

**REPORT WITH RESPECT TO THE APPLICATION FOR REVIEW
OF ██████████ IN RELATION TO INFORMATION REQUESTED FROM
SASKATCHEWAN ENVIRONMENT AND RESOURCE MANAGEMENT**

[1] I have been formally requested by ██████████ (“the Applicant”) to conduct a Review with respect to the refusal of Saskatchewan Environment and Resource Management (“the Respondent”) to provide to the Applicant certain requested information and documentation.

[2] The Applicant mailed to the Respondent an Access to Information Request Form on May 10, 2001. The request for information was filed in accordance with Section 6 of *The Freedom of Information and Protection of Privacy Act* (“the Act”) and was stated as follows:

“All test results for dissolved organic compounds, free chlorine, total chlorine and turbidity for the period February 20/95 – Nov 28/00 inclusive. Plus any and all documents and notes related to the above and to this request.”

[3] The request for information was denied by the Respondent. Its Access Officer, Freedom of Information, outlined the reasons for the refusal by letter to the Applicant dated June 20, 2001. The relevant portion of the letter reads as follows:

“As I am sure you are aware, the Government of Saskatchewan has established a Commission of Inquiry under The Public Inquiries Act (Saskatchewan), into the circumstances that led to the contamination of the public drinking water supply in the City of North Battleford. You will also know that a multi-party, representative lawsuit has been commenced against the Government of Saskatchewan and other defendants in the Saskatchewan Court of queen’s Bench (Q.B. No. 1161 of 2001). It is our opinion, therefore, that release and access to the various records requested could be injurious to the Government of Saskatchewan in the conduct of the existing legal proceedings and the Public Inquiry, and therefore Saskatchewan Environment and Resource Management refuses to give access to the requested records. Information of this nature is exempt from access according to Section 15(1)(c) and (d) of The Freedom of Information and Protection of Privacy Act.”

[4] The Request for Review of the decision of the Respondent is dated July 4, 2001. Following its receipt by me, I informed the Respondent, pursuant to Section 51 of the *Act*, of my

intention to carry out the Review as requested. At the same time, I sought the production of the subject documents for my inspection pursuant to Section 54(1)(a) of the *Act*.

[5] On August 22, 2001, copies of certain documents were delivered to me, which counsel for the Respondent described as the documents identified by the Respondent as the documents relevant to the access request of the Applicant. Additionally, I have been provided with a copy of a Statement of Claim in a multi-party action, being action number 1161 of 2001 in the Court of Queen's Bench, Judicial Centre of Saskatoon. As well, I have been provided with a copy of the Order-in-Council issued pursuant to the provisions of *The Public Inquiries Act* establishing the Commission of Inquiry into matters relating to the safety of the public drinking water in the City of North Battleford and the terms of reference in relation thereto.

[6] A review of the copies of documents provided to me by counsel for the Respondent indicated to me that some documents had not been provided. This was brought to the attention of counsel for the Respondent and further copies of documentation were delivered to me on September 5, 2001.

[7] Prior to receipt of the copies of documentation referred to in paragraph number 5, I received a letter from counsel for the Respondent dated August 15, 2001. The concluding paragraph of that letter reads as follows:

“On August 14, 2001, my client provided notice to the City of North Battleford pursuant to section 52 of *The Freedom of Information and Protection of Privacy Act* that some of the documents caught by the request were provided to SERM by the City on a confidential basis. As my client has not yet finished compiling all of the documents, copies of the documents have not yet been provided to the City of North Battleford. It is expected that the City will require some additional time to make representations to you after they receive copies of the documents.”

[8] I regard the City of North Battleford (“North Battleford”) as a Third Party as defined by the *Act*. North Battleford has, through its counsel, informed me by letter that North Battleford does not oppose the release of any information or documents to the Applicant in respect to the access request filed by the Applicant. It is a condition to the consent of North Battleford to the

release of information and documentation that counsel for North Battleford be given a copy of whatever material is supplied.

[9] I regard the North Battleford Water Inquiry as a Third Party as defined by the *Act*. Counsel for the North Battleford Water Inquiry has written to me expressing his opposition to the release of the requested information and documentation and asserts that he relies on the arguments advanced in this regard by counsel for the Respondent.

[10] Counsel for the Respondent has outlined in writing to me by letter dated August 22, 2001, the specific provisions of the *Act* relied upon for the position taken by the Respondent respecting the release of the information and documents in question. Two general grounds are advanced respecting the non-release of all information and documentation, namely, Section 15(1)(c) of the *Act* (interference with a lawful investigation) and Section 15(1)(d) of the *Act* (injurious effect to the Government of Saskatchewan in the conduct of existing or anticipated legal proceedings).

[11] Counsel for the Respondent has said in part, the following, respecting the position of her client regarding Section 15(1)(c):

“My client asserts that all of the enclosed documents are exempt from release pursuant to *The Freedom of Information and Protection of Privacy Act* on the following grounds:

1. Section 15(1)(c) – Release of these documents could “interfere with a lawful investigation or disclose information with respect to a lawful investigation.”

‘Lawful investigation’ is not defined in the Act, but a reasonable interpretation of this term would include the North Battleford Public Inquiry. The Commission of Inquiry that has been appointed has the statutory authority to investigate into a number of issues identified in its Terms of Reference (copy already provided to your Office). Pursuant to section 3 of *The Public Inquiries Act*, the Commission has the power to hear evidence under oath, summon witnesses, compel the production of documents and “things as the commissioners deem requisite to the full investigation of all matters into which they are appointed to inquire.”

...

All of the enclosed documents are related to the North Battleford Public Inquiry and have already been provided to the Commission Counsel. Early release of those documents to the public could interfere with the Public Inquiry. If pieces of the evidence relevant to the Inquiry are released by the media in a piecemeal fashion without a proper contextual

setting, the Inquiry may end up being directed by the media, rather than by the Commission as intended. Early release may impact the way parties present evidence during the Inquiry. In addition, since the disclosure process of the Inquiry is not yet complete for some parties, early release of evidence may even impact the kind of disclosure that some parties make.”

[12] With regard to the exemption set forth in Section 15(1)(d) of the *Act*, counsel for the Respondent has argued in part as follows in her letter to me of August 22, 2001:

“2. Section 15(1)(d) – Release of these documents could be injurious to the Government of Saskatchewan in the conduct of existing or anticipated legal proceedings.

I have already provided your office with a copy [of] the multi-party, representative lawsuit that has been commenced against the Government of Saskatchewan and other defendants in the Court of Queen’s Bench (No. 1161 of 2001). In addition, you may be aware through the recent media attention that at least one other law firm is attempting to solicit clients for a separate lawsuit, again against the Government of Saskatchewan.

...

The issue of compliance with SERM’s regulatory requirements and SERM’s response to that compliance (or non-compliance) which could well become a central issue in the lawsuit. This data and the related documents are direct evidence on these issues. Release of these documents at this time could be injurious to the Government of Saskatchewan in the conduct of these existing, as well as future possible, legal proceedings.”

[13] Additionally, the Respondent relies on the exemption set forth in Section 13(2) of the *Act* with regard to the copy of an Engineering Report dated November 11, 2000, authored by the consulting firm of Associated Engineering. It is asserted that the Report, which was commissioned by the City of North Battleford and provided to the Respondent in confidence implicitly, and is therefore exempt pursuant to the provisions of Section 13(2) of the *Act*.

[14] Included in the documentation provided to me by the Respondent is a document described as a Briefing Note. The Respondent relies on the provisions of Section 17(1) of the *Act* for refusing to provide the Applicant with a copy of this document, on the grounds that the document contains advice, recommendations, analysis or policy options developed by or for a government institution and is therefore exempt from release either in whole or in part.

[15] The Applicant has indicated to me that she will not be providing me with any further representations respecting her position as to the release of the documents or comments on the grounds relied upon for refusal by the Respondent.

[16] I will deal firstly with the grounds relied upon for refusal by the Applicant, as they relate to the provisions of Section 15(1)(d) of the *Act*. This statutory exemption reads as follows:

“15(1) A head may refuse to give access to a record, the release of which could:

(d) be injurious to the Government of Saskatchewan or a government institution in the conduct of existing or anticipated legal proceedings.”

There is presently underway a Queen’s Bench action wherein numerous parties sue North Battleford, the Government of Saskatchewan and others for damages related to the water quality of North Battleford. Any documents in the possession of the Respondent and North Battleford that have relevance to the issues raised in the lawsuit must be produced as part of the pre-trial procedures in the law suit. The Rules of Practice and Procedure of the Court of Queen’s Bench for Saskatchewan require the production by parties to a lawsuit of all documents that are relevant to the issues raised, as identified by the pleadings in the lawsuit. In my opinion, the release to the Applicant of the documents and information requested by the Applicant could in no way injuriously affect the conduct of the existing legal proceedings on the part of the Government of Saskatchewan. The documents in question presumably must all be produced as part of the pre-trial process in the existing litigation. This would also be the situation in any similar legal action brought by other citizens who may retain different solicitors than those acting in the existing action. I am therefore of the opinion that the exemption relied on by the Respondent in this regard is not applicable to the circumstances of this Review.

[17] Section 15(1)(c) of the *Act* reads as follows:

“15(1) A head may refuse to give access to a record, the release of which could:

(c) interfere with a lawful investigation or disclose information with respect to a lawful investigation;”

The *Act* does not define the words “lawful investigation” as used in Section 15(1)(c).

[18] The North Battleford Water Inquiry has been created by Order-in-Council wherein the Honourable Mr. Justice Robert D. Laing was appointed as Commissioner “of a Commission of Inquiry into matters relating to the safety of the public drinking water in the City of North Battleford...”. The creation of the North Battleford Water Inquiry was pursuant to *The Public Inquiries Act* of Saskatchewan. Section 3 of that *Act* reads as follows:

“3 The commissioners shall have the power of summoning before them any witnesses, and of requiring them to give evidence on oath, or on solemn affirmation if they are persons entitled to affirm in civil matters, and orally or in writing, and to produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to inquire.” [emphasis added]

[19] The Terms of Reference provide authority to inquire into or report upon a wide ranging series of issues and matters related to the water quality in North Battleford. Paragraph 1 of the Terms of Reference sets out the following authority to the Commissioner:

“1. The Commission of Inquiry appointed pursuant to the Order will have the responsibility to inquire into and report on and make findings and make findings and recommendations with respect to any and all aspects of the following matters:

- (a) the circumstances that led to the current contamination of the public water supply of the City of North Battleford;
- (b) the adequacy and effectiveness of the actions taken by officials of the Government of Saskatchewan, the Battlefords District Health Board and the City of North Battleford leading up to and in response to the discovery of the contamination of the Public water supply in the City of North Battleford;
- (c) the effect, if any, of the regulations, bylaws, policies, guidelines, procedures and practices of or applicable to the Government of Saskatchewan, the Battlefords District Health Board and the City of North Battleford on the events referred to in (a) and (b);

- (d) any other relevant matters that the Commission considers necessary to determine that the City of North Battleford's public drinking water is safe in the future."

[20] I am satisfied that the North Battleford Water Inquiry is "a lawful investigation" as contemplated by Section 15(1)(c) of the *Act*. The primary question is whether or not the release of the information and documentation in question would "interfere with"...or "disclose information" with respect to this lawful investigation.

[21] I am advised by counsel for the North Battleford Water Inquiry that all of the documents that have been requested to be produced by the Applicant, copies of which have been forwarded to me for my review, are documents which will be used for purposes of cross-examination in the course of the adducing of evidence at the Inquiry and that a good number of the documents will be filed as exhibits.

[22] There are two aspects to the specific exemption described in Section 15(1)(c) of the *Act*. Firstly, if the release of the record could interfere with a lawful investigation, a head may refuse access. Secondly, access may be refused if the release of the record would disclose information with respect to the investigation. I will deal firstly with the second aspect of the section.

[23] There is nothing in the documentation that has been provided to me that would disclose information respecting the investigation other than the documents supplied to me by the Commission counsel in his letter of August 15, 2001. These documents are simply the basic Inquiry documents, including the Inquiry's mandate and Rules of Practice and Procedure. These documents are a matter of public record and are not covered by the *Act* as stated in Section 3(1)(b) of the *Act*.

[24] In my opinion, the words "disclose information with respect to a lawful investigation" as used in Section 15(1)(c) of the *Act* do not relate to the disclosure of information or documents that will form part of the evidence adduced at the Inquiry but rather methods or techniques that might be employed for the purpose of carrying out the Inquiry. The documents that I have examined are documents related to potential evidence rather than process, with the exception of the basic Inquiry documents referred to in the preceding paragraph.

[25] However, the release of the majority of the documents of an evidentiary nature could interfere with the conduct of the investigation, with some exceptions, in my view. The major portion of the documents reveal testing and measuring results which may be critical to the findings of the Inquiry. I agree with the submissions of counsel for the Respondent that the Inquiry can best seek out the truth on all issues if these documents are introduced in the first instance during the course of the Inquiry. Early public release of the documents might have the effect of altering, innocently or otherwise, the recollections and testimony of witnesses who might have access to the documents prior to testifying. Documents prepared at the time of critical events are reliable evidentiary tools in establishing precisely what occurred. Best results in the truth-seeking exercise are often achieved if the documentary evidence is adduced in a planned and logical way by counsel who are responsible for the leading of evidence. The early public release of these documents could interfere with the process being undertaken at the Inquiry.

[26] There are documents that have been requested, the release of which would not interfere with the Inquiry, in my view. The documents are:

Letter, SERM to North Battleford, June 5, 2000
Letter, SERM to North Battleford, July 4, 2000
Letter, SERM to North Battleford, September 15, 2000
Notice dated September 15, 2000
Notice dated December 16, 2000
Letter, SERM to North Battleford, September 19, 2000
Letter, SERM to North Battleford, November 23, 2000
Letter, SERM to North Battleford, March 23, 1998
Minister's Order dated March 26, 1998
Associated Engineering letter to North Battleford, December 11, 2000
together with appendix
Memo, Associated Engineering to North Battleford, reporting on
completion progress of development of water system

[27] I recommend the release to the Applicant of the documents described in the preceding paragraph and that the remaining documents not be released.

[28] Dated at Regina, in the Province of Saskatchewan, this 12th day of September, 2001.

GERALD L. GERRAND, Q.C.

Commissioner of Information
and Privacy for Saskatchewan