implicitly supplied in confidence. I am persuaded that 19(1)(b) applies to this information.

Audit Reports

- [21] The Ministry has provided my office with two samples of audit reports. It has applied subsection 19(1)(b) of FOIP to the audit reports in their entirety.
- [22] The first sample is 70 pages. The first eight pages are the actual audit report. The Ministry has indicated that the other 62 pages are background pages compiled to produce the audit report. Many of these are blank pages, some are tables with information from the MR521 and monthly base payment return forms and others are copies of relevant MR521 forms.
- [23] The second is 13 pages. The first six pages are the actual audit report. The Ministry indicated again that the other seven pages are background information the same as in the first sample.
- [24] Upon review of the record, the background pages provided at the end of the two sample audit reports appear to be information I have already found to qualify under subsection 19(1)(b) of FOIP or calculations directly derived from it. I find that subsection 19(1)(b) of FOIP applies to the background material.
- [25] With respect to the actual audit report, there are tables and figures drawn from the records discussed above which would qualify for exemption under subsection 19(1)(b) of FOIP. However, the remainder of the information in the audit reports is the auditor's commentary and explanations. This is not information that was supplied by the third party to the public body. As such, the majority of the information in the audit reports does not meet the second part of the test and this exemption does not apply.

2. Does subsection 18(1)(f) of FOIP apply to the record in question?

[26] Subsection 18(1)(f) of FOIP states:

18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:

...

(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution;

[27] The Ministry has applied subsection 18(1)(f) of FOIP to the audit reports. I have already found that subsection 19(1)(b) of FOIP applies to portions of the audit reports. Therefore, I will consider the other portions of the audit reports.

[28] In order to demonstrate that this exemption applies, it must be established that the probability of harm is well beyond or considerably above a mere possibility of harm in order to reach the middle ground between that which is probably and that which is merely possible. This inquiry of course is contextual and what is needed to meet this standard will ultimately depend on the nature of the issue and inherent probabilities or improbabilities or the seriousness of the allegations or consequences.

[29] The Ministry has explained that in order to collect royalties and production tax from potash companies operating in Saskatchewan, a large amount of information is collected. It stated:

The auditors must then determine how to approach this large volume of information to assess whether the royalties and taxes are being reported properly. Since it would be impossible to review all of the information in each audit, the auditors must focus on certain key areas and will then use audit tests and procedures that allow the information to be analysed without reviewing every transaction.

[30] The Ministry added: “If anyone outside the ministry, including the company being audited, saw this information, they would know what areas of the tax return are being focussed on in the audit and the approach taken by the auditor to analysing this information.”

[31] The Ministry submitted that release of the audit reports could allow potash companies to tailor tax reporting information in their favour which would prejudice the economic interests of the Government of Saskatchewan.

[32] I am persuaded that release of the audit report could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan.

3. Does section 20 of FOIP apply to the record in question?

[33] Section 20 of FOIP states:

20 A head may refuse to give access to a record that contains information relating to:

(a) testing or auditing procedures or techniques; or

(b) details of specific tests to be given or audits to be conducted;

if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

[34] These provisions provide protection for the procedures and techniques involved in testing and auditing. It also protects details relating to specific tests to be given or audits to be conducted.

[35] Although I have already found that the audit reports should be withheld, for similar reasons in which subsection 18(1)(f) of FOIP applies to the record, subsection 20(a) also applies.

[36] In its submission, the Ministry stated in its submission:

In our view, the procedures described in the royalty and tax audit reports do outline specific steps taken by the auditor to analyze the company's returns. As well, the identification of the subject areas reviewed represents an auditing technique by which the auditor is able to focus on the areas most likely to reveal shortfalls in tax reported.

[37] I am persuaded that subsection 20(a) of FOIP also applies to the audit reports. There is no need to consider subsection 19(1)(c) of FOIP.

IV FINDING

[38] I find that subsection 19(1)(b) of FOIP applies to the Published Price Lists, MR521 forms, Monthly Base Payment Return Forms and portions of the audit reports.

[39] I find that subsections 18(1)(f) and 20(a) of FOIP apply to the audit reports.

V RECOMMENDATION

[40] I recommend that the Ministry take no further action.

Dated at Regina, in the Province of Saskatchewan, this 6th day of April, 2016.

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