



## REVIEW REPORT 199-2021

### Saskatchewan Research Council

July 13, 2022

**Summary:** The Saskatchewan Research Council (SRC) received an access to information request from the Applicant and denied them access to the record pursuant to section 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found SRC properly applied section 19(1)(b) of FOIP and recommended SRC continue to withhold the record pursuant to section 19(1)(b) of FOIP.

#### I BACKGROUND

[1] On July 26, 2021, the Saskatchewan Research Council (SRC) received an access to information request from the Applicant for the following for the timeframe August 1, 2019, to September 3, 2019:

All data collected from the 4-week continuous ambient air monitoring program for Cargill Clavet. This was conducted 24 hours per day, 7 days a week for 4 weeks by SRC with an Airpointer ambient air monitoring station which was installed southeast of the plant at [location description]. We have the summary from the program results from page 14 of the EPP, Cargill Oilseeds, [date redacted]. We are requesting all data collected in full from the 4-week program.

[2] In correspondence dated July 24, 2021, SRC responded it was withholding the record, in its entirety, pursuant to section 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[3] In an email dated August 5, 2021, the Applicant asked my office to undertake a review of SRC's decision.

[4] On August 18, 2021, my office notified SRC, the Applicant and the third party (Cargill) of my office's intention to undertake a review.

[5] SRC and Cargill provided their submissions on November 29, 2021. The Applicant was invited to provide a submission but did not provide one.

## II RECORDS AT ISSUE

[6] At issue is a 22-page report SRC has withheld in its entirety pursuant to section 19(1)(b) of FOIP.

## III DISCUSSION OF THE ISSUES

### 1. Do I have jurisdiction?

[7] In previous review reports concerning SRC, I have stated it qualifies as a "government institution" pursuant to section 2(1)(d)(ii) of FOIP and section 3 and Part I of the Appendix of *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Therefore, I have jurisdiction to conduct this review.

### 2. Did SRC properly apply section 19(1)(b) of FOIP?

[8] Section 19(1)(b) 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:

...

(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;

[9] Section 19(1)(b) of FOIP is a mandatory, class-based exemption. It permits refusal of access in situations where a record contains financial, commercial, scientific, technical or labour relations information that was supplied in confidence to a government institution by a third party (*Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated April 30, 2021 [*Guide to FOIP*, Ch. 4], p. 197).

[10] Section 2(1)(j) of FOIP defines a “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.

[11] Because Cargill is not the Applicant or a government institution, it qualifies as a third party.

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

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?

[13] SRC is relying on section 19(1)(b) of FOIP to withhold the 22-page report in its entirety. The report includes a statement that it was completed for Cargill by SRC.

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

[14] SRC stated the report contains technical and scientific information.

[15] “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).

[16] “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).

[17] SRC submitted as follows:

In this case, the Third Party hired SRC to provide testing and analysis on the information in question and SRC is qualified to conduct the same. Based on the above definition, the Record constitutes “technical information” since it was prepared by SRC, a professional in the field, and it describes the operation and maintenance of the Third Party’s facility and processes. Specifically, the Record contains explanations and descriptions related to the monitoring and testing of ambient air samples at the Third Party’s industrial site in Clavet, Saskatchewan.

...

In particular, pages 1 through 7 and Appendix A of the Record relate to the observation and testing of specific hypothesis and conclusions by SRC in the field of natural sciences. Similar information was found by your office to qualify as scientific or technical information in Report F-2006-002 at paragraph 90.

[18] From a review of the report in question, it appears to outline SRC’s results for air testing by Cargill. For example, pages 2 to 6 include data SRC gathered as part of its testing, while page 7 provides SRC’s interpretation of the data. Given the definitions I previously outlined, the data appears to be scientific in nature and would not be data someone without expertise in, or knowledge of, environmental testing could interpret or understand. That is, someone with expertise would need to interpret the data. The individual who conducted

the testing is listed as an air technologist who appears to have a background in science. I am satisfied the report contains information that is scientific in nature, which meets the first part of the test. I will now consider the second part of the test.

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

[19] “Supplied” means provided or furnished. Information may qualify as “supplied” if it was directly supplied to a government institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party (*Guide to FOIP*, Ch. 4, p. 200).

[20] Records can still be “supplied” even when they originate with the government institution (i.e. the records still may contain or repeat information extracted from documents supplied by the third party). However, the third party objecting to disclosure will have to prove that the information originated with it and that it is confidential (*Guide to FOIP*, Ch. 4, p. 200).

[21] The following are examples of information *not* supplied by a third party: information that reflects the viewpoints, opinions or comments of government officials; reports resulting from factual observations made by government inspectors; and the terms of a lease negotiated between a third party and a government institution (*Guide to FOIP*, Ch. 4, p. 200).

[22] SRC submitted as follows:

... Cargill clearly supplied the Record to SRC. SRC collected test result information from air samples on Cargill’s property needed to conduct hydrogen sulfide (H<sub>2</sub>S) testing. SRC subsequently prepared a report summarizing the analysis of this information. Thus, the information collected was information embedded in the air samples and the disclosure of the information permitted SRC to make inferences from the same. For this reason, the Record is considered information supplied by Cargill to a government institution.

[23] SRC is arguing that because, “SRC collected test result information from air samples on Cargill’s property needed to conduct hydrogen sulfide (H<sub>2</sub>S) testing”, then the information was supplied by Cargill to SRC. In making its argument, SRC appears to be referring to

my office's [Review Report F-2006-002](#), also concerning SRC. In that report, this office considered the meaning of "supplied" in the context of section 19(1)(b) of FOIP. Paragraphs [48] and [49] of that report stated as follows:

[48] I adopt the above reasoning from the Ontario order. If analysis was conducted on samples, any information derived about the samples by SRC would constitute information, for purposes of the Act, that was provided to SRC from the supplier of the sample. I find that when Environment Canada voluntarily supplied samples to SRC and requested that SRC analyze those samples and report back to Environment Canada this activity falls within the scope of the phrase "information supplied" to a government institution by a third party. This conclusion is critical in consideration of the applicability of both sections [13(1)(a) & 19(1)(b) of the Act].

[49] If the record was prepared by SRC but is built upon information provided by Environment Canada, then this part of the provision applies, but only if the other elements of the sections are also present.

[24] In [Order PO-1811](#), the Ontario Information and Privacy Commissioner (ON IPC) considered a matter where certain information had been collected by Ontario's Ministry of Agriculture, Food and Rural Affairs pursuant to section 17(1)(a) of Ontario's *Freedom of Information and Protection of Privacy Act*. This section, which deals with similar types of information, provides as follows:

17 (1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

[25] In Order PO-1811, the ON IPC stated as follows:

In the circumstances, I am satisfied that all of Record 1, and Records 2c, 2h, 2o and 2r either contain or would reveal information supplied by the affected person to the Ministry. I accept that much of this information was derived from samples provided by the affected person. In the circumstances, however, **I find that by voluntarily providing samples to the Ministry for testing, the affected person was, in effect, supplying information which could be directly derived from the samples. In essence, the test result information was embedded in the samples, and the affected person voluntarily provided that information by providing the samples, and requesting that the Ministry extract this information and report it back to the affected person.** In my view, this situation can be analogized to circumstances where

an affected person retains an outside expert and provides it with samples for testing, obtains the test results, and then provides this information to a government institution. This office has found that such circumstances are sufficient to fall within the scope of the word “supplied” in section 17(1) of the Act [see, for example, Orders P-974 and PO-1803]. This situation can be contrasted with circumstances where an institution, pursuant to a statutory mandate, gathers information through observation in the course of entering and inspecting the premises of a business. In these latter circumstances, this office has found that the information gathered was not supplied for the purpose of section 17(1) [see, for example, Order 16].

[Emphasis added]

[26] Section 16(1) of Alberta’s *Freedom of Information and Protection of Privacy Act* is also similar to section 19(1)(b) of FOIP as follows:

**16(1)** The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

...

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, explicitly or implicitly, in confidence, and

[27] In [Order F2012-14](#), Alberta’s Information and Privacy Commissioner (AB IPC) considered a matter whereby an applicant sought access to information that included information on water well testing. In that matter, the AB IPC stated as follows at paragraphs [136] to [138] with respect to the nature of “supplied”:

[para 136] With respect to whether any information has been supplied in confidence within the terms of section 16(1)(b), the Applicant submitted that only the water sample and well location are supplied by third parties who seek to have their water tested. He argued that the water sample is not really information, that the well location is about the well rather than the third party, and that the testing results derived from the water sample are not supplied by the third parties. In short, the Applicant noted that the information at issue in this inquiry is comprised of the analyses of water, not anything that businesses actually supplied themselves.

[para 137] Counsel for the Public Body, however, argued that landowners who avail themselves of the Water Well Testing Service are nonetheless arranging for the scientific or technical information about their water to be determined, even though that

determination is not made by them. Counsel for the Public Body suggested that it would not be reasonable for landowners to have to do their own testing.

[para 138] I find it plausible to say that some third parties supplied the information at issue in confidence, within the terms of section 16(1)(b). **While they did not supply the actual chemical and microbiological analyses appearing in the records, they supplied the water that gave rise to that information,** along with the legal land description that links the water to their property. While the information about the water is not information about a business – anymore that it is personal information about an individual – the businesses may be said to have supplied, in confidence, the fact that they were having their water tested.

[Emphasis added]

[28] In the matter before me, SRC did not have a statutory mandate to test for the amount of hydrogen sulfide on Cargill's property. Rather, Cargill contracted with SRC to test and analyze the amount of hydrogen sulfide on its property. Ostensibly, hydrogen sulfide is a byproduct of Cargill's operations. SRC was then to prepare a report of its findings and present it to Cargill, which it did.

[29] Like the Ontario and Alberta matters, what SRC required for testing was the information, or amount of hydrogen sulfide, embedded in the air samples. Cargill gave SRC access to its property to set up testing equipment and gather the hydrogen sulfide samples, so it can be said to have been voluntarily supplying that information to SRC. SRC could then extract the information from the samples and report back to Cargill. I am satisfied, then, for the purposes of section 19(1)(b) of FOIP, that Cargill (as a third-party) supplied information to SRC. I now need to consider the third part of the test and if Cargill supplied the information to SRC implicitly or explicitly in confidence.

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

[30] "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. 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 (*Guide to FOIP*, Ch. 4, p. 202).

[31] SRC submitted as follows:

When services are performed by SRC the information gathered, including the samples provided or obtained, and the end product or result are the property of the client. Such end products or results are then stored by SRC in order for the client to have access to them at their discretion. In that sense, SRC views client information and the like in the same way a doctor would view the information of his or her patient. A reasonable person would assume that such information would be regarded as confidential.

...

**In addition to relying on SRC's policies on client confidentiality, the Third Party also provided the information explicitly through an expressed condition of confidentiality at section 9 in the agreement between the Third Party and SRC.**

The Third Party also issued a Purchase Order to SRC which contained an expressed condition of confidentiality at section 8 of its Purchase Order Terms and Conditions. These agreements can be referred to in Appendix "A".

The final report prepared by SRC, which makes up the Record was also marked and titled "confidential." The labelling of documents as "confidential" and the existence of an express condition of confidentiality are both factors considered when determining whether the information was explicitly supplied in confidence. As such, the Record was also supplied to SRC in confidence explicitly.

[Emphasis added]

[32] The "expressed condition of confidentiality at section 9 in the agreement between [Cargill] and SRC" states as follows:

9. CONFIDENTIALITY. Vendor [SRC] agrees to keep confidential the terms and conditions of the Order and all proprietary information disclosed by or on behalf of Purchaser [Cargill] or otherwise learned or obtained by Vendor in connection with the Order or the performance hereof. Vendor will not use any of this information other than in connection with the performance of the Order and will not disclose any of this information except to the extent required by law and then only after prior notice to Purchaser.

[33] I note the report in question was marked as "confidential" by SRC.

[34] SRC also stated it operates in a competitive market, and that it would not be able to compete competitively if it could not provide confidential services. To this end, I note SRC's [Services Schedule](#) speaks to the following in different areas: that SRC treats clients with "strict confidentiality" with respect to its services and products; that SRC embeds statements of confidentiality in its code of ethics and standards; and that SRC delivers its reports in strict confidence. It seems that a third party contracting with SRC would, then, expect a certain level of confidentiality. For section 19(1)(b) of FOIP to apply, there must be a mutual understanding of this expected confidentiality (*Guide to FOIP*, Ch. 4, p 202).

[35] From the materials SRC provided to my office, it appears SRC's standard is to provide confidential services to third parties with which it contracts. Specific confidentiality clauses, such as what I have quoted from SRC in this Report, are built into its contracts or agreements and outline how SRC and the purchaser will manage the information. This way, SRC would be treating information supplied by third parties in a consistent manner, and so there is mutual understanding of the confidentiality provisions. It is apparent this existed in the relationship between SRC and Cargill in this matter. In these ways, confidentiality has been explicitly or clearly stated. This meets the third part of the test.

[36] As all three parts of the test for section 19(1)(b) of FOIP have been met, I find SRC properly applied section 19(1)(b) of FOIP. I recommend it continue to withhold the report in question pursuant to section 19(1)(b) of FOIP.

#### **IV FINDING**

[37] I find SRC properly applied section 19(1)(b) of FOIP.

#### **V RECOMMENDATION**

[38] I recommend SRC continue to withhold the report in question pursuant to section 19(1)(b) of FOIP.

Dated at Regina, in the Province of Saskatchewan, this 13th day of July, 2022.

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