REPORT WITH RESPECT TO THE APPLICATION FOR REVIEW OF [redacted] IN RELATION TO INFORMATION REQUESTED FROM THE BOARD OF EDUCATION OF REGINA SCHOOL DIVISION NO. 4 OF SASKATCHEWAN

1. By an Access to Information Request form (accompanying letter dated February 16, 2001) [redacted] (the "Applicant") requested information from the Board of Education of the Regina School Division No. 4 of Saskatchewan (the "Respondent") regarding correspondence received by the Respondent and/or the Principal of [redacted] School in Regina which contained views or opinions about the Applicant and which originated from certain named individuals or members of their families.

2. The request was worded as follows:

> "All correspondence in the possession of the Regina School Division No. 4 and/or the Principal of [redacted] School which contains views or opinions about me originating from [redacted], [redacted], [redacted], [redacted] or other members of their families."

3. In a letter from Debra G. Burnett, Secretary-Treasurer for the Respondent dated March 21, 2001, the Respondent advised the Applicant as follows:

> "This serves to confirm that the above-noted request was received in this office February 26, 2001.
>
> Upon reviewing the pertinent provisions of both the provincial collective agreement and *The Local Authority Freedom of Information and Protection of Privacy Act*, it has been determined to refuse access to the records in question. In this regard, reference is drawn particularly to subsection 30(2) of *The Act* and the discretion afforded relative to release of the third party evaluative or opinion material provided 'explicitly or implicitly in confidence'."

4. The Respondent's solicitor, Mr. Rex M. Beaton of McDougall Gauley then replied to the Respondent as follows, in a letter dated April 9, 2001:

> "Please be advised that we act on behalf of the Saskatchewan Teachers' Federation and in particular, [redacted], who is employed with the Regina Public School Division at [redacted] School.

We have been provided with a copy of the following documentation:

1. [redacted] letter of February 16, 2001 with attached Access to Information Request Form;

2. Your letter of reply dated March 21, 2001 refusing access to the records requested.

We presume that you have been appointed Head on behalf of the Regina Public School Board for the purposes of *The Local Authority Freedom of Information and Protection of Privacy Act* ("Act"). If we are incorrect in this assumption, please advise who is the Head.

In connection with [redacted] request for access to information, we have also reviewed the following:

1. The Regina Public Board of Education policy GAKD entitled "Employee Access to Personnel Files" approved September 11, 2000;

2. Articles 10.2.2. and 10.2.3. of the current Provincial Collective Bargaining Agreement;

3. The relevant provisions of the Act;

4. Related documentation indicating that [redacted] has been put under formal evaluation or review which process will result in a formal written report.

Based upon the information available to us, it is our understanding that the individuals identified in [redacted] Access to Information Request Form wrote letters to the Regina Public School Board expressing views or opinions about [redacted] in her capacity as a teacher in the employ of the School Board.

These written views or opinions have not been placed in [redacted] personnel file and she has been refused access to this information.

It is our understanding that these views or opinions about [redacted] were a factor in the decision to place [redacted] under formal evaluation or review pursuant to the School Board's evaluation policy CHG. This evaluation process has serious potential impact on [redacted] employment and career. Specifically, it has the potential to result in termination of a teacher's contract of employment. As you are aware, a teacher termination recently occurred with the Regina Public School Board as a consequence of an evaluation under policy CHG.

In our view, the relevant provisions of the Act are as follows:

'PART IV

Protection of Privacy

Interpretation

"23(1) Subject to subsection (2), "personal information" means personal information about an identifiable individual that is recorded in any form, and includes:

...

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

...

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

Individual's access to personal information

30(1) Subject to Part III and subsection (2) and (3), an individual whose personal information is contained in a record in the possession or under the control of a local authority has a right to, and:

(a) on an application made in accordance with Part II; and

(b) on giving sufficient proof of his or her identity;

shall be given access to the record.

(2) A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by the local authority, where the information is provided explicitly or implicitly in confidence.'

Your letter of March 21, 2001 relies on section 30(2) of the Act in support of the decision to refuse access.

In our submission, section 30(2) does not justify refusal in these circumstances as it is intended to facilitate the "compiling" of information for the purpose of hiring employees or awarding contracts.

In addition, it is in our view, inappropriate for an employer to "compile" information on an employee and then use the compiled information as the basis for triggering a formal review or evaluation possibly leading to termination of contract, and at the same time, refuse access to the "compiled" information by the employee.

> We are writing as a courtesy to request a review of the decision to deny access to the materials requested before proceeding with a formal request for review by the Privacy Commissioner.
>
> We thank you for your attention to this matter and would request a prompt written reply to our request."

5. The Respondent replied to the Applicant's solicitor by way of letter dated April 23, 2001 as follows:

> "Receipt of your letter, dated April 9, 2001, relative to the above-noted matter is acknowledged.
>
> Please be advised that your correspondence has been forwarded to the Saskatchewan School Trustees Association for response. I trust this is satisfactory."

6. The Saskatchewan School Trustees Association replied to the Applicant's solicitor, by way of letter dated May 28, 2001. This correspondence stated as follows:

> "Your letter of April 9, 2001 has been forwarded to our office for response. We have reviewed the correspondence of [redacted] and [redacted] as well as the provisions of *The Local Authority Freedom of Information and Protection of Privacy Act*.
>
> Given the dual purpose of the legislation it appears that section 30(2) directly addresses the current fact situation. The information in question was 'provided explicitly or implicitly in confidence' in this case. It is opinion material and relates to the suitability for employment of [redacted]. There is nothing in the section that restricts the section's application to the hiring process. Suitability of an employee can be assessed at any time. The use of the words "and other benefits" also indicates that the refusal to disclose can extend to matters beyond the initial awarding of a contract.
>
> Boards of Education must balance the privacy interests of the person who provide confidential information to the Board about employees, against the right of the employee to access that information. Board also have a further consideration that most local authorities do not. Boards must also include consideration of the interests of the children who may be affected or involved. Given the nature of schools and the types of personal information that parents may want to keep confidential about their child and/or their family background, it is reasonable that the protection of privacy extends to confidential communications about a teacher. One can imagine instances, for example, where a parent might fear reprisals on a child if details of a complaint about a teacher are revealed inappropriately.
>
> Confidential disclosures may or may not lead to a review of a teacher's continued suitability for employment. While the actual documents need not be released, procedural fairness would require that any facts relied upon be fully disclosed to a teacher if a review

or action of a disciplinary nature were taken by the Board. In addition, if the situation leads to a termination of employment there are avenues available for the release of documents that would be covered by the provisions of the *Act* relating to disclosures in the course of legal proceedings.

In fact situations like the present, Boards of Education are caught in the middle between persons who want information kept confidential and employees who want information released. Because of section 30(2) and because there are other avenues for the release of facts or materials if employment is affected, the Board of Education has little choice but to continue to maintain the confidentiality of the information and refuse to disclose it under *The Local Authority Freedom of Information and Protection of Privacy Act*.

We trust this serves to clarify the position of the Board of Education of the Regina School Division No. 4."

7. In a formal Request for Review dated June 22, 2001, addressed to me, the Applicant's solicitor indicated that the Applicant had been refused access to all or part of the record that she had requested. In the correspondence which accompanied the Request for Review, the Applicant's solicitor stated that:

"Our office acts as counsel on behalf of [redacted], who is a teacher in the employ of the Board of Education of the Regina Public School Division No. 4 ('the School Board'). [redacted] has a total of approximately [redacted] years of teaching experience and has been in the employ of the School Board for the last [redacted] years.

We are writing pursuant to section 38 of *The Local Authority Freedom of Information and Protection of Privacy Act* (the 'Act') to request a review of the decision of the School Board or its head made pursuant to section 7 refusing [redacted] access to certain records. The records in issue consist of correspondence from a number of parents to the School Board or School Administration which correspondence, we believe, contain criticisms, allegations or complaints about [redacted] in her capacity as a teacher.

[redacted] has been denied access to these records notwithstanding that the correspondence in question led to [redacted] being placed under a formal teacher evaluation process which may lead to serious employment consequences for her, including possible termination of [redacted] contract of employment.

In support of the application for review, we enclose the following:

1. Application for review in the prescribed form;
2. Supporting Documentation Binder consisting of documents marked Tab A through I.

The enclosed Supporting Documentation Binder discloses the following:

1. Tab 1 – Memo dated January 31, 2001 from [redacted] to [redacted] acknowledging parental 'concerns' and 'constructive criticism' with respect to [redacted]. The memo confirms that [redacted] will be the subject of a series of meetings and observations resulting in a formal written report prior to June 30, 2001. The memo further suggests that the process will be 'fair' and 'based upon the tene[n]ts of natural justice'. Yet [redacted] has been refused access to the written concerns or criticisms levelled against her.

2. Tab 2 – Memo dated February 5, 2001 from [redacted] to [redacted] outlining an extensive Performance Evaluation Process of [redacted] based upon undisclosed parental concerns and criticism. This process includes parental involvement, yet [redacted] has been refused access to the written parental concerns or criticism.

3. Tab 3 – Letter dated February 16, 2001 with attached Access to Information Request form seeking access to the written views or opinions about [redacted] originating from the following named parents:

[redacted]

4. Tab 4 – A copy of School Board policy GAKD relating to employee access to personnel files with specific reference to clause 7.

5. Tab 5 – Copy of Article 10 of the current Provincial Collective Bargaining Agreement between the Boards of Education and the Government of Saskatchewan and the Teachers of Saskatchewan relating to access to Teacher Personnel Files.

6. Tab 6 – Letter dated March 21, 2001 from Ms. Debra Burnett, Secretary-Treasurer, refusing access to the records requested pursuant to section 30(2) of the Act.

7. Tab 7 – Letter dated April 9, 2001 from McDougall Gauley to Ms. Debra Burnett requesting a review of the Head's decision to refuse access.

8. Tab 8 – Letter dated April 23, 2001 acknowledging the request for review and referral of the matter to the Saskatchewan School Trustees' Association (SSTA) for response.

9. Tab 9 – Letter of May 28, 2001 from the SSTA refusing access on the basis of section 30(2) of the Act. Specifically, the School Board's position is that the requested records constitute 'personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility or qualification for employment'.

We have not located any case authority dealing with this specific situation; however, we would make the following submissions in support of the application for review:

1. We submit that the purpose of section 30(2) is to provide a measure of protection to an employer from disclosing material 'compiled solely' for the purpose of hiring employees or awarding contracts. This is supported by the phrase 'determining the individual's suitability, eligibility or qualifications for employment'. This language is more consistent with the initial employment phase as opposed to the performance review phase. The terms 'eligibility' and 'qualifications' for employment are relevant at the point of hiring. Specifically, [redacted] has a Professional A Teaching Certificate and is currently employed by the School Board. As such, her 'qualifications' and 'eligibility' for employment are in no way in issue. This leaves the only remaining attribute being 'suitability' for employment. Applying the *ejusdem generis* principle, it is submitted that this is intended to mean 'suitability' for hiring.

2. Even if section 30(2) is extended in scope to include the employment performance review phase, we submit that unsolicited letters of concern or complaint from parents are not 'compiled solely' for the purpose of determining [redacted] 'suitability for employment'. We submit that Section 30(2) was not intended to create an opportunity for an employer to solicit secret criticisms of its employees without the employee having access to the criticism. This is particularly true if the criticism can affect the individual's employment. Natural justice would dictate the employee be allowed to respond to refute the criticism.

3. The employer's reliance on section 30(2) as the basis for refusal constitutes an acknowledgement by the employer that it has 'compiled' information with respect to [redacted] and that the compiled information includes letters of complaint or concern by one or more parents. This compiled information is then used as the basis for triggering a formal review or evaluation potentially leading to termination of employment while, at the same time, the employer refuses access to the compiled information.

We thank you for your attention to this matter. In the event that you have any questions or require additional information, please do not hesitate to call or write."

8. I then determined that I would undertake the review as requested by the Applicant and advised the Respondent of this. I further determined that for the purposes of carrying out my review, it would be necessary for me to personally inspect the materials in question. I requested that the Respondent, pursuant to the provisions of Section 43(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act*, provide me with a copy of the documentation that was withheld from the Applicant. Copies of the relevant documents were duly forwarded to me by the Respondent and I have had an opportunity to review them.

9. The Respondent also provided me with further clarification as to its position in a letter from the Saskatchewan School Trustees Association addressed to me dated September 7, 2001. This correspondence stated:

> "Further to our correspondence of August 30, 2001, we would like to confirm that the letter that is unsigned came from [redacted]. There were no letters on file from the other two parents who were named in the request from Mr. Beaton.
>
> We have reviewed the letter dated June 22, 2001 from Mr. Beaton to your office and his submissions in support of the application. We offer the following response:
>
> 1. Mr. Beaton submits that Section 30(2) of *The Local Authority Freedom of Information and Protection of Privacy Act* provides protection to an employer from disclosing materials 'compiled solely' for the purpose of hiring employees or awarding contracts but that is not what the section says. There is nothing in the section that restricts the section's application to the hiring process. Suitability of an employee can be assessed at any time. The suitability for employment can be assessed at any time. For example, in many collective agreements an employer may dismiss a probationary employee 'for reasons of unsuitability'. In addition, the use of the words 'and other benefits' also indicates that the refusal to disclose can extend to matters beyond the initial awarding of a contract. Why is that phrase used if only the hiring process is to be included? Qualification for employment may also be assessed during the period of employment. Whether or not a teacher is suitable or qualified to teach a particular subject area; whether or not a teacher is suitable or qualified to act as a vice-principal or principal; whether or not a teacher is suitable to teach certain grades; whether or not a teacher is qualified to be awarded a particular benefit; these are all decisions that can and must be made during the course of an employment contract. It does not stretch the meaning of the section at all to include the concept of performance review.
>
> 2. The use of the words 'compiled solely' in section 30(2) relates to the use made by the employer of the materials. The letters in this case were submitted in confidence and the employer has used them solely for the purpose of determining [redacted] suitability for employment. In using them for that purpose, it is agreed that the Board is required to disclose the facts upon which they rely. That does not extend to include a duty to disclose the actual materials themselves which were submitted in confidence.
>
> It is our understanding that the documents were submitted voluntarily to the Board and we strongly object to any implication that the Board did 'solicit secret criticism'.

3. If the information submitted in confidential documents is used as the basis for triggering a formal review or evaluation the employer still has a duty to disclose the information on which it relies. The employee then has an ability to respond to those facts. That is a separate and distinct issue from the question of whether or not the actual documents must be released. If a matter were to ever proceed to a termination of employment there are other mechanisms in the *Act* relating to the discoverability of documents in the legal process which would apply.

4. As we have previously indicated, Boards have a further consideration that most local authorities do not. Boards must also include consideration of the interests of the children who may be affected or involved. Given the nature of schools and the types of personal information that parents may want to keep confidential about their child and/or their family background, it is reasonable that the protection of privacy extends to confidential communications about a teacher. One can imagine instances, for example, where a parent might fear reprisals on a child if details of a complaint about a teacher are revealed inappropriately. The children cannot control what their parents say and yet are the ones who would have to deal on a day-to-day basis with the results of any disclosure of confidential information.

5. The Provincial Collective Bargaining Agreement specifically addressed the issue of confidentiality of teacher Personnel Files in Clause 10.3 which reads:

    10.3.1 The presence of any document submitted in confidence shall be identified to the teacher.
    10.3.2 Subject to Clause 10.3.3, no written materials regarding the teacher which were submitted in confidence may be examined unless written permission is secured from the originator of such confidential material.
    10.3.3 The views or opinions of another person about a teacher, other than views or opinions given pursuant to Subsection 31(2) of *The Freedom of Information and Protection of Privacy Act* or Subsection 30(2) of *The Local Authority Freedom of Information and Protection of Privacy Act*, are the personal information of the teacher.

    It is clear from these clauses that the issue has been directly addressed by the collective agreement.

    For the purposes of analysis we will make the assumption, (which the Board disputes), that the materials in the present case are the opinions of another person about a teacher and that they are 'other than views or opinions' given pursuant to Subsection (30)(2). In such a case the teacher would

> have a right to view the documents. However, by virtue of clause 10.3.2 the teacher has agreed that she will not access materials which were submitted in confidence unless permission of the third party has been obtained.
>
> This is not a case where the statute overrules the agreement. It is instead a case where the teachers, knowing full well the rights under the statute (evidenced by referring directly to the statute in the collective agreement), have agreed that they will not exercise those rights unless there is permission from a third party. This is not a case of a local authority passing a regulation or policy in contradiction to a statute which would be struck down pursuant to Section 22. It is instead a case of a teacher, through the union, agreeing to only exercise that right under certain conditions, i.e. with the permission of the third party.
>
> We trust this serves to clarify the position of the Board of Education of the Regina School Division No. 4. We look forward to hearing further from you in due course."

10. The Applicant's solicitor then provided me with his response to this correspondence from the Saskatchewan School Trustees Association by way of letter addressed to me dated September 12, 2001. This correspondence stated as follows:

> "Thank you for the opportunity to provide a response to the points raised in Ms. Black's letter of September 7, 2001. I have four brief points to make in response:
>
> 1. In point 1, Ms. Black states 'Suitability of an employee can be assessed at any time.' The point here, as I understand it, is that an employee may be evaluated both at the point of hiring and beyond. We agree.
>
> Ms. Black goes on in point 2 to state 'The letters in this case were submitted in confidence and the employer has used them solely for the purpose of determining [redacted] suitability for employment.'
>
> Ms. Black acknowledges that these letters were used for the purposes of evaluating [redacted]. The School Board does have a formal written policy governing evaluation of teachers. It is intended to reflect the principles and openness and fairness in the evaluation process. It is submitted that the Board's position in this situation is not consistent with the principles or process in its own evaluation policy.
>
> 2. In point 3, Ms. Black suggests that if [redacted] contract is terminated, she may be entitled to the letters through 'other mechanisms' 'relating to the discoverability of documents'. With respect, it is submitted that [redacted] should not be forced to wait until termination of her contract to be in a position to receive and respond to written concerns about her teaching.

3. In point 4, Ms. Black refers to the instance in which 'a parent might fear reprisals on a child'. With respect, there is absolutely no factual basis whatsoever for this submission and I submit it is inappropriate in its suggestive nature.

4. It is submitted that the analysis contained in point 5 of Ms. Black's letter is incorrect in the following four respects:

(i) It is submitted that the parties to the Provincial Collective Bargaining Agreement have not and cannot contract out of the provisions of *The Local Authority Freedom of Information and Protection of Privacy Act* (the Act);

(ii) Ms. Black's statement as to the effect or impact of clause 10.3.2 is incorrect. This clause specifically states that it is 'subject to clause 10.3.3'. Clearly, 10.3.3 overrides 10.3.2.

(iii) It is submitted that the purpose and intent of clause 10.3.3 is not to restrict access, but rather to ensure that 'views or opinions of another person about a teacher ... are the personal information of the teacher'. This ensures that such information is treated as personal information in accordance with the Act and as such, available to the teacher in accordance with section 30 of the Act, subject only to section 30(2) and the statutory exclusions contained in Part III of the Act.

(iv) Clearly, <u>any</u> opinion about a teacher may be considered to be evaluative in nature. The School Board is advancing an interpretation of section 30(2) which would provide an absolute and unfettered discretion to refuse access to any such opinion about a teacher as long as it is provided 'explicitly or <u>implicitly</u>' in confidence.

Again, thank you for the opportunity to respond. Should you have any questions or require anything further, please do not hesitate to call or write."

11. The relevant provisions of *The Local Authority Freedom of Information and Protection of Privacy Act* are as follows:

"23(1) Subject to subsection (2), "personal information" means personal information about an identifiable individual that is recorded in any form, and includes: ...

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

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

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

28(1) No local authority shall disclose personal information in its position 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 29.

(2) Subject to any other Act or Regulation, personal information in the possession or under the control of a local authority may be disclosed:

(a) for the purpose for which the information was obtained or compiled by the local authority or for a use that is consistent with that purpose;

(b) For the purpose of complying with: ...

(i) Rules of Court that relate to the production of information; ...

(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; ...

30(1) Subject to Part III and subsection (2) and (3), an individual whose personal information is contained in a record in the possession or under the control of a local authority has a right to, and:

(a) on an application made in accordance with Part II; and

(b) on giving sufficient proof of his or her identity;

shall be given access to the record.

(2) A head may refuse to disclose to an individual personal information that is evaluative or opinion material compiled solely for the purpose of determining the individual's suitability, eligibility or qualifications for employment or for the awarding of contracts and other benefits by the local authority, where the information is provided explicitly or implicitly in confidence."

12. I have concluded that the documents in question fall within the exemption contained in Section 30(2) of the Act. In my view, the material is evaluative or opinion material compiled

solely for purpose of determining the Applicant's suitability for employment, and the information was provided to the Respondent in confidence by the authors of the material. I do not agree with the Applicant's submission that the exemption in section 30(2) applies only with respect to an individual's initial hiring. In my view, evaluating suitability for employment can also take place at other stages of an employee's career.

13. For the reasons outlined above, I recommend that the Respondent not release to the Applicant the withheld documents in question.

14. Dated at Regina, in the Province of Saskatchewan, this 15th day of October, 2001.

GERALD L. GERRAND, Q.C.
Commissioner of Information
and Privacy for Saskatchewan