



REVIEW REPORT 204-2022

Ministry of Environment

March 15, 2023

Summary: The Applicant submitted an access to information request to the Ministry of Environment. Environment notified a third party, Prince Albert Pulp Inc. (PAPI) of the access request pursuant to section 34 of *The Freedom of Information and Protection of Privacy Act* (FOIP). PAPI responded by asserting that subsections 19(1)(b) and (c) of FOIP apply to the records. Environment responded to PAPI by indicating it would provide the Applicant partial access to the records at issue. PAPI requested a review by the Commissioner. The Commissioner found that subsections 19(1)(b) and (c) of FOIP do not apply to the records at issue. The Commissioner recommended that Environment release the records at issue to the Applicant, except for the portions it withheld pursuant to subsection 29(1) of FOIP.

I BACKGROUND

[1] On August 16, 2022, the Applicant submitted the following access to information request to the Ministry of Environment (Environment):

Most recent Phase I ESA and current D&R Plan for Prince Albert Pulp Inc.'s Pulp Mill located within the following quarter sections:

NW- & NW-26-49-25 W2M
SW-35-49-25 W2M
NW- & NW-27-49-25 W2M
SE-34-49-25 W2M

[2] In a letter dated September 8, 2022, Environment notified the third party, Prince Albert Pulp Inc. (PAPI), of the access request pursuant to subsection 34(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Environment indicated that it intended to give the Applicant access to the enclosed records. However, it invited PAPI to make representations as to whether the records contain information as described in subsection 19(1) of FOIP.

[3] In a letter dated September 30, 2022, PAPI responded to Environment. It asserted that the records should be withheld pursuant to subsections 19(1)(b) and (c) of FOIP.

[4] In an email dated October 3, 2022, Environment responded to PAPI. Environment invited PAPI to provide further representations as to how subsections 19(1)(b) and (c) of FOIP applies. In its email, Environment said:

...the ministry did not consider these records to be confidential because the reports were requested under its regulatory powers. Section 11 of EMPA 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.

[5] In a letter dated October 7, 2022, PAPI responded to Environment. PAPI offered arguments for subsections 19(1)(b) and (c) and proposed “draft redactions” to the records.

[6] In a letter dated October 14, 2022, Environment indicated to PAPI that it will give the Applicant partial access to the records. It said:

We have taken your representations into consideration and have decided that partial access will be given to the records. 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 records has been redacted. Access to this information is denied pursuant to section 29(1) of the Act, disclosure of personal information, section 19(1)(b)(c) of the Act, third party information.

[7] On November 1, 2022, my office received a request for review from PAPI.

- [8] On November 15, 2022, my office notified Environment, PAPI and the Applicant that my office would be undertaking a review.
- [9] On January 17, 2023, my office received a submission from PAPI.
- [10] On March 2, 2023, my office received a submission from Environment.
- [11] My office did not receive a submission from the Applicant.

II RECORDS AT ISSUE

- [12] At issue are two records. The first record is a Decommissioning and Reclamation Plan (D&R plan) report February 2019; it totals 75 pages (Record 1). The second record is a letter dated November 26, 2019, from PAPI to Environment that includes enclosures (5 appendices); it totals 28 pages (Record 2).
- [13] As noted in the background, Environment indicated its decision was to provide the Applicant partial access to the record at issue pursuant to subsection 19(3) of FOIP. Environment indicated it was withholding other portions of the records pursuant to subsections 19(1)(b), (c), and 29(1) of FOIP. PAPI requested this review regarding Environment's decision to release records. PAPI stated that it believes subsections 19(1)(b) and (c) of FOIP apply. Therefore, I will be only considering subsections 19(1)(b) and (c) of FOIP. If I find that subsection 19(1)(b) and/or (c) of FOIP apply to any part of the record, I will also consider Environment's decision to release records pursuant to subsection 19(3) of FOIP. I will not be considering subsection 29(1) of FOIP in this review.

III DISCUSSION OF THE ISSUES

1. Do I have jurisdiction?

[14] Environment qualifies as a “government institution” pursuant to subsection 2(1)(d) of FOIP. PAPI 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?

[15] PAPI asserted that subsection 19(1)(b) of FOIP applies to all or portions of the following:

Record 1

Pages 8 to 11, 13, 15 to 18, 27 to 71, 73 to 74 of PDF (or Pages 3 to 6, 8, 10 to 13 of Report. Pages 5 to 6 of Figures. All of Appendix A, including title page. Pages 1 and 2 of Appendix B.)

Record 2

Page 1 to 5, 8 to 16, 18 to 20, 22, 24 to 26, 28 of PDF

[16] Environment asserted that subsection 19(1)(b) of FOIP applied to all or portions of the following:

Record 1

Page 15 to 18, 27 to 28, and 74 of PDF (or pages 10 to 13 of report. Pages 5 to 6 of Figures. Page 2 of Appendix B).

Record 2

Pages 5, 8 to 16, 22, 24 to 26, and 28 of PDF

[17] 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;

[18] My office uses the following three-part test to determine if subsection 19(1)(b) of FOIP 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?

(*Guide to FOIP*, Chapter 4, “Exemptions from the Right of Access”, updated April 30, 2021 [*Guide to FOIP*, Ch. 4], pp. 196-202)

[19] All three parts of the test must be met in order for subsection 19(1)(b) of FOIP to apply.

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

[20] PAPI asserted that both records contained financial, commercial, scientific and technical information. Its submission said:

PAPI submits that the Records contain financial, commercial, scientific, and technical information. The Redactions concern detailed plans, anticipated costs, and strategic overviews of key aspects of the Mill decommissioning and reclamation project. This includes, but is not limited to:

- specific information regarding the findings and processes of multiple chemical analyses conducted at the Mill by Golder Associates Ltd.;
- descriptions of the processes for the demolition of buildings, and associated costs;
- description of the processes for the decommissioning and treatment of lagoons, and associated costs;
- description of the processes for the closure of landfills, and associated costs.

This constitutes financial and commercial information pertaining to PAPI.

This information also constitutes technical information. The OPIC [sic] has found that records which contain dates and/or information directly related to testing and analysis conducted by engineering consultants and/or engineers contracted by a third party who are qualified to conduct such testing and analysis constitutes technical information.

[21] Environment asserted that the records contain financial and technical information. Its submission said:

The information being withheld under section 19(1)(b) qualifies as financial information as the figures relating to how much something will cost to decommission

and reclaim the site and the amount of material/resources used is considered financial in nature. It is information about the costs and resources required and was collected by a professional in the field. The Ministry submits that it has established that the monetary figures and the information outlining the resources required to decommission and reclaim the site are financial information.

...

The information being withheld under section 19(1)(b) qualifies as technical information as it outlines closure information regarding contours and max capacity detailing the steps involved which is considered technical in nature. Additionally, the information was prepared by a professional in the field. The Ministry submits that it has established that the information regarding closure information specific to the site is technical information.

- [22] “Financial information” is information regarding monetary resources, such as financial capabilities, assets and liabilities, past or present. Common examples are financial forecasts, investment strategies, budgets, and profit and loss statements. The financial information must be specific to a third party (*Guide to FOIP*, Ch. 4, p. 198).
- [23] “Commercial information” is information relating to the buying, selling or exchange of merchandise or services. This can include third party associations, past history, references and insurance policies and pricing structures, market research, business plans, and customer records (*Guide to FOIP*, Ch. 4, p. 198).
- [24] “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).
- [25] “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).

[26] Record 1 is a D&R Plan. I note that the D&R Plan was prepared by a consulting firm. Based on a review of the content, I find that it contains scientific data, including methodologies undertaken to conduct monitoring and assessment programs and their results. Further, I find that it contains technical information including the plans on how to decommission a pulp and paper mill, including plans on how to demolish buildings, and plans on how to reclaim the land. I will consider if the second part of the test is met for the scientific data.

[27] Record 2 is a letter dated November 19, 2019, from PAPI to Environment and its 5 appendices. I find that Record 2 contains scientific and technical information similar to Record 1. I will consider if the second part of the test is met for the scientific and technical information.

[28] I note that both PAPI and Environment identified the estimated costs of decommissioning and the reclamation of the mill site in Records 1 and 2 as “financial information”. According to the Government of Saskatchewan’s resource “[Financial Assurance Requirements – Alternative Solution Guideline](#)”, subsection 9(1) of *The Environmental Management and Protection (General) Regulations*, requires a person who intends to construct, alter, operate, temporarily close or decommission a facility to obtain a permit and provide financial assurance in the form and amount acceptable to Environment. Facilities requiring permits include pulp or paper mills. The person will be required to provide a detailed D&R plan that includes estimated costs of decommissioning and the reclamation of the mill site. Such information will be used by the Environment to determine the amount of financial assurance required. The purpose of the financial assurance is to ensure adequate funds are in place to complete the accepted D&R plan. Financial

assurances are required to be submitted to Environment pursuant to section 17 of *The Environmental Management and Protection Act* (EMPA), which says:

17(1) The minister shall not accept a corrective action plan that proposes risk management with future reclamation unless the responsible party provides a financial assurance that will ensure that the site is ultimately reclaimed.

(2) For the purposes of this section, the financial assurance must be in the amount and in a form that is acceptable to the minister.

(3) The minister may require a financial assurance in an amount and in a form that is acceptable to the minister for corrective action plans that propose actions different than those set out in subsection (1).

[29] However, based on the materials provided to me, I do not find that the estimated costs to decommission to be specific to PAPI. That is, the estimated costs do not reflect financial capabilities, assets and liabilities of PAPI for the purposes of this provision. The estimated costs are simply a quote to decommission and reclaim the mill site. As such, I do not find that Records 1 and 2 contain financial information.

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

[30] “Supplied” means provided or furnished (*Guide to FOIP*, Ch. 4, p. 200). Based on a review, I am satisfied that both Records 1 and 2 contain information supplied by PAPI to Environment. The second part of the test is met for the scientific and technical information in Records 1 and 2.

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

[31] 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. 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).

[32] In its submission, PAPI asserted as follows:

The Records were supplied by PAPI to the Province with either the implicit or explicit expectation of confidentiality. To the extent certain information was communicated to the Province without an explicit statement regarding its confidential nature, there was an implicit and objectively reasonable expectation of confidentiality by virtue of the commercially-sensitive nature of the information being supplied.

...

PAPI further wishes to advise that it is party to an agreement with a Saskatchewan government agency concerning the Mill, which **contains an express covenant of confidentiality binding all parties to the agreement**, including the government agency (the “Government Agreement”). The Records arose and were created in part as a result of the Government Agreement. PAPI submits that, because the Records arose as a result of the Government Agreement and the obligations and covenants contained therein, the Records fall under the Government Agreement’s express confidentiality covenant.

In the event that disclosure of the Government Agreement is required for the purposes of this review, the consent of the Saskatchewan government agency will be required—the Government Agreement expressly stipulates that the consent of all parties to the Government Agreement is required for its disclosure.

[Emphasis added]

[33] PAPI further acknowledged that information submitted to Environment pursuant EMPA is considered to be public information. This is true. Subsection 83(1) of the EMPA provides as follows:

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.

[34] In its submission, PAPI indicated it has met the requirement pursuant to subsection 83(6) of the EMPA for the information to be kept confidential. Subsection 83(6) of the EMPA provides:

83(6) On receipt of a written request pursuant to subsection (3) or (4), the minister may approve the request if the minister is satisfied that the application, information, data, test result, report, return, record or response:

(a) contains matters that:

(i) are of a commercial, financial, scientific or technical nature; and

(ii) would reveal proprietary business, competitive or trade secret information about that person's business; or

(b) meets any prescribed criteria.

[Emphasis added]

[35] PAPI provided my office with no evidence it had submitted a written request pursuant to subsections 83(3) or (4) of the EMPA and that the Minister of Environment approved its request for certain information be kept confidential.

[36] Similar to PAPI, Environment provided arguments that PAPI supplied information to it in confidence. However, it also said the information was “legislatively required” to be supplied by PAPI under the EMPA. It said:

The Ministry submits that the information was supplied in confidence implicitly. ...Although PAPI was legislatively required to provide such information under the Environmental Management and Protections Act (EMPA), that does not affect the confidentiality of the information. The Ministry still treats the information as confidential as is demonstrated when it sought PAPI's input when the information was requested pursuant to an access to information request.

[Emphasis added]

[37] In the past, my office has said information that is “compulsory supplied” by third parties to government is not considered to be confidential.

[38] “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 (*Guide to FOIP*, Ch. 4, p. 204).

[39] In my office's [Review Report 043-2015](#) and [Review Report 057-2022](#), I found that information submitted to Environment under the EMPA to not have been supplied in confidence. This current case before me is no exception. Subsection 83(1) of the EMPA is clear that information submitted to Environment under the EMPA is deemed to be public information. I do not have evidence before me that PAPI undertook the process set out in subsections 83(3) or (4) of the EMPA or that the Minister of Environment approved the information to be kept confidential for a period of 5 years.

[40] As the third part of the three-part test for subsection 19(1)(b) of FOIP is not met, I find that subsection 19(1)(b) of FOIP does not apply.

3. Does subsection 19(1)(c) of FOIP apply to the records?

[41] PAPI applied subsection 19(1)(c) of FOIP to the same pages to which it claimed subsection 19(1)(b) of FOIP applied as follows:

Record 1

Pages 8 to 11, 13, 15 to 18, 27 to 71, 73 to 74 of PDF (or Pages 3 to 6, 8, 10 to 13 of Report. Pages 5 to 6 of Figures. All of Appendix A, including title page. Pages 1 and 2 of Appendix B.)

Record 2

Page 1 to 5, 8 to 16, 18 to 20, 22, 24 to 26, 28 of PDF

[42] Environment applied subsection 19(1)(c)(i) and (ii) of FOIP to the same pages to which it claimed subsection 19(1)(b) of FOIP applies as follows:

Record 1

Page 15 to 18, 27 to 28, and 74 of PDF (or pages 10 to 13 of report. Pages 5 to 6 of Figures. Page 2 of Appendix B)

Record 2

Pages 5, 8 to 16, 22, 24 to 26, and 28 of PDF

[43] Subsection 19(1)(c) of FOIP provides:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(c) information, the disclosure of which could reasonably be expected to:

(i) result in financial loss or gain to;

(ii) prejudice the competitive position of; or

(iii) interfere with the contractual or other negotiations of;

a third party;

[44] I will consider subsection 19(1)(c)(i) and (ii) of FOIP separately below.

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

[45] My office uses the following two-part test to determine if subsection 19(1)(c)(i) of FOIP applies:

1. What is the financial loss or gain being claimed?
2. Could the release of the record reasonably be expected to result in financial loss or gain to a third party?

(Guide to FOIP, Ch. 4, p. 211)

[46] “Financial loss or gain” must be monetary, have a monetary equivalent, or value (e.g., loss of revenue or loss of corporate reputation) *(Guide to FOIP, Ch. 4, p. 211)*.

[47] In order for subsection 19(1)(c)(i) of FOIP to apply, there must be objective grounds for believing that the disclosing of the information could result in loss or gain to a third party measured in monetary terms. The disclosure of information that is not already in the public domain that is shown to give competitors a head start in developing competing products,

or to give them a competitive advantage in future transactions may, in principle, meet the requirements. The evidence would have to demonstrate that there is a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure. However, asserting disclosure would create a more competitive environment does not give rise to a reasonable expectation of a material financial loss or prejudice to a third party's competitive position (*Guide to FOIP*, Ch. 4, p. 211).

[48] PAPI provided several arguments as to how there could be a financial loss or gain. In summary, it said that the anticipated decommissioning and reclamation costs:

- would be “extremely valuable” to its competitors when competing for contracts. PAPI asserted that “In a competitive market such as the pulp industry **any information** can be used by a competitor to improve its own strategic planning and how it competes with PAPI.” [Emphasis added];
- could be used by potential buyers and sellers to influence negotiations in the event the mill was sold; and
- could be used by contractors, suppliers, and other actors as a reference point when negotiating environmental, labour and other associated costs with respect to other mill sites operated by PAPI. It says that the redacted information “contains valuable internal information that could be used against PAPI in numerous ways that could reasonably be expected to result in financial harm”.

[49] PAPI also asserted that that revealing the redacted information would provide its suppliers and clients with a competitive advantage “that would invariably result in less beneficial arrangement for PAPI and therefore undue financial loss and associated harm”.

[50] Environment provided my office with similar arguments. In summary, it said that:

- competitors could use the “financial information” to their advantage;
- a potential contractor could use “financial information” for quotes. Releasing such information “would discourage quote development”;
- suppliers and clients would have a competitive advantage if they had the redacted information; and

- suppliers and clients would have an advantage if they had the “financial figures” when negotiating pricing for future agreements and contracts.

[51] However, I also note that Environment indicated in its submission the following:

D&R plan estimates change based on economic conditions and the quotes are required to be updated every five years.

[52] Based on the submissions provided to my office, I am not persuaded that the release of the redacted information will result in a financial loss or gain. First, PAPI has not identified the financial loss or gain. In its submission, PAPI argued there could be “financial harm” or “undue financial loss and associated harm” but does not identify precisely the financial loss or gain that would result from release of the information.

[53] PAPI also asserted that the information could be used by potential buyers and sellers to influence negotiations in the event the mill was sold. However, I note that such information must be disclosed if PAPI was to sell the mill. Subsection 19(1) of EMPA provides that if an environmentally impacted site is transferred from one person to another, the other person must agree to undertake the responsibilities set out in an “corrective action plan” (such as a D&R plan) and provide the Minister of Environment with financial assurance. Subsection 19(1) of EMPA provides:

19(1) Subject to subsection 20(2), responsibility for an environmentally impacted site may be transferred by a person responsible to another person if:

(a) the other person has agreed to accept responsibility for the environmentally impacted site in the prescribed manner or in any manner set out in the code;

(b) a site assessment has been conducted in accordance with any prescribed requirements or any requirements set out in the code setting out the nature and extent of the presence of the substance that may cause or is causing an adverse effect on the site and any adjacent property;

(c) a corrective action plan is prepared that satisfies any prescribed requirements or any requirements set out in the code;

(d) an estimate of the costs to carry out the corrective action plan mentioned in clause (c) has been prepared;

(e) the other person has agreed to undertake the corrective action plan within the time frame contemplated in the corrective action plan; and

(f) the other person has provided the minister with a financial assurance in the amount and in the form acceptable to the minister equal to:

(i) the anticipated costs of reclaiming the site; and

(ii) an additional contingency amount that is equal to the prescribed amount or that satisfies the requirements set out in the code.

(2) On being satisfied that the corrective action plan mentioned in clause (1)(c) provides for an appropriate means of addressing the adverse effect on the site, the minister shall direct that the corrective action plan be filed in the registry.

[Emphasis added]

[54] Therefore, based on subsection 19(1) of EMPA, PAPI would need to disclose the redacted information, including the cost estimates, to a potential buyer.

[55] Environment asserted that the release of the information would result in other parties having an “advantage” over PAPI. However, it does not identify the financial loss or gain resulting from the release of the information or precisely what the advantage is. Further, I note that Environment indicated that the estimates provided in D&R plans change based on economic conditions and they are required to be updated every five years. The changing nature of the cost estimates would suggest that such information would not give other parties an advantage over PAPI.

[56] As the two-part test for subsection 19(1)(c)(i) of FOIP is not met, I find that subsection 19(1)(c)(i) of FOIP does not apply.

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

[57] My office uses the following two-part test to determine if subsection 19(1)(c)(ii) of FOIP applies:

1. What is the prejudice to a third party's competitive position that is being claimed?
2. Could the release of the record reasonably be expected to result in the prejudice?

(*Guide to FOIP*, Ch. 4, p. 216)

[58] "Prejudice" in this context refers to detriment to the competitive position of a third party (*Guide to FOIP*, Ch. 4, p. 216).

[59] "Competitive position" means the information must be capable of use by an existing or potential business competitor, whether or not that competitor currently competes for the same market share. This may include information that reveals the internal workings of a private company (*Guide to FOIP*, Ch. 4, p. 216).

[60] PAPI asserted that the redacted information is about PAPI's operations and future plans. It said:

As noted, the Redactions concern plans to decommission and reclaim the Mill. This includes information regarding PAPI's operations and future plans. Disclosure of the Redactions would provide PAPI's competitors with an undue advantage in the highly competitive pulp industry. Information about PAPI's future plans would provide competitors with a significant competitive advantage, which could reasonably be expected to affect PAPI's ability to compete for new clients, negotiate with suppliers, and hire and retain staff.

[61] Based on a review of Record 1, I note certain sections such as section 1.2.2 "Site Operations" provides a historical overview of the operations at the site. However, neither PAPI nor Environment has marked this particular portion to be withheld. It is unclear precisely what portions of the records that PAPI has identified as describing its "operations". I note there are phrases such as "current operations" or "landfill operations" or "mill operation". However, there are no specific details of such operations. It is unclear precisely what portions of the records to which PAPI has identified as detailing its "operations" that should be withheld under subsection 19(1)(c)(ii) of FOIP. Similarly, based on a review of Record 2, it is not clear which portions detail the "operations" information PAPI wishes to be withheld.

[62] Regarding “future plans”, I note that both Records 1 and 2 are about “future” decommissioning and reclamation plans of PAPI. PAPI asserted that disclosure of such information would give its competitors a “significant competitive advantage.” However, it is unclear how the disclosure of such information would prejudice PAPI’s competitive position. I note that in my office’s [Review Report 057-2022](#), the record at issue in that review included details about a third party’s future projects and plans. I had found subsection 19(1)(c)(ii) of FOIP applied to such information because if the information were disclosed, its competitors will have an opportunity to react and adjust their own plans accordingly. However, the nature of future decommissioning and reclamation plans in this case are different from future projects and plans in the records at issue in Review Report 057-2022. It is unclear how a competitor can use such information in the records at issue to outcompete PAPI in decommissioning or reclaiming PAPI’s mill site. PAPI has not explained how such information can be used by competitors.

[63] In its submission, Environment asserted that the redacted information contains financial figures and operation information. It said:

In this instance the Ministry agrees with PAPI that if the information were released competitors would have access to information that would give the competitors an advantage. This advantage could affect PAPI’s ability to compete for new contractors, negotiate with suppliers and potential buyers. The information contains financial figures and operation information that if released could negatively affect their competitive position and could reasonably be expected to result in financial harm.

...

Although PAPI was legislatively required to provide such information under the Environmental Management and Protection Act (EMPA), that does not affect whether harm would result from its disclosure by the Ministry. There must be a reasonable expectation that disclosure could result in financial loss or gain to PAPI. In this case, as mentioned previously the harm could be used by competitors to PAPI’s disadvantage in future negotiations. The number of businesses operating in this field is small and therefore, the Ministry submits the harm is reasonable.

[64] Based on the above, Environment is asserting that the disclosure of redacted information would give PAPI’s competitors an advantage in competing for contractors and in negotiations with suppliers and potential buyers. However, Environment has not explained precisely how the redacted information would give PAPI’s competitors an advantage. For

example, how would revealing the details of decommissioning a particular area of the mill site provide a competitor an advantage? How would the cost estimates to decommission and reclaim the mill provide a competitor an advantage? Section 61 of FOIP places the burden of proof on Environment to make the case that an exemption applies. It is not for my office to make these arguments for Environment. As the second part of the test is not met, I find that subsection 19(1)(c)(ii) of FOIP does not apply.

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

[65] My office uses the following two-part test to determine if subsection 19(1)(c)(iii) of FOIP:

1. Are there contractual or other negotiations occurring involving a third party?
2. Could release of the record reasonably be expected to interfere with the contractual or other negotiations of a third party?

(Guide to FOIP, Ch. 4, pp. 221-222)

[66] Below is the analysis to determine if the two-part test is met.

1. Are there contractual or other negotiations occurring involving a third party?

[67] A “negotiation” is a consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter. It can also be defined as dealings conducted between two or more parties for the purpose of reaching an understanding. It connotes a more robust relationship than “consultation”. It signifies a measure of bargaining power and a process of back-and-forth, give-and-take discussion (*Guide to FOIP, Ch. 4, p. 221*).

[68] Prospective or future negotiations could be included within this exemption, as long as they are foreseeable. It may be applied even though negotiations have not yet started at the time of the access to information request, including when there has not been any direct contact with the other party or their agent. However, a vague possibility of future negotiations is

not sufficient. There must be a reasonable fact-based expectation that the future negotiations will take place (*Guide to FOIP*, Ch. 4, p. 221).

[69] Once a contract is executed, negotiation is concluded. The exemption would generally not apply unless, for instance, the same strategy will be used again and it has not been publicly disclosed (*Guide to FOIP*, Ch. 4, p. 222).

[70] In its submission, PAPI explained that to “generate” the estimates in the records at issue, PAPI sought and received quotes and estimates from third party service providers. It said that these third party service providers provided such estimates to PAPI in good faith on the mutual understanding that this information “would be treated as confidential”. As such, the disclosure of such information would cause harm to the third parties as their competitors would have access to the quotes and estimates. The disclosure would negatively impact PAPI’s future relationship with the third party service providers.

[71] Based on PAPI’s submission, it appears that negotiations took place between PAPI and third party service providers when it sought and received quotes and estimates. Ultimately, PAPI selected one third party service provider’s estimates to submit to Environment. Since PAPI is required to submit such information every five years to Environment, it is conceivable that future negotiations will take place. Therefore, the first part of the two-part test is met.

2. Could release of the record reasonably be expected to interfere with the contractual or other negotiations of a third party?

[72] “Interfere” means to hinder or hamper (*Guide to FOIP*, Ch. 4, p. 222).

[73] Although PAPI may have sought and received quotes and estimates from more than one third party service provider, it appears that PAPI ultimately chose one specific provider’s cost estimates to submit to Environment as required by EMPA. PAPI asserted that there was a mutual understanding that redacted information, including the cost estimates, “would be treated as confidential”. However, such a mutual understanding is not sound. Subsection

83(1) of EMPA provides all information submitted under EMPA is public information. Therefore, PAPI cannot provide assurance to any service provider that the cost estimate information is treated as confidential when the information is ultimately submitted to Environment under EMPA. Therefore, as the second part of the two-part test is not met, I find that subsection 19(1)(c)(iii) of FOIP does not apply.

[74] Since I have found that neither subsections 19(1)(b) nor 19(1)(c) of FOIP apply to the redacted information, then I do not need to consider subsection 19(3) of FOIP. I recommend that Environment release Records 1 and 2 to the Applicant except for the information Environment withheld pursuant to subsection 29(1) of FOIP.

IV FINDINGS

[75] I find that I have jurisdiction to undertake this review.

[76] I find that subsections 19(1)(b), (c)(i), (ii) and (iii) of FOIP do not apply to the records at issue.

V RECOMMENDATION

[77] I recommend that Environment release the records at issue, except for the information Environment withheld pursuant to subsection 29(1) of FOIP, within 30 days of issuance of this Report.

Dated at Regina, in the Province of Saskatchewan, this 15th day of March, 2023.

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