94/011

FILE NO. -

REPORT WITH RESPECT TO THE APPLICATION FOR REVIEW OF [redacted] WITH RESPECT TO INFORMATION REQUESTED FROM SASKATCHEWAN FINANCE

This was a request for access to personal information by [redacted] to the Department of Finance (the "Department"). She requested "access to all documents in my file."

By letter dated September 7, 1994, she was advised by the Access Officer of the Department that:

> Your request includes medical information which has been provided in confidence to the Public Employee Benefits Agency (PEBA) by various physicians. PEBA has a long standing policy of not disclosing this type of information without the physician's consent.
>
> I understand that PEBA staff have had discussions with you about the need to obtain this approval before the information can be released.
>
> For ease of reference, we have attached listings of the physicians and medical reports which are included in your file.

The Applicant requested a review stating:

> I have been denied access to documents in my file relating to my LTD* claim by PEBA. These documents are letters written by doctors regarding me. These letters are used as medical evidence to deny my claim and have been reviewed by the entire council – at least 12 other people that I know of. It is unfair for me to have to make my appeal without access to these documents. I cannot adequately defend my position without knowing how or why PEBA has come to their decision and whether the information they have received is factual.
>
> *LTD – Long Term Disability

Having received this request, I was in touch with the Access Officer of Saskatchewan Finance, and requested that he provide me with an elaboration of the reasons for refusal including direct reference to the specific sections of the Act upon which the Department relied in refusing to provide the records requested. In reply I received a letter dated November 10, 1994 which is attached as Appendix "A" hereto.

At this point it should be explained that:

1. The Public Employee Benefits Agency administers claims under various public employees' benefit entitlements such as, in this, case benefits under a collective bargaining agreement which provides for payment to an employee who is by virtue of illness disabled from continued employment, and is itself under the jurisdiction of the Department.

2. Much of the administration and responsibility for dealing with these claims is delegated by PEBA to The Co-operators, a large life and disability insurer which presumably has expertise and experience in dealing with matters of this sort.

3. The Applicant was on disability leave with pay until a determination was made in June of last year that she was no longer entitled to receive these benefits.

After discussions with the Applicant, she has indicated to me that she has, in fact, by other means obtained copies of the medical reports in question or most of them, and that her application is in reality concerned with a report made by [redacted] to The Co-operators dated June 15, 1994.

It is convenient to deal first with the issues regarding the application of Section 31 of *The Freedom of Information and Protection of Privacy Act* (the "Act") and particularly Section 31 which provides:

> **31**(1) Subject to Part III and subsection (2), an individual whose personal information is contained in a record in the possession or under the control of a government institution has a right to, and:
>
> (a) on an application made in accordance with Part II; and
>
> (b) on giving sufficient proof of his or her identity;
>
> shall be given access to the record.

> (2) A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits, where the information is provided explicitly or implicitly in confidence.

In the event, three issues arise with respect to subsection 31(2):

1. is the Applicant's claim for sickness disability payment a "government benefit" within the meaning of the Act;

2. was the information provided explicitly or implicitly in confidence; and

3. is the information in the possession or under the control of a government institution.

I am far from convinced that the information in question was compiled for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits. It appears to me that the word "benefits", which of course is an extremely broad and elastic term, must be interpreted in the context in which it is used, and accordingly should not be stretched beyond the apparent ambit of the Section which appears to deal with situations where a government department is deciding to award a contract of employment, some other government contract or some other similar benefit, and should be distinguished from the situation we have here where the Applicant is an employee of a government institution as defined by the Act, and the claim is for a benefit to which she has an

entitlement not by virtue of the award of a government contract or benefit but by virtue of an existing agreement of employment between herself and the Institution.

Secondly, I am not satisfied that the information provided by [redacted] to the Co-operators can be properly said to have been provided explicitly or implicitly in confidence. Certainly there is no express statement to that effect, either in the letter or otherwise, and certainly it was the expectation of [redacted] that his report would be used in the adjudicative process relating to the Applicant's claim. It would be a reasonable expectation under those circumstances that she would be given a copy of the report in order that she could properly appreciate the case which she would be required to meet in order to substantiate her claim.

Finally, it is clear that The Co-operators is acting as the agent for the Department, and accordingly the Department, as principal, has control and indeed the constructive possession of the record.

With respect to the arguments made by the Department under Section 18(1)(d) of the Act, I regard these submissions speculative and unsubstantiated. I would require direct evidence that the results suggested by the Department would transpire before I would be prepared to accept this position.

With respect to the position taken by the Department under Section 19(1)(c)(iii), I am of the view that if [redacted] is, in fact, apt to refuse to provide further services [redacted]

[redacted] I would require direct evidence of that before I would accept such a suggestion.

By virtue of Section 61 of the Act, the burden of proof is on the Head of the Department.

As I have said in previous reports, a policy of non-disclosure cannot stand in the face of the provisions of the Act. The Act establishes a policy of disclosure and it is only if the record falls squarely within a specific exception contained in the Act that non-disclosure will be acceptable. This applies to claims of confidentiality unless the information for which confidentiality is claimed comes within one of the exceptions contained in the Act.

Accordingly, it is my recommendation that the Department disclose to the Applicant the report which it obtained from [redacted] dated June 15, 1994.

Dated at Regina, Saskatchewan this day of January, 1995.

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