SEPTEMBER 23, 2004 FILE NO. – 2004-015

SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2004-004

SASKATCHEWAN INDUSTRY AND RESOURCES

Summary: The Applicant sought information with respect to budget materials prepared in anticipation of the Wide Open Future advertising campaign. During a media scrum, the Premier verbally advised the Applicant that the documents he sought would be released. The Commissioner found that this did not constitute valid consent and the documents were therefore properly withheld from disclosure as being records created to present advice and recommendations to the Executive Council.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, ss. 16, 61 and 69; *The Freedom of Information and Protection of Privacy Regulations, S.R. c. F-22.01, s. 18;* Alberta *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25.

Authorities Cited: Weidlich v. *Saskatchewan Power Corporation (1998), 164 Sask. R. 204 (Q.B.)*

Alberta OIPC Order: 97-010, [17] to [21], [48] to [52].

I. BACKGROUND

[1] On December 5, 2003, the Applicant requested access from Saskatchewan Industry and Commerce (the "Department") to the following:

> *. . . all materials that were prepared in advance of November, 2002, that describe the anticipated budget for the Wide Open Future campaign and funding sources at that time.*

The Applicant is a journalist. He alleged that the Premier, as President of the Executive Council, agreed verbally to release the documents during a media scrum on December 2, 2003.

[2] On January 12, 2004, the Department provided the Applicant with three pages dealing with advertising rates and a budget relating to advertising. The Department denied access to a remaining document on the basis that it was a cabinet decision item and exempt pursuant to section 16(1)(a) of *The Freedom of Information and Protection of Privacy Act*. The Department denied that proper consent had been given by the Premier and stated the following:

> *In your request, you indicated that the President of the Executive Council provided consent to access and that, in accordance with Clause 16(2)(b) of the Act, "a head shall not refuse to give access to this record". You have not, however, submitted proper consent from the Premier granting access to this particular Cabinet document. The requirement is for written consent as set out in Section 18 of The Freedom of Information and Protection of Privacy Regulations . . .*

[3] The record to which access was denied was a Cabinet Decision Item entitled "Creating a Positive Attitude in Saskatchewan" which contains recommendations dealing with the development of and a budget for an advertising program.

II. ISSUES

A. Is the Cabinet Decision Item exempt as being a record created to present advice, proposals, recommendations, analyses or policy options to Executive Council pursuant to section 16(1)(a) of *The Freedom of Information and Protection of Privacy Act*?

B. If the Cabinet Decision Item is exempt, was valid consent given by the Premier to allow access to the document?

III. DISCUSSION OF THE ISSUES

Issue A: Is the Cabinet Decision Item exempt as being a record created to present advice, proposals, recommendations, analyses or policy options to Executive Council pursuant to section 16(1)(a) of *The Freedom of Information and Protection of Privacy Act*?

[4] Subsections 16(1)(a) and (2)(b) of *The Freedom of Information and Protection of Privacy Act* provide the following:

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

[5] It is significant that the section is mandatory unless consent is given. The head has no discretion to release the documents that are covered by this section. It is also significant that unlike section 17, there is no exception to the exemption for background research or statistical surveys.

[6] It may be useful to consider developments in the interpretation of Cabinet confidences to assist in understanding section 16 of the Act. Alberta's former Information and Privacy Commissioner succinctly summarized such developments in Alberta Order 97-010 [17] to [21] when he considered the application of section 21 of the Alberta *Freedom of Information and Protection of Privacy Act*. That Alberta provision is as follows:

> *21(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.*

[7] Commissioner Robert Clark observed as follows:

> *The rationale for protecting Cabinet confidences and for excluding them from the coverage of the federal Act* [Access to Information Act] *is because the government is based on a Cabinet system. Thus, responsibility rests not on a single individual, but on a committee of ministers sitting in Cabinet. As a result, the collective decision-making process has traditionally been protected by the rule of confidentiality. This rule protects the principle of the collective responsibility of ministers by enabling them to support government decisions, whatever their personal views. The rule also enables ministers to engage in full and frank discussions necessary for effective functioning of a Cabinet system of government.*[1]
>
> *These principles give rise to the public interest immunity privilege which used to be absolute.*

[1] Confidences of the Queen's Privy Council for Canada, Access to Information Act: Policies and Guidelines, Treasury Board Secretariat (Ottawa, 1993)

> *However, the public interest immunity privilege in Canada has evolved. Courts now review the evidence for which immunity is being sought in order to assess whether or not the injury to the public interest which might arise from disclosure, outweighs the injury which might arise from non-disclosure. If the court is not persuaded that any harm to the public interest will ensue, the evidence will be disclosed.*
>
> *As a result of recent decisions such as the Supreme Court of Canada in Carey v. Ontario [1986] 2 S.C.R. 637, and Leeds v. Alberta (Minister of Environment) [1990] A.J. no. 370, the Courts will now weigh the facts in each particular case to determine whether the public interest in non-disclosure. The claim of privilege will prevail only when it is in the public interest.*
>
> *The Cabinet confidences exception in the Act does not reflect the evolution of public interest immunity privilege as set out above. Unlike the common law, section 21 has no provision to allow the decision maker to assess whether or not the injury to the public interest which might arise from disclosure outweighs the injury which might arise from non-disclosure. Rather, under section 21, public interest immunity or Cabinet confidence is determined by whether the information or document in question falls within a certain class. Consequently, section 21 does not codify the common law, but abrogates it or returns it to the status it had before Carey. As a result, as Commissioner, I cannot use the common law to aid in my interpretation of section 21.*

[8] I find that the same analysis applies to section 16 of the Act.

[9] In reviewing this document, I have found that it comprised recommendations, advice, proposals, some background information and some budget proposals. The document was clearly produced for presentation to the Executive Council for a decision on the proposals and recommendations. Clearly, the portions of the document containing proposals, recommendations, analyses and policy options are exempt from disclosure pursuant to section 16(1)(a). The only question remaining is whether the portions of the document that purport to discuss "background" issues should be released.

[10] I am mindful of the comments of Mr. Justice Geatros in Weidlich v. Saskatchewan Power Corp. about what constitutes "advice" in a case involving section 17 of the Act. In *Weidlich v. Saskatchewan Power* Corporation (1998), 164 Sask. R. 204, Mr. Justice Geatros of the Saskatchewan Court of Queen's Bench dealt with an appeal of SaskPower's decision to withhold certain documents despite the Information and Privacy Commissioner's recommendation that they should be released. Mr. Justice Geatros examined the meaning of "analyses" under section 17 of the Act and held:

> *I suggest that the meaning of "advice" in ordinary parlance is to be adopted here, meaning "primarily the expression of counsel or opinion, favourable or unfavourable, as to action, but it may, chiefly in commercial usage, signify information or intelligence." per Rand, J., in Moodie (J.R.) Co. v. Minister of National Revenue*, [1950] 2 D.L.R. 145 (S.C.C.), at 148.

[11] The court also found that where facts and opinions are so intertwined in a document that they cannot be intelligently separated, the documents "must be disclosed *in total* or not at all".

[12] It is important to note however that although section 16 and 17 of the Act both deal with advice, proposals, recommendations and policy options there are some important differences between the two sections. I am guided by the discussion of Mr. Clark in Alberta Order 97-010 [48] to [52] and his reference to the *Treasury Board of Canada Policy Manual-Access to Information Volume, Part 2-Guidelines, Chapter 2-6*. Sections 16 and 17 reflect different levels of information within the Saskatchewan government hierarchy. As Mr. Clark observed,

> *The Act may reflect the fact that, as information moves up the decision-making hierarchy of government, that is from research and analysis levels towards Cabinet decision-making levels, it is assumed to take on an increasing amount of sensitivity. Hence, communications between ministers are excluded, Cabinet deliberations, which are the ultimate decision-making forum, receive as strong, mandatory exception to disclosure while the research and analysis levels have a discretionary exception.*

[13] The major difference between records described in section 16 and those in section 17 is the purpose for which they were prepared. Memos and briefs and other forms of records prepared for the purpose of presenting recommendations or proposals to Cabinet fall within section 16. Records prepared for or by a government institution for consideration by the Minister but which are not records prepared for consideration by the Cabinet fall within section 17.

[14] In the present case, I find that the portions of the document that are described as background information really contain analyses as these portions provide counsel and opinion for the Executive Council to assist in making its decision. If there are purely factual references in these portions, those facts are so intertwined with the analyses as to make it impossible for them to be severed from the rest of the document. I therefore find that the Cabinet Decision Item entitled "*Creating a Positive Attitude in Saskatchewan"* is entirely exempt from disclosure under section 16(1)(a).

Issue B: **If the Cabinet Decision Item is exempt, was valid consent given by the Premier to allow access to the document?**

[15] Even if the document is exempt from disclosure pursuant to section 16(1)(a) of the Act, the head must disclose it if the President of the Executive Council has consented to its release. Section 69(p) of *The Freedom of Information and Protection of Privacy Act* gives the Lieutenant Governor in Council the power to make regulations:

> *(p) prescribing manners in which the consent of an individual may be given;*

[16] Section 18 of *The Freedom of Information and Protection of Privacy Regulations* provides the following:

> *Where the Act requires the consent of an individual to be given, the consent is to be in writing unless, in the opinion of the head, it is not reasonably practicable to obtain the written consent of the individual.*

[17] The Applicant alleges that the Premier, as President of the Executive Council, verbally gave his consent to the release of the requested documents in a media scrum before the Applicant launched his access application. He provided a copy of a transcript of the Premier's statement.

[18] The Applicant has also argued that section 18 of the Regulation does not apply in this case because a broad, fair and liberal interpretation of the Act would require that the section only applies to individuals providing consent under the Act's personal information provisions in either section 28 or 29. However, I find this argument must fail. Any broad, fair and liberal interpretation must be consistent with the clear, ordinary meaning of the words of the section. Section 18 of the Regulations contains no restriction to any section or provision of the Act. It requires that all required consents of all individuals must be in writing. The President of the Executive Council is an individual and his consent therefore must conform with section 18. Verbal consent is therefore insufficient and cannot be used to circumvent the head's mandatory prohibition in section 16(1)(a) of the Act. All consents must be in writing unless it is not reasonably practicable to obtain the written consent of the individual. The document therefore remains exempt from disclosure.

[19] A question arises as to which party has the onus to prove that consent was given. Section 61 of the Act states the following:

> *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.*

I have determined that in the present case, the head of the Department has satisfied the burden of proof by stating the record contains no written consent and asserting that no written consent exists. In this case, the Applicant may be in a better position to meet the burden of proving consent since he has raised the issue

and alleged that consent was given. However, he is unable to produce the required written consent and I therefore must deny his application.

IV. RECOMMENDATIONS

[20] My finding is that valid consent was not given by the President of the Executive Council pursuant to section 16(2)(b)(i) of the Act.

[21] My finding is that the Cabinet Decision Item is exempt from disclosure pursuant to section 16(1)(a) of the Act.

[22] Dated at Regina, in the Province of Saskatchewan, this 23rd day of September, 2004.

R. GARY DICKSON, Q.C.
Information and Privacy
Commissioner for Saskatchewan