SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT F-2012-004

Executive Council

Summary: Subsequent to the November 2007 provincial general election, the Applicant sought copies of briefing books provided to Ministers of 19 different government institutions. All access requests were transferred to Executive Council for processing. Executive Council denied access to all records relying on section 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* (FOIP). After a preliminary analysis from the OIPC was received suggesting this exemption would not be upheld, Executive Council invoked a new exemption, section 16(1)(d) four years after the review commenced. After advising Executive Council that the burden of proof had not been met for section 16(1)(d) and our intention was to issue a formal report, Executive Council then invoked yet a third exemption, section 16(1). The Commissioner found that the responsive record included considerable statistical and background information to orient new Ministers that would not disclose the nature of Cabinet discussions nor would it disclose advice given or received by Cabinet ministers. The Commissioner determined that Executive Council failed to meet the burden of proof to justify any of the three exemptions invoked for all of the material but acknowledged it appeared there was material that would be caught by section 16(1). He recommended that the briefing books be disclosed to the Applicant after severing personal information and that information that properly qualified as 'Cabinet confidence' material.

Statutes Cited: *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, ss. 8, 11, 16(1), 16(1)(d)(i), 16(2), 17(1)(a), 17(2), 24, 29, 49, 61; *The Local Authority Freedom of Information and Protection of Privacy Act,* S.S. 1990-91, c. L-27.1 s. 16(1)(a); Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, s. 6;

Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 1994, c. F-18, s. 21; Canada's *Access to Information Act*, R.S.C., 1985, c. A-1, s. 69.(1); Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 12(1)(e); Nova Scotia's *Freedom of Information and Protection of Privacy Act*. 1993 c.5, ss. 13(1), 13(2).

Authorities Cited: Saskatchewan OIPC Reports F-2010-001, F-2004-004, LA-2011-004, LA-2011-001, LA-2010-001, LA-2009-002, LA-2007-001, 2000/035, 99/003; Alberta IPC Order 97-010; Ontario IPC Orders P-1570, P-946; *O'Connor v. Nova Scotia (Priorities and Planning Secretariat)*, 2001 NSCA132; *Weidlich v. Saskatchewan Power Corp.*, (1998) 164 Sask. R. 204.

Other Sources Cited: *Public Government for Private People: The Report of the Ontario Royal Commission on Freedom of Information and Individual Privacy/1980*; *Report of the Honourable E. M. Culliton, Former Chief Justice of Saskatchewan on the Matter of Freedom of Information and Protection of Privacy in the Province of Saskatchewan*; Office of the Information Commissioner of Canada, *The Investigators Guide to Interpreting the ATIA*; Service Alberta, *FOIP Guidelines and Practices*.

I BACKGROUND

[1] The Applicant made an access to information request to the Ministry of Justice and Attorney General (Justice) for the following records: "All briefing materials, including briefing book and/or books that are provided to the incoming minister by the department officials". Justice received the access to information request on November 30, 2007.

[2] The Applicant received a response from Justice dated November 30, 2007, acknowledging receipt of his access request by Justice, assigning it a file number JU23/07G and indicating that a response would be forthcoming within 30 days. The Applicant then received a letter from Justice dated December 14, 2007 acknowledging the receipt of his access request by Justice and advising him that, by the authority of section 11 of *The Freedom of Information and Protection of Privacy Act* (FOIP)[1], the request had been transferred to the Office of the Executive Council as: "that office has a greater interest in the records relating to your request".

[1] *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01.

[3] The Applicant received a letter from the Deputy Minister to the Premier and Cabinet Secretary dated January 14, 2008. The Applicant had made similar requests to other Ministries which were all transferred to Executive Council as follows:

Ministry/ Corporation	Request Number	Date Transfer Received
Advanced Education, Employment and Labour	AEE04/07G	Dec. 18/07
Agricultural Credit Corporation of Saskatchewan	AG013/07/G	Dec. 18/07
Agriculture	AG012/07/G	Dec. 18/07
Corrections, Public Safety and Policing	CPS27/07G	Dec. 18/07
Crown Investments Corporation of Saskatchewan	CIC 02/07G	Dec. 17/07
Education	L02/07/G	Dec. 18/07
Energy and Resources	ER01/07G	Dec. 14/07
Enterprise and Innovation	E12/07/G	Dec. 20/07
Finance	FIN 19/07G	Dec. 14/07
First Nation and Métis Relations	FNMR06-2007G	Dec. 20/07
Northern Affairs	FOI07/08-001	Dec. 31/07
Intergovernmental Affairs	IA01-07G	Dec. 14/07
Government Services	SPM04/07G	Dec. 18/07
Health	1810.50-HE17/07	Dec. 17/07
Highways and Infrastructure	HI 117/07G	Dec. 14/07
Information and Technology Office	ITO 07/08-1G	Dec. 14/07
Justice	JU23/07G	Dec. 17/07
Liquor and Gaming Authority	07-400LAG	Dec. 19/07
Saskatchewan Gaming Corporation	01/07	Dec. 17/07
SaskEnergy	SEI-07-2007G	Dec. 18/07
SaskPower	SPC26/07G	Dec. 18/07
SaskTel	ST07/01G	Dec. 18/07
SGI	SGI-07-G-53	Dec. 18/07
Social Services	CR53/07-08G	Dec. 14/07
Tourism, Parks, Culture and Sport	CYR 08/07-G	Dec. 14/07

[4] In its response to the Applicant's access requests, Executive Council stated in a letter dated January 14, 2008 that the access to information requests had been transferred to the Office of the Deputy Minister to the Premier and Cabinet Secretary pursuant to section 12 of FOIP. He also stated that:

> Access to the records you have requested is denied pursuant to 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* (the Act) because the records were prepared and provided to the new government and its Ministers to advise them on current issues so they can determine any action they may want to take on them.

[5] As a result of this denial of access to records, the Applicant formally requested a Review by this office in accordance with section 49 of FOIP on January 28, 2008.

[6] By letter dated March 5, 2008, my office provided notification to Executive Council of the Review and asked that it provide my office with a copy of the Record and a submission regarding the applicability of section 17(1)(a) of FOIP. As we had not received the requested material, my office sent reminder letters dated June 16, 2008 and August 26, 2008.

[7] As the responsive record is very large - an estimated 10,000 pages, my office confirmed with Executive Council on September 30, 2008 that for the purposes of this Review, we would require only a representative sample of the records.

[8] My office proceeded to send reminder messages dated December 30, 2008, March 31, 2009 and May 22, 2009 as we had yet to receive the requested material from Executive Council. I sent a letter requesting the material on June 17, 2009. On July 6, 2009, 16 months after our first request, I received a representative sample of the Record and a submission regarding section 17(1)(a) of FOIP dated July 2, 2009.

[9] With the permission of Executive Council, my office shared its submission and Index of Records with the Applicant. We received a submission dated November 27, 2009 from the Applicant on November 30, 2009.

[10] On June 9, 2010, my office completed a preliminary analysis and shared it with Executive Council asking for a response. The analysis indicated that the burden of proof[2] had not been met and that Executive Council must perform a line by line review of the record and apply severing as necessary. Over the next 15 months, my office reminded Executive Council that I was awaiting a response by e-mail, letter and phone call on the following dates: December 1, 2010, February 24, 2011, March 1, 2011, May 6, 2011, May 26, 2011, May 30, 2011 and October 24, 2011.

[2]Section 61 of FOIP states: "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."

[11] On November 17, 2011, I received from Executive Council a letter stating that it disagreed with the preliminary analysis of section 17(1)(a) of FOIP. Further, four years after the Applicant's original request, it raised a new mandatory exemption: section 16(1)(d)(i) of FOIP.

[12] My office provided further analysis of section 16(1)(d)(i) of FOIP to Executive Council on March 9, 2012. We advised that the burden of proof had not been met to justify section 16(1)(d)(i) either. We reminded Executive Council of the need to sever personal information. We signalled Executive Council that it was our intention to proceed to a formal report.

[13] Executive Council then provided a further response to our office by letter dated April 5, 2012. At this time, Executive Council raised section 16(1) as a stand-alone mandatory exemption in addition to sections 17(1)(a) and 16(1)(d)(i).

II RECORDS AT ISSUE

[14] We were advised by Executive Council that the responsive record contained 23 briefing books which had been provided to the incoming Cabinet members after the 2007 provincial election. They included the following government institutions:

- Advanced Education, Employment and Labour
- Agriculture (includes Agriculture Credit Corporation)
- Corrections, Public Safety and Policing
- Crown Investments Corporation
- Education
- Energy and Resources
- Enterprise and Innovation
- Finance
- First Nations & Métis Relations (includes Northern Affairs)
- Government Services
- Health
- Highways and Infrastructure
- Information Technology Office
- Intergovernmental Affairs

- Justice and Attorney General
- Liquor and Gaming Authority
- Saskatchewan Gaming Corporation
- Saskatchewan Government Insurance
- SaskEnergy
- SaskPower
- SaskTel
- Social Services
- Tourism, Parks, Culture and Sport

[15] As noted above, it is estimated that the responsive Record is comprised of approximately 10,000 pages.

[16] For the purposes of this Review, I have chosen the following 3 briefing books as a representative sample for my analysis:

- Saskatchewan Justice – Government of Saskatchewan Transition Binder, October 2007;
- Saskatchewan Health – Minister of Health Briefing Book; and
- SaskPower – Briefing Book, October 25, 2007.

[17] Each briefing book that I reviewed was different with regard to its content and structure. They included material such as biographies of senior officials, organizational charts, lists and descriptions of stakeholders, financial overviews, business plans, immediate and long term issues and recaps of the election platform as it relates to each organization.

III ISSUES

1. Did Executive Council properly apply section 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* to the Record?

2. What general approach should be taken in dealing with a record subject to a claim of Cabinet confidence?

3. Did Executive Council properly apply section 16(1)(d)(i) of *The Freedom of Information and Protection of Privacy Act* to the Record?

4. Does the Record contain personal information pursuant to section 24 of *The Freedom of Information and Protection of Privacy Act*?

IV DISCUSSION OF THE ISSUES

1. Did Executive Council properly apply section 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* to the Record?

[18] Section 17(1)(a) of FOIP is a discretionary exemption and states the following:

> 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...[3]

[19] Executive Council applied section 17(1)(a) of FOIP to the entire record.

[20] In order for section 17(1)(a) of FOIP to apply, Executive Council must demonstrate the following:

a) the withheld portions of the Record qualify as advice, proposals, recommendations, analyses or policy options;
b) the Record was developed by or for a government institution or a member of the Executive Council; and
c) Executive Council exercised its discretion when applying this exemption.

[21] I accept that the responsive material was developed for members of the Executive Council. I then must determine if the Record, which is all the briefing books in their entirety, constitutes advice, proposals, recommendations, analyses or policy options.

[3] *Supra* note 1, s. 17(1)(a).

[22] The Ministry's position is outlined in its submission of July 2, 2009 as follows:

> In essence we believe that when a new Executive Council is first installed following a general election as defined in *The Elections Act*, the transition briefings from officials should be considered "Advice from Officials" pursuant to section 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* and should be exempted from access in their entirety. This is critical to ensure that the public service is able to give a new government the benefit of full, open and frank briefings on a wide range of policy issues.
>
> We believe that section 17(1)(a) applies to these transition briefing materials in their entirety for the following reasons.
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> - What constitutes "advice" may change based on the circumstances and purposes for which it is given. The briefing materials in question are different from "normal" briefing notes prepared at other times in the normal course of the business of government. **These briefing materials exist for the sole purpose of identifying and providing counsel and opinion to the incoming administration and its ministers about matters and specific issues they needed to consider for possible action, and in these circumstances are consistent with what constitutes "advice" as referenced in the court decisions discussed below in the detailed legal analysis.**
>
> - These briefing materials were the first significant opportunity for officials in ministries and crowns to provide the incoming administration and its ministers with this type of advice and, more importantly, the briefing materials were often the first time the incoming administration and its ministers were made aware of the range of issues they were required to consider as part of their responsibilities. These materials were not simply providing background information or updates on issues for which decisions had already been made; these materials were for the first time providing a comprehensive review of the range of matters and issues which the incoming administration and its ministers would need to address, including matters on which the new administration and its ministers may want to consider action or make changes even if it differs from the policies of the previous administration. In addition, these were not simply provided to brief one new minister on his or her new portfolio; these briefing materials were requested by Executive Council to advise the entire incoming administration of the range of issues that required their attention and decisions. The importance of comprehensive and candid advice and identification of issues being provided to a new administration and its ministers on a change in the administration, even if that advice may run contrary to policies or decisions adopted by the previous administration, cannot be overemphasized.
>
> - 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* provides the head with the discretion to refuse access to records which could reasonably be expected to disclose "*advice, proposals, recommendations,*

> *analyses or policy options developed by or for a government institution or a member of the Executive Council*….". This is the sole purpose of the briefing materials that are the subject of this access request. Disclosure of any portion – even the titles or the subject of briefing material and notes, will effectively be disclosing advice received from ministry and Crown officials. For example, the new government came to power with a promise of change. To accomplish this change, the new government and its ministers needed to review programs, activities, and issues of government. The briefing materials are a significant part of the early decision making for individual ministers and within government as a whole. Each specific topic or issue described by the briefing material would disclose a matter under consideration and which requires a decision – for example, whether or not the program would continue to operate as it had in the past, whether or not issues are being handled as desired by the new minister and government, etc. More significantly, because the briefing materials in question presented a comprehensive picture of the ministries, Crown corporations and, in fact, the government as a whole, they collectively advise the new administration of the activities and issues within government. Even the disclosure of portions of the notes – such as the titles or subject matter of the notes – would in this instance be disclosing matters under consideration and elements of the advice being provided.

[emphasis added]

[23] Executive Council appears to be arguing that the entire Record constitutes "advice" so there is no need to consider the definitions of proposals, recommendations, analyses or policy options.

[24] I note that section 17(1)(a) of FOIP is equivalent to section 16(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).[4]

[25] In its submission of July 2, 2009, Executive Council also references a definition of advice from *Weidlich v. Saskatchewan Power Corp.*[5] as follows:

> It is important to consider how Saskatchewan courts and courts in other Canadian jurisdictions have interpreted the words in this and similar provisions.
>
> - In Saskatchewan, in *Weidlich v. Saskatchewan Power Corp.,* (1998) 164 Sask. R. 204, Geatros, J. of the Court of Queen's Bench stated at page 209 in dealing with the meaning of "advice in clause 17(1)(a):

[4] *The Local Authority Freedom of Information and Protection of Privacy Act,* S.S. 1990-91, c. L-27.1 at s. 16(1)(a).
[5] *Weidlich v. Saskatchewan Power Corp.,* (1998) 164 Sask. R. 204.

> *"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".*

In Report 2007-001, the Saskatchewan Information and Privacy Commissioner considered the meaning of the word "advice" in 16(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act*, and by extension in 17(1)(a) of *The Freedom of Information and Protection of Privacy Act*. In that report, the Commissioner agreed with Geatros J. that advice is "primarily the expression of counsel or opinion, favourable or unfavourable as to action...".

[26] However, in my Report LA-2007-001 as referenced by Executive Council, I also stated my concern with obiter comments in that Court of Queen's Bench decision.

> [89] The analysis of section 17 of FOIP by Geatros J. in Weidlich and his description of "*advice*" as "*primarily the expression of counsel or opinion, favourable or unfavourable, as to action…*" is perfectly consistent with the ascribed purpose of FOIP and the Act, and with the decisions of the Ontario Court of Appeal noted earlier. With all due respect, I find that the quote he used from a 1950 Supreme Court of Canada decision and the phrase, "…*but it may, chiefly in commercial usage, signify information or intelligence*" did not form an essential element of his decision.
>
> [90] In addition, I rely on major developments since Weidlich that have refined the interpretation of "advice" in the context of a freedom of information and protection of privacy statute. This includes the April 3, 2006 decision of the Supreme Court of Canada to refuse leave to appeal from the Ontario Court of Appeal decision in *Ministry of Transportation* v. *Cropley*. I further find that, at this time, to best achieve the objectives of the Act and to ensure that the right of access is not unduly diminished by assigning an extremely broad meaning to the word "advice", I should construe "advice" in a way that is consistent with the Ontario Court of Appeal decisions noted above. I am further guided by a body of Supreme Court of Canada and Federal Court of Appeal decisions that highlight the limited and specific nature of exemptions generally. To interpret section 16 of the Act to allow non-disclosure by a local authority of records that contain "information or intelligence" would cast such a large blanket of secrecy over all kinds of information that public bodies routinely collect that it would seriously compromise transparency to the people of Saskatchewan.[6]

[6]Saskatchewan Information and Privacy Commissioner (hereinafter SK OIPC), Report LA-2007-001 at [89] to [90], available at www.oipc.sk.ca/reviews.htm.

[27] In my Report LA-2010-001, I drew upon the definition of advice from the Alberta *FOIP Guidelines and Practices*[7]:

> [28] I found definitions for the terms "advice, proposals, recommendations, analyses or policy options" also in the above noted Alberta resource, [Alberta FOIP Guidelines and Practices], as follows:
>
> > *Advice* includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts.[8]

[28] This Report also notes:

> [22] This sentiment is reiterated in the Alberta Government's *Freedom of Information and Protection of Privacy Guidelines and Practices* (FOIP Guidelines) as follows:
>
> > ***Advice, proposals, recommendations, analyses or policy options***
> >
> > *Section 24(1)(a)*
> > **This exception is intended to allow for candour during the policy-making process, rather than providing for the non-disclosure of all forms of advice** (see *IPC Order 99-001*) **or all records related to the advice** (*IPC Order 99-040*).
> >
> > **This exception** [equivalent to exemption in SK legislation] **applies to these advisory functions at all levels in a public body. It also applies to advice and recommendations obtained from outside the public body, including advice and recommendations received under a contractual or other advisory arrangement** (see *IPC Order F2005-012*). However, it does not apply to unsolicited documents sent to a public body by special interest groups for lobbying purposes (see *IPC Order 2001-002*) or **to records created by a third party participating in a general stakeholder consultation**(see *IPC Orders F2004-021* and *F2008-008*).
> > …
> >
> > **Section 24(1)(a) would not apply where the disclosure of information would not reasonably be expected to reveal advice or recommendations**. For example, the disclosure of documents discussed at a meeting of a Cabinet Policy Committee that is open to the public would not *reveal* advice (see *IPC Order 2001-002*). **The exception also would not apply to the names of correspondents, dates, subject lines that do not reveal advice, or information that reveals that a person participated in a discussion about a particular**

[7]Access and Privacy Branch, Service Alberta, *FOIP Guidelines and Practices* (2009), available at http://www.servicealberta.ca/foip/resources/guidelines-and-practices.cfm.
[8]SK OIPC Report LA-2010-001 at [28], available at www.oipc.sk.ca/reviews.htm.

> **subject matter but does not indicate anything substantive about their involvement** (*IPC Order F2004-026*).[9]

[29] To summarize, in order for section 17(1)(a) to apply the withheld information must be more than mere information, it must relate to a suggested course of action which will be considered by the recipient. Support for this definition of advice in other Canadian jurisdictions is well documented and consistently used throughout my Reports.[10]

[30] While it is my view that the purpose of section 17(1)(a) is to allow for the free flow of frank advice and recommendations to a member of Executive Council or a government institution to assist in decision-making processes, it is clear that there must be a reasonable expectation that the disclosure of information will allow accurate inferences to be drawn which could disclose the nature and content of the advice and recommendations provided to Executive Council.

[31] As an example, parts of the "Saskatchewan Justice Transition Binder" (the Justice binder) would not constitute advice for the purposes of section 17(1)(a). The information found under these tabs is general information about the mandate of Justice. This information is likely public information. Similarly, organizational charts, branch/departmental overviews, and lists of stakeholders would already be information in the public domain and at least some of this is available on the Ministries public website, www.http://www.justice.gov.sk.ca/about/.

[32] The Justice binder also includes a list of Boards and Commissions administered by Justice that has no evaluative aspect and would not qualify as advice. There is what is described as Department of Justice Stakeholder/Client Assessment that contains both factual public information and some evaluative assessments. These two elements are clearly divided in the format of the document and would be a simple matter to separate to protect the latter element and disclose the former element. There is a schedule of key

[9] *Ibid.* at [22]
[10] SK OIPC Reports, *Supra* note 6 at [41] to [91]; LA-2009-002 at [146] to [147]; *Supra* note 8 at [21] to [35]; F-2010-001 at [75] to [84]; LA-2011-001 at [56] to [68]; LA-2011-004 at [11] to [41]; all available at www.oipc.sk.ca/reviews.htm.

appearances most of which involve the date, time and place and the identity of the hosting organization. Since most of these involved attendances at very public events and large conferences, it is hard to determine what advice would be involved that would warrant severing.

[33] There may be portions of other documents within the binder that could conceivably constitute advice, or even recommendations, analyses or policy options. The Justice binder includes a list of ten issues occurring within the first month. Some are marked *Action Required* and some are marked as *Information Only*. I recognize what appears to be normative or evaluative material in assessing stakeholders, assessing weaknesses in certain areas of the mandate and discussions of some key topics. There is a section on immediate issues that may well constitute advice within the meaning of section 17(1)(a). There has been no attempt however by Executive Council to provide explanations or additional information to allow me to make that determination. Nonetheless pursuant to section 8 of FOIP, it is up to Executive Council to identify and sever those limited and specific cases and present its argument with respect to each instance in the course of a review.[11] Executive Council has chosen not to do so despite the more than four years this review has been underway and despite our repeated recommendations for it to do so.

[34] With respect to the "Minister of Health Briefing Book" (Health Briefing Book), there is an Administrative Orientation Booklet with names and job descriptions of the senior leadership team and photos. There is a list of key contacts including the names, addresses, email addresses and phone numbers of other Ministers of Health, heads of the 26 regulated health profession bodies and CEOs of Regional Health Authorities. There is a description of the mandate of the Department with goals and objectives that all appear to have been in the public domain. There is a neutral description of the relevant legislation for the Ministry of Health (Health) and a description of a number of advisory boards and committees. There is an Executive Organization Chart that appears to have no more information than what is currently available on Health's public website under

[11]Section 8 of FOIP states "Where a record contains information to which an applicant is refused access, the head shall give access to as much of the record as can reasonably be severed without disclosing the information to which the applicant is refused access."

the Saskatchewan Government Phone Directory. There are sheets that describe the various business units within Health including an overview and program responsibilities. There are lists of proposed stakeholders and key contacts together with phone numbers. There is a Stakeholder/Client Assessment and at least two of the four columns contain publicly available information.

[35] I also note in the Health Briefing Book that there are materials which may be appropriate to sever including descriptions of immediate issues, near term issues and long term issues. There is a section on Election Commitments which appears to contain both general information and evaluative information and advice. Unfortunately again, as with the Justice material, Executive Council has provided no argument or explanation that would permit a determination of what qualifies for protection under the section 17(1)(a) exemption and what should be released.

[36] The "SaskPower Briefing Book" contains a number of documents that appear to be public information or at least background information. This includes an organization chart, biographical information of Board members, an Executive-Managers organization chart and biographical information of executive members. There are a number of fact sheets that appear to include simple background information and statistics. There is information about union agreements, information about strategic direction, flow charts, information about Board meeting dates, a schedule of sponsored community events, fact sheets about subsidiaries, information about workforce planning and workplace diversity programs. None of this material appears to warrant severing other than personal information of Board members and Executive-Managers which I discuss further in issue four of this report.

[37] In addition, there is material which appears to be in the nature of advice and may justify severing. This includes information about litigation, briefing notes about a number of current issues and challenges for the Crown corporation. Again, it is not possible to make a determination of what should or should not be severed without any details in the form of supporting arguments from Executive Council which would provide the necessary context and significance of these documents. What is reasonably clear is that

much of the information in the SaskPower Briefing Book does not constitute advice, proposals, recommendations, analyses or policy options as required by section 17(1)(a).

[38] The foregoing comments about the contents of the Justice binder, the Health Briefing Book and the SaskPower Briefing Book are not exhaustive of the content of each briefing book and are intended only to enable some better understanding of the material that is the subject of this review. My assessment is that easily 70% of the briefing material would clearly not qualify as advice for purposes of section 17(1)(a) of FOIP. This of course is only an estimate since we have nothing from Executive Council to assist us in making a more precise assessment of what should be released and what should be withheld from the Applicant. What is more, had we been provided with evidence and argument to address the burden of proof on Executive Council, I have no doubt that it would have been relatively straightforward to identify those portions that would warrant severing.

[39] However, it is the position of Executive Council that these briefing notes are unique and require special consideration in the application of FOIP. Its submission of July 2, 2009 stated:

> The following will argue that this particular set of briefing materials is different from "normal" briefing materials (such as briefing notes and binders) routinely created by government officials to brief ministers and senior officials on specific issues. **We believe that because of the unique circumstances surrounding this particular set of briefing materials, the exemptions found in section 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* are correctly applicable to the records in their entirety.**
>
> Rationale
>
> Briefing notes are used widely throughout government. They are prepared to provide information on any number of issues to ministers, deputy ministers and others. Briefing notes will generally contain advice, proposals, recommendations, analyses or policy options related to a specific topic, but may also contain other information such as references to Cabinet discussions, confidential third party information, negotiations with other governments, discussions of pending budget decisions, personal information of individuals – all potentially subject to exemptions in *The Freedom of Information and Protection of Privacy Act*. **In addition, briefing notes also contain background information or general information to which exemptions may not usually apply.**

> However, the briefing materials responsive to this access request do not fall within the understanding of "normal" briefing notes. The purpose these briefing material were created is significantly different from normal circumstances and must be considered when determining how the Act was applied.
>
> In essence we believe that when a new Executive Council is first installed following a general election as defined in *The Elections Act*, the transition briefings from officials should be considered "Advice from Officials" pursuant to section 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* and should be exempted from access in their entirety. This is critical to ensure that the public service is able to give a new government the benefit of full, open and frank briefings on a wide range of policy issues.
>
> [emphasis added]

[40] I do not accept Executive Council's assertions that these briefing books constitute "unique circumstances" and that FOIP should be applied differently. The access rights of the citizens of Saskatchewan are best served if FOIP is applied in a consistent matter and not altered at the discretion of the government institution which has possession and control of the record.

[41] Further, I note that the Alberta Legislature has decided documents used for briefing a minister assuming new responsibilities to be a unique circumstance worthy of a specific exclusion from the rights of access afforded by the Alberta *Freedom of Information and Protection of Privacy Act*. In 2006 Alberta's FOIP Act was amended to read:

> 6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.
> …
> (4) The right of access does not extend
>
> **(a) to a record created solely for the purpose of briefing a member of the Executive Council in respect of assuming responsibility for a ministry, or**
>
> (b) to a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the Legislative Assembly.
>
> (5) Subsection (4)(a) does not apply to a record described in that clause if 5 years or more has elapsed since the member of the Executive Council was appointed as the member responsible for the ministry.

> (6) Subsection (4)(b) does not apply to a record described in that clause if 5 years or more has elapsed since the beginning of the sitting in respect of which the record was created.[12]
>
> [emphasis added]

[42] However, the Legislative Assembly of Saskatchewan has not chosen to include such an exclusion for post-election briefing materials in our FOIP legislation. Therefore, I must apply the law that is applicable to these briefing books as it presently stands.

[43] I find that there are no unique circumstances afforded by section 17(1)(a) of FOIP. As such, the briefing books, in their entirety, do not qualify as "advice".

[44] It is also worth mentioning that section 17(1)(a) of FOIP is a discretionary exemption. In the preliminary analysis that my office offered to Executive Council, we explored this issue in an attempt to persuade Executive Council to release those portions of the Record that would not be subject to the exemption relied on by Executive Council.

[45] With all discretionary exemptions, the default is not concealment but openness. As this is a class based exemption, the onus is on the government institution to establish that the portions of the record withheld from disclosure qualify for a particular exemption.

[46] To complete the analysis of subsection 17(1), I note that all of subsection 17(1) is qualified by subsection 17(2) which provides as follows:

> (2) This section does not apply to a record that:
>
> (a) has been in existence for more than 25 years;
>
> (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;
>
> (c) is the result of product or environmental testing carried out by or for a government institution, unless the testing was conducted:

[12] Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, section 6.

> (i) as a service to a person, a group of persons or an organization other than a government institution, and for a fee; or
>
> (ii) as preliminary or experimental tests for the purpose of:
>
> (A) developing methods of testing; or
>
> (B) testing products for possible purchase;
>
> (d) is a statistical survey;
>
> (e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal; or
>
> (f) is:
>
> (i) an instruction or guide-line issued to the officers or employees of a government institution; or
>
> (ii) a substantive rule or statement of policy that has been adopted by a government institution for the purpose of interpreting an Act or regulation or administering a program or activity of a government institution.[13]

[47] As noted earlier the records are not older than 2007 so subclause 17(2)(a) does not apply.

[48] Since the argument advanced by Executive Council is predicated on "advice" not a "decision" subclause 17(2)(b) would also not apply. The record in issue is also not captured by subclauses 17(2)(c), (d), (e) or (f) on the basis of the representations of Executive Council and my office's perusal of the sample records provided by Executive Council for purposes of this review.

[49] In its response of November 17, 2011, Executive Council stated:

> After thorough discussion of the matter, Executive Council continues to take the position that it advanced in its submission of July 2, 2009, the contents of the Briefing Binders constitutes advice being given to members of the new Executive Council and the materials are accordingly exempt under clause 17(1)(a) of the Act. Because of this exemption, there is no need for us to review the contents and sever personal information or third party information for mandatory exemption as the information is already claimed to be exempt from disclosure.

[13] *Supra* note 1, s. 17(2).

[50] However, it is still my position that Executive Council has not made the case that this exemption applies despite ample opportunity afforded it to do so. I find that section 17(1)(a) does not apply.

[51] Before dealing with section 16(1)(d)(i) and given that this case raises certain questions that are matters of first impression for our office it may be useful to provide some historical context for the discussion.

2. What general approach should be taken in dealing with a record subject to a claim of Cabinet confidence?

[52] I have considered the comprehensive and thoughtful analysis of the *Public Government for Private People: The Report of the Ontario Royal Commission on Freedom of Information and Individual Privacy/1980* (Report of the Royal Commission). This is particularly persuasive since almost all provincial and territorial access to information laws, including FOIP in Saskatchewan have been constructed on that foundation.

[53] The relevant discussion in the Report of the Royal Commission includes the following:

> B. Cabinet Documents
>
> As we have indicated in previous chapters of this report, the deliberations and decision-making processes of the Ontario Cabinet have traditionally been shielded from public view, as they have been in all other parliamentary jurisdictions. There are a number of reasons for accommodating this tradition in a freedom of information law by expressly exempting certain kinds of Cabinet materials from the general right of public access. First, the routine disclosure of Cabinet deliberative materials would bring an abrupt and, in our view, undesirable end to the tradition of collective ministerial responsibility. In Chapter 5 of this report, we expressed our conviction that the notion of collective ministerial responsibility retains a contemporary relevance. The requirement that each member of the Cabinet assume personal responsibility for government policy ensures that all members of the government of the day can be held accountable to the public, and encourages frank and vigorous exchanges of views in Cabinet discussions. The tradition of confidentiality of Cabinet discussions can also be supported on the basis that it permits public officials to provide the Cabinet with candid advice. Further, there is an evident public interest in ensuring that the decision-making processes of the Cabinet can be conducted as expeditiously as is possible.

If it is obvious that the confidentiality of Cabinet deliberations must be preserved in a freedom of information scheme, it is less obvious how an exemption relating to this matter should be drafted. In particular, there is some uncertainty in the concept of "Cabinet documents." If this phrase includes not only those documents that are physically within the possession of Cabinet officials, but also documents that are prepared for eventual submission to Cabinet, the notion of "Cabinet documents" would extend far beyond the Cabinet decision-making processes into the files of the various ministries and other governmental institutions of the province of Ontario. Clearly, a more restricted definition of this concept would be appropriate for our purposes.

In designing a freedom of information act exemption pertaining to Cabinet decision-making processes, it is useful to assume, for definitional purposes, that Cabinet documents consist only of those documents that have been either generated by or received by Cabinet members and officials in the course of their participation in the decision-making processes. Thus described, Cabinet documents would include agendas, informal or formal minutes of the meetings of Cabinet committees or full Cabinet, records of decision, draft legislation, Cabinet submissions and supporting material, memoranda to and from ministers relating to matters before Cabinet, memoranda prepared by Cabinet officials for the purpose of providing advice to Cabinet, and briefing materials prepared for ministers to enable them to participate effectively in Cabinet discussions.

The disclosure of many of these documents would have the effect of disclosing the nature of Cabinet discussions and the advice given or received by Cabinet members. For the reasons suggested above, all such material should be considered exempt under a freedom of information scheme. Some observers have suggested, however, that two kinds of documents – decisions of Cabinet and background memoranda containing essentially factual material - could be routinely disclosed without undermining the confidentiality of Cabinet discussions.

With respect to Cabinet decisions, it is argued that once a decision has been made, the immediate availability of the record of the decision would be in the public interest. The Australian Minority Report Bill would require the Prime Minister to "cause a register to be kept and made available for inspection and copying by members of the public containing details of all decisions made by the Cabinet." We are not persuaded of the wisdom of this proposal. There may be many situations in which the Cabinet might properly wish to delay public announcement of its decisions. It may have entered into arrangements with other governments or with affected individuals to postpone announcement until a specific time or until the occurrence of a particular event. The Cabinet may develop plans for dealing with emergencies or other contingencies, the effectiveness of which might be diminished by public announcements. Further, it is a feature of the parliamentary tradition, and a frequent practice of the government of Ontario, to make important announcements of policy decisions in the Legislative Assembly. We see no merit in reducing the importance of the legislature as a forum for announcements of this kind. Although it might be possible to draft exemptions to the general rule proposed in the Minority Report Bill

to accommodate circumstances of the kind we have mentioned, we do not believe that the public interest in open government would be significantly advanced by a adopting a scheme of this kind.

A more persuasive argument can be made for making available what might be referred to as background materials containing essentially factual information submitted to Cabinet. As will be seen, it is our view that documents containing factual material should generally be accessible to the public under our freedom of information proposals. Thus, material such as statistical studies and staff reports in the possession of ministry (as opposed to Cabinet) officials would routinely be made available under the scheme we propose. This is a common feature of proposed and existing freedom of information legislation in other jurisdictions. The question which then arises is whether such material should become exempt from access merely because it has passed into the hands of a Cabinet official (for example, where a statistical report has been attached to a Cabinet submission recommending action with respect to the same matter to which the statistical information pertains). The federal Australian bill provides for the availability of such material by stipulating that the general exemption for Cabinet documents does not apply to a document simply by virtue of the fact that it has been submitted to the Cabinet for consideration "if it was not brought into existence for the purpose of submission for consideration by the Cabinet".

Although it is our view that documents of this kind should be made available to the public in response to requests directed to ministries, we do not think it would be wise to require disclosure of such materials from Cabinet officials at a time prior to Cabinet deliberations based upon them. The effect of routinely making available to the public information concerning the nature of material forwarded to Cabinet may be to create an undesirable pressure on the Cabinet to publicly respond quickly to inquiries concerning such material even though it may have not yet arisen for consideration by Cabinet members. In this way, the ability of Cabinet to allocate its decision-making resources in accord with its own determinations of the relative importance of matters on its agenda could be significantly impaired.

Once a decision has been made by Cabinet with respect to a particular matter, however, this reason for withholding disclosure loses its force. Bill C-15, the federal Canadian proposal, included in its exemption for Cabinet documents a sub-paragraph exempting "records containing background information, analyses of problems or policy options submitted or prepared for submission by a Minister of the Crown to Council for consideration by Council for making decisions, before such decisions are made". We believe that a provision of this kind would provide a desirable limitation on the general principle that documents pertaining to Cabinet deliberations should be exempt from the freedom of information scheme. Adoption of this measure would represent an extension of the current practice of the Ontario government of tabling

> compendiums of background information with the introduction of bills to Cabinet decisions more generally.[14]
>
> [emphasis added]

[54] Former Chief Justice E.M. Culliton, in providing context for his report entitled the *Report of the Honourable E.M. Culliton, Former Chief Justice of Saskatchewan, on the Matter of Freedom of Information and Protection of Privacy in the Province of Saskatchean* (the Culliton Report) and recommendations to the Saskatchewan Government, acknowledged that he had not only access to "the recent report of the Ontario Royal Commission on Freedom of Information and Individual Privacy, but also the whole mass of research studies upon which the Report had been founded".[15] In fact, he concluded that in view of the 10 volumes of the Ontario Royal Commission Report "all aspects of access to government information were carefully considered and reviewed."[16] He went on to observe "[a]ll of the Ontario information, briefs and research material would be available to me, I was assured, hence I was completely satisfied that any attempt to duplicate the work which that Commission had done, would be an unwarranted expenditure of both time and money."[17]

[55] The Culliton Report made the following recommendations relevant to the issue before me:

> The solidarity of cabinet can be maintained only by complete confidentiality in respect to all records relevant to its administration and operation. I recommend that the legislation provide for such complete confidentiality and without in any way restricting that wide protection, should provide specifically that access shall not be granted to
>
> (a) memoranda the purpose of which is to present proposals or recommendations to the executive council;

[14] *Public Government for Private People: The Report of the Ontario Royal Commission on Freedom of Information and Individual Privacy/1980* (Toronto: Queen's Printer of Ontario, 1980), pp. 284-287.
[15] *Report of the Honourable E. M. Culliton, Former Chief Justice of Saskatchewan on the Matter of Freedom of Information and Protection of Privacy in the Province of Saskatchewan* (Regina: Legislative Assembly of Saskatchewan Library, 1981), p. 4.
[16] *Ibid.* at p. 5.
[17] *Ibid.*

(b) discussion papers, the purpose of which is to present background, explanation, analysis of problems or political options to the executive council for consideration by the council in making decisions;

(c) agenda of executive council or minister or records disclosing deliberations or decisions of the executive council;

(d) records used for or reflecting conclusions or discussions by the members of the executive council on matters relating to the making of government decisions or the formulation of government policy;

(e) records the purpose of which is to brief members of the executive council in relation to matters that are before or are proposed to be brought before the executive council; and

(f) draft legislation.

The legislation also should recognize the anonymity of public servants by providing that access shall not be granted to records which

(a) would disclose legal opinions or advice provided to a person or government institution by a law officer of the Crown or privileged information between solicitor and client in a matter of government institution business;

(b) would disclose opinions or recommendations by public servants for a member of the executive council or for the executive council;

(c) would disclose the substance of proposed legislation or regulations; and

(d) would disclose information received on a confidential basis.[18]

[56] Section 16 of FOIP provides as follows:

16(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;

(b) agendas or minutes of the Executive Council or any of its committees, or records that record deliberations or decisions of the Executive Council or any of its committees;

(c) records of consultations among members of the Executive Council on matters that relate to the making of government decisions or the formulation of government policy, or records that reflect those consultations;

(d) records that contain briefings to members of the Executive Council in relation to matters that:

[18] *Ibid.* at p. 85.

> (i) are before, or are proposed to be brought before, the Executive Council or any of its committees; or
>
> (ii) are the subject of consultations described in clause (c).
>
> (2) Subject to section 30, a head shall not refuse to give access pursuant to subsection (1) to a record where:
>
> (a) the record has been in existence for more than 25 years; or
>
> (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; or
>
> (ii) in the absence or inability to act of the President, by the next senior member of the Executive Council who is present and able to act.[19]

[57] I previously had occasion to consider section 16(1)(a) of FOIP in my Report F-2004-004.[20] In this Report, I considered the interpretation of "Cabinet confidence" by Alberta's original Information and Privacy Commissioner, Robert Clark. I considered his discussion of section 21 of Alberta's FOIP Act that deals with a mandatory exemption for information "that would reveal the substance of deliberations of the Executive Council 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…".[21] In his Alberta Order 97-010, Commissioner Clark considered whether public interest immunity privilege was applicable when applying section 21 of the Alberta FOIP Act:

> [18.] The rationale for protecting Cabinet confidences and for excluding them from the coverage of the federal [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.

[19] *Supra* note 1, s. 16.
[20] SK OIPC Report F-2004-004 at [7], available at www.oipc.sk.ca/reviews.htm.
[21] Alberta's *Freedom of Information and Protection of Privacy Act*, R.S.A. 1994, c. F-18, s. 21. Note: section 21 has been re-numerated to section 22 of the current version of this Act.

> …
>
> [22.] 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 [Supreme Court of Canada in *Carey v. Ontario* [1986] 2 S.C.R. 637]. As a result, as Commissioner, I cannot use the common law to aid in my interpretation of section 21.[22]

[58] I also found in my Report F-2004-004 that although sections 16 and 17 of FOIP both deal with advice, proposals, recommendations and policy options they also reflect different levels of information within the Saskatchewan Government hierarchy.[23] Section 16 deals with information for Cabinet whereas section 17 deals with advice to a Minister. I quoted with approval the observation of Commissioner Clark that:

> *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 a strong, mandatory exception to disclosure while the research and analysis levels have a discretionary exception*.[24]

[59] Since there is a suggestion from Executive Council that all of this material should be treated as an indivisible whole, I should address the obligations of Executive Council in responding to this kind of access request. I repeat herein and incorporate by reference my comments from paragraphs [40] to [43].

[60] In this respect, I have found the decision of the Nova Scotia Court of Appeal in *O'Connor v. Nova Scotia (Priorities and Planning Secretariat)* very helpful. The record in question had also been withheld by the public body on the basis that the information denied "would reveal advice, recommendations and policy considerations to the Priorities

[22]Alberta Information and Privacy Commissioner (hereinafter AB IPC) Order 97-010 at [18] to [22], available at http://www.oipc.ab.ca/downloads/documentloader.ashx?id=1906 .
[23]*Supra* note 20 at [12].
[24]*Ibid.* at [12]. Note: The Alberta FOIP Act describes as "exceptions" what would be "exemptions" in Part III of FOIP.

and Planning Committee, a Committee of Executive Council, and the Executive Council."[25] This was based on section 13(1) of the Nova Scotia *Freedom of Information and Protection of Privacy Act*. That section provides as follows:

> 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council 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.
>
> (2) Subsection (1) does not apply to
>
> (a) information in a record that has been in existence for ten or more years;
>
> (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal pursuant to an Act; or
>
> (c) background information in a record the purpose of which is to present explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if
>
> (i) the decision has been made public,
>
> (ii) the decision has been implemented, or
>
> (ii) five or more years have passed since the decision was made or considered.[26]

[61] Mr. Justice Saunders, speaking for the Court, considered what kind of analysis was appropriate for the public body assessing possible exemptions. He described the process as follows:

> [94] Whenever an application for information is filed, the head of the public body, or the Review Officer, or a reviewing court, must examine the information to see if the test I have described, is satisfied. Among other questions, the examiner will want to know: how the information is labeled or characterized by government, what it purports to be or do, and what, in fact, it is or does. **However, no government can hide behind labels. The description or heading attached to the document will not be determinative.** The hyperbole accompanying speeches or press releases will not be decisive. **There is no shortcut to inspecting the information for what it really is and then conducting the required analysis under s. 13 to see if its disclosure would enable the reader to infer the essential elements of Cabinet**

[25] *O'Connor v. Nova Scotia (Priorities and Planning Secretariat),* 2001 NSCA 132 at [14].
[26] Nova Scotia *Freedom of Information and Protection of Privacy Act.* 1993, c. 5, ss. 13(1) and (2).

> **deliberations.** The Review Officer must always be wary of such traps before embarking upon the necessary inquiry.[27]
>
> [emphasis added]

[62] I agree with the approach outlined by the Nova Scotia Court of Appeal. It will be necessary for any public body in Saskatchewan asserting a claim of Cabinet privilege to have undertaken a line by line review of the record. Therefore, it would not be appropriate to simply treat the 10,000 pages as an indivisible whole. To do so would be inconsistent with FOIP.

[63] Having given due consideration to all of this persuasive commentary, I approach the claim for exemption by Executive Council as follows:

a) The Cabinet confidence exemption is a fundamental element of FOIP and warrants careful consideration by both the public body and my office.

b) Public interest immunity privilege at law has no application when applying FOIP nor does the explicit balancing of risk and reward inherent in that public interest immunity privilege test.

c) There is a particular need to deny disclosure of material in advance of Cabinet deliberation on those same matters.

d) Once a decision has been made by Cabinet with respect to a particular matter, the reason (c) above for withholding disclosure loses its force.

e) Background materials for Cabinet that contain essentially factual information usually should be available to the public and would not warrant the same confidentiality that applies to Cabinet confidences.

f) In any event, invoking the Cabinet confidence exemption, will require a line by line review of the record to determine whether the exemption applies. In other words there is no short cut by which the government institution can claim a large volume of records can be assessed without considering all of the content.

3. Did Executive Council properly apply section 16(1)(d)(i) of *The Freedom of Information and Protection of Privacy Act* to the Record?

[64] Section 16(1)(d)(i) of FOIP states:

[27] *Supra* note 25.

> 16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:
>
> …
>
> (d) records that contain briefings to members of the Executive Council in relation to matters that:
>
> (i) are before, or are proposed to be brought before, the Executive Council or any of its committees…[28]

[65] I have not previously considered section 16(1)(d)(i) formally in a Report. However, former Commissioner McLeod considered the exemption in his Report 99/003 and former Commissioner Gerrand considered it in his Report 2000/035. Commissioner McLeod's comments are not particularly relevant. However, Commissioner Gerrand stated:

> With respect to Section 16(1)(d), the material does not contain briefings to Executive Council members either regarding matters that are before, or proposed to be brought before, the Executive council or its committees, or regarding matters that are the subject of consultations among members of Executive Council.
>
> It is clear from the Budget Briefing Material that the material relates to a matter (the provincial budget) that was, at the March 29, 2000 date indicated on the document, before the Provincial Legislature, and no longer before the Executive Council.[29]

[66] Only a handful of access to information legislation in Canada includes provisions that explicitly address Cabinet confidences. These include the federal *Access to Information Act* (ATIA) and Ontario, Manitoba and Saskatchewan's provincial FOIP legislation.

[67] Section 69 of ATIA precludes the entire Act from applying to Cabinet confidences. It states:

> 69. (1) This Act does not apply to confidences of the Queen's Privy Council for Canada, including, without restricting the generality of the foregoing,
>
> …
>
> (d) records used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy;

[28] *Supra* note 1, s. 16(1)(d)(i).
[29] SK OIPC Report 2000/035, p. 9.

> (e) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d)…[30]

[68] Section 69.(1)(e) of ATIA however appears to be similar to section 16(1)(d)(i) of FOIP.

[69] The Information Commissioner of Canada's resource *The Investigators Guide to Interpreting the ATIA* outlines the steps to determine when a record might be classified as one to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council as follows:

> The determination as to whether section 69 applies to requested information is a multi-step process. Each step should be followed carefully in order to avoid undesirable mistakes. The following will summarize the steps you should follow:
>
> **1) <u>Step I</u>:**
>
> Determine whether the requested information constitutes confidences of the Queen's Privy Council of Canada for the purpose of the Access to Information Act. To do so, you must determine whether the requested information consist of:
> …
> (e) records the purpose of which is to brief ministers of the Crown in relation to matters that are before, or are proposed to be brought before, Council or that are the subject of communications or discussions referred to in paragraph (d);
> …
> The examples of confidences of the Queen's Privy Council for Canada contained in section 3 of the *Access to Information Act* is not exhaustive. The sections includes 7 examples of what <u>could constitute</u> confidences of the Queen's Privy Council. These specific examples are not in any way exhaustive and only serve to illustrate the principal types of material the legislator had in mind when creating the provision. It is very important to remember that these paragraphs are examples only and do not in any way guarantee that the information is necessarily confidences of the Queen's Privy Council.
>
> **2) <u>Step II</u>:**
>
> Determine whether the requested information falls within subsection 69(3) of the *Access to Information Act*. This subsection excludes from the exclusion information where:

[30]Canada's *Access to Information Act*, R.S.C., 1985, c. A-1, s. 69(1).

> • confidences of the Queen's Privy Council for Canada that have been in existence for more than twenty years; or
>
> • discussion papers described in paragraph b) have been made public; or
>
> • the decision have not been made public, if four years have passed since the decisions were made.[31]

[70] *The Investigators Guide to Interpreting the ATIA* also defines what is meant by section 69.(1)(e):

> **69(1)(e) Records to Brief Ministers**
>
> Paragraph 69(1)(e) refers to records the purpose of which is to brief Ministers of the Crown in relation to matters that **are before, or are proposed to be brought before Cabinet.** It also refers to records the purpose of which is to brief ministers in relation to matters that are to be the subject of communications or discussions between ministers concerning the making of government decisions or the formulation of government policy.[32]
>
> [emphasis added]

[71] Section 12(1)(e) of the Ontario *Freedom of Information and Protection of Privacy Act* is also similar to section 16(1)(d)(i) of FOIP. It is a follows:

> 12(1) A head shall refuse to disclose a record where the disclosure would reveal the substance of deliberations of the Executive Council or its committees, including,
>
> …
>
> (e) a record prepared to brief a minister of the Crown in relation to matters that are before or are proposed to be brought before the Executive Council or its committees, or are the subject of consultations among ministers relating to government decisions or the formulation of government policy…[33]

[72] I referred to several Orders from the Ontario Information and Privacy Commissioner (IPC) that deal with section 12(1)(e). Most notable is Order P-1570 which summarizes the position of the Ontario IPC. Order P-1570 states:

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[31]Office of the Information Commissioner of Canada, *The Investigators Guide to Interpreting the ATIA*, available at http://www.oic-ci.gc.ca/eng/inv_inv-gui-ati_gui-inv-ati_section_69.aspx.
[32]*Ibid.*
[33]Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 12(1)(e).

Section 12(1)(e)

To qualify for an exemption under section 12(1)(e), the Ministry must establish that the record itself has been prepared to brief a Minister in relation to matters that are either:

> **(a) before or proposed to be brought before the Executive Council or its committees; or**
>
> **(b) the subject of consultations among ministers relating to government decisions or the formulation of government policy.**

[Order 131]

The Ministry submits that Record B-58 was a briefing note to prepare the Minister for a meeting with the OCP regarding the draft regulation. I find that it is a briefing note for the Minister about the proposed advertising regulations, a matter which has already been discussed by Cabinet.

Previous orders have held that section 12(1)(e) is prospective in that the use of the present tense in this section precludes its application to matters that have already been considered by the Executive Council or its committees. The subject matter of the responsive portion of Record B-58 was discussed by the Cabinet Committee on Legislation and Regulations on April 14, 1997 and the full Cabinet on April 16, 1997.

I find, therefore, since the matter in the briefing note which comprises the responsive portion of Record B-58 has already been presented to and discussed by Cabinet and one of its committees, section 12(1)(e) does not apply to it.[34]

[emphasis added]

[73] Further, Ontario IPC Order P-946 states that:

> The difficulty with the Ministry's position is one of timing. Section 12(1)(e) is prospective, or at least meant to cover issues that are presently the subject of interministerial consultations or currently before the Executive Council or its committees (Order 40). Moreover, the fact that these issues **may** be revisited is insufficient to substantiate a claim for exemption under section 12(1)(e).

With respect to this issue the Ministry states that:

[34]Ontario Information and Privacy Commissioner (hereinafter ON IPC) Order P-1570, pp. 5 to 6, available at http://www.ipc.on.ca/images/Findings/Attached_PDF/P-1570.pdf .

> The Ministry of Consumer and Commercial Relations and the Premier's office intended to take the issue of franchising legislation and the high profile [Franchisor] dispute to Cabinet. The whole issue of whether to enact franchising legislation in Ontario was to have been discussed at Cabinet in the context of the [Franchisor] dispute but the election call intervened. The Ministry of Consumer and Commercial Relations has every intention of bringing this issue forward once the election is completed.

Based on several factual matters, I cannot conclude that section 12(1)(e) applies to these records. First of all, given the dates of these records, it is clear that these matters are currently neither before the Executive Council nor its committees; nor are they the subject of interministerial consultations. Secondly, there is no indication in the records, themselves, that the issue is one which the Ministry will or has the intention to bring to Cabinet in the future.

The Cabinet submission, Record (2)10, referred to by the Ministry in its submissions in support of this assertion, is entitled "Ontario Retail Sector Strategy Workplan" and, in fact, indicates that the purpose of the submission is to obtain approval for a sector strategy workplan for the retail sector. It is, in fact, a submission prepared by the Ministry of Economic Development and Trade (now the Ministry of Economic Development, Trade and Tourism) (MEDT). The submission contains only one very minor reference to franchisors and franchisees. This reference does not in any way relate to the issues pertaining to the Franchisor and/or legislation regulating franchises as set out in the briefing notes and issue sheets. Thus, I do not accept the Ministry's assertion that this record "... support's the Institution's position that the issue of franchising and the [Franchisor] dispute were going to be discussed by Cabinet".

The Franchisor dispute was widely reported in the media in the spring of 1993, and, as has been the case when such disputes become public, there were many groups lobbying for the implementation of legislation to regulate franchising in the province of Ontario. The most recent of the documents to which the Ministry has applied the Cabinet records exemption is dated June 27, 1994. The provincial election was called on April 11, 1995, some 10 months later. Obviously, with the change in government, the intentions of the then government, whatever they may have been, cannot automatically be applied to the legislative agenda of the new Cabinet. Based on the records themselves and the information provided by the Ministry in its submissions, there is no evidence before me to indicate that the issue of whether to enact franchise legislation is a matter "that is proposed to be brought before the Executive Council or its committees ..." within the meaning of section 12(1)(e) of the Act.

Record (3)8 is a discussion paper on franchising dated November 1987. The Ministry submits that this record was used to advise the Minister of the background and issues involving franchising and franchising legislation and thus "... was a record prepared to brief a minister of the Crown in relation to matters that are proposed to be brought before the Executive Council."

> I find, however, that the Ministry has not provided evidence to show that the matters discussed in Record (3)8 were or are proposed to be brought before the Executive Council.
>
> In my view, the Ministry has failed to establish a claim for exemption for any of these records under section 12(1)(e). I have been provided with no evidence to indicate that the matters referred to in the briefing notes and the issue sheets were ever considered by Cabinet, or that these matters are to be addressed by the Executive Council or one of its committees in the future. Furthermore, given the results of the election referred to by the Ministry, it is unclear whether this issue will be on the agenda of the new Cabinet. Based on all of these factors, and the purposes of the Act as set out in section 1(a)(ii) that exemptions from the right of access should be limited and specific, I find that none of these records are exempt pursuant to section 12(1)(e) of the Act.[35]

[74] Executive Council stated in its letter to my office dated November 17, 2011 that:

> In addition, Executive Council submits that the contents of the Briefing Binders are exempt from disclosure on the basis of clauses 16(1)(d)(i) of the Act. The Binders were created to present briefings and advice to the new members of the Executive Council in relation to their new roles and responsibilities. The Binders were attached to mandate letters for each minister. **Both the mandate letter and the Binders were distributed to the respective ministers at the initial meeting of the new cabinet where the expectations, roles and responsibilities of ministers were discussed. As you can appreciate, cabinet discussions are confidential, however we can advise that Cabinet Minutes reflect this**…
>
> [emphasis added]

[75] The test for section 16(1)(d)(i) of FOIP is as follows:

a) the record must be prepared to brief members of the Executive Council; and

b) must be before or proposed to be brought before the Executive Council or its committees.

[76] On the face of the record, the briefing books appear to have been prepared for members of the Executive Council and satisfy the first part of the test.

[77] With regards to the second part of the test, timing is an issue in this case. Executive Council has submitted that the material in the briefing books had already been considered

[35] ON IPC Order P-946, pp. 3 to 4, available at http://www.ipc.on.ca/images/Findings/Attached_PDF/P-946.pdf.

and discussed at Cabinet meetings. As section 16(1)(d)(i) of FOIP is prospective, the Record does not meet the second part of the test.

[78] Section 16(1)(d)(i) therefore does not apply to the record in this case.

[79] As noted earlier, on April 5, 2012, a full 49 months after we commenced our formal review under Part VII of FOIP, Executive Council advanced a different argument based solely on section 16(1).

[80] Section 16(1) of FOIP provides as follows:

> 16(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;
>
> (b) agendas or minutes of the Executive Council or any of its committees, or records that record deliberations or decisions of the Executive Council or any of its committees;
>
> (c) records of consultations among members of the Executive Council on matters that relate to the making of government decisions or the formulation of government policy, or records that reflect those consultations;
>
> (d) records that contain briefings to members of the Executive Council in relation to matters that:
>
> (i) are before, or are proposed to be brought before, the Executive Council or any of its committees; or
>
> (ii) are the subject of consultations described in clause (c).
>
> (2) Subject to section 30, a head shall not refuse to give access pursuant to subsection (1) to a record where:
>
> (a) the record has been in existence for more than 25 years; or
>
> (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; or

> (ii) In the absence or inability to act of the President, by the next senior member of the Executive Council who is present and able to act. [36]

[81] As noted earlier in this Report, included in the record is some material that I would have thought may qualify as Cabinet confidence material. It provides advice as to alternative action, assesses strategies and outlines plans and initiatives. This is presumably the kind of material that would have been contemplated as warranting the mandatory exemption. This may be material which, if disclosed, would have the effect of disclosing the nature of Cabinet discussions and the advice given or received by Cabinet members. My role however is not to do the work required of a government institution. The structure of FOIP is that the government institution(s) must do the line by line analysis of the record at issue to determine which exemptions apply to which portions of the record. They are required to sever those portions that may qualify for a mandatory or discretionary exemption and release the balance of the record to the Applicant. At the review stage, the burden of proof is that of the government institution to establish on a balance of probabilities that certain portions of the record should not be released.

[82] At the same time, in the three sample files available to us, I find a significant amount of background material that is essentially factual information and that does not contemplate action of any kind. This material would be useful orientation material for a new Minister undoubtedly but it would in no way have the effect of disclosing the nature of Cabinet discussions and the advice given or received by Cabinet members. If Executive Council had undertaken the process of severing contemplated by section 8 of FOIP it would have been able to protect all Cabinet confidences and yet made available to the Applicant a large body of statistical information and background material that clearly does not qualify as Cabinet confidence material.

[83] My difficulty is that Executive Council has taken the position that it has no need to separate background material from Cabinet confidences, even when this could easily be undertaken by someone familiar with the briefing books. It instead chooses to assert that Cabinet confidences captures even statistical information and background information

[36] *Supra* note 1, s. 16.

and the only necessary element is that the purpose of the briefing books may be to facilitate discussions by Cabinet or committees of Cabinet. While I appreciate we are dealing with a very large volume of material and the process of severing may be a lengthy one, this should have been foreseen and accounted for at the time the briefing books were assembled.

[84] As noted earlier, at least one other province has explicitly excluded post election briefing books from the scope of its FOIP Act. This province would have been free to provide for a similar exclusion if they wanted to carve out such briefing books from FOIP and the Commissioner's review but it has not chosen to amend FOIP for that purpose.

[85] I should note that all of the subsections in section 16 are qualified by subsection 16(2). In this case, the records are not apparently older than 2007 so subsection 16(2)(a) would have no application. As well, the responsive records have been transferred to Executive Council from the Ministries that received the initial requests for access and it is Executive Council that is invoking exemptions in Part III of FOIP to deny access to the Applicant. There is therefore no consent that access be given as contemplated by subsection 16(2)(b). Therefore subsection 16(2) does not apply in this case.

[86] There is easily identified and severable statistical and background information included in the briefing books that constitute the record that should be disclosed to the Applicant. Section 16(1) cannot apply to statistical information and background information that is not so interwoven with legitimate Cabinet confidences and advice to Cabinet that it cannot be easily severed.

[87] Whereas 17(1)(a) is a discretionary exemption and Executive Council has not met the burden of proof to support the exemption, I am mindful that section 16(1) is a mandatory exemption. Furthermore, given the authorities noted earlier, the Cabinet confidence exemption is one that has been treated as a more important exemption than a discretionary exemption such as section 17(1)(a). If this were not the case, my inclination would be to simply find that Executive Council has also failed the burden of proof to justify the Cabinet confidence exemption. Mindful however that I have found

there is some material in the record that would likely qualify as "Cabinet confidence material", my disposition is to recommend that Executive Council, utilizing this Report and the authorities cited, sever the Cabinet confidence material and disclose the balance of the record to the Applicant. My estimate is that this would mean approximately 70% of the record would be disclosed to the Applicant.

4. Does the Record contain personal information pursuant to section 24 of *The Freedom of Information and Protection of Privacy Act*?

[88] I am always mindful of a government institution's duty to protect the personal information of individuals. Section 29(1) of FOIP states:

> 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.[37]

[89] However, Executive Council has not raised section 29(1) of FOIP as an exemption for withholding records. We recommended on June 9, 2010 and March 9, 2012 that Executive Council assess the applicability of the mandatory exemption for personal information, section 29(1). It appears it has failed to do so. Upon review of the sample responsive record I found documents such as biographies and resumés of certain individuals. I note that these portions of the record may contain personal information pursuant to section 24(1) of FOIP which states:

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

[37] *Supra* note 1, s. 29(1).

(c) **Repealed**. 1999, c.H-0.021, s.66.

(d) any identifying number, symbol or other particular assigned to the individual, other than the individual's health services number as defined in *The Health Information Protection Act;*

(e) the home or business address, home or business telephone number or fingerprints of the individual;

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

(g) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to the correspondence that would reveal the content of the original correspondence, except where the correspondence contains the views or opinions of the individual with respect to another individual;

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

(i) information that was obtained on a tax return or gathered for the purpose of collecting a tax;

(j) information that describes an individual's finances, assets, liabilities, net worth, bank balance, financial history or activities or credit worthiness; or

(k) the name of the individual where:

(i) it appears with other personal information that relates to the individual; or

(ii) the disclosure of the name itself would reveal personal information about the individual.[38]

[90] Executive Council must sever all personal information from the Record before releasing to the Applicant.

V FINDINGS

[91] I find that Executive Council has not met the burden of proof in demonstrating that the record constitutes advice and therefore section 17(1)(a) of *The Freedom of Information and Protection of Privacy Act* does not apply.

[38] *Supra* note 1, s. 24.

[92] I find that section 16(1)(d)(i) of *The Freedom of Information and Protection of Privacy Act* does not apply to the record as it has already been brought before Executive Council.

[93] I find that although there likely is some Cabinet confidence material in the record pursuant to section 16(1) of *The Freedom of Information and Protection of Privacy Act,* Executive Council has completely failed to identify those portions.

[94] I find that the record does contain some third party personal information pursuant to section 24 of *The Freedom of Information and Protection of Privacy Act.*

VI RECOMMENDATIONS

[95] I recommend Executive Council release the briefing books to the Applicant, severing:

a) personal information as defined by section 24 of *The Freedom of Information and Protection of Privacy Act*; and

b) only that content of the record that qualifies as Cabinet confidence material within the meaning of section 16(1) of *The Freedom of Information and Protection of Privacy Act*.

Dated at Regina, in the Province of Saskatchewan, this 12th day of June, 2012.

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