

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

[1] By an Access to Information Request form dated March 27, 2002, ██████████ (the “Applicant”) requested information from the Saskatchewan Finance (the “Respondent”) pertaining to documents regarding the impact of a change in the tobacco tax to the level of tobacco smuggling. His request was worded as follows:

“Any documents that would indicate how changing the tobacco tax might affect the level of tobacco smuggling into and away from Saskatchewan.”

[2] In a letter from William R. Van Sickle, Access Officer, Freedom of Information for the Respondent, dated April 23, 2002, the Respondent advised the Applicant as follows:

“Your request for ‘any documents that would indicate how changing The Tobacco Tax might affect the level of tobacco smuggling into and away from Saskatchewan’ was received in this office on March 28, 2002.

Section 13(1)(a) of *The Freedom of Information and Protection of Privacy Act*, (the Act), states as follows:

‘13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:
(a) the Government of Canada or its agencies, Crown corporations or other institutions;’

Sections 16(1)(a) and 16(1)(b) of the Act, states as follows:

‘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;
- (b) agendas or minutes of the Executive Council or any of its committees, or records that record deliberations or decisions of the Executive Council or any of its committees;’

Section (17)(1)(a) of *The Freedom of Information and Protection of Privacy Act*, (the Act), states as follows:

‘17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose’

- (a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;’

Access to the documents requested is denied as all of the documents are exempt under these sections of the 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, you may complete a "Request for Review" form, which is available at the same location where you applied for access. Your request should be sent to the Information and Privacy Commissioner, Mr. Gerald Gerrand, Q.C. at 700 – 1914 Hamilton Street, Regina, S4P 3N6.

Further Correspondence on this request should be directed to me at:
909 – 2350 Albert Street
Regina, SK. S4P 4A6"

[3] In a formal Request for Review dated April 26, 2002, addressed to me, the Applicant indicated that he had been refused access to all or part of the documents that he had requested. Attached to his Request for Review was the Applicant's correspondence to me dated April 26, 2002, which stated as follows:

"This is a request for review of a decision by Saskatchewan [sic] Finance to deny access to my request for information.

I am enclosing the following:

1. A completed "request for review" form
2. A copy of my original request
3. A copy of the department's response

If there is any other information you require of me, please let me know.

Pursuant to Section 53 of the Act, I reserve the right to make representations to you, should you decide to conduct a review of this matter. For you [sic] convenience, I reproduce the relevant section here:

Conduct of review

53(1) The commissioner shall conduct every review in private.

(2) The:

- (a) person who applies for a review;
 - (b) third party or applicant who is entitled to notice pursuant to section 52;
- and
- (c) head whose decision is the subject of a review;

are entitled to make representations to the commissioner in the course of the review

I also note that Section 61 of the Act indicates the following:

Burden of proof

61 In any proceeding pursuant to this Act, the burden of establishing that access to the

record applied for may or must be refused or granted is on the head concerned.

Given that, I would like to receive a copy of any representation made regarding this review, and be afforded an opportunity to comment on such material. I accept that portions of the representation(s) may be severed, or restated by the commissioner in order to avoid disclosing details of the record sought. I further understand that this section is of no avail, if it is determined that no review shall take place.
Thank-you.”

[4] I determined that I would undertake the review as requested by the Applicant and I duly advised the Respondent. Further, I requested that the Respondent, pursuant to the provisions of Section 54 of *The Freedom of Information and Protection of Privacy* (the “Act”), provide me with a copy of the documents that were withheld from the Applicant. Copies of the relevant documents were duly forwarded to me by the Respondent, and I have had an opportunity to read and consider them.

[5] In a letter accompanying these documents, the Respondent wrote to me as follows:
“Enclosed is a copy of the material you requested in your letter of May 1, 2002 with reference to [REDACTED] request for access to information.

There are nine documents in total and my comments concerning each of these documents are as follows:

Document

Comments

Document No. 1

This is a document which was provided to the Province by the federal government in confidence. It is clearly marked “secret” by the federal government and has been exempted under section 13(1)(a) of the Act.

Document No. 2

This document was presented to the Treasury Board during the development of the 2002-03 Budget. The document was formally submitted to Treasury Board and contains Finance’s recommendations, analysis and policy options respecting increase of the tax on tobacco. As the document was created to present advice, proposals, recommendations, analyses and policy options to the Treasury Board, it has been exempted under section 16(1)(a) of the Act.

- Document No. 3 This document was formally prepared for and submitted to Cabinet during the development of the 2002-03 Budget. It contains Treasury Board recommendations, as well as Department of Finance analysis and policy options respecting increase of the tax on tobacco. As the document was created to present advice, proposals, recommendations, analyses and policy options to Cabinet, it has been exempted under section 16(1)(a) of the Act.
- Document No. 4 This document outlines the Department of Finance's position with respect to a Cabinet Decision Item that was to be presented to Treasury Board and Cabinet by the Department of Health in response to the Special Committee on Tobacco Control. This document was created to provide Finance's advice and analysis to a government institution and records deliberations involving officers and employees of the Departments of Finance and Health. Moreover, the document makes reference to previous Treasury Board decisions to reject certain options and would therefore also disclose a confidence of a Cabinet Committee. The document has been exempted under sections 17(1)(a), 17(1)(b) and section 16(1) of the Act.
- Document No. 5 This document is a formal Treasury Board Minute and is exempt under section 16(1)(b) of the Act.
- Document No. 6 This document outlines the Department of Finance's analysis, position and recommendations in response to a report to the Department of Health from the Special Committee on Tobacco Control. It records consultations and deliberations involving officers and employees of the two departments. The document has been exempted under sections 17(1)(a) and 17(1)(b) of the Act.
- Document No. 7 This document was created to provide advice, recommendations and analyses to the Minister of Finance by officers of the Department of Finance. It has been exempted under section 17(1)(a) of the Act.
- Document No. 8 This document was formally prepared for and submitted to the Treasury Board and contains Finance's recommendations, analysis and policy options respecting increase of the tax on tobacco. As the document was created to present advice, proposals, recommendations, analyses and

policy options to the Treasury Board, it has been exempted under section 16(1)(a) of the Act.

Document No. 9

This document was created to provide the Minister of Finance with advice, analysis, options and recommendations respecting a strategy for announcing changes to the Tobacco Tax rates. Two options are discussed in the strategy paper, one of which was recommended to the Minister. The document has been exempted under section (17)(1)(a) of the Act.

I trust this is satisfactory. Please contact me, if I can be of any further assistance with respect to your review.”

[6] With the permission of the Respondent, I provided a copy of this letter (without attachments) to the Applicant.

[7] In a letter dated June 7, 2002, the Applicant wrote to me as follows:

“I am writing in follow up to your letter of May 15.

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

I find it difficult to make arguments over documents I have not been allowed to see, but here it goes.

Document 1: There is no indication as to who marked the document ‘secret’ and to what degree that person has any credible basis for doing so. Can any federal civil servant declare a document ‘secret,’ thus trumping our right to see it under Freedom of Information legislation? Was there any credible reason for that document to be issued in confidence?

The remainder of the documents are being exempted based on Sections 16 and 17 of the Freedom of information and protection of privacy act.

With respect to 16(1)(a), I submit that the documents are clearly tied to the 2002 budget. The tobacco tax was increased as part of the budget. The budget is no longer before Executive Council. Rather, it was put to, and passed by, the provincial legislature. As indicated in a report by the freedom of Information and Privacy Commissioner (2000/035 page 9), some materials prepared for the provincial budget are eligible for release under 16(1)(a).

With respect to 17(1)(a), my request did not ask for a range of options, nor recommendations, nor analyses. I am simply looking for expected cause and effect. The information I am seeking is somewhat technical in nature. If the tobacco tax was increased by a given amount, what would be the implications for the smuggling of tobacco into and out of the province? The province has clearly increased the tobacco tax. The province has clearly admitted to performing, or being in possession of those calculations that would reflect how such an increase would effect [sic] smuggling.

With respect to 17(1)(b), I must register my complete and total surprise. Finance made NO mention of 17(1)(b) in their letter dated April 23, in which they indicated they were denying me access to all the documents that fell within my request. I would ask the commissioner to limit his consideration to the reasons that finance indicated in their first, and only such letter to me. (See attached).

Should the commissioner find himself considering 17(1)(b), I would remind the commissioner that Sask Finance has previously tried to used [sic] this section, only to be find [sic] the Commissioner disagrees with their notion of what constitutes consultations or deliberations (2000/035 page 10).

I hope you find this information useful.”

[8] In a letter dated June 14, 2002, the Applicant provided his further submissions to me as follows:

“I am writing in follow up to my submission of June 3, 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 interpretation as to what actually constitutes advice or recommendations by a government official.

The ruling indicates in short 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 advice; that “advice” suggests 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.”

[9] The provisions of the Act upon which the Respondent relies are as follows:

“13(1) A head shall refuse to give access to information contained in a record that was obtained in confidence, implicitly or explicitly, from:

(a) the Government of Canada or its agencies, Crown corporations or other institutions . . .

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;
(b) agendas or minutes of the Executive Council or any of its committees, or records that record deliberations or decisions of the Executive Council or any of its committees . . .

unless the government or institution from which the information was obtained consents to the disclosure or makes the information public. . . .

(2) Subject to section 30, a head shall not refuse to give access pursuant to subsection (1) to a record where:

(a) the record has been in existence for more than 25 years; or
(b) consent to access is given by:
(i) the President of the Executive Council for which, or with respect to which, the record has been prepared; or
(ii) in the absence or inability to act of the President, by the next senior member of the Executive Council who is present and able to act.

17(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

(a) advice, proposals, recommendations, analyses or policy options developed by or for a government institution or a member of the Executive Council;
(b) consultations or deliberations involving:
(i) officers or employees of a government institution;
(ii) a member of the Executive Council; or
(iii) the staff of a member of the Executive Council; . . .

(2) This section does not apply to a record that:

(a) has been in existence for more than 25 years;
(b) is an official record that contains a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;

(c) is the result of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

(i) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or

(ii) as preliminary or experimental tests for the purpose of:

(A) developing methods of testing; or

(B) testing products for possible purchase;

(d) is a statistical survey;

(e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal; or

(f) is:

(i) an instruction or guide-line issued to the officers or employees of a government institution; or

(ii) a substantive rule or statement of policy that has been adopted by a government institution for the purpose of interpreting an Act or regulation or administering a program or activity of a government institution.”

[10] I firstly wish to address the Applicant’s argument, contained in his letter dated June 7, 2002, that the exemption subsequently sought by the Respondent (pursuant to Section 17(1)(b) of the Act) should not be considered as part of this review.

[11] It is my opinion that 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 (*Tolmie v. Canada (Attorney General)*, [1997] 3 F.C. 893 (T.D.); *Air Atonabe 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.)), the provisions of the 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 determine the exemptions have application.

[12] With respect to the document labelled as “Document No. 1”, the Respondent claims that it is exempt from production pursuant to Section 13(a) of the Act. After reviewing this document, it

appears to me that the information contained therein was obtained explicitly in confidence from the federal government. The wording “Draft – For Government Discussion Purposes Only – SECRET” is contained at the top of every page of the document. In my opinion, this document is exempt pursuant to Section 13(1)(a) of the Act.

[13] With respect to the document labelled as “Document No. 2”, the Respondent claims that the document is exempt from production pursuant to Section 16(1)(a) of the Act, as it alleges it was created to present advice, proposals, recommendations, analyses and policy options to the Treasury Board. In my view, Document No. 2 is exempt pursuant to this section, as it is a record created to present advice, proposals, recommendations, analyses or policy options to the Treasury Board. Section 16(2) is not applicable with respect to this document.

[14] The Applicant relies on reasoning contained in my Report No. 2000/035 (dated March 21, 2001) with respect to his submission that Section 16(1)(a) should not apply. I find that the matter at hand is distinguishable from the facts contained in my earlier report. In my earlier report, I found that there was nothing to indicate that the particular document involved was prepared for the purpose of presenting any advice, proposals, recommendations or policy options to the Executive Council or that the material or any portion of it was presented for these purposes to Executive Council. Further, I found that the document in question in that matter was, at the date indicated on the document, before the Provincial Legislature, and no longer before the Executive Council. In this case, neither of these factors is applicable.

[15] With respect to the document labelled as “Document No. 3”, the Respondent claims that the document is exempt under Section 16(1)(a) of the Act, as it was created to present advice, proposals, recommendations, analyses and policy options to Cabinet. After reviewing this document, it is my view that this document was created to present advice, proposals, recommendations, analyses and policy options to Cabinet. As such, this document is exempt from disclosure pursuant to Section 16(1)(a) of the Act. Section 16(2) is not applicable with respect to this document.

[16] With respect to the document labelled as “Document No. 4”, the Respondent claims that the document is exempt from production pursuant to Sections 17(1)(a), 17(1)(b)(i) and Section 16(1) of the Act. After reviewing this document, it is my view that the information contained therein should be exempted pursuant to Section 17(1)(b) of the Act, as it could reasonably be expected to disclose deliberations involving officers and employees of the Departments of Finance and Health. Section 17(2) is not applicable with respect to this document.

[17] With respect to the document labelled as “Document No. 5”, the Respondent claims that this document is exempt from production pursuant to Section 16(1)(b) of the Act, as it is a formal Treasury Board Minute. Having reviewed this document, in my view it is properly exempt pursuant to Section 16(1)(b) of the Act, as it is a Minute of the Treasury Board.

[18] With respect to the document labelled as “Document No. 6”, the Respondent claims that this document is exempt from production pursuant to Section 17(1)(a) and 17(1)(b) of the Act. In my view, this document is exempt from disclosure pursuant to Section 17(1)(a) of the Act, as it contains recommendations and analyses developed by a government institution, the Department of Finance. Section 17(2) is not applicable with respect to this document.

[19] With respect to the document labelled as “Document No. 7”, the Respondent claims that this document is exempt under Section 17(1)(a) of the Act as it was created to provide advice, recommendations and analyses to the Minister of Finance by officers of the Department of Finance. In my view, this document is exempt from disclosure pursuant to Section 17(1)(a) of the Act, as it contains advice, recommendations and analyses developed by Saskatchewan Finance for a member of the Executive Council, the Minister of Finance. Section 17(2) is not applicable with respect to this document.

[20] With respect to the document labelled as “Document No. 8”, the Respondent claims that the document is exempt from production pursuant to Section 16(1)(a) of the Act, as it contains

Saskatchewan Finance's recommendations, analyses and policy options to the Treasury Board respecting an increase in tobacco tax. In my view, the document is exempt from disclosure pursuant to Section 16(1) of the Act, as it was created to present recommendations, analyses and policy options to the Treasury Board. Section 16(2) is not applicable with respect to this document.

[21] With respect to the document labelled as "Document No. 9", the Respondent claims that this document is exempt pursuant to Section 17(1)(a) of the Act, as it was created to provide the Minister of Finance with advice, analyses, options and recommendations regarding a strategy for announcing changes to the tobacco tax rates. In my view, this document is exempt from disclosure pursuant to Section 17(1)(a) of the Act, as it contains advice, recommendations, and analyses developed by Saskatchewan Finance for a member of the Executive Council, the Minister of Finance. Section 17(2) is not applicable with respect to this document.

[22] In the Applicant's June 7, 2002 correspondence to me, he refers me to my decision on File No. 2000/035 (dated March 21, 2001) as authority for the proposition that I disagree with Saskatchewan Finance's view of what constitutes consultations or deliberations pursuant to Section 17(1)(b) of the Act. In that earlier report, I found that the particular material in question in that matter did not disclose consultations or deliberations pursuant to Section 17(1)(b) of the Act. However, in this matter as noted above, I have been satisfied that certain documents are properly exempt under Section 17(1)(b) of the Act, as those particular documents could reasonably be expected to disclose deliberations within the meaning of the Act.

[23] Further, I have reviewed and considered the *O'Connor v. Nova Scotia* case referred to me by the Applicant. I note that the Applicant referred me to the decision of the trial court in that matter. Upon researching the matter at hand, I found that the *O'Connor* case was later appealed to the Nova Scotia Court of Appeal ([2001] N.S.J. No. 360). The appellant provincial government claimed that information sought was exempt from disclosure, as it was protected by the Cabinet confidentiality exemption contained in section 13 of Nova Scotia's *Freedom of Information and*

Protection of Privacy Act. The Court of Appeal upheld the trial court's decision, and dismissed the appeal. In the course of its decision, the Court of Appeal compared Nova Scotia's Act to similar legislation throughout Canada, and then set forth the following conclusion:

"I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada. Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation; ensure fairness in government decision making; and permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives."

The Supreme Court of Canada has declined leave to appeal this matter ([2001] S.C.C.A. No. 582).

[24] Section 13(2) of Nova Scotia's *Freedom and Information and Protection of Privacy Act* contains certain exceptions to the exemption regarding deliberations of Executive Council that Saskatchewan's legislation does not contain. In particular, Section 13(2)(c) of the Nova Scotia Act states that this exemption does not apply to:

"background information in a record the purpose of which is to present explanations or analyses to the Executive Council or any of its committees for its consideration in making a decision if

- (i) the decision has been made public,
- (ii) the decision has been implemented, or
- (iii) five or more years have passed since the decision was made or considered."

[25] In my opinion, this exception provides a significant limitation to the Cabinet confidentiality exemption that does not exist in the Saskatchewan legislation. The only exceptions set forth in section 16 of Saskatchewan's Act related to circumstances where:

- (a) the government or institution from which the information was obtained consents to the disclosure or makes the information public;
- (b) the record has been in existence for more than 25 years; or
- (c) consent to access is given by:
 - (i) the President of the Executive Council for which, or with respect to which, the record has been prepared; or
 - (ii) in the absence or inability to act of the President, by the next senior member of the Executive Council who is present and able to act.

In my view, given the significant differences in the legislation involved, the reasoning set forth in the Nova Scotia decision is not applicable to the issues raised in this Review.

[26] In the course of this Review, I have considered whether Section 8 of the Act applies, so that portions of the documents requested by the Applicant could be severed in order to give the Applicant access to portions of the documents. In my view, severing portions of the documents requested in this matter is not a viable option.

[27] For the reasons above given, I am of the view that none of the requested documents be disclosed to the Applicant.

[28] Dated at Regina, in the Province of Saskatchewan, this 28th day of June, 2002.

GERALD L. GERRAND, Q.C.
Commissioner of Information
and Privacy for Saskatchewan

