



REVIEW REPORT 197-2023

Ministry of Environment

January 18, 2024

Summary:

Viterra Canada Inc. (Viterra), a third party, requested that the Commissioner review the Ministry of Environment's (Environment) decision to disclose records in response to an access to information request. Viterra claimed that the records were exempt pursuant to subsection 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found that the records at issue were not exempt pursuant to subsection 19(1)(b) of FOIP. The Commissioner recommended that Environment release the records to the Applicant within 30 days of issuance of this Report, subject to any information that may be withheld pursuant to section 21 and subsection 29(1) of FOIP.

I BACKGROUND

[1] On April 28, 2023, the Applicant submitted the following access to information request to the Ministry of Environment (Environment):

Seeking the types of reports and documents listed below for the following companies/locations:

- Viterra, Regina
 - Federated/AGT, Regina
 - Louis Dreyfus, Yorkton
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- Approval applications under the Environmental Management and Protection Act
 - Approvals issued under the Environmental Management and Protection Act
 - Technical proposals under the Environmental Assessment Act
 - Determinations under the Environmental Assessment Act

Time period – 1/1/2021 - current

[2] The same day, Environment contacted the Applicant seeking further details such as civic addresses for the sites, or legal descriptions to identify the correct site. Environment explained that most of its databases relied on such information for similar searches.

[3] On May 23, 2023, the Applicant submitted a revised access to information request to Environment as follows:

Seeking the types of reports and documents listed below for the following companies/locations:

- Viterra, Regina (NE-08-018-19 W2M, SE-08-018-19 W2M)
- Federated/AGT, Regina (FCL-AGT Canola Crush Facility, 15-NE-05-18-19 W2M)
- Louis Dreyfus, Yorkton (500 Sully Ave, Yorkton, SK, S3N 3X3)
 - Approval applications under the Environmental Management and Protection Act
 - Approvals issued under the Environmental Management and Protection Act
 - Technical proposals under the Environmental Assessment Act
 - Determinations under the Environmental Assessment Act

Time period – 1/1/2021 - current

[4] On July 6, 2023, while processing the access request, Environment identified that some portions of the responsive records included third-party information. Environment then notified the third party, Viterra, pursuant to subsection 34(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). On the same date, Environment informed the Applicant that the response time had been extended by another 30 days to August 8, 2023, pursuant to subsection 12(1)(c) of FOIP.

[5] On July 26, 2023, Viterra responded to Environment, identifying six responsive records. Viterra indicated that three of the records were available publicly, and it agreed to the release of one more responsive record to the Applicant. However, Viterra stated that two of the responsive records should be withheld pursuant to subsection 19(1)(b) and section 21 of FOIP.

- [6] On August 3, 2023, Environment responded to Viterra that it had reviewed Viterra's representation. Environment informed Viterra of its decision that it had determined that subsection 19(1)(b) of FOIP does not apply to the record and, therefore, planned to provide access to the Applicant. Environment informed Viterra of its right to request a review by my office of its decision pursuant to subsections 37(2) and 49(3) of FOIP. Environment also agreed that section 21 and subsection 29(1) of FOIP applied to parts of the records and that it would withhold those parts pursuant to these subsections.
- [7] On August 3, 2023, Environment informed the Applicant that it had received representation from the third party and took it into consideration. Accordingly, Environment decided that it would deny access to part of the record pursuant to section 21 and subsection 29(1) of FOIP. Environment also provided links to the Applicant pursuant to subsection 3(1)(b) of FOIP, for three of the six records that were available publicly, and also provided access to one record in part.
- [8] On August 23, 2023, my office received a request for a review from Viterra. My office advised Environment of the request for review and asked that it not release any records until the review is complete.
- [9] On October 19, 2023, my office notified Environment, the Applicant and Viterra that my office was undertaking a review, and that the scope will be limited to a review of subsection 19(1) of FOIP.
- [10] On December 13, 2023, Environment provided its submission to my office. The Applicant did not provide a submission to my office.
- [11] On December 22, 2023, Viterra informed my office that it had provided its representation to Environment on July 26, 2023, and provided a copy of the same representation for my office to use.

II RECORDS AT ISSUE

[12] In this review, Viterra objected to the release of two documents (the records), totaling 235 pages in full, pursuant to subsection 19(1)(b) and section 21 of FOIP. These documents are as follows:

- Regina Canola Crushing Plant – Industrial Waste Works (Approval to Construct) - Permit Application (IIW Application) – 158 pages.
- Environmental Protection Plan – Viterra Canola Crushing Plant (Viterra Final EPP) – 77 pages.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[13] Environment qualifies as a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP. Viterra is a “third party” as defined in subsection 2(1)(j) of FOIP. Therefore, I have jurisdiction to conduct this review.

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

[14] As previously mentioned, Viterra objected to the release of the records, totaling 235 pages, asserting that subsection 19(1)(b) of FOIP applied to the information. Subsection 19(1)(b) of FOIP 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;

[15] Section 19 of FOIP is a mandatory, class-based and harm-based provision, meaning, it contains both class and harm-based exemptions. As a mandatory provision, the government

institution has no, or more limited, discretion regarding whether or not to apply the exemption. That is, if the information is covered by the exemption and the conditions for the exercise of discretion do not exist, then it must not be disclosed. The provision is intended to protect the business interests of third parties and to ensure that government institutions are able to maintain the confidentiality necessary to effectively carry on business with the private sector (*Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access”, Updated October 18, 2023 [*Guide to FOIP*, Ch. 4], p.196).

[16] Pages 201 to 209 of the *Guide to FOIP*, Ch.4, outlines the following three-part test to determine if this exemption applies:

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?

[17] In my office’s Review Reports [209-2023](#) and [220-2023](#), also concerning Environment, I began my analysis of subsection 19(1)(b) of FOIP with parts two and three of the test. I will do the same, here.

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

[18] Page 203 of the *Guide to FOIP*, Ch.4, defines “supplied” to mean provided or furnished.

[19] In its submission to my office, Viterra stated:

...the Records were supplied directly by Viterra to the Ministry as required by *The Environmental Assessment Act* (Saskatchewan) (the “EAA”) and/or *The Environment Management and Protection Act, 2010* (Saskatchewan) (“EMPA”)...

[20] Environment agreed that Viterra supplied the records to it. Based on a review of the records, I am satisfied that both these records contain information provided by Viterra to Environment.

[21] As such, I find that the second part of the test for subsection 19(1)(b) of FOIP is met.

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

[22] Page 205 of the *Guide to FOIP*, Ch.4, defines “in confidence” usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained in confidence means that the supplier of the information has stipulated how the information can be disseminated. In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the government institution and the third party providing the information. “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. 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.

[23] Page 205 of the *Guide to FOIP*, Ch.4, explains that the expectation of confidentiality must be reasonable and must have an objective basis. Whether the information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled or communicated. Simply labelling documents as “confidential” does not, on its own, make the documents confidential (i.e., confidentiality stamps or standard automatic confidentiality statements at the end of emails). It is just one factor that my office considers when determining whether the information was explicitly supplied in confidence. Such notes are largely format and platitudes.

[24] Page 205 of the *Guide to FOIP*, Ch.4, further explains that “mutual understanding” means that the government institution and the third party both had the same understanding regarding the confidentiality of the information at the time it was supplied. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been supplied in confidence. However, mutual understanding alone is not sufficient.

[25] Viterra claimed that it provided the information in confidence. In its submission, it stated:

...Viterra supplied the information in the Records to the Ministry in confidence implicitly. The Records contain sensitive proprietary scientific and technical information. This information is not available to the public and there was a mutual expectation between Viterra and the Ministry that the information would be maintained in confidence. Given that the Records were provided under both the EAA and EMPA, it is Viterra's submission that the Records are confidential...

...It is further Viterra's position that if the Ministry concludes there is public interest in the Records pursuant to section 19(3) of the Act, such public interest is met through other sources (for example, the publicly available Records, which can be accessed at the following link: <https://publications.saskatchewan.ca/#/products/117580>). This publicly available information satisfies the public interest in the Records while at the same time maintaining the confidentiality of the third party information in the Records and preventing the harm that could result from release of the Records...

[26] While Viterra asserts this, it has not provided any evidence such as emails or cover letters to support its claim. Furthermore, neither of these two records appear to include statements to suggest that they were provided in confidence by Viterra to Environment.

[27] In its submission, Environment addressed the issue of confidentiality as follows:

...the representations did not explain how the information contained in the records was supplied in confidence either explicitly or implicitly...

...The Ministry explicitly expressed in its Decision Letter to Viterra... that there was no explicit or implicit understanding of confidentiality between Viterra and the Ministry.

As information such as a Permit Application and Environmental Protection Plan is information that the Ministry requests and receives regularly, there would not be an implicit understanding by the Ministry that these reports were received in confidence from Viterra.

[28] Environment added that "the information was a requirement under legislation" from Viterra, under the EMPA. Environment explained its Minister's discretion to require permits for records like the "Industrial Waste Work (IWW) Application", which is the first record, pursuant to subsection 26(1)(a) of the EMPA. Subsection 26(1)(a) of the EMPA states:

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;

[29] Environment further explained that information for the second record (i.e., Environmental Protection Plan), was required pursuant to subsection 51(e) of the EMPA, which states:

51 In this Part and in Part VIII:

...
(e) “industrial source” means a source of air contaminants that is from a prescribed category of facilities, operations and equipment.

[30] For the purposes of subsection 51(e) of the EMPA, Environment stated that an oil seed processing and dehydration facility is a prescribed facility, and that such facilities must submit an Environmental Protection Plan to the Minister pursuant to section 27 of the EMPA. Environment explained that as both records were required from Viterra for the IWW application process and to be in compliance with the Environmental Protection Plan, it did not consider that the records were provided by Viterra implicitly in confidence.

[31] In my office’s Review Reports [043-2015](#), [171-2023](#) and [220-2023](#), I found that 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 Environment required that Viterra provide the information and if there was a legislative requirement that it be held in confidence. Page 207 of the *Guide to FOIP*, Ch. 4 defines “compulsory supply” as follows:

“Compulsory supply” means there is a compulsory legislative requirement to supply information. Where supply is compulsory, it will not ordinarily be confidential. In some cases, there may be indications in the legislation relevant to the compulsory supply that establish confidentiality. The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence. Where information is required to be provided, unless otherwise provided by statute, confidentiality cannot be built in by agreement, informally or formally.

[32] I note that section 83 of the EMPA provides that information provided to Environment pursuant to the EMPA is deemed to be public information:

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.

[33] Subsections 83(3) to (11) of the EMPA provides a procedure where a person may request certain records to be kept confidential for up to a period of 5 years. The Minister must still approve the request. However, Viterra has not provided any evidence that it submitted or plans to submit any such request to Environment. As noted earlier in this Report, Environment did not consider that the records were provided by Viterra implicitly in confidence.

[34] Based on the information provided by Environment, I find that both records at issue were provided by Viterra to Environment as compulsory supply. As such, there was no implicit understanding of confidentiality. Therefore, the third part of the test has not been met. As all three parts of the test must be satisfied, I find that subsection 19(1)(b) of FOIP does not apply to the records.

[35] I recommend that Environment release the responsive records to the Applicant within 30 days of issuance of this Report, subject to any information that may be withheld pursuant to section 21 and subsection 29(1) of FOIP.

IV FINDINGS

[36] I find that I have jurisdiction to conduct this review.

[37] I find that subsection 19(1)(b) of FOIP does not apply to the records.

V RECOMMENDATION

[38] I recommend that Environment release the responsive records to the Applicant within 30 days of issuance of this Report, subject to any information that may be withheld pursuant to section 21 and subsection 29(1) of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 18th day of January, 2024.

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