

SEPTEMBER 23, 2004

FILE NO. 2004/016

SASKATCHEWAN
OFFICE OF THE
INFORMATION AND PRIVACY COMMISSIONER

REPORT 2004 – 005

Executive Council

Summary: The Applicant sought certain materials prepared by or for or held by Executive Council with respect to a public opinion survey in November 2003. Executive Council denied access on the basis that the information would be published within 90 days. The Commissioner found that Executive Council calculated the time correctly. The Commissioner further found that Executive Council failed to meet its duty to reasonably assist the Applicant and failed to respond openly, accurately and completely. The Commissioner recommended that Executive Council provide access to the raw data related to the survey and to records with respect to the costs of the survey.

Statutes Cited: *Freedom of Information and Protection of Privacy Act* [S.S. 1990-91, c. F-22.01], s. 7(2)(c) and s. 61

Authorities Cited: Saskatchewan OIPC Report: 2004-003

I. BACKGROUND

[1] The Applicant applied on January 28, 2004 for access to

... all materials prepared by or for or held by Executive Council that show the results of 17 budget-related questions undertaken in November, 2003. Please show the questions, the answers and the costs of the survey.

[2] On January 28, 2004, Executive Council had issued a news release #04-020 that accompanied a coil bound document entitled “*Government of Saskatchewan Public Opinion Polling from October 1, 2004 -- December 31, 2003.*” [hereinafter referred to as the First Report] The page following the title page contains the following statement:

NOTE: Seventeen budget-related questions are being withheld at this time and will be released with a quarterly release post-Budget.

- [3] Executive Council responded on February 12, 2004 advising the Applicant as follows:

You do not need to apply under The Freedom of Information and Protection of Privacy Act in order to obtain the polling information you have requested. In accordance with Section 7(2)(c) of the Act, this information will be made public within 90 days. This information is scheduled to be released as part of the regular process in mid-April 2004 and will be available in the Media Services/Media Relations Branch, Room 34, Legislative Building.

- [4] The Applicant submitted to our office a Request for Review on February 18, 2004.

- [5] In his submission the Applicant stated as follows:

The government's interpretation of the 90-day clock [section 7(2) of that Act] is flawed, I submit, in that the time has already started. It began, I submit, on the date that the government's polling information was ready. That is: a date in November 2003. As such the release or "publication" of the budget polling should have taken place at the same time [Jan. 28th, 2004] that the other polling was published.

The government cannot choose to publish a portion of a record, and then wait for a formal FOI request to begin the 90-day clock for the balance of the record.

- [6] Executive Council claimed that the Department of Executive Council, for confidentiality reasons, annually withholds all budget related public opinion polling results until after the release of the budget. Executive Council asserted that the request was received on January 28, 2004 and that it would be releasing the results of the budget related questions prior to the end of the 90-day period mentioned above.

- [7] Our office was initially advised by Executive Council that the polling in question was part of omnibus polling. In other words, the polling involved different areas and different departments. On April 2, 2004 we were advised that in fact the budget related questions were done as a separate and complete poll and were not a part of the omnibus polling released on January 28, 2004. We were further advised that when a Department has a relatively large number of questions to submit for the omnibus polling, they are routinely directed to have their own polling conducted in accordance with the Communications Services Procurement Policy.

- [8] On April 22, 2004 Executive Council released a further coil bound report entitled “*Government of Saskatchewan Public Opinion Polling from January 1, 2004 – March 31, 2004.*” [hereinafter referred to as the Second Report] At the end of that Second Report is a section on budget-related questions. The title page for that section states: “*Budget-related Questions Withheld Prior to the Budget – November 2003*”. What follows are 20 pages related to the 17 budget related questions. There is an introduction (2 pages); Highlights (1 page); Section A: Financial Perception (2 pages); Section B: Provincial Government Financial Performance (3 pages); Section C: Provincial Budget Expectations (4 pages); Section D: Targeted Deficits (4 pages); Section E: Health Care Spending (2 pages) and Section F: Provincial Budget Priorities (2 pages).
- [9] We requested that Executive Council do a further search for responsive records. We were then advised that there were no additional responsive records other than “raw data” provided by the polling company prior to receipt by Executive Council of the report.
- [10] We requested that Executive Council produce the “raw data” and this was provided on June 17, 2004. This consists of 63 pages of data tables. These data tables include such variables as gender, age group, education, income, employment status, occupation, location and region. Much of this information is not included in the Second Report. This raw data will hereinafter be described as the “Data Tables”.
- [11] On August 27, 2004 Executive Council provided us with the cost of the budget related polling conducted in November 2003.

II. RECORDS AT ISSUE

- [12] Public Opinion Polling from January 1, 2004 – March 31, 2004 (20 pages) in coil bound document. [the Second Report]
- [13] Package entitled “*November 03 Omnibus, Data Tables*” (63 pages)[Data Tables]

III. ISSUE

Did the government institution properly apply section 7(2)(c) of the *Freedom of Information and Protection of Privacy Act* (“the Act”) to the records withheld?

IV. DISCUSSION OF THE ISSUE

[14] I am encouraged that the Saskatchewan government routinely produces reports on public opinion surveys undertaken with public resources. The fact that this information becomes publicly accessible without the necessity of an access request under the Act is very positive from the perspective of greater government transparency. This review however does involve an access request and gives rise to the following issues:

- (a) When does the 90 days commence to run for purposes of section 7(2)(c) of the Act?
- (b) Did Executive Council in this case discharge its duty to assist the Applicant openly, accurately and completely?

When does the 90 days commence to run for purposes of section 7(2)(c) of the Act?

[15] Section 7(2)(c) of *The Freedom of Information and Protection of Privacy Act* provides as follows:

The head shall give written notice to the applicant within 30 days after the application is made:

...

c) if the record is to be published within 90 days, informing the applicant of that fact and of the approximate date of publication.

[16] In this case, I find that Executive Council did inform the Applicant within 30 days of the fact that the record would be published within 90 days and of the approximate date of publication.

- [17] I have been unable to find any previous report of this office addressing this question. The Applicant asserts that once the November polling was done the budget related responses must be released within 90 days of that November date. The Applicant also claims that when other poll results were released by Executive Council on January 28, 2004 in the First Report, the budget related questions should have been included in that publication.
- [18] The word “record” is defined in section 2(1)(i) in very broad terms. It includes a “*record of information in any form and includes information that is written, photographed, recorded or stored in any manner, but does not include computer programs or other mechanisms that produce records.*” The “record” however referred to in section 7(2)(c) is the particular record responsive the specific access request. The other survey questions described in the First Report were unrelated to the budget and budget specific matters. In this case, I conclude that the 90 days referred to in section 7(2)(c) starts to run on the date the Applicant’s access request is received by the government institution.

Did Executive Council discharge its duty to assist the Applicant openly, accurately and completely?

- [19] In Report 2004-003, [5] to [15], I concluded that there is an implicit duty on the part of a government institution to make every reasonable effort to assist an applicant and to respond without delay to each applicant openly, accurately and completely. This also means that the government institution must make an adequate search for all records responsive to the access request.
- [20] In this case, Executive Council initially represented to the Applicant that the record in question had been one element in a more comprehensive polling report. A similar representation was made by Executive Council when we commenced our investigation. In the course of our investigation, we were subsequently advised that this was not the case and the budget questions had been a separate poll altogether. I find that this was an innocent error and that the correct information was provided to our office as soon as the Access Officer realized the mistake. It was apparent that Executive Council was relying on certain information it had received from another Department.

- [21] Executive Council responded to the Applicant solely with respect to a single document, namely the Second Report. In the course of our investigation we learned that the polling agency also provided government with the Data Tables. In responding to an access request, it is not sufficient for the government institution to either prepare or produce a summary and disclose only that summary instead of the source documents from which it has been prepared.
- [22] Similarly, it is not appropriate for a government institution to invoke only section 7(2)(c) if the intention is to release within 90 days only some of the records that would be responsive to the access request. If section 7(2)(c) applies to certain records then it would be necessary for the government institution to provide access to the balance of responsive records or advise the Applicant why access was being denied. In my view Executive Council took too narrow a view of what was or was not a responsive record. Further, in my view, the Data Tables must be included in the record responsive to the access request. The failure of Executive Council to identify to the Applicant that the Data Tables existed and then the failure to provide the Applicant with the Data Tables means that the duty to assist has not been met.
- [23] Since the Department has not asserted any discretionary exemption or mandatory exemption, the Data Tables should be released to the Applicant.
- [24] Executive Council has not provided to the Applicant any information with respect to “*the costs of the survey*” as described in the original access request from the Applicant.
- [25] I note that the burden of proof is addressed in section 61 of the Act as follows:
- 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.*
- [26] I find that Executive Council has failed to meet and discharge the burden of proof to establish that the Applicant is not entitled to access the raw data and the costs related to the survey in question by reason of section 7(2)(c).

V. RECOMMENDATIONS

- [27] I find that the release by Executive Council of the seventeen budget related questions and responses on April 23, 2004 [the Second Report] met the requirements of section 7 (2)(c) and that the 90-day period contemplated in that section commenced to run on the date Executive Council responded to the access request of the Applicant i.e. February 12, 2004.
- [28] I further find that the seventeen budget related questions and responses [Second Report] were publicly available within the 90 days prescribed in section 7(2).
- [29] I find that Executive Council failed to discharge its duty to assist the Applicant insofar as it did not disclose the existence of additional documents referred to as the Data Tables when it responded to the access request.
- [30] I recommend that Executive Council release to the Applicant the Data Tables relevant to the access request of the Applicant within 30 days.
- [31] I further recommend that Executive Council disclose the costs of the survey with respect to the seventeen budget-related questions within 30 days.
- [32] 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