SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT F-2006–002

Saskatchewan Research Council

Summary: The Applicant applied under *The Freedom of Information and Protection of Privacy Act* (the Act) for access to records in the possession of Saskatchewan Research Council (SRC), a government institution, including information relating to and generated by SRC in its analysis of samples provided for environmental testing by various third parties. SRC refused access to all responsive records citing sections 13(1)(a), 17(1)(a), 17(2)(c)(i), 18(1)(f), 18(2)(a) and 19(1)(b) of the Act. The Commissioner determined that the raw data, the test reports, and other documents related directly to the testing carried out by SRC as a service for a fee had been properly withheld. However, a few documents or portions thereof included in the record contain general administrative or billing information of Saskatchewan Research Council that should be released to the Applicant.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act* [S.S. 1990-91, c. F-22.01 as am], ss. 2(1)(i), 2(1)(j), 13(1)(a), 17(1)(a), 17(2)(c)(i), 18(1)(f), 18(2)(a), 19(1)(b) and 50(2)(a).
The Freedom of Information and Protection of Privacy Regulations, c. F-22.01, Reg 1, Appendix, Part I.
Access to Information Act, R.S., 1985, c. A-1, s. 3(1).
Personal Information Protection and Electronic Documents Act, 2000, c. 5, s. 2(1)(a)-(j).

Authorities Cited: **Reports & Orders:** Saskatchewan OIPC Reports F-2004-005, F-2004-003, LA-2004-001, F-2006-001, F-2005-001, F-2005-003, F-2004-007; Ontario IPC Orders PO-1811, MO-1896, PO-2020, PO-1811, P-974; British Columbia IPC Order No. 331-1999; Alberta IPC Order 2000-014.

Court Decisions: *Regina Airport Authority v. Lumsden Aero Ltd.*, 2002 SKQB 96 (CanLII), 50 R.P.R. (3d) 114, (2002), 218 Sask. R. 110, 45 C.E.L.R. (N.S.) 173.

Other Resources Cited: Co-published by Elizabeth Wilcox and Alberta Queen's Printer, *Annotated Alberta Freedom of Information and Protection of Privacy Act*, January 2005 update; C. H. H. McNair & Christopher D. Woodbury, *Government Information: Access and Privacy*, (Toronto: Thomson Canada Ltd., 1992); Michel W. Drapeau & Marc-Auréle Racicot, *Federal Access to Information and Privacy Legislation Annotated 2006*, (Toronto: Thomson Canada Limited, 2004) at 1-686.1; Michel W. Drapeau & Marc-Auréle Racicot, *Federal Access to Information and Privacy Legislation Annotated 2005*, (Toronto: Thomson Canada Limited, 2004) at 1-163 & 1-164; Judy Pearsall, *Concise Oxford Dictionary*, 10th Ed., (Oxford University Press); Regina Airport Authority's 1999 Annual Report, available at: http://www.yqr.ca/reports/1999.pdf; Transport Canada's National Airports Policy, available at: http://www.tc.gc.ca/programs/airports/policy/nap/NAP.htm; Treasury Board of Canada Secretariat's website, available at: http://www.tbs-sct.gc.ca/pubs_pol/gospubs/TBS_121/CHAP2_8-2_e.asp; Standards Council of Canada, available at: www.scc.ca); Canadian Association for Environmental Analytical Laboratories (CAEAL), available at: www.caeal.ca; SRC Analytical Laboratories, 2003 Price Guide, (effective April 1, 2003), at 1-9; available at: http://www.src.sk.ca/images/ AnalyticalPrice_revFeb05.pdf.

I BACKGROUND

[1] On March 12, 2004 the Applicant made application to Saskatchewan Research Council (SRC) for the following:

> *We are respectfully requesting any information, reports, analysis or similar material related to agricultural and aircraft de-icing chemicals found or submitted from samples obtained from the Regina airport by any group, firm or government agency during the time period 1990 until present. Please include data submitted to either your Regina or Saskatoon Offices. We also request the total number of reports your agency has handled regarding the Regina airport and who requested them.*

[2] Within the original response deadline, SRC provided a preliminary response to the Applicant indicating the following:

> *Thank you for your request under the Freedom of Information and Protection of Privacy Act received March 12, 2004 for information regarding reports or analysis of samples from the Regina airport.*
>
> *The information you requested is attached. Please contact me if you require further information. Thank you.*

An attachment to its letter contained the following comments:

> *SRC has processed numerous samples (fish, water, soil) submitted by and around the Regina Airport during the period of time in question. Samples were processed for the Regina Airport, Environment Canada and several consultants.*
>
> *All analysis and results provided to clients are the property of each client. SRC maintains a strict policy of confidentiality with all client information. SRC will only release results of analysis if the client provides written approval or if required to do so by a court of law.*

[3] In response to the SRC's letter, the Applicant wrote to SRC on March 29, 2004 stating the following:

> *Deferring to your decision, we respectfully ask the names, dates and file numbers for the testing the SRC has done at and around the Regina airport that we may follow your advice and contact them for permission.*

[4] On April 23, 2004 the Applicant requested that our office, the Office of the Information and Privacy Commissioner (OIPC), conduct a review of the matter.

[5] At the same time that the Applicant requested a review by our office, SRC wrote the Applicant to inform him that its formal response would arrive shortly.

[6] In order for our office to be clear on whether or not the Applicant had modified his request, on April 27, 2004 we requested that the Applicant clarify for us the following:

> *It appears that you subsequently modified your initial request and by virtue of your March 29, 2004 letter to the Saskatchewan Research Council modified the request to seek only "the names, dates and file numbers for the testing the SRC has done at and around the Regina Airport."*
>
> *It now appears that you have an indication from the Saskatchewan Research Council that you may receive a response to your modified request in the week of April 26, 2004.*
>
> *In the circumstances, our inclination is to diarize this file over one week. Perhaps you could contact us once you've heard from SRC and advise whether the response is satisfactory or alternatively whether you wish us to proceed with a formal review under The Freedom of Information and Protection of Privacy Act.*

[7] While our office awaited clarification from the Applicant, SRC provided its formal response to the Applicant's access request on April 28, 2004. It refused to provide the Applicant with the responsive records citing various grounds including sections 13(1)(a),

17(1)(a), 17(2)(c)(i), 18(1)(f), 18(2)(a) and 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* (the Act). SRC advised the Applicant of the following:

> *SRC refuses access to the information you request on the following grounds:*
>
> 1. *The records were obtained in confidence from another institution. Accordingly, access is refused pursuant to Clause 13(1)(a) of The Freedom of Information and Protection of Privacy Act (hereinafter referred to as "the Act").*
>
> 2. *The records were created to provide advice or analyses by a government institution. Accordingly, access is refused pursuant to Clause 17(1)(a) of the Act. Furthermore, the record contains the results of product or environmental testing carried out by a government institution as a service to an organization for a fee and therefore access is refused pursuant to Clause 17(2)(c)(i) of the Act.*
>
> 3. *The records and information contained therein, if disclosed could reasonably be expected to prejudice the economic interest of a government institution. Accordingly, access is refused pursuant to Clause 18(1)(f) of the Act. Furthermore, the record contains the results of product or environmental testing carried out by a government institution as a service to an organization for a fee and therefore access is refused pursuant to Clause 18(2)(a) of the Act.*
>
> 4. *The records contain scientific and technical information that was supplied in confidence to a government institution by a third party. Accordingly, access is refused pursuant to Clause 19(1)(b) of the Act.*

[8] After receipt of the above noted letter, the Applicant wrote our office to provide us with the following update on May 1, 2004:

> *We received a letter from S.R.C. on April 28, 2004. They have forwarded a copy to you.*
>
> *The letter outlines reasons for refusing our information request. We have modified our request to include only the names, dates and file numbers related to our original request. This would insure* [sic] *their confidentiality concerns.*
>
> *We would use this information to correlate existing information, some supplied as disclosure in two recent court cases and others discovered after. One court case involved Mr. Dick Rendick when he headed the Regina Airport Authority.*
>
> *This information would help insure* [sic] *that we were provided full and complete disclose* [sic] *prior to trial or, in the alternative give rise to concerns regarding lack of disclosure by several parties.*

[9] The Applicant wrote SRC again on June 1, 2004 requesting the following:

> *Further to our requests and various correspondences* [Company Name] *continues to pursue testing records the SRC holds and we feel we were and are entitled to.*
>
> *As an interim request, pending a decision by the Saskatchewan Information and Privacy Commissioner and the Queens Bench, we are seeking those environmental records and tests in and around the Regina airport that indicate* ***no presence of agricultural chemicals****.*

[10] In its next letter to us on June 29, 2004, SRC advised:

> *We are reviewing our files in the context of preparing a record to deliver to you. We note* [the Applicant's] *comment in his letter dated June 1, 2004, his focus is on records and test results indicating no presence of agricultural chemicals. Thus, the record would relate to this narrow issue.*

[11] We addressed the issue of the interim request in a follow-up letter to SRC which provided the following explanation:

> *With respect to* [the Applicant's] *letter of June 1, 2004, our interpretation of* [the Applicant's] *request is that this is "an interim request" in the hope that some information could be released immediately pending the decision of our office. We do not understand from* [the Applicant's] *letter that the issue has been narrowed in the fashion you describe in your June 29, 2004 correspondence.*
>
> *The issue as our office understands it, is whether there is good and sufficient reason under the mandatory and discretionary exemptions of The Freedom of Information and Protection of Privacy Act to withhold the names, dates and file numbers related to agricultural and aircraft de-icing chemicals found or submitted from samples obtained from the Regina Airport by any group, firm, or government agency during the time period 1990 until March 29, 2004.*
>
> *Consequently we request that you ensure the record relates to that issue and not simply records and test results indicating no presence of agricultural chemicals.*

[12] The Applicant confirmed the above with us in writing shortly thereafter. The Applicant's letter to us explained that: *"no, we do not wish to narrow our original request. As an interim measure, we would accept test results (minus names) until your office reaches a decision."*

[13] SRC had responded on the issue of the Applicant's interim requests in a later letter they wrote to him stating the following:

> *Further to your request of June 1, 2004 for information regarding samples around the Regina airport, you also indicate this is an interim request pending a decision by the Saskatchewan Information and Privacy Commissioner.*
>
> *SRC's response is to wait for the outcome of the Commissioner's review.*

II RECORDS AT ISSUE

[14] We received a full Index of Records from SRC consisting of 5 pages which describes the record in great detail. To summarize, the record consists of documents grouped according to agency affiliation (prepared by or copies provided to). Those agencies and the number of responsive documents per agency (tab) are as follows:

- Tab 1 – Environment Canada – 67 pages
- Tab 2 – AMEC [AMEC Earth and Environmental Ltd] – 88 pages
- Tab 3 – Clinton Associates Ltd – 19 pages
- Tab 4 – Environment Canada – 41 pages
- Tab 5 – Regina Airport Authority – 45 pages
- Tab 6 – Regina Airport Authority – 81 pages

III ISSUES

1. Is there a basis to dismiss the review request summarily?

2. Has SRC met its implied duty to assist?

3. Did SRC properly invoke section 13(1)(a) of the Act?

4. Did SRC properly invoke section 19(1)(b) of the Act?

5. Did SRC properly invoke section 17(2(c)(i) of the Act?

6. Did SRC properly invoke section 18(2)(a) of the Act?

7. Did SRC properly invoke section 18(1)(f) of the Act?

8. Did SRC properly invoke section 17(1)(a) of the Act?

IV DISCUSSION OF THE ISSUES

[15] SRC is listed as a government institution in Part I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations*[1]. SRC is therefore a government institution for purposes of the Act.

[1] *The Freedom of Information and Protection of Privacy Regulations*, c. F-22.01, Reg 1, Appendix, Part I.

1. Is there a basis to dismiss the review request summarily?

[16] Section 50(2) of the Act provides as follows:

> *50(2) The commissioner may refuse to conduct a review or may discontinue a review if, in the opinion of the commissioner, the application for review:*
>
> *(a) is frivolous or vexatious;*
>
> *(b) is not made in good faith; or*
>
> *(c) concerns a trivial matter.*

[17] Once informed of the request for review, SRC argued that since the Applicant had already been afforded the opportunity to examine some of the information pertinent to this review during the course of litigation, the Applicant's request should be dismissed.

[18] If, at the commencement of a review, a public body invokes section 50(2)(a) and offers reasons as to why our office should not undertake a review, we will consider them. However, our view is that the exercise of the right to access government records is an important matter that should not be extinguished except in those limited circumstances such as when there is compelling evidence that a particular request is frivolous or vexatious. In this specific case, the government institution argued that since some of the information in question was disclosed in summary form during the course of an earlier court proceeding that it should be excused from having to discharge its obligations under the Act. The review process under the Act is independent of any other proceedings that may provide access to documents.

[19] Based on the information before me, I find no proper basis to dismiss the Applicant's application for review under section 50(2) of the Act.

2. Has SRC met its implied duty to assist?

[20] Typically in a review, this office considers whether the implicit duty to assist has been met (OIPC Reports F-2004-005, F-2004-003, LA-2004-001). In the particular circumstances of this case, I am satisfied that SRC has met its duty to assist.

3. Did SRC properly invoke section 13(1) to deny access to the record in question?

[21] The applicable provision of the Act is as follows:

> *13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:*
>
> *(a) the Government of Canada or its agencies, Crown corporations or other institutions;*
>
> *(b) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;*
>
> *(c) the government of a foreign jurisdiction or its institutions; or*
>
> *(d) an international organization of states or its institutions;*
>
> *unless the government or institution from which the information was obtained consents to the disclosure or makes the information public.*

a. What type of agencies would be captured by this clause?

[22] SRC described the agencies in question as 'Regina Airport', 'Environment Canada' and 'several consultants' or as 'other institutions'.

[23] For the exemption in section 13(1)(a) to apply, the agencies in question must qualify as either "*Government of Canada or its agencies, Crown corporations or other institutions*". Because of the possessive pronoun in this clause, "agencies" and "other institutions" should be understood as federal agencies and federal institutions.

[24] I note that the Department of the Environment (also known as Environment Canada) is already designated as a "government institution" under the federal *Access to Information Act* (ATIA). The definition is *"any department or ministry of state of the Government of Canada listed in Schedule 1 or any body or office listed in Schedule 1"*. Since the Department of Environment appears on Schedule 1 I have no hesitation in concluding that the Department is caught by section 13(1)(a) of the Act.

[25] No evidence has been advanced to demonstrate that AMEC or Clinton Associates Ltd should be considered part of the federal government. I see no basis to make such a finding.

[26] Turning to the Regina Airport, I note that in the submissions from SRC "Regina Airport" and "Regina Airport Authority" (RAA) appear to be used interchangeably. In fact it

appears from the record and submissions that it was the RAA that requested services from SRC and provided samples to SRC. I intend therefore to read all references to the Regina Airport as a reference to the RAA.

[27] On this point, SRC offered the following:

> *The very foundation of the Saskatchewan Research Council's (SRC) existence and its ability to operate as a research & develop* [sic] *organization is based on the principle of confidentiality. Under section 13(1)(a) "A head shall refuse to give access to information contained in a record that was obtained in confidence" from the Government of Canada. Environment Canada and the Regina Airport fall under this section.*
>
> . . .
>
> ***Section 13(1)(a)***
>
> *Environment Canada and the Regina Airport fall under this provision. In 1972 the Federal Government purchased the Regina Airport for $3.2 million (see Appendix A, page 13). On May 1, 1999 the operation of the Regina Airport was leased to the Regina Airport Authority (see Appendix A, page 13). The Federal Government is landlord and regulator of the Airport (see Appendix B, page 14).*
>
> *The Federal Government as owner of the Airport property is ultimately responsible for the environmental well-being of the property (environmental compliance and clean-up) and the owner of any sample(s) collected in relation to the property.*

[28] SRC directed us to a portion of RAA's 1999 Annual Report[2] that is of interest:

> *In 1972 the Regina Airport was sold to the Federal Government for $3.2 million, it being Transport Canada's plan to establish a National Airports System (NAS) comprised of the country's 26 key airports to meet national and regional needs.*
>
> *After years of increasing federal subsidization, the Federal Government decided that the NAS should be cost free to the federal taxpayer resulting in the creation of the National Airports Policy (NAP) in 1994.*
>
> *To achieve this objective, the NAP shifted the Federal government's role from owner and operator to landlord and regulator and the 26 NAS airports were to be leased to local authorities who would be responsible for their entire financial and operational management with the exception of navigational services which were to become the responsibility of Nav Canada, a corporation created solely for this purpose.*

[29] SRC also provided us with a copy of Transport Canada's National Airports Policy[3] with highlighted sections offering the following:

[2] Regina Airport Authority's 1999 Annual Report, available at: http://www.yqr.ca/reports/1999.pdf.

> *To develop such a system and ensure its ongoing viability, the government has introduced the National Airports Policy (NAP). Under the NAP, the federal government will maintain its role as regulator but will change its current role from airport owner and operator, to that of owner and landlord.*
>
> *The federal government will retain ownership of the 26 airports identified as part of the National Airports System. However, under the NAP they will be leased to Canadian airport authorities. These local operators will be responsible for financial and operational management.*

[30] I also reviewed the decision of the Saskatchewan Court of Queen's Bench in Regina Airport Authority v. Lumsden Aero Ltd[4]. The relevant portions are as listed below:

> *4 RAA was incorporated pursuant to the Canada Business Corporations Act, R.S.C. 1985. c. C-44, in June, 1998. It has been registered in Saskatchewan under The Non-Profit Corporations Act, 1995, S.S. 1995, c. N-4.2. In 1994, the federal government adopted a policy that a number of airports were to be transferred from the federal government operating authority to local authorities. The City of Regina negotiated with the federal government with respect to the terms of transfer and on May 1, 1999, the Regina Airport was transferred from the Federal Government to RAA.*
>
> *5 All of the property is still owned by the federal government and, therefore, RAA has a lease for all of the property located on the airport property. As part of the transfer, RAA acquired all leases held by the federal government at the date of the transfer. Many of the tenants on the airport property own their own buildings and had a ground lease. RAA has superseded the Federal Government as the landlord with respect to those ground leases.*
>
> *6 In March, 1999, all tenants were advised by the then acting airport manager for the Federal Government that all leases would be assigned to RAA. LA* [Lumsden Aero Ltd.] *had a ground lease with Transport Canada and the same has been assumed by RAA. LA owns the hangar located on RAA leased property.*
>
> *7 The original lease was entered into on December 14, 1976, and was assumed by LA when it purchased the hangar building in 1990. This original lease has been amended by further supplemental agreements of January 1, 1994, June 1, 1996, and a primary supplemental agreement to the lease dated September 1, 1993. . . .*
>
> *8 When RAA was incorporated it was required to comply with guidelines established by the Federal Government. . . .*

[31] The *Personal Information Protection and Electronic Documents Act* (PIPEDA) provides additional insight into how to possibly classify the RAA. The definitions section of

---

[3] Transport Canada's National Airports Policy, available at: http://www.tc.gc.ca/programs/airports/policy/nap/NAP.htm.

[4] *Regina Airport Authority v. Lumsden Aero Ltd.*, 2002 SKQB 96 (CanLII), 50 R.P.R. (3d) 114, (2002), 218 Sask. R. 110, 45 C.E.L.R. (N.S.) 173.

PIPEDA describes the types of organizations that qualify as a federal work, undertaking or business. The relevant provision is as follows:

> *2(1) The definitions in this subsection apply in this Part.*
>
> . . .
>
> ***"federal work, undertaking or business"*** *means any work, undertaking or business that is within the legislative authority of Parliament. It includes*
>
> *(a) a work, undertaking or business that is operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of ships and transportation by ship anywhere in Canada;*
>
> *(b) a railway, canal, telegraph or other work or undertaking that connects a province with another province, or that extends beyond the limits of a province;*
>
> *(c) a line of ships that connects a province with another province, or that extends beyond the limits of a province;*
>
> *(d) a ferry between a province and another province or between a province and a country other than Canada;*
>
> *(e) aerodromes, aircraft or a line of air transportation;*
>
> *(f) a radio broadcasting station;*
>
> *(g) a bank;*
>
> *(h) a work that, although wholly situated within a province, is before or after its execution declared by Parliament to be for the general advantage of Canada or for the advantage of two or more provinces;*
>
> *(i) a work, undertaking or business outside the exclusive legislative authority of the legislatures of the provinces; and*
>
> *(j) a work, undertaking or business to which federal laws, within the meaning of section 2 of the Oceans Act, apply under section 20 of that Act and any regulations made under paragraph 26(1)(k) of that Act.*
>
> [emphasis added]

[32] I take the reference in section 13(1)(a) of the Act to "other institutions' to refer to those institutions that are either federal "government institutions" for purposes of ATIA or institutions controlled by the federal government.

[33] Given the background noted above, it appears that RAA may be federally regulated and indeed is likely a federal works, undertaking or business. It is not however, a federal government institution, nor is it controlled by the federal government.

[34] SRC argues that because the land on which the Regina airport is located is owned by the federal government, and any soil and water samples from that land would be 'owned' by the federal government, any analysis done by the SRC with respect to those samples would somehow constitute a record obtained in confidence from one of the federal bodies identified in section 13(1)(a) of the Act. Regardless of who has title to the airport lands, I need only focus on the source of the record provided to SRC. The evidence is clear that it was a non-profit corporation operating as a kind of local authority and not an agency, Crown corporation or institution of the federal government that provided the record to SRC.

[35] Given that, of all the agencies in question, only Environment Canada is covered by section 13(1)(a) of the Act, I only need to consider whether the records contained in Tabs 1 & 4 (Environment Canada) should be exempted by that section.

b. With respect to the records in the tabs referring to Environment Canada, have any of these records or the information <u>contained</u> in these records been <u>obtained from</u> Environment Canada?

(i) How do we define "<u>obtained</u>" or "<u>supplied</u>"?

[36] Section 19(1)(b) of the Act provides as follows:

> *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;*

[37] Because section 19(1)(b) of the Act which was cited as a justification for exemption by SRC, is similarly worded to that of section 13(1)(a), we will analyze similar terms and phrases concurrently. Both provisions refer to "information" that is "contained in a record" "obtained in confidence, implicitly or explicitly" (section 13) or "supplied in confidence, implicity or explicitly" (section 19). While section 13 uses the term "obtained" section 19 uses the term "supplied". Different words in a statute mean different things. It would appear that "obtain" is about receiving, whereas "supplied"

would infer giving. In either case, the information comes into the possession of the government institution, in this case, SRC.

[38] In order to assign meaning to these words, we need to see how they are interpreted elsewhere. In a scan of other provinces, we have determined that many other jurisdictions do not use "obtained" as in Saskatchewan, but instead use "received or supplied." The federal ATIA, however, does use the phrase "obtained in confidence."

[39] "Obtained" was defined in our OIPC Report F-2006-001 in paragraphs [58] and [59], as follows:

> *[58] In Alberta IPC Order 2000-021, "obtain" is defined as follows:*
>
> *"[para. 26.] The Concise Oxford Dictionary (9th Edition) defines "obtain" as "[to] acquire, secure; have granted to one." Black's Law Dictionary (6th Edition) defines "obtain" as: "[t]o get hold of by effort; to get possession of; to procure; to acquire, in any way." Both definitions suggest that for the purposes of section 14(1)(b) a public body could "obtain" a record either intentionally or unintentionally. Further, the definitions suggest that a public body that obtains a record did not create it.*
>
> *[59] I adopt the same definition for purposes of section 13(2) of the Act. These records, although authored by the local authority, were subsequently acquired by CPS [Saskatchewan Corrections and Public Safety] are thus in the possession of CPS. Accordingly, I find these records were "obtained" from a local authority.*

[40] OIPC Report F-2005-003 addressed section 19(1)(b) of the Act, but is dissimilar as its discussion centres around a negotiated agreement between Crown Investment Corporation and a third party, Meyers Norris Penny (MNP) LLP. What is relevant to the analysis in this case is paragraph [17] of the above noted Report. It reads as follows:

> [17] *Of additional assistance is Ontario's Information and Privacy Commissioner's (Ontario/IPC) Final Order MO-1846-F. It provides:*
>
> *. . .*
>
> *Information may qualify as "supplied" if it was directly supplied to an institution by a third party. . . .*

[41] The *Federal Access to Information and Privacy Legislation Annotated 2005*[5] (Federal ATIP 2005) publication summarizes a court decision that describes the scope of section 13(1)(a) of the federal ATIA as:

> *Information obtained in confidence*
>
> *13. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains information that was obtained in confidence from*
>
> *(a) the government of a foreign state or an institution thereof . . .*[6]

[42] This provision is very similar to Saskatchewan's counterpart, 13(1)(a). The relevant summary is as follows:

> *Scope of Paragraph 13(1)(a)*
>
> *Sherman v. Minister of National Revenue, 2003 FCA 202 (Fed. C.A.), additional reasons at 2004 FCA 29 (Fed. C.A.). . . .Section 13(1)(a) of the Act mandates the non-disclosure of records by the minister that contain information obtained in confidence from, in this case, the United States. It does not necessarily follow that the scope of the provision does not or cannot extend to Canadian information, that is to say information generated or produced here in Canada by Canadian authorities. Létourneau J., for the Court, had no doubt that information, whether in statistical form or not, generated by Canadian authorities that would contain information obtained in confidence from a foreign government would fall under the scope of the mandatory exemption. For example, a letter written by the minister, but containing information provided by the United States in confidence or referring to such information in a manner revealing its contents, is a Canadian record containing, in part or in its entirety, information falling within the parameters of the exemption in s. 13(1)(a). What is significant for the purpose of s. 13(1)(a) is not so much the source of the record to which access is sought as both the confidential nature and the source of the information it contains. That appears clearly and plainly from the words "a record requested under the Act that contains information that was obtained in confidence from the government of a foreign state". In other words, the record sought is not to be confused with the information that it contains. The record may be Canadian, but the contents American. Of course, a Canadian record containing information obtained from a Canadian source, whether confidential or not, is not caught by the prohibition found in s. 13(1)(a). A record created by the Canadian government, but composed of information obtained in confidence, in this case from the United States government, cannot be disclosed, directly or indirectly,*

[5] Michel W. Drapeau & Marc-Auréle Racicot, *Federal Access to Information and Privacy Legislation Annotated 2005*, (Toronto: Thomson Canada Limited, 2004)
[6] *Access to Information Act*, R.S., 1985, c. A-1, s. 13(1)(a)

> *through a release by the Canadian Government of its own information, by reason of s. 13(1)(a), unless consent is obtained in accordance with s. 13(2) of the Act.*[7]
>
> [emphasis added]

[43] In light of the foregoing materials, I need to consider the contents of the record and determine if any of the information contained in each record was offered by any of the agencies captured by the applicable provision in that specific instance [section 13(1)(a) or 19(1)(b) of the Act].

(ii) How do we define 'information'?

[44] Sections 13(1)(a) and 19(1)(b) of the Act are worded differently than most other exemptions in Part III of the Act. Instead of stating "access to records" the two sections read as "access to information contained in a record." "Information" is a term not defined by the Act. However, what constitutes a "record" is defined. Section 2(1)(i) of the Act defines "record" as follows:

> *2(1) In this Act:*
>
> . . .
>
> *(i) "**record**" means a record of information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include computer programs or other mechanisms that produce records;*

[45] The Concise Oxford Dictionary[8] defines "information" as "*facts or knowledge provided or learned as a result of research or study*."[9]

[46] Access to information rights under the Act is for records, not information (section 5 of the Act). The question is whether the records at issue contain any information from Environment Canada or not. The exemption should apply if the records at issue contain information offered by Environment Canada or if the record itself was prepared and submitted by Environment Canada to SRC.

---

[7] Michel W. Drapeau & Marc-Auréle Racicot, *Federal Access to Information and Privacy Legislation Annotated 2005*, (Toronto: Thomson Canada Limited, 2004) at 1-163 & 1-164.

[8] Judy Pearsall, *Concise Oxford Dictionary*, 10th Ed., (Oxford University Press).

[9] Ibid, page 727

(iii) If Environment Canada only supplied samples of soil or water, would the resultant records or information contained within prepared by SRC qualify as 'information' under the Act 'obtained from' or 'supplied by' Environment Canada?

[47] Ontario Information and Privacy Commissioner (IPC) Order PO-1811 addresses this question. The relevant portions of that Order are as follows:

> *Sections 17(1)(a) and (c) of the Act read:*
>
> *A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,*
>
> > *(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;*
> >
> > *. . .*
> >
> > *(c) result in undue loss or gain to any person, group, committee or financial institution or agency;*
>
> *The appellant submits:*
>
> > *The Ministry and the Affected Party must establish that the information was supplied by the Affected Party to the Ministry and/or that the information contained in a document would reveal information supplied by the Affected Party because its disclosure would permit the drawing of accurate inferences with respect to the actual information supplied to the Ministry. [Refer Orders P-204, P-251, P1-1105 and P1-1687]*
> >
> > *. . . [T]he documents at record 1, which are described as reports of the Agricultural Laboratory Services, Pesticide Residue Section, must, by their very nature, constitute information which was created by the Ministry, rather than supplied by the Affected Party. The Ministry acknowledges that the items which were "supplied" by the Affected Party were samples or specimens…[S]uch items do not constitute "information" within the meaning of the Act…[T]he Ministry and the Affected Party have not established that any of the information presently withheld was supplied by the Affected Party.*
>
> *The Ministry submits:*
>
> > *A record generated by an institution may meet the second part of the section 17 test if that record, would, if disclosed, reveal the confidential information that was supplied or that would permit the drawing of accurate inferences as to the nature of the confidential information supplied by a third party to the institution. In Order P-1085 Inquiry Officer Mumtaz Jiwan states:*

> *Previous orders have indicated that information contained in a record may be said to have been "supplied" to an institution if its disclosure would permit the drawing of accurate inferences with respect to the information that was actually supplied.*

The affected person submits:

> *. . . [T]he condition that the information be "supplied" by a third party should not be interpreted, as suggested by the [appellant], as creating an additional requirement that only information in documents created by the third party are eligible for protection under Section 17 of the Act. The language of the Act does not support this interpretation of the word "supplied". Had the Legislature's intent been as suggested by the [appellant], language to that effect would have been included in the Act. The word "supplied" has a broader meaning which would include the results of samples provided by the [affected person] to [the Ministry] for analysis. The samples that were submitted to [the Ministry] contained the very information that is reflected in the documents subsequently created by [the Ministry]. No distinction should accordingly be made in this case between "supplying samples" and "providing results of what the samples contain."*
>
> *In the circumstances, I am satisfied that all of Record 1, and Records 2c, 2h, 2o and 2r either contain or would reveal information supplied by the affected person to the Ministry. I accept that much of this information was actually derived from samples provided by the affected person. In the circumstances, however, I find that by voluntarily providing samples to the Ministry for testing, the affected person was, in effect, supplying information which could be directly derived from the samples. In essence, the test result information was embedded in the samples, and the affected person voluntarily provided that information by providing the samples, and requesting that the Ministry extract this information and report it back to the affected person. In my view, this situation can be analogized to circumstances where an affected person retains an outside expert and provides it with samples for testing, obtains the test results, and then provides this information to a government institution. This office has found that such circumstances are sufficient to fall within the scope of the word "supplied" in section 17(1) of the Act [see, for example, Orders P-974 and PO-1803].*

[48] I adopt the above reasoning from the Ontario order. If analysis was conducted on samples, any information derived about the samples by SRC would constitute information, for purposes of the Act, that was provided to SRC from the supplier of the sample. I find that when Environment Canada voluntarily supplied samples to SRC and requested that SRC analyze those samples and report back to Environment Canada this activity falls within the scope of the phrase "information supplied" to a government

institution by a third party. This conclusion is critical in consideration of the applicability of both sections [13(1)(a) & 19(1)(b) of the Act].

[49] If the record was prepared by SRC but is built upon information provided by Environment Canada, then this part of the provision applies, but only if the other elements of the sections are also present.

c. How do we determine if the information/records were obtained "in confidence, implicitly or explicitly" from Environment Canada or any of the other third parties?

[50] As both sections 13(1)(a) and 19(1)(b) of the Act require the information to meet the "in confidence" test, we will consider the applicability of both sections concurrently here in our analysis.

[51] In the Federal ATIP 2005 publication, page 1-167 explains that "'*information obtained in confidence' means that the supplier of the information has stipulated that the information is not available for dissemination beyond the government institutions which have a need to know the information."* [emphasis added]

[52] Also useful on this point is Ontario IPC Order MO-1896 that reads, in part, as follows:

> *Previous orders issued by this office have stated that for information to "have been received in confidence" there must be an expectation of confidentiality on the part of the supplier and the receiver of the information. [Orders 210, P-278, P-480, and M-871]. I agree with this analysis. For a matter to be "in confidence", there must be a mutual intention, or at least a mutual expectation, of secrecy. If one party intends that the information be kept confidential but the other party does not, the information generally cannot be considered "in confidence". The requirement for mutuality is illustrated by the Oxford Concise Dictionary, 1990 edition, definition of "confidence" as "the telling of private matters with mutual trust".*
>
> *In determining what evidence will satisfy the onus to establish that information has been supplied in confidence under section 10, this office has made the following observations:*
>
> *To satisfy the "in confidence" component of the section, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].*

> *In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was*
>
> - *communicated to the institution on the basis that it was confidential and that it was to be kept confidential*
> - *treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization*
> - *not otherwise disclosed or available from sources to which the public has access*
> - *prepared for a purpose that would not entail disclosure [Order PO-2043]*
>
> *In my view, similar considerations apply to determination of whether information was received in confidence under section 9 of the Act.*
>
> *In determining whether information was received in confidence for the purpose of this section it is also necessary to consider all the circumstances of the case. This would include*
>
> - *the nature of the information*
> - *whether the information was prepared for a purpose that would entail disclosure*
> - *whether the information was communicated to the institution on the basis that it was confidential and that it was to be kept confidential*
> - *whether the institution receiving the information agreed explicitly or implicitly to accept it on the basis that it was confidential and that it was to be kept confidential*
> - *whether the government agency that supplied the information treated it consistently in a manner that indicates a concern for its protection from disclosure prior to communicating it to the institution*
> - *whether the institution that received the information treated it consistently in a manner that indicates a concern for its protection from disclosure after receiving it*
> - *whether the information was otherwise disclosed or available from sources to which the public has access, either before or after the government or government agency provided it to the institution.*
>
> [emphasis added]

[53] The Treasury Board of Canada Secretariat's website[10] offers advice on what the phrase "information obtained in confidence" means and how to prove it applies. The relevant excerpts from that site include the following:

> *This is a mandatory class exemption. The term "in confidence" means that the supplier of the information has stipulated that the information is not available for*

[10] Treasury Board of Canada Secretariat's website, available at: http://www.tbs-sct.gc.ca/pubs_pol/gospubs/TBS_121/CHAP2_8-2_e.asp

> *dissemination beyond the government institutions which have a need to know this information.*
>
> . . .
>
> *This exemption protects the information provided "in confidence" both formally and informally, by officials of other governments or international organizations and their institutions. In order to ensure that a claim for exemption in this area can be adequately proved, institutions should obtain in writing at the time of receipt of the record concerned notification or a statement from the supplier of the information indicating that it is being supplied "in confidence". Wherever feasible, it is advisable that government institutions have agreements with other governments, international organizations or their institutions stipulating those types of information which are exchanged "in confidence".*
>
> [emphasis added]

[54] British Columbia IPC Order No. 331-1999 provides insight into the difference between the phrasing "received in confidence" versus "supplied in confidence" as follows:

> *The next issue is the meaning of the phrase "received in confidence" in s. 16(1)(b). The concept of confidential information arises in other sections of the Act. Section 21(1)(b), for example, protects information that, among other things, has been "supplied in confidence" to a public body. Section 22(2)(f) says that one circumstance to be considered in deciding whether someone's personal information can be released is whether the information was "supplied in confidence". The phrase used in s. 16(1)(b) differs from that used in ss. 21(1)(b) and 22(2)(f). It is an accepted rule of statutory interpretation that where different words are used in a statute, the Legislature intended each to have a different meaning. See R. Sullivan, Driedger On the Construction of Statutes, 3rd ed., (Butterworths: Toronto, 1994), at pp. 164-165, and the cases referred to there.*
>
> *It is not necessary for the purposes of this inquiry to comment exhaustively on the meanings of the different phrases in ss. 16, 21 and 22. In my view, however, use of the word "supplied" in ss. 21 and 22 – which deal with information provided to a public body by a non-public body third party – focuses more on whether the supplier of the information expected it to be kept confidential. By contrast, I think s. 16 focuses on the intention of both the receiver and the supplier of the information. This does not mean the intention or understanding of the recipient of information is irrelevant to ss. 21 or 22. It simply means that the Legislature intended, to my mind, that the focus under those two sections should be more on the intention of expectation of the information supplier.*
>
> *Turning to s. 16(1)(b), it is my view that – in almost all cases – the necessary element of confidentiality will not be established solely because the receiver of the information intends it to be confidential. For example, the intention of a local government to receive information in confidence from the provincial government cannot of itself turn otherwise non-confidential information into confidential information. This is true, even where the receiving local government does not*

wish others to know that it has been given information that is otherwise non-confidential.

In cases where information is alleged to have been "received in confidence", in my view, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information. For example, it may be that if a public body asks the British Columbia government for information, and says the request is made in confidence, the information will have been received in confidence. But if the government declines at the outset to treat the supply as being confidential, the information will not have been received in confidence. This interpretation accords with what I think is the legislative policy underlying s. 16(1)(b), i.e., to promote and protect the free flow of information between governments and their agencies for the purpose of discharging their duties and functions.

. . .

In Order P-278 (March 4, 1992), Assistant Commissioner Mitchinson concluded, at p. 9, that there "must be an expectation of confidentiality on the part of the supplier and the receiver of the information" before the Ontario equivalent to s. 16(1)(b) would apply. He noted, at p. 9, that the government bodies involved in that case had "provided no evidence to indicate that they expected them [some of the responsive records] to be treated confidentially by the [receiving] institution". Because there was no such evidence, he ruled that the exception did not apply to some records.

. . .

I am not aware of any Ontario decision which explains the different between the language of s. 15(b) of the Ontario Act and that found in ss. 17 and 21 of the statute. Those sections – which respectively deal with personal and commercial information – use variations on the phrase "supplied in confidence". I do not think Order M-844, or other orders referred to above, should be taken to focus exclusively on the intention of the supplier of information for the purposes of Ontario s. 15(b). In any case, s. 16(1)(b) of the British Columbia Act should not be interpreted in that way. Section 16(1)(b) requires public bodies to look at the intentions of both parties, in all the circumstances, in order to determine if the information was "received in confidence".

What are the indicators of confidentiality in such cases? In general, it must be possible to conclude that the information has been received in confidence based on its content, the purpose of its supply and receipt, and the circumstances in which it was prepared and communicated. The evidence of each case will govern, but one or more of the following factors – which are not necessarily exhaustive – will be relevant in s. 16(1)(b) cases:

1. *What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?*
2. *Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?*

> 3. *Was the record in question explicitly stated to be provided in confidence? (This may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to receive the record in confidence or may not actually have understood there was a true expectation of confidentiality.)*
> 4. *Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in the legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)*
> 5. *Was there agreement or understanding between the parties that the information would be treated as confidential by its recipient?*
> 6. *Do the actions of the public body and the supplier of the record – including after the supply – provide objective evidence of an expectation of or concern for confidentiality?*
> 7. *What is the best practice of the recipient public body respecting the confidentiality of similar types of information when received from the supplier or other similar suppliers?*
>
> . . .
>
> *There is no evidence, even, as to the identity of the author of the record. In short, there is no direct basis on which I can conclude that information in the record was explicitly or implicitly "received in confidence."*
>
> *That might not end the matter had I been able to infer from the material before me that information in the record was received in confidence by the Board. . . Nothing in the record itself – which consists largely of a summary of existing facts – indicates that it was of a confidential nature or that it was supplied in confidence.*
>
> [emphasis added]

[55] Notwithstanding the quote from the *Federal Access to Information and Privacy Legislation Annotated 2005* publication noted above, I am not persuaded that it is essential to establish that the supplier of information has **stipulated** that the information must be kept confidential. If, after considering the entire record and surrounding circumstances there is evidence from which it is reasonable to conclude that both parties had an expectation of confidentiality, I find that would be sufficient. I accept the British Columbia approach that the use of the word "supplied" as in section 19(1) of the Act focuses more on whether the supplier of the information expected it to be kept confidential. By contrast I accept that the word "obtained" as in section 13(1)(a) of the Act focuses on the intention of both the receiver and the supplier of the information. If there was insufficient evidence from which I could conclude that the supplier of the

information intended that the information supplied be kept confidential, then there would be no proper basis for the section 19(1) exemption. If there was insufficient evidence from which I could conclude that the receiver and supplier had a common intention to keep information "obtained" confidential, then there would be no proper basis for the section 13(1)(a) exemption.

(i) How do we determine that the information provided to SRC by each of the third parties was done so "implicitly" or "explicitly" in confidence?

[56] The *Annotated Alberta Freedom of Information and Protection of Privacy Act*[11] (Alberta's Annotated FOIP Act) publication offers definitions of the above-noted terms as listed below:

> Page 5-16-5, discusses "provided in confidence, implicitly or explicitly".
>
> > *In the past, factors that have been cited to support a finding that information has been supplied to a public body by a third party in confidence include:*
> > *a. the existence of an express condition of confidentiality in an agreement between a public body and the third party (Orders 97-013 [23-27], 2001-008 [54], 2001-019 [15]);*
> > *b. the fact that the public body requested the information be supplied in a sealed envelope (Order 97-013 [23-27]);*
> > *c. the third party's evidence that it considered the information to have been supplied in confidence (Order 97-013 [23-27]);*
> > *d. the fact that the third party supplying the information was promised by the public body that he or she would not be identified (Order 2000-003 [122]); and*
> > *e. the passing of a motion that the information remain private (Order 2001-019 [15]).*

[57] Also, the same tool defines "implicitly" as meaning,

> *that the confidentiality is understood even though there is no actual statement of confidentiality, agreement, or other physical evidence of the understanding that the information will be kept confidential. In such cases, all relevant facts and circumstances need to be examined to determine whether or not there is an understanding of confidentiality including whether the information was:*
>
> > *a. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;*
> > *b. treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body;*

[11] Co-published by Elizabeth Wilcox and Alberta Queen's Printer, *Annotated Alberta Freedom of Information and Protection of Privacy Act*, January 2005 update.

c. not otherwise disclosed or available from sources to which the public has access; or
d. prepared for a purpose which would not entail disclosure.

[58] I cannot find that there was an explicit insistence on confidentiality on the part of those third parties that supplied information and records to SRC. Indeed, this question could likely have been easily resolved if SRC had provided executed contracts between SRC and the third parties that addressed confidentiality.

[59] Nonetheless, I am required to also consider whether an expectation of confidentiality on the part of the third parties can be inferred in the circumstances.

[60] Pages 2 to 4 of SRC's submission include the following:

> *All clients, whether individuals, companies, or other government institutions are aware of the confidentiality policies involved in the services provided by the Council. Most, if not all of these clients rely on such policies in their decision to contract with the Council for these services.*
>
> *In fact, some of the larger clients require the Council to sign additional confidentiality agreements which give the client additional avenues to restrain the disclosure of information and avenues to obtain compensation. . . .*
>
> *When services are performed by the Council the information gathered, including samples provided or obtained, and the end product or result are the property of the client. . . . [T]he Council views client information and the like in the same way a doctor would view the information of his or her client.*
>
> *Evidence of the confidential nature of the Council's services can be seen throughout their marketing, internal policy, client and employee contracts. Please refer to the "SRC Analytical Laboratories" brochure found at TAB 1, Section 2. Supporting Documents. . . .*
>
> *The "SRC Analytical Laboratories 2003 Price Guide"…also makes reference to the confidentiality policy at page 3. . . .*
>
> *The "Geoanalytical Laboratories" Brochure also makes note of the confidentiality policy in its mission statement as well as in the "Geoanalytical Laboratories Fee Schedules". The brochure and Fee Schedule can be referred to at Tab 2, Section 2. Supporting Documents.*
>
> . . .
>
> *Client confidentiality is the cornerstone of the Council's service and without being able to maintain such a standard it unlikely that the Council would remain viable. Clients would undoubtedly move their business elsewhere if the Council could not guarantee such confidentiality.*

[61] To support its position, SRC provided additional supporting documentation along with its submission. Included were the following:

- SRC Analytical Brochure
- Website Page
- SRC Analytical Laboratories 2003 Price Guide
- Geoanalytical Laboratories Brochure
- Geoanalytical Laboratories Fee Schedule
- Client Confidentiality Agreement
- Short Contract
- Agreement
- Multi-Client Agreement
- Code of Ethics
- Code of Ethics Contractor
- Directive C-2-Code of Ethics
- Directive C-3-Intellectual Property
- Directive C-4-Confidential Research Projects
- Sales Analysis
- Sales Analysis Top 20
- SRC Annual Report 2003-2004
- Overview of Strategic Plan

[62] One of the brochures referenced above explains that a "*laboratory information management system documents and archives all analytical processes, including sample tracking, reporting and invoicing. All work is treated with the utmost confidentiality*."

[63] Page 3 of the 2003 Price Guide[12] reads, "[a]*ll data and reports are the confidential property of the client. No information will be released to others without the express written consent of the client, unless legally required by government regulation or a court of law*."

[64] On page 4 of SRC's Fee Schedule, point 2.4 reads as follows:

> *All reports are the confidential property of the client. Publications of statements, conclusions or extracts from these reports are not permitted without the client's written approval. All reports are kept under lock and key and are accessible to only a select few senior lab staff. The entire premises are regularly patrolled by security guards 24 hours a day. Entry to the lab is restricted by an electronic security system. Only those with cards can gain access to the lab. We take the issue of confidentiality and security very seriously and have taken appropriate steps to protect our clients' interests.*

[12] SRC Analytical Laboratories, 2003 Price Guide, (effective April 1, 2003), at 1-9; available at: http://www.src.sk.ca/images/AnalyticalPrice_revFeb05.pdf.

[65] The Client Confidentiality Agreement provided by SRC includes the following:

> *Without the written consent of the other party, neither party will disclose, make public or authorize the disclosure or publication of any confidential data or information obtained from the other party, including, without limitations, information relating to proprietary formulations, manufacturing operations (including customers, suppliers, equipment, services of employees, financial affairs or methods of operation), know-how, trade secrets, technical and economic data, computer programs, system documentation, secret processes, ideas (including patentable ideas), copyrights or publications of a confidential nature. . . .*

[66] There is no evidence that the third parties in question signed this contract or one similar in nature. I note that SRC did include a copy of a signed contract with another party as part of its submission to our office. I give no weight to that document in the absence of the executed contracts for the third parties in question.

[67] SRC's 'short contract' includes an attachment that highlights the following limitations on maintaining confidentiality of information:

> *(b) Subsection (a) shall not apply to confidential or proprietary information that:*
>
> *i) is in the public domain*
>
> *. . .*
>
> *iv) as may be ordered by a court of competent jurisdiction or otherwise required by local, provincial, or federal government law or regulation.*
>
> *. . .*
>
> *(d) For the purposes of this provision all information provided by one party to the other shall be considered as confidential and proprietary unless it falls within the exceptions enumerated above.*

[68] The Confidential Research Projects Policy reads, "*All information obtained from and through the project is confidential.*"

[69] Page 6 of SRC's Directive C-3 offers that a "*breach of confidentiality may result in termination of employment and therefore loss of revenue from the net revenue sharing agreement or other benefits that may accrue to the employee in accordance with the terms of this policy*."

[70] Directive C-4 speaks to disclosures by members of SRC:

> *Disclosure – All members of SRC must not disclose to persons outside the Council any information that is obtained concerning contract projects. Any discussion with staff members not working on the project is prohibited. If there is any doubt about the release of information the respective Branch Director should be consulted.*

[71] Even though SRC failed to provide explicit evidence of an expectation of confidentiality from the third parties, I find that burden of proof has been met by SRC. I have come to this conclusion after a careful review of all of the circumstances before me. I was impressed with the consistent and specific representations by SRC in its literature, forms and documents that information supplied by third parties or obtained by SRC from third parties would be kept confidential. I also have given considerable weight to the nature of the business of SRC and the importance of confidentiality in that business when it comes to receiving, testing and reporting on soil or water samples for commercial clients, whether private or public.

[72] This, however, only applies to information that is derived from sample analysis, or that would reveal documented information known about aspects of the samples prior to its analysis. Accordingly, all records containing this type of information provided by Environment Canada will be exempt from release to the Applicant under section 13(1)(a) of the Act.

[73] This still leaves us to determine if all other information provided by the other third parties (AMEC, Clinton Associates Ltd and RAA) or those records provided by Environment Canada to SRC that do not contain confidential information are exempt from release under any other exemption invoked by SRC.

4. *Did SRC properly invoke section 19(1)(b) of the Act?*

[74] The applicable provision is as follows:

> *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;*

[75] A third party cannot be another provincial government institution since section 2(1)(j) of the Act provides that: "*"third party" means a person, including an unincorporated entity, other than an applicant or a government institution.*" None of the four agencies (AMEC, Clinton Associated Ltd, Environment Canada and RAA) qualifies as a provincial government institution under the Act. Reference in the Act to "government institution" means a **provincial** government institution given the definition in section 2(1)(d)(i) of the Act and the appendix, Part I of *The Freedom of Information and Protection of Privacy Regulation* (OIPC Report F-2005-001, [35] – [37]). This phrase would not include a **federal** government institution without other qualifying words in the statute. We note that section 19(1)(a) of the Act is applicable if the information was supplied by a third party which all four of the agencies in question should qualify as.

a. Were the records or information contained in the records at issue "supplied" to SRC by the various third parties?

[76] As discussed earlier, the information obtained by SRC from Environment Canada appears to qualify as also being supplied by that same agency, Environment Canada. What about the other third parties?

[77] The following excerpts from Ontario IPC Order PO-2020 are helpful in further clarifying when information may be considered to have been supplied:

> *To meet the second part of the test, it must be established that the information in the records was actually supplied to the Ministry, or that its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (Orders P-203, P-388, P-393).*
>
> *Record 75 consists of minutes of a meeting held between representatives of MCCR* [Ministry of Consumer and Commercial Relations] *and the primary affected party. Although the record was not created by the primary affected party, I find that some of the portions of the record that constitute technical or commercial information reveal information that clearly on the face of the record was supplied by the primary affected party during the course of the meeting.*
>
> *Record 80 is a report prepared by the primary affected party for MCCR and provided to the MCCR. Therefore, I am satisfied that all of the information in Record 80 was "supplied" to MCCR by the primary affected party.*

[78] As earlier discussed, it appears that the same information that would qualify as "obtained" by SRC in section 13(1)(a) of the Act would also qualify as information "supplied" to SRC by those same third parties under section 19(1)(b) of the Act.

[79] Section 19(1)(b) of the Act also states that the record has to contain information that was "supplied in confidence". In our earlier analysis, we determined that sample information provided or received was done in confidence. However, section 19(1)(b) also requires that the information in question qualify as financial, commercial, scientific, technical or labour relations information in order for the provision to apply. Section 13(1)(a) of the Act merely requires that the information was obtained in confidence. The application of section 19(1)(b) of the Act is narrower.

(i) Can the information derived from samples qualify as scientific, commercial, financial, or technical information supplied by a third party when SRC is utilizing the techniques and conducting the analysis on the samples, not the third parties?

[80] SRC asserts the following:

> *The Record in this matter contains information which is of a scientific and technical nature which was supplied to the Council in confidence by third party clients. These clients make up 75% of the Council's top 20 in 2003-2004. The Council was able to secure and maintain clients and others, because there* [sic] *are able to maintain the degree of confidentiality that the clients demand. We respectfully submit that the record must not be disclosed for this reason.*
>
> *It should also be noted that governing bodies such as Standards Council of Canada (see website www.scc.ca), and Canadian Association for Environmental Analytical Laboratories (CAEAL) (see website www.caeal.ca), who provide accreditation to the Council, require that such confidentiality policies be in place.*

[81] The record contains a few records with billing and payment information which would appear to qualify as financial information, not scientific or technical.

[82] OIPC Report F-2005-003 addressed what qualifies as "financial information" under this provision. The relevant portion is as follows:

> *[25] A broader explanation of what constitutes "financial information" is offered in Ontario/IPC, Order MO-1246. It reads, in part as follows:*
>
> > "*Financial information 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 (Orders P-47, P-87, P-113, P-228, P-295 and P-394). . . .*
>
> *I also find that documents containing profit and loss data, revenue and expenses, price lists, hourly rates of various towing operators, information pertaining to the actual income and/or salaries of tow truck operators, monthly expenses and driver commissions qualify as both "commercial" and "financial" information."*

[83] Billing and payment information will qualify as "financial information" under this section if also provided by a third party in confidence. As the other records do not appear to also contain "financial information", I need to determine if the contents are commercial, scientific or technical in nature.

[84] As explained earlier, the majority of the records or information contained within the records constitute sample information. A few records provided by the third parties appear to have accompanied the samples when they were provided to SRC, such as requests for analysis containing instructions and chain of custody forms. These types of records do not to qualify as financial. Would these qualify as "technical", "commercial" or "scientific" in nature?

[85] The Alberta's Annotated FOIP Act[13] defines the terms "scientific" and "technical" as follows:

> *The phrase "scientific information" is information exhibiting the principles or methods of science, and "technical information" is information relating to a particular subject, craft or profession that is used on a specific technique or approach (Orders 2000-014 [26], 2000-017 [31-32], 2001-022 [14], 2001-026 [26], F2002-002 [35]. To qualify as "technical information of a third party", the information must have been developed by the third party. . . .*[14]

[86] Alberta IPC Order 2000-014 provides additional considerations on the applicability of the terms as follows:

> *[para 27.]. . . I find that the Records would reveal scientific information of Bovar, since those Records set out test data and discuss that data. . . .*
>
> *[para 28.] The following pages of the Records would not reveal scientific or technical information of Bovar, or any of the other kinds of information set out in section 15(1)(a). . . .*

[13] Co-published by Elizabeth Wilcox and Alberta Queen's Printer, *Annotated Alberta Freedom of Information and Protection of Privacy Act*, January 2005 update.
[14] Ibid, page 5-16-4.

> *[para 29.] The foregoing pages consist of such things as cover pages for reports, a fax coversheet, end parts of faxed pages that spilled over onto another page, general information about contamination control, and general lists of types of analyses made and methodologies used.*
>
> *[para 30.] As the information in the foregoing pages does not meet the requirements of section 15(1)(a), the Public Body did not correctly apply section 15(1). I therefore intend to order the Public Body to disclose. . . .*

[87] Ontario IPC Order PO-1811 is also helpful. It reads, in part:

> *Previous orders of this office have defined "scientific", "technical" and "commercial" information as follows:*
>
> > *Scientific Information*
> > *Scientific information is information belonging to an organized field of knowledge in either the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information which also appears in this section [Order P-454].*
> >
> > *Technical Information*
> > *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. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in a 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 which also appears in this section [Order P-454].*
>
> *. . .*
>
> *Having reviewed Records 1 and 2 in detail, I am satisfied that all of Record 1, and Records 2c, 2h, 2o and 2r contain or reveal scientific and/or the technical information directly relating to the testing and analysis conducted by the Ministry's agricultural laboratory. ...This finding is consistent with earlier orders of this office dealing with, for example, records relating to soil contamination testing [see Orders P-974, PO-1803].*

[88] Also of relevance are the findings in Ontario IPC Order P-974. In that case, a requester sought information regarding a property that may have experienced soil and groundwater contamination. The Inquiry Officer determined the following:

> *For the record to qualify for exemption under section 17(1)(a), (b) or (c) the Ministry* [Ministry of Environment and Energy] *and/or affected party must satisfy each part of the following three-part test:*

> 1. *the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and . . .*
>
> . . .
>
> *The report contains information which is the result of a technical study by staff of a firm of consulting engineers with expertise in the field of environmental testing and analysis. Both the appellant and the Ministry submit that, as such, the record contains scientific and technical information. I have reviewed the record at issue and I agree with this view. . . .*

[89] The provision in the above case is different than its Saskatchewan counterpart. Even though the records in question may have information that qualifies as scientific or technical information, section 19 of the Act does not require that the record must 'reveal information', rather it must constitute scientific or technical information 'from the third party'. Even though 13(1)(a) of the Act would apply to all confidential information obtained from Environment Canada, the information caught by section 19(1)(b) of the Act only includes the information supplied by the other three agencies (RAA, AMEC, and Clinton Associates Ltd) that qualifies as scientific, technical or financial information.

[90] As previously determined it appears that even though SRC conducted the sample analysis and prepared the reports containing the findings, this information will still qualify as scientific or technical information supplied in confidence to a government institution. The requests for analysis sent to SRC by the other parties do not appear to constitute technical or scientific information for the most part. Some of these requests do contain some financial information but it has not been "supplied by" the third party. As a result, the financial information is not captured by this exemption. Any other information that is indicative of the samples themselves in these request letters/documents appears to also qualify as scientific or technical information and would need to be severed before the remaining portions of the record are released. However, before I recommend release of these portions of records, I still need to consider four more exemptions invoked by SRC.

5. Did SRC properly invoke section 17(2)(c)(i) of the Act?

[91] SRC has invoked section 17(2) of the Act. That provides as follows:

> *17(2) This section does not apply to a record that:*
>
> . . .
>
> *(c) is the result of product or environmental testing carried out by or for a government institution, unless the testing was conducted:*
>
> *(i) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; . . .*

[92] On this issue, SRC offers that, "*The record is made up of results for various clients, not all of which are government institutions. We have submitted that those which were created for a government institution are not subject to disclosure . . .*"

a. Is the testing in question carried out "for a government institution" as asserted by SRC?

[93] SRC argues,

> *Saskatchewan Environment and its federal counterparts require analysis to be done on samples provided . . . In this matter, a request was put forth for information regarding the Regina Airport Authority and Environment Canada, among others. Both of these clients are "government institutions" according to the Act.*

[94] Evidence that SRC was providing a service for other bodies is included within the record itself. I disagree, however, that the records were created for a government institution as none of the bodies listed qualify as provincial government institutions.

[95] I consequently find that this exemption claimed by SRC does not apply.

6. Did SRC properly invoke section 18(2)(a) of the Act?

[96] Section 18(2) of the Act provides as follows:

> *18(2) A head shall not refuse, pursuant to subsection (1), to give access to a record that contains the results of product or environmental testing carried out by or for a government institution, unless the testing was conducted:*
>
> *(a) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; . . .*

[97] The only apparent difference between the above noted provision and section 17(2)(c) is that section 18(2) is a mandatory exemption.

[98] SRC's arguments on the applicability of this exemption include the following statements:

> *We have submitted that those which were created for a government institution are not subject to disclosure via section 18(1)(f) of the Act.*
>
> *We also respectfully submit that the results of those clients which are not government institutions are also not subject to disclosure as they were required to pay a fee for services rendered. All clients are billed for services based on the price lists provided by the Council regardless of whether or not they are a government institution.*

[99] This argument would only apply to services provided to organizations not designated as government institutions. As none qualifies as a government institution for purposes of the Act, the exemption should apply to all four agencies if all other parts of the provision are met.

[100] This subsection will only protect those documents associated with the results of the testing if also carried out by or for a government institution.

[101] SRC argued that the records containing results were created <u>for</u> a government institution not <u>by</u> a government institution. However as SRC is carrying out the testing for its clients, the section is applicable as the environmental testing was carried out by a government institution as a service to non-provincial government third parties.

[102] There is also evidence of the fees charged within the record itself and in the government institution's submission.

[103] I find that this exemption applies to records containing result information derived from environmental testing. However, records that contain information that is not result based is not captured by this exemption. This exemption also excludes most of the same records that sections 19(1)(b) and 13(1)(a) of the Act already prohibit being released to the Applicant.

7. Did SRC properly invoke section 18(1)(f) of the Act?

[104] SRC also invoked section 18(1)(f) of the Act to justify withholding the records in question. It provides as follows:

> *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;*

[105] There are a number of records or parts thereof such as chain of custody forms and requests for analysis to SRC that do not appear to be exempt from release under those sections discussed to this point. Would this provision [s. 18(1)(f)] require that no records be provided, or would damage to SRC only result from the release of certain kinds of information (i.e. sample-specific information)?

[106] SRC advances the following arguments as to why this exemption should apply:

> *The Council would see an enormous loss of revenue if clients became aware that the Council was no longer able to maintain the confidentiality that was guaranteed at the time of contracting its services…economic loss would not only result from the loss of revenue, but from the costs and damages incurred in any litigation . . . It is also possible that the Council's privately funded competitors could us the Act as a means to acquire information about the services . . . it places the Council's competitors at an advantage. . . . Evidence of the potential loss can be viewed in the Sales Analysis overview and the Sales Analysis of the Council's Top 20 clients, copies of which are included . . . TAB 6, section 2.*

[107] An earlier Report by this office is helpful as to what test is applicable to determine if the exemption will or will not apply. In OIPC Report F-2004–007**,** the relevant section is as follows:

> *[28] In Report 92/009, our office held that the disclosure of records of the Saskatchewan Liquor Board dealing with the leasing agreements for liquor stores would not prejudice the economic interests of the Board. The names of the specific landlords who were individuals should not be disclosed according to my predecessor. This decision was cited and followed by our office in Report 94/002 when the amount of rent paid by Saskatchewan Archives Board was found not to prejudice the government's economic interests and consequently it was recommended that SPMC* [Saskatchewan Property Management Corporation] *release those records.*

> . . .
>
> *[31] The Federal Court concluded speculation was not sufficient and that the landlord had to demonstrate a reasonable expectation of harm. The Court further concluded that the evidence of the landlord "remains in the realm of speculation". I have also considered a number of other decisions interpreting the federal provisions.*
>
> . . .
>
> *[35] The Saskatchewan Act does not qualify the harm as "probable" as does the Access to Information Act provision. Consequently, I find that the standard or threshold test is somewhat lower in Saskatchewan than that which exists under the Access to Information Act. Nonetheless, I find that there could not be a reasonable expectation of harm in any event based on the facts as we understand them.*
>
> . . .
>
> *[38] I find that SPMC has failed to meet its burden of proof of showing that the disclosure of the records in question could reasonably be expected to prejudice the economic interest of SPMC.*

[108] The above demonstrates that SRC does not have to prove that the harm is probable, but needs to show that there is a "reasonable expectation of harm" if any of the information/records are released.

[109] In support of its assertions, SRC provided the following arguments:

> *Under section 18(1)(f) disclosure of the records and information would "prejudice the economic interest of the Government of Saskatchewan" as follows:*
>
> - *SRC's clients pay for the cost of the services (1,500 paying clients and $19 million in 2004-2005) and therefore they are the owners of the data, results and reports provided to them (unless negotiated otherwise). The agreements signed with clients reflect this position. If SRC violated this principle and the terms of its agreements, it would result in a loss of accreditation for its labs ultimately causing their demise. In addition, research clients would leave when they learn that their results may not be kept confidential. A number of lawsuits claiming substantial damages for breach of contract and fiduciary duty would be filed.*
> - *SRC would collapse with the Province left to defend itself from the litigation and pay for the employee severance and benefits costs, cancellation of space leases and other costs to wind-up the organization (the overall cost would be conservatively $10 million). The economic loss of SRC's closure would be 264 jobs and $27.8 million of economic activity. The economic loss to the Province would be approximately 1,907 jobs and $268 million of economic activity (based on the SRC Economic Impact Report for 2004-05).*

If the principle of confidentiality were compromised in any way SRC would not exist. SRC must be impartial, independent and be seen as providing its services in an unbiased manner without interference.

[110] Offered later in another part of the same submission[15] are the following arguments:

3. Section 18(1)(f)

The records and information contained therein, if disclosed, could reasonably be expected to prejudice the economic interest of the Government of Saskatchewan or a government institution.

Confidentiality of information is paramount to SRC's and its clients (see Appendix C, page 18). If the confidentiality of client information, test results, and reports could not be ensured, it would cause the complete collapse of SRC. SRC would be forced to cease operations which would have the following negative impacts on SRC, its clients and the Province of Saskatchewan and hundreds of SRC clients:

a. Loss of SRC's laboratories certification

SRC's laboratories have certification or accreditation from several organizations including:

- *CAEAL (Canadian Association for Environmental Analytical Laboratories)*
- *ISO (International Standards Organization)*
- *ISO/IEC (Standards Council of Canada)*
- *CFIA (Canadian Food Inspection Agency)*
- *Certificate of Laboratory Proficiency (Standards Council of Canada)*
- *ESDA (United States Department of Agriculture)*

The certifying bodies require that confidentiality of customer results be maintained in order to maintain accreditation. If the labs were to lose their certification or accreditation they would not be able to perform services for clients. For example, clients such as Environment Canada, Cameco, Cogema, Saskatchewan Environment and Resources, Parks Canada, SaskWater, Atomic Energy of Canada, Health Canada, National Research Council require labs which are accredited to perform many of their services. These organizations would then send the majority of their samples to labs outside of Saskatchewan for testing. The lost revenue would force SRC to shut down its laboratories (which represented over $10 million of revenue in 2004-2005, see Appendix D, page 46).

[15] Submission pages 5-10

b. Loss of Client Competitiveness

SRC's private sector clients operate in a competitive global environment. They zealously guard their intellectual property rights (see example of standard agreement Appendix E, page 56). For example, SRC's test results and consulting services are often the foundation of a mining company's 25 year strategic plan. The results determine the quality and quantity of the ore. Based on this information companies create plans to invest millions in new mine sites and they place significant emphasis on protecting the assets and processes that they developed (Appendix E, page 56). If a company was allowed to access test results or reports of its competitor(s) through the Freedom of Information and Privacy Act, it would undermine the competitive nature of the private sector and the whole basis of SRC's services to clients. The clients would withdraw their work from SRC and use organizations in other provinces.

c. Loss of Client and Revenue to SRC

SRC has worked for a decade to attract large mining companies to use SRC as their main laboratory. SRC invested millions in equipment and facilities in order to meet the standards set by these companies.

SRC's clients require that the information, test results and research be kept confidential. In 2004-2005 SRC had about 1,500 paying clients with total fee-for-service contract revenue of over $19 million (see Appendix D, pages 47-48). If SRC cannot guarantee confidentiality it is our belief that all our clients would eventually take their business elsewhere and SRC would be forced to close.

d. Loss of Reputation

SRC has developed its reputation on the basis of treating its work in confidence. This reputation has been developed over many decades, with diligent efforts by its personnel to achieve this. If this reputation were lost through disclosure of client information, SRC would be out of business. The losses to the province would be significant: in 2004-2005 SRC's total revenue was almost $28 million (see Appendix D, page 33). SRC currently has 264 full-time equivalent staff with annual salary and benefits cost of $12.9 million (see Appendix D, page 33). The economic loss of SRC's closure would be 264 jobs and $27.8 million of economic activity. After applying a multiplier, the economic impact of SRC's work to the Province is 1,907 jobs and $268 million (see Appendix E, page 63).

If clients knew that SRC was required to provide confidential information to a third party without their authorization, SRC would not be entrusted to perform services to most of its clients, such as: Cameco, Cogema, Apex Geoscience, Syncrude Canada, Trigon Exploration, Golder Associates, GGL Diamondex Resources, Nexen, De Beers, Shear Minerals, etc. SRC's top 25 clients made up over $13 million in revenue last year (Appendix D, page 48).

e. Ownership of Information

For many services that SRC performs, clients collect samples and provide information to SRC before the services can be performed. Lab clients pay for 100% of the cost of service and therefore test results and reports provided to them are their property. The agreements signed with clients reflect this position. As a result, the information, test results and reports are the property of the client and thus SRC does not have the right to disclose to any third party without prior written approval from the client (see Appendix E, page 56, section 12.4).

f. Litigation Against SRC and the Province

SRC is subject to confidentiality agreements with its clients. Many of SRC's clients would automatically sue for damages if SRC were to provide test results or consulting reports to a third party. SRC would immediately be subject to significant lawsuits claiming substantial damages for breach of contract and fiduciary duty. As a Crown Corporation and Agency of the Crown, SRC would seek financial assistance from the Province through a Cabinet Decision Item to defend the lawsuits and the damages. Any litigation against SRC is in effect litigation against the Province of Saskatchewan since SRC is an Agent of the Crown and has the capacity to contract and be sued (see Appendix H, page 83, sections 3.1(1) and 3.2(1)).

The disclosure of testing results to a third party may be considered equivalent to insider trading. Many of SRC's clients are listed on various Stock Exchanges. If their trade secrets were to become public information as a result of disclosure by SRC it is reasonable to assume that their respective share values would decrease, giving rise to claims for damages v. SRC on the basis of breach of contract and breach of fiduciary duty.

The agreements that SRC signs with clients always include a section where SRC is required to indemnify the client for costs (see Appendix E, page 54, section 11 and Appendix G, page 73, section GC5).

g. Loss of Staff Expertise

A loss of reputation will cause a loss of staff expertise and loss of revenue from clients to SRC. Most of SRC's leading experts would have to leave the Province to find work. SRC is the only multi-disciplinary research & development organization of its type in Saskatchewan. SRC was created April 1, 1947 by the Province. Its Mandate is:

"The Council shall take under consideration matters pertaining to research, development, design, consultation, innovation, and investigation in, and commercialization of, the natural and management sciences, pure and applied, as they affect the welfare of the province, and any particular matters that may be brought to its attention by the Lieutenant Governor in Council. 2000, c.23, s. 3" (see Appendix H, page 86).

SRC invests over a million dollars each year to maintain and upgrade its equipment and facilities. In 2004-2005 SRC invested $2.6 million (see Appendix D, page 34). This approach to partnering with clients, hiring the expertise and building facilities to meet the needs of our clients is confirmed by De Beers comments (see Appendix F, page 64).

h. Close SRC

The loss of certification, clients, revenue, reputation and a large number of lawsuits would result in SRC closing and selling its assets at fire sale prices. SRC would not be able to avoid the litigation, legal costs and damages. SRC would also incur very conservatively from $3 to $6 million (from 3 to 6 months of SRC monthly payroll) in severance and payout of benefits costs to employees and millions of lost revenue to the Province from the cancellation of leases with the Saskatchewan Opportunities Corporation and Saskatchewan Property Management (see Appendix D, page 43, section 13, and paragraph 3).

i. Precedence Set

SRC's biggest fear is the precedent that a decision from the Commissioner would create if SRC was required to provide client information to a third party. It would set the stage for anyone to take advantage of the Freedom of Information process to obtain confidential reports and/or test results (performed for clients on a fee-for-service basis) for personal gain and/or gain for an individual company over its competitors or to release the information to the public and embarrass a competitor or provincial or federal government and cause them harm. In 2004-2005 SRC performed $3.3 million of services to the Saskatchewan

> *Government and $1.2 million to the Federal Government (see Appendix D, page 47).*
>
> *A decision from the Commissioner could also set the stage for a court challenge, media attention and a question in the minds of clients as to whether or not information with SRC or any area of government can be trusted to remain confidential. Actions of this type would be damaging to SRC's and the Province's reputation.*

j. Private Sector Clients Not Subject to Disclosure

> *SRC's clients which are not government institutions are also not subject to disclosure as they were required to pay a fee-for-services rendered. All clients are billed for full cost recovery regardless of whether or not they are a government institution. All information generated for the Regina Airport Authority or consultant or client who is not a government institution is not subject to disclosure.*

[111] SRC has not provided submissions from any of the third parties to attest to the harms foreseen. However, I believe that it is reasonable to expect that SRC would experience some of the harm described above if sample testing information were released to the Applicant. This exemption, however, will not result in blanket protection for all other records.

8. Did SRC properly invoke section 17(1)(a) of the Act?

[112] The last exemption invoked by SRC is section 17(1)(a) of the Act that reads as follows:

> *17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;*

[113] In its submission, SRC contends that:

> *Saskatchewan Environment and its federal counterpart require analysis to be done on samples provided. The analysis of such samples and the results provided enable government entities to make decisions whether or not to impose regulations set out in various pieces of provincial and federal legislation. Various branches of government require such services from the Council. These branches, like all clients of the Council, are required to pay a fee for services rendered.*
>
> *In this matter, a request was put forth for information regarding the Regina Airport Authority and Environment Canada, among others. . . . Both contracted*

> *with the Council for services. Both have results which make up the record in this matter.*
>
> *It is respectfully submitted that such results were created to provide advice and analysis for a government institution and therefore must not be disclosed.*

[114] We have already determined that none of the agencies in question is a provincial government institution. Accordingly, I find that the records were not created, as advanced by SRC, to provide advice and analysis for a government institution.

[115] I find that SRC did not properly invoke section 17(1)(a) of the Act.

[116] The Applicant had also asked for the total number of reports SRC has handled regarding the Regina Airport and who requested them. SRC certainly is free to volunteer the total number of reports but this is information and not an existing record. The Act does not require a government institution to create a record where none exists.

[117] As none of the exemptions cited applies to the last few remaining records including requests for analysis and chain of custody forms, these are not exempt from disclosure and should be provided to the Applicant. Although not raised by SRC, I have determined that some additional severing is required to prevent the release of third party personal information to the Applicant. In order to clearly identify which parts of which records require severing, I will provide a severed version of the records in question to SRC to clarify what needs to be masked in preparation of the record for the release.

[118] I acknowledge and appreciate the cooperation of, and the thorough and detailed submissions provided by, the Applicant and SRC throughout this process.

V FINDINGS

[119] I find that for the most part, sections 13(1)(a), 18(1)(f), 18(2)(a) and 19(1)(b) of the Act apply to the record in issue.

[120] I find that sections 17(1)(a) and 17(2)(c)(i) of the Act do not apply to the record in issue.

VI RECOMMENDATIONS

[121] That SRC not release the record or any part thereof save and except for those pages and portions of pages marked on a copy of the record which is provided to SRC together with this Report.

Dated at Regina, in the Province of Saskatchewan, this 7th day of September, 2006.

R. GARY DICKSON, Q.C.
Information and Privacy Commissioner for Saskatchewan