

**SASKATCHEWAN**  
**OFFICE OF THE**  
**INFORMATION AND PRIVACY COMMISSIONER**

**REVIEW REPORT F-2013-003**

**Ministry of Agriculture**

**Summary:**

The Applicant requested certain records from the Ministry of Agriculture (the Ministry). The Ministry released some responsive records and withheld others pursuant to sections 17(1)(a), 17(1)(b), 18(1)(a), 18(1)(d), 19(1)(a), 19(1)(b), 19(1)(c), 19(1)(e) and 19(1)(f) of *The Freedom of Information and Protection of Privacy Act* (FOIP). During the review, the Ministry was persuaded to release records withheld pursuant to sections 17(1)(a), 17(1)(b), 18(1)(a) and 18(1)(d) of FOIP but continued to withhold records based on the third party exemptions. The Commissioner found that the Ministry did not meet the burden of proof to demonstrate sections 19(1)(a), 19(1)(b), 19(1)(c), 19(1)(e) and 19(1)(f) of FOIP applied to the record as it did not identify the relevant third parties or meet other tests required of these exemptions. The Commissioner recommended release of the remaining record.

**Statutes Cited:**

*The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, ss. 2(1)(d), 2(1)(h), 2(1)(j), 17(1)(a), 17(1)(b), 18(1)(a), 18(1)(d), 19(1)(a), 19(1)(b), 19(1)(c), 19(1)(c)(i), 19(1)(c)(ii), 19(1)(c)(iii), 19(1)(e), 19(1)(f), 34, 36, 52, 53, 61; *The Freedom of Information and Protection of Privacy Regulations*, [Chapter F-22.01 Reg 1 (effective April 1, 1992) as amended by Saskatchewan Regulations 53/92, 108/92, 8/93, 37/94, 18/95, 28/95, 9/97, 59/97, 76/1999, 32/2001, 6/2002, 45/2003, 52/2004 and 109/2004, by the Statutes of Saskatchewan, 2003, c.15; Saskatchewan Regulations 101/2007 and 119/2008.], Part I of the Appendix; *The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1, s. 18(1)(c); *The Agricultural Credit Corporation of Saskatchewan Act*, S.S. 1983-84, c. A-8.1; *The Agri-Food Equity Fund Regulations*, formally c. A-8.1 Reg 3 (repealed September 22, 1997), ss. 2(a), 2(b).

**Authorities Cited:** Saskatchewan OIPC Review Reports F-2012-003, F-2012-001/LA-2012-001, F-2010-001, F-2006-002, F-2005-006, F-2005-003, LA-2013-002, LA-2011-002, LA-2011-001, LA-2009-001; Northwest Territories IPC Review Recommendation 05-049.

## **I BACKGROUND**

[1] On or about October 15, 2010 the Applicant made a request to the Ministry of Agriculture (the Ministry) for the following records:

- All records/documents relating to the planning of, the share purchase and the subsequent takeover of [Business #1] and [Business #2] by Agri-Food Equity Fund (AFEF) in 1998.
- [Business #2] and [Business #1] Board of Directors minutes and records for the period March 1, 1998 to March 31, 2003.
- Agri-Food Equity Fund and Ministry of Agriculture (then called Saskatchewan Agriculture) internal records, documents, memos and directives involving [Business #2] and [Business #1] for the period January 1, 1998 to January 31, 2003.
- Records of financial transactions between Agri-Food Equity Fund, Ministry of Agriculture and [Business #2]/[Business #1] for the period March 1, 1998 to March 31, 2003.

[2] The Ministry replied to the Applicant in a letter dated December 14, 2010 releasing many records. However, the letter also informed the Applicant as follows:

Some of the records have been withheld from release in full relating to confidentiality of the transaction, access to third party information where records contain trade secrets, information supplied in confidence, and advice to senior management. Access to this information is denied pursuant to section 17(1)(a), 17(1)(b), 18(1)(a), 18(1)(d), 19(1)(a), 19(1)(b), 19(1)(c), 19(1)(e) and 19(1)(f) of the Act. Our search of the files resulted in no loan documents on file for the period from April 20, 2001, to March 31, 2003.

[3] My office then received a Request for Review from the Applicant on January 18, 2011 on the basis he had been refused part of the record. My office undertook the review and sent

- notification letters to both the Ministry and the Applicant dated January 28, 2011. We asked the Ministry to send a copy of the record and its submission.
- [4] On March 25, 2011, the Ministry advised my office by e-mail that the responsive material was over 7000 pages and it would take some time to prepare. On August 12, 2011, the Ministry asked if it could provide us with a representative sample as the record was so voluminous. My office agreed. We did not receive a copy of the responsive record until 12 months later on August 10, 2012; however, no submission accompanied it.
- [5] On August 31, 2012, my office asked again for a submission. We also asked for third party contact information. We received a submission on October 11, 2012, but no third party contact information. My office wrote to the Ministry on October 29, 2012 explaining the provisions in *The Freedom of Information and Protection of Privacy Act* (FOIP)<sup>1</sup> addressing third party notification and asking again for third party contact information. On November 26, 2012, we received a letter from the Ministry indicating that the Ministry did not provide third party notification.
- [6] With permission, my office then shared the Ministry's submission with the Applicant on November 27, 2012. On January 3, 2013, the Applicant confirmed by telephone that he did not wish to make a rebuttal.
- [7] My office shared a preliminary analysis with the Ministry on March 22, 2013. The analysis indicated that the Ministry did not meet the burden of proof to demonstrate that sections 17(1)(a), 17(1)(b), 18(1)(a), 18(1)(d), 19(1)(a), 19(1)(b), 19(1)(c), 19(1)(e) and 19(1)(f) of FOIP applied to the record. My office recommended that the Ministry release all responsive records to the Applicant. We requested a response no later than April 19, 2013.
- [8] The Ministry indicated that it could not meet the April deadline. After monthly correspondence, the Ministry provided a formal response on August 19, 2013.

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<sup>1</sup>*The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01.

[9] The Ministry’s response indicated that it agreed with my office’s assessment of sections 17(1)(a), 17(1)(b), 18(1)(a) and 18(1)(d) of FOIP and would release records to which it had applied these exemptions to the Applicant. However, its letter indicated that “[t]he records will be reviewed, personal information will be redacted, and the information provided to the applicant by October 31, 2013.” This timeline is disappointing given that October 31, 2013 is over 70 days from the time the decision was communicated to my office and 3 years after the Applicant’s access request was made. The Ministry provided further records to the Applicant on or about October 31, 2013.

[10] However, the Ministry indicated that it would continue withholding the records withheld under sections 19(1)(a), 19(1)(b), 19(1)(c), 19(1)(e) and 19(1)(f) of FOIP.

## II RECORDS AT ISSUE

[11] The Ministry indicated that the responsive record was over 7000 pages long and provided my office with a representative sample of 130 pages for the purposes of this review. As the Ministry has indicated that it would be providing further responsive records to the Applicant, records withheld pursuant to sections 17(1)(a), 17(1)(b), 18(1)(a), 18(1)(d) of FOIP are no longer at issue. As such, the representative sample is characterized as follows:

<b>Category A</b>			
Records responsive to the first part of the Applicant’s Request: “All records/documents relating to the planning of, the share purchase and the subsequent takeover of [Business #1] and [Business #2] by Agri-Food Equity Fund (AFEFF) in 1998.”			
<b>Document #</b>	<b>Ministry’s Description</b>	<b>Exemptions Cited</b>	<b># of Pages</b>
A1	November 18, 1998 – [Business #1] Issuance of Shares in satisfaction of interest	19(1)(b) and 19(1)(c)(ii)	7
A2	March 5, 1998 – Agri-food Equity Fund and [a major Canadian financial institution] Agreement to Purchase Debt	19(1)(b)	24
A3	February 4, 1999 – Share Issuance in Lieu of Interest	19(1)(b)	4
A4	March 12, 1998 – Project Submission	19(1)(f)	12

<b>Category A continued</b>			
<b>Document #</b>	<b>Ministry's Description</b>	<b>Exemptions Cited</b>	<b># of Pages</b>
A5	September 23, 1998 [Business #1] Share issuance and [Business #1] Debt	19(1)(b)	5
A6	March 20, 1998 [Business #1] Debt to AFEF	19(1)(a)	1

<b>Category B</b>			
Records responsive to the second part of the Applicant's Request: "[Business #2] and [Business #1] Board of Directors minutes and records for the period March 1, 1998 to March 31, 2003."			
<b>Document #</b>	<b>Ministry's Description</b>	<b>Exemptions Cited</b>	<b># of Pages</b>
B1	March 22, 1999 – Board of Directors Minutes	19(1)(b) and 19(1)(a)	5
B2	Sept 26, 2000 – Board Working Session,	19(1)(b)	7
B3	July 12, 2000 – Board of Directors Meeting	19(1)(b)	7
B4	December 18, 1998 – Board of Directors Meeting re: Shares for Debt.	19(1)(b) and 19(1)(c)(ii), 19(1)(c)(iii)	3
B5	December 8, 1999 – Board of Directors Document – Developing a Survival Plan for [Business #1]	19(1)(b) and 19(1)(a)	6

<b>Category C</b>			
Records responsive to the third part of the Applicant's Request: "Agri-Food Equity Fund and Ministry of Agriculture (then called Saskatchewan Agriculture) internal records, documents, memos and directives involving [Business #2] and [Business #1] for the period January 1, 1998 to January 31, 2003."			
<b>Document #</b>	<b>Ministry's Description</b>	<b>Exemptions Cited</b>	<b># of Pages</b>
C4	February 11, 1999 – E-Mail re: [Business #1] Update	19(1)(e)	2
C5	October 30, 2000 – Ministry Memo re: Additional Investment in [Business #1]	19(1)(e)	1
C7	February 17, 1999 – Briefing Note re: Additional Loan to [Business #1]	19(1)(c)(ii)	2
C8	October 2, 2000 – [Business #1] Business Plan Summary	19(1)(c)(i)	9

<b>Category D</b>			
Records responsive to the fourth part of the Applicant's Request: "Records of financial transactions between Agri-Food Equity Fund, Ministry of Agriculture and [Business #2] / [Business #1] for the period March 1, 1998 to March 31, 2003."			
<b>Document #</b>	<b>Ministry's Description</b>	<b>Exemptions Cited</b>	<b># of Pages</b>
D1	March 9, 1998 – Statement of Adjustments Various dates and Various Financial Transactions AFEF and [Business #1]	19(1)(e)	5
D2	April 6, 1999 – Auditors Letter re: [Business #1] Debt Obligations to AFEF	19(1)(e)	2
D3	February 24, 1999 – [Business #1] Conversion of AFEF Debt to Equity	19(1)(e)	11
D4	May 14, 2001 – Indebtedness (and default) of [Business #1] Loans to the Province of Saskatchewan	19(1)(e)	2
D5	April 16, 2001 – Negotiations re: Purchase of AFEF Shares in [Business #1] by potential purchaser	19(1)(c)(iii)	2

### III ISSUES

1. **Did the Ministry of Agriculture properly apply sections 19(1)(a), 19(1)(b), 19(1)(c)(i), 19(1)(c)(ii), 19(1)(c)(iii), 19(1)(e) and 19(1)(f) of *The Freedom of Information and Protection of Privacy Act* to the record?**

### IV DISCUSSION OF THE ISSUES

[12] The Ministry qualifies as a government institution pursuant to section 2(1)(d)(i) of FOIP which states as follows:

2(1) In this Act:

...

(d) "government institution" means, subject to subsection (2):

(i) the office of Executive Council or any department, secretariat or other similar agency of the executive government of Saskatchewan; or

**1. Did the Ministry of Agriculture properly apply sections 19(1)(a), 19(1)(b), 19(1)(c)(i), 19(1)(c)(ii), 19(1)(c)(iii), 19(1)(e) and 19(1)(f) of *The Freedom of Information and Protection of Privacy Act* to the record?**

[13] The applicable portions of section 19(1) of FOIP state:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

(a) trade secrets of a third party;

(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;

(c) information, the disclosure of which could reasonably be expected to:

(i) result in financial loss or gain to;

(ii) prejudice the competitive position of; or

(iii) interfere with the contractual or other negotiations of;

a third party;

...

(e) a statement of financial assistance provided to a third party by a prescribed Crown corporation that is a government institution; or

(f) information supplied by a third party to support an application for financial assistance mentioned in clause (e).

[14] Section 2(1)(j) of FOIP defines “third party” as:

2(1) In this Act:

...

(j) “third party” means a person, including an unincorporated entity, other than an applicant or a government institution.

[15] When a third party exemption is applied by a government institution, FOIP provides opportunity to the third party to become involved in the review process. We explained this to the Ministry in a letter dated October 29, 2012 as follows:

In addition, you are relying on third party exemptions to withhold the record. As such, FOIP affords the third parties opportunity to make representations during the course of a Review. Pursuant to section 52(1) of FOIP, the Ministry is required to inform the Third Party(ies) of the Review....

Please notify the Third Party(ies) of the Review, including which records and information have been identified, but **do not** reveal the identity of the Applicant as that is his personal information. Also, please provide us with the contact information of the Third Party(ies) so that we may contact them when it is appropriate and invite them to make representation.

[16] The Ministry telephoned our office on November 14, 2012 to seek clarification on this subject. The Ministry explained that this may be difficult as the records were old. A Portfolio Officer from our office explained third party involvement over the telephone and followed up with the following e-mail dated November 14, 2012:

...I wanted to highlight the fact that the Commissioner has said that if a government institution can't identify the Third Parties then they cannot meet the burden of proof to demonstrate that the exemption applies.

[17] In response, the Ministry provided the following in a letter dated November 26, 2012:

With respect to notification of third parties, the records requested by the applicant, are in some cases in excess of 15 years old and, as such, have presented issues with locating the third parties in question. Consequently, the Ministry has not, as yet, notified the third parties that there is a review under way, therefore is not in a position to provide you **with the names** at this time.

[emphasis added]

[18] In addition, the Ministry's submission is not explicit in identifying the third party relevant for each record.

[19] My views on the identification of third parties are outlined in my Review Report F-2012-003:



[50] When a third party exemption is applied, it is the invariable practice of my office to contact the third party to invite them to make a submission....

[52] These problems persist as I delve into specific analysis of the applied sections. To show that section 19(1)(b) applies to a record, it must be clear which third party supplied the record to the government institution. Likewise, it must be clear which third party will be affected by release of the record in order for section 19(1)(c) to apply to a record. The vagueness of the Ministry's submissions does not assist in demonstrating these exemptions apply.

[53] Further, it is not [sic] responsibility to determine which Third Party applies to each portion of the Record. Section 61 of FOIP clearly places the burden of proof on the government institution to establish that access to a record must be denied. In terms of third party exemptions, the onus is on government institutions to demonstrate that they apply. **Fundamentally, I expect the government institution to clearly identify the third party in order to proceed.**

[54] The Saskatchewan Court of Appeal has held that the principle is transparency subject to only limited and specific exemptions. Implicit in that statement is that if third party interests are involved the government institution must identify that third party.

...

[63] Again, I am not in a position to speculate. **The burden of proof rests with the Ministry.**

...

[65] Fundamental to any meaningful analysis of section 19 is to identify the third party in question and then to proceed to identify the interests of that identified third party. Given the inability of the Ministry to isolate and identify the third party(ies) in this case, there is no foundation upon which we can proceed with a section 19 analysis. Without a 'third party', section 19 of FOIP is simply not engaged.<sup>2</sup>

[emphasis added]

[20] Section 61 of FOIP places the burden of proof on a government institution during a Review as follows:

61 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

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<sup>2</sup>Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC) Review Report F-2012-003 at [50] to [65], available at [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

[21] Upon review of the Ministry's submission and the record there appears to be two plausible third parties: Business #1 and Business #2. Upon a non-exhaustive search of the Internet, my office has discovered that Business #2 has a current website; however, there is nothing substantial for Business #1. Business #1 appears to no longer exist. Further, in a discussion between the Ministry and a Portfolio Officer from our office on June 18, 2013, the Ministry indicated that the Applicant had been the owner of Business #1 and would have had access to some of the responsive records when he still retained ownership. During that discussion, the Ministry also indicated that two major Canadian financial institutions would qualify as third parties for some of the records. The Ministry did not follow up these assertions with formal written submissions, even though at the time of the discussion any delay in waiting for further representation from the Ministry would have been prejudicial to the Applicant.

[22] These observations and discussions raise questions such as: If Business #1 no longer exists, can it have third party interests in the record? How can third party exemptions apply to certain responsive records if the Applicant already had access to those records? Why did the Ministry not identify the two major Canadian financial institutions formally and earlier in the Review? It is not my role to speculate on these matters. However, answers to these questions may have assisted the Ministry in meeting the burden of proof.

[23] Further, FOIP provides opportunity to a third party to provide representation via sections 34 and 52 as follows:

34(1) Where a head intends to give access to a record that the head has reason to believe may contain:

(a) information described in subsection 19(1) that affects the interest of a third party; or

(b) personal information that may be disclosed pursuant to clause 29(2)(o) and that relates to a third party;

and, in the opinion of the head, the third party can reasonably be located, the head shall give written notice to the third party in accordance with subsection (2).

(2) The notice mentioned in subsection (1):

(a) is to include:

(i) a statement that:

(A) an application for access to a record described in subsection (1) has been made; and

(B) the head intends to give access to the record or to part of it;

(ii) a description of the record that the head has reason to believe may contain:

(A) information described in subsection 19(1) that affects the interest of the third party; or

(B) personal information that may be disclosed pursuant to clause 29(2)(o) and that relates to the third party; and

(iii) a statement that the third party may, within 20 days after the notice is given, make representations to the head as to why access to the record or part of the record should not be given; and

(b) subject to subsection (3), is to be given within 30 days after the application is made.

(3) Section 12 applies, with any necessary modification, to the extension of the period set out in clause (2)(b).

**(4) Where, in the opinion of the head, it is not reasonable to provide a notice to a third party pursuant to subsection (1), the head may dispense with the giving of notice.**

...

**52(1) A head who has refused an application for access to a record or part of a record shall, immediately on receipt of a notice of review pursuant to section 49 by an applicant, give written notice of the review to any third party that the head:**

**(a) has notified pursuant to subsection 34(1); or**

**(b) would have notified pursuant to subsection 34(1) if the head had intended to give access to the record or part of the record.**

(2) A head shall, immediately on receipt of a notice of review pursuant to section 49 by a third party, give written notice of the review to the applicant.

[emphasis added]

[24] Failure to provide notice to the third party(ies) also factors into my decision that the Ministry will not meet the burden of proof for third party exemptions as FOIP requires them to do so. By not doing so, it prejudices the rights of both the third parties and the Applicant in this review. The third party(ies) are not afforded the opportunity to make representation to me if it objects to release of the records. Contrarily, if the third party(ies) do not object to release, the Applicant is prejudiced by the Ministry's failure to notify as this would not be communicated.

[25] As the Ministry did not provide notice to the third party(ies) regarding this review, and has not identified or provided us with contact information for the third party(ies) there is no way for me to give opportunity to make representation pursuant to sections 36 and 53 of FOIP as follows:

36(1) A third party who is given notice pursuant to subsection 34(1):

(a) is entitled to make representations to the head as to why access to the record or part of the record should not be given; and

(b) within 20 days after the notice is given, shall be given the opportunity to make those representations.

(2) Representations made by a third party pursuant to clause (1)(b) shall be made in writing unless the head waives that requirement, in which case they may be made orally.

...

53(1) The commissioner shall conduct every review in private.

(2) The:

(a) person who applies for a review;

(b) third party or applicant who is entitled to notice pursuant to section 52; and

(c) head whose decision is the subject of a review;

are entitled to make representations to the commissioner in the course of the review.

(3) No one is entitled as of right:

(a) to be present during a review; or

(b) before or after a review:

(i) to have access to; or

(ii) to comment on;

representations made to the commissioner by any other person.

[26] The fact that the Ministry has not identified the relevant third parties or provided notification leaves me to find that the burden of proof is not met. However, as section 19 is a mandatory exemption, I will examine the record to determine if a third party may be identified and if the Ministry has satisfied other parts of the tests for each specific exemption.

***Section 19(1)(a)***

[27] Section 19(1)(a) of FOIP states:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

(a) trade secrets of a third party

[28] The Ministry wrote the following in support of this exemption:

**19(1)(a)** This exclusion along with 19(b)(c)(e) and (f) has been applied to the applicant's request for Board of Director' [sic] Minutes. The Ministry received all directors' minutes as a result of various ministry employees serving on the boards of **[Business #2] and [Business #1]**. Those employees as directors had an obligation to maintain the confidentiality of the minutes. The minutes are not public documents pursuant to *The Business Corporations Act*. The Ministry received all directors' minutes as a result of various Ministry employees serving on the boards of [Business #2] and [Business #1] and have an obligation to maintain the confidentiality of the minutes.

[emphasis added]

[29] The Ministry has applied section 19(1)(a) of FOIP to three of the responsive records: A6, B1 and B5. A6 is not minutes as described by the Ministry's submission, but a letter from the Ministry to a major Canadian financial institution regarding Business #2. It is

unclear if the third party would be the major Canadian financial institution or Business #2. B1 are minutes of the Board of Directors' Meeting of Business #1 which does not appear to exist anymore. Further, other third parties are also mentioned in the document. Finally, B5 is not minutes as described by the Ministry's submission. It relates to Business #1 which does not appear to exist.

[30] Even if I could decipher on the face of the record which third parties have interests in these records, the Ministry must also explain how each one contains "trade secrets" of that third party.

[31] I have found in my Review Report LA-2011-001 that "trade secrets" is to be defined narrowly as follows:

[89] As I have not had occasion to consider this exemption, I took guidance from the following resources.

[90] In Société Gamma Inc. v. Canada (Secretary of State) Strayer J. held:

In the absence of authoritative jurisprudence on what is a "trade secret" for the purposes of s. 20(1), the Court held that "trade secrets" must have a reasonably narrow interpretation, since one would assume that they do not overlap the other categories: in particular, they can be contrasted to "commercial ... confidential information supplied to a government institution ... treated consistently in a confidential manner ..." which is protected under s. 20(1)(b). In respect of neither (a) nor (b) is there a need for any harm to be demonstrated from disclosure for it to be protected. There must be some difference between a trade secret and something which is merely "confidential" and supplied to a government institution. **A trade secret must be something, probably of a technical nature, which is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure.**

[91] *Black's Law Dictionary* defines 'trade secret' as follows:

A formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors; information – including a formula, pattern, compilation, program, device, method, technique, or process – that (1) derives independent economic value, actual or potential, from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use, and (2) is the subject of reasonable efforts, under the circumstances, to maintain its secrecy.

[92] Alberta's *Freedom of Information and Protection of Privacy Act*, section 1(s) defines "trade secret" as:

"trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process

(i) that is used, or may be used, in business or for any commercial purpose,

(ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use,

(iii) that is the subject of reasonable efforts to prevent it from becoming generally known, and

(iv) the disclosure of which would result in significant harm or undue financial loss or gain.

[93] In turn, the following guidance comes from Alberta's *FOIP Guidelines and Practices*:

Information **must meet all of these criteria** [in the definition] to be considered a trade secret. The fact that others may benefit from the disclosure of the information does not mean that there is independent economic value in the secrecy of the information (*IPC Order F2004-006*).

Information that is generally available through public sources (e.g. corporate annual reports) would not usually qualify as a trade secret under the Act. A third party **must be able to prove ownership or a proprietary interest** in a trade secret or must be able to prove a claim of legal right to the information (e.g. a licence agreement) in order for that information to qualify for the exception.

[94] Because we received nothing from the third parties or from the City as to how the information in the record might qualify as a "trade secret" I was unable to conclude that this exemption applies to any of the documents at issue.<sup>3</sup>

[emphasis in original]

[32] As, I have received no explanation from the Ministry as to how records A6, B1 and B5 contain "trade secrets" of a third party and it is unclear on the face of the record who the third party is, I must conclude that the Ministry has not met the burden of proof to demonstrate that section 19(1)(a) of FOIP applies to these records.

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<sup>3</sup>SK OIPC Review Report LA-2011-001 at [89] to [94], available at [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

**Section 19(1)(b)**

[33] Section 19(1)(b) of FOIP states:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party

[34] In order to demonstrate that section 19(1)(b) of FOIP applies, the government institution must demonstrate the following for each responsive record:

- That the record contains financial, commercial, scientific, technical *or* labour relations information. Government institutions must be specific in identifying which type of information is in play for each record. I have defined these terms in past Review Reports;<sup>4</sup>
- That the record was *supplied to* the government institution *by a third party*. I have discussed what this means in past Review Reports;<sup>5</sup> and
- That the record was supplied to the government institution *implicitly or explicitly in confidence*. I have also discussed this in past Review Reports.<sup>6</sup>

[35] In support of this exemption, the Ministry wrote the following in its submission:

**19(1)(b)** – This exclusion has been applied to correspondence and documents related to the issuance of shares in satisfaction of interest owed on debt, the agreement with [a major Canadian financial institution] to purchase of [Business #2] debt by the Agri-Food Equity fund. There was a non-disclosure/confidentiality agreement between [the major Canadian financial institution] and the Crown in the purchase of the shares. Records related to the issuance of shares in lieu of interest paid of the

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<sup>4</sup>SK OIPC Review Reports F-2010-001 at [95], F-2006-002 at [80] to [90], F-2005-006 at [16] to [26], F-2005-003 at [22] to [29], LA-2013-002 at [34] to [42], LA-2009-001 at [52] to [59], all available at [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

<sup>5</sup>SK OIPC Review Reports F-2012-001/LA-2012-001 at [59], F-2006-002 at [76] to [79], F-2005-003 at [14] to [21], LA-2013-002 at [44] to [47], LA-2011-002 at [20] to [25] LA-2009-001 at [67] to [72], all available at [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

<sup>6</sup>SK OIPC Review Reports F-2012-001/LA-2012-001 at [29] to [39], F-2006-002 at [56] to [57], F-2005-003 at [30] to [32], LA-2013-002 at [48] to [62], all available at [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).



debt, and records documenting [Business #2] debts to the Agri-Food Equity Fund. This exemption was relied upon because it is maintaining the confidentiality agreement with [the major Canadian financial institution], FOIPP states that “*a head shall refuse to give access to a record that contains financial, commercial, scientific, technical, or labour relations information that is supplied in confidence, **implicitly or explicitly** to a government institution by a third party.*”

[36] The Ministry applied section 19(1)(b) of FOIP to nine records: A1, A2, A3, A5, B1, B2, B3, B4 and B5.

[37] The Ministry has not explained if each of these records contains financial, commercial, scientific, technical or labour relations information. It has not clarified if each of these documents were “supplied by” a third party or who that third party would be. I note that the Ministry’s submission speaks of an agreement between Business #2 and the major Canadian financial institution, yet seven out of nine of these records (A1, A3, A5, B1, B2, B3, and B5) appear to concern Business #1. I do not have enough information to draw conclusions, nor is it my role to speculate.

[38] Record A2 appears to involve the major Canadian financial institution, but relates to Business #1, not Business #2. Record B4 is an agenda and minutes but does discuss the acquisition of shares of Business #1, not Business #2, by the Ministry. Business #2 is mentioned. However, it is unclear if the record was supplied to the Ministry; and if so, which third party supplied it.

[39] Finally, the Ministry needed to demonstrate that all of the records were supplied implicitly or explicitly in confidence by the third party. Its submission stated:

...There was a non-disclosure/confidentiality agreement between [the major Canadian financial institution] and the Crown in the purchase of the shares. Records related to the issuance of shares in lieu of interest paid of the debt, and records documenting [Business #2] debts to the Agri-Food Equity Fund. This exemption was relied upon because it is maintaining the confidentiality agreement with [the major Canadian financial institution]....

[40] The Ministry has not provided me with a copy of this “non-disclosure/confidentiality agreement”. As noted, it is unclear if all of these records relate to the “the issuance of shares in satisfaction of interest owed on debt, the agreement with [a major Canadian

financial institution] to purchase of [Business #2] debt by the Agri-Food Equity fund.” Even if the Ministry had provided a copy of the agreement, FOIP requires that a government institution demonstrate that each record was supplied in confidence.

[41] The Ministry has not satisfied any of the tests for section 19(1)(b) of FOIP and it is not apparent who is the relevant third party. As such, it has not met the burden of proof to demonstrate this exemption applies to the record.

***Sections 19(1)(c)(i), 19(1)(c)(ii) and 19(1)(c)(iii)***

[42] Section 19(1)(c) of FOIP provides as follows:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(c) information, the disclosure of which could reasonably be expected to:

(i) result in financial loss or gain to;

(ii) prejudice the competitive position of; or

(iii) interfere with the contractual or other negotiations of;

a third party;

[43] I have discussed section 18(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP)<sup>7</sup> in my Review Report LA-2011-001. This exemption is equivalent to section 19(1)(c) of FOIP. I stated:

[111] This provision has a harms test component. In my Report F-2005-003, after considering a test developed in Alberta and modifying it to reflect the wording of our FOIP, I set out the following test:

The three part test that should be applied in Saskatchewan consists of the following elements: (a) there must be a **clear cause and effect relationship** between the disclosure and the harm which is alleged; (b) the harm caused by the

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<sup>7</sup>*The Local Authority Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1.

disclosure **must be more than trivial or inconsequential**; and (c) the **likelihood of harm must be genuine and conceivable**.

[112] In my Report LA-2009-001, after considering the above three part test, I made the following conclusion:

In terms of applying the above noted three part test, I am of the view that the **likelihood of harm is conceivable as any grant process is in itself a competitive process**. What is likely is that if one grant applicant had access to another's, he/she could use it to his/her advantage supplementing or making revisions to his/her own application which could in turn alter the outcome. Therefore, I find that the cause and effect relationship is clear, the harm that may result would be more than trivial or inconsequential, and the likelihood of the harm resulting is plausible.

[113] I also addressed section 18(1)(c) of LA FOIP in my Report LA-2007-001:

In Report 2001/047 section 18(1)(c) of the Act was considered by this office. A former Commissioner found that the disclosure of the information exempted by the University of Saskatchewan in that case could reasonably be expected to result in financial loss to, prejudice the competitive position of, or interfere with the contractual or other negotiations of a third party. He noted that in view of differences in the Act from other provinces' access legislation it **is not necessary to find that these expected results be "significant" or "undue"**. ... He further concluded that disclosing portions of the Coca Cola agreement with the University could reasonably be expected to interfere with future negotiations involving the third party and to impact upon the third party's financial well-being if the information was released to a direct competitor.

[114] Ultimately, reliance on section 18(1)(c)(i) as authority for exemption requires that the party citing that exemption must demonstrate that a "reasonable expectation of harm" exists if the information at issue is disclosed. I have considered the reasonable expectation of harm in my Report F-2004-007.<sup>8</sup>

[emphasis in original]

[44] The Ministry indicated that section 19(1)(c)(i) applied to Document C8, an "October 2, 2000 – [Business #1] Business Plan Summary". It provided nothing in its submission to support its claim. Therefore, the burden of proof is not met.

[45] The Ministry applied section 19(1)(c)(ii) of FOIP to records A1, B4 and C7. It applied section 19(1)(c)(iii) of FOIP to records B4 and D5. The Ministry's submission provided the following in support of sections 19(1)(c)(ii) and 19(1)(c)(iii):

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<sup>8</sup>SK OIPC Review Report LA-2011-001 at [111] to [114], available at [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

**19(1)(c)(ii) and 19(1)(c)(iii)**– This exclusion has been applied to correspondence and documents which detail records interest paid on loans, exchange of debt for shares, planning for the viability of the company, etc. It is of note that also contains details of plans for potential buyers for the company. This type of information could potentially, as described in Section 19(1)(c)(ii) and (iii) fall within the definition of both “*prejudicing the competitive position of and interfering with the contractual or other negotiations of a third party*”

[46] In terms of the records withheld under 19(1)(c)(ii), the Ministry has not identified what third party would be prejudiced by the release of these records. All three of the records appear to concern Business #1 which no longer appears to exist. Further, the records are in excess of 12 years old. The Ministry has not 1) established a clear cause and effect relationship between the disclosure and the harm which is alleged; 2) shown that the potential harm caused by the disclosure would be more than trivial or inconsequential; or 3) described how the likelihood of harm would be genuine and conceivable. As such, it has not met the burden of proof to demonstrate that the exemption applies.

[47] Further, section 19(1)(c)(iii) of FOIP protects third parties against interference with the contractual or other negotiations. I considered a similar exemption involving interference with contractual or other negotiations, 18(1)(d) of FOIP, in my Review Report F-2012-001/LA-2012-001. I stated:

[62] Section 18(1)(d) protects records from disclosure that could “reasonably be expected to interfere with contractual or other negotiations”. Section 25(1)(c)(iii) of Alberta’s FOIP is similar to section 18(1)(d) of Saskatchewan’s FOIP. Alberta’s *FOIP Guidelines and Practices 2009* states:

*Interfere with a contractual or other negotiations* means to obstruct or make much more difficult **the negotiation of a contract or other sort of agreement** between the public body or the government and a third party.

...

[64] British Columbia IPC Order 142-1997 considered the disclosure of a proposal during an ensuing period of negotiation in relation to the proposal:

The City argues that complex negotiations like the present one require a long time line, which should not be disrupted by premature disclosure of the records in dispute. It argues, for example, that disclosing the proposal of Pilot Pacific and the reports of Coriolis Consulting “could jeopardize the project by forcing all parties to negotiate in a public forum. Clearly this would seriously affect the

ability of each party to fully present its negotiating position.” (Submission of the City, p. 3) With respect, this argument does not make much sense, given the actual contents of the records in dispute, which I will describe further below. **There is nothing in these records that reports on any of the actual negotiations that have occurred** with Pilot Pacific before or after the signing of the Memorandum of Agreement. In addition, the skeletal outlines of any sensitive information in the proposals and related records can be readily severed.

The records in dispute literally contain very little “information about negotiations carried on by or for a public body,” in the language of section 17(1)(e), **because at the time of their preparation and submission almost no negotiations had occurred**, except to clarify the original proposals. The significant negotiations have taken place subsequent to the selection of Pilot Pacific as the winning contractor. In this connection, **I think that a useful distinction can be made between disclosure of records that provide the framework or basis for subsequent negotiations (but only in the most general terms) as opposed to information about actual negotiations**, which is what section 17(1)(e) is primarily intended to protect. The disclosure of information in the former category cannot reasonably be expected to harm the financial or economic interests of the City of Victoria in the context of this particular inquiry.

[65] I adopt this analysis of the British Columbia IPC....<sup>9</sup>

[emphasis in original]

[48] The Ministry has not indicated what negotiation could be interfered with or what third party is involved in such a negotiation. Again, the Ministry would have to meet the harms test as described above. I do note that record D5 does appear to contain information about negotiation; however, the record is over 10 years old. The Ministry has not indicated if the negotiations have ended. If not, I would still be unclear how release of this record could interfere with this or other negotiations. As the Ministry has provided little or no detail, and conclusions cannot be drawn from review of the record, I must conclude that the Ministry has not met the burden of proof to demonstrate that section 19(1)(c)(iii) of FOIP applies to the record.

### ***Section 19(1)(e)***

[49] Section 19(1)(e) of FOIP states:

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<sup>9</sup>SK OIPC Review Report F-2012-001/LA-2012-001 at [62] to [65], available at [www.oipc.sk.ca/reviews.htm](http://www.oipc.sk.ca/reviews.htm).

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(e) a statement of financial assistance provided to a third party by a prescribed Crown corporation that is a government institution;

[50] The Ministry applied this exemption to six records: C4, C5, D1, D2, D3 and D4. In support of this exemption the Ministry provided the following:

**19(1)(e)** – This exclusion is applied to correspondence and documents related to the provision of financial assistance to [Business #1] through the sale of AFEF shares. It is of note that The AgriFood Equity Fund (AFEF) is part of Agricultural Corporation of Saskatchewan (ACS) which is a prescribed crown under FOIPP. The records in question detail proposed shares for debt transactions, as well as the loans owed AFEF by [Business #1]/[Business #2]. There are numerous examples of records that document the provisions of loans by AFEF to [Business #1] throughout the submission, which fall within this exemption.

[51] Again, I reiterate that the Ministry has not identified which third party benefited from financial assistance. From review of the records, it appears to be Business #1 that benefited. However, Business #1 does not appear to exist anymore. Again, it is not my role to speculate.

[52] I then must consider the other requirements of section 19(1)(e) of FOIP; namely if Agri-Food Equity Fund (AFEF), as part of Agricultural Credit Corporation of Saskatchewan (ACS), qualifies as a prescribed government institution pursuant to FOIP and if the records qualify as “a statement of financial assistance”.

[53] Sections 2(1)(d) and 2(1)(h) of FOIP state:

2(1) In this Act:

...

(d) “government institution” means, subject to subsection (2):

(i) the office of Executive Council or any department, secretariat or other similar agency of the executive government of Saskatchewan; or

**(ii) any prescribed board, commission, Crown corporation or other body, or any prescribed portion of a board, commission, Crown corporation or other body, whose members or directors are appointed, in whole or in part:**

(A) by the Lieutenant Governor in Council;

(B) by a member of the Executive Council; or

(C) in the case of:

(I) a board, commission or other body, by a Crown corporation; or

(II) a Crown corporation, by another Crown corporation;

...

**(h) “prescribed” means prescribed in the regulations;**

[emphasis added]

[54] For the purposes of this review, I consulted the version of *The Freedom of Information and Protection of Privacy Regulations* that were in effect at the time the access request was made on or about October 15, 2010.<sup>10</sup> ACS was listed as a prescribed government institution in Part I of the Appendix.<sup>11</sup> I am satisfied that ACS is a crown corporation pursuant to *The Agricultural Credit Corporation of Saskatchewan Act*.<sup>12</sup> I also note section 2 of *The Agri-Food Equity Fund Regulations* which stated:

2 In these regulations

(a) “**Act**” means *The Agricultural Credit Corporation of Saskatchewan Act*;

(b) “**Agri-Food Equity Fund**” means the division of the corporation known as the Agri-Food Equity Fund;

...<sup>13</sup>

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<sup>10</sup>*The Freedom of Information and Protection of Privacy Regulations*, [Chapter F-22.01 Reg 1 (effective April 1, 1992) as amended by Saskatchewan Regulations 53/92, 108/92, 8/93, 37/94, 18/95, 28/95, 9/97, 59/97, 76/1999, 32/2001, 6/2002, 45/2003, 52/2004 and 109/2004, by the Statutes of Saskatchewan, 2003, c.15; Saskatchewan Regulations 101/2007 and 119/2008.]

<sup>11</sup>*Ibid.* at Part I of the Appendix.

<sup>12</sup>*The Agricultural Credit Corporation of Saskatchewan Act*, S.S. 1983-84, c. A-8.1.

<sup>13</sup>*The Agri-Food Equity Fund Regulations*, formally c. A-8.1 Reg 3 (repealed September 22, 1997), at sections 2(a) and 2(b).

[55] I find it curious, however, that *The Agri-Food Equity Fund Regulations* were repealed on September 1997, which predates records C4, C5, D1, D2, D3 and D4. The Ministry has not provided representation on this point.

[56] Finally, I must consider if each of these records would constitute “a statement of financial assistance”. I have not previously considered this term before. As such, I look to my colleague in the Northwest Territories’ Review Recommendation 05-049 which stated:

So the question then becomes, what is a “statement of financial assistance”? Section 24(1)(f) appears to be fairly unique in Canada. **In fact, it appears that only Saskatchewan and Nunavut have similar provisions.** Neither of these jurisdictions appears yet to have been asked to consider what, exactly, the provision means. We are therefore left with the “ordinary meaning” test. The term “statement” has a number of meanings but, in connection with finances, the term usually means a document showing credits and debits. If one accepts that as the intended meaning in this provision, it seems to me that a statement which says “ABC Company received \$15,000.00 from BCC” would constitute a “statement of financial assistance” given to ABC Company. Whether or not other jurisdictions would routinely disclose this information is irrelevant. Our Act, rightly or wrongly, prohibits the disclosure of this kind of information and we are bound by that.

That having been said, and keeping in mind always that exceptions to disclosure must be narrowly interpreted, I do not believe that section 24(1)(f) prohibits the public body from disclosing a list of the names of businesses which received loans. In my opinion, the mere fact that a company received a loan from BCC is not a “statement of financial assistance” in that it does not indicate credits and debits or any other details. A statement that financial assistance has been given to a particular company is not the same as a “statement of financial assistance given” to a company. There is nothing in the Act which, in my opinion, prohibits the public body from disclosing which companies have received financial assistance from BCC, provided that the details of that financial assistance are not disclosed.<sup>14</sup>

[emphasis added]

[57] I adopt this interpretation and find that only records D1, D2, one page of D3 and D4 would qualify as a statement of financial assistance. However, the Ministry has not identified the third party or addressed the fact that *The Agri-Food Equity Fund Regulations* were repealed in 1997. As such, I am not satisfied that the Ministry has met the burden of proof to demonstrate section 19(1)(e) of FOIP applies to these records.

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<sup>14</sup>Northwest Territories Information and Privacy Commissioner Review Recommendation 05-049.



***Section 19(1)(f)***

[58] Section 19(1)(f) of FOIP states:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(f) information **supplied by a third party** to support an application for financial assistance mentioned in clause (e).

[emphasis added]

[59] The Ministry applied this exemption to one record, A4. In support of the exemption, it wrote:

**19(1)(f)** – This exclusion is applied to project submissions, provided by [Business #1] which outline proposals, plans, amount of debt, marketing plans, financial analysis statements etc. Also supplied are sales figures, sales projections, losses incurred by the Company, projected losses, as well as information related to CFIA inspections, and improvements that [sic] required to ensure compliance with CFIA recommendations. This information is considered proprietary information by the company, but is provided in order to request additional investment in [Business #1] from AFEF.

[60] The Ministry stated that this record was provided by Business #1; however, on review of the record, it appears that the record was created by AFEF and it appears to be commenting and making recommendations with respect to Business #1's need for financial assistance. AFEF was apparently a business unit of the crown corporation ACS. The Ministry has provided no representations to counter my belief that the record was supplied to it by ACS. I then must consider whether this document was supplied by a third party.

[61] First, as cited earlier, section 2(1)(j) of FOIP defines "third party" as follows:

2(1) In this Act:

...

(j) “third party” means a person, including an unincorporated entity, **other than** an applicant or **a government institution**.

[emphasis added]

[62] Therefore, as ACS is a prescribed government institution, it cannot qualify as a third party.

[63] As the Ministry has not identified the third party and it appears that the record in question was supplied to the Ministry by another government institution, this exemption does not apply to the record.

[64] Third party exemptions are designed to protect third party business interests.

[65] As noted throughout this analysis, a review of these exemptions cannot proceed if the third parties cannot be identified or no longer exist. If a third party no longer exists than I cannot see how the third party business interests can exist.

[66] As the Ministry has not identified which third party would have an interest in each of the documents in the record, it has not met the burden of proof to demonstrate that the exemption applies.

## **V FINDINGS**

[67] I find that the Ministry of Agriculture has not identified the third party(ies) relevant in this review.

[68] I find that the Ministry of Agriculture has failed to provide notification to the third party(ies) pursuant to sections 52 and 34 of *The Freedom of Information and Protection of Privacy Act*.

[69] I find that the Ministry of Agriculture has not met the burden of proof to demonstrate section 19(1)(a) of *The Freedom of Information and Protection of Privacy Act* applies to the record.

[70] I find that the Ministry of Agriculture has not met the burden of proof to demonstrate section 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* applies to the record.

[71] I find that the Ministry of Agriculture has not met the burden of proof to demonstrate section 19(1)(c) of *The Freedom of Information and Protection of Privacy Act* applies to the record.

[72] I find that the Ministry of Agriculture has not met the burden of proof to demonstrate section 19(1)(e) of *The Freedom of Information and Protection of Privacy Act* applies to the record.

[73] I find that the Ministry of Agriculture has not met the burden of proof to demonstrate section 19(1)(f) of *The Freedom of Information and Protection of Privacy Act* applies to the record.

## **VI RECOMMENDATIONS**

[74] I recommend that the Ministry of Agriculture should release the entire record to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 19th day of November, 2013.

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