

Report No. 00/017

**REPORT WITH RESPECT TO THE APPLICATION
FOR REVIEW OF ██████████ IN RELATION TO INFORMATION
REQUESTED FROM SASKATCHEWAN JUSTICE**

██████████ is a journalist who directed a written request for copies of documents and information to Saskatchewan Justice in a letter dated March 31, 2000. The letter, which accompanied the formal Access to Information Request Form submitted by ██████████ to Saskatchewan Justice, sets out in specific detail the copies of documents to which he seeks access and the reasons for his request. ██████████'s letter reads as follows:

“This is a request for records under the Freedom of Information and Protection of Privacy Act.

I would like copies of any recent documents, files, notes, reports, memorandums, letters, e-mails, briefing notes, transcripts of meetings, agendas of meetings, or any other material regarding measures being looked at to extend legal rights to same sex couples or economically dependent couples.

I am interested in knowing what consideration is being given to codify legal obligations since the recent Supreme Court decision extending benefits to Homosexuals. Moreover, I am interested in knowing what direction executive council has provided bureaucrats on this issue. Furthermore, I am interested in seeing any intergovernmental correspondence Saskatchewan has received from other governments in Canada regarding this issue.

I believe releasing this information is in the public's interest, and request that you waive any fee. I am a journalist and will disseminate the information contained in the records I have requested. This dissemination will promote the free and vigorous debate of important public issues.

I am aware that you can impose fees for search time and for the cost of reproducing material. If you do not grant my request for a fee waiver, I request that you provide me with an itemized list of any fee you wish to impose.

If the time for searching for the records is excessive, I will want to know the qualifications of the person doing the search, the locations where that person had to search, any transfer of records from one part of the department to another, the qualifications of the person who reviewed the records once found and the time necessary to segregate the exempt portions of the records from the non-exempt.

I am confident there should be no exemptions given my understanding of the Act. I'm sure the information I am looking for will not harm any law enforcement efforts. I am not looking for information about another person. It will not cause

financial harm to another person or organization; and definitely will not interfere with public safety.

If you should decide to withhold any of the records I have requested, then I ask you to provide me with a list of the records you are withholding and the reason you are withholding each of them.

I am available to discuss my request with you. My phone number is [REDACTED]. Thank you for your assistance.

Sincerely,

[REDACTED]

Saskatchewan Justice responded to [REDACTED] [REDACTED] by letter dated May 3, 2000. John D. Whyte, Q.C., in his capacity as Access Officer Freedom of Information for Saskatchewan Justice, advised [REDACTED] in that letter that the documents requested by him could not be released to him. The reason given for the refusal was succinctly stated as follows:

“This information cannot be released because it is subject to solicitor-client privilege. Information of this nature is exempt from access according to section 22(a) of *The Freedom of Information and Protection of Privacy Act*.”

A Request for Review was filed with me by [REDACTED] on May 9, 2000 and after reviewing the materials supplied to me by [REDACTED], I concluded, pursuant to Section 50(1) of *The Freedom of Information and Protection of Privacy Act* (“the Act”) that reasonable grounds existed for me to conduct a Review as requested.

Section 51 of the *Act* requires that I inform the head of the Government institution involved of my intention to conduct the review, I wrote Saskatchewan Justice on May 15, 2000, as follows:

“I have received a Request for Review from [REDACTED] [REDACTED], of [REDACTED] [REDACTED], in connection with the above-described matter. For your information, I enclose a photocopy of [REDACTED]’s formal Request for Review, together with a copy of the attached letter outlining details of the basis of his Request for Review.

I intend to conduct a review of this matter and I so advise you in accordance with Section 51 of *The Freedom of Information and Protection of Privacy Act*.

In the carrying out of the review I will wish to have access to the written materials that are relevant to the review. If they are not too voluminous, I would appreciate receiving a copy of these materials; if they are in excess of 100 pages, I would like to make arrangements with your office to have access to the files and materials.

Additionally, I would be pleased to receive any further representations you wish to make to me respecting the entitlement of the applicant to the information requested.

May I hear from you regarding these matters at your convenience.

Yours truly,

G.L. GERRAND
Acting Freedom of Information
and Privacy Commissioner
Province of Saskatchewan."

By letter dated June 8, 2000, Saskatchewan Justice responded to me confirming the availability of the materials for my inspection at their offices and outlining additional grounds upon which denial of access to the material was asserted. The letter of Mr. Whyte in this regard reads as follows:

"Thank you for your letter of May 15, 2000, respecting the Request for Review from [REDACTED] of [REDACTED].

Given the volume of material in question, access to this material will be available to you at our offices. Please contact [REDACTED] office (telephone [REDACTED]), to make arrangements for a convenient time for you to review the material.

As indicated in my letter to [REDACTED] of May 3, 2000, access to this material was denied pursuant to clause 22(a) of *The Freedom of Information and Protection of Privacy Act*. If you are of the view that this clause may not be wide enough to

cover any particular document, I would, in the alternative, rely on sections 13, 14, 16 and 17 and clauses 22(b) and (c) to deny access to this material.

With respect to sections 13 and 14, any information received from other governments was either received in confidence or the release of it would be injurious to relations with those governments, in that they would be adverse to sharing this kind of confidential information with us in the future if they knew there was a risk it would be made public.

With respect to section 16, a number of the documents encompass records referred to in clauses 16(1)(a) and (b) and subclause 16(1)(d)(i).

With respect to section 17, a number of the documents fall within the exceptions outlined in clauses 17(1)(a), (b), (e) and (g).

With respect to section 22, you will note that the exemptions outlined in clauses 22(b) and (c) go beyond what would generally fall within solicitor-client privilege, as referred to in clause 22(a). These clauses would apply to a number of the documents in question.

Yours truly,

John D. Whyte, Q.C.
Deputy Minister of Justice and
Deputy Attorney General”

I invited [REDACTED] to make submissions respecting the additional exemptions outlined by Saskatchewan Justice as grounds for refusing access to the information requested. [REDACTED] provided me with his response by letter dated June 19, 2000, the relevant portion of which reads as follows:

“It is my submission, first, that the additional exemptions sought by the department [referenced in its letter of June 8] should not be considered as part of this review.

As can be seen in comparing the original refusal and the letter of June 8, the department initially cited section 22(a) as the reason for denying access to the material. Now, the department is hoping to rely on sections 13, 14, 16 and 17 and clauses 22(b) and (c) to deny access.

This is, I submit, demonstrably unfair. Such an action fails to live up to the spirit of the Act. If the additional sections and clauses cited are, indeed, valid reasons to deny access, why were they not identified at the outset?

Case law on access to information has established that government institutions are specifically barred from amending or adding to the exemptions they claim in an original refusal.

This is for good reason, I submit. As the courts have said, to allow such practice prejudices appellants from the ability to make a full representation on the matter. Further, it allows institutions to interminably delay the process. [See: *Ontario (Minister of Consumer and Commercial Relations) v. Fineberg, Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused [1996] O.J. No. 1838 (C.A.)*].

Further, the department indicates that “a number of the documents [I am looking for] encompass records [that are] referred to in” the additional exemption it has cited. This indicates, I submit, that “a number” of the documents probably do not encompass material exempted by the Act.

As such, section 8 of the Act requires the department to provide “access to as much of the record as can reasonably be severed without disclosing the information to which [I am] refused access”

I turn now to the exemption originally sought by the department: that is, that it contains information that is subject to solicitor-client privilege—section 22(a). It is not the case, I submit, that every communication from a solicitor to a public official is confidential. Again, there are legal precedents to follow, specifically *Legal Services Society v. British Columbia (Information and Privacy Commissioner)* 140 D.L.R. 4th 372 (1996). In that case, the judgement showed that an exempted communications (sic) must relate to obtaining legal advice. This is distinguished from normal communications between the department and the minister.

A review of the material will, I submit, show that the records I seek do not contain communication or information that is a result of obtaining legal advice. In the alternative, such portions as may be captured in that definition, could be severed.

The Saskatchewan Court of Appeal has made it clear that the over-riding objective of the Act is to have records disclosed, that releasing information is in the public interest.”

I now wish to address [REDACTED] argument that the additional exemptions sought by Saskatchewan Justice should not be considered as part of this review.

Saskatchewan Justice has referred me to five decisions that Saskatchewan Justice argues have held, pursuant to the *Access to Information Act* (Canada), that it is proper for government institutions to raise further grounds during the Commissioner's review: *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [1999] F.C.J. No. 522 (QL) (FCA), A-785-96, aff'g in part (1996) 120 F.T.R. 207 (F.C.T.D.); *Rubin v. Canada (Minister of Transport)* (1995), 105 F.T.R. 81 (F.C.T.D.); *Tolmie v. Canada (Attorney General)*, [1997] 3 F.C. 893 (T.D.); *Air Atonabee Limited v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245; 27 C.P.R. (3d) 180; 27 F.T.R. 194 (F.C.T.D.); and *Tridel Corp. v. Canada Mortgage and Housing Corp.* (1996), 115 F.T.R. 185 (F.C.T.D.).

In *Tolmie v. Canada (Attorney General)*, McGillis, J. states as follows:

"I have concluded that the Information Commissioner properly determined, in the context of the facts of this case, that the respondent was entitled to raise, during the course of the Information Commissioner's investigation, an additional ground of exemption under the provisions of the Access to Information Act."

And, in the course of his decision in *Air Atonabee Limited v. Canada (Minister of Transport)*, MacKay, J. states as follows:

"I appreciate the applicant's frustration in this situation where the respondent's decision to disclose records seems to be based at different stages on different grounds. Those changes do not demonstrate exemplary administrative practice, nor do they foster understanding and goodwill in the necessary continuing relationship between the parties. Nevertheless, I conclude that the respondent ought not to be bound by the grounds identified by the decision letter of September 25, 1986."
[Emphasis added]

[REDACTED] relies on *Ontario (Minister of Consumer and Commercial Relations) v. Fineberg*, Toronto Doc. 220/95 (Ont. Div. Ct.), leave to appeal refused, [1996] O.J. No. 1838 (C.A.) in

support of his position. He has provided me with a copy of the Information and Privacy Commissioner's decision that was the subject of the aforementioned case.

In the Ontario Commissioner's decision, the Commissioner deals with the matter of raising discretionary exemptions late in the appeals process as a preliminary issue. Due to the non-adherence to a particular policy of the office of the Information and Privacy Commissioner for Ontario, which dictates a specific time frame for raising new discretionary exemptions not originally claimed in a department's decision letter, the Commissioner refused to consider the late-requested exemptions.

As the office of the Information and Privacy Commissioner for Saskatchewan does not have such a policy in place, I find that the conclusions of the Ontario Commissioner in the above-quoted case are not applicable to the Review.

In my view the relevant conclusions in the *Tolmie* and *Air Atonabee* cases are on point. In addition, I am in agreement with the comment made by Saskatchewan Justice (in its correspondence dated July 14, 2000) that *The Freedom of Information and Protection of Privacy Act* places no restrictions on the grounds the Commissioner may consider in the course of a review.

It is my opinion, there should be no limitation on me applying any provisions of the *Act* to any matter I undertake to review. Having regard to the relevant case authorities, the provisions of *The Freedom of Information and Protection of Privacy Act*, and the dictates of common sense, I conclude that I am entitled to consider whatever exemption provisions contained in the *Act* that I deem appropriate. This is the case whether the exemptions relied upon are referred to me by the parties involved either initially or subsequently, or whether I refer to the exemptions of my own volition.

I requested that Saskatchewan Justice make available to me for purposes of my review all relevant documents and records in the possession or under the control of Saskatchewan Justice. My authority for making this request is set forth in Section 54(1) of the *Act*. Arrangements were duly made for me to examine the documents and records at the offices of Saskatchewan Justice.

The documents and records are physically situated in offices occupied by lawyers and support staff employed by Saskatchewan Justice. They are divided into files comprised essentially of constitutional law matters and legislative services matters. In total they are voluminous and cover a time period of upwards of a decade, ending with very current dates.

Almost all of the documentation falls into the type of records exempted by Section 22 of the *Act*, which provides:

- “22. 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 an agent of the Attorney General for Saskatchewan or legal counsel for a government institution in relation to a matter involving the provision of advice or other services by the agent or legal counsel; or
 - (c) contains correspondence between an agent of the Attorney General for Saskatchewan or legal counsel for a government institution and any other person in relation to a matter involving the provision of advice or other services by the agent or legal counsel.”

My perusal of the documents satisfies me that the documents, with a few exceptions, constitute legal advice as contemplated by Section 22 of the *Act*. Some of the material is comprised of actual opinions from departmental solicitors to superiors in Saskatchewan Justice. Other material is comprised of requests from and responses to departments of government other than Saskatchewan Justice on legal issues and possible scenarios related to pensions and same sex couples. These materials are exempt from production, in my opinion, as they clearly reflect the providing of legal advice by legal counsel to a government institution.

The files contain material that reflects the “work product” of the lawyers employed by Saskatchewan Justice. Included in the files are chronologies prepared by counsel and memos to and from deputy ministers discussing events and the implications of events. Copies of reported cases with

highlighting of portions of the reported cases, which is part of the opinion developing exercise, are included in the files.

The exemption related to solicitor-client privilege set forth in Section 22 of the *Act* is not limited, in my view, to actual providing of a formal opinion by counsel to client. The files are replete with memoranda of counsel to files where counsel postulates on the effect of particular court decisions, alternate strategies and options of government institutions and departments. This is what is referred to as counsel's working notes and these ramblings of counsel are exempted from production under Section 22 of the *Act* and in particular, the provisions of Section 22(1) that refers to "information that is subject to solicitor-client" privilege.

The files reflect as well correspondence between law officers of Saskatchewan and other jurisdictions which, in my view, fall within the exemptions particularized in Section 22(3) of the *Act*.

Included in the materials reviewed by me is correspondence involving citizens. The release of copies of this correspondence would constitute the release of "personal information" as defined, in part, by Section 24 of the *Act*. "Personal information" includes information relating to "sex" as stated, in part, by Section 24(1) of the *Act* and I interpret the word "sex" as used in that section to include sexual orientation. The correspondence with citizens contained in the files includes reference to or implications of the sexual orientation of some of the correspondents. This group of documents should not be disclosed pursuant to Section 29 of the *Act*.

There are certain documents that I conclude can be released to the Applicant. The documents are described as follows:

- Bill 21/2000 of the Province of British Columbia.
- Letter from ACPM to Hon. John Nilson dated August 10, 1998.
- Letter from Hon. Robert Mitchell to Lynda Haverstock dated May 12, 1993.

- Letter from Premier Romanow to Lynda Haverstock dated May 12, 1993.
- House of Representatives, State of Vermont, Questions and Answers.
- An Act relating to Civil Unions, State of Vermont.
- Speech notes re: Sexual Orientation, The *Charter* and Human Rights for address to Canadian Bar Association October 15, 1998.
- Second Reading speech of Chris Axworthy respecting *the Miscellaneous Statutes (Domestic Relations) Amendment Act, 2000*.
- Bill 32 of the National Assembly of Quebec (First Session, Thirty-sixth Legislature).
- Extract of Hansard April 29, 1993.

I therefore recommend the release to [REDACTED] of copies of the documents listed above and I further recommend that the balance of the files of Saskatchewan Justice not be released to [REDACTED]

Dated at Regina, in the Province of Saskatchewan, this 12th day of October, 2000.

[REDACTED]
/ GERALD L. GERRAND, Q.C.
Commissioner of Information
and Privacy for Saskatchewan