FILE NO. - 2002/042

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

[1] By letter dated June 25, 2002, [redacted] (the "Applicant") requested information from Saskatchewan Justice (the "Respondent") as follows:

> "This is a request for records under the *Freedom of Information and Protection of Privacy Act*.
>
> I would like all documents that detail the Department of Justice's statistical predictions about crime committed by aboriginal or Metis people in Saskatchewan. Essentially, I am interested in obtaining information that outlines Justice's sense of what future crime will be committed by First Nations people in Saskatchewan. I am also interested in receiving the department's analysis of any such predictions or modeling.
>
> These records I wish to access may include: documents, files, notes, reports, memorandums, letters, e-mails, briefing notes, transcripts of meetings, agendas of meetings, sticky notes – and any other material that make reference to modeling or predictions surrounding crime committed by First Nations people in Saskatchewan.
>
> I believe releasing this information is in the public's interest, and request that you waive any fee. I am a journalist and will disseminate the information contained in the records I have requested. This dissemination will promote the free and vigorous debate of important public issues.
>
> I am aware that you can impose fees for search time and for the cost of reproducing material. If you do not grant my request for a fee waiver, I request that you provide me with an itemized list of any fee you wish to impose.
>
> If the time for searching for the records is excessive, I will want to know the qualifications of the person doing the search, the locations where that person had to search, any transfer of records from one part of the department to another, the qualifications of the person reviewed the records once found and the time necessary to segregate the exempt portions of the records from the non-exempt.
>
> I am confident there should be no exemptions given my understanding of the *Act*. If you should decide to withhold any of the records I have requested, then I ask you to provide me with a list of the records you are withholding and the reason you are withholding each of them."

[2] The Respondent replied by letter dated July 25, 2002 as follows:

> "Thank you for your application for access under *The Freedom of Information and Protection of Privacy Act*, received in this office June 27, 2002, requesting "documents or records that detail the Department of Justice's statistical predictions about crime committed by Aboriginal or Metis people in Saskatchewan.
>
> Enclosed are five documents with information on Aboriginal involvement with the justice system as offenders and victims, several of which are publicly available. These include:
>
> - the Canadian Centre for Justice Statistics (CCJS), *Police-Reported Aboriginal Crime in Saskatchewan*, prepared under contract for Saskatchewan Justice, January 2000;
> - CCJS, *Aboriginal Peoples in Canada*, CCJS profile series, June 2001;
> - The statistical section of a January 2002 power point presentation for a departmental briefing to the Commission on First Nations and Metis Peoples and Justice Reform; and
> - Saskatchewan Institute of Public Policy, Aboriginal People and the Justice System: Disproportionality, Socio-Economic Status and Cultural Dislocation – A Literature Review and Commentary, and a Selected Annotated Bibliography, September 2001.
>
> We are unable to provide information regarding statistical predictions or modeling regarding Aboriginal or Metis people in Saskatchewan. This information is exempt from access pursuant to clause 17(1)(a) of *The Freedom of Information and Protection of Privacy Act*.
>
> If you wish to request a review of this action, 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 the Information and Privacy Commissioner at #700 – 1914 Hamilton Street, Regina, Saskatchewan, S4P 3N6.
>
> Further correspondence on this request should be directed to Sherri Fowler, Freedom of Information Co-ordinator, at (306) 787-5473."

[3] On August 27, 2002 I received a Request for Review from the Applicant and on August 28, 2002 I wrote to the Respondent as follows:

"On August 27th I received a Request for Review from [redacted] dated August 23, 2002, a copy of which is enclosed.

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 information or records requested by the Applicant and which you have declined to disclose. This request is made pursuant to Section 54 of the Act.

In your response you may wish to elaborate on the grounds relied upon for declining to disclose.

I look forward to your reply."

[4] On September 12th I received from the Respondent the following reply to my letter:

"I have enclosed the materials we did not release to [redacted] This includes:

- Detailed calculations prepared by the Policy, Planning and Evaluation Branch, Saskatchewan Justice, in 2001
- A letter to Executive Council indicating that these materials were prepared to support analysis in a Cabinet Decision Item

The above materials were summarized and formed part of an analysis placed before Cabinet in the fall of 2001. They were shared only on a confidential basis for assisting the Cabinet analysis of a Cabinet decision item.

Given this background, we feel that the documents not released to [redacted] fall within clause 17(1)(a) of *The Freedom of Information and Protection of Privacy Act*.

If you require further information, please contact me at (306) 787-5473."

[5] I forwarded a copy of the Respondent's letter to the Applicant and requested that he advise me if they wished to make any further representations respecting this application and by letter dated September 19, 2002 the Applicant wrote to me as follows:

"Dear Mr. Rendek:

Thank you for your letter of September 16, 2002.

I do wish to respond to the Department of Justice's September 12, 2002 letter to you.

I fail to understand how Justice can claim that the detailed calculations it prepared in 2001 constitutes "advice, proposals, recommendations, analyses or policy options developed by or for a government institution." Simply put, this material is statistical information compiled by a government department. I submit, this information is factual information and should be accessible by the public. As you know, and I can attest to this as a journalist, empirical data generated by government agencies is released to the public all the time. Moreover, section 17(2)(d) and (e) of the *Act* indicates that exemptions should not apply to "a statistical survey" or "the results of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal.

Second, I would draw your attention to *Canada (Information Commissioner and TeleZone Inc. v. Canada (Minister of Industry*. [sic] Citing jurisprudence from both the Supreme Courts of Canada and the Federal Court, the court in this case reiterated 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 and the statutory language in which they were expressed.

The court also held that 'advice' should be given a narrow meaning. According to the court, exemptions "should be limited and specific," including "an expression of opinion on policy-related matters but exclude(s) information of a largely factual nature.

Therefore, the court ruled that exemptions should be reserved for "the opinion, policy or normative elements of advice, and should not be extended to the facts on which it is based.

In conclusion, I note that over and over, courts have ruled that government institutions need to live up to the spirit of the *Act* and make information accessible to the public.

Thank you for considering this matter.

I eagerly await your ruling. If you have any questions, please feel free to contact me at: [redacted]

[6] I then forwarded a copy of the Applicant's letter to the Respondent and by letter dated October 10, 2002 I received the following response:

"Dear Mr. Rendek:

RE: Your File Number F 2002/042 RPR (Our File [redacted])

Thank you for your letter to Ms. Fowler dated September 23, 2002 requesting, "... further representations that you wish to make prior to my completing my review and filing my report." Ms. Fowler has asked me to reply to your letter as my Branch was responsible for compiling the information for the original request.

I have made the following observations for supporting our decision to not release the information to [redacted]

- [redacted] contends that the documents in question are merely statistical information compiled by the Department, information that should be accessible to the public. However, such factual information on Aboriginal crime is contained in a variety of publications by the Canadian Centre of Justice Statistics (CCJS), publications we previously provided to [redacted] is in pursuit of *modeling analysis* based on this statistical information. Such analysis, needless to say, is not factual, purely statistical, information. Rather it is laden with assumptions and parameters that are applied to existing statistical data to generate a range of analytical possibilities.
- Subsection 17(2)(d) does not allow exemption with regard to statistical survey, and subsection 17(2)(e) does not allow an exemption with regard to "background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal." However, neither of these terms is further defined in the act.
- We need to review these terms in context. The New Webster Encyclopedic Dictionary defines statistics as, "a collection of facts which admit of numerical statement and of arrangement in tables ...." Research is defined by the same source as, "diligent inquiry or examination in seeking facts or principles; a continued search after the truth; investigation." In contrast, analysis is defined as involving,

> "consideration of anything in its separate parts and the relation to each other.
>
> Based on these definitions, it is our submission that the lack of exemption for statistical surveys applies to the pure numbers in tables generated as well as survey methodologies, but not to the analysis derived therefrom. Similarly, we would contend that the removal of an exemption with regard to background research of a scientific or technical nature applies to research intended to add to the statistical base, as in the research Saskatchewan Justice commissioned from CCJS on police-reported Aboriginal crime.
>
> These definitions to not cover the independent application of analytical thought and approaches to the information provided by research or surveys. This, I would contend, involves modeling different scenarios, additional assumptions, analysis of scenario outcomes, and so on. It is the latter activity that we were engaged in when we prepared the documents we did not release to [redacted] While these documents recite information from statistical surveys and research, in and of themselves they are neither statistical surveys nor research. Rather, they are *analytical modeling exercises*. Further, per our Deputy Minister's correspondence with [redacted] these documents were developed for the purpose of supporting Cabinet decisions.
>
> Finally, it is our opinion that the Court of Queen's Bench decision in *Weidlich v. Saskatchewan Power Corporation* supports our decision. A copy of this decision is attached.
>
> If you require further information, please contact Sherri Fowler at 787-5473 or myself at 787-8954."

[7] On October 15, 2002 I forwarded a copy of the Respondent's letter to the Applicant and asked him to advise me if he had any further submissions or representations to make and the Applicant responded by letter dated October 28, 2002 as follows:

> "Again I submit that the department cannot exempt statistical information. The *Act* is quite clear on this matter. Subsection 17(2)(d) and (e) state that departments cannot withhold information that is a "statistical survey" or "is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy or proposal". The *Act* does not define statistical survey or background research of a scientific or technical nature. I suggest the most liberal interpretation of the two subsections must be taken. In *Canada*

(Information Commissioner) and TelZone Inc. v. Canada (Minister of Industry), the Federal Court was quite clear that the right of public access to information under the control of government institutions must be construed broadly in light of the statutory purpose of giving the public access to information. Moreover that exceptions should be given as narrow a meaning as is consistent with their purpose and the statutory language in which they were expressed.

The Saskatchewan Legislature, I believe, used clear statutory language to express itself. If did not attach a dictionary definition to its intention.

The Department of Justice is trying to dress up statistical and background research as "advice." This is a slippery slope. What's next? Could the department of finance withhold monthly sales tax figures because cabinet may use statistics gleaned from that information to make decisions about the economy? Again, the public must be given the benefit of the doubt – and the *Act* must be construed broadly – not narrowly as the Department of Justice seems to want. As you know, and I can attest to as a journalist, empirical data generated by government agencies, is released routinely to the public. I have enclosed a statistical survey I obtained under the *Act* from Saskatchewan Environment and Resources Management.

The Department argues that the information I am requesting was prepared to support cabinet decisions. Surely then, I should have access to the documents. The public has a clear right to scrutinize the information our leaders use to make their decisions after they have made them. As well, I must ask you to factor in the reality of the ongoing Commission on First Nations and Metis Peoples and Justice Reform hearings. There is public interest in the information I am seeking. Frankly, I am perplexed as to why the Department will not release the information and add it to the ongoing – and important – public discourse about aboriginal justice.

Again, as I stressed in my letter of September 19, 2002, I submit that the Department cannot rely on exemptions 17(1)(a). The Federal Court has clearly said that the exemption must be limited and specific – and that "an expression of opinion on policy-related matters exclude(s) information of a largely factual nature."

In conclusion, I must stress that over and over the courts have ruled that government institutions need to live up to the spirit of the *Act* and make information accessible to the public."

[8] I have now reviewed the documents which the Respondent has declined to disclose to the Applicant. They consist of a letter dated August 28, 2001 from the Respondent's Director of Policy, Planning and Evaluation to the Cabinet Planning Unit of the Executive Council together with 26 pages of material which I will describe as follows:

Page 1	- Projections of the number of Aboriginals involved with the criminal justice system by 2018 together with an analysis of these projections
Page 2	- Revised supplementary projections to the figures contained in the first page
Page 3 – 12	- An analysis of various scenarios based upon certain backgrounds and assumptions and the projected implications resulting therefrom, such as projected crime rates for different rural or urban areas, the cost implications of same, together with an analysis of the charts attached to these projections
Pages 13 – 17	- Charts that depict graphically the various scenarios referred to in Pages 3 – 12. They deal with various scenarios and assumptions contained therein and project them in graph and chart form to the year 2018.

[9] The documents are all marked confidential and the accompanying letter dated August 28, 2001 (referred to in paragraph 8 hereof) states in the second paragraph:

> "The enclosed scenarios were prepared for internal purposes. I ask therefore, that you treat them as confidential for your information only, and not for distribution."

[10] The Respondent's position is that the records being withheld are exempt from production pursuant to Section 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* which reads 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"

They assert that the documents are, in essence, a modelling analysis of statistical information resulting in specific projections based upon that information being incorporated into certain scenarios when utilizing various assumptions.

[11] It is the Applicant's position that the information being requested is simply statistical information compiled by a government department and accordingly is governed by Section 17(2)(d) of the Act which states:

> "17(2) This section does not apply to a record that:
>
> ...
>
> (d) is a statistical survey"

[12] The Applicant further contends that Section 17(2)(e) of the Act is also applicable. Subsection 17(2)(e) reads as follows:

> ""17(2) This section does not apply to a record that:
>
> ...
>
> (e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal"

[13] A similar position was taken by an Applicant in the case of *Weidlich vs. Saskatchewan Power Corporation* (1998) 164 Sask. R. 204.

[14] As stated by Mr. Justice Geatros, it is the ordinary meaning of the words "scientific" and "technical" that is to be applied. The learned trial judge goes on to say:

> "... it is apparent the terms refer to research dealing with a recognized category of learning, physics or biology, for example, involving the application of the methodology employed in the exploration or science. To categorize "scientific" and "technical" as the kind of research undertaken in the present case would, in my view, be going beyond the traditional connotation of the words not intended by the framers of the legislation."

[15] My review of the records in question indicate that they are much more than a "statistical survey". There is no question that statistical information has been utilized but the main purpose and effect of the documents has been to take this statistical information together with certain assumptions to create certain scenarios and projections and the implications that may arise therefrom. They are clearly distinguishable from the statistical survey enclosed by the Applicant in his letter of October 28th, as in that case the records constituted criteria utilized by Municipal Government offices to determine the frequency of compaction and cover of the working face at waste disposal grounds. It is, in effect, a compliance report.

[16] The records in question are clearly "analyses" or "policy options" as contemplated by Section 17(1)(a). As I have indicated in paragraph 8 hereof, the records consist of certain scenarios which are established by utilizing certain background information and assumptions and resulting in various projections which are then provided to the Cabinet Planning Unit to establish certain Government policies. They are not a statistical survey in any sense of the word.

[17] The Applicant's analogy, in his letter of October 28th, to monthly sales tax figures is, in my view, not tenable. If the Department of Finance created certain scenarios and, based upon certain information and assumptions, made various projections which they then provided to Cabinet for planning or policy recommendations, then I believe those records would be exempt from production.

[18] The Applicant further contends that "advice" should be given a narrow meaning and exemptions should be limited and specific and not be extended to the facts on which it is based and I presume he contends that this principle applies to "analyses" or "policy options" as well.

[19] However, I believe the facts and opinions contained in the records herein are so intertwined that they cannot be intelligently separated. As stated by Mr. Justice Geatros in the *Weidlich* decision, "the Reports must be disclosed *in toto* or not at all."

[20] I would also point out that, in my view, the records in question would also be exempt from production by virtue of the provisions of 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:
>
> records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;

The language of this section is mandatory and does not contain the same exceptions that are found in Section 17(2) of the Act that are relied on by the Applicant.

[21] For these reasons, I would recommend that the Respondent continue to deny access to the records requested by the Applicant.

[22] Dated at Regina, in the Province of Saskatchewan, this 6th day of November, 2002.

[redacted]

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