FILE NO. - 2002/032

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

[1] [redacted] (the "Applicant") forwarded an Access to Information Request form dated June 12, 2002 to Saskatchewan Executive Council, (the "Respondent") wherein she stated:

> "Please provide a copy of the report done by MacKenzie Consultants Inc. re: [redacted]."

[2] By letter dated July 17, 2002 the Respondent replied as follows:

> "Your Freedom of Information (FOI) application for access was received at this office on June 14, 2002, requesting the following:
>
> > "Please provide a copy of the report done by MacKenzie Consultants Inc. re: [redacted]."
>
> This is to advise you that the record you have requested is exempt from release pursuant to sections 29(1), 17(1)(a) and 15(1)(c) of *The Freedom of Information and Protection of Privacy Act*.
>
> If you wish to request a review of this response, 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 Mr. Gerald Gerrand, Q.C., Information and Privacy Commissioner, #700 – 1914 Hamilton Street, Regina, Saskatchewan, S4P 3N6.
>
> Sincerely,
>
> Bonita K. Cairns, Access Officer
> Freedom of Information"

[3] The Applicant then forwarded a Request for Review dated July 22, 2002 to the Freedom of Information Commissioner, Mr. G.L. Gerrand, Q.C. who advised the Applicant that as his term of office would expire on July 31, 2002 this matter would be attended to by his successor.

[4] On August 19, 2002, I wrote the following letter to the Respondent:

> "I have recently been appointed as Acting Freedom of Information and Privacy Commissioner, replacing Mr. G. L. Gerrand, Q.C.
>
> On July 23, 2002 Mr. Gerrand received a Request for Review dated July 22, 2002 and a copy of this document together with the attachment referred to therein, is enclosed.
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> Pursuant to the provisions of Section 51 of The Freedom of Information and Protection of Privacy Act, I hereby advise you of my intention to conduct a Review.
>
> Would you please provide me with a copy of the original Access for Information Request form together with a copy of the Report which is the subject of the access request. I make this request pursuant to Section 54 of the Act.
>
> In your response, if you wish to elaborate upon the grounds relied upon for declining to produce said Report, I would be pleased to receive such representation.
>
> I look forward to your response."

[5] I received a copy of the requested report (the "Report") on September 11, 2002 following which I wrote to each of the parties asking them to advise whether or not they wished to make any submissions or representations with respect to my review.

[6] The Respondent's position is set out in their letter of July 17, 2002 wherein they state their reliance on sections 29(1), 17(1)(a) and 15(1)(c) of The Freedom of Information and Protection of Privacy Act. These sections read as follows:

"29(1) No government institution shall disclose personal information in its possession or under its control without the consent, given in the prescribed manner, of the individual to whom the information relates except in accordance with this section or section 30."

"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;"

"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"

[7] The Applicant's position is set out in her letter to me of October 19, 2002 wherein she states:

"The government references three sections of the Act which it believes warrants the withholding of this report: 29(1), 17(1)(a) and 15(1)(c).

As mentioned, I do not believe that section 15(1)(c) applies in any way, as there is no longer any investigation with which to interfere.

With regards to section 29(1), if you believe this applies, I would request that the private information (names) be severed from the report.

For section 17(1)(a), I can only reiterate, as has been done in other letters, that the interpretation of "advice" and "recommendations" should be considered in its narrowest meaning – so as to uphold the spirit of the Act.

> In the case of *Canada (Information commissioner [sic] and TeleZone Inc.) v. Canada (Minister of Industry),* the court repeated the principles that the right of the public to access to information under control of government institutions should be construed broadly – and that exemptions regarding advice or recommendations should be given as narrow a meaning as is consistent with their purpose."

[8] I have now reviewed the Report which in my view contains two distinct sections.

[9] The first section consists of 12 pages and deals with the purpose and parameters of the investigation, the background of the incident in question, the nature and particulars of the investigation, the various matters considered by the investigator and her conclusions.

[10] The second section of the Report consist of five pages and contains recommendations and advice to the Respondent not only as to the disposition of this specific incident but as to policies and procedures that should be adopted in the future.

Attached to the Report were certain appendices which are not relevant to the issues herein.

[11] Dealing with the first section, in my view it clearly falls within the ambit of Section 29(1) as it contains personal information about the subject of the Report, namely [redacted] as well as personal information about a third party, namely the "Complainant" in the Report.

"Personal information" is defined by Sections 24 of the Act as:

> "(1) Subject to subsection (2), "personal information" means personal information about an identifiable individual that is recorded in any form, and includes:

(a) information that relates to the race, creed, religion, colour, sex, sexual orientation, family status or marital status, disability, age, nationality, ancestry or place of origin of the individual;
(b) information that relates to the education or the criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved;
(c) information that relates to health care that has been received by the individual or to the health history of the individual;
(d) any identifying number, symbol or other particular assigned to the individual;
(e) the home or business address, home or business telephone number, fingerprints or blood type of the individual;
(f) the personal opinions or views of the individual except where they are about another individual;
(g) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to the correspondence that would reveal the content of the original correspondence, except where the correspondence contains the views or opinions of the individual with respect to another individual;
(h) the views or opinions of another individual with respect to the individual;
(i) information that was obtained on a tax return or gathered for the purpose of collecting a tax;
(j) information that describes an individual's finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness; or
(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual; or

(ii) the disclosure of the name itself would reveal personal information about the individual.

Subsection 24(2) provides several exclusions from "personal information" that are not relevant in the present case.

[12] I might mention that in a similar application before me by [redacted] I expressed the view that she was entitled to access regarding the first section of the Report. I subscribed to that view

as this section of the Report contains personal information about the Applicant in that case to which she is entitled by virtue of Section 31(1) of the Act which reads as follows:

> "31(1) Subject to Part III and subsection (2), an individual whose personal information is contained in a record in the possession or under the control of a government institution has a right to, and:
>
> (a) on an application made in accordance with Part II; and
>
> (b) on giving sufficient proof of his or her identity;
>
> shall be given access to the record."

[13] In addition, in *Liick v. Saskatchewan*, (1994), 122 Sask. R. 180, the Court of Queen's Bench has ruled that reports dealing with employment harassment cases should be released to the alleged harasser because the public interest in disclosure outweighs any invasion of privacy that could result from the disclosure.

[14] In that case, the Applicant was a government employer who was accused of employment harassment with respect to a co-worker. He applied for disclosure of all documents relating to the internal investigation of the complaint but was denied by the head of his department on the basis that the documents disclosed personal information about the complainant pursuant to section 29(1) and that the documents involved consultations and deliberations involving government officers or employees under section 17(1). The Applicant argued that he should be entitled to access to the documents because they were personal information relating to him and he required the documents for a grievance against his employer.

[15] The Applicant has suggested that the private information (names) be severed from the Report. The Report does not contain names other than that of [redacted] and the Complainant, but as stated, the first section does contain throughout, private information respecting [redacted] which is not subject to disclosure except to [redacted] herself.

[16] The second section of the Report is entitled "Findings and Recommendations for Disposition and Restoration" and, as previously indicated, they contain recommendations for the Premier as to the actions required for resolving the complaint and actions recommended for Cabinet members and their employees.

[17] These recommendations, in my view, do constitute advice or policy options developed for the Executive Council and accordingly fall within the ambit of Section 17(1)(a) of the Act. I adopted the same view in the [redacted] application referred to in paragraph 12 above. As I have now issued my report in the [redacted] application, I attach a copy of same hereto.

[18] The Respondent also denies access to this section of the Report on the grounds that it may disclose information with respect to a lawful investigation. I agree with the Applicant and had the document not been exempt for the above reasons, I would have found that the document is not exempt under section 15(1)(c) of the Act.

[19] In *Rubin v. Canada* (1997), 154 D.L.R. (4th) 414, the Federal Court of Appeal reviewed provisions under the federal legislation that are similar to section 15 of the Saskatchewan Act. The federal legislation however contains a more detailed exemption for documents relating to lawful investigations. Section 16(1)(c) of the Access to Information Act provides an exemption for:

> "(1) The head of a government institution may refuse to disclose any record requested under this Act that contains
>
> . . .
>
> (c) information the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including without restricting the generality of the foregoing, any such information

> (i) relating to the existence or nature of a particular investigation;
> (ii) that would reveal the identity of a confidential source of information, or
> (iii) that was obtained or prepared in the course of an investigation."

[20] The applicant in this case sought an airplane accident safety report but was denied access by the Minister of Transport on the ground that it was obtained or prepared in the course of an investigation and its disclosure might prejudice future investigations. The court found that the exemption related solely to a specific, ongoing investigation and not to a general investigative process.

[21] The court also found that where there is ambiguity within a section, the court must choose the interpretation that infringes on the public's stated right to access to information the least. The federal legislation includes a specific purpose of the Act in section 2 which closely reflects the general philosophy of the Saskatchewan Act of promoting full disclosure as stated by Mr. Justice Tallis in *General Motors Acceptance Corp. v. SGI* (1994), 116 Sask. R. 36 (Sask. C.A.) as follows:

> "The FOIA was proclaimed in force effective April 1, 1992. It was enacted to facilitate public access to "Government" documents. It is broadly conceived and, like similar legislation in other jurisdictions, it seeks to permit access to official information shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from reluctant or unwilling officials. The Act does not limit or reduce the rights of access existing at the time of proclamation.
>
> The Act's basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly delineated statutory language. There are specific exemptions from disclosure set forth in the Act, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act. That is not to say that the statutory exemptions are of little or no significance. We recognize that they are intended to have a

> meaningful reach and application. The Act provides for specific exemptions to take care of potential abuses. There are legitimate privacy interests that could be harmed by release of certain types of information. Accordingly, specific exemptions have been delineated to achieve a workable balance between the competing interests. The Act's broad provisions for disclosure, coupled with specific exemption, prescribed the "balance" struck between an individual's right to privacy and the basic policy of opening agency records and actions to public scrutiny."

Using this purpose as a guide, the Federal Court of Appeal found that section 16(1)(c) was wide enough to include past information obtained in the course of an investigation but the exclusion should only extend to protect past information that will have an effect on an investigation currently underway. That affected investigation must be specific, ongoing or about to be undertaken.

[22] The wording of the Saskatchewan exemption in section 15(1)(c) is clearly broader than the federal statute because it relates to "information with respect to a lawful investigation" and does not include any reference to the disclosure being "injurious" to "the conduct" of the investigation contained in the federal legislation. But nevertheless, the same principles apply. The Saskatchewan section only has meaning if it relates to information relating to a present, specific investigation. To interpret otherwise would be against the general philosophy of the Act to allow access whenever possible as enunciated in the *General Motors* case.

[23] In the present case, the investigation of the Applicant's actions has ended and there is no specific investigation currently undertaken or about to be undertaken with respect to the incident. Therefore, I find that the exclusion raised under section 15(1)(c) does not apply.

[24] For the reasons set out above, I would recommend that the Respondent continue to deny access to the Applicant to the Report in question.

[25] Dated at Regina, in the Province of Saskatchewan, this 8th day of November, 2002.

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