



REVIEW REPORT 171-2022

Ministry of Environment

May 5, 2023

Summary:

The Applicant submitted an access to information request to the Ministry of Environment (Environment). In the course of processing the access request, Environment notified a third party, Cargill Ltd (Cargill), of the access request pursuant to section 34 of *The Freedom of Information and Protection of Privacy Act* (FOIP). Cargill responded to Environment. Cargill's position was that subsection 19(1)(b) of FOIP applied to specific pages of the record at issue. Environment took Cargill's representations into consideration. Environment determined that subsection 19(1)(b) of FOIP applied to specific portions of the pages of the record at issue, but not all the pages identified by Cargill. Cargill requested a review by the Commissioner. The Commissioner found that subsection 19(1)(b) of FOIP did not apply to the pages of the record at issue, in whole or in part. The Commissioner recommended that Environment release the record at issue to the Applicant.

I BACKGROUND

[1] On June 20, 2022, the Applicant submitted the following access to information request to the Ministry of Environment (Environment):

Annual Environmental Reports for Cargill Clavet Oilseed Crushing Plant

[2] The Applicant specified the time period for the records to be 2013 to current.

[3] In a letter dated July 7, 2022, Environment notified the Applicant it was extending the time to respond to the access request by an additional 30 days pursuant to subsection 12(1)(c) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

- [4] In an email dated July 7, 2022, Environment notified the third party, Cargill Ltd (Cargill), of the access request pursuant to subsection 34(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Attached to Environment's email was nine records.
- [5] In a letter dated July 27, 2022, Cargill responded to Environment. Cargill responded by saying it does not consent to and specifically objects to the release of the records. Cargill cited subsection 19(1)(b) of FOIP as the reason why the records should be withheld.
- [6] In an email dated July 28, 2022, Environment responded to Cargill. Environment invited Cargill to identify the portions of each record to which Cargill believed subsection 19(1)(b) of FOIP would apply. Environment also stated in its email the following:

In this case, the ministry did not consider these records to be confidential because the reports were requested under its regulatory powers. Section 11 of [*The Environmental Management and Protection Act*] provides the power for the ministry to require reports and information to assess an environmentally impacted site. If the party does not voluntarily provide the information, section 13 authorizes the ministry to order the reports under its enforcement powers in EMPA. Reports and information submitted by third parties to the ministry under EMPA are generally considered to be public information, section 83, EMPA 2010.

- [7] In a letter dated August 9, 2022, Cargill responded to Environment. It said it consented to the release of all nine records except for pages 21 to 50 of its "2015 Annual Summary Environmental Report". It provided Environment with proposed draft redactions for Environment's consideration. It asserted that the redactions are subject to subsection 19(1)(b) of FOIP.
- [8] In a letter dated August 19, 2022, Environment responded to Cargill. Environment said it had taken Cargill's representations into consideration and had decided that it would provide partial access to the record pursuant to subsection 19(3) of FOIP. Environment said:

We have taken your representations into consideration and have decided that partial access will be given to the record. We are providing access pursuant to section 19(3) of *The Freedom of Information and Protection of Privacy Act*. Please note that, pursuant to section 8 of *The Freedom of Information and Protection of Privacy Act* (the

Act), some of the information contained in the attached record has been redacted. Access to this information is denied pursuant to section 29(1) of the Act, disclosure of personal information. **Access to your represented portions including proprietary figures of production capacity and operation is denied pursuant to section 19(1)(b), Third Party Information. The remaining information that was represented by Cargill we will be providing access pursuant to section 19(3) of the Act as the Ministry of Environment has determined that disclosure is in the public's interest as it relates to public health, public safety and protection of the environment. The information in regards to process and methods used are not unique to Cargill and are considered industry-wide practices and procedures commonly used.**

[Emphasis added]

- [9] Also on August 19, 2022, Environment notified the Applicant of its decision.
- [10] On September 7, 2022, Cargill requested a review by my office.
- [11] On September 27, 2022, my office notified the Applicant, Environment and Cargill that my office would be undertaking a review.

II RECORDS AT ISSUE

- [12] At issue is a record entitled *2015 Annual Summary Environmental Report*.
- [13] Environment provided my office with an 82-page version of the record in portable document format (PDF). Cargill asserted that pages 21 to 50 of the PDF should be withheld pursuant to subsection 19(1)(b) of FOIP. Environment asserted that subsection 19(1)(b) of FOIP applies to portions of pages 22, 27, 32, 37, 43, and 47 of the PDF. However, Environment said it was releasing the remainder of the record pursuant to subsection 19(3) of FOIP. These particular portions are about the production capacity of a plant and the production volume of the plant during sampling when monitoring was conducted.
- [14] Environment also applied subsection 29(1) of FOIP to portions of the record at issue. However, the Applicant did not request a review of the application of that exemption, Cargill's review request only involves Environment's decision to withhold only portions

of pages 21 to 50 of the record at issue and Environment's decision to release the remainder pursuant to subsection 19(3) of FOIP. Therefore, the focus of my office's review is subsections 19(1)(b) and 19(3) of FOIP. My office will not be reviewing Environment withheld portions of the record pursuant to subsection 29(1) of FOIP.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[15] Environment qualifies as a "government institution" pursuant to subsection 2(1)(d) of FOIP. Cargill is a "third party" pursuant to subsection 2(1)(j) of FOIP. Therefore, I find that I have jurisdiction to undertake this review.

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

[16] In order for government institutions to rely on subsection 19(3) of FOIP to release records, subsection 19(1) of FOIP must apply to the records first.

[17] In this case, I must determine if subsection 19(1)(b) of FOIP applies to pages 21 to 50 of the record at issue. If so, then I will consider if subsection 19(3) of FOIP provides Environment with the authority to release these pages.

[18] In order to determine if subsection 19(1)(b) of FOIP applies, my office uses the following three-part test:

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?
2. Was the information supplied by the third party to a government institution?
3. Was the information supplied in confidence implicitly or explicitly?

(*Guide to FOIP*, Chapter 4 "Exemptions from the Right of Access", Updated April 30, 2021 [*Guide to FOIP*, Ch. 4], pp. 198-202)

[19] The following is my analysis to determine if the three part test is met.

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?

[20] Cargill asserted that the information contained within pages 21 to 50 qualifies as “scientific” information. Environment asserted that the portions to which it believes subsection 19(1)(b) of FOIP applies qualifies as “technical” information.

[21] “Scientific information” is information exhibiting the principles or methods of science. The information could include designs for a product and testing procedures or methodologies. It is information belonging to an organized field of knowledge in the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypothesis or conclusions and be undertaken by an expert in the field. Finally, scientific information must be given a meaning separate from technical information (*Guide to FOIP*, Ch. 4, pp. 198-199).

[22] “Technical information” is information relating to a particular subject, craft or technique. Examples are system design specifications and the plans for an engineering project. It is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. It 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. Finally, technical information must be given a meaning separate from scientific information (*Guide to FOIP*, Ch. 4, p. 199).

[23] Cargill asserted that pages 21 to 50 of the record at issue contains scientific information. Pages 21 to 50 contains ambient monitoring reports. Based on a review of these pages, I find that these pages contain some scientific information, including the approach and methodologies undertaken, the observations and the results of the monitoring.

[24] Environment asserted that the portions it believes subsection 19(1)(b) of FOIP applies qualifies as technical information. Specifically, portions that describe the production capacity of a plant and the production volume of the plant during sampling. Similar to my finding in my office's [Review Report 057-2022](#) at paragraph [32] where I found the volume capacity of storage tanks to qualify as technical information, I find that the production capacity of the plant to qualify as technical information. Further, I find that the production volume during sampling to qualify as technical information.

[25] I find that the first part of the test is met.

2. Was the information supplied by the third party to a government institution?

[26] “Supplied” means provided or furnished (*Guide to FOIP*, Ch. 4, p. 200).

[27] As noted earlier, the information at issue is a part of the *2015 Annual Summary Environmental Report*. This report appears to have been provided to Environment as a requirement of Approval to Operate Permit #PO15-035. Special Condition 8.3 of the permit, which will be quoted in the next part of my analysis, provides that Cargill is to provide a written report to Environment containing environmental monitoring results. I find that pages 21 to 50 of the record at issue contains the information required to be provided by Cargill to Environment pursuant to Special Condition 8.3 of the permit.

[28] I find that the second part of the test is met.

3. Was the information supplied in confidence implicitly or explicitly?

[29] The information must have been supplied in confidence either implicitly or explicitly. “Implicitly” means that confidentiality is understood, even though there is no actual agreement or statement of confidentiality. “Explicitly” means confidentiality has been clearly stated, such as through documentary evidence showing the information was supplied with the understanding the government institution would keep it confidential (*Guide to FOIP*, Ch. 4, p. 202).

- [30] In order for subsection 19(1)(b) of FOIP to apply, it must be shown that both parties intended the information to be held in confidence at the time the information was supplied (*Guide to FOIP*, Ch. 4, p. 202).
- [31] Environment asserted that only portions on pages 22, 27, 32, 37, 43, and 47 (the production capacity and production volume during sampling) were supplied in confidence, not all the information on pages 21 to 50 as Cargill has asserted.
- [32] In my office's [Review Report 043-2015](#), [Review Report 057-2022](#) and [Review Report 204-2022](#), I found that information submitted to Environment under *The Environmental Management and Protection Act, 2010* (EMPA) to have not been supplied in confidence. The “compulsory supply” of information, or information required by statute, will not ordinarily qualify as confidential unless the relevant legislation establishes confidentiality. Therefore, I must consider if the information at issue was compulsory supplied by the third party to Environment.
- [33] Subsection 26(1) of EMPA provides as follows:
- 26(1)** If the minister believes there is an enhanced risk of an adverse effect occurring associated with a particular activity, the minister may require the person engaged in or proposing to engage in the activity:
- (a) to obtain a permit to carry out the activity;** and
- (b) to provide a financial assurance in the form and amount acceptable to the minister.
- [Emphasis added]
- [34] Section 27 of EMPA sets out the process in which a person may obtain a permit. Section 9 of *The Environmental Management and Protection (General) Regulation* provides that the minister may impose terms and conditions on the permit. It says:

9(1) A person who intends to construct, alter, operate, temporarily close, close or decommission a facility that is mentioned in subsection 8(2) and that is not exempt from this Part pursuant to subsection 8(3):

(a) is required to obtain a permit; and

(b) shall provide a financial assurance in the form and amount acceptable to the minister.

(2) The minister may impose any terms and conditions on the permit mentioned in subsection (1) that the minister considers appropriate.

[Emphasis added]

[35] According to Special Condition 8.3 of the Approval to Operate PO15-035, the Minister required Cargill to provide a written report containing the following:

8.3 The Company shall submit a written report on or before March 31, 2017 with the sampling results (laboratory analysis) of Total Suspended particulates, n-hexane and hydrogen sulfide taken during the 18-month sampling period as indicated in **Appendix B: Monitoring (April 2015)**. The report shall clearly indicate the dates samples were taken, prevailing wind direction, weather conditions, **Facility operating capacity/status (such as normal operations, shut-down, etc) and other pertinent information that may be useful for review purposes.** The report shall include summaries of new and historical data, and interpretation of the data. An interpretation of the environmental monitoring results include comparison to applicable standards, guidelines, limits and a provision of trends.

[Emphasis added]

[36] Appendix B of the permit requires information such as regular capacity and sampling information also be provided (at footnotes 5 and 6):

Ambient air ² monitoring (downwind)	23) Total Suspended Particulates	Monthly (beginning on or before July 6, 2015) ^{5,7} for 18 months	Continuous for a 24 hour period
	24) n-Hexane 25) Hydrogen Sulfide	Monthly (beginning on or before July 6, 2015) ^{5,7} for 18 months	Grab ⁶
Ambient air ² monitoring (upwind)	26) Total Suspended Particulates	Monthly (beginning on or before July 6, 2015) ^{5,7} for 18 months	Continuous for a 24 hour period

...

⁵ Monitoring of parameters for Ambient shall be only carried out when the Facility is operating at its regular capacity.

⁶ Grab means a single, individual sample which is representative of the matrix sampled.

[37] Based on what is required to be provided by Cargill to Environment pursuant to the permit, I find that pages 21 to 50 were compulsory supplied. This includes the information regarding production capacity and production volume during sampling.

[38] As such, I find that the information was not supplied in confidence. I find that the third part of the three-part test is not met. I find that subsection 19(1)(b) of FOIP does not apply to pages 21 to 50 of the PDF of the record at issue, in whole or in part.

[39] Further, I note that subsection 83(1) of EMPA provides reports submitted to the Minister pursuant to EMPA is deemed to be public information. It says:

83(1) Subject to subsections (3) to (11), all applications, information, data, test results, reports, returns and records and responses to a direction of the minister submitted to the minister pursuant to this Act, the regulations, the code or an accepted environmental protection plan are deemed to be public information.

[Emphasis added]

[40] Subsections 83(3) to (11) of EMPA sets out a process where a person can submit a written request to have all or any part of the information submitted to Environment be kept confidential for only a prescribed amount of time. The Minister of Environment may or

may not approve the written request. Cargill has not provided any information to my office whether it has engaged in the process set out in subsections 83(3) to (11) of EMPA, nor has it demonstrated that the Minister of Environment has approved such a request.

[41] Since I have found that subsection 19(1)(b) of FOIP does not apply, then there is no need to consider subsection 19(3) of FOIP. I recommend that Environment release the record at issue in full to the Applicant.

IV FINDING

[42] I find that subsection 19(1)(b) of FOIP does not apply to pages 21 to 50 of the PDF of the record at issue, in whole or in part.

V RECOMMENDATION

[43] I recommend that Environment release the record at issue in full except for the information Environment withheld pursuant to subsection 29(1) of FOIP.

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

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