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

[1] On July 25, 2000 [redacted] (the "Applicant") filed with Saskatchewan Labour (the "Respondent") an Access to Information Request form where he requested:

> "Entire file harassment, file name [redacted] Investigation"

[2] The Respondent replied by letter dated August 31, 2000 which states:

> "Your recent request for access to information has been partially granted. The reports related to your claim of harassment are attached.
>
> Other information has been withheld under section 15 of *The Freedom of Information and Protection of Privacy Act* (attached).
>
> If you wish to request a review of this decision, you may do so within one year of this notice. To request a review, please complete a "Request for Review" form, which is available at the same location where you applied for access. Your request should be sent to:
>
> Freedom of Information Officer
> Saskatchewan Justice
> 1874 Scarth Street
> REGINA SK S4P 3V7
>
> Yours sincerely,
> Sandra Morgan
> Deputy Minister"

[3] The Applicant then filed a Request for Review on September 11, 2000 following which my predecessor contacted the Respondent advising that he would be conducting a review and requesting that they provide him with copies of the documentation that had been withheld.

[4] The Respondent replied as follows:

"From: Sandra Morgan, Deputy Minister Date: October 18, 2000
Saskatchewan Labour

To: G.L. Gerrand, Q.C. Phone: 787-2399
Freedom of Information and Privacy Commissioner
Province of Saskatchewan

Re: [redacted], Freedom of Information and Privacy
Your file: 2000/028 GLG

In answer to your request of September 26, 2000 please find enclosed a copy of [redacted] Access to Information Request Form, as well as copies of the documents related to [redacted] harassment file which were withheld under section 15 of *The Freedom of Information and Protection of Privacy Act*.

The enclosed documents contain witness statements and officer's notes containing the names of witnesses. These documents were withheld for the reason that the officer had assured the witnesses, prior to obtaining their statements, that their names and statements would not be disclosed to [redacted]. More than one witness only agreed to provide a statement on the condition of this assurance.

It is not the standing practice of occupational health officers to solicit confidential statements in an investigation. However in this instance the officer was of the opinion that the statements were necessary to the investigation and could not have been otherwise obtained. In such circumstances we were of the view that sub-section 15(1)(f) applied in the matter.

You may also wish to consider that the statements do not appear to contain any evidence that [redacted] was harassed within the meaning of harassment as contained in section 2(1)(l) of *The Occupational Health and Safety Act, 1993*.

Sandra Morgan
Deputy Minister"

[5] On August 1, 2002 I was appointed the Acting Freedom of Information and Privacy Commissioner and on November 12, 2002 the Applicant attended at my office and produced to me

a letter dated November 1, 2002 which he had received from the Respondent, which reads as follows:

"Dear [redacted]:

Re: Appeal to Director of Occupational Health Officer's Decision

As you may recall, on August 14, 2000, you appealed a July 18, 2000 decision of an occupational health officer, to the Executive Director of the Division. The occupational health officer's decision under appeal was to the effect that you had not been harassed at your place of employment within the meaning of *The Occupational Health and Safety Act, 1993*.

Following your appeal, you had made a request pursuant to *The Freedom of Information and Protection of Privacy Act*, to obtain documents related to the occupational health officer's investigation into your complaint of harassment. That request was partially granted. You then appealed to the Freedom of Information Commissioner to require the Department to provide you a copy of the documents withheld.

As you believed the withheld documents may be relevant to your submission to the Executive Director on the appeal, you requested and we agreed, to hold the Executive Director's decision in abeyance pending the conclusion of the Freedom of Information Commissioner's decision. However, to date no decision by the Commissioner has been made. We understand that the Commissioner's decision is also pending your providing him with further information or direction on the matter.

Recently, we have been contacted by the Provincial Ombudsman concerning our investigation into your harassment complaint. They brought to our attention your concern that no one had explained the reasons for the occupational health officer's conclusion that you had not been harassed. We agreed with the Ombudsman that it is incumbent on a decision maker to provide reasons for decisions made.

Accordingly, I write to provide you with the occupational health officer's reasons for his decision.

Pursuant to section 3(d) of *The Occupational Health and Safety Act, 1993*, every employer has a duty to "ensure, insofar as is reasonably practicable,

that the employer's workers are not exposed to harassment at the place of employment."

However, an employer's duty under section 3(d) only applies to conduct that falls within the definition of harassment contained in the Act. Section 2(1) of the Act, defines harassment as follows:

> (1) **"harassment"** means any objectionable conduct, comment or display by a person that:
>
> (i) is directed at a worker;
>
> (ii) is made on the basis of race, creed, religion, colour, sex, sexual orientation, marital status, family status, disability, physical size or weight, age, nationality, ancestry or place of origin; and
>
> (iii) constitutes a threat to the health or safety of the worker;

Where a worker complains to an occupational health officer of harassing conduct in the workplace, that falls within the Act's definition of harassment, an occupational health officer must then take action to ensure the employer meets its obligation under the Act to bring the harassing conduct to an end and prevent further harassment insofar as the employer is able to do so by reasonably practicable action. In most cases, this involves requiring the employer to investigate the matter in accordance with its harassment policy, to determine whether harassment did in fact occur and take the most appropriate action required to end and prevent further harassment.

On the other hand, where a worker complains of harassing conduct in the workplace, that does <u>not</u> fall within the definition of harassment contained in the Act, then an occupational health officer has no authority to order the employer to investigate or take specific action to end the conduct complained of. Most often, objectionable conduct in the workplace that falls outside the Act's definition of harassment is a labour relations issue. A worker may still have grounds for complaint about such conduct, but the forum for resolving the worker's complaint is not through occupational health and safety legislation. Labour relations issues are matters usually resolved pursuant to the collective bargaining agreement with the assistance of the worker's union, or by private lawsuit or mediation.

In this instance, the occupational health officer who investigated your complaint came to the conclusion that the type of conduct you complained of did not fall within the Act's definition of harassment.

I understand the officer's reasons for having reached this conclusion is that the motive or basis given for your co-worker's objectionable conduct was that your co-workers were displeased that [redacted] had been assigned to [redacted]. You stated they expressed fear that she would be prejudiced against their work area because of [redacted] The officer concluded that this basis for the harassing conduct did not fall within any of the grounds listed in subsection 2(1)(ii) of the definition, i.e., race creed, religion etc.

Consequently, even had the officer concluded from his investigation that the incidents and conduct you complained of did in fact occur, he could not have directed the employer to take action to end the objectionable conduct as it fell outside the Act's definition of harassment.

As to the Division's jurisdiction in addressing harassment complaints, there are two other matters, which should also be noted.

First, an employer only has an obligation concerning harassment that occurs at the place of employment. Harassing conduct that occurs outside the place of employment, such as at a union meeting, would not be covered by the Act in any event.

Second, the purpose of the Act is to ensure that when harassment does occur, action is taken to stop and prevent further harassment. There is no authority under the Act to compensate a worker for the harm or emotional stress he or she may have suffered as a consequence of the harassment. However, the issue of compensation is one dealt with by the Human Rights Commission where the conduct falls within the definition of harassment found in the *Saskatchewan Human Rights Code*.

I hope this information will be helpful to you in determining whether you wish to proceed with your appeal of the occupational health officer's decision under *The Occupational Health and Safety Act, 1993*. If you have any further questions or concerns, I may be contacted directly at (306) 787-4498.

In any event, I would appreciate if you could contact myself within the next month to advise whether or not you wish to proceed with the appeal of the occupational health officer's decision. If I do not hear from you, we shall presume you do not wish to proceed and close our file.

I look forward to hearing from you.

Yours sincerely,
Jennifer Fabian
Manager, Legal & Technical Analysis"

[6] I then reviewed my predecessor's file which contained a note from the Ombudsman's office dated May 21, 2002 indicating that they believed the Applicant had abandoned his Request for Review. Accordingly, my predecessor closed his file on July 12, 2002.

[7] At our meeting on November 12, 2002, the Applicant advised me that he had not abandoned his Request for Review and wished to proceed with same. I accordingly wrote to the Respondent on November 13, 2002 as follows:

"**RE:** [redacted]
Freedom of Information and Privacy
File Reference: F 2000/028 RPR

I have recently been appointed the Acting Freedom of Information and Protection of Privacy Commissioner to replace the former Commissioner, Mr. G.L. Gerrand, Q.C. who resigned from the position effective July 31, 2002.

[redacted] attended at my office on November 12, 2002 and provided me with a copy of your letter to him dated November 1, 2002.

I have now reviewed this file and note that on September 11, 2000 [redacted] filed a Request for Review as a result of the decision of your Deputy Minister dated October 18, 2000 whereby access to certain of the documents related to [redacted] harassment file were withheld.

A review of this file further indicates that the former Commissioner did not complete his review, apparently under the belief that Mr. [redacted] application for review had been abandoned.

In your letter to [redacted] of November 1, 2002 you state in the third paragraph that "you understand that the Commissioner's decision is also pending your providing him with further information or direction on the matter". I see nothing on the file to indicate that understanding to be correct.

In any event, [redacted] has now requested that I proceed with the review as he believes this documentation is necessary and vital to his appeal to the Occupational Health Officer's decision pursuant to *The Occupational Health and Safety Act*, 1993.

[redacted] advises that he does in fact wish to proceed with his appeal of the Occupational Health Officer's decision, but that such appeal be postponed until I have completed my review and submitted my report regarding his request for access to the documentation in question.

I would accordingly ask that you advise me whether or not you are continuing to refuse access to the documents in question and if so would you also provide me with any further reasons or representations or submissions that you might wish to make in support of your position.

The above requests are made pursuant to the provisions of The Freedom of Information and Protection of Privacy Act and I look forward to receiving your response."

[8] The Respondent replied by letter dated November 19, 2002 which states:

"Thank you for your letter to me of November 13, 2002, and advice that at [redacted] request you will be proceeding with his Freedom of Information Review.

We had agreed previously with [redacted] that his appeal under *The Occupational Health and Safety Act, 1993*, would be placed in abeyance pending the completion of the Privacy Commissioner's review. Accordingly we will continue to await your decision before proceeding with the occupational health and safety appeal.

> To clarify the dates, we understand that the Deputy Minister partially denied [redacted] Freedom of Information request in a letter to [redacted] dated August 31, 2000. [redacted] then appealed that decision to the Privacy Commissioner. The Deputy Minister's letter of October 18, 2000 to the Privacy Commissioner was written in response to the Commissioner's requests that he be provided with a copy of the documents withheld and the reasons for the partial denial. We have no further information to add to this explanation of October 18, 2000. However, should you have any further questions we would be pleased to answer them. I may be contacted directly at (306) 787-4498.
>
> Yours sincerely,
>
> Jennifer Fabian
> Manager, Legal and Technical Analysis"

[9] On November 25, 2002, I sent a letter to the Applicant enclosing the November 19, 2002 letter from the Respondents and asking if he had further submissions. On November 28, 2002, the Applicant provided further submissions by letter which states:

> "Thank you for the opportunity to respond to your letter of November 25, 2002. As two years have passed since I have visited this process, I find have [sic] had to review The Freedom of Information and Protection of Privacy Act and The Occupational Health and Safety Act. Unfortunately, I am not able to address one without regard for the other. After reviewing the Act in your jurisdiction, I have found many reasons for you to deny my request and almost no reason within the Act to grant it. As I understand, information can be a tool or used as a weapon and you will decide as to how I will use the information in my file.
>
> I realize there are witness statements in my file that are unflattering to myself. : [redacted] the investigator explained to me how my co-workers were hostile to me when he interviewed them and this opinion perpetuates through out the statements. He also explained how [redacted] a [redacted] went into a tirade about me. To these points I will address them to you, as I did to him. I already have my complete file from Worker's Compensation Board for my appeal there. That file has the statements collected from my co-workers and [redacted] The comments range from, management told us not to talk about what happened, to nobody knows anything or I am a trouble maker. By showing [redacted] WCB Statements I prove he is a liar. The interesting

point about the WCB investigation and appeal is that they found I suffered stress and the stressor's [sic] were threats of physical violence, a petition signed against me, coffee and eggs thrown on my truck, and other stressors. My point is it is unlikely there is any new information in your file that I am unaware of.

As I have been in these processes since 1996 I am prepared to let my actions speak for themselves. I have retained [redacted] to assist me and have not taken any legal action nor plan any, with this said, I give you permission to contact him if you require it. Nor have I retaliated against anyone for their statements but work within the law to prove my allegations.

The current round of letters from the Labor Board represents their position, that they are not interested in my appeal by referring me to Saskatchewan Human Rights Commission and even if they found a violation of their own Act I would not be compensated. My quest is not for them to compensate me but for right and wrong. I believe in the law as is defined by these Acts the same as you appear to. You have dedicated your life to the justice system as a lawyer and risen to the high level of Queen's Court designation. I realize the law and justice are two very different things but I honestly believe it was wrong for [redacted] my employer to take an active role in [redacted]. I believe the poison pen letters about me should not have been distributed by senior management. I believe there should not have been a petition taken to have me terminated. I believe the termination meetings, taking away my job duties and overtime, the refusal of allowing me to transfer or bid to other jobs, death threats and other actions were harassment, a violation of The Occupational Health and Safety Act.

Due to my beliefs I have been judged and certified by a [redacted] Panel of Doctors as mentally unable to work, permanently. I ask you for my file to find the investigations the employer was ordered to do and all the investigations the company and union did jointly and or separately from June 1996 to 2000. Everyone acknowledges there were investigations but no one has ever seen one. Another interesting point that I take great pride in is that no one nor the company has called me a lair [sic] or said the events I allege did not take place. I am trying to obtain the complete file so I may ask under the Occupational Health and Safety Act under the rules of evidence why the employer has never produced any evidence to disprove my accusations as "the onus" is stated on the employer to disprove my allegations".

Should I be successful in having a violation of the Occupational Health and Safety Act found, I will be able to contest the findings of the medical panel and return to society as a productive member. This is my only goal for this information I request and the subsequent appeal processes."

[10] The issue in the present case is relatively straight forward. Basically, the Applicant has requested documents from his harassment complaint file in order that he might appeal the decision of a Health and Safety Officer.

[11] The Respondent provided the Applicant with most of the records in his harassment complaint file but has denied him access to certain documents involving witness statements on the grounds that they are exempt from production pursuant to Section 15(1)(f) of The Freedom of Information and Protection of Privacy Act and on the ground that said statements were only able to be obtained on the condition that they were confidential and would not be disclosed to the Applicant.

[12] Section 15(1)(f) of the Act provides:

> "15(1) A head may refuse to give access to a record, the release of which could:
>
> > (f) disclose the identity of a confidential source of information or disclose information furnished by that source with respect to a lawful investigation or a law enforcement matter;"

[13] My review of the withheld documents indicates that they are in fact witness statements, and accordingly, in my opinion, section 15(1)(f) should apply to exclude these documents from disclosure. The section allows a head to deny disclosure where the information would disclose the identity of a confidential source or the information furnished by the confidential source. In this case, the witnesses were advised before giving any statements that their identity and evidence would remain confidential and would not be released to the Applicant. Although it is possible that the Applicant could very easily figure out who the confidential witnesses might be, it is still permissible and proper that their identities and statements be withheld.

[14] In *Liick v. Saskatchewan (Minister of Health)* (1994), 122 Sask. R. 180 (Q.B.), the Court of Queen's Bench dealt with the situation where an the applicant sought disclosure of all documents relating to a harassment complaint against him. The Government refused to disclose some information because it was either personal information about an identifiable individual other than the Applicant or it consisted of consultations or deliberations involving government officers or employees. The documents in question were witness statements and the complainant's diary. The Applicant's position was that the information was personal to him and he required it to support his grievance against his employer. The court ordered disclosure on the basis that the public interest in disclosure outweighed any invasion of privacy that could result from disclosure of the personal information following section 29(2)(o)(i).

[15] In the present case, there has been no claim that the undisclosed documents contain personal information. The exception used by the Court in the *Liick* decision is only applicable to claims for exemptions under section 29. There is no similar exception in section 15. For that reason, I do not believe that *Liick* applies in the present case. Furthermore, it is doubtful that the undisclosed documents would be of any use to the Applicant in his appeal or for the purposes set out in his final submissions. The issue on appeal is whether there was harassment using the very limited definition in section 2 of The Occupational Health and Safety Act, 1993. The witness statements indicating that there was no harassment at all do not deal with the issue of the objectionable conduct being made on the basis of race, creed, religion or the other enumerated characteristics.

[16] At my invitation, the Applicant provided me with submissions as to why he believed his application for access to these statements should be granted. I have reviewed his submissions but unfortunately they do not deal with the issue at hand, namely the application of Section 15(1)(f) but deal mainly with his dissatisfaction (perhaps justified) of the entire appeal process.

[17] As I have found Section 15(1)(f) to be applicable, I have no alternative but to recommend that the Respondent continue to deny access to the Applicant to the witness statements in issue herein.

[18] Dated at Regina, in the Province of Saskatchewan, this 4th day of December, 2002.

RICHARD P. RENDEK, Q.C.
Acting Commissioner of Information
and Privacy for Saskatchewan