FILE NO. 99/011

REPORT WITH RESPECT TO THE APPLICATION FOR REVIEW OF [redacted] IN RELATION TO INFORMATION REQUESTED FROM REGINA PUBLIC LIBRARY

In early 1999 [redacted] (the applicant) filed an Access to Information Request Form with the Regina Public Library. The form detailed the description of the record requested as follows:

> "Amount paid by Regina Public Library to the Law Firm of MacPherson Leslie & Tyerman broken down by payment for contract negotiations, arbitrations, labour relations advice and other legal services"

There was presumably attached to the Access to Information Request Form a sheet of paper requesting further information of the Regina Public Library in the following words:

> "Please provide me with the following:
>
> 1. The details of any severance or retirement agreement that has been concluded with the former library director [redacted].
>
> 2. Details of any payments made or benefits provided to [redacted] under the agreement to date.
>
> 3. Details of payments that will be made or benefits to be provided to [redacted] under the agreement in the future."

The Respondent replied to the Applicant by letter dated March 30, 1999 denying access to the information requested and setting out its reasons in the following terms:

> "This letter is in response to your "Access to Information Request Form" under The Freedom of Information and Protection of Privacy Act, received March 29, 1999.
>
> We have reviewed the request and determined that the Regina Public Library Board is not permitted to disclose the information requested without [redacted] consent. Even if the Regina Public Library Board was permitted to disclose the information without [redacted] consent, it is not obligated to do so."

The Applicant filed a Request for Review with the office of the Information and Privacy Commissioner dated March 29, 1999.

On June 17, 1999 the then Information and Privacy Commissioner, Derril G. McLeod, Q.C., wrote the Respondent pointing out that its letter of reply to the Applicant of March 30, 1999 did not comply with the provisions of Section 7(2) of *The Local Authority Freedom of Information and Protection of Privacy Act* (the Act). When I was appointed Acting Freedom of Information and Privacy Commissioner in the Spring of 2000, I reviewed this file and determined that no response had been provided by the Respondent to the letter of the then Commissioner of June 17, 1999. I then wrote the Respondent on May 2, 2000 as follows:

> " As you may be aware, I was recently appointed Acting Information and Privacy Commissioner for the Province of Saskatchewan.
>
> I have now had an opportunity to review the above-noted file, and I note that [redacted] has made two separate access for information requests:
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> i) She has requested information regarding the severance agreement of [redacted], the former Library Director;
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> ii) She has requested information regarding the amount paid by the Regina Public Library to the law firm of MacPherson Leslie and Tyerman for contract negotiations, arbitration, labour relations advice and other legal services.
>
> With respect to [redacted] first request, from my review of the file, it does not appear that the Regina Public Library responded to a letter dated June 17, 1999, sent to the Library by Darril McLeod, the then Information and Privacy Commissioner. We enclose a copy of this correspondence for your convenience. Please advise as to whether the information requested by [redacted] in this first request has been provided to her.
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> With respect to her second request, we have reviewed the Library's response to [redacted] dated May 4, 1999. (We have also enclosed a copy of this letter for your convenience.) We wish to draw to your attention the fact that this correspondence does not comply with Section 7(2) of *The Local Authority Freedom of Information and Protection of Privacy Act*. As such, please provide us with the reason for the refusal of access and identify the specific provision of this Act on which the refusal is based.
>
> Thank you for your anticipated co-operation."

A response to that letter was finally received by me, prepared by counsel for the Respondent. The position of the Respondent was lengthily detailed by its counsel in that letter and for purposes of this Report I think it is appropriate to reproduce that communication in its entirety.

> "We act for the Regina Public Library Board with respect to the above-noted Request for Information regarding the severance agreement of [redacted], the former Library Director. We have received a copy of your letter dated May 4, 2000 to the Regina Public Library, and wish to apologize for the delay in responding.
>
> Your letter of May 4, 2000 references a letter dated June 17, 1999 sent to the Regina Public Library by the then Information and Privacy Commissioner, Derril McLeod. That letter stated that the Library Board's decision not to provide [redacted] with the information requested did not comply with section 7(2) of *The Local Authority Freedom of Information and Protection of Privacy Act* and Regulations (hereinafter the "Act and Regulations"). This letter is intended to provide you with a response to that concern.
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> Shortly after receiving [redacted] request for information with respect to the former Library Director's severance package, we reviewed for the facts and the applicable legislation and came to the following conclusions:
>
> (a) The Regina Public Library is not permitted to disclose the information requested without [redacted] consent;
>
> (b) Even if the Library was permitted to disclose the information without [redacted] consent, it is not obligated to do so.
>
> We reached the above conclusions for the following reasons:
>
> 1. <u>The severance package is personal information which requires consent for disclosure</u>.
>
> When [redacted] request for information concerning [redacted] severance package was originally received, we considered whether the information requested was public or personal information. By focussing on section 10 of the Regulations the Privacy Commissioner in his letter dated June 17, 1999 assumed that the severance package should be considered personal information.
>
> We agree with his assessment. Section 3 of the *Privacy Act* is comparable to s.23(2) of the *Local Authority Freedom of Information and Protection*

of Privacy Act. Under s.23(2), personal information does not include: (a) the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer or employee of a local authority; (c) financial or other details of a contract for personal services; or (e) details of a discretionary benefit of a financial nature granted to an individual by a local authority. Because "severance package" is not expressly referred to in this section, it follows that the severance package of [redacted] is personal information protected by the *Act*.

The relevant portions of section 10 are as follows:

> 10. For the purpose of subsection 28(2) of the Act, personal information may be disclosed:
>
> (g) to any person where the information pertains to:
>
> (i) The performance of any function or duty or the carrying out of any responsibility by an officer or an employee of a local authority; or
>
> (ii) The terms or circumstances under which a person ceased to be an employee of a local authority including the terms of any settlement or award resulting from the termination of employment: (emphasis added.)

Pursuant to *The Public Libraries, 1996 Act*, [redacted] was an officer of the library. Thus, only personal information as it pertains to his performance in his capacity as Library Director may be disclosed by the library without his permission. Because the word officer is absent from (g)(ii), it is unlikely that the library has the authority to unilaterally release information pertaining to his severance package.

Section 28(2) of the *Act* provides for two other instances where the library might release this information without the consent of [redacted]. The relevant portions of that section are as follows:

> 28(2) Subject to any other Act or regulation, personal information in the possession or under the control of a local authority may be disclosed:
>
> (n) for any purpose where, in the opinion of the head:
>
> (i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure; or

> (ii) disclosure would clearly benefit the individual to whom the information relates;

In the opinion of the head, there is no clear public interest for disclosure. On the one hand, in *R. v. Hanna* (1997, 25 C.E.L.R. (N.S.) 296), Kitchen J.P. of the Ontario Court of Justice stated at pp. 305-306:

> ...the public has a vital interest in knowing that their business is conducted fairly and in compliance with the law. One must not lose sight of the fact that the city is governed by persons elected by the public and entirely financed from the public purse...the right of access serves another useful purpose in that the business of the city is open to public scrutiny thus enhancing the prospect for proper conduct.

Furthermore, it is clear from the case law and writings on the subject that disclosure is the general rule and the refusal of disclosure is the exception. As McNairn and Woodbury conclude in *Government Information: Access and Privacy* (Scarborough: Richard De Boo, 1989):

> In general terms, access legislation provides for access to all information in records controlled by government institutions unless there is a specific provision in the legislation that either permits or requires the government to refuse to disclose the information.

On the other hand, information that is personal is clearly an exception to disclosure. And, while there are exemptions to personal information, it is our opinion that these, too, must be interpreted narrowly. In *Terry v. Canada (Minister of National Defence)* (1994, 30 Admin. L.R. (2d) 122) (F.C.T.D), Rouleau J. reaches a similar conclusion:

> After review, it is clear to me that the information being sought is "personal information" under s. 3 of the *Privacy Act*. However, the applicant submits that since the individual, whose personal information is presumed to be protected, was a Non-Commissioned Officer in the Canadian Armed forces, then par. 3 "personal information" (j) of the *Privacy Act* should apply. I have concluded that the exceptions found in para. 3(j) of the *Privacy Act* are very specific and should be interpreted narrowly. The rule of interpretation *expressio unius est exclusio alterius* has to be followed when interpreting this paragraph...

2. Even if the library could unilaterally disclose the information contained in the severance package, it is not required to do so.

Although it is our conclusion that the severance package is personal information that can not be disclosed without [redacted] consent, it is arguable that s.

10(g)(ii) referred to above does apply to officers and/or that the public interest "clearly" outweighs any invasion of privacy. In that event, it is necessary to examine whether s. 10 of the Regulations makes it mandatory for the local authority to disclose personal information if an application has been made. Section 10 of the regulations states that the local authority "may disclose" certain personal information without consent. Section 10 of the regulations states that the local authority "may disclose" certain personal information without consent. Section 28(2) of the Act, which governs s. 10 of the Regulations, states the same thing. Does the word "may" impose an obligation to disclose?

It is our opinion that the word "may" does not impose an obligation, but instead confers a discretion upon the local authority. *The Interpretation Act, 1995* states:

> 27(3) In the English version of an Act:
>
> (a) "shall" shall be interpreted as imperative;
>
> (b) "may" shall be interpreted as permissive and empowering.

An examination of the case law on this point is necessary. In the case *Smith & Rhuland Limited v. The Queen, on the Relation of Brice Andrews et al*, [1953] 2 S.C.R. 95, the Supreme Court of Canada decided that the word "may" is to interpreted as being permissive and granting a discretion, unless the context indicates otherwise. If the context indicates otherwise, "may" is to be interpreted as being imperative and demanding action.

In the present situation, the context indicates that "may" is to be interpreted as being discretionary. In the *Smith & Rhuland Limited*, the Court held that one factor to look at is the use of the words "may" and "shall" within the Act. If both are used, then "may" is discretionary, as any sections that are meant to be imperative will have used the word "shall". In our situation, the Act uses both "may" and "shall". For example, under s 28(1) the local authority "shall" not disclose personal information unless with consent. Therefore, since both words are used within the Act, "may" is to be interpreted as being permissive and granting discretion. In the context of confidential information under the *Special Import Measures Act*, Rouleau J. reached the same conclusion in *Electrohome Ltd. v. Canada (Deputy M.N.R. Customs and Excise)*, [1986] 2 F.C. 344 (F.C.T.D.).

A second factor to look at when determining whether the word "may" is intended to be imperative or discretionary is to look at the purpose of the Act. In the *Dagg* case mentioned above, the Supreme Court of Canada held that, with regards to the provisions dealing with privacy, the purpose of the Act is to protect an individual's privacy. The Act has specific exceptions as to what constitutes personal information, ensuring that most information is protected. In addition, most personal information cannot be released without the individual's consent.

Therefore, it seems contrary to the purpose of the Act to make it an obligation for the local authority to disclose personal information under s. 10 of the Regulations. It seems more plausible that the local authority is given some discretion so that not all personal information is released and the individual can receive some measure of protection of their privacy.

As a final not, in the *Liick* case referred to above, the Saskatchewan Court of Queen's Bench considered the discretionary and imperative sections in *The Freedom of Information and the Protection of Privacy Act*, the provisions of which are equivalent to those in the local authority legislation. Hrabinsky J. held that s. 28(2), the section which governs s. 10 of the Regulations, gives a local authority discretion in releasing information. Therefore, there is no obligation upon the library to release the severance package of [redacted].

Conclusion

Based upon the above analysis, our client accepts the view that the severance package of [redacted] is personal information as defined by the Act. While the Act promotes disclosure of information, personal information may only be disclosed upon the written consent of the individual unless there is a compelling public interest in disclosure. In this case, it is our client's opinion that there is no such clear and compelling public interest.

Although section 10(g)(ii) of the Regulations contemplates disclosure of the terms of any settlement or award resulting from the termination of employment without the consent of an employee, section 10(g)(ii) does not include "officers". (This was not a drafting oversight: section 10(g)(i) explicitly includes officers.) [redacted] was clearly an officer of the local authority, and it follows that pursuant to section 10(g)(ii) his severance package cannot be disclosed without his consent.

For these reasons, the Regina Public Library Board has not provided [redacted] with the information related to [redacted] severance package.

Your letter dated May 4, 2000 also refers to a request by [redacted] dated May 4, 1999 asking for information regarding the amount paid by our client to this firm for legal services. We were unaware of that request until our client provided us with a copy of your letter dated May 4, 2000.

We note your comment that our client's refusal to provide [redacted] with information concerning legal fees paid to this firm for specific legal services did not give the reason for the refusal and identify the specific provision of the Act on which the refusal was based.

We are instructed to advise you that [redacted] is requesting access to information subject to a solicitor/client privilege. As such, a head may refuse to give access to the information pursuant to section 21 of the Act.

We trust that this information will satisfactorily respond to your letter of May 4, 2000."

The position of the Respondent can be summarized as follows:

1. A severance package which in essence is the detail being requested by the Applicant is not specifically listed in the exclusions to personal information set forth in Section 23(2) of the Act, and, therefore, must be governed by the provisions of the Act and Regulations regarding personal information.

2. Since [redacted], he does not fall within the provisions of Section 10(g)(ii) of the Regulations (which makes reference only to "an employee").

3. Even if it is determined that [redacted] falls within the category of employee, the Respondent has a discretion under the provisions of Section 28(ii) of the Act and Section 10 of the Regulations to withhold the information requested.

(For purposes of this draft, then proceed to analyze the above;

although [redacted], he nevertheless is an employee as well;

obtain definition of employee from the dictionary and apply it to the facts of the case; conclude that [redacted] does come within the provisions of Section 10(g) of the Regulations. Section 28(i) of the Act sets out the prohibition against release by a local authority without the consent in the prescribed manner of the individual of personal information;

28(ii) permits the disclosure of information in the several instances listed in Section 28(ii). If there is a discretion residing in the Respondent by reason of the use "may", that discretion must be reasonably applied and the reasons for refusing to reveal the information are arguably unsustainable.