

REPORT WITH RESPECT TO APPLICATION OF [REDACTED]  
[REDACTED] FOR REVIEW OF REFUSAL OF INFORMATION BY  
THE DEPARTMENT OF HEALTH

[REDACTED] made a Request for Access to Information directed to the Department of Health in which he sought:

"All polling conducted in the 1991-92 and 1992-93 fiscal years, including results, reason done, how used, cost, questions asked, plus all polling planned for (reasons, questions, for what use, questions)."

He received a response from Saskatchewan Health by letter dated June 15, 1992, which reads in part:

"This is in response to your application for access to records on polling conducted by the Department of Health.

In the 1991-92 fiscal year, no polling was conducted by the Department therefore no records exist.

In the 1992-93 fiscal year, two polls on health issues have been conducted to date for a cost of \$13,500.

The remaining information you requested cannot be released because it is not under the control or in the possession of the Department. The information is in the office of the Minister of Health who is a member of the Executive Council, and therefore is exempt from the provisions of The Freedom of Information and Protection of Privacy Act pursuant to Section 2 of the Act.

In accordance with Section 7 of the Act, we cannot confirm or deny the existence of plans for future polls."

It is convenient to first dispose of the question of plans for future polls. I have been informed by the Department that at the time the Request for Information was received and at the

time when the response was made by the Department, the Department did not in fact have any records of any plans for future polling which disposes of this portion of the request.

The question of the status of the polls that were carried out by the Department is difficult and complicated due in no small part to the poor draughtsmanship of Section 2 of The Freedom of Information and Protection of Privacy Act (the Act). The relevant portions of Section 2 are as follows:

"2(1)(d) 'government institution' means, subject to subsection 2:

(i) the office (sic) of Executive Council or any department, secretariat or other similar agency of the executive government of Saskatchewan..."

(2) 'Government institution' does not include: ...

(b) the Legislative Assembly Office or offices of members of the Assembly or members of the Executive Council;..."

There is a department of government known as the Office of the Executive Council established under Section 73 of The Legislative Assembly and Executive Council Act Cap. L-11.1. This Department is under the Premier and, in effect, acts as the secretariat of the Premier's office. This Department does not appear to include members of the Executive Council.

The Government Organization Act Cap. G-5.1 provides for the continuance of and membership in the Executive Council. Briefly put, in ordinary language, this is the Cabinet which consists of the Premier and Ministers of the Crown appointed by the Lieutenant-Governor.

It appears to me that the reference to "office of Executive Council" in Section 2(1)(d)(i) of the Act must have been intended to be the Office of Executive Council appearing as it does in a Section dealing with departments and agencies of the government of Saskatchewan, and that the word "office" is a misprint and should read "Office".

I am informed by the Department that one of the polls in question was undertaken through the Office of the Executive Council and that the other was commissioned by "the House Leader". I am informed that the Office of the Executive Council was functioning in a co-ordinating capacity on behalf of the Minister of Health for a poll on health issues, and that the House Leader commissioned a poll on behalf of the Minister of Health with respect to health premiums.

I am further informed that these polls were received by the Minister of Health and that they were paid for by the Department of Health.

The position of the Department of Health is that the polling results were received by the Minister of Health as a member of Executive Council, have remained in her "office" at all times, and are not in the possession of the Department of Health.

The exclusion in Clause 2(2)(b) is in my view ambiguous. It may be read as including "members of the Executive Council" or "offices of members of the Executive Council", but in my view in either case the result is the same. If the office premises occupied by a Minister are intended, then this must be taken to mean the office premises which the Minister (member of Council) occupies in that capacity. If she occupies the same office premises from time to time, or most of the time, as Minister of Health, then on all those occasions the premises are those of the Minister of Health in that special statutory capacity. The same is true if one speaks only of a Member of Council. The exclusion does not in my view extend to a Minister who is the statutory head of a department of government, such as the Department of Health, while acting as such and performing those functions or duties.

Under The Freedom of Information and Protection of Privacy Act, Section 2(1)(e) 'head' (of a government institution) means "(i) in the case of an agency mentioned in subclause (d)(i), the member of the Executive Council responsible for the

administration of the agency; ..." It is the "head" who is responsible for carrying out all of the duties and obligations for the disclosure of information which are provided for by the Act. The Department of Health is clearly a "government institution" within the meaning of Section 2 and the Minister of Health is clearly the head of that department by virtue of the provisions of The Department of Health Act Cap. D-17 and The Freedom of Information and Protection of Privacy Act.

As I have indicated above the exclusion of members of the Executive Council or "offices of members of the Executive Council" relates only to the performance of such duties as they may have as members of Cabinet and their status as members of the Executive Council, and does not extend to their capacities and duties as heads of government departments. These are different roles - a member of Council may or may not be in charge of a Department of Government. The appointment to Council is by the Lieutenant-Governor, the subsequent appointment of a Minister to a Department is by Order-in-Council.

The fact that the polls in question were commissioned by others for and on behalf of the Minister of Health does not appear to me to be significant. Ministers, as department heads, more often than not execute their duties through agents and the act of the agent is the act of the Minister regardless of whom

the agent may be. The polls in question were paid for by the Department of Health, and I can find no reason to conclude that they should not be regarded as records of government business conducted by the Department of Health. While the Executive Council or Cabinet considers, discusses and makes policy decisions it does not, at least ordinarily, execute the day-to-day business of government which is, in the most part, if not entirely, the function of the various established departments of government. The business with which we are here concerned seems clearly to be that of the Department of Health.

The Department of Health Act Cap. D-17 continues the Department of Health as a department of the government of Saskatchewan and as previously mentioned provides that the Department shall be presided over by the Minister of Health. Section 6 provides in part as follows:

"6. Unless specifically dealt with under some other Act of the Legislature, the Minister with the assistance of the Department may ... do such things as he considers advisable for promoting the health of the people of the Province ... and without limiting the generality of the foregoing, the Minister shall:  
...

(j) collect such information and statistics respecting the state of health of members of the public, health resources, facilities and services and other matters relating to the health needs or conditions affecting the public as are considered necessary or advisable, and publish any information so collected ..."

It appears to me that the Minister of Health was engaged by or through her agents in collecting information within the meaning of the said subsection (j), and that she has a duty to publish that information. In brief, the polls are not Cabinet records or documents, but records of the Department of Health of which the Minister of Health is a part. As stated in the letter of June 15, 1992, from the Department of Health "... two polls on health issues have been conducted to date ..."

Accordingly, I have concluded and it is my recommendation that the information requested by the Applicant with respect to the polls in question should be released by the head to the Applicant.

DATED at Regina, Saskatchewan, this 17th day of September, 1992.

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**Derril G. McLeod, Q.C.,  
Commissioner of Information and Privacy  
for Saskatchewan**