FILE NO. - 2002/039

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

[1] By letter dated July 8, 2002, [redacted] (the "Applicant") forwarded to the Executive Council of the Province of Saskatchewan (the "Respondent") an Access to Information Request for requesting:

> "Report of Marilyn J. MacKenzie Consulting Inc., June 3, 2002."

[2] By letter dated August 8, 2002 the Respondent replied as follows:

> "This is in response to your letter to Premier Lorne Calvert dated July 8, 2002, requesting a copy of the report of Marilyn J. MacKenzie Consultant Inc.
>
> I wish to advise that subject to ss. 29(1), 17(1)(a) and 15(1)(c) of *The Freedom of Information and Protection of Privacy Act*, your request for access to the above mentioned record is denied. The report is essentially personal information respecting an individual other than yourself (s. 29(1)), discloses advice, proposals, recommendations, analyses or policy options developed for a government institution or a member of the Executive Council (s.17(1)(a)) and could disclose information with respect to a lawful investigation (s. 15(1)(c)).
>
> You are aware, as a result of the discussions to date relating to the release of the report, including those that have taken place between the Department of Justice and your counsel [redacted] that the government considers it very important that the report, of which your legal counsel has a copy, not be made public for reasons of privacy and confidentiality. We are concerned not just for the individuals affected by this case, but for the integrity of the system for handling workplace complaints. It is important to ensure, to the greatest extent practicable, that future complaints can be processed appropriately and future complainants will not be unduly reluctant to voice their concerns.
>
> At the same time, we recognize that you have a valid interest in the report. In attempting to balance the interests of the individuals involved in this case and the need for a functional workplace complaints process, we proposed through our respective legal counsel that the report would be released to you subject to conditions aimed at keeping it confidential. If you would like to renew those discussions, please have [redacted] contact the Department of Justice.
>
> 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 the enclosed "Request for Review" form and submit it to Mr. Richard Rendek, Q.C., Acting Information and Privacy Commissioner, #700 – 1914 Hamilton Street, Regina, Saskatchewan, S4P 3N6.

If you require further information, please contact me at (306) 787-6351."

[3] The Applicant then forwarded to me a Request for Review dated August 17, 2002 following which I wrote to the Respondent on August 23, 2002 the following letter:

> "On August 23rd I received a Request for Review dated August 17, 2002 and a copy of this document together with the attachment referred to therein is enclosed herein.
>
> 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.
>
> In light of the applicant's request for a speedy review due to her personal situation I would ask that you expedite your response.
>
> I look forward to your response."

[4] The Respondent through the Department of Justice, replied by letter dated September 11, 2002 which states:

> "By letter dated August 23, you informed Bonita Cairns of the Department of Executive Council of [redacted] request for review and your intention to conduct a review. Ms. Cairns will be providing you with the original form of application and a copy of the report requested in the application. On behalf of the Department of Executive Council, I am pleased to provide some additional information concerning the grounds relied on in not granting the application.
>
> Background – the investigation and the report

The report itself outlines the circumstances giving rise to its preparation, and I will recount those circumstances in this submission. [redacted] is, of course, familiar with the circumstances.

The nature of an investigation report related to a harassment complaint must be understood in the context of the complaint process itself. The Government of Saskatchewan, like other employers, had developed a process for handling harassment complaints in a formal manner. This is, in part, a response to s. 3 of *The Occupational Health and Safety Act, 1993*, which requires every employer to:

> (a) ensure, insofar as is reasonably practicable, the health, safety and welfare at work of all of the employer's employees; [and]
> (c) ensure, insofar as is reasonably practicable, that the employer's workers are not exposed to harassment at the place of employment ...

Harassment and other workplace complaints cannot be dealt with effectively unless workers have confidence in the process for handling them. First and foremost, workers must believe they can make a complaint without undue further risk to themselves. They must believe that their complaints will be taken seriously and that they will not suffer further harm if they were justified in complaining.

When a worker brings forward a complaint, he or she understands that a formal investigation may follow. That necessarily involves some exposure of the worker's life at the office. However, the worker should be confident that there will not be an unnecessary invasion of his or her privacy.

Obviously, the government's interest is not just related to this particular complaint and these particular individuals. The government must establish and maintain an environment where future complaints can confidently come forward.

There is currently no formal policy regarding workplace complaints that is specific to ministers' offices. The Public Service Commission ("PSC") has a formal policy relating to harassment complaints in the regular part of the executive government. In the absence of a specific policy relating to ministers' offices, the PSC policy was a useful guide in processing [redacted] complaint against [redacted] As [redacted] points out in her August 16 letter, that policy contemplates that the complainant and the respondent will receive copies of the investigator's report. However, PSC policy also contains the following provision respecting confidentiality:

> All complaints made in which an individual is named or can be identified will be communicated to that individual. All information relating to verbal and written complaints and formal investigations will be kept strictly confidential. The investigation is limited to only those individuals who must be contacted to fulfill the employer's legal duty to investigate,

provide a safe workplace and resolve the situation. Those involved in the investigation are prohibited from discussing the harassment complaint outside the official restorative or investigative process.

Confidentiality means, in its simplest form, that no one talks about the harassment complaint outside the official restorative or investigative process. It is not to be discussed informally or gossiped about by anyone. Lack of confidentiality can cause further pain or harm to the people involved and makes restoration to a respectful environment more difficult. If you are involved in an investigation and someone asks you about it, you must inform that individual that you can not discuss it. Breaches of confidentiality may result in the application of the Corrective Discipline Policy.

In short, in the typical workplace setting, a copy of the report can be provided to each of the complainant and the respondent because both can be required to keep it confidential pursuant to this part of the policy. That is not the case here. Neither [redacted] nor [redacted] are under the authority of the employer and cannot be disciplined if they breach the confidentiality contemplated by the policy.

On behalf of the government, I have advised counsel for both [redacted] and [redacted] that the report can be made available to them, provided they enter into agreements that they will respect this requirement of confidentiality. Neither has accepted the report on this basis. [redacted] has advised us through her counsel that she is not willing to keep the report confidential. As she indicated in her letter to you, she feels the public has a right to know the complete details. It is for this reason that the government resists providing her with a copy of this report.

Exemptions under *The Freedom of Information and Protection of Privacy Act*

[redacted] August 8 letter denying access to the report sets out the three exemptions relied on. I don't intend to elaborate on the application of ss. 15(1)(c) and 17(1)(a). I believe those provisions speak for themselves. However, some further detail respecting s. 29(1) of the Act might be useful.

First, we do not dispute [redacted] assertion that the report is about her as well as about the complainant. For that reason, if the complainant were to apply for access to the report, [redacted] privacy rights and the application of s. 29(1) to those rights would have to be considered. For the reasons set out above, the government takes the position that the report and its contents should be kept confidential and we submit that the exception set out in s. 29(1) permits that to occur.

S. 31 of the Act gives [redacted] a right of access to her own personal information, but that right is to be exercised by an application under Part II, which

is subject to all of the exemptions, including s. 29(1). Briefly stated, [redacted] right to a document containing her personal information is subject to the privacy rights of anyone whose personal information is also contained in the document.

[redacted] stated intention to make the report public illustrates the importance of protecting the complainant's personal information and corresponding right to privacy.

It is no answer to say that the complainant has spoken publicly about aspects of this case. There is no concept of waiver in the legislation. To the very limited extent that information in the report is in the public domain, portions of the report could, theoretically, be released. However, this is entirely impractical. The report in its totality remains essentially a document about the complainant and [redacted] Neither should have a right to make it public at the expense of the other.

If we can provide any further information, we would be pleased to do so. If it would be helpful to meet to discuss this, that can certainly be arranged.

All of which is respectfully submitted.

Yours truly,

Gerald Tegart"

[5] I forwarded a copy of the Respondent's letter to the Applicant in order that she could respond to same which she did by forwarding a detailed submission to me dated September 23, 2002 which she requested be kept confidential due to the personal nature of same.

[6] Pursuant to the suggestions contained in the Respondent's letter of September 11, 2002 I arranged to meet with the Respondent's representatives on September 30th in order that I might clearly understand the Respondent's position with respect to this matter.

[7] I then arranged to meet with the Applicant and her legal counsel, [redacted] on October 9th, in Saskatoon in order that they might make representations outlining their position as well.

[8] I then held a further meeting with the Respondent's Deputy Minister on October 16th and outlined to him the submissions that I had received from the Applicant and her legal representative.

[9] During the above meetings, I advised both parties that in my view the Report in question contains two distinct sections.

[10] 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.

[11] 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. Also attached to the Report were certain appendices which are not relevant to the issues herein.

[12] Both the Applicant and the Respondent agreed with this characterization of the Report.

[13] The Respondent has denied access to the Report on the basis of sections 29(1), 17(1)(a) and 15(1)(c) of the Act. The Civil Law Division of the Department of Justice has raised a fourth ground, namely that the disclosure of this report will jeopardize the investigation of future employment harassment cases by discouraging future complainants from coming forward. Since this fourth ground relates to the exclusions under section 15 relating to investigations, I will discuss this ground under my examination of the section 15(1)(c) exclusion.

[14] The Respondent has claimed that because the report contains personal information about the complainant, he must not give the Applicant access to that report.

[15] "Personal information" is defined by section 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.

[16] From an examination of section 24(1), it is unclear as to what personal information of the complainant, if any is included in the report. At best, her complaint and the facts relating to that complaint could be classified as part of her employment history. But any personal information about the complainant is clearly overshadowed by the personal information contained in the report relating to the Applicant. As the Applicant has argued, the report may contain information about others but it is essentially about her.

[17] 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.

[18] 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.

[19] The court adopted the general philosophy of the Act as described by Mr. Justice Tallis of the Saskatchewan Court of Appeal in *General Motors Acceptance Corp. of Canada v. SGI* (1994), 116 Sask. R. 36, 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."

[20] The court found that section 29(2)(l) of the Act provided a discretion to the head to release documents for the purpose of administration of personnel. Investigating a complaint of harassment in the workplace clearly fell into that category. The court also found that there was discretion to disclose personal information where the public interest clearly outweighed any invasion of privacy. At page 191, the court stated:

> "A decision by a head to withhold personal information of the appellant on the ground that it is also personal information of another individual is untenable in this instance. It is difficult to foresee a situation where there is personal information of an identifiable individual without there being personal information of another identifiable individual.
>
> I find the public interest in disclosure clearly outweighs any invasion of privacy that could result in the disclosure. Further, the disclosure would clearly benefit the appellant in his grievances against his employer."

The court thus ordered that all written and typed personal information of the Applicant was to be released.

[21] Clearly, this case applies to the first 12 pages of the Report. This was a matter relating to workplace harassment just as in the *Liick* decision. Any rights to privacy claimed by the complainant are outweighed by the rights of the Applicant to receive access to her personal information contained in the report. Although there is no grievance procedure as there was in the *Liick* decision, the Applicant has the right to clear her name and restore her reputation with the public and, in particular, with her constituents. Pursuant to section 29(2)(o), the public interest in allowing the Applicant access to the report obviously outweighs any invasion of privacy that would occur by releasing the report which may or may not include personal information about the complainant.

[22] Section 29 therefore does not provide a compelling ground for denying access to the first section of the Report, particularly in view of the provisions of Section 31(1) of the Act which entitles an individual to access to their own personal information.

[23] The Respondent has claimed that the report cannot be disclosed because it discloses advice, proposals, recommendations, analyses or policy options developed for a government institution or a member of the Executive Council pursuant to section 17(1)(a).

[24] 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.

[25] 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.

[26] The third ground claimed by the Respondent for denying access is pursuant to section 15(1)(c) of the Act which states:

> "(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;"

[27] This exemption in the present case raises two issues. Firstly, is the investigator's report excluded by this section as relating to a lawful investigation that has been completed. Secondly, is the investigator's report excluded due to the harm disclosure might cause to future investigations of workplace harassment.

[28] With respect to the first issue, there is no definition in the Act of "lawful investigation." The Applicant has argued that because the complainant has stated she will not make a complaint to the local police with respect to the incident, that there will be no police report and this section does not apply. I would however interpret the meaning of "lawful investigation" to mean an investigation justified under the law and which would include an internal investigation as in the present case.

[29] I have found that the decision of the Federal Court of Appeal in *Rubin v. Canada* (1997), 154 D.L.R. (4th) 414, applies to the resolution of both of these issues.

[30] In that case, 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."

[31] 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. Therefore, any harm contemplated in future investigations by release of the report was irrelevant. As stated by the court at page 426:

> "Thus, one cannot refuse to disclose information under s. 16(1)(c) on the basis that to disclose would have a chilling effect on future investigations."

[32] I adopt the same reasoning with respect to the Deputy Minister's argument that the Report in the present case should not be disclosed because of potential harm to future workplace harassment complaints.

[33] 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*, supra.

[34] 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.

[35] 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.

[36] 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.

[37] The Respondent through its solicitor at the Department of Justice has argued that the Report can only be released if the Applicant agrees to keep the Report confidential and does not disclose its contents to anyone. He relates the policy contained in the Public Service Commission policy on workplace harassment which requires the parties to keep any reports relating to complaints confidential. Because the parties remain members of the Public Service, they will be subject to discipline if they breach the confidentiality requirement. The Respondent argues that because neither the Applicant or complainant are under the authority of the employer, they cannot be disciplined if the Report is disclosed to third parties.

[38] In my opinion, this is not a valid argument. Throughout this process, the Executive Council and the Investigator have pointed to the fact that the Public Service Commission policy does not apply to this case. It is not the Applicant's fault that the Executive Council does not have a similar policy in place.

[39] Furthermore, the Deputy Minister's argument about disciplining employees for breaching the confidentiality is flawed in that employees leave the employment of the government all the time and very possibly more often after being involved in a harassment complaint. There is no effective means of disciplining them at that point. To deny the Applicant access to a Report that is fundamentally about her and has affected her life and her career in such an intrusive and detrimental manner on the ground that she cannot be disciplined should she disclose its contents, is unreasonable and flies in the face of the policy governing the Act.

[40] More importantly, the Act does not provide any provision whereby a document can be released on conditions. Either access is granted or it is denied based on the specific exclusions.

[41] For the reasons set out above, I would recommend that the Applicant be granted access to the first 12 pages of the Report (the first section) but that the Respondent continue to deny access to the last five pages (the second section) of the Report.

[42] Dated at Regina, in the Province of Saskatchewan, this 7th day of November, 2002.

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