

**REPORT WITH RESPECT TO THE APPLICATION  
FOR REVIEW OF [REDACTED] IN RELATION TO INFORMATION  
REQUESTED FROM THE UNIVERSITY OF SASKATCHEWAN**

[1] By an Access to Information Request form dated February 8, 2002, [REDACTED] (the “Applicant”) requested information from the University of Saskatchewan (the “Respondent”) pertaining to the Jacques Whitford Environmental Audit Report. His request was worded as follows:

“Jaques [sic] Whitford Environmental Audit Report –  
\*the full environmental report including the management systems report  
\*plus documents pertaining to this FOI request.”

[2] In a letter from Cheryl Avery, University Archivist for the Respondent, dated March 16, 2002, the Respondent advised the Applicant as follows:

“This is to advise you that the records you have requested will not be released. Under section 16(1) of the *Act*, the University ‘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 the local authority.’

The reports requested by you under the *Local Authority Freedom of Information Act* were a series of reports done by consulting engineers and environmental scientists company Jacques Whitford. As stated in their introductions, the reports by Jacques Whitford were to ‘provide specific recommendations’ and analysis relating to issues surrounding health, safety and environmental management. These studies were undertaken at the request of the University and provide the University with analysis, recommendations and policy options. As such these reports must be considered advisory documents, within the scope of section 16(1) of the *Act*.

The reports do not include results of environmental testing as would be understood by section 17(2) [sic] of the *Act*.

If you wish a review of this decision, you may do so within one year of this notice. To request a review, please complete a ‘Request for Review’ form, available at the University Archives. Your request should be sent to the Information and Privacy Commissioner: G.L. Gerrand, Q.C., 700-1914 Hamilton Street, Regina, SK S4P 3N6.

Please contact me at 966-6028 should you wish to discuss this matter further.

[3] In a formal Request for Review dated March 21, 2002, addressed to me, the Applicant indicated that he had been refused access to all or part of the documents that he had requested. Attached to his Request for Review was the Applicant's correspondence to me dated March 21, 2002, which stated as follows:

"I wish to request a review of a decision by the University of Saskatchewan to refuse access to a series of reports.

The reports, done by the firm Jacques Whitford, outline the status of health, safety and environmental management issues at the University.

These issues potentially affect students, staff and the surrounding community. Therefore the public has a right to know the contents of the reports and whether any of the recommendations have been acted upon.

Please contact me at [REDACTED] should you wish to discuss this matter further."

[4] I determined that I would undertake the review as requested by the Applicant and I duly advised the Respondent. Further, I requested that the Respondent, pursuant to the provisions of Section 40 of *The Local Authority Freedom of Information and Protection of Privacy Act* (the "Act"), provide me with a copy of the documents that were withheld from the Applicant. Copies of the relevant documents were duly forwarded to me by the Respondent, and I have had an opportunity to read and consider them.

[5] By letter dated April 30, 2002, I wrote to the Respondent as follows:

"Thank you for your letter of April 23, 2002 enclosing copies of the materials that are the subject of the application of [REDACTED].

In your letter to [REDACTED] of March 16, 2002, you assert that the University of Saskatchewan relies on Section 16(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (the "Act") for your refusal to grant access to [REDACTED] of the documentation in question

Section 16(1)(a) provides as follows:

'16(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, analysis or policy options developed by or for the local authority;'

As noted above, Section 16(1) is subject to the provisions of subsection (2). Section 16(2) of the *Act* provides as follows:

'16(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 existence of a discretionary power or an adjudicative function;
- (c) is the result of product or environmental testing carried out by or for a local authority, unless the testing was conducted:
  - (i) as a service to a person, a group of persons or an organization other than the local authority, 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 local authority; or
  - (ii) a substantive rule or statement of policy that has been adopted by a local authority for the purpose of interpreting an Act, regulation, resolution or bylaw or administering a program or activity of the local authority.'

Does the University of Saskatchewan have any representation to make to me respecting the potential application of the exceptions detailed in Section 16(2) as outlined above? If the University does have representations in this regard, I would be pleased to receive them from you at your early opportunity.

Section (8) of the *Act* contemplates the severability of documents. If you have any representations to submit to me regarding the applicability of the provisions of Section

16(2), would you also consider advising me what position you take regarding the severability of the voluminous material which you forwarded to me i.e. what portions does the University believe fall within that exception (if that is the position of the University) and what portions fall within the ambit of Section 16(1)(a).

I look forward to hearing from you in this regard.”

[6] The Respondent then replied to me as follows, by letter dated May 13, 2002:

“Thank you for the opportunity to provide further comment respecting the potential application of exceptions, as outlined in Section 16(2) of the *LAFOI Act*, to the materials requested by [REDACTED].

Section 16(2) appears to refer generally to material that is statistical or polling data, factual in nature, and/or was the basis for a policy or final decision made by an institution, or guidelines issued to assist with the adherence of established policies procedures, and does not refer to analyses or recommendations made to that institution. Of the exceptions stated, 16(2)(c) and 16(2)(e) appear most relevant.

Section 16(2)(c) refers to ‘the result of product or environmental testing carried out by or for a local authority.’ Particularly in light of the other exemptions, ‘product or environmental testing’ suggests specific testing of a quantitative nature; for example, standard tests for specific air, water, and ground contamination with results expressed in terms of precise amounts; or conducting standard tests on a product; again, producing specific measurable results.

The original Request for Proposal from the University was to ‘provide management consultation services to assist the University to implement and effective HSEMS (Health, Safety and Environmental Management System). The objective of this component (was) to provide the university with a comprehensive report’ containing recommended organizational changes; recommended structure, organization, terms of reference and lines of reporting for a HSEMS; recommendations for training; recommendations to improve existing HSE programs; an estimate of the required resources; a review of relevant existing policies and recommended modifications to those policies; and a recommended plan and timetable to implement the HSEMS at the University. A second component to the project was to undertake an audit, including submitting recommendations based on the audit, and to modify and/or develop procedures and provide training to facilitate subsequent audit projects. (Please see attached).

I submit that the University was not seeking a report containing ‘environmental testing’ as intended by Section 16(2)(c); nor does the report from Jacques Whitford contain the results of environmental testing. Instead, the *Report on Health, Safety and Environmental Management Consulting Study* and the audit reports very clearly provide a qualitative

analysis and resultant recommendations, including provisions of various options. Their analysis includes a broad 'risk management' assessment, including 'anticipated frequency of occurrence,' 'a cross section of possibilities' and related 'impacts which...may not have occurred.' Actual, (if any) occurrences, impacts, and frequency and quantitative data are not detailed in the reports.

Section 16(2)(e) refers to a record that is 'the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal.' This clause appears to reinforce Section 16(2)(b) and (f), referencing policies, guidelines, or other instructional documents that have been formally adopted by the institution. In light of Section 16(1)(a), it cannot refer to policy proposals under advisement, in draft form, or as-yet unformulated. Given the all-encompassing nature of the reports submitted for review by Jacques Whitford, it is my understanding that the University has yet to formulate policies in connection with the recommendations it received. It would be my advice to the University to reference the Jacques Whitford reports in any future HSE policies developed; and I would assume that any such policies would be publicly accessible via its website at <http://www.usask.ca/policies/>.

The reports requested by [REDACTED] are less than 25 years old (Section 16(2)(a)); are not official records outlining reasons for a decision (Section 16(2)(b)); are not statistical (Section 16(2)(d)); and are not rules, policy documents, guidelines or instructions adopted by the University (Section 16(2)(f)).

The essential issue from our perspective is to enable the institution for fully analyse the advice, analysis and recommendations it has received. This would appear to be the intent of Section 16(1) of the *Act*. The University should then be held accountable for any formal decisions or policies it makes based on those recommendations, as would appear to be the intent of Section 16(2).

[At the request of the Respondent, the final paragraph of this letter was severed from the copy of this letter that was provided to the Applicant. As such, it is not appropriate to reproduce this paragraph herein.]”

[7] With the permission of the Respondent, I provided a copy of this letter (with the final paragraph severed) to the Applicant.

[8] In a letter dated June 17, 2002, the Applicant wrote to me as follows:

“Thank you for the opportunity to provide further comment respecting the potential application of exceptions. Unfortunately, I’m not an expert on the FOI act and the [REDACTED] does not have the resources to hire legal counsel on this matter. However, I have enclosed a copy of a newspaper article that appeared in the Globe and Mail June 14, 2002. It deals with the release of background information used by cabinets for decision making.

I am surprised and disappointed at the University's efforts to stop this material from being released. I am told by people who have seen this document that it is of public interest. If it is released the University will have an opportunity to respond. I look forward to your decision."

[9] The provisions of the *Act* upon which the Respondent relies are as follows:

"16(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 the local authority..."

"16(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 existence of a discretionary power or an adjudicative function;
- (c) is the result of product or environmental testing carried out by or for a local authority, unless the testing was conducted:
  - (i) as a service to a person, a group of persons or an organization other than the local authority, and for a fee; or
  - (ii) as preliminary or experimental tests for the purpose of:
    - 1. developing methods of testing; or
    - 2. testing products for possible purchase;
- (b) is a statistical survey;
- (c) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal; or
- (d) is:
  - (i) an instruction or guide-line issued to the officers or employees of a local authority; or
  - (ii) a substantive rule or statement of policy that has been adopted by a local authority for the purpose of interpreting an Act, regulation, resolution or bylaw or administering a program or activity of the local authority..."

[10] The withheld documents consist of five bound volumes, totaling 626 pages. The Respondent claimed that these documents are exempt from production pursuant to Section 16(1)(a) of the *Act*. Further, they claim that none of the exemptions set forth in Section 16(2) of the *Act* apply to these documents. After reviewing these documents, it appears to me that these

documents were created to present advice, recommendations, analyses and policy options to the Respondent. As such, these documents do fit within the scope of Section 16(1)(a) of the *Act*.

[11] The withheld documents relate to issues surrounding health, safety and environmental management. It is my view that as far as the documents relate to health and safety issues, no portion of Section 16(2) of the *Act* applies. Thus, I recommend that these portions of the requested documents not be disclosed to the Applicant.

[12] However, with respect to the portions of the document that deal with environmental issues I have considered whether these portions of the requested documents fall within Section 16(2) of the *Act*. In my view, these portions of the documents fall within Section 16(2)(c) of the *Act*. In my opinion, these records are the result of environmental testing carried out for the University of Saskatchewan, and that such testing does not properly fall within Section 16(2)(c)(i) and 16(2)(c)(ii) of the *Act*. Thus, these portions of the document do not fall within the Section 16(1)(a) provision, which would allow the Respondent to exempt these documents from access by the Applicant. I recommend that the Respondent sever the portions of the requested documents that pertain to environmental issues and disclose these portions of the documents to the Applicant. In my opinion, these portions of the documents can be severed from the body of the reports so that there is no reasonable prospect of revealing information in contravention of the provisions of Section 16(1)(a).

[13] In making this determination, I have considered jurisprudence in the realm of access to information. In *General Motors Acceptance Corp. of Canada vs. Saskatchewan Government Insurance* (1993), 116 Sask. R. 36 at 41 (C.A.), Tallis, J.A. set out the governing principles as follows:

“The *Act*’s basic purpose reflects a general philosophy of full disclosure unless information is exempted under clear delineated statutory language. There are specific exemptions from disclosure set forth in the *Act*, but these limited exemptions do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the *Act*. That is not to say that the statutory exemptions are of little or no significance. We recognize that they are intended to have a meaningful reach and application. The *Act* provides for specific exemptions to take care of potential abuses. There are legitimate privacy interests that could be harmed by

release of certain types of information. Accordingly, specific exemptions have been delineated to achieve a workable balance between the competing interests. The *Act's* broad provisions for disclosure, coupled with specific exemptions, prescribe the 'balance' struck between an individual's right to privacy and the basic policy of opening agency records and action to public scrutiny."

[14] The analysis of this matter must commence with the proposition that the Applicant has the statutory entitlement to access to the information requested. Section 5 of the *Act* sets forth in clear terms the entitlement of every person to access to records in the possession or under the control of a local authority. Section 5 of the *Act* reads as follows:

"Subject to this Act and the Regulations, every person has a right to and, on an application made in accordance with this Part, shall be permitted access to records that are in the possession or under the control of a local authority."

[15] The fundamental issue here is whether or not the Respondent is entitled to refuse access to the information requested on the basis of the statutory exemptions relied upon.

[16] As referenced above, the Respondent contends that Section 16(2)(c) of the *Act* does not apply as the particular exemption enunciated therein suggested testing of a quantitative nature. It is my view that the wording of Section 16(2)(c) does not lend itself to this interpretation. I am satisfied that portions of the requested documents that deal with environmental issues are the result of environmental testing within the meaning of the *Act*.

[17] I therefore recommend that the Respondent prepare and submit to the Applicant an estimate of the costs that it expects it would incur in carrying out the severing from the reports it had previously withheld from the Applicant all portions of the document pertaining to environmental issues. This estimate of costs should be identified in accordance with the provisions of the *Act* and the Regulations passed thereunder. I further recommend that upon the Applicant making appropriate arrangements for the payment of the costs of the severing of these portions of the documents, that copies of these portions of the document be produced and furnished to the Applicant.



[18] It appears to me that it can easily be ascertained which portions of the documents should be severed and released to the Applicant; however, if there is uncertainty about this, this matter may be brought back before me or my successor, for further direction.

[19] There is one more portion of the withheld documents that I recommend not be disclosed to the Applicant as it falls within Section 21 of the *Act*, which states:

“A head may refuse to give access to a record that:

- (a) contains information that is subject to solicitor-client privilege;
- (b) was prepared by or for legal counsel for the local authority in relation to a matter involving the provision of advice or other services by legal counsel;  
or
- (c) contains correspondence between legal counsel for the local authority and any other person in relation to a matter involving the provision of advice or other services by legal counsel.”

This document is contained at Appendix 11 of the bound report labelled “Project No. SKR 00934-1”.

[20] Dated at Regina, in the Province of Saskatchewan, this 26<sup>th</sup> day of July, 2002.

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