QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2017 SKQB 259**

Date: **2017 08 31**
Docket: QBG 979 of 2016
Judicial Centre: Saskatoon

2017 SKQB 259 (CanLII)

BETWEEN:

[redacted]

Appellant
(Applicant)

\- and -

UNIVERSITY OF SASKATCHEWAN

Respondent
(Respondent)

Counsel:

Gary L. Bainbridge for the appellant
John R. Beckman, Q.C., and Robert J. Affleck for the respondent

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FIAT DANYLIUK J.
August 31, 2017

Introduction

[1] This is a statutory appeal brought by [redacted]. He seeks access to certain documents and records from the University of Saskatchewan. The University resists.

[2] For the reasons that follow, I am directing that the University provide further information regarding its claims of privilege so that both parties can provide further and better submissions and so this court can properly adjudicate this matter.

Facts

[3] The facts are really not in dispute. The parties differ over application and interpretation of the facts within a particular legal context.

[4] ██████ was, and is, an employee of the University. He is a librarian and holds a tenured appointment as faculty effective September 23, 2013.

[5] In April 2015, he applied to the University for disclosure of certain records pursuant to *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 [*Act*]. These records spanned March 1, 2014, to April 24, 2015. Mr. Britto's request sought the following records:

> All correspondence in electronic form sent or received (including those deleted from her e-mail mailbox) by ██████ (Dean of the University of Saskatchewan Library) that includes a reference to me by name (i.e. ██████, ██████, and/or ██████), and/or a reference to my employment history (including changes to my employment positions held by me with the University of Saskatchewan), and/or a reference to the harassment complaint filed by me.

[6] An exchange of correspondence followed, the nature of which was to clarify ██████'s requests. It appears the parties agreed that a number of records could be excluded:

- Emails in which ██████ was copied (a "cc" or "bc" recipient);
- Emails in which ██████ was a recipient through a group list;

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- Emails in which [redacted] was the “to” recipient; and

- Emails in which [redacted] was the sender.

[7] By letter dated July 24, 2015, the University replied to this request. The nature of the reply was twofold. Some of the requested records were provided to [redacted], comprised of 129 pages of information. Some of the requested records were not provided to [redacted], amounting to 306 pages. The reasons for the University’s denial of [redacted]’s request were based on exemptions from disclosure claimed by the University.

[8] The nature of the University’s exemption claims comprised:

- Some records were withheld or redacted in accordance with s. 8 of the *Act* so as to prevent unauthorized disclosure of a third party’s personal information.

- Some records were withheld as duplicates.

- Some records were withheld pursuant to ss. 14(1)(d), 16(1)(a) and (b), 21, 28(1) and 30(2) of the *Act* because they contained:

  - Correspondence regarding a third party that was provided to the University that was confidential in nature;

  - Advice or recommendations developed by or for the University;

  - Consultations or deliberations involving University officers or employees;

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- Information possibly injurious to the University in the conduct of existing or anticipated legal proceedings;

- Information subject to solicitor-client privilege, prepared by or for the University's legal counsel and/or correspondence between such legal counsel and third parties relating to a matter involving provision of advice or other services by legal counsel;

- Information that is evaluative or opinion-related material provided in confidence and compiled solely for the purpose of determining an individual's suitability, eligibility or qualifications for employment.

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[9] It appears ██████ was dissatisfied with the University's response. As a result, on July 30, 2015, he sought a review of the University's decision to withhold those records. That review was sought pursuant to s. 38 of the *Act* and was conducted by the Office of the Saskatchewan Information and Privacy Commissioner [Office]. By mid-August, that Office indicated that it would conduct such a review.

[10] The review was actually conducted by Ronald Kruzeniski, Q.C., the Information and Privacy Commissioner. He conducted an *in camera* review of all requested documents. He also received written submissions from the parties.

[11] Mr. Kruzeniski, Q.C., documented his findings in a report dated May 24, 2016. He found ██████'s request was made in good faith and for a legitimate purpose. He found the University did not respond to the request within the legislative time frame and suggested that the University improve its processes so that it could respond in a timely manner.

[12] Regarding the University's exemption claims, Mr. Kruzeniski, Q.C., determined that some of those claims were valid and some were not. He found that the claim under s. 14(1)(d) was not valid. He found the claim under s. 16(1)(a) and (b) partially valid. He found the claim under s. 28(1) partially valid. He found the claim under s. 30(2) partially valid. He then listed (in Appendix "A" to his report) the records which he found were not properly exempted by the University and recommended the University release those records to [redacted].

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[13] Under the legislation, Mr. Kruzeniski's recommendations and findings did not bind the University. The University had 30 days to decide whether it would agree with, and follow, those recommendations and findings. It communicated its determination in writing on June 22, 2016. The University accepted Mr. Kruzeniski's recommendation regarding reviewing its internal processes to ensure timely responses to such requests for information. However, the University refused to release the documents recommended by Mr. Kruzeniski. It must be noted that under s. 45 of the *Act*, the University was not bound to accept all or any of the Commissioner's findings or recommendations and was not bound to release the documents (in whole or in part) that he said should be released to [redacted].

[14] [redacted] therefore launched this appeal under s. 46(1) of the *Act*.

Issues

[15] The issues in this application are:

1. What is the proper scope and process of this appeal?
2. Should the documents in question be examined by this court?
3. If so, should any documents be released to the applicant or to the applicant's counsel?

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Analysis

1. What is the proper scope and process of this appeal?

[16] This legislation does not address government directly but, rather, applies to local authorities including rural municipalities, health authorities, school boards and (as here) post-secondary educational institutions. There is a dearth of Saskatchewan judicial decisions in this area of the law. As a result, there is not a significant amount of guidance as to process or to substantive decisions.

[17] This appeal is not a standard review on the record. It is a *de novo* proceeding, taken pursuant to ss. 46 and 47 of the *Act*, which read as follows:

> **Appeal to court**
> **46**(1) Within 30 days after receiving a decision of the head pursuant to section 45 that access is granted or refused, an applicant or a third party may appeal that decision to the court.
>
> (2) A head who has refused an application for access to a record or part of a record shall, immediately on receipt of a notice of appeal by an applicant, give written notice of the appeal to any third party that the head:
>
> (a) has notified pursuant to subsection 33(1); or
>
> (b) would have notified pursuant to subsection 33(1) if the head had intended to give access to the record or part of the record.
>
> (3) A head who has granted an application for access to a record or part of a record shall, immediately on receipt of a notice of appeal by a third party, give written notice of the appeal to the applicant.
>
> (4) A third party who has been given notice of an appeal pursuant to subsection (2) or an applicant who has been given notice of an appeal pursuant to subsection (3) may appear as a party to the appeal.
>
> (5) The commissioner shall not be a party to an appeal.
>
> **Powers of court on appeal**
> **47**(1) On an appeal, the court:
>
> (a) shall determine the matter *de novo*; and
>
> (b) may examine any record *in camera* in order to determine on the merits whether the information in the record may be withheld pursuant to this Act.

> (2) Notwithstanding any other Act or any privilege that is available at law, the court may, on an appeal, examine any record in the possession or under the control of a local authority and no information shall be withheld from the court on any grounds.
>
> (3) The court shall take every reasonable precaution, including, where appropriate, receiving representations *ex parte* and conducting hearings *in camera*, to avoid disclosure by the court or any person of:
>
> > (a) any information or other material if the nature of the information or material could justify a refusal by a head to give access to a record or part of a record; or
> >
> > (b) any information as to whether a record exists if the head, in refusing to give access, does not indicate whether the record exists.
>
> (4) The court may disclose to the Attorney General for Saskatchewan or the Attorney General of Canada information that relates to the commission of an offence against:
>
> > (a) an Act or a regulation; or
> >
> > (b) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada;
>
> by an officer or employee of a local authority if, in the opinion of the court, there is evidence of the commission of the offence.
>
> (5) Where a head has refused to give access to a record or part of it, the court, if it determines that the head is not authorized to refuse to give access to the information or part of it, shall:
>
> > (a) order the head to give the applicant access to the record or part of it, subject to any conditions that the court considers appropriate; or
> >
> > (b) make any other order that the court considers appropriate.
>
> (6) Where the court finds that a record falls within an exemption, the court shall not order the head to give the applicant access to the record, regardless of whether the exemption requires or merely authorizes the head to refuse to give access to the record.

[18] I take these provisions to mean that under the *Act* there is, essentially, a two-step process involved in an appeal to this court. First, under s. 47(1)(b), this court decides whether to review the disputed records *in camera*. If so, then the court goes on to review the records in light of the parties' submissions and the applicable law, then determine whether any records ought to be released to the applicant pursuant to

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s. 47(5) or make any other appropriate order. The court may also declare records exempt from disclosure (s. 47(6)).

[19] Further, I agree with University counsel's submission that because it is a *de novo* process and because the Commissioner's findings are non-binding, there is no duty of substantial deference to the Commissioner's decision. Members of this court are entitled, even obligated, to look at this matter afresh.

[20] This strikes me as self-evident from the face of the legislation, but I have also considered: *Confederation Life Insurance Co. v Woo* (1994), 123 Sask R 150 (CA); *Green v College of Physicians and Surgeons of Saskatchewan* (1986), 51 Sask R 241 (CA); *Abouhamra v Prairie North Regional Health Authority*, 2016 SKQB 293, 16 Admin LR (6th) 265; *Humboldt Electric Ltd. v Saskatchewan (Workers' Compensation Board)*, 2016 SKQB 234; *Regina Qu'Appelle Regional Health Authority v Dewar*, 2011 SKQB 392, 384 Sask R 222; and *Tomporowski v Saskatchewan Assn. of Architects* (1994), 113 DLR (4th) 693 (Sask QB).

[21] In *Green*, it was held that members of any panel conducting an appeal *de novo* would form their own conclusions based on the evidence and material adduced. The duty in such an appeal is not to review and consider previous findings; rather, it is to independently assess the issues based on the evidence presented to that appeal body.

[22] Accordingly, I do not consider myself bound by any of the Commissioner's rulings unless error in same is demonstrated. At law, I am free to make my own determinations in this matter.

[23] I further note s. 51 of the *Act*. My reading of same is that the onus of proving any document should not be disclosed is on the party in possession of those records, in this case the University.

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2. Should the documents in question be examined by this court?

[24] In an earlier fiat rendered in this matter, I determined that it was appropriate to examine the records in question. That was a short fiat, designed to move this process along.

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[25] As noted above, this is a *de novo* process. In *Evenson v Kelsey Trail Regional Health Authority*, 2012 SKQB 382, Justice Zarzeczny held that he fully agreed with the Commissioner, but he specifically noted that he reached this conclusion only after his own review of the material.

[26] Given the nature of this proceeding as a *de novo* appeal, the threshold to meet for this court to review the actual documents in issue must be very low. It seems to me that the documents will be examined by a judge in virtually every case, of necessity, since the decisions of the Commissioner in such matters do not provide particulars of the documents nor the reasons for granting or denying access to same.

3. If so, should any documents be released to the appellant?

[27] I have examined all the documents submitted by the University pursuant to s. 47(2) of the *Act*, as well as the claims to exemption and/or privilege from production.

[28] The somewhat unique construction of the appeal mechanism under the *Act* results in somewhat unique arguments in this matter. ████████ does not take issue with the Commissioner's ruling, and his appeal does not seek to rectify or change same; rather, he substantially agrees with the disclosure ruling and seeks a remedy more akin to enforcement than anything else.

[29] ████████'s first position is that the records should be released to his

lawyer, at least initially, to enable the within appeal to be properly argued. ██████ asserts this position, in part, because he says the University has not claimed privilege over any of the records. In fact, the University does assert privilege, and it appears that the University asserted privilege as a ground before the Commissioner given that it relied upon ss. 14, 16 and 30 the *Act*. While it may well be that the University is not asserting solicitor-client privilege, *per se*, it asserts other privilege claims which I have determined fall within the ambit of the *Act*.

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[30] This engages the principles set out in *Goodis v Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 SCR 32. There, a party requested government records. Privilege was asserted. The first issue considered was whether that party's lawyer could obtain disclosure of those records in the face of the privilege claim (paragraph 11(a)). In that case solicitor-client privilege was solely in issue, as opposed to other claims (such as litigation privilege). The Supreme Court's analysis is contained at paragraphs 14 to 25. After reaffirming the prior series of decisions on point, the Court declined to establish any new or different test for disclosure of records subject to a claim of solicitor-client privilege. It remains the "absolutely necessary" test. The nature of solicitor-client privilege is nearly absolute.

[31] Solicitor-client privilege is specifically noted in s. 21 of the *Act*:

> **Solicitor-client privilege**
> **21** A head may refuse to give access to a record that:
>
> (a) contains information that is subject to solicitor-client privilege;
>
> (b) was prepared by or for legal counsel for the local authority in relation to a matter involving the provision of advice or other services by legal counsel; or
>
> (c) contains correspondence between legal counsel for the local authority and any other person in relation to a matter involving the provision of advice or other services by legal counsel.

[32] But I see s. 21 as covering both solicitor-client privilege and litigation or other legal privilege. With respect to the latter, s. 21(b) in my view is not likely strictly limited to matters of litigation privilege, as that term has been defined. Our statute is not identical, but is similar, to the legislation considered in *Liquor Control Board of Ontario v Magnotta Winery Corp.*, 2010 ONCA 681, 102 OR (3d) 545, a case which also considered *Goodis*. At paragraphs 41 to 46, the Ontario Court of Appeal held the ambit of this statutory term was broader than litigation privilege, but was inclusive of same. Not included in the scope of such privilege is "simple correspondence".

[33] Section 21 extends beyond matters of pure solicitor-client or litigation privilege. The wording of subsection (b) connotes an intention that privilege claims be broadly captured in the exemption provisions of the *Act*. I do not accept ██████'s argument that the legislative exemption is strictly limited to solicitor-client privilege. If that was the case, the section would end after subsection (a), and there would be no need to include subsections (b) and (c) unless the provision was intended to cover something more than strict solicitor-client privilege.

[34] Augmenting this analysis is s. 14(1)(d), which the University has specifically relied upon from the outset. This provision of the *Act* states that a head may refuse to release a record where same could be "injurious to the local authority in the conduct of existing or anticipated legal proceedings". I agree with University counsel that this provision is also distinct from "pure" solicitor-client privilege. I also agree the record shows there are matters in issue between these parties, including litigation both extant and anticipated.

[35] Further supporting this view is s. 43 of the *Act*, which describes the powers of the Commissioner but begins with "Notwithstanding any other Act or any privilege available at law". It has been held that this phrase includes all legal privilege

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and, certainly, solicitor-client privilege. From this, one may reasonably infer that it is not limited to solicitor-client privilege. See *Saskatchewan (Office of the Information and Privacy Commissioner) v University of Saskatchewan*, 2017 SKQB 140 at paras 20 and 21.

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[36] So, it is my conclusion that the *Act* recognizes and protects numerous types of legal privilege and is not limited to pure solicitor-client communications.

[37] Notwithstanding, ███████'s counsel argues he should see all the documents. Reliance is primarily placed on *Hunter v Canada (Consumer and Corporate Affairs),* [1991] 3 FC 186 (FCA). However, in that case the disclosure order was overturned on the basis that the record-holder had disclosed sufficient information about the nature and content of the records to make full production to counsel unnecessary. As stated at paragraph 46:

> [46] … The Court has the power to control access to counsel, the extent of that access and the conditions of that access. It can refuse access to the actual information and be satisfied, as it should have in this case, with the communication to counsel of a summary or a general description of the actual information. …

[38] Some ten years later, the Federal Court of Appeal once again waded into these waters. In a case not cited by counsel, the court considered the federal equivalent of s. 21 (which reads: "advice and recommendations") and specifically the word "advice". See *3430901 Canada Inc. v Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 FCR 421 [*Telezone*]. In this legislative context, the court noted that "advice" likely had a broader meaning than the more specific term "recommendations". The court found "advice" includes:

- an expression of opinion on policy matters, but excludes information of a largely factual nature, unless it is so intertwined with the advice

that severance is precluded;

- uncommunicated advice developed by or for a government institution or a minister of the Crown (e.g., personal notes created in preparation of a meeting);

- inconclusive advice (the advice need not urge a specific course of action to fall within the exemption); and

- advice that has been approved.

[39] In *Telezone*, there was also a discussion of the underlying purpose of the exemption, which was held to be a removal of impediments to free and frank communications within government departments, which in turn ensured that undue outside scrutiny would not undermine the ability of government to perform its essential functions. While we are not concerned with government here, the principles remain intact.

[40] The *Act* speaks to options the court has in considering whether to grant any order. It is neither an all-or-nothing proposition, nor one-size-fits-all. That this court has considerable discretion in fashioning an appropriate order is borne out by s. 47(3), which states that the court is to take every reasonable precaution to ensure records that are exempt (or possibly exempt) from disclosure are not revealed inappropriately.

[41] That the University has records which are subject to the request is beyond dispute. The University has chosen to indicate this. Each record is a piece of correspondence sent by or to the University's Library Dean within a specified time.

[42] The University has also broadly claimed privilege, but even on my own

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inspection of those records, it is difficult to determine the precise nature of the privilege and whether it is properly claimed by the University. The problem is that releasing all these records to ████'s solicitor (who also apparently represents him in his disputes with the University) will effectively and practically vitiate any privilege claim. Even if the document itself cannot be used, the information contained in same cannot be purged from the mind of ████'s counsel.

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[43] Thus, I have concluded some disclosure is warranted to permit further submissions to be made, but not the total disclosure (even to counsel) sought by ████. I am therefore going to direct that the University provide some further details about the documents to ████, subsequent to which the parties may file further argument with me on the main disclosure issue. That argument of each party will be *in camera* and embargoed from the other side, as contemplated by the *Act*. This will allow each side to speak directly to me without the other side's involvement, to permit a frankness that would be notably absent in a traditional chambers argument.

[44] This sort of process has been utilized by courts previously where privilege and the insalubrious effects of any form of actual records disclosure are the points squarely in issue. For example, see: *Fogal v Regina School Division No. 4*, 2002 SKCA 142, 227 Sask R 247.

[45] It is also recognized in *Goodis* at paragraph 21, where it was stated that:

> ... it is difficult to envisage circumstances where the absolute necessity test could be met if the sole purpose of disclosure is to facilitate argument by the requester's counsel on the question of whether privilege is properly claimed. …

[46] I make this order because in at least some cases what the University appears to be asserting is litigation privilege as opposed to solicitor-client privilege. More information is required for me to determine the former. I am mindful of the

distinctions within this dichotomy as expressed in *Blank v Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 SCR 319, and the cases following.

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[47] I also make this order because it would be a very simple matter indeed if all the University had to do was invoke privilege and disclosure/production was halted. That is not all the University must do. As it asserts privilege, it must prove, on a balance of probabilities, that the documents in question qualify as privileged. *Redhead Equipment Ltd. v Canada (Attorney General)*, 2014 SKQB 172 at paras 19 to 26, 448 Sask R 109, and affirmed in large measure and as to applicable general principles at *Redhead Equipment Ltd. v Canada (Attorney General)*, 2016 SKCA 115, 402 DLR (4th) 649. I agree with ██████'s counsel that in order to have an "intelligent debate" over the privilege claim, more information is likely required from the University.

[48] **Accordingly I make the following order:**

1. The documents filed by the University of Saskatchewan shall remain under seal until further order and may not be inspected or viewed by any person or party without a specific order of this court.

2. At this time and subject to further order, none of the documents presently on the court file shall be made available to ████ ███ or his counsel.

3. The University of Saskatchewan shall provide this court and counsel for ████ ███ with a summary of the sealed documents presently on file, which summary shall include the following information and be supplied on the following terms:

(a) The University shall only supply this summary after counsel for ████ provides the University and the court with an undertaking as to confidentiality that is satisfactory to both sides. In the event the parties cannot agree on the nature of the undertaking, that dispute is to be referred back to me.

(b) The University's summary shall contain a list of the documents to which the University claims privilege; the type or nature of the privilege claimed with respect to each document (including references to *The Local Authority Freedom of Information and Protection of Privacy Act* provisions if required); the date(s) of the documents or communications; and the sender and recipient. The University is not presently required to summarize the contents of any of the documents.

(c) The University's summary shall also be filed with this court and maintained under seal until further order.

4. Within 45 days of receipt of the summary, both █████ ████ and the University of Saskatchewan shall file with this court a further brief or memorandum setting out their further positions regarding the University's claims of exemption of the sealed documents from disclosure. These briefs shall not be exchanged by counsel and shall be filed independently with the court and *in camera*, and both of them shall be sealed and not to be accessed by anyone without a specific order authorizing same. The court's expectation is that the University's brief will be very specific as

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to the basis, background and context of how privilege attaches to each document, including the type of privilege claimed.

5. After receipt of these briefs, the court shall render a decision and, if required, provide further directions.

6. Costs of this application are reserved.

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"R.W. Danyliuk" J.
R.W. Danyliuk