FILE NO. 92/009

REPORT WITH RESPECT TO REVIEW OF A REQUEST FOR INFORMATION MADE BY [redacted] TO SASKATCHEWAN LIQUOR BOARD

This review arises from a refusal by the Saskatchewan Liquor Board to disclose information requested by the Applicant pursuant to *The Freedom of Information and Protection of Privacy Act* (the "Act").

The initial request for information was made to Saskatchewan Property Management Corporation for "all records and correspondence that pertained to the leasing agreement for property occupied by the Saskatchewan Liquor Board Store at Dewdney Avenue and Lewvan Drive". In accordance with the Act, the request was referred to the Saskatchewan Liquor Board (the "Board").

By letter dated July 7, 1992, the Applicant was advised that the information requested would not be disclosed. The reason given was:

> "This information cannot be released because to do so could affect the economic interests of the Board. Information of this nature is exempt from access according to Section 18(1)(d) and (f) of *The Freedom of Information and Protection of Privacy Act*."

[redacted] then applied for a review but before the review had been completed made a further request to the Board for information with respect to other premises occupied by the Board. By letter dated September 30, 1992, he was advised by the Board that the information would be refused for the same reasons as had been previously given. At the same time he was advised that certain of the premises for which he had requested information were actually owned by the Board.

In the result, in addition to the premises previously mentioned, [redacted] request for information was identified as applying to the following premises held as tenant by the Saskatchewan Liquor Board:

1359 Broadway Avenue, Regina, Saskatchewan
McCarthy Boulevard and 9th Avenue North, Regina, Saskatchewan
Avalon Shopping Centre, Saskatoon, Saskatchewan
Central Avenue Plaza, Saskatoon, Saskatchewan
Confederation Park Plaza, Saskatoon, Saskatchewan
31 28th Street, Saskatoon, Saskatchewan
1935 1st Avenue North, Saskatoon, Saskatchewan
301 2nd Avenue North, Saskatoon, Saskatchewan

I then received a further application for review with respect to these additional premises. Since many of the issues are common to all of the premises in question, I am dealing with both applications for review as a single application.

The Saskatchewan Liquor Board has given notice to all of the third parties (landlords) as required by Section 52(1) of the Act as parties who would have been notified pursuant to Section 34(1) if the Head had intended to give access to the record in the first instance.

In its refusal, the Saskatchewan Liquor Board relied on the following provisions of the Act:

> "18(1) A head may refuse to give access to a record that could reasonably be expected to disclose:
>
> (d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of ... a government institution;
>
> (f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of ... a government institution."

In support of its position, the Board, by letter dated October 8, 1992, made the following submission:

> "... the Board feels that disclosure of the lease amounts could interfere with future contractual negotiations and be prejudicial to the economic interests of the Board, based on the following:

1. The Board, on occasion received preferential lease rates as liquor board stores are seen as "drawing cards" or "anchor" stores. The developers of these properties would not like to have these amounts disclosed and, as such, some of our lease agreements include non-disclosure clauses. If the information became public, other tenants in those properties would, no doubt, seek preferential rates as well.

2. At times, the Board is not in a position to negotiate as suitable properties are not always available. Therefore, lease rates are higher. The disclosure of this information could prejudice negotiations as landlords may view these amounts as "starting" points in negotiating future leases with the Board."

Subsequently, the Board submitted to me information showing the base rental rate per square foot which it pays on five selected locations. There is a significant range in the base rate rentals being paid for the five different premises.

In the course of the review, I had occasion to discuss with the Applicant the precise information which he wished to obtain, and as a result he has indicated to me that the information he wishes to have is:

1. a description of the location of each of the premises involved and the number of square feet being leased to the Board at each location;

2. the total lease costs of each location including:

   (a) leasehold improvements including any payment upon termination or expiry of the lease;

   (b) the actual base rent;

   (c) other costs and charges payable by the Board as tenant, including taxes;

3. the duration of the term of the lease;

4. the name of the landlord;
5. the name of the person who signed each of the leases on behalf of the Board.

In a free market economy, rents, like other prices, are determined by supply and demand. In the case of rents, the price will be influenced by the desirability (or lack thereof) of the location and the special need of the tenant for that particular location or one like it. From a landlord's point of view, it may also, of course, be influenced by the desirability of the tenant, by the willingness of a financially responsible tenant to enter into a longer term lease, and other factors, so that, even if premises are roughly comparable (they will never be exactly the same) rents may vary significantly for the same amount of space devoted to the same use. Needless to add, the quality of the premises and the services provided by the landlord are also factors. It follows that the rent commanded by a similar amount of space may vary substantially depending on the previously mentioned factors and any others that may be applicable, including general economic conditions at the time the lease is negotiated.

Accordingly, I am unable to conclude that disclosure of the information requested by the Applicant will either prejudice the economic interests of the Board or interfere with contractual or other negotiations of the Board. I am unable to conclude that knowledge of rentals which the Board has agreed to pay at a certain time for a certain location, presumably for good and sufficient reasons, has any significant bearing on the rental that it might be prepared to pay at a different time for a different location and under different circumstances.

As previously mentioned the landlords, as third parties, were given notice of this application for review and of the 12 so notified, 5 have responded objecting to the disclosure of the information requested on the basis of Section 19(1)(b) and 19(1)(c) of the Act which provides:

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

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence implicitly or explicitly to a government institution by a third party; (or)

(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."

The foregoing provisions are substantially the same as Section 20(1)(b), (c) and (d) of the *Access to Information Act* of Canada which were characterized by Denault, J. of the Federal Court in **Re: Information Commissioner of Canada and Minister of External Affairs** (1990) 72 DLR (4th) 113 at 115 as intended to:

"...protect third parties from the disclosure by government institutions of confidential information that would be detrimental to their interests."

At page 119 he observes that:

"What must be objectively determined is whether the information was obtained in exchange for the explicit or implicit promise that it would be treated confidentially.

However, if the information falls under Section 19(1)(b) the Act does not stipulate that disclosure must result in a detriment to a third party. Upon analysis it would appear that there are three situations which may arise under Section 19(1)(b):

1. Cases where there is an explicit confidentiality agreement between a government institution and a third party. In such cases a covenant not to disclose (a negative covenant) is

enforceable without proof of damage. Difficulties with respect to obtaining an injunction against the Crown do not, in my view, diminish or affect the principle set out in 24 Halsbury 4th ed., article 904:

> "Where parties to an agreement contract with their eyes open that a particular thing is not to be done, proof of damage is generally not necessary in order to entitle the plaintiff to a perpetual injunction to restrain a breach... If the construction of the contract is clear and the breach is clear, the mere circumstance of the breach affords a sufficient ground for the injunction. In such a case, the court has no discretion to exercise. All that it has to do is to say by way of injunction that the thing must not be done. The injunction does nothing more than give the sanction of the process of the court to that which is already the contract between the parties."

2. If there is an existing contractual relationship or fiduciary relationship between a government institution and a third party, the courts will, in certain cases, imply a duty of confidentiality as, for example, where the relationship is that of employer/employee or solicitor/client or trustee/beneficiary.

3. If there be no existing contractual relation between the parties, a contractual obligation or promise of confidentiality may be implied from all the circumstances as in **Lac Minerals v. International Corona** (1989) 61 DLR (4th) 14. In such cases it would appear that a detriment to the person asserting an implied promise of confidentiality (or a reasonable expectation of probable harm) must be shown. In other words, a court may not imply a promise of confidentiality unless it appears that disclosure will be harmful to the third party. In such a case, although Section 19(1)(b) does not require the head to find that disclosure will be detrimental to the third party, or that there would be a reasonable expectation of harm, it may be necessary for him to do so before a promise of confidentiality may be implied.

Section 19(1)(c) is another matter. It prohibits disclosure and therefore imposes a duty of confidentiality on the head of a government institution with respect to any information if disclosure could reasonably be expected to result in financial loss or gain, prejudice the competitive position of, or interfere with the contractual or other negotiations of a third party.

These provisions appear to impose a statutory duty of confidentiality on the head to any third party if there is a reasonable expectation of probable harm of the kind described therein to such third party, whether or not the information might be considered confidential as having the necessary quality of confidence about it, i.e. is private or undisclosed. Admittedly, it seems unlikely that disclosure could result in harm to a third party if the information does not have the quality of confidentiality and is known, available or disclosed to others..

There is no doubt that the information sought by the applicant is of a financial and commercial nature and, accordingly, the question is, with respect to each lease, whether the information was "supplied in confidence implicitly or explicitly" by the landlords to the Board, or, if not, whether the information must, nevertheless, be treated as confidential information in accordance with Section 19(1)(c).

One of the leases in question between Saskatoon Market Mall Ltd. as landlord, and the Board as tenant, specifically provides:

> "The Tenant agrees that this Lease is a confidential document and its (sic) will make no use of the Lease or any provisions or information delivered to the Tenant except in connection with the tenancy created hereunder. The Tenant agrees with the Landlord that it will not register this Lease in this form in any land registry office and, if either party desires to register a caveat for the purpose only of giving notice of the lease, the parties hereto may execute a short form thereof solely for the purpose of supporting the caveat."

It appears to me that this provision in the lease is sufficient to bring it within the prohibition contained in Section 19(1)(b) and that, accordingly, the information requested by the applicant contained in this lease, must not be disclosed.

None of the remaining eleven leases in question contain an express confidentiality clause. Should such a promise be implied? I know of no case where it has been held that the contractual relationship between landlord and tenant will give rise to an implied promise of confidentiality. Indeed, I expect that most tenants would be surprised if it were suggested to them that the rent or any other information regarding the lease on their apartment or office would place upon them an implied obligation of confidentiality. Nor has my attention been directed to any other circumstances with respect to any of these leases which would justify or support an implied promise of confidentiality. Accordingly, it is my conclusion that they are not covered by Section 19(1)(b).

The question remains whether a duty of confidentiality arises under 19(1)(c). I observe that there is no suggestion that the information requested by the applicant has, in fact, been disclosed or is otherwise available.

To come within 19(1)(c), the party resisting disclosure is required to provide evidence that disclosure would give rise to a reasonable expectation of probable harm. This is the test adopted by the Federal Court of Canada and reaffirmed by the Federal Court of Appeal in **St. John Shipbuilding Ltd. v. Minister of Supply and Services** (1990) 67 DLR (4th) 315 under similar provisions in the federal *Access to Information Act*, but as stated by Denault, J. in **Information Commissioner of Canada v. Minister of External Affairs** (supra) at page 123:

> "Thus, while the law is clear and there is no dispute as to the test to be applied, determining just what constitutes a 'reasonable expectation of probable harm' will invariably give rise to serious disagreement..."

This issue was not addressed by the head in his decision not to disclose the information, since he relied on Section 18(1)(d) and (f), and since the head did not intend to disclose the information, it was unnecessary at that time, and the head did not give notice to third parties. However, as previously mentioned, following the application for review, the head notified all of the third parties and they have been given ample time to make representations to me with respect to this matter.

For the reasons which I have already outlined in dealing with the suggestion that the Board would be prejudiced or suffer interference with contractual or other negotiations, I have concluded that the disclosure of the information requested does not give rise to a reasonable expectation of probable harm to the landlords of the nature described in Section 19(1)(c). The representations made to me by the landlords were all of general or speculative nature. No specific or concrete instance was given of an expectation of probable financial loss, prejudice to competitive position or interference with contractual or other negotiations.

One final point must be dealt with. It appears from the lease of the premises at Dewdney Avenue and Lewvan Drive (Regina) that the landlords are three individual, and from the lease of 1935 1st Avenue North (Saskatoon) that one of the two landlords is an individual. In my view, this information is severable in accordance with Section 8 of the Act. Accordingly, the names and addresses of these individual landlords should not be disclosed.

In summary, I recommend the disclosure of the information requested except names and addresses where it appears that landlords are individuals and with respect to the lease from Saskatoon Market Mall Ltd.

DATED at Regina, Saskatchewan, this 11th day of March, 1993.

[redacted]

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