

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

[1] On March 11, 2002, [REDACTED] (the "Applicant") filed an Access to Information Request Form with Saskatchewan Labour (the "Respondent") requesting the following:

"All the material submitted by the Minimum Wage Board to the Provincial government re the Notion of Raising the minimum wage."

[2] On the same date the Applicant filed a further Access to Information Request Form with the Respondent requesting:

"All analysis of the economic impact of increasing the minimum wage - analysis done by the Saskatchewan Government or an Agency thereof."

[3] The Respondent replied to the above two applications by letter dated April 12, 2002 which reads in full as follows:

"April 12, 2002

[REDACTED]
[REDACTED]

Dear [REDACTED]:

Your application for access to analyses of the economic impact of increasing the minimum wage and all materials submitted by the Minimum Wage Board to the government have been denied.

Information of this nature cannot be released because it is exempt from access according to Subsection 16(1) of *The Freedom of Information and Protection of Privacy Act*.

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:

Gerald L. Gerrand, Q.C.
Freedom of Information and Privacy Commissioner
Province of Saskatchewan
C/o 700 – 1941 Hamilton Street
REGINA, SK S4P 3N6

Sincerely,

Steven Pillar
Deputy Minister

c: Sharon Ackerman, Freedom of Information Co-ordinator”

[4] On March 11, 2002 the Applicant filed a Request for Review with Mr. G.L. Gerrand, Q.C. who at that time was the Saskatchewan Freedom of Information and Privacy Commissioner.

[5] Mr. Gerrand requested of the Respondent the documentation for which access as refused and this was received by Mr. Gerrand on March 15, 2002.

[6] By letter dated May 16, 2002 Mr. Gerrand inquired of the Respondent whether they wished to make any further representations regarding their denial of access to which the Respondent replied by letter dated June 3, 2002 which states:

“Thank you for your letter of May 16, 2002, which invited further or more specific representations as to the application of section 16 of *The Freedom of Information and Protection of Privacy Act* to the documents which were furnished to you. Subsection 16(1) of *The Freedom of Information and Protection of Privacy Act* provides as follows:

“16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

- (a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees”.

“Executive Council”, for the purposes of subsection 16(1), means Cabinet, as established pursuant to section 4 of *The Government Organization Act*.

The jurisdiction of The Minimum Wage Board is established by subsection 15(4) of *The Labour Standards Act*, which provides that:

“15(4) Subject to the approval of the Lieutenant Governor in Council, the board may by regulation, conditionally or otherwise:

- (a) determine which employees in any class of employment are full-time employees and fix the minimum wage that shall be paid to full-time employees in any class of employment;
- (b) determine which employees in any class of employment are part-time employees, fix the minimum wage that shall be paid to part-time employees in any class of employment, and limit the number or proportion of employees in any establishment who may be paid as part-time employees”.

I respectfully submit that the Report and two recommendations of the Minimum Wage Board, which were withheld, are clearly and on their face, records created to present recommendations to Cabinet, through the Minister of Labour. As such, their release is prohibited pursuant to subsection 16(1)(a) of *The Freedom of Information and Protection of Privacy Act*.

The approval of Cabinet is necessary for a minimum wage regulation, pursuant to subsection 15(4) of *The Labour Standards Act*. The two recommendations which were withheld were submitted to Cabinet for their consideration. The report which accompanied the first recommendation is the basis upon which the recommendation was made and is integral to it. Therefore, the recommendations and accompanying report are both in fact and law, recommendations presented to Cabinet. I therefore request that you maintain the confidentiality of the withheld documents pursuant to subsection 16(1) of *The Freedom of Information and Protection of Privacy Act*.

Thank you for this opportunity to make representations to you concerning [REDACTED]'s application for the release of this information.”

[7] Mr. Gerrand forwarded a copy of this letter to the Applicant and inquired if he wished to make any further representations to which the Applicant replied by letter dated June 12, 2002 which reads:

"I am writing in follow up to your letter of June 6, 2002.

Please consider the following submissions in regard to the decision of Saskatchewan Labour to exempt all documents from my freedom of information request.

With respect to 16(1), I submit that the documents are clearly tied to a decision that has been adopted by cabinet. The question about whether to raise the minimum wage is no longer under consideration, no longer under debate. The decision has been implemented, and advertised publicly. As the decision is no longer secret, neither should be the facts on which that decision was built.

I have not asked for a list of options that cabinet may have been asked to consider. Rather, I have asked for a reporting of the implications of a specific policy adopted by the provincial government.

The Province has a history of releasing such background material. I direct your attention to the briefing note titled "Burning At Waste Disposal Grounds." (See attached). It is a documentary prepared by Saskatchewan Environment and Resource Management to serve as a briefing note for Executive Council. It is a document that was released by CBC Radio under a Freedom of Information request. Such documents are regularly released.

I also submit that Saskatchewan Labour is being inconsistent in its application of these exemptions. Contrary to its use of 16(1)(a) in this matter, Sask Labour has already released to CBC Radio the recommendation of the Minimum Wage Board to the Minister of labour [sic] (See attached).

Justice Tallis has found that "There are specific exemptions from disclosure set forth under the Act, but these limited exemptions do not obscure the basic policy the disclosure, not secrecy, is the dominant objective of the Act. (general [sic] Motors Acceptance Corp. of Canada v. Saskatchewan Government Insurance (1993), 116 sask. [sic] R. 36 at 41 (C.A.).

Thanks for the opportunity to make representations on this matter."

[8] Mr. Gerrand forwarded a copy of this letter to the Respondent inviting further submissions. The Respondent forwarded a letter dated June 28, 2002 but later noticed a typographical correction was required and substituted this letter with a letter dated August 21, 2002 which states:

“Thank you for your letter of June 12, 2002, and the opportunity to respond to the submissions of the Applicant.

Subsection 16(1)(a) of the Act, in our submission, prohibits a head from releasing access to all three documents which have been provided to you. The Applicant has apparently already received a copy of one document. That in itself does not change the character of the second recommendation made to Executive Council. The second recommendation made to Executive Council is still, within the meaning of subsection 16(1)(a), a record that was created to present a recommendation to Executive Council. However, I acknowledge that the document is no longer a confidential document, because the Applicant already possesses it.

The Applicant refers to the release of Briefing Notes as support for the disclosure requested in this particular case. Briefing Notes are of a different character than Recommendations in respect of Minimum Wage. The briefing note attached to the submission of the Applicant contains no recommendations or policy options, but rather only refers to existing facts. On its face, the briefing note is not caught by subsection 16(1)(a) of the Act.

Recommendations made in respect of Minimum Wage are statutory recommendations and are explicitly covered by subsection 16(1)(a).

The Applicant relies on the General Motors Acceptance Corp. of Canada case. The specific exemptions from disclosure are limited, as noted by Justice Tallis. However, we submit that the requested material falls squarely within one of those limited exemptions, as provided for in subsection 16(1)(a), and that the Applicant should be denied access to the requested documents.

Finally, the requested documents are not “a reporting of the implications of a specific policy adopted by the provincial government”, as suggested by the Applicant, but rather recommendations with rationale for consideration by Executive Council.

Once again, thank you for this opportunity to respond to the submissions of the Applicant.”

[9] In the interim, the Applicant, by letter dated June 12, 2002, forwarded a further submission to Mr. Gerrand which reads:

“I am writing in follow up to my letter of June 12, 2002.

I have just found one more piece of information to add to my submission. It is *O'Connor v Nova Scotia* [2001 NSSC 6].

The ruling considers, among other things, the meaning of cabinet deliberation, and the degree to which elements of those deliberations are protected by a Freedom of Information Act similar to that of Saskatchewan. It also distinguishes between advice to cabinet, and factual information supplied to cabinet. It even offers some helpful interpretations as to what actually constitutes advice or recommendations by a government official.

The ruling indicates that:

- Material used by cabinet would be far more appropriate for release AFTER a decision has been adopted by cabinet.(paragraphs 16, 29).
- That not all information presented to cabinet can be considered to be part of secret cabinet deliberations. (paragraphs 21 - 24).
- That not all material presented to cabinet can be considered advice; that “advice” suggest a course of action, and not all documents presented to cabinet do so.

I have attached the full text of this ruling of the Supreme Court of Nova Scotia.

I hope you find this information useful.”

[10] I have now had an opportunity to review the documents which were forwarded to Mr. Gerrand by the Respondent. They consist of the following:

1. A letter from the Chair of the Saskatchewan Minimum Wage Board to the Minister of Labour dated February 25, 2002.
2. A recommendation to the Minister of Labour dated February 25, 2002.
3. A Report and Recommendation of the Minimum Wage Board dated August 10, 2001 which consisted of a specific recommendation as to a minimum wage increase, a one page document entitled "Collective Principles" and a two page document entitled "Background Information Provided".

[11] The first and second documents are specific recommendations to the Executive Council as to an increase in the minimum wage and clearly the Respondent is obligated to refuse access pursuant to Section 16(1)(a) of *The Freedom of Information and Protection of Privacy Act* which reads as follows:

16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

16(1)(a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;"

[12] The fact that the Applicant has already received a copy of the second document is irrelevant as the language of Section 16(1) is mandatory.

[13] Similarly, the first page of the third document is a specific recommendation as to a minimum wage increase and the same provision is applicable.

[14] The second page of the third document contains the principles upon which the Minimum Wage Board relied in making their recommendation and accordingly they are an integral part of the advice or recommendations made by the Board and are exempt from disclosure pursuant to Section 16(1)(a) or Section 16(1)(d).

[15] The last two pages of the third document entitled "Background Information Provided" are exactly that. They constitute a factual record of minimum wage rates and adjustments and in my opinion do not come within the specific exemptions of the Act which, as noted by Mr. Justice Tallis in the *General Motors Acceptance Corp. of Canada* case are limited.

[16] The Applicant in his submission of June 12, 2002 referred me to the case of O'Connor v. Nova Scotia (2001) NSSCG for the proposition that material for use by Cabinet would be far more appropriate for release AFTER a decision has been adopted by Cabinet.

[17] This proposition is based upon wording of Section 13(2) in the Nova Scotia statute which in effect states that the exemption from disclosure is not applicable where the decision has either been made public or the decision has been implemented.

[18] The Saskatchewan Act contains no similar provisions and accordingly this proposition is not tenable but, as I have already indicated, the background information in this instance is not caught by Section 16(1)(a) of the Act.

[19] For these reasons I would recommend that the Respondent continue to decline access to all of the documents in question with the exception of the last two pages of the third document entitled "Background Information Provided".

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

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

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

[1] On September 4, 2002 I issued my Report with respect to this matter and forwarded same to the interested parties.

[2] On September 19, 2002 I received a letter from the Respondent dated September 17, 2002 which I have set out in its entirety as follows:

"September 17, 2002

Dear Mr. Rendek

Thank you for your report and recommendation dated September 4, 2002, regarding the Freedom of Information request (File Reference: F2002/017) submitted by [REDACTED] of [REDACTED] [REDACTED] respecting the provincial minimum wage.

I must inform you that upon reviewing the recommendation with all affected staff in the Department, it was discovered that a number of documents had inadvertently been overlooked when responding to the request to provide copies of all documents which had been withheld.

The Department of Labour regrets this unintended oversight.

These additional documents are described as:

1. Minimum Wage Database prepared by QED Information Systems Inc., dated August 2001.
2. Memorandum from [REDACTED] dated September 24, 2001, with attached Cabinet Analysis.
3. Minimum Wage Increase Proposal Analysis forwarded by [REDACTED] on October 30, 2001.
4. Economic Impact Analysis forwarded by [REDACTED] on January 29, 2002.
5. Handwritten notes of [REDACTED] dated February 18, 2002.
6. Analysis of the comments of [REDACTED] of CJME Radio, forwarded March 11, 2002.
7. Information for the Minimum Wage Board dated May 14, 2002.

8. Undated documents entitled "Labour Initiatives 2002, Cost to Business", "Social Services CDI re Phase III Building Independence Initiatives and NCB Reinvestment Opportunities", "Minimum Wage: Comparison With Average Industrial Wage and Low Income Cut-Off (LICO) 1993-2000" and "Economic Development's Comments Regarding the Current Proposal to Increase the Minimum Wage".

Copies of these documents are enclosed with this letter.

It is my belief that only one of these additional documents can be released to the Applicant, that being the document described in point six. In my view, the release of the remainder of the documents is prohibited pursuant to the provisions of *The Freedom of Information and Protection of Privacy Act*.

RATIONALE:

1. Minimum Wage Database prepared by QED Information Systems Inc., dated August 2001. This document was prepared by and for a third party. The Department of Labour obtained a copy of this document in confidence from its author, [REDACTED], who prepared it for the Minimum Wage Board. In our submission, therefore, the document is exempt from access pursuant to subsection 19(1)(b) of the Act. Additionally, the document does not fall within the categories of documents covered by the request; the document was not "done" by government, nor was it "submitted" to government by the Minimum Wage Board.
2. Memorandum from [REDACTED] dated September 24, 2001, with attached Cabinet Analysis. This document is exempt from access pursuant to subsection 16(1)(a) of the Act.
3. Minimum Wage Increase Proposal Analysis forwarded by [REDACTED] on October 30, 2001. This document is exempt from access pursuant to subsection 16(1)(a) of the Act.
4. Economic Impact Analysis forwarded by [REDACTED] on January 29, 2002. This document is exempt from access pursuant to subsection 16(1)(a) of the Act.
5. Handwritten notes of [REDACTED] dated February 18, 2002. This document is exempt from access pursuant to subsection 16(1)(a) of the Act.
6. Analysis of the comments of [REDACTED] of CJME Radio, forwarded March 11, 2002. A copy of this document has already been provided to the Applicant.

7. Information for the Minimum Wage Board dated May 14, 2002. This document was created after the Freedom of Information Request was submitted by [REDACTED], and therefore is not covered by it.
8. Undated documents entitled "Labour Initiatives 2002, Cost to Business", "Social Services CDI re Phase III Building Independence Initiatives and NCB Reinvestment Opportunities", "Minimum Wage: Comparison With Average Industrial Wage and Low Income Cut-Off (LICO) 1993-2000" and "Economic Development's Comments Regarding the Current Proposal to Increase the Minimum Wage". Each of these documents is exempt from access pursuant to subsection 16(1)(a) of the Act.

All of the documents listed in points 2, 3, 4, 5 and 8 above were by employees of the government expressly and solely for the purpose of incorporation into documents known as Cabinet Decision Items. Cabinet Decision Items are documents considered by Cabinet which include recommendations, policy alternatives and arguments in support of recommended alternatives.

Cabinet in fact considered Cabinet Decision Items concerning the minimum wage during a period of time from December 2001 to February 2002. These Cabinet Decision Items incorporated the documents listed in points 2, 3, 4, 5 and 8.

In addition to the above submissions, I am relying upon the points made in department's letters dated June 3, 2002, and August 21, 2002.

Saskatchewan Labour apologizes to you and the Applicant for not discovering these additional documents initially. Moreover, I regret any inconvenience that may have resulted from this matter.

Sincerely,

Christine Tanner
Deputy Minister"

[3] I then wrote to the Applicant enclosing a copy of the above letter and provided him with the opportunity to make further representations to me if he so desired.

[4] I have received no further submissions from the Applicant.

[5] The Respondent's letter of September 17th lists the eight separate documents which were not previously disclosed and I have now completed my review of these documents.

[6] It is noted that a copy of document No. 6 has already been provided to the Applicant.

[7] It is further noted that document No. 7 was dated May 14, 2002, whereas the Applicant's request for information was dated March 11, 2002. The Respondent accordingly takes the position that as the document post-dated the Request it is not covered by the Request. It is not clearly an exemption under any Section of The Freedom of Information and Protection of Privacy Act.

In addition, the original Access to Information Requests did not contain any time limitation but requested "all analysis" etc. in the first instance and "all the material submitted by the Minimum Wage Board" in the second request.

Further, the existence of the document in question was not actually made known to myself or the Applicant until the Respondent's letter of September 17th.

It seems to me that any documents that are in existence at the time of my review are covered by the Request for Access unless a specific time deadline was contained therein.

The document (No. 7) is background information and is not in the nature of advice, proposals, recommendations, analysis or policy options as set out in Section 16(1)(a). It is more in the nature of statistical information as contemplated by Section 17(2)(d).

Accordingly, I would recommend that access to Document No. 7 be provided to the Applicant.

[8] Dealing now with the remaining six documents, the Respondent takes the position that Document No. 1 is exempt from access as it was prepared "by and for a third party" and is therefore covered by Section 19(1)(b) of the Act which reads as follows:

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

- (a) trade secrets of a third party;
- (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;”

The document in question is entitled “Minimum Wage Database” and states on its cover page:

“prepared by QED Information Systems Inc. for the Saskatchewan Minimum Wage Board”.

Clearly this document falls within the ambit of Section 19(1)(b) as it was prepared for a government institution by a third party.

The Respondent asserts that a copy of this document was obtained by it in confidence and accordingly I would recommend that access to this document continue to be denied as the wording of this Section is mandatory.

[9] The Respondent takes the position that the remaining five documents (i.e. documents 2, 3, 4, 5, and 8) are all exempt from production as they are documents contemplated by Section 16(1)(a) of the Act which reads as follows:

“16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

- (a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;”

[10] Dealing with these documents in numerical order I am of the view that document No. 2 is clearly an analysis created to present advice to the Executive Council. The memorandum accompanying the

document states that “this analysis is for Cabinet and is, therefore, not to be shared with third parties or special interest groups.”

[11] Document No. 3 is commentary on the proposal to increase the minimum wage and was created to present advice, analysis and recommendation to Cabinet.

[12] Similarly, Document No. 4 falls within the same category.

[13] Document No. 5 is handwritten notes by [REDACTED], Manager, Economic Policy Analysis, Planning and Policy Branch, Department of Labour. The notes contain the author’s calculations as to the economic impact of minimum wage increases and contains confidential commentary regarding Cabinet discussion on proposed increases. Again, this document is clearly exempt from production.

[14] The final document, No. 8, consists of two undated two page items. The first of these is entitled “Labour Initiatives 2002 – Cost to Business” and the second is entitled “Minimum Wage Comparison with Average Industrial Wage”. These documents are identified at the bottom as “Cabinet/CDI/Labour Initiatives 2002”. “CDI” stands for “Cabinet Decision Items” and was created for the purposes set out in Section 16(1)(a).

[15] In summary, therefore, I would recommend that access be provided to the Applicant to Document No. 7 (it has already been provided with respect to Document No. 6) and that access continue to be denied with respect to Documents 1, 2, 3, 4, 5, and 8.

[16] Dated at Regina, in the Province of Saskatchewan, this 30th day of September, 2002.

[REDACTED]

RICHARD [REDACTED] C.
Acting Commissioner of Information
and Privacy for Saskatchewan