

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT F-2014-006

Ministry of Environment

Summary:

In March 2013, the Applicant submitted an access to information request to the Ministry of Environment (Environment) for access to a record in the possession and control of Environment that potentially contained third party business information. Environment provided notification to the Third Party under section 34 of *The Freedom of Information and Protection of Privacy Act* (FOIP) and invited the Third Party to provide its consent to release the records or arguments to support withholding the records in question. The Third Party did not provide its consent but instead argued that subsections 19(1)(c), 22(a) and (b) of FOIP applied to the record and they should therefore be withheld. Environment concluded that release of the records was in the public interest as it related to public health, public safety and/or the protection of the environment and this public interest outweighed any harms proposed by the Third Party pursuant to subsection 19(3) of FOIP. Environment advised the Third Party of its decision and its intention to release the record. The Third Party proceeded to submit a request for review to the Office of the Information and Privacy Commissioner. The Commissioner found that Environment did not show that subsection 19(1)(b) of FOIP applied to the record. Further, the Commissioner found that the Third Party did not show that the disclosure of the information in the record could reasonably be expected to result in the harms proposed. As such, the Commissioner found that subsection 19(1)(c) of FOIP did not apply. In addition, as subsections 19(1)(b) and (c) of FOIP were found not to apply there was no need to consider the application of subsection 19(3) of FOIP. Finally, the Commissioner found that authority to apply subsections 22(a) and (b) rested with the “head” of Environment and not with the Third Party. As Environment did not apply subsections 22(a) and (b) of FOIP to the record, the Commissioner did not consider them. The Commissioner recommended that Environment release the record in full to the Applicant.

I BACKGROUND

[1] On March 11, 2013, the Ministry of Environment (Environment) received an access to information request for the following:

In respect to the Soil Sampling that took place, during the latter part of 2011 and into 2012, on publicly owned land areas in, around and north of [a local authority's] Transit Centre located along [name of street], that was formally part of [the Third Party's] site, please provide the following information:

1. Provide all communications, written or electronic, between the representatives of the Saskatchewan Ministry of Environment, [a local authority] and [the Third Party], regarding the soil sampling procedure, test parameters, test results and any proposals, recommendations or directions before, during and after soil sampling and test results were known.
2. Provide the scope of the soil testing in respect to the depths of soil sampling and the substances tested for.
3. Provide all test results for all samples taken relative to soil and water.
4. Provide the name of the company commissioned to take the samples, the name of the soil test laboratory, the cost of these two separate activities and how this work was paid for.
5. Provide all communications of all types and variations (electronic and hard copy) that has occurred between the representatives of the Saskatchewan Ministry of Environment, [a local authority] and [the Third Party] regarding any direct or indirect references or plans relative to Phase II Environmental Site Assessment on the former [the Third Party's] site.

[2] In a letter dated March 12, 2013, Environment responded to the Applicant advising that third party notification would be required for some of the information requested pursuant to section 34 of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] Environment contacted the Third Party by letter dated March 12, 2013, and advised it of the access to information request. In a letter dated April 1, 2013, the Third Party responded to Environment indicating it did not consent to the release of the information citing subsections 19(1)(c), 22(a) and (b) of FOIP. The Third Party provided a submission to Environment in support of its position.

[4] In a letter dated May 8, 2013, Environment responded to the Third Party indicating it had considered the representations provided but was relying on subsection 19(3) of FOIP as the “disclosure of the information could reasonably be expected to be in the public interest as it relates to public health and protection of the environment and that the public interest outweighs in importance any financial or competitive prejudice suffered by the company in relation to the disclosure.”

[5] On May 28, 2013, my office received a Request for Review from the Third Party.

[6] On September 25, 2013, my office received a copy of the record from Environment and its submission. On October 24, 2013, my office received a submission from the Third Party.

II RECORDS AT ISSUE

[7] The record is a 4678 page document. However, as the record was voluminous, our review focused on a representative sample of the pages.

[8] Environment applied subsection 19(1)(b) of FOIP to the record and intended to release the record pursuant to subsection 19(3) of FOIP.

[9] The Third Party asserted subsections 19(1)(c), 22(a) and (b) of FOIP applied to the record.

III DISCUSSION OF THE ISSUES

[10] Environment is a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP.

[11] The Third Party (a private business) would qualify as a “third party” pursuant to subsection 2(1)(j) of FOIP.

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

[12] Subsection 19(1)(b) of FOIP is a mandatory exemption and provides:

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;

[13] Environment applied subsection 19(1)(b) of FOIP to all 4678 pages of the record. As noted earlier, the Third Party did not raise subsection 19(1)(b) of FOIP. As the record is voluminous, our determinations will be based on a representative sample of the pages. Environment should apply the findings and analysis to the remainder of the record.

[14] The three part test to apply for subsection 19(1)(b) of FOIP is as follows:

- i. The record must contain financial, commercial, scientific, technical *or* labour relations information;
- ii. The record must be *supplied to* the government institution *by the Third Party*; and
- iii. The record must be supplied to the government institution *implicitly or explicitly in confidence*.

(Review Report F-2013-003 at [34])

[15] All three parts of this test must be met in order for a government institution to deny access to information in reliance on subsection 19(1)(b) of FOIP.

i. Does the record contain financial, commercial, scientific, technical or labour relations information?

[16] In its submission, provided to our office on September 25, 2013, Environment asserts that the information in question is “technical” information.

[17] Technical information “will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.” (Review Report F-2005-003 at [26])

[18] Some of the information in the record contains data and/or information directly related to testing and analysis conducted by engineering consultants and/or engineers contracted by the Third Party and appear to be qualified to conduct such testing and analysis.

[19] For example, page 3 of the record appears to include details of testing to be conducted by the contracted engineering company. Similar information can be found on pages 4, 5, 6 and 7 of the record.

[20] From a review of the record, the following appears to constitute technical information:

- All of pages 3, 4, 5, 6, 7;
- Drawing Numbers 4, 5, 6, 7, 8, 9 and 10;
- Tables 1(a), 1(b), 2 and 3;
- Appendix A;
- Appendix B; and
- Appendix C.

[21] The remainder of the information in the record refers to factual background information, the scope of the work to be completed, limitations of liability, cover page, table of contents, closing signature page, etc. This type of information would not constitute technical information as defined. In addition, the photographs at Appendix D would also not appear to constitute technical information. As this other information does not meet the first part of the test, it will not be considered further under subsection 19(1)(b) of FOIP. It will, however, be considered under subsection 19(1)(c) of FOIP raised by the Third Party.

ii. Was the record supplied to the government institution by the Third Party?

[22] The record in this case involves the results of soil testing. If analysis was conducted on soil samples, any information derived about the samples by Environment would

constitute information that was provided to Environment from the supplier of the sample. In addition, where the disclosure of information reveals or permits the drawing of inferences with respect to information supplied by a third party, the information could qualify as having been “supplied” by the Third Party. (Review Report F-2006-002 at [48] and Review Report F-2012-001/LA-2012-001 at [57])

[23] Environment’s submission indicates that the record was provided to Environment for review and consultation. The record was completed by a contracted engineering company and provided to both the Third Party and a local authority. However, it is not clear if it was the Third Party or the local authority that then forwarded it to Environment.

[24] It is necessary to consider what portion of the information may constitute the contracted engineering company’s information and not that of the Third Party. Subsection 19(1)(b) of FOIP is intended to protect third party proprietary information.

[25] Soil samples in this case were collected on a local authority’s property by the contracted engineering company and sent by the contracted engineering company for testing. The results of the testing were reflected in the record completed by the contracted engineering company. As noted earlier, the results of soil sampling could be found to be supplied by the Third Party if the test result information is embedded in the samples.

[26] Page 3 of the record contains technical information about how the testing was performed. This kind of information cannot be said to be about the Third Party and would not appear to reveal or permit the drawing of accurate inferences with respect to information supplied by the Third Party. There is nothing on page 3 regarding the results of the soil testing conducted. The same can be found on page 4. Page 4 appears to outline how the property was surveyed and quality controls used by the contracted engineering company.

[27] Only a portion of pages 5 and 6 appear to contain information about the results of the soil testing under the headings, *Findings* and *Summary and Conclusions*. The remainder of these pages does not. Page 7 contains the results of the investigation so all of page 7 appears to contain information about the results of the soil testing.

[28] Drawings Numbers 4 through 10 appear to contain the results of soil testing. In addition, Tables 1(a), 1(b), 2 and 3 also appear to contain results of soil testing. Finally, Appendixes A, B and C also contain the results of soil testing.

[29] Therefore, I find that the following information would qualify as having been supplied by the Third Party to Environment:

- Portions of pages 5 and 6;
- All of page 7;
- Drawing Numbers 4, 5, 6, 7, 8, 9 and 10;
- Tables 1(a), 1(b), 2 and 3;
- Appendix A;
- Appendix B; and
- Appendix C.

iii. Was the record supplied to the government institution implicitly or explicitly in confidence?

[30] Factors to consider when determining whether a document was obtained in confidence *implicitly* include:

- a. Whether the information was communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
- b. Whether the information was 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;
- c. Whether the information was not otherwise disclosed or available from sources to which the public has access; or
- d. Whether the information was prepared for a purpose which would not entail disclosure.

(Review Report F-2012-00/LA-2012-001 at [29])

[31] Factors to consider when determining if a document was obtained in confidence *explicitly* include:

- a. the existence of an express condition of confidentiality in an agreement between a public body and the third party;
- b. the fact that the public body requested the information be supplied in a sealed envelope;
- c. the third party's statement that it considered the information to have been supplied in confidence.

(Review Report F-2012-00/LA-2012-001 at [29])

[32] There must be a reasonable and objective basis for the information being treated confidentially. Nothing persuasive was provided by Environment to support its assertion that the record was supplied in confidence. As such, I find that Environment has not shown that the information was supplied in confidence either implicitly or explicitly by the Third Party.

[33] As the information in question does not meet the third part of the test, I find that subsection 19(1)(b) of FOIP does not apply to the information in the record.

2. Does subsection 19(1)(c) of FOIP apply?

[34] Subsection 19(1)(c) of FOIP is a mandatory exemption and provides:

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;

[35] The Third Party asserted that subsection 19(1)(c) of FOIP applies to the information in the record. Environment has not applied this subsection.

[36] The test for subsection 19(1)(c) of FOIP is as follows:

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

(Review Report F-2005-003 at [36])

[37] The Third Party outlined the “harms” expected if the information were released in its submission. However, the expectation of harm in this instance appears to be speculative and hypothetical. In any event, it is hard to imagine that any relevant documents, including the record at issue, would not be required to be part of routine disclosure by any party to litigation. It is unclear what the prejudice is. The Third Party provided no details to persuade my office in this regard.

[38] The Third Party did not connect specific portions of the record to the harm it is asserting would occur. The Third Party is also speculating that, where the information may not be flattering, harm will automatically result.

[39] I find, based on the submission from the Third Party that it has not shown that the disclosure of the information in the record could reasonably be expected to result in financial loss, prejudice the competitive position or interfere with negotiations involving the Third Party. As such, the records do not meet the test for exemption under subsection 19(1)(c) of FOIP.

[40] As the record does not meet the criteria established for subsections 19(1)(b) and (c) of FOIP, there is no need to review the application of subsection 19(3) of FOIP as the records must constitute Third Party information first and they do not.

3. Can the Third Party rely on subsections 22(a) and (b) of FOIP?

[41] Subsections 22(a) and (b) of FOIP are discretionary exemptions and provide as follows:

22 A head may refuse to give access to a record that:

(a) contains information that is subject to solicitor-client privilege;

(b) was prepared by or for an agent of the Attorney General for Saskatchewan or legal counsel for a government institution in relation to a matter involving the provision of advice or other services by the agent or legal counsel;

[42] Environment did not claim these exemptions. The Third Party asserted that subsections 22(a) and (b) of FOIP apply to the record in question.

[43] Subsections 22(a) and (b) of FOIP are discretionary exemptions and provide the “head” of a government institution the ability to exercise his/her discretion to deny access or to release a record (Review Report LA-2009-001 at [100]). Environment has not raised subsections 22(a) or (b) of FOIP. This discretion is solely reserved under FOIP for the head of the government institution for records in its possession and/or control. These subsections do not apply to a Third Party.

IV FINDINGS

[44] I find that Environment did not establish that the information in the record qualified as third party information pursuant to subsection 19(1)(b) of FOIP.

[45] I find that the Third Party did not show that the disclosure of the information in the record in question could reasonably be expected to result in the harms proposed. Therefore, subsection 19(1)(c) of FOIP would not apply to the information in the record.

V RECOMMENDATIONS

[46] I recommend that the Ministry of Environment release the record in full to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 13th day of August, 2014.

RONALD J.KRUZENISKI, Q.C.
Saskatchewan Information and Privacy
Commissioner