

QUEEN'S BENCH FOR SASKATCHEWAN

Date: 2019 05 21
Docket: QBG 1222 of 2018
Judicial Centre: Saskatoon

BETWEEN:

D'ARCY HANDE

APPELLANT
(APPLICANT)

- and -

UNIVERSITY OF SASKATCHEWAN

RESPONDENT
(RESPONDENT)

Counsel:

Alexandra M. Anderson
Robert J. Affleck

for the appellant
for the respondent

JUDGMENT
May 21, 2019

GABRIELSON J.

INTRODUCTION

[1] This is an appeal brought pursuant to ss. 46 and 47 of *The Local Authority Freedom of Information and Protection of Privacy Act*, SS 1990-91, c L-27.1 [Act], regarding the refusal by the University of Saskatchewan [University] to release certain

portions of a record belonging to the University which D'Arcy Hande [Hande] had sought access to pursuant to a request for information under the *Act*.

BACKGROUND

[2] Hande was a former employee of the Saskatchewan provincial archives which were located at the University until his retirement in 2005.

[3] On or about July 6, 2017 Hande submitted an access to information request form to the University seeking information about a symposium entitled "Symposium: Research Management and the Right to Know" which had been held at the University on December 2, 2015.

[4] In a letter to Hande dated September 1, 2017 Rayelle Johnston [Johnston], access and privacy officer at the University, advised that there was an audio file of the symposium which will need to be transcribed and reviewed in order to consider the request and further advising that the University would require a deposit of \$241.50 if Hande wished to proceed with the access request.

[5] Hande responded to Johnston by email dated September 21, 2017 that he would like to proceed with the application for transcription and that a third party, Gary Ruskin of U.S. Right to Know, would be making payment on his behalf.

[6] On November 14, 2017 Johnston forwarded a transcript of the symposium but advised that portions of the transcript had been deleted because the transcript contained information about identifiable individuals and also contained consultations and deliberations involving employees of the University as provided for in ss. 28 and 16 of the *Act*.

[7] On or about November 22, 2017 Hande requested, pursuant to s. 38 of the *Act*, that the Office of the Information and Privacy Commissioner of Saskatchewan [Commissioner] conduct a review of the University's decision to deny access to portions of the transcript.

[8] On June 5, 2018 the Commissioner, Ronald J. Kruzeniski, Q.C., issued a review report in which he recommended that:

[50] I recommend that the U of S continue to withhold the personal information on pages 9, 26, 27, 29 and 36. In addition, it should withhold the portions of pages 7 and 8 as noted in this report.

[51] I recommend that the U of S release the remaining information on pages 4 to 41.

[9] In a response dated July 5, 2018 from Johnston to Hande, the University declined to follow the recommendations of the Commissioner.

[10] Pursuant to ss. 46 and 47 of the *Act*, Hande filed an appeal of the University's decision not to accept the Commissioner's recommendations.

[11] Counsel for Hande and counsel for the University then sought a consent order minimizing expenses, court resources, time and expediting the appeal. In a consent order dated November 21, 2018, Meschishnick J. ordered that within 30 days the University would provide an unredacted copy of the information under seal subject to the court's decision to review the same and within 30 days counsel for Hande and the University would file written briefs setting out their positions in respect to the University's claim for exemptions to be filed under seal. The consent order further provided that after receipt of the written briefs the court would render a decision on the merits of the appeal and the University's claim of exemption from disclosure.

ISSUES

[12] The issues are as follows:

- (1) What general principles are applicable to the appeal?
- (2) Should the court disregard part of the affidavit of Rayelle Johnston?
- (3) Does s. 28(1) of the *Act* have any application?
- (4) Does s. 16(1)(a) of the *Act* have any application?
- (5) Does s. 16(1)(b) of the *Act* have any application?
- (6) What order should be made as to costs?

ANALYSIS

(1) *What general principles are applicable to the appeal?*

[13] The purpose of the *Act* and similar legislation that has been passed in other provinces was recently commented upon in the case of *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3, [2012] 1 SCR 23.

[14] In that case, Justice Cromwell stated at paragraphs 1 to 4:

1 Broad rights of access to government information serve important public purposes. They help to ensure accountability and ultimately, it is hoped, to strengthen democracy. “Sunlight”, as Louis Brandeis put it so well, “is said to be the best of disinfectants” (“What Publicity Can Do”, *Harper’s Weekly*, December 20, 1913, 10, at p. 10).

2 Providing access to government information, however, also engages other public and private interests. Government, for example, collects information from third parties for regulatory purposes, information which may include trade secrets and other confidential commercial matters. Such information may be valuable to competitors

and disclosing it may cause financial or other harm to the third party who had to provide it. Routine disclosure of such information might even ultimately discourage research and innovation. Thus, too single-minded a commitment to access to this sort of government information risks ignoring these interests and has the potential to inflict a lot of collateral damage. There must, therefore, be a balance between granting access to information and protecting these other interests in relation to some types of third party information.

3 The need for this balance is well illustrated by these appeals. They arise out of requests for information which had been provided to government by a manufacturer as part of the new drug approval process. In order to get approval to market new drugs, innovator pharmaceutical companies, such as the appellant *Merck Frosst Canada Ltd.* ("*Merck*"), are required to disclose a great deal of information to the government regulator, the respondent Health Canada, including a lot of material that they, with good reason, do not want to fall into their competitors' hands. But competitors, like everyone else in Canada, are entitled to the disclosure of government information under the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Act*" or "*ATI*").

4 The *Act* strikes a careful balance between the sometimes competing objectives of encouraging disclosure and protecting third party interests. While the *Act* requires government institutions to make broad disclosure of information, it also provides exemptions from disclosure for certain types of third party information, such as trade secrets or information the disclosure of which could cause economic harm to a third party. It also provides third parties with procedural protections. These appeals concern how the balance struck by the legislation between disclosure and protection of third parties should be reflected in the interpretation and administration of that legislation.

[15] As can be seen, the *Act* attempts to strike a balance between the public's right to access information which the Government of Saskatchewan (or a body holding delegated authority from the government) has to ensure accountability to persons affected by the information and the corresponding need to protect the privacy of individuals or other legitimate interests that may be impacted by the release of such material. It starts with the proposition that a person has access to all government records subject to limitations established by the *Act*. The limitations are set out in Part III of the *Act* which is entitled "Exemptions". The exemptions define circumstances under which the head of a government or a government institution is required to refuse access to

information contained in a record. Part IV of the *Act*, which is entitled “Protection of Privacy” deals with the balancing of the right of access to information with the protection of the interests of the individual in their own personal information.

[16] The parties agree that although Hande is appealing the University’s decision not to accept the recommendations of the Commissioner concerning his application for disclosure of the transcript of the symposium, the wording of the statute places the onus upon the University to establish that the information sought falls within an exemption from disclosure. Section 51 of the *Act* provides:

Burden of proof

51 In any proceeding pursuant to this Act, the burden of establishing that access to the record applied for may or must be refused or granted is on the head concerned.

[17] Section 8 of the *Act* provides that, even where access is refused, the local authority must give access to as much of the record as can reasonably be severed, without disclosing the information to which an exemption prevents such disclosure.

[18] The University has throughout this application taken the position that it is entitled to refuse access to portions of the record of the symposium because:

- (1) Portions of the record relate to personal information of individuals and s. 28(1) prohibits the disclosure of personal information without the consent of the individuals affected;
- (2) The information consists of advice, recommendations or options developed for the University and is therefore exempt from disclosure by virtue of s. 16(1)(a); and

- (3) The information consists of consultation or deliberations involving officers and employees of the University and is therefore exempt pursuant to s. 16(1)(b).

Each of these sections will be considered.

(2) *Should the court disregard part of the affidavit of Rayelle Johnston?*

[19] Hande objects to the contents of paragraphs 4 to 9 of the affidavit of Rayelle Johnston dated December 18, 2018. Hande submits that the paragraphs contain hearsay, argument, and irrelevant material and should be struck.

[20] The University's position is that the information provided in paragraphs 4 to 9 is background and places into context the issues to be determined in this appeal.

[21] I am satisfied that paragraphs 4 and 6 to 9 contain factual information as to how the application came to be before the court and are not offensive in the circumstances.

[22] In respect to paragraph 5, I am satisfied that the paragraph offends Rule 13-30(1) of *The Queen's Bench Rules* which holds that an affidavit must be confined to the facts that are within the personal knowledge of the person swearing or affirming the affidavit. The article attached to paragraph 5 as Exhibit D is written about the U.S. organization Right to Know and Ms. Johnston cannot be said to be aware of the accuracy of all of the information. Therefore, I have disregarded the contents of paragraph 5 for the purposes of this appeal.

(3) *Does s. 28(1) of the Act have any application?*

[23] Section 28(1) of the *Act* provides as follows:

Disclosure of personal information

28(1) No local authority shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 29.

[24] Section 23(1) defines personal information. Section 23(1) provides as follows:

Interpretation

23(1) Subject to subsections (1.1) and (2), “**personal information**” means personal information about an identifiable individual that is recorded in any form, and includes:

...

(f) the personal opinions or views of the individual except where they are about another individual;

(g) correspondence sent to a local authority by the individual that is implicitly or explicitly of a private or confidential nature, and replies to the correspondence that would reveal the content of the original correspondence, except where the correspondence contains the views or opinions of the individual with respect to another individual;

...

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual; or

(ii) the disclosure of the name itself would reveal personal information about the individual.

...

(2) “**Personal information**” does not include information that discloses:

...

(b) the personal opinions or views of an individual employed by a local authority given in the course of employment, other than personal opinions or views with respect to another individual;

...

[25] The University's position is that the record in question is a transcript of a recording of the symposium. On page 1 of the record (which was an unredacted portion of the transcript), the host identified the ground rules of participation in the symposium as follows:

My primary intention is not – well, my commitment is that we're not going to put this en masse as a digital file. This is just a memoir for me. I will write something on Chatham House Rule. There is only one rule of Chatham House, there's no rules it's one rule. What's said in the room is never attributed. So you can say something we might talk about what the message was, but it's not – if it can be attributed back to an individual we don't say it in that way. So the idea is to get us to unpack what we know and what we think about a problem space, without having to carry the baggage of that outside of the room. So we'll try and design something in terms of a policy brief about this problem space.

[26] The University's position is that what the host of the symposium was saying is that there was a ground rule for the symposium which established an environment of confidentiality for the participants under the "Chatham House Rule". The University also says that while oral contributions at a symposium may not be the most obvious understanding of the word "correspondence" sent to the local authority, it would appear to be an unduly "cramped interpretation" to suggest that a confidential letter takes on greater protection than a recording of oral submissions given in confidence. Such an interpretation would create an artificial distinction between forms of communications, without giving credence to the importance of protecting individual personal information.

[27] Hande's position is that s. 23 of the *Act* protects only "personal information" and that only individuals have personal information defined by the *Act*. The term "individual" in s. 23 does not mean a company or other entity. Opinions or views of an organization as expressed by its employees or officers does not constitute personal information and is not exempt from disclosure. Privacy is not paramount over access to information under the *Act*. Hande refers to *Dagg v Canada (Minister of*

Finance), [1997] 2 SCR 403 at para 107, where Cory J. held that access to information and privacy statutes have to be read together such that neither takes precedence over another.

[28] Hande also points to the lengthy list of exceptions to what might be considered “personal information” and refers to s. 23(2) as to exclusions from personal information. He specifically refers to ss. 23(2)(d) and (e) which state:

23

(2) “Personal information” does not include information that discloses:

...

(d) details of a licence, permit or other similar discretionary benefit granted to an individual by a local authority;

(e) details of a discretionary benefit of a financial nature granted to an individual by a local authority;

...

[29] Hande submits that the symposium event was a discretionary benefit “granted” to all individual attendees by the University as they were invited at the organizer’s discretionary invitation and may have benefitted from their attendance through networking or listening to the speakers.

[30] The Commissioner appears to have dismissed the applicability of s. 28. He states at paragraph 13 of his report:

From a review of the pages, it appears the U of S has severed the names of non-university employees who participated in the event along with the names of the companies they represented. Based on the transcript, the individuals introduced themselves by name and indicated their positions and the companies they worked for. Based on the list of the 19 participants provided by the U of S, all of the individuals are connected to a professional association or private business. In other words, it appears they were acting in their professional capacity at this event.

[31] It appears that the Commissioner reduced the term “personal information protection” to exclude personal information protection for any employee, whether they work for the local authority or any other company or organization. The legislation, however, does not isolate professional protection from personal protection. Simply because the participants identified their work association or profession does not negate the personal information protection. It does not follow that mere participation at a university event waives personal information protection. The protection offered by s. 23(1)(f) does not suggest such a limitation. The entire purpose of the symposium was an opportunity to share individual perspectives, offer opinions and views with respect to organizations, such as the Right to Know, and to facilitate discussion.

[32] Furthermore, the participants at the symposium were specifically told at the outset of the symposium that the “Chatham House Rule” would be applied.

[33] Chatham House was established by Royal Charter in 1926 as the Royal Institute of International Affairs. Its mission was to advance the sciences of international politics ... to promote the study and investigation of international questions by means of lectures and discussion ... and to promote the exchange of information, knowledge and thought on international affairs. It has expanded since its organization to cover local government, commercial organizations and research organizations. It became known colloquially as Chatham House based upon the name of its headquarters at 10 St. James’s Square, London, England. The Chatham House Rule reads as follows:

When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.

See: Chatham House, *Chatham House Rule*, online: www.chathamhouse.org/chatham-house-rule.

[34] The expectation, therefore, of the participants at the meeting held on December 2, 2015, was that they would have the opportunity to speak as individuals and to express views that may not be those of their employer or the universities they are associated with. Furthermore, in my opinion, there would have to be an express definition of what is not personal information such as that found in s. 23(2)(b) of the *Act* in order to have such information be excluded from the protection of the Chatham House Rule. Section 23(2)(b) provides:

(2) “**Personal information**” does not include information that discloses:

...

(b) the personal opinions or views of an individual employed by a local authority given in the course of employment, other than personal opinions or views with respect to another individual;

...

[35] Therefore, I would hold that the University has established that s. 28(1) does prevent the University from disclosing the personal opinions and views of the individuals who participated in the symposium (other than employees of the University). I have reviewed the record of the symposium and am also satisfied that all of the comments made by non-university employees would fall within the exception as they consist of personal opinions on the topic and were not comments about another individual. Also, I do not accept that the symposium was a discretionary benefit so as to come within the other exclusions of personal information with the meaning of s. 23(2)(d) and (e).

(4) *Does s. 16(1)(a) of the Act have any application?*

[36] Section 16(1)(a) of the *Act* states:

Advice from officials

16(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

- (a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority;

[37] The University's position is that both advice and recommendations are present in the record of the symposium. The participants are offering their experience and their suggestions for what it would take to achieve a better result in respect to the management of research at the University and elsewhere. It would be an unduly restrictive interpretation of advice or recommendations if every meeting required a corresponding and detailed plan of attack. Local authorities must be able to candidly consider options, ideas and apply previous experience to future courses of action. Exemptions such as s. 16(1)(a) are intended to facilitate such exercises without fear of exposure.

[38] Hande's position is that, firstly, the record does not actually contain advice, proposals, recommendations, analyses or policy options and, secondly, that if it does, they were not developed for or by the local authority. Hande's position is that the University cannot assume that the record falls under the exemption of s. 16(1)(a). In order to qualify for the exemption, the information must have been prepared or requested by the local authority. In this case it was an investigator who led the initiative, and there was no approval for the event or an approved budget. See Hande affidavit dated August 1, 2018 at Exhibit B.

[39] The Commissioner applied a three-part test in order to qualify for the exemption given in s. 16(1) of the *Act* as stated at paragraph 24 of his report:

[24] ...

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?
2. The advice, recommendations, proposals, analyses and/or policy options must:
 - i) be either sought, expected, or part of the responsibility of the person who prepared the record; and
 - ii) be prepared for the purpose of doing something, for example, taking an action or making a decision; and
 - iii) involve or be intended for someone who can take or implement the action.
3. Was the advice, recommendations, analyses and/or policy options developed by or for the public body?

[40] The three-part test set out in paragraph 24 of the Commissioner's report in this matter has not been adopted by this court. In *Britto v University of Saskatchewan*, 2018 SKQB 92, Justice Danyliuk commented at para. 83 as follows:

83 Having said that, the "three part test" set out at para. 38 of the Commissioner's report in this matter reflects language and considerations not contained in s. 16. The statute's language is broad; the Commissioner's attempt to refine or define a single applicable test to apply to a myriad of situations seems to me to be a stretch. Sometimes the considerations identified by the Commissioner in para. 38 will be applicable, but sometimes the facts will be such that those considerations will not apply. One size does not fit all. I would not adopt the relatively narrow test set out by the Commissioner.

[41] Instead, Danyliuk J. referred to a test set out in *John Doe v Ontario (Finance)*, 2014 SCC 36 at paras 22-24, [2014] 2 SCR 3:

22 The Court of Appeal also found that "[a]dvice' may be construed more broadly than 'recommendation'" (para. 29). However, it distinguished these terms by finding that "recommendation' may be understood to 'relate to a suggested course of action' more explicitly and pointedly than 'advice'", while "[a]dvice' ... encompass[es] material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific

recommendation” (ibid.). In oral argument in this Court, the Information and Privacy Commissioner of British Columbia and the Canadian Civil Liberties Association made a similar distinction: that while “recommendation” is an express suggestion, “advice” is simply an implied recommendation (transcript, at pp. 52 and 57).

23 In this case, the IPC Adjudicator applied MOT. She found that to qualify as “advice” and “recommendations” under s. 13(1), “the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised” (p. 4). I accept that material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised falls into the category of “recommendations” in s. 13(1).

24 However, it appears to me that the approach taken in MOT and by the Adjudicator left no room for “advice” to have a distinct meaning from “recommendation”. A recommendation, whether express or inferable, is still a recommendation. “[A]dvice” must have a distinct meaning. I agree with Evans J.A. in *3430901 Canada Inc. v. Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 F.C. 421 (“Telezone”), that in exempting “advice or recommendations” from disclosure, the legislative intention must be that the term “advice” has a broader meaning than the term “recommendations” (para. 50 (emphasis deleted)). Otherwise, it would be redundant. By leaving no room for “advice” to have a distinct meaning from “recommendation”, the Adjudicator’s decision was unreasonable.

See also: *3430901 Canada v Canada (Minister of Industry)*, 2001 FCA 254, [2002] 1 FC 421.

[42] Having reviewed the material in question, I find that the University has not met its onus of establishing that the symposium was held to give advice, proposals, recommendations, analyses or policy options for the University. Rather, the symposium was to discuss the topic in general terms without coming to any conclusions or recommendations. Therefore, I find s. 16(1)(a) of the *Act* not to be applicable as a ground for refusal to disclose.

(5) *Does s. 16(1)(b) of the Act have any application?*

[43] Section 16(1)(b) of the *Act* provides as follows:

Advice from officials

16(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(b) consultations or deliberations involving officers or employees of the local authority;

...

[44] The University's position is that s. 16(1)(b) contemplates University representatives and employees participating in deliberations of the University. By its nature, any symposium is an application of previous experience to an existing problem. It is a blend of antidote and aspirations. Collaborating with other interested parties that possess a unique expertise is entirely consistent with the concept of consultations. Universities are intended to facilitate discussion and exploration of all ideas, whether they be controversial, disruptive or unpopular.

[45] Hande's position is that the exemption in s. 16(1)(b) is intended to allow a local authority to consider options in private. Therefore, participation of independent third party individuals in the event forecloses the use of this exemption whenever others are involved. Furthermore, the exemption relates only to consultations or deliberations which involve prospective actions.

[46] The Commissioner stated at paragraph 39 of his report:

[39] In order to qualify, the opinions solicited during a "consultation" or "deliberation" must:

- i. be either sought, expected, or be part of the responsibility of the person who prepared the record; and

- ii. be prepared for the purpose of doing something, such as taking an action, making a decision or a choice.

[47] The Commissioner therefore held that there was a lack of actual consultation and deliberation on the face of the record and that the University did not meet the burden of proof in demonstrating that the exemption applied as required by s. 51 of the *Act*.

[48] In the case of *Britto v University of Saskatchewan*, 2018 SKQB 92, Danyliuk J. stated at paragraphs 88 and 89:

[88] Mr. Britto's counsel points to the *IPC Guide* [*The IPC Guide to Exemptions For FOIP and LA FOIP* (Office of the Saskatchewan Information and Privacy Commissioner, 2017), online: <www.oipc.sk.ca/assets/ipc-guide-to-exemptions.pdf> (October 2017)]. It is argued that "consultation" and "deliberation" are prospective only; that is, that the exemption can only apply to the University considering future actions and outcomes in response to a developing situation, as opposed to any deliberations about past courses of action.

[89] Again, this is unduly restrictive. Surely in the case of an employer considering what to do with an employee in the future, what has been done in the past can be summarized. It may be that such portion of a record is not exempt, but I am not prepared to read s. 16(1)(b) so narrowly as to preclude any discussion of the past from a legitimate consideration of what to do in the future.

[49] Similarly here, the symposium involved consultations between the University employees and third parties where what had been done in the past was summarized, and recommendations were made for future actions, not only by the University but by other parties. There is nothing in the exception which limits the exceptions to participation only of employees of the University. Collaboration with others is consistent with the concept of consultation. Furthermore, there is nothing in the *Act* that limits the exception to prospective actions only. The University has therefore established that the symposium fell within the exception provided for in s. 16(1)(b) of the *Act*.

(6) *What order should be made as to costs?*

[50] The material filed by the University did not request an order for costs but asked only that the appeal be dismissed. Hande requested that the appeal be allowed with costs.

[51] As the University has, for the most part, been successful on the appeal, I will therefore make no order as to costs.

CONCLUSION

[52] I make the following orders:

1. The University shall forthwith provide a copy of the transcript of the symposium held on December 2, 2015, entitled “Research Management and the Right to Know”. The University may redact and withhold the personal information identifying participants in this symposium other than those that the University has already identified. The University may also withhold the personal information which is identified as being withheld pursuant to s. 28(1) and s. 16(1)(b).
2. The appeal is therefore dismissed.

 J.
N.G. GABRIELSON