

**SASKATCHEWAN
INFORMATION AND PRIVACY COMMISSIONER**

REVIEW REPORT 111/2015

City of Regina

Summary: The Applicant requested from the City of Regina two reports supplied by a Third Party. The Commissioner reviewed the application of subsections 18(1)(a), (b) and (c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). He found that subsection 18(1)(b) of LA FOIP applied to the records and subsection 18(1)(c) only applied to portions of the records. He also found that subsection 18(3) of LA FOIP applied to portions of the record to which subsection 18(1)(c) did not apply. He recommended release of those portions.

I BACKGROUND

[1] On February 23, 2015, the City of Regina received the following access to information request:

Please provide the qualitative major incident hazard assessment that [name of Third Party A] provided to the City of Regina as condition C of the city's approval to operate issued to [Third Party A] October 21, 2008.

Please provide the plan and implementation schedule to reduce the encroachment of odorous emissions impact from [Third Party A] into residential which is condition D of the city's approval to operate...

[2] The City identified two records. It also identified three third parties that may have business interests in the record. It provided notice to the third parties of its intention to release portions of the record. Two of the Third Parties, Third Party A and Third Party B, both objected to release of the record on the basis that it contained third party business information pursuant to subsection 18(1)(a), (b) and (c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).

- [3] After considering the Third Parties' objections, on May 11, 2015, the City provided notice to the Third Parties that it had decided that portions of the record should be released. Pursuant to subsection 36(2) of LA FOIP, the City informed the Third Parties that it had 20 days to request a review from my office.
- [4] On May 29, 2015, my office received a request for review by Third Party A. On June 3, 2015 my office provided notification to the City, the Applicant and Third Party A.
- [5] On June 10, 2015, Third Party B requested a review by my office. On June 12, 2015, my office advised Third Party B of this review. We also advised Third Party C of this review.
- [6] We have received submissions from the City, the Applicant and Third Party A.

II RECORDS AT ISSUE

- [7] The record consists of two documents. The first is entitled *Atmospheric Emissions Reduction Plan 2012* (AERP) for Third Party A. It is 60 pages. The City has identified portions on 38 pages that should be severed pursuant to subsection 18(1)(b) of LA FOIP. Third Party A believes the whole report should be withheld pursuant to subsections 18(1)(a), (b) and (c) of LA FOIP.
- [8] The second document is entitled *Major Hazards Risk Assessment Report* (MHRAR). It was authored by Third Party B on behalf of Third Party A. It is 186 pages. The City has identified portions on 144 pages that should be severed pursuant to subsection 18(1)(b) of LA FOIP. Both Third Parties A and B believe the whole report should be withheld pursuant to subsections 18(1)(a), (b) and (c) of LA FOIP.
- [9] A table describing the portions of the Record to which the City has applied subsection 18(1)(b) of FOIP is found in Appendix A of this report.

III DISCUSSION OF THE ISSUES

1. Does subsection 18(1)(a) of LA FOIP apply to the records?

[10] Subsection 18(1)(a) of LA FOIP states:

18(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

(a) trade secrets of a third party;

[11] Trade Secret is defined as information, including a formula, pattern, compilation, program, device, product, method, technique or process:

- i) that is used, or may be used, in business or for any commercial purpose;
- ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use;
- iii) that is the subject of reasonable efforts to prevent it from becoming generally known; and
- iv) the disclosure of which would result in significant harm or undue financial loss or gain.

[12] The information must meet all of the above criteria to be considered a trade secret. Further, the third party must also be able to prove ownership or a proprietary interest in the trade secret or prove a claim of legal right to the information (i.e. license agreement).

[13] The City has stated that subsection 18(1)(a) does not apply. Third Party A contends that the records contain trade secrets and that both documents should be withheld in their entirety pursuant to this exemption. However, section 8 of LA FOIP states:

8 Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access.

[14] Upon review of the record, I am not persuaded that the entire record would constitute a trade secret. Third Party A has not identified which parts of the records it considers to be trade secrets. Its submission is general and vague. It states: “[Third Party A] employs a unique configuration of process equipment as well as processing methods in order to produce high quality petroleum products. The Records include descriptions of the process

equipment and processing methods employed by [Third Party A] to produce its end products.”

[15] The third part of the test noted above is whether the information is the subject of reasonable efforts to prevent it from becoming generally known. My office has given the opportunity to both the Ministry and Third Party A to persuade me that this exemption applies. In this context, it would be reasonable for Third Party A to clearly identify any trade secrets within the document. Because Third Party A has not done so, I find that the third part of the test is not met. Therefore subsection 18(1)(a) of LA FOIP does not apply.

2. Does subsection 18(1)(b) of LA FOIP apply to the record?

[16] Subsection 18(1)(b) of LA FOIP states:

18(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 the local authority by a third party;

[17] The Third Party has indicated that subsection 18(1)(b) of LA FOIP applies to the records in their entirety. The City has indicated that the exemption applies only to certain portions of the documents.

[18] My office has established a three part test for subsection 18(1)(b) of LA FOIP as follows:

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

1. Is the information financial, commercial, scientific, technical or labour relations information?

[19] The City has indicated that portions of the records contain scientific and technical information. Third Party A's submission has indicated that the entire report qualifies as technical, commercial, scientific and financial information.

[20] My office has previously defined technical information as follows:

Technical information 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.

[21] The City has identified portions of the records that would qualify as technical information which is listed in Appendix A of this report. Third Party A argues the entire documents would qualify as technical information. I agree that the records in their entirety qualify as technical information as they describe the construction or operation of a process or equipment. This part of the test is met.

2. Was the information supplied by the third party to a public body?

[22] This part of the test is satisfied as Third Party A supplied the two records to the City.

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

[23] In the past, my office has stated that information supplied in confidence means that the Third Party has stipulated how the information can be disseminated. 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.

[24] Both the City and Third Party A's submissions indicate that the information was supplied in explicit confidence. Upon review of the material provided, it is evident that Third Party A explicitly communicated that these records were to be held in confidence. Therefore, this part of the test is met.

[25] Subsection 18(1)(b) of LA FOIP applies to the record in its entirety.

3. Does subsection 18(1)(c) of LA FOIP apply to the record?

[26] Subsection 18(1)(c) of LA FOIP states:

18(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; or

[27] Third Party A has indicated that it believes that subsections 18(1)(c)(i), (ii) and (iii) of LA FOIP apply to all portions of the records. The City's view is that subsection 18(1)(c) does not apply at all.

[28] For these provisions to apply there must be objective grounds for believing that disclosing the information would result in an undue loss or gain measured in monetary or monetary-equivalent terms (e.g. loss of revenue, loss of corporate reputation or loss of good will) or would prejudice or cause detriment to the competitive position of a Third Party.

[29] To make this determination, my office applies the harms test as follows:

1. There must be a clear cause and effect relationship between the disclosure and the harm which is alleged;

2. The harm caused by the disclosure must be more than trivial or inconsequential;
and

3. The likelihood of harm must be genuine and conceivable.

1. Is there a cause and effect relationship between the disclosure and the harm which is alleged?

[30] Third Party A has not specifically identified which portions of the record would qualify under subsection 18(1)(c) of LA FOIP. However, it has identified four general types of information that would qualify under this exemption.

[31] The first type is information that describes “existing and proposed process equipment and processing methods”. This includes “proposed projects aimed at improving [Third Party A’s] operations, processes and equipment.” Third Party A’s submission contends that if this information was released “competitors would be able to replicate the quality of petroleum products that [Third Party A] is producing. This is particularly critical for [Third Party A’s] petroleum products which are established as superior quality products in the marketplace.” Its submission argues that if this were to occur it would result in financial loss or gain to or prejudice the competitive position of Third Party A.

[32] I agree that a cause and effect relationship between release of the information described above and the harms contemplated in subsection 18(1)(c). However, only portions of the records would qualify as the description above. Since Third Party A has not identified these portions, I have indicated what would be captured in Appendix A.

[33] I note that part of the record describes Third Party A’s air monitoring processes. I do not see how release of this information relates to the production of petroleum and could result in financial loss or gain to or prejudice the competitive position of Third Party A. Therefore a cause and effect relationship does not apply to the information describing the air monitoring process.

[34] The second type of information Third Party A has identified is “process equipment and processing methods are protected under third party licensing agreements and non-disclosure or confidentiality agreements.” It indicates that the release of this information could result in financial loss or gain to or prejudice the competitive position of other third parties. Third Party A has not identified which parts of the records or which third parties would be relevant. I note Third Parties B and C have not provided submissions to

address this. From review of the record, I cannot identify what portions might require protection. Therefore, I do not see a cause and effect relationship.

[35] The third type of information identified in Third Party A's submission is detailed information regarding the volumes of inventory maintained by Third Party A. Third Party A has indicated that this information is found in Appendix V of the MHRAR. It further noted that "An understanding of the volume of inventory maintained by [Third Party A] at any time will directly impact [its] bargaining position, and will enable competitors to alter their own pricing practices, based on their knowledge of the inventory that [Third Party A] has available. I agree there is a cause and effect relationship.

[36] Finally, the last type of information identified by Third Party A is information produced by engineering and risk assessment professionals that refers to possible or hypothetical risks. Third Party A has said release of the information would negatively impact its brand and reputation. Third Party A's submission noted that the public may not understand the technical conclusions of the report and have a negative view of the company and in turn reduce public consumption of its goods. However, earlier in its submission Third Party A stated that its "petroleum products... are established as superior quality products in the marketplace". Third Party A has not persuaded me that, in the petroleum industry, the public's negative view would cause them to choose inferior products. Therefore, I see no cause and effect relationship.

[37] In summary, there is cause and effect relationship between release of information and alleged harm in the following cases:

- i. the release of the information that describes existing and proposed process equipment and processing methods that could result in financial loss or gain to or prejudice the competitive position of Third A Party as noted in Appendix A of this report; and
- ii. the release of inventory information and potential interference with contractual or other negotiations.

2. Would the harm caused by the disclosure be more than trivial or inconsequential?

[38] I am persuaded that the harm by the disclosure of portions of the record would be more than trivial or inconsequential.

3. Is the likelihood of harm genuine and conceivable?

[39] I am persuaded that the likelihood of harm would be genuine and conceivable.

[40] Subsections 18(1)(c)(i) and (ii) of LA FOIP apply to certain portions of the record as noted in Appendix A of this Report.

4. Does subsection 18(3) of LA FOIP apply to the record?

[41] Subsection 18(3) of LA FOIP states:

18(3) Subject to Part V, a head may give access to a record that contains information described in clauses (1)(b) to (d) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

(i) financial loss or gain to;

(ii) prejudice to the competitive position of; or

(iii) interference with contractual or other negotiations of; a third party.

[42] In order for subsection 18(3) of LA FOIP to apply to a record, a subsection of 18(1) must apply to the record. In this case, subsection 18(1)(b) of LA FOIP applies to both records in their entirety. Subsections 18(1)(c)(i) and (ii) of LA FOIP apply to certain parts of the record.

1. Is disclosure in the public interest as it relates to public health, public safety or protection of the environment?

[43] Upon review of the records, I have determined that they relate to both the public safety and the protection of the environment. My office has established the following test to determine whether disclosure of information would be in the public interest:

1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it? The following may be relevant:
 - Have others besides the Applicant sought or expressed an interest in the records? Are there other indicators that the public has or would have an interest in the records?
2. Is the Applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public? The following may be relevant:
 - Do the records relate to a personal conflict between the Applicant and the government institution? What is the likelihood the Applicant will disseminate the contents of the records in a manner that will benefit the public?
3. If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government? The following may be relevant:
 - Do the records contain information that will show how the government institution reached or will reach a decision? Are the records desirable for the purpose of subjecting the activities of the government institution to scrutiny? Will the records shed light on an activity of the government institution that have been called into question?

[44] The Applicant, who is a journalist, has addressed this test in his submission. He contends that release of this information will contribute to the public understanding of a matter or issue that is of concern to the public. He is interested in investigating whether the City is upholding regulations. He stated “We know from countless stories that the protection of public health and safety is of utmost concern to Canadians. For example, Lac Megantic, Mad Cow Disease, Lysteria etc. Railway regulation wasn't much of a concern until the Lac Megantic disaster, but now the intricacies of this sort of regulation is top of mind for the public. That's because people have a real world example of how a lack of regulation, or a lack of observation of regulation, can lead to disaster.” He also referred to comparable news stories about Third Party A that have garnered attention. This meets the first part of the test.

[45] As noted, the Applicant is a journalist. This does not appear to be motivated by private interests. He called to attention the journalistic standards of his news organization that

states “Our mission is to inform, to reveal, to contribute to the understanding of issues of public interest and to encourage citizens to participate in our free and democratic society.” The Applicant is very likely to disseminate the information in a manner that will benefit the public. The second part of the test is met.

[46] Finally, the Applicant has indicated that he is concerned about the City’s decision to create a new residential area near Third Party A. Upon review of the records, I agree that their release will contribute to open, transparent and accountable government.

[47] Therefore, disclosure is in the public interest as it relates to public safety and protection of the environment.

2. Would public interest outweigh in importance any financial loss or gain to or prejudice to the competitive position of the Third Party?

[48] As noted above, subsection 18(1)(b) of LA FOIP applies to both records in their entirety. However, subsection 18(1)(c)(i) and (ii) apply only to certain portions. There is nothing to persuade me that public interest would outweigh any financial loss or gain to or prejudice to the competitive position of Third Party A. Therefore, portions to which subsection 18(1)(c)(i) and (ii) of LA FOIP apply should continue to be withheld. However, even though subsection 18(1)(b) applies to the rest of the record, as previously discussed, the rest of the information could not reasonably be expected to result in financial loss or gain to prejudice the competitive position of a third party. Therefore, subsection 18(3) would apply and that information should be released.

IV FINDINGS

[49] I find that subsection 18(1)(a) of LA FOIP does not apply to the records.

[50] I find that subsection 18(1)(b) of LA FOIP applies to the entire records.

[51] I find that subsections 18(1)(c)(i), (ii) and (iii) of LA FOIP apply to portions of the records.

[52] I find that subsection 18(3) of LA FOIP apply to the portions of the records to which subsections 18(1)(c)(i) and (ii) do not apply.

V RECOMMENDATIONS

[53] I recommend that the City release the records to the Applicant with the following exceptions:

AERP	
Pages 13-20	Sections entitled: <ul style="list-style-type: none"> • “Unit description” • “Project Objectives” • “Project Costs” and photographs and diagrams.
Page 24	Expenditures

MHRAR	
Pages 4-7	Information regarding production/facilities
Appendix V	Vessel Risk Calculation Spreadsheet
Appendix VIII	Summary of Effects Distances
Appendix IX	Heat Radiation and Explosion Overpressure Effects

[54] I recommend that release occur 30 days after the City gives its written decision to the Third Party pursuant to sections 45 and 46 of LA FOIP.

Dated at Regina, in the Province of Saskatchewan, this 21st day of July, 2015.

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

Appendix A

Portions of the Record to which the City has applied subsection 18(1)(b) of LA FOIP

Portions to which the City has applied 18(1)(b)	Description	Does subsection 18(1)(c)(i), (ii) or (iii) apply?
AERP		
Page 4	Emissions from source	No
Page 5 (First and second Portions)	Emissions from source	No
Page 5 (last portion)	Fact about provincial emissions	No
Page 6	Comparison of emissions	No
Page 7	Emissions from source	No
Page 8	Emissions from source	No
Page 9	Description of Air Monitoring Program	No
Page 10	Map of Air Monitoring Program	No
Page 11	Description of Air Monitoring Program	No
Page 12	Map of future Air Monitoring Program	No
Pages 13 – 20	Description of four projects aimed at reducing emissions. Each one describes: <ul style="list-style-type: none"> • Unit description • Problem Definition • Project Objectives • Project Costs • Project Timelines • Reduction of Emissions • Can include photographs or diagrams 	Subsections 18(1)(c)(i) and (ii) apply to the sections entitled “Unit description”, “Project Objectives”, “Project Costs” and photographs and diagrams in these pages.
Page 21	Human Health Risk Assessment Concerns	No
Page 22	Future Air Monitoring Process	No
Page 24	Expenditures	Yes
Page 25 (First Portion)	Recommendation	No
Page 25 (Second Portion)	Projects	No
Page 25 (Third Portion)	Expected reduction of emissions as a result of projects	No
Page 25 (Fourth Portion)	General description of goals and commitments	No
Page 1 of Appendix A	Emissions of Third Party	No

Portions to which the City has applied 18(1)(b)	Description	Does subsection 18(1)(c)(i), (ii) or (iii) apply?
Page 2 of Appendix B	Description of Air Monitoring Program	No
Page 3 of Appendix B	Emissions of Third Party	No
Page 4 of Appendix B	Map of Air Monitoring Program	No
Page 7 of Appendix B	Dispersion Weighting	No
Page 8 of Appendix B	Description of Air Monitoring Program	No
Pages 9 to 13 of Appendix B	Map of Air Monitoring Program	No
Page 14 of Appendix B	Receptor Sensitivity	No
Pages 15 to 17 of Appendix B	Calculations for Potential Monitoring Sites	No
Page 18 of Appendix B	Recommendations	No
MHRAR		
Pages 1 to 2	Information regarding analysis	No
Pages 4 to 7	Information regarding production/facilities	Yes
Pages 11 to 16	Information about analysis and methodology	No
Pages 17 to 18	Vapour Cloud Explosives	No
Page 19	Jet fires	No
Pages 20 to 21	Pool fires	No
Pages 22 to 23	Fireball/Flash Fires	No
Pages 24 to 25	Boiling Liquid Expanding Vapour Explosions	No
Pages 26 to 28	Pipeline events	No
Pages 29 to 33	Toxic Releases	No
Page 34	Factors considered	No
Page 36	Probability of ignition	No
Page 40	Factors considered	No
Pages 41 to 44	Risk Plots	No
Page 45 to 48	Acceptability Comparison	No
Page 51	Conclusion	No
Page 68	Pipeline route	No
Appendix V	Vessel Risk Calculation Spreadsheet	Yes
Appendix VII	Consequence Results	No
Appendix VIII	Summary of Effects Distances	Yes
Appendix IX	Heat Radiation and Explosion Overpressure Effects	Yes