



REVIEW REPORT 128-2022

Ministry of Environment

January 5, 2023

Summary: The Applicant requested information from the Ministry of Environment (Environment). Environment denied access to portions of the records pursuant to subsections 15(1)(c), (k), 17(1)(a), (b), 22(a) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found Environment properly applied subsections 17(1)(a), (b) and 29(1) of FOIP to some portions of the record, but not others. He also found Environment did not properly apply subsections 15(1)(c), (k) and 22(a) of FOIP at all. He recommended that Environment release or continue to withhold information accordingly.

I BACKGROUND

[1] On March 27, 2022, the Ministry of Environment (Environment) received an access to information request from the Applicant as follows:

Records from April 20, 2021 to present on both enforcement file and correspondence files from Imperial Oil, Highway 10 East, Yorkton property

[2] On May 11, 2022, Environment responded that it was denying access to portions of the records pursuant to subsections 17(1)(a), (b) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] On June 16, 2022, the Applicant asked my office to undertake a review of Environment's decision.

[4] On July 21, 2022, my office provided notification to the Applicant and Environment of my office’s intention to undertake a review of Environment’s decision to deny the Applicant access to portions of the records.

[5] Environment provided its submission to my office on November 11, 2022. The Applicant did not provide one.

II RECORDS AT ISSUE

[6] On October 26, 2022, Environment notified my office it had released newly identified records to the Applicant, with additional exemptions added to those records: subsections 15(1)(c), (k) and 22(a) of FOIP. These additional exemptions are included in my review. At issue, then, are 91 total pages which Environment severed accordingly:

Record Number	Page Numbers	Description	FOIP Exemption applied
R1	3 to 25, 27, 30, 31, 33, 37, 38, 41, 43, 44 to 48, 51, 53, 54	R1 - Discharge Case - 2016-08-15T14-55-56	17(1)(b) and 29(1),
R2	2 to 6	R2 - BN - Imperial Oil Ltd. Property - Yorkton_2021-04-09	17(1)(a), 29(1)
R3	1 to 4	R3 – Briefing Note	17(1)(a)
R4	3 to 11	R4 – Chronology of Events	15(1)(c), (k), 17(1)(a), (b), 22(a) and 29(1)
R5	1 to 3	R5 - Discharge Case - 2016-08-15T14-55-56 – Notes	17(1)(a), (b), and 29(1)
R6	1 to 11	R6 - Discharge Case - 2016-08-15T14-55-56 – Correspondence	15(1)(c), (k), 17(1) (b), 22(a) and 29(1)

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[7] Environment is a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Therefore, I have jurisdiction to conduct this review.

2. Did Environment properly apply subsection 29(1) of FOIP?

[8] Subsection 29(1) of FOIP provides as follows:

29(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30.

[9] Subsection 29(1) of FOIP protects the privacy of individuals whose personal information may be contained within records responsive to an access to information request made by someone else. Subsection 29(1) of FOIP requires the government institution to have the consent of the individual whose personal information is in the record prior to disclosing it. Information must qualify as personal information pursuant to section 24 of FOIP (*Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated April 30, 2021 [*Guide to FOIP*, Ch. 4], p. 281).

[10] Environment applied subsection 29(1) of FOIP as follows:

- R1 – pages 3, 5 to 10, 12 to 16, 18 to 22, 24, 25, 27, 30, 31, 33, 37, 38, 41, 43, 44 to 48, 51, 53 and 54
- R2 – page 3
- R4 – pages 3, 5 to 8, 10 and 11
- R5 – pages 1 to 3

- R6 – pages 3 to 5, 10

[11] In past reports, I have stated that information relating to an individual who is working in a business or professional capacity is not personal information. I have often referred to this type of information as “business card information”, which includes their name and contact details such as their telephone number and email address. I have also stated it includes their personal home address, telephone number and email address if they use these for business or professional purposes (see [Review Report 132-2022](#), [Review Report 126-2020](#), [185-2020](#)).

[12] In past reports, I have also stated that it is an absurd result to deny access to personal information an Applicant would have knowledge of or have supplied (see [Review Report 138-2021](#), [185-2021](#), [Review Report 196-2021](#)).

[13] Taking the same approach here, I note the following contain information of individuals working in a professional capacity (including name, contact information and signatures) or who the Applicant would otherwise know (e.g., someone who in the file is noted to be related to them), and find Environment did not properly apply subsection 29(1) of FOIP to this information:

- R1 – pages 10, 13 to 16, 18 to 22, 24, 25, 30, 31, 33, 37, 38, 41, 43, 44 to 48, 51, 53 and 54
- R2 – page 3
- R4 – pages 3, 5 and part of 6; parts of 10 and 11 where portions contain information known to the Applicant
- R5 – pages 1 to 3
- R6 – pages 3 to 5, 10

[14] I recommend Environment release the information to the Applicant as I have outlined at paragraph [13] of this Report.

[15] I add that I find Environment did not properly apply subsection 29(1) of FOIP to pages 12 and 27 of R1, but recognize that it also applied subsection 17(1)(b) of FOIP to this same information; as such, I will consider it under that exemption later in this Report.

[16] Regarding the remaining portions where Environment applied subsection 29(1) of FOIP (R1, pages 3, 5 and 6; R4, part of pages 6, 8, 10 and 11 that do not contain personal information or information otherwise known to the Applicant), I am satisfied that these portions contain the name of an individual and information they provided that would otherwise be personal in nature to them pursuant to subsection 24(1)(k)(i) of FOIP, which provides as follows:

24(1) Subject to subsections (1.1) and (2), “personal information” means personal information about an identifiable individual that is recorded in any form, and includes:

...

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual; or

[17] I find Environment properly applied subsection 29(1) of FOIP as I have outlined at paragraph [16] of this Report, and recommend it continue to withhold this information pursuant to subsection 29(1) of FOIP.

3. Did Environment properly apply subsection 22(a) of FOIP?

[18] Subsection 22(a) of FOIP provides as follows:

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

(a) contains any information that is subject to any privilege that is available at law, including solicitor-client privilege;

[19] Subsection 22(a) of FOIP is a discretionary, class-based exemption. It permits refusal of access in situations where a record contains information that is subject to any legal privilege, including solicitor-client privilege (*Guide to FOIP*, Ch. 4, p. 255). Environment provided the record to my office.

[20] “Including” means that the list of information that follows is incomplete (non-exhaustive). The example in the provision is the type of information that could be presumed to qualify as a “privilege available at law” (*Guide to FOIP*, Ch. 4, p. 256).

[21] “Privilege” is a special right, exemption, or immunity granted to a person or class of persons (*Guide to FOIP*, Ch. 4, p. 256).

[22] The following three-part test can be applied:

1. Is the record a communication between solicitor and client?
2. Does the communication entail the seeking or giving of legal advice?
3. Did the parties intend for the communication to be treated confidentially?

(*Guide to FOIP*, Ch. 4, pp. 259-261)

[23] Environment applied subsection 22(a) of FOIP as follows:

- R4 – pages 3 and 7 to 10
- R6 - page 1

- 1. *Is the record a communication between solicitor and client?***
- 2. *Does the communication entail the seeking or giving of legal advice?***

[24] In [*Descôteaux et al. v. Mierzwinski*](#) (1982), Justice Lamer outlined a very liberal approach to the scope of the privilege by extending it to include all communications made “within the framework of the solicitor-client relationship.” The protection is very strong, as long as the person claiming the privilege is within the framework.

[25] A “communication” is the process of bringing an idea to another’s perception; the message or ideas so expressed or exchanged; the interchange of messages or ideas by speech, writing, gestures or conduct (*Guide to FOIP*, Ch. 4, p. 258).

- [26] “Client” means a person who: 1) consults a lawyer and on whose behalf the lawyer renders or agrees to render legal services; or 2) having consulted the lawyer, reasonably concludes that the lawyer has agreed to render legal services on his or her behalf (*Guide to FOIP*, Ch. 4, p. 258).
- [27] “Lawyer” (solicitor) means a member of the Law Society and includes a law student registered in the Society’s pre-call training program (*Guide to FOIP*, Ch. 4, p. 259).
- [28] “Legal advice” means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications (*Guide to FOIP*, Ch. 4, p. 261).
- [29] In terms of its reliance on subsection 22(a) of FOIP for R4 and R6, Environment stated as follows:
- R4, p. 3 - Environmental Protection Officer indicating they will be reaching out to government legal consul [sic] as well as summary of conversation and advice given - contains information that is subject to solicitor-client privilege
 - R4, p. 7 - Environmental Protection Officer requesting assistance from government legal consul as well as consultation involving two employees of the government - contains information that is subject to solicitor-client privilege
 - R4, p. 8 - Contains information that is subject to solicitor-client privilege
 - R4, p. 9 - Environmental Protection Officer asking for advice from government legal counsel as well as consultation involving two employees of the government
 - R4, p. 10 - Government employee meeting with legal counsel and seeking/receiving legal advice from that legal counsel
 - R6, p. 1 - Contains information that is subject to solicitor-client privilege as employee indicates they are going to reach out to legal counsel for advice.
- [30] In this matter, the client is Environment. The lawyer is a particular lawyer with Environment who is a member of the Law Society of Saskatchewan.

- [31] The information in the portions of R4 where Environment applied subsection 22(a) of FOIP could be categorized as notes, while it applied subsection 22(a) of FOIP on R6 to an email.
- [32] None of the portions where Environment is relying on subsection 22(a) of FOIP include communications directly to Environment's lawyer and Environment. The *Guide to FOIP* (Ch. 4, p. 260), however, states that this provision can apply to "notes to file in which legal advice is quoted or discussed". Upon review of the record, the only portion that directly quotes legal advice provided by Environment's lawyer to Environment is at the last redaction on page 3 of R4. This passage outlines that Environment's lawyer provided advice on follow up actions, which meets the first and second parts of the test; I will then consider the third part of the test on this portion.
- [33] Regarding the remaining portions where Environment is relying on subsection 22(a) of FOIP, I am not satisfied that they contain communications (or the substance of any communications) where legal advice was sought or given. Rather, they outline the intent to seek legal advice on matters, but not the actual seeking of legal advice, or general statements that Environment's lawyer made that do not provide any particular type of advice. I find, therefore, Environment did not properly apply subsection 22(a) of FOIP to R4 (first and third redactions on page 3, and pages 7 to 10) and R6 (page 1). Environment also applied subsection 17(1)(b) of FOIP to R4 (last redaction page 7 and last redaction page 9) and to R6 (second redaction page 1), so I will still review those portions pursuant to subsection 17(1)(b) later in this Report; I recommend, however, Environment release the remaining portions where it applied subsection 22(a) of FOIP.

3. Did the parties intend for the communication to be treated confidentially?

- [34] I am only reviewing the third part of the test for subsection 22(a) of FOIP on the last redaction of page 3 on R4.
- [35] There must be an expectation on the part of the government institution that the communication will be confidential. "Not every aspect of relations between a lawyer and a client is necessarily confidential". Conduct which is inconsistent with an expectation of

confidentiality can constitute a waiver of privilege. Confidentiality is the *sine qua non* of privilege. Without confidentiality there can be no privilege and when confidentiality ends so too should the privilege (*Guide to FOIP*, Ch. 4, p. 263).

[36] As a general rule, the client (usually a government institution) must not have disclosed the legal advice (either verbally or in writing) to parties who are outside of the solicitor-client relationship. Wide circulation of internal communications by in-house counsel or communications with in-house counsel that do not clearly reflect an intention that those communications be kept confidential will not be protected by privilege (*Guide to FOIP*, Ch. 4, p. 263).

[37] While Environment states the information at question is subject to solicitor-client privilege, it does not speak to the confidentiality of the information. On review of the records, it is not clear that the legal advice provided to Environment was intended to be kept confidential, and it appears that it was information provided to several individuals for Environment to make decisions. As the third part of the test is not met, I find Environment did not properly apply subsection 22(a) of FOIP to the last redaction on page 3 of R4. As Environment has applied no other exemptions to this portion, I recommend Environment release this information to the Applicant.

4. Did Environment properly apply subsection 17(1)(a) of FOIP?

[38] Subsection 17(1)(a) of FOIP provides 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;

[39] Subsection 17(1)(a) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council (*Guide to FOIP*, Ch. 4, p. 123).

[40] The following two-part test can be applied:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

(Guide to FOIP, Ch. 4, pp. 125-126)

[41] Environment applied subsection 17(1)(a) of FOIP as follows:

- R2 – pages 2 and 4 to 6
- R3 – pages 1 to 4
- R4 – page 10
- R5 – pages 1 and 3

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?

2. Was the advice, proposals, recommendations, analyses and/or policy options developed by or for a government institution or a member of the Executive Council?

[42] From its submission, it appears Environment is stating the portions of the record where it is relying on subsection 17(1)(a) of FOIP contains advice, proposals, recommendations, analyses and/or policy options. My office's resource, *Guide to FOIP* (pp. 124-125) offers the following definitions:

- “Advice” is guidance offered by one person to another. It can include the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. Advice encompasses material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation. The “pros and cons” of various options also qualify as advice. It should not be given a restricted meaning. Rather, it should be interpreted to include an opinion that involves exercising judgement and skill in weighing the significance of fact. It includes expert opinion on matters of fact on which a government institution must decide for future action.

- A “recommendation” is a specific piece of advice about what to do, especially when given officially; it is a suggestion that someone should choose a particular thing or person that one thinks particularly good or meritorious. Recommendations relate to a suggested course of action more explicitly and pointedly than “advice”. It can include material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised. It includes suggestions for a course of action as well as the rationale or substance for a suggested course of action. A recommendation, whether express or inferable, is still a recommendation.
- A “proposal” is something offered for consideration or acceptance.
- “Analyses” (or analysis) is the detailed examination of the elements or structure of something; the process of separating something into its constituent elements.
- “Policy options” are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made. They would include matters such as the public servant’s identification and consideration of alternative decisions that could be made. In other words, they constitute an evaluative analysis as opposed to objective information.

[43] “Developed by or for” means the advice, proposals, recommendations, analyses and/or policy options must have been created either: 1) within the government institution, or 2) outside the government institution but for the government institution and at its request (for example, by a service provider or stakeholder) (*Guide to FOIP*, Ch. 4, p. 126).

[44] “Executive Council” means the Executive Council appointed pursuant to *The Executive Government Administration Act*. It consists of the Premier and Cabinet Ministers. Executive Council is also referred to as “Cabinet”. Cabinet has also been defined as the committee of senior ministers (heading individual provincial government ministries) which acts collectively with the Premier to decide matters of government policy (*Guide to FOIP*, Ch. 4, p. 126).

[45] Upon review of the record, I am not satisfied that page 10 of R4 contains advice, proposals, recommendations, analyses and/or policy options, and Environment has not made it clear how this information contains any of these. Rather, the information appears to be a statement of fact about something that will occur. As such, the first part of the test is not met for page 10 of R4, and I find that Environment did not properly apply subsection

17(1)(a) of FOIP to this page. I will, however, still consider this page under my analysis of subsection 17(1)(b) of FOIP.

[46] Regarding the remaining portions where Environment applied subsection 17(1)(a) of FOIP, I am satisfied that the portions in R2, R3 and R5 invariably contain analyses, recommendations, and options. For example, the portions of R2 contain an analysis of a situation, plus recommendations on how Environment can respond. R3 is a briefing note that contains an analysis as well as recommendations regarding how the Minister may respond to a situation. R5 also contains an analysis of a situation. It is apparent, as well, from the portions of the records released to the Applicant that the information in these portions was prepared by Environment employees, mainly for the purpose of how Environment officials or the Minister, who is a member of Executive Council, may respond. As this satisfies both the first and second parts of the test, I find Environment properly applied subsection 17(1)(a) of FOIP as outlined above and recommend Environment continue to withhold this information pursuant to subsection 17(1)(a) of FOIP.

[47] I found subsection 17(1)(a) of FOIP applies to R5, I do not need to consider Environment's application of subsection 17(1)(b) of FOIP on R5.

5. Did Environment properly apply subsection 17(1)(b) of FOIP?

[48] Subsection 17(1)(b) of FOIP provides 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:

...

(b) consultations or deliberations involving:

- (i) officers or employees of a government institution;
- (ii) a member of the Executive Council; or
- (iii) the staff of a member of the Executive Council;

[49] Subsection 17(1)(b) of FOIP is a discretionary class-based exemption. It permits refusal of access in situations where release of a record could reasonably be expected to disclose consultations or deliberations involving officers or employees of a government institution, a member of the Executive Council or the staff of a member of the Executive Council. The provision is intended to allow persons having the responsibility to make decisions to freely discuss the issues before them to arrive at well-reasoned decisions. The intent is to allow such persons to address an issue without fear of being wrong, looking bad, or appearing foolish if their frank deliberations were to be made public (*Guide to FOIP*, Ch. 4, p. 131).

[50] The following two-part test can be applied:

1. Does the record contain consultations or deliberations?
2. Do the consultations or deliberations involve officers or employees of a government institution, a member of the Executive Council, or the staff of a member of the Executive Council?

[51] I need to consider Environment's application of subsection 17(1)(b) of FOIP as follows:

- R1 – pages 4, 5, 8, 9, 11 to 14, 17, 18, 27
- R4 – pages 7, 8, 9, 10, 11 (note I previously found Environment did not properly apply subsection 22(a) of FOIP to portions of pages 7 and 9 and subsection 17(1)(a) of FOIP to page 10)
- R6 – pages 1, 2, 5 to 10 (note I previously found Environment did not properly apply subsection 22(a) of FOIP to a line on page 1)

1. Does the record contain consultations or deliberations?

2. Do the consultations or deliberations involve officers or employees of a government institution, a member of the Executive Council, or the staff of a member of the Executive Council?

[52] Environment stated that both consultations and deliberations are involved in these portions of the records. My office's resource, *Guide to FOIP* (p. 132) offers these definitions:

- "Consultation" means the act of consulting or taking counsel together, or a deliberation or conference. It can also be a conference in which the parties consult

and deliberate. A consultation can occur when the views of one or more officers or employees of a government institution are sought as to the appropriateness of a particular proposal or suggested action. It can include consultations about prospective future actions and outcomes in response to a developing situation. It can also include past courses of action.

- “Deliberation” means the act of deliberating (to deliberate: to weigh in mind; to consider carefully with a view to a decision; to think over); careful consideration with a view to a decision. It can also mean the consideration and discussions of the reasons for and against a measure by a number of councillors. A deliberation can occur when there is a discussion or consideration of the reasons for or against an action. It can refer to discussions conducted with a view towards making a decision.

[53] Upon review of the records, I am not satisfied that the portion of R4, p. 10 where Environment applied subsection 17(1)(b) of FOIP contains either consultations or deliberations. Rather, the information appears to be a statement of fact about something that will occur. As the first part of the test is not met, there is no need for me to go further; as such, I find Environment did not properly apply subsection 17(1)(b) of FOIP to R4, p.10. As Environment has applied no other exemptions to this portion of the records, I recommend it release it to the Applicant.

[54] Regarding the remaining portions of R1, R4 and R6 where Environment applied subsection 17(1)(b) of FOIP, I am satisfied that they invariably contain consultations or deliberations. For example, throughout R1 Environment employees are consulting on an issue that has arisen; I note the names of who was involved in these emails were released to the Applicant. Further, the portions of the records throughout R4 (except for page 10) include consultations between Environment employees regarding a course of action, as do all portions of R6 where this exemption has been applied. As the first and second parts of the test are met, I find Environment properly applied subsection 17(1)(b) of FOIP as I have described above, and recommend it continue to withhold this information pursuant to subsection 17(1)(b) of FOIP.

[55] Environment applied subsections 15(1)(c) and (k) of FOIP to R6, pages 10 and 11 to some of the same portions where it applied subsection 17(1)(b) of FOIP. As I found subsection 17(1)(b) of FOIP applies to those portions, I do not need to review its reliance on subsections 15(1)(c) and (k) of FOIP to these portions but add there are portions of these

pages where Environment applied subsections 15(1)(c) and (k) on its own, so will review the portions where it has in the next part of this Report.

6. Did Environment properly apply subsection 15(1)(c) of FOIP?

[56] Subsection 15(1)(c) of FOIP provides as follows:

15(1) A head may refuse to give access to a record, the release of which could:

...

(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;

[57] Subsection 15(1)(c) of FOIP is a discretionary class-based and harm-based exemption. Meaning it contains both a class and harm-based component. It permits refusal of access in situations where the release of a record could interfere with a lawful investigation or disclose information with respect to a lawful investigation (*Guide to FOIP*, Ch. 4, pp. 50-51).

[58] The following two-part test can be applied:

1. Does the government institution's activity qualify as a "lawful investigation"?
2. Does one of the following exist?
 - a) Could release of the information interfere with a lawful investigation?
 - b) Could release disclose information with respect to a lawful investigation?

(*Guide to FOIP*, Ch. 4, pp. 52-53)

[59] I need to consider Environment's Application of subsection 15(1)(c) of FOIP as follows:

- R4 – pages 5 and 6
- R6 – pages 10 and 11 (portions where subsection 15(1)(c) appears on its own)

1. Does the government institution's activity qualify as a "lawful investigation"?

2. Does one of the following exist?

a) Could release of the information interfere with a lawful investigation?

b) Could release disclose information with respect to a lawful investigation?

[60] Regarding its reliance on subsection 15(1)(c) of FOIP, Environment submitted that release of the information could either interfere with a lawful investigation, or could disclose information with respect to a lawful investigation as follows:

Information regarding an enforcement file that could reasonably be expected to disclose information or interfere with an investigation under the Environmental Management and Protection Act, 2010, s. 8(1) Prohibition on discharges. [R4]

Consultation and deliberations involving government employees addressing ongoing issues with site and how to proceed moving forward once those issues are addresses [sic]; the information is regarding an enforcement file that if released could reasonably be expected to disclose information or interfere with an investigation under the Environmental Management and Protection Act, 2010, section 82(a) Prohibition on obstructing environment officer. [R6]

[61] Section 15 of FOIP uses the word “could” versus “could reasonably be expected to” as seen in other provisions of FOIP. The threshold for could is somewhat lower than a reasonable expectation. The requirement for could is simply that the release of the information could have the specified result. There would still have to be a basis for asserting the harm could occur. If it is fanciful or exceedingly remote, the exemption should not be invoked (*Guide to FOIP*, Ch. 4, p. 52).

[62] A “lawful investigation” is an investigation that is authorized or required and permitted by law. The government institution should identify the legislation under which the investigation is occurring. The investigation can be concluded, active and ongoing or be occurring in the future (*Guide to FOIP*, Ch. 4, p. 52).

[63] “Interfere with” includes hindering or hampering an investigation and anything that would detract from an investigator’s ability to pursue the investigation (*Guide to FOIP*, Ch. 4, p. 52).

[64] “With respect to” are words of the widest possible scope; the phrase is probably the widest of any expression intended to convey some connection between two related subject matters (*Guide to FOIP*, Ch. 4, p. 53).

[65] Upon review, the pages on R4 and R6 under review pursuant to subsection 15(1)(c) of FOIP reference both investigations under subsections 8(1) and 82(a) of *The Environmental Management and Protection Act, 2010* (EMPA). These sections of the EMPA provide as follows:

8(1) No person shall discharge or allow the discharge of a substance into the environment in an amount, concentration or level or at a rate of release that may cause or is causing an adverse effect unless otherwise expressly authorized pursuant to:

(a) this Act or the regulations;

(b) any other Act, Act of the Parliament of Canada or the regulations made pursuant to any other Act or Act of the Parliament of Canada;

(c) any approval, permit, licence or order issued or made pursuant to:

(i) this Act or the regulations; or

(ii) any other Act, Act of the Parliament of Canada or the regulations made pursuant to any other Act or Act of the Parliament of Canada;

(d) the code; or

(e) an accepted environmental protection plan.

...

82 If an environment officer and any person or persons lawfully accompanying the environment officer are carrying out the environment officer’s duties, no person shall:

(a) fail to comply with any reasonable request of an environment officer;

[66] Regarding the first part of the test and based on the contents of the records, I am satisfied that a lawful investigation was carried out by agents from Environment regarding a matter pursuant to these subsections of the EMPA.

[67] Regarding the second part of the test, Environment needed to describe the harm that would result from disclosure of the information in the records, but did not do so. On the face of the records, this harm is not apparent, either. While the threshold for the ensuing harm if the information was disclosed is low, the harm nonetheless needs to be described. As such, the second part of the test is not met and I find Environment did not properly apply subsection 15(1)(c) of FOIP to R4 and R6. I will, however, still review Environment's reliance on subsection 15(1)(k) of FOIP to these same portions.

7. Did Environment properly apply subsection 15(1)(k) of FOIP?

[68] Subsection 15(1)(k) of FOIP provides as follows:

15(1) A head may refuse to give access to a record, the release of which could:

...

(k) interfere with a law enforcement matter or disclose information respecting a law enforcement matter;

[69] Subsection 15(1)(k) of FOIP is a discretionary exemption that contains both a class and harm-based component. It permits refusal of access in situations where release of a record could interfere with a law enforcement matter or disclose information respecting a law enforcement matter (*Guide to FOIP*, Ch. 4, p. 75).

[70] The following two-part test can be applied:

1. Is there a law enforcement matter involved?

2. Does one of the following exist?

a) Could release of information interfere with a law enforcement matter?

b) Could release disclose information with respect to a law enforcement matter?

(*Guide to FOIP*, Ch. 4, pp. 75-76)

[71] I need to consider Environment's Application of subsection 15(1)(c) of FOIP as follows:

- R4 – pages 5 and 6

- R6 – pages 10 and 11 (portions where subsection 15(1)(c) appears on its own)

[72] Environment submitted the same argument for subsection 15(1)(k) of FOIP as it did for subsection 15(1)(c) of FOIP.

1. Is there a law enforcement matter involved?

2. Does one of the following exist?

a) Could release of information interfere with a law enforcement matter?

b) Could release disclose information with respect to a law enforcement matter?

[73] For the purposes of this provision, “law enforcement” includes investigations, inspections or proceedings conducted under the authority of or for the purpose of enforcing an enactment which could lead to a penalty or sanction. A “penalty or sanction” means a punishment or penalty to force obedience to a law. It can include a fine, imprisonment, or an order to cease an activity. “Matter” should be given its plain and ordinary meaning; it does not have to apply to some specific ongoing investigation or proceeding (*Guide to FOIP*, Ch. 4, p. 76).

[74] As with subsection 15(1)(c) of FOIP, subsection 15(1)(k) of FOIP uses the word “could”, which is a lower threshold than “could reasonably be expected to”. Although the threshold is lower, there still needs to be an objective basis for asserting the harm could occur (*Guide to FOIP*, Ch. 4, p. 77).

[75] I have previously in this Report described “interfere” and “with respect to” as the terms that would apply to this provision.

[76] Upon review of the records, it appears that there was a law enforcement matter involved in which an entity could have been sanctioned. This meets the first part of the test.

[77] Regarding the second part of the test, Environment did not describe the harm that would ensue from releasing the information in the records. It is not apparent from review of the

records, either, what that harm may be. As the second part of the test is not met, I find Environment did not properly apply subsection 15(1)(k) of FOIP as described at paragraph [68] of this Report and I recommend it release this information to the Applicant.

IV FINDINGS

[78] I find I have jurisdiction to conduct this investigation.

[79] I find Environment did not properly apply subsection 29(1) of FOIP as described at paragraph [13] of this Report, and that it did properly apply subsection 29(1) as described at paragraph [16] of this Report.

[80] I find Environment did not properly apply subsection 22(a) of FOIP as described at paragraphs [33] and [37] of this Report.

[81] I find Environment did not properly apply subsection 17(1)(a) of FOIP as described at paragraph [45] of this Report, and that it did properly apply subsection 17(1)(a) of FOIP as described at paragraph [46] of this Report.

[82] I find Environment did not properly apply subsection 17(1)(b) of FOIP as described at paragraph [53] of this Report, and that it did properly apply subsection 17(1)(a) of FOIP as described at paragraph [54] of this Report.

[83] I find Environment did not properly apply subsection 15(1)(c) of FOIP as described at paragraph [67] of this Report, and that it did not properly apply subsection 15(1)(k) of FOIP as described at paragraph [77] of this Report.

V RECOMMENDATIONS

[84] I recommend Environment release the information where it applied subsection 29(1) of FOIP as described at paragraph [13] of this Report, and continue to withhold the

information as described at paragraph [16] of this Report pursuant to subsection 29(1) of FOIP within 30 days of issuance of this Report.

[85] I recommend Environment release the information where it applied subsection 22(a) of FOIP as described at paragraphs [33] and [37] of this Report within 30 days of issuance of this Report.

[86] Within 30 days of issuance of this Report, I recommend Environment release the information where it applied subsection 17(1)(a) of FOIP as described at paragraph [45] of this Report, and that it continue to withhold the information as described at paragraph [46] of this Report pursuant to subsection 17(1)(a) of FOIP.

[87] Within 30 days of issuance of this Report, I recommend Environment release the information where it applied subsection 17(1)(b) of FOIP as described at paragraph [53] of this Report, and that it continue to withhold the information as described at paragraph [54] of this Report pursuant to subsection 17(1)(b) of FOIP.

[88] I recommend Environment release the information where it applied subsections 15(1)(c) and (k) of FOIP as described at paragraphs [67] and [77] of this Report respectively within 30 days of issuance of this Report.

Dated at Regina, in the Province of Saskatchewan, this 5th day of January, 2023.

Ronald J. Kruzeniski, KC
Saskatchewan Information and Privacy
Commissioner