SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT F-2006–004

Saskatchewan Human Rights Commission

Summary: Two Applicants jointly applied for a copy of the file created by the Saskatchewan Human Rights Commission (the Commission) during its investigation of the Applicants' human rights complaint. The Commission released portions of the file to the Applicants but withheld the remainder citing sections 15(1)(c) and 17(1)(b) of *The Freedom of Information and Protection of Privacy Act* as its authority to do so. The Commissioner found that some third party personal information and consultative/deliberative material was rightfully withheld, but he recommended release of many of the withheld documents in full or in part.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act* [S.S. 1990-91, c. F-22.01 as am], ss. 7, 12(1)(b), 15(1)(c), 17(1)(b), 17(2), 24, 29, 31

Authorities Cited: Saskatchewan OIPC Reports F-2006-003, F-2004-006, F-2006-001, F-2006-002, Report F-2004-001, F-2005-006; Alberta IPC Order F2004-026; Ontario IPC Order MO-1487, Order M-64

Other Resources Cited:

Ontario Ministry of Government Services, Access and Privacy Office. *Freedom of Information Guidelines* available online http://www.accessandprivacy.gov.on.ca/english/pub/foiguideline.html; Co-published by Elizabeth Wilcox and Alberta Queen's Printer, *The Annotated Alberta Freedom of Information and Protection of Privacy Act*, January 2005 Update; Government of Alberta. *Freedom of Information and Protection of Privacy Guidelines and Practices 2005* available online http://foip.gov.ab.ca/resources/guidelinespractices/index.cfm

I BACKGROUND

[1] Two Applicants jointly submitted a human rights complaint to the Saskatchewan Human Rights Commission ("SHRC" or "the Commission") for investigation.

[2] Shortly after receiving notification of the Commission's decision to dismiss their complaint, the Applicants wrote the Commission requesting the following:

> *We are requesting all **information** and **records** accumulated and generated during the life of this file – thus we are requesting **all materials** which pertain to ourselves within this file – such as [but not limited to] investigator's notes etc., information gathered from investigative requests for information etc., additionally we are seeking all inter-office communications memorandums – as well as all third party communications memorandums and we request all information relating to 'opinions' collected – regardless of sources they were collected from.*
>
> *Where **records** or **information** are severed from SHRC's **FOIPP** response – we are entitled to the balance of the **information** and **records –** responsive to our reuest.*
>
> *In the event of a non-disclosure of **information** or **records** – **severing notations** – citing ALL relevant sections of the **FOIPP** Act relied upon in the severing of the **information** or **records** must be supplied [meaning if there be multiple exemptions applicable to **information** or **records** severed – we must be provided all of them] – additionally – **we request that SHRC place all severing notations on each record severed and on each specific area in a record where information is severed.***

[3] The Commission responded with a letter informing the Applicants of its decision to extend the response deadline by 30 days.

[4] Within the extended time period, the Commission explained the following to the Applicants:

> *Your application for access has been processed. You requested access to your entire files. The portion of the record that has been cleared for access is attached.*
>
> *However, in accordance with section 8 of The Freedom of Information and Protection of Privacy Act, some of the documents have been deleted for the following reasons:*
>
> 1. *Information was gathered with respect to a lawful investigation, pursuant to section 15(1)(c) of the Freedom of Information Act* [sic]; and
> 2. *The information would disclose internal consultations and deliberations pursuant to section 17(1)(b)(i) of the Freedom of Information Act* [sic].
>
> *If you wish to have this decision reviewed, you may do so within one year of this notice. To request a review, you must 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 1874 Scarth Street, Regina, Saskatchewan S4P 3V7. …

[5] In the Applicants' Request for Review, the Applicants listed several reasons for the request: refusal of access, lack of reply to application, and disagreement with extension of the 30 day response period.

II RECORDS AT ISSUE

[6] The Commission provided our office with an Index of Records revealing responsive material consisting of 485 pages, indicating 69 of those pages were released to the Applicants. The record is comprised mostly of witness statements, interview guides, the Commission's internal Note and Case Reports, emails, handwritten notes, letters, resumes, questionnaires, memorandums, fax cover sheets, and posters. In review of the records, I, however, noted the following:

1. Pages 1-7 & 12 on the Index of Records were created after the Applicants' request for access was submitted and would not be relevant;

2. "No reason" was cited by the Commission on the Index of Records corresponding to pages 404 and 428;

3. Multiple copies of some documents were included [e.g. page 81 is the same as 93; 3 full copies of the same Case Report (62-72, 83-92, & 100-109)]; and

4. Across from pages 444-445 in the Index of Records is the following notation: "Copy provided see 429-430".

After taking into account the above, the record only comprises 264 pages.

III ISSUES

Has the Commission met the implied duty to assist?

Did the Commission properly apply section 15(1)(c) of the Act to the records withheld?

Did the Commission properly apply section 17(1)(b) of the Act to the records withheld?

Did the Commission properly apply section 29 of the Act to the records withheld?

Did the Commission meet the requirements of section 7 of the Act when it provided notice to the Applicant within the time extension?

Was the Commission's extension of the response deadline in accordance with the criteria set out in section 12(1)(b) of the Act?

IV DISCUSSION OF THE ISSUES

[7] In our Report F-2004-006[1], I determined that the Commission is a "government institution" for purposes of *The Freedom of Information and Protection of Privacy Act* (the Act). As such, the Act applies to the Commission.

[8] In its submission, the Commission raised a preliminary matter. That is, whether or not the failure of the Applicants to make use of an alternate access process unique to the Commission may somehow prejudice that individual's right of access under the Act. The relevant portion of the Commission's submission is as follows:

> *In considering objects and purposes of the Act, in your Report 2004-003, you recognize that the underlying objective to freedom of information legislation is full disclosure and openness of agencies to public scrutiny (¶¶5-11). The procedure under the Code has a very similar objective and makes extensive provision for the release of information integral to the investigation. When I dismiss a complaint, a complainant has the right to have a tribunal member review my decision under section 29.4 of the Code. When the Complainant seeks such a review,* ***I must provide a copy of the record to both the complainant and the review tribunal****. Section 14(1) of the Code Regulations defines the record as including "all witness statements and documents that could comprise evidence at an inquiry." This is precisely what is exempted in this case under section 15(1)(c). I believe the disclosure under this process provides the openness and transparency of action that is at the root of freedom of information legislation. Had the applicants wished to know all of the information that lead to the determination against them they could have sought a review under section 29.4 but chose not to do so. Furthermore, as is my usual practice, the applicants were sent a letter detailing how to go about applying for a review along with the necessary application form. (See page 48 in Index of Records).*
>
> *Freedom of Information and protection of privacy are joint objectives in the same legislation. It my view, when the applicants fail to avail themselves of the procedure that allows for full disclosure and transparency within the purposes for which the records were created, the privacy interests of those through whom the records have been created must be taken into account. …*
>
> [Emphasis added]

[9] In rebuttal to the Commission's above noted submission, the Applicants offered the following:

> *The commissioner's attempted transfer of our access rights to the "**code**" – clearly bears witness to the commissioner's illusory 'overriding jurisdiction' claims.*
>
> *…*
>
> *…**Had the applicants wished to know all of the information that lead** (sic) **to the determination against them they could have sought a review under section 29.4 but chose not to do so…***

[1] At paragraph [63]

> *Well considering everything that happened is it any wonder that we 'chose not to do so' – notwithstanding that – who is going to file any appeal without seeing any of the information first….*

[10] In our Report F-2004-006 I considered a similar argument at paragraph [22] advanced instead by the Applicant in that case as reproduced below:

> *The Applicant has asserted that the Commission will be obliged to grant access to the Applicant in any event by reason of procedural provisions of the Saskatchewan Human Rights Code and the Saskatchewan Human Rights Code Regulations. With respect to this argument, the possibility that responsive documents may be disclosed in the future through some alternative process is not relevant to our review of whether a government institution has properly applied the discretionary exemption in the Act.*

[11] At paragraph [18] of our Report F-2006-002, I clarified that "*[t]he review process under the Act is independent of any other proceedings that may provide access to documents.*"

[12] I do not agree with the Commission's reasoning that because the Applicants did not initiate an appeal through the Commission and thereby trigger a right to see their file they forfeited their right to seek access under the Act.

Has the Commission met the implied duty to assist?

[13] In order to meet the implied 'duty to assist', a government institution must respond openly, accurately and completely to the Applicant. (Saskatchewan OIPC Reports F-2004-003, [12] to [15]; F-2004-005, [19]; F-2004-007, [13] to [17]; F-2006-001 [96])

[14] On February 3, 2004, the Commission responded to the Applicants' request. Its response is as follows:

> *Your application for access has been processed. You requested access to your entire files. The portion of the record that has been cleared for access is attached.*
>
> *However, in accordance with section 8 of The Freedom of Information and Protection of Privacy Act, some of the documents have been deleted for the following reasons:*
>
> 1. *Information was gathered with respect to a lawful investigation, pursuant to section 15(1)(c) of the Freedom of Information Act* [sic]; and
> 2. *The information would disclose internal consultations and deliberations pursuant to section 17(1)(b)(i) of the Freedom of Information Act* [sic].
>
> *If you wish to have this decision reviewed, you may do so within one year of this notice. To request a review, you must 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* ***1874 Scarth Street, Regina, Saskatchewan S4P 3V7****. …*
>
> [Emphasis added]

[15] In an initial letter to the Applicants dated January 16, 2004, the Commission provided the above address for our office as well. The relevant portion of the Commission's letter is as follows:

> *If you wish to request a review of this delay, you may do so within one year of this notice. To do so, 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* ***1874 Scarth Street, Regina, SK S4P 3V7****.*
>
> [Emphasis added]

[16] As evident in both cases, the government institution provided an incorrect address for our office to the Applicants.

[17] Providing inaccurate contact information for our office to an applicant may interfere with the individual's attempts to request a review of the matter by our office. The government institution is responsible to provide accurate information with respect to applicants' right to request a review.

[18] We identified an additional concern upon examination of the Index of Records provided by the Commission to our office during the review process. In the Index of Records, the Commission lists additional discretionary exemptions [sections 22(a) and 31(2) of the Act] not earlier cited in its correspondence in its formal response to the access request from the Applicants. We informed the parties of the following:

> *We refer both parties to the following 'reminder' that appeared in the September 2004 issue of the Saskatchewan FOIP FOLIO:*
>
> > *We remind government institutions and local authorities that it is important to cite all relevant mandatory and discretionary exemptions when they respond to an access request. We have encountered a number of cases where the public body decides to raise a number of new exemptions once our office undertakes a formal review of their decision to withhold a record. This is unfair to the applicant.*
> >
> > *Our practice is that we will not normally consider a new discretionary exemption once we commence our review unless the public body can demonstrate that this will not cause undue delay to the applicant and that it will not prejudice the applicant.*
>
> …
>
> *If either the Commission or the Applicants wish to make any submissions with respect to the issues in this review, we request that such submissions be provided to our office prior to February 1, 2005.*
>
> *We enclose a copy of the Helpful Tips document to assist the parties in preparing their written submission.*

[19] The Commission made no further representations on this question.

[20] In our Report F-2005-006, I commented on the inappropriateness of this practice as follows:

> *[5] The government institution raised an additional discretionary exemption during the review process. In accordance with our interpretation of section 7 of the Act, discretionary exemptions should be identified in the institution's original response to the Applicant, not during a formal review by our office.*

[21] I will not consider sections 22(a) and 31(2) of the Act in the circumstances. Though not raised in its formal response to the access request by the Commission, I will nevertheless consider the applicability of section 29 of the Act as it is a mandatory exemption.

[22] In light of these circumstances, I conclude that the Commission did not meet its duty to assist the Applicants in this case.

Did the Commission properly apply section 15(1)(c) of the Act to the records withheld?

[23] The applicable clause of section 15 is as follows:

> ***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;*

[24] In order for section 15(1)(c) to apply, the investigation undertaken by the Commission must qualify as a lawful investigation under that section. In our Report F-2004-006 (paragraph [31]), I determined that investigations undertaken by the Commission qualify "*for purposes of section 15(1)(c) of the Act*."

[25] The Commission presented the following arguments for its reliance on section 15(1)(c) of the Act:

> *The records that the applicants seek released have been compiled pursuant to an investigation into a complaint filed with the Commission by the applicants.* ***The release of these documents would not interfere with this investigation because the investigation is complete.*** *I have already dismissed the complaint and issued my reasons. For those documents indicated in the index,* ***I rely primarily on the second part of section 15(1)(c), which allows me not to disclose information with respect to a lawful investigation****.*
>
> *I accept that in order to justify the refusal the burden is on me to establish:*
>
> *a) That the records were gathered pursuant to a lawful investigation; and*
>
> *b) That the release of the record would disclose information with respect to a lawful investigation.*
>
> …
>
> ***We submit that to release any of these materials would be to disclose information that is integral to the lawful investigation of the applicants' complaint.***
>
> …

> *…All of the witnesses in this case, other than the applicants themselves, provided us with information in cooperation with a human rights investigation. It is fair to say that they cooperated with us because of the operation of the law and not because of a personal interest in the applicants' human rights. Some of the statements indicate that the witness giving the statement feels a sense of harassment by the applicants. It is not within the purview of our work to determine whether this fear is based on reality. However, suffice it to say that these witnesses, who did not choose to come into conflict with the applicants, would not now wish their statements and corporate documents released to the applicants for any purpose other that that for which they were originally gathered. In my view, taking the privacy interests of others into account is a legitimate purpose that is not improper or arbitrary.*
>
> *This objective of protecting others is consistent with the first part of section 15(1)(c), which allows me to exempt records, the release of which would interfere with an investigation. I note that this section does not refer only to the investigation to which the records relate, but an investigation. When we ask witnesses to co-operate with us we make them aware of the fact that their assertions and their private corporate and other documents may be subject to public scrutiny within the adjudicative process. However, it would be much harder to get the cooperation of witnesses if we had to make them aware that anything they might provide us with could be scrutinized outside the human rights process and even after the complaint process was completed. I believe this would leave potential witnesses feeling very vulnerable and uncooperative.* ***For this reason, disclosure of evidence would interfere with other investigations****.*
>
> [Emphasis added]

[26] The Commission is arguing that release of the records would "*interfere with a lawful investigation*" but also that it would "*disclose information with respect to a lawful investigation*".

[27] In our Report F-2006-001 at paragraph [41], I explained that "*[w]e view both parts of section 15(1)(c) of the Act to denote the same meaning of lawful investigations. If the legislature had intended a different meaning, then different words would have been used. The two parts of the subsection will only apply if there is an active investigation underway.*"

[28] As the Commission has confirmed that its investigation has long been concluded, I find that section 15(1)(c) of the Act does not apply to any of the withheld records in this present case.

Did the Commission properly apply section 17(1)(b) of the Act to the records withheld?

[29] The applicable provision of the Act is 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:*
>
> …
>
> *(b) consultations or deliberations involving:*
>
> *(i) officers or employees of a government institution;*

…

…

(2) This section does not apply to a record that:

…

(b) is an official record that contains a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function;

[30] The Commission applied section 17(1)(b) of the Act to 71 documents. To determine if the exemption applies to any of these records or parts thereof, firstly, I need to revisit the criteria for determining what constitutes "consultations" or "deliberations" under this provision.

[31] In our Report F-2004-001, I determined that,

> *[12] A "consultation" occurs when the views of one or more officers or employees of a government institution are sought as to the appropriateness of a particular proposal or suggested action. (Alberta Order F2003-016 [20]) A "deliberation" is a discussion of the reasons for and against an action by the persons described in this section. (Alberta Order 2001-010 [32]) …*
>
> *[13] In order to justify withholding a record on a basis of section 17(1)(b)(i), the opinions solicited during a "consultation" or "deliberation" must:*
> *a) either be sought or expected, or be part of the responsibility of the person from whom they are sought;*
> *b) be sought for the purpose of doing something, such as taking an action or making a decision; and*
> *c) involve someone who can take or implement the action. (Alberta Orders 96-006 [p.10], 99-013[48])*

[32] On its application of section 17(1)(b) of the Act, the Commission provided the following representation:

> ***Section 17(1)(b) – consultations and deliberations involving officers or employees of a government institution***
>
> *In Report 2004-001 you establish that in order to rely on section 17(1)(b), I must be able to establish that the opinions contained in the exempted record must:*
>
> *a. either be sought or expected, or be part of the responsibility of the person from whom they are sought;*
>
> *b. be sought for the purpose of doing something, such as taking action or making a decision; and*
>
> *c. involve someone who can take or implement the action. (¶ 13)*

The communications in this case involve the following individuals:

1. *…Deputy Minister of Justice*
2. *… acting as Chief Commissioner,*
3. *… the Commission's senior staff lawyer,*
4. *… supervisor of mediation and investigation*
5. *… a Commission investigator who was assigned the task of investigating the applicants' complaint*
6. *… the intake officer in the Regina office, and*
7. *…the receptionist in the Regina office.*

There are also notes to the file which record general observations and opinions. While these may not be directed at specific individuals, they are nonetheless for the purpose of informing decision-makers of the observations and opinions for the purpose of future decision making. Finally, there are Case Reports. These are created for the purpose of presentation at case conferences, which are attended by the investigating officer, one or more of the Commission's lawyers, the Supervisor of Mediation and Investigation and myself. The case report is required on every investigation and is presented at case conference for the purpose of assisting me in making decisions concerning complaints.

You will note from the records provided to you that the applicants were not happy with the services they received from the Commission. As was their right, they complained to [Supervisor of Mediation and Investigation] *concerning the investigator, to me concerning our staff generally and to the Minister of Justice. They expressed their opinions vigorously to our staff in our Regina office, and in the minds of the staff, created the potential for harm and breaches of security.*

The record covered by this exemption fall into one of the following categories:

a. *Summaries, advice and opinions recorded in the course of employment to assist either me in deciding on the merits and course of action concerning the applicants' complaint, or to assist those advising me for the same purpose,*
b. *Reporting the Commission's activity with respect to the applicants' complaints for the purpose of allowing those who had been complained to, to assess the situation and respond appropriately, or*
c. *To report conduct of the applicants for the purpose of determining whether there was a potential risk of harm or security concern.*

While the information in the records were not always solicited, it was within the job duties of those making these records to record their opinion and observations for possible future action. Thus I believe the records so indicated in the Index of Records do qualify under this section.

[33] For insight into the applicability of section 17(1)(b) of the Saskatchewan Act, Alberta IPC Order F2004-026 is useful as it considers a similar provision in its FOIP legislation.

In this Order, the Commissioner elaborated on the scope of the exception in section 24(1) of its legislation[2] as follows:

> *[para 76] …Where a person consults or is consulted on a given subject as a function of their office, and the application of section 24 is claimed on the basis that they are* ***officers or employees of a public body, the very fact they participated in the consultation cannot, in my view, be withheld under section 24 unless this fact also reveals the substance of the consultation****. …*
>
> *…*
>
> *[para 78] In defining the scope of the exceptions in sections 24(1)(a) and 24(1)(b), I have in mind that these exceptions are broader than those in parallel provisions in some other jurisdictions. The legislation in Ontario and British Columbia, for example, excepts only "advice and recommendations". In Alberta, "advice, proposals, recommendations, analyses or policy options" are all excepted, as well as "consultations or deliberations".* ***Thus, in my view, the exceptions in section 24(1)(b) embrace the substantive parts of communications that seek an opinion as to the appropriateness of particular proposals respecting a course of action to be decided, including any background materials that inform the advisors about the matters relative to which advice is being sought, and are thus inextricably interwoven with the questions being asked ("consultations").*** *…* ***In my view, "deliberations" also includes comments that indicate or reveal reliance on the knowledge or opinions of particular persons, including those of the person making the communication****.** [The footnote here is also of relevance. It reads as follows: "**Withholding of such information is permitted under the legislation, even though no specific content about the topic in issue (in this case, the Bill) is revealed, because such information falls within the policy rationale that* ***persons must be able to freely express the reasons why they are choosing a particular course – in this situation, that they are or are not relying on their own expertise or opinions or those of someone else****. Statements of this kind have a substantive element, and could conceivably be inhibited if they were subject to disclosure."*]
>
> *…*
>
> *[para 81]* ***I am also strengthened in my view that the names of authors or correspondents, dates, and subject lines are not excepted from disclosure under section 24 of the Act by a number of court decisions and decisions of Offices of the Information and Privacy Commissioners in other jurisdictions.***
>
> *…*
>
> *[para 87] …However, these wider* ***exceptions do not encompass non-substantive material which merely indicates that someone gave advice or had a discussion, without revealing some substantive element of the advice or substance of the discussion****.*
>
> [Emphasis added]

[2] *24(1) The head of the public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal…(b) consultations or deliberations involving (i) officers or employees of a public body…*"

[34] Even as I have not yet determined which of the 71 pages are releasable, I find that heading information such as subject lines and "to" and "from" lines of internal email communications of Commission employees or similar details contained on fax cover sheets are releasable (i.e. pages 9, 10, 11, 21, 43-46, & 61) for the reasons cited above at paragraph [81].

[35] I also am of the same opinion as cited in the above Order at paragraph [78] that the exemption [section 17(1)(b) of the Act] will not only capture the substantive parts of communications speaking to the appropriateness of particular proposals but also capture portions that may reveal the individual's reliance on other facts or the opinions of others in formulation of those opinions. An example of such material is contained in Case Reports withheld by the Commission.

[36] I agree with the Commission's assertion that much of what is accumulated by Commission employees during an investigation will be, at some point, relied upon by the Chief Commissioner to make a decision with respect to that matter. Accordingly, I find that section 17(1)(b) of the Act applies to some of the records to which the Commission has applied the exemption, but not all. For the most part, however, the exemption will not apply to the records described earlier under "b" of the Commission's submission[3]. The exemption, for example, does not capture records such as internal Note Reports (i.e. pages 111-114) as these are a record of interactions between parties and documents actions taken by Commission staff. Also, the exemption will not apply to records containing instructions to staff on how to proceed with the investigation.

[37] I find that the section does not apply to the following: pages 13-18, 21, 73-77, 81, 82, 94, 110-114, 117, 166-167, 168-176, 220, 286, 287, 321, 322, 375, 433, 441, 450, 458, 473, 474, 477 & 481. I find, however, that section 17(1)(b) of the Act does apply to the following records: 9, 10, 11, 23, 24, 43, 44, 45-46, 61, portions of the Case Report 65-72, 285, 478-479, and 480.

[38] Before concluding this section, I note that quite a significant number of records (pages 13-18, 166-167, 168-176, 196, 275, 276, 353, 354, 355, 356-372, 452-454, 463, 464-465, 482-483, and 484-485) were withheld by the Commission under this section or 15(1)(c) that: (a) the Applicants authored; (b) the Commission sent to the Applicants; or (c) consist of discussion threads between Commission staff and the Applicants. I find that these do not qualify for protection under either of these exemptions.

Did the Commission properly apply section 29 of the Act to the records withheld?

[39] Personal information for purposes of the Act is defined as follows:

> ***24****(1) Subject to subsections (1.1) and (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;*

[3] See paragraph [32] of this Report.

(b) information that relates to the education…or employment history of the individual or information relating to financial transactions in which the individual has been involved;

…

(e) the home or business address, home or business telephone number…

(f) the personal opinions or views of the individual except where they are about another individual;

…

(h) the views or opinions of another individual with respect to the individual;

…

(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.

…

(2) ***"Personal information"*** *does not include information that discloses:*

(a) the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer or employee of a government institution or a member of the staff of a member of the Executive Council;

…

(c) the personal opinions or views of an individual employed by a government institution given in the course of employment, other than personal opinions or views with respect to another individual;…

[40] At issue is section 29(1) of the Act that reads 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.*

[41] If section 29 of the Act is to apply, then withheld information must meet the definition of personal information under section 24(1) of the Act and belong to data subjects other than the Applicants. It is necessary then to decide whether each record contains personal information, and if so, to whom that personal information pertains.

[42] Some documents contain names and job titles of government employees, but also information that appears to constitute the views or opinions of those same individuals.

[43] The Alberta Annotated FOIP Act, page 5-1-10, characterizes an "opinion" as follows:

> *An "opinion" is a belief or assessment based on grounds short of proof; a view held as probable. An "opinion" is subjective in nature, and may or may not be based on fact. An example of an "opinion" would be a belief that a person would be a suitable employee, whether or not the opinion is based on the person's employment history (Order 97-020 [129]). Under section 1(n)(viii) anyone else's opinions about an individual will be that individual's personal information (Order 97-002 [41-45]). However, in order for information to be an opinion about an individual it must be connected with that individual (Order 98-001 [42]).*

[44] The phrasing "views or opinions" appears in different parts of section 24 of the Act [24(1)(f), 24(1)(h) & 24(2)(c)]. Clauses 24(1)(f) "*the personal opinions or views of the individual except where they are about another individual*", (h) "*the views or opinions of another individual with respect to the individual*" and 24(2)(c) "*the personal opinions or views of an individual employed by a government institution given in the course of employment, other than personal opinions or views with respect to another individual*" differ in meaning as follows:

> a. Whether or not you work for a public body, if you have an opinion or view about another person, that view or opinion material is the personal information of the data subject, not the author; and
>
> b. If you are not an employee of a public body, your personal opinion or view (not involving another individual) is your own personal information. However, as per subsection 24(2)(c), if offered by a government employee in the course of employment, these will not be considered the employee's personal information. This is due to the fact that the individual is only offering his/her opinion or view as part of his/her employment responsibilities, not in a personal capacity.

[45] In our Report F-2006-001 at paragraph [95], I clarified that names, job titles, and views or opinions of government employees "*would not typically be treated as personal information by reason of section 24(2) of the Act*". I elaborated further on this point at paragraph [113] as reproduced below:

> *In determining which information should be severed as "personal information", we have considered the following:*
>
> > *(1) Personal information subject to the Act does not include information that can be described as "work product". This concept is discussed at some length in our Report on The Health Information Protection Act Draft Regulations, page 16. By "work product" we mean information prepared or collected by an individual or group of individuals as a part of the individual's or group's responsibilities or activities related to the individual's or group's employment or business.*
> >
> > *The information in the record that shows the opinion or comments of a fire fighter who completes a report about a particular file intended to be furnished to the OFC would be "work product" information and therefore not "personal information" of the public sector employee.*

[46] Some of records contain employee names of those working for non-government bodies. This information does qualify for protection as it constitutes the personal information of third parties under section 24(1) of the Act.

[47] The Commission did not highlight specific portions thereof or individual line items on each record to indicate what it constituted personal information under the Act. Instead it applied section 29 to: (a) full records containing information provided by witnesses gathered as part of its investigation (statements, contact sheets); and (b) resumes and employment related assessments of third parties [e.g. 142, 148, 149, 150,151, 152, 153, 157, 159, 161, 183-185, 186-188, 189-190, 191-193, 194-195, 216, 217, 218, 219, and 221-242].

[48] The Commission did, however, provide the following general explanation as to which records should be subject to section 29 of the Act:

> ***Section 29 – exemption for personal information***
>
> *The records referred to here fall into two categories:*
>
> 1. *contact information for witnesses,*
> 2. *personal records for individuals not involved in the applicants complaint.*
>
> *The categories of records could have been released to the applicants "for the purpose for which the records were obtained." Had the applicants requested a review of my decision to dismiss their complaint, they would have been entitled to review the evidence upon which my decision was made. The first category of evidence referred to above would have given the applicants the information necessary to contact and interview witnesses for themselves. The second category is comprised of the respondent's records of other individuals seeking employment opportunities through it. These records would have allowed the applicants to compare their treatment with the treatment of others. But it is now too late for the applicants to seek a review of my decision. The Tribunal had determined in other cases that it does not have the jurisdiction to extend the period of time in which a complainant can seek a review of the dismissal of their complaint. Outside the context of this one purpose of seeking a review, these records are highly personal. It would be an invasion of the right of privacy of the individuals involved to release personal information about them for no legitimate purpose.*

[49] Even without names or contact information (severed at some point by the Commission or someone else), I note that many of these records contain enough personally identifying information of third parties (i.e. employment history, education, interests and hobbies) for section 29(1) to apply to each page in its entirety. The Commission has appropriately withheld all third party employment assessments, candidate information, and resumes. I find that the Commission has rightfully withheld pages 148 – 153, 183-195, 216-219, 231-242, and portions of 374 under this section.

[50] The Applicants have not expressed an interest in accessing third party personal information. They are, however, seeking access to their own personal information believed to be contained in records withheld under other exemptions.

[51] On granting access to one's own personal information the Act provides the following:

> ***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.*
>
> *(2) A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment….*

[52] Section 31 of the Act clearly contemplates the possibility that a government institution may withhold an individual's own personal information if an exemption in Part III of the Act requires or enables it to.

[53] In our review of the record, we note that the Commission withheld copies of the Applicants' resumes (pages 325-327 and 333-335). The Commission should release these documents as these constitute the Applicants' personal information and as no other exemption(s) clearly apply.

[54] We note that many of the documents contain individually identifying information of different witnesses interviewed by the Commission. These records include witness contact sheets (pages 142, 157, 159, and 161), Commission authored instructional letters (pages 118, 123, 126, 129, 132, 138) addressed to individual witnesses, and witness statements (119-120, 121-122, 124-125, 127-128, 130-131, 133-134, 135-137, 139-141, 143-146 & 147). Only witness statements contain the opinions or views of others about the Applicants. This opinion material is releasable to the Applicants. The Commission must, however, sever the names, addresses and other individually identifying information of third parties before doing so.

[55] Earlier on in our analysis of the applicability of section 17(1)(b) of the Act, the Applicants raised the following concern:

> *When internal 'consultations and deliberations' are interspersed with and interrelated to – personal information – can the responsive personal information be severed from a record citing s. 17(1)(b)(i) of the Act?*

[56] The Applicants assert that since they were the subject of internal consultations/deliberations that the Commission should be able to extract what constitutes their personal information from these records and release to them even if the section otherwise applies. In order to determine if this is reasonable or feasible, I must first determine what, if any, information contained in these records constitutes the personal information of the Applicants.

[57] I determined at paragraph [37] that section 17(1)(b) of the Act applies but only to certain records. Some of these records contain employee views and opinions about the Applicants in the context of the human rights investigation (i.e. Case Reports). Others contain employees' opinions on whether the Applicants pose a safety risk (i.e. pages 43-

46, 61). Some of these documents also contain other data elements that constitute third party personal information.

[58] Ontario IPC Order MO-1487 does not deal specifically with opinion material about an identifiable individual, but is useful nonetheless as it demonstrates that if relied on for decision making during the deliberative process there are circumstances when the personal information of an identifiable individual can be withheld from the data subject to whom it pertains. The relevant portions of that Order are as follows:

> *The Municipality submits that the record was presented to Council on August 19, 1999 and "was received during the closed (in-camera session)." It indicates that:*
>
> > *Closed sessions are authorized by section 55(5)(b) of the Municipal Act where the matter being considered* ***is a personal matter concerning an identifiable individual****. In this case, the record pertained to financial matters specifically associated with the individuals.*
> >
> > *The record contains the contents of these confidential matters as presented to the Council for its deliberations. These are the facts upon which the Council* ***actually deliberated. Disclosure of the document would reveal the actual substance of the discussions conducted by the Council****.*
>
> *The appellant concedes that Part 1 and 2 of the test set out above have been satisfied by the Municipality. She takes issue, however, with the Municipality's assertion that the disclosure of the record would reveal the substance of Council's deliberations. She submits that:*
>
> > *…the representations of the Municipality state that the Tax Clerk's Report is a chronological account of financial transactions and exchanges concerning my property taxes, and that "these are the facts on which the Council actually deliberated." If that is so, I would respectfully ask the Municipality why my husband and I attended the meeting at all. I submit that we requested and attended the meeting in order to inform Council of our situation of financial hardship and disability and request relief, and that the actual substance of the Council's deliberations was whether or not any relief was possible given our circumstances. Information regarding our current financial and medical problems was provided in person by myself and my husband, as well as in my written presentation, while the Tax Clerk's Report dealt with "the actions of staff to deal with problems presented by the individuals". I therefore conclude that the disclosure of the Report would not reveal the actual substance of Council's deliberations regarding our request for relief. In addition, while the Tax Clerk's Report provided the Council with background information regarding payment of my taxes, and staff action to collect taxes, this information would not be revealed by disclosure of the Report, as it was previously known to me and referred to in my presentation.*
>
> *In my view, based on my reading of the record, it contains information whose disclosure would reveal precisely the substance of Council's deliberations.* ***The record addresses the circumstances surrounding the appellant's tax arrears and the steps taken by the appellant and her husband to bring them up to date.*** *The record also addresses specifically and in detail the appellant's request for relief and the position taken by the Municipality in response. This is the substance of*

> *what Council was being asked to decide upon, how the Municipality ought to respond to the appellant's request for relief.* ***In my view, the disclosure of the record would reveal the substance of Council's deliberations and the record qualifies for exemption under section 6(1)(b)****.*
>
> [Emphasis added]

[59] Another Order[4] from Ontario explains that if section 38(a) of the *Municipal Freedom of Information and Protection of Privacy Act*[5] applies, that the Town, in that case, had the "*discretion to refuse to disclose to the appellant his own personal information.…"*

[60] The above two cases demonstrate that in certain limited circumstances when personal details about an individual are central to the decision being contemplated, this personal information may be withheld from the data subject to whom it pertains. Therefore, I find that when section 17(1)(b) of the Act applies to records, even if the information contained within the record constitutes the Applicants' personal information, that personal information may be withheld under section 17(1)(b) of the Act. I find this is the case, for example, pages 65-72 of the Case Report.

Was the Commission's extension of the response deadline in accordance with the criteria set out in section 12(1)(b) of the Act?

[61] The Commission informed the Applicants on January 16, 2004 of its decision to extend the response deadline by "*another 30 days to February 20, 2004 in accordance with subsection 12(1) of The Freedom of Information and Protection of Privacy Act."* The remaining relevant parts of the letter are as follows:

> *The reason for this extension is that consultations necessary to comply with your application cannot reasonably be completed within the original period, which falls under subsection 12(1)(b) of the Act.*
>
> *If you wish to request a review of this delay, you may do so within one year of this notice….*

[62] During our review, the Commission offered additional reasons as to why the time extension was necessary as offered below:

> *…The Applicants' request dated December 16, 2003 was received in my office December 22, 2003. At that time I was out of the office for Christmas break. I returned to my office January 6, 2004, which was my first opportunity to review the Applicants' letter. As you know, the file contained extensive documentation – I believe our record consisted of 485 pages. It took considerable time to review the file and prepare our response. We were unable to do so within the time allotted under the Act and therefore notified the Applicants that we would be extending the time within which to reply as provided for under the Act.*

[63] In our Report F-2006-003, I offered the following with respect to providing notice of an extension including what specific activities qualify as "consultations" under that section:

> *[9] The applicable provisions of the Act are as follows:*

[4] Ontario Order M-64, page 4

[5] "*a head may refuse to disclose to the individual to whom the information relates personal information if section 6…would apply to the disclosure of that personal information*"

> *12(1) The head of a government institution may extend the period set out in section 7 or 11 for a reasonable period not exceeding 30 days:*
>
> *…*
>
> *(2) A head who extends a period pursuant to subsection (1) shall give notice of the extension to the applicant within the 30 days after the application is made.*
>
> *(3) Within the period of extension, the head shall give notice to the applicant in accordance with section 7.*

…

> *[44] The provision in the Saskatchewan Act does not explicitly exclude internal "consultation" types of activities. However, my view is that internal consultations are part of every government institution's routine responsibilities when responding to an access to information application. For that reason, for purposes of section 12(1)(b) of the Act, activities that constitute "consultations" should be those outside of intrinsic and routine obligations of any government institution.*

…

> *[54] Section 12(1)(b) of the Act states that the head may only extend the response deadline for a "reasonable period" where consultations are necessary to comply with the application and cannot reasonably be completed within the original period.*

…

> *[62] Justice did not provide sufficient evidence of the nature and complexity of external consultations for me to find that these activities warranted a further extension of the 30 day response time line.*

[64] I find that the above circumstances are also the case in this present review. The Commission did not provide any evidence of the nature and complexity of its consultations so I am unable to find that the extension was warranted for this reason in this case.

[65] As evident in its later submission, the Commission's reasons for extending the deadline is actually attributable to a lack of adequate resourcing as key employees were away on vacation, but also as the Commission regarded the request as too voluminous to process within the original 30 day deadline. In our Report F-2006-003, I offered the following on determining if a request is voluminous:

> *[41] Of assistance in quantifying what constitutes "a large number of records" is the following excerpt from the text Federal Access to Information and Privacy Legislation Annotated 2005*:
>
> > *2.* ***Large Number of Records****. There is no magic number of records that qualify as a "large number". Historically, however, the Information Commissioner has rarely accepted 500 or fewer records as being a large number. On the other hand, it has not been unusual for the Commissioner*

> *to accept 1,000 or more records as being a large number. No matter what the number of records may be, if an institution wishes to make a case for an extension based on a large number of records, it should take into account the following factors:*
>
> *a. are the records easily reviewed, despite the number of pages, due to their homogeneity [example: a large computer printout where review of one or two pages results in a uniform approach to be applied to all pages];*
>
> *b. have the records been reviewed in response to a previous request;*
>
> *c. does the number of records exceed the average number of records requested per request in the institution;*
>
> *d. does the number of records exceed the number which, historically, the institution has been able to process in 30 days; or*
>
> e. *would processing the request in 30 days unreasonably interfere with the operations of the institution?*

[66] In consideration of the above and in review of the record, I do not find that the record is so voluminous as to warrant a time extension.

[67] On the Commission's argument that the time extension was warranted due to staff unavailability, I considered advice from Ontario's *Freedom of Information Guidelines*[6]. Of relevance is the following:

> *A qualified, trained FOI Coordinator is essential to the proper and timely conduct of an institution's FOI business and acts as its liaison with requesters, appellants and the IPC. Consequently, institutions should identify the FOI Coordinators as a critical position for succession planning purposes and ensure that a qualified individual is available at all times to discharge the Coordinator's responsibilities.*[7]

[68] Also on this point, I considered portions of an Alberta Government publication[8] which clarifies that "*[t]he Act* [Alberta's FOIP] *does not provide for extensions for other administrative reasons, such as…working conditions arising from sickness, staff absence or vacation, or staff workloads.*"[9] I am of the same view.

[69] I find that extending the response deadline in the circumstance was not appropriate.

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[6] Ontario Government publication available online at http://www.accessandprivacy.gov.on.ca/english/pub/foiguideline.pdf

[7] Ibid, page 10

[8] *Freedom of Information and Protection of Privacy Guidelines and Practices, 2005*. Available online: http://foip.gov.ab.ca/resources/guidelinespractices/chapter3.cfm#3.3.

[9] Ibid, Chapter 3: Access to Records, page 14

Did the Commission meet the requirements of section 7 of the Act when it responded to the Applicants request?

[70] The applicable provision of the Act is as follows:

> ***7****(1) Where an application is made pursuant to this Act for access to a record, the head of the government institution to which the application is made shall:*
>
> > *(a) consider the application and give written notice to the applicant of the head's decision with respect to the application in accordance with subsection (2); or*
> >
> > …
>
> *(2) The head shall give written notice to the applicant within 30 days after the application is made:*
>
> > …
> >
> > *(d) stating that access is refused, setting out the reason for the refusal and identifying the specific provision of this Act on which the refusal is based;*

[71] During the review, we gave the Commission an opportunity to respond to the following:

> *Did the Commission discharge its duty under section 7 of the Act in response to the request for access…?*

[72] In response, the Commission offered the following:

> *I assume that the questions under section 7 are answered in the affirmative if you agree that I have properly relied on the exemptions stated above. If you are referring to some other duty in raising section 7, please advise.*

[73] In order to provide an adequate response as per section 7 of the Act, the Commission's response letter to the Applicants, as stated in our Report F-2006-003 at paragraph [22], should have contained the following elements:

> S*ection 7 of the Act requires that denying an applicant's access application whether in full or in part, the written notice must meet three requirements:*
>
> > *(a) It must state that access is refused to all or part of the record;*
> >
> > *(b) It must set out the reason for refusal; and*
> >
> > *(c) It must identify the specific provision of the Act on which the refusal is based.*

[74] In the same Report at paragraph [27] I provided examples of what would constitute a detailed explanation of the reasons for the refusal. In its response to the Applicant the Commission did not set out reasons for the refusal, instead only paraphrased the wording of the two exemptions invoked at the time, sections 15(1)(c) and 17(1)(b) of the Act.

[75] Even though the Commission provided its response within the 30 day extension, I find that the Commission did not discharge its duty under section 7 of the Act for the reasons noted in the above paragraphs.

V RECOMMENDATIONS

[76] I recommend release of the following records in full: 13-18, 21, 81-82, 114, 115, 156, 166-167, 168-176, 196, 197, 226-230, 275, 276, 277-284, 321, 324-327, 328-332, 333-335, 336-340, 341, 350-351, 353, 354, 357, 359, 360-361, 362-367, 371, 372, 404, 428, 441-443, 450, 452-454, 458, 463, 464-465, 474, 482-483, and 484-485

[77] I recommend release of the following records in part severed in accordance with the instructions I have provided to the Commission: 9, 10, 11, 23, 43, 44, 45, 46, 61, 62-64, 73-77, 78, 79, 80, 94, 97-98, 99, 110-113, 116-125, 126, 127-128, 129, 130-131, 132, 133-141, 143-147, 154, 155, 158, 160, 162-164, 165, 177, 178-180, 181-182, 220, 221-225, 250, 274, 285, 286-287, 289-291, 292, 320, 322, 323, 342, 346, 348, 349, 352, 355, 356, 358, 368-370, 373, 374, 375, 407, 432, 433, 434, 435-440, 446, 462, 473, 477, 478-479, 480, and 481.

[78] I recommend that the Commission continue to deny access to the following records: 24, 65-72, 142, 148-153, 157, 159, 161, 183-195, 216-219, and 231-242.

Dated at Regina, in the Province of Saskatchewan, this 29th day of November, 2006.

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