Date: October 1, 2007 **File No.: 2004/051**

SASKATCHEWAN

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT LA-2007-001

University of Saskatchewan

Summary: The Applicant sought access to the letters of resignation from three former members of the University of Saskatchewan Biomedical Research Ethics Board. The University refused access on the basis of a number of exemptions, namely sections 14(1)(d); 16(1)(a) and (b); 17(1)(d) and (f); 18(1)(c) and 23(1)(h) of *The Local Authority Freedom of Information and Protection of Privacy Act.* The Commissioner upheld the severing of two paragraphs in one letter on the basis of section 16(1)(a) and recommended the severing of personal information of third parties pursuant to section 28. He recommended that the redacted record be provided to the Applicant.

Statutes Cited: *The Local Authority Freedom of Information and Protection of Privacy Act*, [S.S. 1990-91, c. L-27.1 as amended], ss. 2(k), 12(1), 14(1)(d), 16(1)(a),(b),(d), 16(2), 17(1)(d),(e),(f), 18(1)(c), 23, 28, 28(2)(s), 41, 50; *The Local Authority Freedom of Information and Protection of Privacy Regulations*, [c. L-27.1, Reg. 1], s. 10(g)(ii); *The Freedom of Information and Protection of Privacy Act*, [S.S. 1990-91, c. F-22.01 as amended], ss. 14, 15(1)(d), 16, 17(1)(a), 18, 19(1)(c); Ontario's *Freedom of Information and Protection of Privacy Act*, [R.S.O. 1990, c. F.31 as amended], ss. 13(1), 13(2), 18; British Columbia's *Freedom of Information and Protection of Privacy Act*, [R.S.B.C. 1996, c. 165, as amended], ss. 2(1), 12, 13(1).

Authorities Cited: **Reports and Orders:** Saskatchewan (SK) OIPC Reports 92/008, 92/009, 92/015, 92/023, 92/001, 93/009, 93/012, 94/002, 94/011, 95/001, 95/023, 96/002, 96/010, 96/021, 96/023, 96/032, 2000/011, 2000/025, 2001/009, 2001/027, 2001/029, 2001/036, 2001/047,

2002/004, 2002/014, 2002/037, 2002/041, 2003/018, 2003/034, 2004/034, 2004/055, F-2004-001, F-2004-002, F-2004-003, F-2004-005. F-2004-007, F-2006-002, F-2006-003, F-2006-004, LA-2004-001; British Columbia OIPC Orders 00-48, F07-17; Newfoundland and Labrador OIPC Report 2005-005.

Court Decisions: *Canada (Information Commissioner)* v. *Canada (Solicitor General),* [1998] 3 F.C. 551 (Fed. T.D.); *Blank* v. *Canada (Minister of Justice),* [2006] 2 S.C.R. 319, 2006 SCC 39, 52; *College of Physicians of British Columbia* v. *British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 2779; *Weidlich* v. *Saskatchewan Power Corporation* (1998), 164 Sask. R. 204; *Ontario (Ministry of Northern Development and Mines)* v. *Ontario (Assistant Information and Privacy Commissioner),* [2004] O.J. No. 163; *Ministry of Transportation* v. *Cropley,* [2006] CanLII 11832 (S.C.C.); *General Motors Acceptance Corporation of Canada* v. *Saskatchewan Government Insurance* [1993] S.J. No. 601 (C.A.); *Ontario (Ministry of Transportation)* v. *Consulting Engineers of Ontario,* [2005] O.A.C. 379 (ON C.A.); *Ontario (Ministry of Northern Development and Mines)* v. *Mitchinson,* [2005] CanLII 34229 (ON C.A.); *H.J. Heinz Co. of Canada Ltd.* v. *Canada (Attorney General),* 2006 SCC 13, [2006] 1 S.C.R. 441; *Canada (Information Commissioner)* v. *(Commissioner of the Royal Canadian Mounted Police),* [2003] 1 S.C.R. 66, 2003 SCC 8; *Rubin* v. *Canada (Minister of Transport) (1997),* 221 N.R. 145 (Fed. C.A.); *Northern Cruiser Co.* v. *R.* (1992), 47 F.T.R. 192 (Fed T.D.), affirmed (1995) 185 N.R. 391 (Fed. C.A.); *Rubin* v. *Canada (Minister of Transport) (1997),* 221 N.R. 145 (Fed. C.A.); *Canada Post Corp.* v. *Canada (Minister of Public Works),* [1993] 3 F.C. 320 (Fed T.D.), affirmed [1995] 2 F.C. 110 (Fed. C.A.); *Noel* v. *Great Lakes Pilotage Authority Ltd.* (1987), [1988] 2 F.C. 77 (Fed. T.D.); *St. Joseph Corp.* v. *Canada (Public Works & Government Services),* [2002] F.C.J. No. 361, 2002 FCT 274, 2002 CarswellNat 573, 2002 CarswellNat 1296 (Fed. T.D.).

Other Sources Cited:

Black's Law Dictionary, Eighth Edition; *Annual Report 2004-2005*, British Columbia Information and Privacy Commissioner; *The Report of the 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*; Saskatchewan Justice, *The Freedom of Information and Protection of Privacy Act Annual Report 2006-2007*; *The Offices of The Information and Privacy Commissioners: The Merger and Related Issues,* Gerard V. La Forest.

I. BACKGROUND

[1] Three members (A, B and C) of the Biomedical Research Ethics Board (the Board) of the University of Saskatchewan (the University) resigned their position in December 2003. The Applicant wrote to the University on January 16, 2004 and submitted a Request for Access to the *"letters of resignation from University of Saskatchewan Biomedical Research Ethics Board written by:* [A], [B] and [C]*"*.

[2] The University advised the Applicant on or about February 13, 2004 that "[i]*n accordance with section 12(1) of the Local Authority Freedom of Information Act* [sic], *this letter is to inform you that we will require an extension in order to comply with your request"*.

[3] On March 12, 2004 the University wrote to the Applicant to advise that the records requested would not be released. The University's FOIP Coordinator advised the Applicant, in part, that:

> *This is to advise you that the records you have requested will not be released.*
>
> *Part III, section 16(1)(a) & (b) authorizes a local authority to refuse 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;*
> >
> > *(b) consultations or deliberations involving officers or employees of the local authority.*
>
> *Further definition of "advice" as understood with regard to access legislation has been given as "primarily the expression of counsel or opinion, favourable or unfavourable, as to action but it may …signify information or intelligence." [Weidlich* v. *Saskatchewan Power Corporation (1998), 164 Sask. R. 204].*
>
> *Part II, section 17(1)(f) authorizes a local authority to refuse access to a record:*
>
> > *(f) the disclosure of which could reasonably be expected to prejudice the economic interest of the local authority.*

> *All three letters provide elements of situational analysis, personal opinion, and advice; one letter in particular also offers policy options to the University. Specifically, the authors are providing their analysis of current situations and are in effect advising the University. That the authors have demonstrated a strong commitment to their analysis merely indicates their desire for the University to act upon their advice.*
>
> *Any specific facts within the documents are so intertwined with opinion that the two cannot be intelligently separated. In such cases, the court has found that it is reasonable to refuse access to the whole of the document rather than to attempt to sever it.*
>
> *Additionally, portions of the letters would each be subject to a refusal under other sections of the LA FOI* [sic] *Act. Specifically:*
>
> > *23(1)(h): the views or opinions of another individual with respect to the individual;*
> >
> > *14(1)(d): be injurious to the local authority in the conduct of existing or anticipated legal proceedings;*
> >
> > *17(1)(d): information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the local authority.*
> >
> > *18(1)(c): information, the disclosure of which could reasonably be expected to: result in the financial loss or gain to; prejudice the competitive position of; or interfere with the contractual or other negotiations of a third party.*

[4] By a Request for Review dated June 16, 2004 received in our office on June 21, 2004, the Applicant requested that our office review the decision of the University.

[5] Our office requested that the University provide us with the record in issue and its written submission. On August 13, 2004 we received the record and a detailed written submission from the University. The entire submission was forwarded to our office on the basis that it not be shared with the Applicant. We requested and the University agreed to redo the submission so that more of the explanation for the refusal to disclose could be shared with the Applicant. We received the revised submission on September 24, 2004. The portion that could be shared with

the Applicant, as a result of revised instructions from the University, was forwarded to her.

[6] The University has taken the position that although not all of the three resigning Board members were permanent employees of the University, they were acting as officials of the institution in the same manner as non-employee members of the Board of Governors or Senate would be considered University officers. Terms of appointments to the Board are clearly defined and the conditions as well as duration of appointments are at the discretion of the University. The University has provided our office with a document entitled *University of Saskatchewan Research Ethics Boards, Terms and Conditions of Appointments for REB Members.*

II. THE RECORD

[7] In the record provided by the University, each of the seven pages is numbered consecutively from 1 to 7.

[8] The responsive record consists of the following:

1. Letter dated December 15, 2003 from A to a Vice-President of the University (pages 1-3 of the record).
2. Letter undated from B to a Vice-President of the University (pages 4-5 of the record).
3. Letter dated December 19, 2003 from C to a Vice-President of the University (pages 6-7 of the record).

Page	Paragraph	EXEMPTIONS APPLIED		
		Letter A	Letter B	Letter C
1	1	no exemption claimed		
	2	no exemption claimed		
	3	16(1)(b), 17(1)(d)		
	4	16(1)(b), 17(1)(d)		
	5	16(1)(b), 17(1)(d)		
2	1	16(1)(a)		
	2	14(1)(d), 16(1)(a),(b), 18(1)(c), 23(1)(h)		
	3	16(1)(a)		
	4	14(1)(d), 16(1)(a),(b)		
3	1	no exemption claimed		
	2	no exemption claimed		
	3	no exemption claimed		
	4	no exemption claimed		
4	1		no exemption claimed	
	2		14(1)(d), 16(1)(a),(b), 18(1)(c), 23(1)(h)	
	3		17(1)(d)	
5	1		17(1)(d)	
	2		17(1)(d)	
	3		no exemption claimed	
	4		no exemption claimed	
	5		no exemption claimed	
6	1			no exemption claimed
	2			14(1)(d), 16(1)(a),(b), 17(1)(d), 23(1)(h)
	3			17(1)(d)
	4			17(1)(d)
	5			17(1)(d)
	6			16(1)(b)
	7			14(1)(d), 16(1)(a),(b), 18(1)(c), 23(1)(h)
7	1			14(1)(d), 16(1)(a),(b), 23(1)(h)
	2			no exemption claimed

III. ISSUES

1. **Is the University entitled to raise new discretionary exemptions during the review that were not communicated to the Applicant when the Request for Access was dealt with?**

2. **Does section 28 of *The Local Authority Freedom of Information and Protection of Privacy Act* apply to the record withheld?**

3. **Did the University properly apply section 16(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record withheld?**

4. **Did the University properly apply section 16(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record withheld?**

5. **Did the University properly apply section 14(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record withheld?**

6. **Did the University properly apply sections 17(1)(d) and (f) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record withheld?**

7. **Did the University properly apply section 18(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record withheld?**

IV. DISCUSSION

1. Is the University entitled to raise new discretionary exemptions during the review that were not communicated to the Applicant when the Request for Access was dealt with?

[9] When our office commenced the review we were advised by the University that it wished to rely on additional discretionary exemptions not previously raised in its dealings with the Applicant, namely sections 16(1)(d) and 17(1)(e) of *The Local Authority Freedom of Information and Protection of Privacy Act* (the Act). We advised both the University and the Applicant that our practice is not to consider discretionary exemption claims raised for the first time at the review stage unless we are satisfied that there is no prejudice to the Applicant (SK OIPC Report F-2004-007, [16]). We invited submissions on this preliminary issue. After reviewing submissions on that issue, I cannot conclude that there is no prejudice

to the Applicant in considering additional discretionary exemptions that the University failed to raise in responding to the original access request. Consequently, I will not consider submissions with respect to section 16(1)(d) and section 17(1)(e) of the Act.

Accuracy of the Record

[10] The University has advanced an argument that the record is incomplete, and inadequately describes a situation that is much more complex than might be apparent from the bare text of the record.

[11] I have no reason to believe this concern is unfounded but that is quite apart from the specific legislation I am charged with overseeing. The scheme of the Act is to ensure that applicants are entitled to access **records** in whatever form they exist subject only to limited and specific exemptions. The above noted arguments advanced by the University have no foundation in LA FOIP and therefore provide no basis for refusing access.[1] The University is free to provide clarification to any applicant if it determines that the record is incomplete or overly simplistic but it cannot convert inadequacies or inaccuracies in the record into a reason to deny access under LA FOIP.

[12] Furthermore, the implicit duty to assist[2] would normally apply such that a local authority that is providing inaccurate, incomplete or misleading documents in response to a formal access request would need to carefully consider whether there is some additional information that ought to be provided to the applicant to supplement the record.

[1] SK OIPC Report F-2006-003, [49] to [53]. Available at www.oipc.sk.ca.
[2] This implicit duty to assist is to respond openly, accurately and completely to an access request. SK OIPC Reports F-2006-004 and F-2004-005.

2. Does section 28 of *The Local Authority Freedom of Information and Protection of Privacy Act* apply to the record withheld?

[13] The burden of proof on this review rests with the University by reason of section 51 of the Act that provides as follows:

> ***51*** *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.*

[14] Section 23(1)(h) of the Act has been raised by the University in respect of each of the three letters from resigning Board members. It has been invoked in respect to the letter from A (page 2, paragraph two); the letter from B (page 4, paragraph two); and the letter from C (page 6, paragraphs two and seven; and page 7, paragraph one).

[15] Section 23(1) provides as follows:

> ***23****(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;*
>
> *(c) information that relates to health care that has been received by the individual or to the health history of the individual;*
>
> *(d) any identifying number, symbol or other particular assigned to the individual;*
>
> *(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;*
>
> *(g) correspondence sent to a local authority 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.

(1.1) On and after the coming into force of subsections 4(3) and (6) of The Health Information Protection Act, with respect to a local authority that is a trustee as defined in that Act, ***"personal information"*** *does not include information that constitutes personal health information as defined in that Act.*

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

(a) the classification, salary, discretionary benefits or employment responsibilities of an individual who is or was an officer ore employee of a local authority;

(b) the personal opinions or views of an individual employed by a local authority given in the course of employment, other than personal opinions or views with respect to another individual;

(c) financial or other details of a contract for personal services;

(d) details of a licence, permit or other similar discretionary benefit granted to an individual by a local authority;

(e) details of a discretionary benefit of a financial nature granted to an individual by a local authority;

(f) expenses incurred by an individual travelling at the expense of a local authority;

(g) the academic ranks or departmental designations of members of the faculties of the University of Saskatchewan or the University of Regina; or

(h) *the degrees, certificates or diplomas received by individuals from the Saskatchewan Institute of Applied Science and Technology, the University of Saskatchewan or the University of Regina.*

(3) Notwithstanding clauses 2(d) and (e), "personal information" includes information that:

(a) is supplied by an individual to support an application for a discretionary benefit; and

(b) is personal information within the meaning of subsection (1).

[emphasis added]

[16] Although the University has invoked section 23 in its response to the Applicant, this is only a definition of what is and is not "personal information". In terms of whether that personal information can be disclosed we need to examine section 28.

[17] Section 28 provides as follows:

> ***28****(1) No local authority 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 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) a subpoena or warrant issued or order made by a court, person or body that has the authority to compel the production of information; or*
>
> *(ii) rules of court that relate to the production of information;*
>
> *(c) to the Attorney General for Saskatchewan or to his or her legal counsel for use in providing legal services to the Government of Saskatchewan or a government institution;*
>
> *(d) to legal counsel for a local authority for use in providing legal services to the local authority;*
>
> *(e) for the purpose of enforcing any legal right that the local authority has against any individual;*
>
> *(f) for the purpose of locating an individual in order to collect a debt owing to the local authority by that individual or make a payment owing to that individual by the local authority;*
>
> *(g) to a prescribed law enforcement agency or a prescribed investigative body:*
>
> *(i) on the request of the law enforcement agency or investigative body;*
>
> *(ii) for the purpose of enforcing a law of Canada or a province or territory or carrying out a lawful investigation; and*
>
> *(iii) if any prescribed requirements are met;*
>
> *(h) pursuant to an agreement or arrangement between the local authority and:*

(i) the Government of Canada or its agencies, Crown corporations or other institutions;

(ii) the Government of Saskatchewan or a government institution;

(iii) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;

(iv) the government of a foreign jurisdiction or its institutions;

(v) an international organization of states or its institutions; or

(vi) another local authority;

for the purpose of administering or enforcing any law or carrying out a lawful investigation;

(h.1) for any purpose related to the detection, investigation or prevention of an act or omission that might constitute a terrorist activity as defined in the Criminal Code, to:

(i) a government institution;

(ii) the Government of Canada or its agencies, Crown corporations or other institutions;

(iii) the government of another province or territory of Canada, or its agencies, Crown corporations or other institutions;

(iv) the government of a foreign jurisdiction or its institutions;

(v) an international organization of states or its institutions; or

(vi) another local authority;

(i) for the purpose of complying with:

(i) an Act or a regulation;

(ii) an Act of the Parliament of Canada or a regulation made pursuant to an Act of the Parliament of Canada; or

(iii) a treaty, agreement or arrangement made pursuant to an Act or an Act of the Parliament of Canada;

(j) where disclosure is by a law enforcement agency:

(i) to a law enforcement agency in Canada; or

(ii) to a law enforcement agency in a foreign country;

pursuant to an arrangement, a written agreement or treaty or to legislative authority;

(k) to any person or body for research or statistical purposes if the head:

(i) is satisfied that the purpose for which the information is to be disclosed is not contrary to the public interest and cannot reasonably be accomplished unless the information is provided in a form that would identify the individual to whom it relates; and

(ii) obtains from the person or body a written agreement not to make a subsequent disclosure of the information in a form that

> *could reasonably be expected to identify the individual to whom it relates;*
>
> *(l) where necessary to protect the mental or physical health or safety of any individual;*
>
> *(m) in compassionate circumstances, to facilitate contact with the next of kin or a friend of an individual who is injured, ill or deceased;*
>
> *(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;*
>
> *(o) to the Government of Canada or the Government of Saskatchewan to facilitate the auditing of shared cost programs;*
>
> *(p) where the information is publicly available;*
>
> *(q) to the commissioner;*
>
> *(r) for any purpose in accordance with any Act or regulation that authorizes disclosure; or*
>
> *(s) as prescribed in the regulations.*

[18] I assume that the University's argument is that section 28 of the Act limits disclosure by a local authority without consent of the individual to the circumstances enumerated in subsection (2) of section 28 of the Act. Although the notification to the Applicant is deficient in not identifying section 28 of the Act as a basis for the refusal to disclose, it is a mandatory exemption. Our invariable practice is to consider mandatory exemptions regardless of whether the local authority properly raises those exemptions in its response to the Applicant.

[19] In considering the exemption for personal information I note that in past Reports of this office, reference has been made to the LA FOIP Regulation section 10. That Regulation, which is enabled by section 28(2)(s) of the Act, permits personal information to be disclosed by a local authority:

> *(g) to any person where the information pertains to:*
>
> *(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]

[20] That Regulation does not alter my approach which is to treat section 28 of the Act as a mandatory exemption. It simply provides an exception to the mandatory exemption in the limited circumstances of Regulation 10(g).

[21] Unlike the circumstances of a school volunteer that I considered in Report LA-2004-001, members of the Board are formally appointed in accordance with the *University of Saskatchewan Research Ethics Boards, Terms and Conditions of Appointments for REB Members*. I therefore accept the submission of the University that members of the Biomedical Research Ethics Board qualify as "employees" or "officers" within the meaning of the Act.

[22] There is authority that resignation letters containing information such as employment history including the reasons for resigning should be treated as the personal information of the authors.[3]

[23] I find that the three letters of resignation contain information that relates to the employment history of the respective authors within the meaning of section 23(1)(b) of the Act.

[24] Section 41 of the Act requires that the University give notice to the three authors immediately upon receipt of the Applicant's notice of review. In the course of our review we also notified each of the authors of the resignation letters and invited them to make submissions on the Review.

[25] Author A responded that:

> *I had not been aware of any freedom of information process relative to the subject matter.*
>
> *I have no wish to make any submissions on your review of the University's decision beyond saying that I have no objections to the disclosure sought.*

[3] BC OIPC Order 00-48. Available at http://www.oipc.bc.ca/orders/.

[26] No response was received from B and C. The University however then advised us late in the Review process that B and C had also communicated to the University that they would consent to the release of their letters.

[27] In light of the consent of the three resigning Board members, I need consider section 28 of the Act solely in connection with any reference to the personal information of third parties other than A, B and C. In accordance with sections 23(1)(f) and 23(2)(b) of the Act opinions of an employee or officer about another individual would be the personal information of that other individual not the personal information of the author.

[28] If the consent of the three authors had not been forthcoming, I would have determined that each of these letters relates to events that can be characterized as "employment history" of the authors. In the result I would have found that the letters of resignation from A, B and C in their entirety would be subject to the mandatory exemption in section 28 of the Act.

Letter of Resignation of A

[29] In the letter from A, there is reference to five other individuals. Each is or was an employee or officer of the University. In some cases the information relates to the employees' positions or functions. In other cases the information relates to their performance in those positions which would constitute her/her employment history.[4]

[30] As noted earlier in this Report, I accept that the 3 resigning members of the Board were at all material times, "officers" of the University.

[4] *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1998] 3 F.C. 551 (Fed. T.D.) at 558.

[31] In the result, although A has consented to release of the letter of resignation from the Board, A cannot consent to the release of the personal information of other individuals included in the letter.

[32] To the extent that A's personal opinions relate to an individual who has not consented to the release of this information, those personal opinions concerning another individual could only be released with the consent of that individual.[5] Otherwise, the personal information of those third parties would need to be severed before any release of the record to the Applicant.

[33] The specific references to be severed comprise:

Letter of A:

Page 2, paragraph four, reference to an individual in the context of a particular review
Page 2, all of paragraph two
Page 3, paragraph one, names of two other employees

Letter of Resignation of B

[34] I considered the personal information exemption in respect of paragraph two on page 4 of the record.

[35] This paragraph includes two references to activities of the Board that relate to an individual who is a third party. Those references should be severed as personal information of those individuals. That paragraph also includes comments that are evaluative of the performance of another individual and should be severed. In addition, the bolded heading that precedes this paragraph should also be severed since it evaluates the performance of another individual.

[36] I also considered the personal information exemption in respect to paragraph three on page 5 of the record. This includes an evaluative opinion of the performance

[5] LA FOIP, s. 23(1)(f) and s. 23(2)(b)

of another third party and the name of that third party should be severed as the personal information of that third party.

Letter of Resignation of C

[37] The personal information exemption needs to be considered in respect of certain identifying information of several different individuals.

[38] Paragraph two on page 6 includes evaluative opinion about another individual and that sentence should be severed.

[39] Paragraph seven on page 6 refers to a transaction involving a third party. It also includes evaluative opinion about another individual. These references should be severed.

[40] On page 7 of the record, paragraph one includes evaluative opinion about another individual and the name should be severed. There is also reference to a transaction involving a third party that warrants severing. Paragraph two on page 7 of the record includes evaluative opinion about another individual and the name should be severed.

3. Did the University properly apply section 16(1)(a) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record withheld?

[41] The relevant provision in the Act is 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;*
>
> *(b) consultations or deliberations involving officers or employees of the local authority;*
>
> …

(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 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.

(a) Section 16(1)(a) of the Act

[42] In making a determination with respect to section 16 of the Act, a local authority must initially determine whether the material fits within the scope of section 16(1) of the Act.[6] If it does, the local authority must proceed to assess whether the material falls within any of the categories enumerated in section 16(2) of the Act. If the records in question are caught by one of the categories under section 16(2), the local authority must not refuse disclosure under section 16(1). If the local authority determines that the material falls within section 16(1) and is not caught by any of the section 16(2) categories, the local authority must proceed to decide whether to exercise its discretion to refuse disclosure.

[6] BC OIPC Order F07-17, [16] to [44].

[43] I have found that this provision was considered by previous Saskatchewan Information and Privacy Commissioners (Commissioners) in only three Reports: Reports 2000/011, 2002/014 and 2003/018.

[44] In Report 2000/011 a former Commissioner held that a health district's operating budget and health plan could not be entirely withheld under this exemption.

[45] In Report 2002/014 a former Commissioner found that certain documents that relate to health, safety and environmental management would be subject to section 16(1) of the Act and were properly withheld. He found however the portions that dealt with environmental issues fell within section 16(2) of the Act and should be released.

[46] In Report 2003/018 a former Commissioner determined that certain documents and Minutes of a Pesticide Working Group and emails dealing with policy development by that Group should be withheld by the City of Regina. This was based on section 16(1)(a) and (b) of the Act.

[47] The wording of section 16(1)(a) of the Act is almost identical to section 17(1)(a) in *The Freedom of Information and Protection of Privacy Act* (FOIP). A former Commissioner noted in his Report 2003/018 that section 17(1)(a) of FOIP is similar to section 16(1)(a) of the Act and should be approached the same way. I agree with that view and accept that the same considerations should apply to each provision.[7]

[7] Section 17(1)(a) of FOIP has been considered by my predecessors in the following reports: 92/002, 92/003, 92/006, 92/008, 92/010, 95/006, 96/005, 97/006, 98/003, 99/017, 2000/031, 2000/033, 2000/035, 2002/005, 2002/016, 2002/018, 2002/019, 2002/032, 2002/036, 2002/038, 2002/039, 2002/042, 2003/011, and 2003/014.

[48] This 'advice from officials' exemption has been the most frequently used discretionary exemption by Saskatchewan government institutions since at least 2002.[8]

[49] My predecessor's Report 2003/018 was based on the Order of Geatros J. of the Saskatchewan Court of Queen's Bench in *Weidlich* v. *Saskatchewan Power Corporation* (Weidlich)[9] that dealt with section 17 of FOIP. Later in this Report I will revisit this decision.

[50] In my Report F-2006-002, my consideration of section 17(1)(a) of FOIP is brief and turned on my determination that none of the agencies in question was "a provincial government institution". For that reason I found that section 17(1)(a) of FOIP did not apply and did not consider the exemption further.[10]

(b) Background to section 16(1) of the Act

[51] As Saskatchewan's first full-time Commissioner I have not previously considered the merits of a claim by a local authority under section 16 of the Act or a claim by a government institution under its counterpart, section 17(1)(a) of FOIP. Since this is therefore a matter of first impression for me, it may be useful to describe the considerations that inform my analysis.

[52] Any review of first principles should include the key antecedent instruments. In this case there are two in particular: (1) *The Report of the Commission on Freedom of Information and Individual Privacy/1980* (Royal Commission or Williams Commission Report)[11] and (2) *Report of The Honourable E.M. Culliton,*

[8] *The Freedom of Information and Protection of Privacy Act Annual Report 2006-2007*, Table B Exemptions Used to Deny Access 2002-03 to 2006-07. Available at www.saskjustice.gov.sk.ca/overview/annual/2006-2007/FOI-May20. No similar annual report is produced in Saskatchewan for LA FOIP.
[9] (1998), 164 Sask. R. 204
[10] SK OIPC Report F-2006-002, [112] to [115].
[11] Publications Centre, Ministry of Government Services, Queen's Park, Toronto ON; Volume 2:0-7743-5434-8

Former Chief Justice of Saskatchewan, On The Matter of Freedom of Information and Protection of Privacy In The Province of Saskatchewan.[12] The former report led directly to Ontario's *Freedom of Information and Protection of Privacy Act*. The latter report led to Saskatchewan's two access and privacy statutes.[13]

[53] Former Chief Justice E.M. Culliton observed in his report that:

> *The inquiry carried out by the Royal Commission of Ontario is the most complete and detailed review of the issue of freedom of information undertaken in Canada. For that reason, the Report of the Commission must be carefully reviewed and examined both for the substantive recommendations it contains but perhaps more importantly, for the philosophy and reasons underlying those recommendations.*[14]

[54] In the Royal Commission discussion of 'advice and recommendations', the following appears:

> *The need for confidentiality pertaining to various aspects of decision-making processes is not restricted to decisions at the Cabinet level. An absolute rule permitting public access to all documents relating to policy formulation and decision-making processes in the various ministries and other institutions of the government would impair the ability of public institutions to discharge their responsibilities in a manner consistent with the public interest. On the other hand, were a freedom of information law to exempt from public access all such materials, it is obvious that the basic objectives of the freedom of information scheme would remain largely unaccomplished. There are very few records maintained by governmental institution that cannot be said to pertain in some way to a policy formulation or decision-making process.*
>
> *Although the precise formula for achieving a desirable level of access for deliberative materials has been a contentious issue in many jurisdictions in which freedom of information laws have been adopted or proposed, there is broad general agreement on two points. First, it is accepted that some exemption must be made for documents or portions of documents containing advice or recommendations prepared for the purpose of participation in decision-making processes. Second, there is a general agreement that documents or parts of documents containing essentially factual material*

[12] Legislative Assembly of Saskatchewan Library; AG. 890.81. F10.
[13] *The Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01 as amended; *The Local Authorities Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. L-27.1 as amended.
[14] Supra, note 12 at 15.

> *should be made available to the public. If a freedom of information law is to have the effect of increasing the accountability of public institutions to the electorate, it is essential that the information underlying decisions taken as well as the information about the operation of government programs must be accessible to the public. We are in general agreement with both of these propositions.*[15]

[55] In the Culliton Report, the following recommendation is stated:

> *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.*[16]

[56] FOIP came into force in 1992 and the Act came into force in 1993. Neither includes a purpose or object clause.

[57] In my Report F-2004-003 I described the purpose of FOIP as:

> *[10] Over the twenty two years since the Access to Information Act came into force, provincial and territorial governments have enacted their own access to information and protection of privacy legislation. Many of those more recent provincial instruments have included a more comprehensive purpose clause. Those purpose clauses tend to reflect and reinforce the approach taken by the federal Information Commissioner and numerous decisions of superior courts in Canada. A good example is section 2 of the British Columbia Freedom of Information and Protection of Privacy Act:*
>
> *"**2**(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by:*
>
> *(a) giving the public a right of access to records*

[15] Supra, note 11 at 288.
[16] Supra, note 13 at 85.

> *(b) giving individuals a right of access to, and a right to request corrections of, personal information about themselves*
>
> *(c) specifying limited exceptions to the rights of access*
>
> *(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and*
>
> *(e) providing for an independent review of decisions made under this Act"*
>
> *[11] I find that this neatly summarizes and clearly identifies the purpose of legislation such as the Saskatchewan Act. Our office will deal with the subject request for review and future requests for review by reference to those same five purposes.*

[58] I note also the recent guidance provided by Fish J. in the Supreme Court of Canada decision *Blank* v. *Canada (Minister of Justice)* when dealing with a different discretionary exemption in the federal *Access to Information Act*. In the majority judgment for the Court, he observed that:

> *The language of* [the solicitor-client exemption] *is, moreover permissive. It provides that the Minister* ***may*** *invoke the privilege. This permissive language promotes disclosure by encouraging the Minister to refrain from invoking the privilege unless it is thought necessary to do so in the public interest. And it thus supports an interpretation that favours* ***more*** *government disclosure, not* ***less****.* [17]

[59] A similar approach should be taken in dealing with any discretionary exemption.

(c) Queen's Bench Decision in *Weidlich* v. *Saskatchewan Power Corporation*

[60] The University asserted in its section 7 response to the Applicant that the *"definition of "advice" as understood with regard to access legislation has been given as "primarily the expression of counsel or opinion, favourable or unfavourable, as to action, but it may…signify information or intelligence."* It cited in support of this claim the Weidlich decision. In that case the Applicant sought access to focus group analyses done for Saskatchewan Power Corporation (SaskPower) with respect to power rates in the province. The then Commissioner

[17] [2006] 2 S.C.R. 319, 2006 SCC 39.

recommended that these records be disclosed. The government institution refused and appealed to the Saskatchewan Court of Queen's Bench. One of the exemptions relied on by SaskPower was section 17(1)(a) of FOIP.

[61] Geatros J. stated that:

> *10 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,*** *" per Rand J. in J.R. Moodie Co. Ltd.* v. *Minister of National Revenue, [1950] 2 D.L.R. 145 (S.C.C.) at p. 148.* ***It is apparent, in my view, that the Reports, "…could reasonably be expected to disclose…analyses…policy options developed," for SaskPower.*** *The views and opinions of the focus group participants disclosed in the Reports would obviously be analysed by SaskPower in determining the direction it should take as regards the matters discussed in the Reports, including concerning power rates.*[18]
>
> [emphasis added]

[62] In the Weidlich decision, Geatros J. noted that the Applicant's counsel submitted that section 17(1)(a) of FOIP applies only to "advice, proposals, recommendations, analyses or policy options". It follows, the Applicant's counsel argued, that in any event the underlying facts contained in the Reports should be disclosed. Geatros J. stated however that, "*Having read the Reports, I find that the facts and opinions are so intertwined that they cannot be intelligently separated. The Reports must be disclosed in toto or not at all"*.[19]

[63] In my respectful view, Geatros J. clearly determined that the focus group information qualified as "advice" in the sense that it was the "*expression of counsel or opinion, favourable or unfavourable, as to action*". Alternatively, he found that the focus group information qualified as "*analyses*" or "*policy options developed*" for SaskPower. In any event, he did not rely on what Rand J. described as "*information or intelligence*". This phrase simply appeared in the

[18] Supra, note 10.
[19] Ibid at para. 15.

larger quote from the 1950 Supreme Court decision and was not mentioned again or referred to in the balance of the reasons for his Order dismissing the appeal. If I am correct, then his comments about the meaning of advice in commercial usage i.e. signifying information or intelligence would be obiter and not necessary for him to come to his conclusion on the law. "Obiter dictum" is defined in Black's Law Dictionary, 8th Edition as "*A judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential*."[20]

[64] In my respectful view, I am therefore not bound by the interpretation of section 16(1)(a) of the Act that the University attributes to Geatros J. from the Weidlich decision. Given the recent developments detailed elsewhere in this Report, I think it would be salutary if a superior court in the province could revisit this issue and provide further clarification.

(d) Role of Information and Privacy Commissioner Revisited

[65] A further consideration is that the background to the Geatros J. decision reveals a gap in the FOIP review process in that case. The government institution, SaskPower, had raised three different exemptions, namely sections 16, 17 and 18 of FOIP to support its decision to deny access to the applicant. In this office's report the then Commissioner dealt only with two of the three exemptions namely, sections 16 and 18. Even though SaskPower had raised section 17(1)(a) of FOIP in its section 7 response to the Applicant, this office did not consider that exemption in the review process. In the result, Geatros J. appears to have been deprived of the benefit of any guidance from this office. In fact, it also appears from the reported decision of the Court of Queen's Bench that Geatros J. did not have the benefit of information about the treatment of provisions similar to section 17(1)(a) in other Canadian jurisdictions.

[20] Garner, Bryan A. (Editor in Chief), Thomson West, 2004.

[66] The fact that Geatros J. was deprived of input from this office on section 17 is significant given the structure of both the Act and FOIP. FOIP created this office as an independent officer of the Legislative Assembly charged with oversight responsibility. This is similar to the structure in freedom of information legislation at the federal level and in the provinces of British Columbia, Alberta, Manitoba, Ontario, Quebec, Prince Edward Island (PEI), Newfoundland and Labrador, New Brunswick, Yukon, Northwest Territories and Nunavut.

[67] In Manitoba, New Brunswick and the Yukon, oversight is exercised by the Ombudsman. In the other provinces such as Saskatchewan, it is a Commissioner.

[68] In the provinces of Ontario, British Columbia, Alberta, Quebec and Prince Edward Island, the Commissioner has order-making power. Former Supreme Court Justice Gerard La Forest described the model in those provinces as an "*ombudsman with a stick*". This reflects the reality that even those provinces in which the Commissioner has order-making power, "*Commissioners in most of these provinces use this power sparingly, preferring whenever possible to resolve complaints through conciliation, mediation and other informal means.*" He also noted that in those provinces where the Commissioner has order-making power, "*By and large, claims are settled in a manner satisfactory to all parties*".[21]

[69] The role of a Commissioner was considered at some length by the Ontario Court of Appeal when it had to determine the proper standard to be applied to a judicial review of the Ontario Information and Privacy Commissioner's decision. That decision includes the following quote:

> *[11] Goudge J.A., Moldaver J.A. concurring, employed the pragmatic and functional analysis and found that reasonableness is the proper standard to be applied to decisions of the Commissioner. He specifically found that this standard applied even to decisions involving a pure question of law. In arriving at this conclusion, Goudge J.A. noted the following at paras. 27-35:*

[21] *The Offices of The Information and Privacy Commissioners: The Merger and Related Issues*, Gerard V. La Forest, (November 15, 2005), at 50

> *(i) the Act contains neither a privative clause nor a statutory right of appeal:*
>
> *(ii) the Act constitutes the Commissioner as a specialized decision maker to independently review the disclosure decisions of government;*
>
> *(iii) in every review of a disclosure decision, the Commissioner must strike a delicate balance between the public right of access to information and protecting the privacy of individual with respect to that information;*
>
> *(iv) the Act requires the Commissioner to give general policy advice in addition to deciding individual appeals;*
>
> *(v) more generally, the Commissioner plays a role in achieving the legislative purposes of advancing the right of the public to access information in the hands of government, protecting the privacy of individuals with respect to that information, and balancing the tension between those two objectives;*
>
> *(vii)*[sic] *finally, the Commissioner was required to decide the nature of the test to be met by the Minister under s. 21(5) in order to refuse to confirm or deny the existence of a record.*[22]

[12] Goudge J.A. recognized, at para. 36, that in interpreting s. 21(5), the Commissioner was addressing a pure question of law. However, citing Monsanto, supra, he found that the legal question was "at the core" of the tribunal's expertise. At para. 39 he concluded that:

> *When these factors are viewed together, I conclude that they all suggest that a moderate deference be accorded to the Commissioner's decision. None suggest the greater deference of the patently unreasonable standard nor the strict scrutiny of the correctness standard. Rather, reasonableness is the proper standard of review to be applied to the Commissioner's decision.* [23]

[70] Clearly the Saskatchewan Commissioner is not an administrative tribunal,[24] has no order-making power and any reports issued by this office may be subject to a

[22] Items (i) and (vii) do not apply to the Saskatchewan Office of the Information and Privacy Commissioner.

[23] *Ontario (Ministry of Transportation) v. Consulting Engineers of Ontario* (2005), 34 Admin. L.R. (4th) 12, (2005), 202 O.A.C. 379 (ON C.A.). See also *Ontario (Ministry of Northern Development and Mines) v. Mitchinson* 2005 CanLII 34229 (ON C.A.).

[24] The Federal Access to Information Task Force, in summarizing the advantages of the order-making or administrative tribunal model stated:

> *Under the full order-making model, the requester receives a more immediate determination. It is more rules-based and less ad hoc than the ombudsman model. Commissioners with order-making powers are tribunals. They issue public decisions, with supporting reasons. This results in a consistent body of jurisprudence that assists both institutions and requesters in determining how*

de novo appeal to the Court of Queen's Bench. Nonetheless, I find that the discussion of the work and role of the Ontario Information and Privacy Commissioner has relevance in understanding the role of Saskatchewan's Commissioner.

(e) Significance of the OIPC Ombudsman Role in Saskatchewan

[71] Even though this office attempts to establish and follow a "consistent body of jurisprudence" and to adopt many of the characteristics of those administrative tribunals, there is a key difference.

[72] If my office was constituted as an administrative tribunal such as the Commissioners in Ontario, PEI, British Columbia and Alberta, I would consider myself bound to scrupulously follow precedent and Court of Queen's Bench decisions including obiter commentary. My office is not so constituted however. My office has no coercive power to require any public body to disclose or not to disclose any records. In its sovereign wisdom, the Legislative Assembly intended instead that this office should be *"an ombudsman* [who] *is free, and indeed expected, to define* [his] *function as one of advocating vigorously on behalf of the principle of transparency."*[25] In that spirit this office offers advice and commentary on 'best practices', a normative assessment of proposed legislation and regulations, programs and projects by way of non-binding recommendations. When it is appropriate, it is not unusual for this office to encourage Saskatchewan public bodies to meet even higher standards than the minimal legislative requirements. In each of our formal reports, we offer recommendations which government institutions and local authorities are free to adopt, in full or in part, or to reject.

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the Act should be interpreted and applied. As administrative tribunals, under the scrutiny of courts, they are subject to high standards of rigour in their reasons and procedural fairness.
Report of the Access to Information Review Task Force, page 2, available at //www.atirtf-geai.gc.ca/report/report24-e.html

[25] Supra, note 18 at 51, quoting Professor Alasdair Roberts, "New Strategies for Enforcement of the Access to Information Act" (2002), 27 Queen's Law Journal 647.

[73] Mindful of the analysis done and conclusions offered by Geatros J., Gerard LaForest, and the Ontario Court of Appeal and the fact that the Commissioner is a specialized Ombudsman explicitly mandated to independently review the disclosure decisions of government institutions and local authorities, I intend to undertake a detailed analysis of section 16 of the Act in this Report in light of the most recent developments.

(f) Guidance from Other Jurisdictions

[74] I have found that, subsequent to the date of the Weidlich decision, there has been considerable judicial consideration of similar exemptions to the right of access in other Canadian jurisdictions. Given the evolving jurisprudence and body of orders from Commissioners that interpret access and privacy laws, it is appropriate for me to consider those subsequent developments.

(i) British Columbia Approach

[75] The interpretation of "advice" has attracted considerable attention in British Columbia. I refer specifically to the decision of the British Columbia Court of Appeal in *College of Physicians of British Columbia* v. *British Columbia (Information and Privacy Commissioner)*.[26]

[76] The British Columbia statutory provision considered in that decision states:

> *13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.*[27]

[77] The British Columbia Information and Privacy Commissioner had earlier found that the experts' reports in question were not "advice or recommendations" for the purposes of section 13(1) since they were technical or medical findings, opinions

[26] (2002), [2003] 2 W.W.R. 279, (2002), 9 B.C.L.R. (4th) 1.
[27] *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, as amended.

or conclusions as to whether a particular medical procedure was or was not used on the applicant. The Court of Appeal held that it is not necessary in order for it to qualify as "advice" that the information must communicate future action and not just an opinion about an existing set of circumstances. Levine J.A. in delivering the court's judgment stated that:

> *[106] By defining "advice" so that it effectively has the same meaning as "recommendations", the Commissioner and the chambers judge failed to recognize that the deliberative process includes the investigation and gathering of the facts and information necessary to the consideration of specific or alternative courses of action….*
>
> …
>
> *[110] In my view, it is clear from s. 12 that in referring to advice or recommendations, the Legislature intended that "information…the purpose of which is to present background explanations or analysis …for…consideration in making a decision…" is generally included. There is nothing in s. 13 that suggests that a narrower meaning should be given to the words "advice" and "recommendations" where the deliberative secrecy of a public body, rather than of the cabinet and its committees, is in issue.*
>
> …
>
> *[113] I am similarly of the view that the word "advice" in s. 13 of the Act should not be given the restricted meaning adopted by the Commissioner and the chambers judge in this case. In my view, it should be interpreted to include an opinion that involves exercising judgment and skill to weigh the significance of matters of fact. In my opinion, "advice" includes expert opinion on matters of fact on which a public body must make a decision for future action.*[28]

[78] I note that in the *Annual Report 2004-2005* of the British Columbia Information and Privacy Commissioner, this issue is addressed as follows:

> *The most important access to information recommendation relates to s. 13, which gives public bodies the discretion to refuse to disclose "advice or recommendations developed by or for a public body or a minister." This section was never intended to shield factual information, but a 2003 decision by our Court of Appeal gave a sweeping and, in my view, excessively broad interpretation to "advice" under s. 13. This decision threatens to seriously erode the public's right of access to information in order to hold public bodies accountable, a goal explicitly stated in s. 2 of the*

[28] Supra, note 23.

> *legislation. It could also allow a public body to refuse to disclose to individuals their own previously available personal information. The* [Special Committee to Review the Freedom of Information and Protection of Privacy Act] *considered this decision and laudably and sensibly recommended that s. 13 be amended to ensure that accountability through FIPPA is not impaired and I urge the government to do so as soon as possible.*[29]

(ii) Ontario Approach

[79] Subsequent to the Weidlich decision in this province and the College of Physicians of British Columbia decision, the Ontario Superior Court of Justice considered the same issue in *Ontario (Ministry of Northern Development and Mines)* v. *Ontario (Assistant Information and Privacy Commissioner).*[30]

[80] The relevant Ontario legislative provision is as follows:

> *13.(1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.*[31]

[81] The Ontario Ministry of Northern Development and Mines had refused to release records of project evaluation reports notwithstanding two orders of the Ontario Commissioner to release them. The Ministry asserted that the reports constituted advice or recommendations within the scope of a statutory exemption from disclosure. The Commissioner, on appeal from the Ministry, held that the parts of the records did not constitute advice or recommendations, nor would their disclosure allow one to accurately infer any such advice or recommendations. For that reason, they did not qualify for exemption from disclosure. The Ministry then initiated a judicial review of the Commissioner's order by arguing that the Commissioner erred in interpretation of advice and recommendations by

[29] Available at http://www.oipc.bc.ca/publications/annual_reports/2005AR/OIPC_Annual_Report_web.pdf.
[30] [2004] O.J. No. 163.
[31] *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31

narrowing the definition to the extent that the interpretation was tautological. The Ontario Court dismissed the application and upheld the Commissioner's orders.[32]

[82] The Court considered the Weidlich decision as follows:

> *57 The Ministry finds support for their position in Weidlich* v. *Saskatchewan Power Corp., [1998] S.J. No. 133 (Q.B.) at paras. 9-12 and 22 where the court exempted from disclosure reports summarizing the opinions of focus group participants on a variety of issues, including rate structures, that could reasonably be expected to disclose analyses and policy options developed for SaskPower. The court accepted that the right of access should be the paramount consideration under access legislation generally, but there are exceptions put in place by the legislature, which must be given effect.*
>
> *58 I find that Weidlich is of little assistance, because the provision at issue was differently worded than section 13. It exempted "advice, proposals, recommendations, analyses or policy options [emphasis added] developed by or for a government institution…". The court held that the reports could not logically be categorized as being other than advice and analyses.* ***The suggestion in Weidlich that advice in commercial usage may signify information or intelligence appears to be incompatible with a freedom of information regime for government record holdings.***
>
> …
>
> *60 It is asserted by the Ministry that one of the purposes of the exemption for advice or recommendations is to encourage the free and frank flow of communications within government departments, in order to ensure that the decision-making process is not subject to the kind of intense scrutiny that would undermine the ability of government to discharge its essential functions. See Canadian Council of Christian Charities* v. *Canada (Minister of Finance) (T.D.), [1999] 4 F.C. 245 (Christian Charities) at paras. 30, 32. The Ministry's position is that the Commissioner's interpretation of section 13(1) hampers this goal.*
>
> *61 I note that in Christian Charities, the court states at para. 32:*
>
> > *On the other hand, of course, democratic principles require that the public, and this often means the representatives of sectional interests, are able to participate as widely as possible in influencing policy development. Without a degree of openness on the part of government*

[32] See also Newfoundland and Labrador OIPC Report 2005-005, [19] to [54], available online at http://www.oipc.gov.nl.ca/pdf/Report2005005.pdf. That Commissioner cited with approval the interpretive approach of the Ontario IPC with respect to "advice" that does not protect "merely factual information" but only a "suggested course of action".

> *about their thinking on public policy issues, and without access to relevant information in the possession of government, the effectiveness of public participation will inevitably be curbed.*

62 In my view, ***the Ministry seeks to ascribe to the word "advice" an overly broad meaning tending to eviscerate the fundamental purpose of the statute to provide a right of access to information under the control of institutions, in accordance with the principles that information should be available to the public and exemptions from the right of access should be limited and specific*** *(s. 1(a)(i), (ii) of the Act).*

63 Section 13(2) of the Act lists various types of information, such as factual material, statistical surveys and certain reports, which are not to be protected under section 13(1). They are not intended, as the Ministry would suggest, to limit what would otherwise have been a very broad interpretation of the exemption at section 13(1).

64 The Ministry submits that the Commissioner has interpreted the words "advice" and "recommendations" to have the same meaning. I disagree with their position. The Commissioner states that the words have similar meanings in the context of section 13(1) of the Act and should be interpreted to mean information that reveals a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy and decision-making. Moreover, in Fineberg, this court has endorsed as reasonable the interpretation adopted by the Commissioner.

65 In Human Rights Commission, this court has also upheld the Commissioner's interpretation and application of section 13(1). There he found that a memorandum from an investigating human rights officer to her supervisor seeking direction as to how an investigation should be handled and the response of the supervisor did not qualify under section 13, because neither set out any suggested course of action which could be accepted or rejected during the deliberative process.

66 In Dagg v. *Canada (Minister of Finance), [1997] 2 S.C.R. 403 at paras. 61-63, La Forest J. described the importance of access to information legislation to the proper functioning of a democracy:*

> *The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry….*
>
> *Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable.*

> *67 The Commissioner's interpretation of the meaning of section 13(1) followed a long line of previous orders, which held that the terms "advice" and "recommendations" have similar meanings. The Commissioner observed that ordinary dictionary meanings use the words "advice" and "recommendation" to define each another. Further, the legislative history set out in the Williams Commission Report (Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980) uses the words "advice" and "recommendations" interchangeably.*
>
> *68 The Commissioner also referred to the policy rationale in the Williams Commission Report for including the exemption and the fact that the exemption was not designed to protect analytical discussion of factual material or the assessment of various options relating to a specific factual situation that does not offer specific advice or recommendations.*
>
> *69 In view of these findings, there is no need to apply the presumption against tautology. Alternatively, there are ample indicators of legislative meaning to suggest that the presumption is rebutted and the Commissioner's interpretation complies with the legislative text, promotes the legislative purpose, and is reasonable.*[33]
>
> [emphasis added]

[83] In addition, I note the Ontario Court of Appeal also considered section 18 in the Ontario FOIP Act in *Ministry of Transportation* v. *Cropley.* The Court of Appeal observed that at the outset of the Ontario Commissioner's Order, she stated as follows:

> *…advice and recommendations, for the purposes of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Orders P-94, P-118, P-883 and PO-1894). Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1) of the Act (Orders P-1054, P-1619 and MO-1264).*[34]

[33] Supra, note 27.
[34] 2006 CanLII 11832 (S.C.C.)

[84] The Court of Appeal added:

> *[21] The Ministry submits that this definition is too narrow. The Ministry submits that the ordinary meaning of "advice" does not require a deliberative process and would include information or analyses conveyed without a view to influencing a decision or the adoption of a course of action. In the Ministry's view, the Commissioner's interpretation offends the rule against tautology, which dictates that "advice" must be given a meaning separate and independent from "recommendations". Furthermore, the Ministry submits the Commissioner erred in invoking Public Government for Private People: The Report of The Commission on Freedom of Information and Individual Privacy 1980, vol. 2 (Toronto: Queen's Printer, 1980) (the "Williams Commission Report") as an aid of interpretation because the meaning of "advice" is unambiguous, and the exemption as enacted differs from the wording that the Williams Commission Report proposed.*[35]

[85] The Court of Appeal concluded in that case that:

> *[28] In my view, the meaning of "advice" urged by the Ministry would not be consonant with this statement of purpose. The public's right to information would be severely diminished because much communication within government institutions would fall within the broad meaning of "advice", and s. 13(1) would not be a limited and specific exemption. I conclude, in the words of the Divisional Court that "the Commissioner's interpretation complies with the legislative text, promotes the legislative purpose and is reasonable.*[36]

[86] Of particular importance, I note that on April 3, 2006 the Supreme Court of Canada refused leave to appeal from the decision in *Ministry of Transportation* v. *Laurel Cropley, Adjudicator, Consulting Engineers of Ontario, Affected Party*.

[87] I find that the Ontario Court of Appeal in the above noted decision accurately addressed the purpose of freedom of information legislation. This is consistent with the statement of our Court of Appeal in *General Motors Acceptance Corp. of Canada* v. *Saskatchewan Government Insurance* as follows:

[35] Ibid
[36] Ibid

> *11 The* [Freedom of Information and Protection of Privacy Act]*'s basic purpose reflects a general philosophy of full disclosure unless information is exempted under clearly 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 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.* [37]

[88] I find that these comments apply also to the Act.

(g) Summary of Analysis of Section 16(1)(a) of the Act

[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

[37] [1993] S.J. No. 601 (Sask. C.A.)

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.[38] 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.

[91] In this Report I have not addressed in any significant way the words "*…proposals, recommendations, analyses or policy options*" in section 16(1)(a) of the Act. I take the view that each of these words also require more than mere information. To qualify for purposes of section 16(1)(a), the information in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Furthermore, information that would permit the drawing of accurate inferences as to the nature of the actual proposals, recommendations, analyses or policy options would also qualify for the exemption in section 16(1)(a) of the Act.

[38] *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13, [2006] 1 S.C.R. 441; *Canada (Information Commissioner) v. (Commissioner of the Royal Canadian Mounted Police)*, [2003] 1 S.C.R. 66, 2003 SCC 8; *Rubin* v. *Canada (Minister of Transport) (1997)*, 221 N.R. 145 (Fed. C.A.); *Northern Cruiser Co.* v. *R.* (1992), 47 F.T.R. 192 (Fed T.D.), affirmed (1995) 185 N.R. 391 (Fed. C.A.); *Rubin* v. *Canada (Minister of Transport) (1997)*, 221 N.R. 145 (Fed. C.A.); *Canada Post Corp.* v. *Canada (Minister of Public Works)*, [1993] 3 F.C. 320 (Fed T.D.), affirmed [1995] 2 F.C. 110 (Fed. C.A.); *Noel* v. *Great Lakes Pilotage Authority Ltd.* (1987), [1988] 2 F.C. 77 (Fed. T.D.) at 80: … the absolutely essential exceptions to this right must be specific and limited.; *St. Joseph Corp.* v. *Canada (Public Works & Government Services)*, [2002] F.C.J. No. 361, 2002 FCT 274, 2002 CarswellNat 573, 2002 CarswellNat 1296 (Fed. T.D.)

(h) Application of Section 16(1)(a) of the Act to the Record

Letter of Resignation of A

[92] Much of the record in respect to which section 16(1)(a) of the Act has been invoked, is general in nature and is not specific advice as contemplated by the authorities noted above.

[93] Section 16(1)(a) of the Act was invoked in respect of paragraph one on page 2. This paragraph describes "one choice" to affirm academic freedom. I accept that this is the outline of specific action that the author is recommending the University take. I accept that the entire paragraph can be exempt by reason of section 16(1)(a).

[94] On page 2, paragraph two, this can be described as advice that relates to a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process. I find that this paragraph also can be exempt by reason of section 16(1)(a) of the Act.

[95] On page 2, paragraphs three and four, there is only a recitation of facts and events that does not qualify within the section 16(1)(a) exemption.

Letter of Resignation of B

[96] This exemption was invoked in respect to paragraph two on page 4 of the record. I have already found that much of that paragraph should be severed to protect the personal information of others. The balance of that paragraph does not contain anything that would be caught by section 16(1)(a) of the Act.

Letter of Resignation of C

[97] This exemption was invoked in respect to paragraphs two and seven on page 6. Paragraph two includes some very general statements about the reasons for this resignation but there is no attempt to provide advice, proposals, recommendations, analyses or policy options developed by or for the local authority within the meaning of section 16(1)(a) of the Act.

[98] Paragraph seven on page 6 is essentially a generalized historical observation that does not qualify within the section 16(1)(a) exemption.

[99] On page 7, paragraph one, I find there is no basis for severing under section 16(1)(a) of the Act.

4. Did the University properly apply section 16(1)(b) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record withheld?

[100] The relevant provision in the Act is 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:*
>
> …
>
> *(b) consultations or deliberations involving officers or employees of the local authority;*

[101] In Report F-2004-001, I defined "consultation" as when the views of one or more officers or employees of a government institution are sought as to the appropriateness of a particular proposal or suggested action. A "deliberation" is a discussion of the reasons for and against an action by the persons described in the section. I further held that in order to justify withholding a record on the basis of section 17(1)(b)(i), which is the counterpart in FOIP to section 16(1)(b) in the Act, consultations and deliberations must:

a) either be sought or expected, or be part of the responsibility of the person from whom they are sought;

b) be sought for the purpose of doing something, such as taking an action or making a decision; and

c) involve someone who can take or implement the action.

[102] I have found three previous Saskatchewan reports that interpreted section 16(1)(b) of the Act: Report 95/001, 96/032 and 2003/018.[39] In Report 95/001, a former Commissioner held that certain memoranda recording information or conveying information from one employee of the City of Saskatoon to another did not constitute records of "consultations or deliberations" within the meaning of section 16(1)(b). He found they were "*purely factual in nature and lack any quality of confidentiality that would justify non-disclosure"*.[40] In Report 96/032 a former Commissioner concluded that any consultations or deliberations were not referenced in the record and that section 16(1)(b) would not therefore apply. In Report 2003/018 a former Commissioner held that section 16(1)(b) applied and cited the Weidlich decision as authority.

[103] Section 16(1)(b) of the Act was cited in respect of the letters from A, B and C.

Letter of Resignation of A

[104] This is a letter from a resigning member of the Board. It is addressed to a Vice-President of the University.

[105] Page 1, section 16(1)(b) of the Act was invoked in respect of three paragraphs (3-5). One is a recitation of past events including the history surrounding the Committee's response to a "direction" from the Vice-President. Another paragraph recounts a response to a meeting invitation. The other paragraph

[39] The comparable provision in FOIP is section 17(1)(b). That section has been considered in SK OIPC Reports F-2006-004 [29] to [38]; 2005-004 [15] to [20]; and F-2004-002 [8] to [12].
[40] SK OIPC Report 95/001 at 5.

discusses a document received by the author from a senior University official. It also discusses the disagreement of the author with this document.

[106] In my view this is an unsolicited communication to the Vice-President that is critical of certain actions taken by the University. It is focused on past decisions of the University and not on how the University should conduct itself going forward other than by implication.

[107] I find that these portions of the letter cannot be characterized as "consultations or deliberations" as required by section 16(1)(b).

[108] On page 2, the second paragraph was also withheld on the basis of section 16(1)(b). This is essentially a recitation of certain historic events although it does include a statement as to the author's concern together with a prediction as to further outcomes. I find that this portion of the letter cannot, however, be characterized as "consultations or deliberations". In any event, I have already determined this paragraph should be severed by reason of section 16(1)(a).

[109] On page 2, the fourth paragraph was withheld on the basis of section 16(1)(b). This paragraph represents observations and certain historic events. I do not find this qualifies as "consultations or deliberations".

[110] I find that section 16(1)(b) of the Act does not apply to the letter from A.

Letter of Resignation of B

[111] Section 16(1)(b) was invoked only in respect to paragraph two on page 4. This is essentially a complaint about past conduct of a third party. I do not find that this provides any proper basis to invoke this exemption.

Letter of Resignation of C

[112] Section 16(1)(b) was invoked in respect to paragraphs two, six and seven on page 6 and paragraph one on page 7. Paragraph two is a historical observation and a criticism of a third party. Paragraph six is a historical observation. Paragraph seven laments a lack of action in the past and suggests a reason for this lack of action. The burden of proof has not been met in respect of these paragraphs to support the section 16(1)(b) exemption.

[113] On page 7 there is a critical comment about a third party. As noted earlier, this should be severed as it is personal information of an individual. If I had to decide whether section 16(1)(b) applies to warrant severing, I find it would not apply.

5. Did the University properly apply section 14(1)(d) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record withheld?

[114] The relevant section in the Act provides as follows:

> ***14****(1) A head may refuse to give access to a record, the release of which could:*
>
> …
>
> *(d) be injurious to the local authority in the conduct of existing or anticipated legal proceedings;*

[115] Section 14(1)(d) of the Act was considered by a former Commissioner in his Report 2003/034. This exemption was one of two exemptions relied upon by a rural municipality in refusing access to records that related to a fire and the costs attributed to fighting the fire. The Commissioner found that if the documents in question were relevant to a lawsuit, which he found unlikely, those records would have to be disclosed to the opposing parties to the litigation under the discovery procedures in the Rules of the Court of Queen's Bench. Furthermore, the costs of the firefighting "*should be accessible to all members of the public in order to promote the transparency of the supplier process and to allow ratepayers and*

other interested parties to examine the costs to determine legitimacy".[41] In the result, that Commissioner found that section 14(1)(d) would not justify withholding the record.

[116] The counterpart to section 14(1)(d) in the Act would be section 15(1)(d) of FOIP. This FOIP provision was considered by this office in Reports 92/008 and 2001/029.

[117] In Report 92/008, a former Commissioner noted that unlike sections 14 and 17 of FOIP, where the exemption requires that the release of records "could reasonably be expected" to have a particular result, in section 15 of FOIP the requirement is simply that the release of information "could" have the specified result. This Report supports the proposition that to invoke section 14(1)(d) the threshold test is somewhat lower than a 'reasonable expectation". Nonetheless, there would still have to be some kind of basis to found such an expectation. If it is fanciful or exceedingly remote, section 14(1)(d) could not be successfully invoked.

Letter of Resignation of A

[118] This has been invoked by the University in regard to paragraphs two and four on page 2 of the letter from A. Even though paragraph two on page 2 can be severed for another exemption, paragraph four on page 2 remains, at least to this point, producible under the Act. There is no evidence of any existing legal proceeding that would be affected by access to the record in issue. The University in its submission has suggested that there might in the future be a defamation action brought against the University. It also has suggested that publication of the report may trigger a lawsuit from parties involved in research projects referred to in the letter from A.

[41] SK OIPC Report 2003/034 at para. 10.

[119] Page 2, paragraph two contains comments about a particular research project. It makes vague references however both to the project and the approval process. Interestingly it also refers to "*adverse comment in the media*" which suggests that there is already a degree of notoriety to the matters touched on in the letter. I have already found that this paragraph should be severed by reason of the exemption in section 16(1)(a) so there is no need to consider it further in connection with section 14(1)(d) of the Act.

[120] The section 14(1)(d) exemption has also been invoked by the University in respect to page 2, paragraph four. This paragraph offers opinion about a failure to take certain action and attributes blame for the failure.

[121] The University has offered no specific explanation of how the release of this letter from A would or could be injurious in the conduct of anticipated legal proceedings. Again, if there should be some litigation at some future date this letter would undoubtedly be produced under the discovery and disclosure provisions of the Rules of the Court of Queen's Bench of Saskatchewan. These discovery and disclosure rules operate independent of any process under either FOIP or the Act. I see no evidence of injury to the University or any third party beyond what may flow from the usual production of any relevant documents in a lawsuit.

[122] I interpret section 14(1)(d) of the Act to contemplate some injury to the local authority or a third party above and beyond any prejudice that relates to the production of a relevant, non-privileged document in the usual course of a lawsuit. This is consistent with the decision in Report 2001/029.

[123] The University has also expressed concern that if the Applicant is successful in obtaining access to the record, the record may be 'published' in the media and that the 'publication' of the record or parts of it may attract lawsuits. The only potential lawsuit that the University identifies in this respect relates to a possible

cause of action based on the fact of such a **potential publication** of the record. In the event that an applicant obtains access under the Act and should decide to publish any portion of the record they obtain under the Act, it is that applicant who will be responsible because defamation is based on the publication by the applicant or others **not on the release of the record by the University** to the Applicant.

[124] I find that there is no basis for this exemption claimed by the University.

Letter of Resignation of B

[125] This exemption has been raised in connection with paragraph two on page 4. The effect of the severing already recommended in respect to personal information of third parties in paragraph two on page 4 means there would be nothing left in the paragraph to constitute the basis for the injury to current or anticipated litigation required by the provision.

Letter of Resignation of C

[126] This exemption has been cited in respect to paragraph two and paragraph seven on page 6 of the record. It has also been cited in respect to paragraph one on page 7 of the record.

[127] Given the severing already identified as necessary to address the personal information of others, there is nothing left in paragraph two that could reasonably be seen as injuring the University by reason of impacting the conduct of anticipated legal proceedings. The same comment would apply to paragraph seven on page 6.

[128] The prospect that what is left in paragraph one of page 7 of the record will injure the University in some anticipated legal proceeding is no longer a reasonable prospect.

6. Did the University properly apply sections 17(1)(d) and (f) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record withheld?

[129] The relevant provisions in the Act are as follows:

> ***17****(1) Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose:*
>
> *…*
>
> *(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the local authority;*
>
> *…*
>
> *(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the local authority;*
>
> *…*
>
> *(3) The head of the University of Saskatchewan, the University of Regina or a hospital may refuse to disclose details of the academic research being conducted by an employee of the university or hospital, as the case may be, in the course of the employee's employment.*

(a) Section 17(1)(d) of the Act

Letter of Resignation of A

[130] Section 17(1)(d) of the Act was cited in respect to the letter from A. The University contended that this exemption should apply to paragraphs three, four and five of page 1 of the Record.

[131] Our office has not discussed this provision in earlier reports. It has however considered section 18(1)(d) in FOIP, the counterpart to section 17(1)(d) of the Act, in Report F-2004-007 [20] to [25].[42] I observed in that report:

> *In my view, the right of public access must not be frustrated except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure. There may well be a possibility of harm but in our view, that possibility is not sufficient to meet the threshold test.*[43]

[132] The University has made reference to a matter under grievance with the University Faculty Association. The University has submitted that there was a related grievance process underway at the time of the application and that this related to negotiations with a bargaining unit on campus. The statutory exemption however requires "interference" and that surely connotes something more than the simple fact that there is a grievance pending. In addition, the University has provided no particulars of the grievance, the grievance process or the interference that would ensue if access was granted to the applicant. My job is not to speculate about possible interference in the absence of evidence from the University.

[133] There is no evidence of contractual or other negotiations of the University in respect of which there would be a reasonable expectation of interference. The arguments of the University are vague and speculative.

[134] I see no prejudice or interference with any contractual negotiations generally or with any grievance pending. I find that the University has not discharged the burden of proof of establishing that the disclosure of the record to the Applicant could reasonably be expected to interfere with contractual or other negotiations of the local authority.

[135] The University, quite properly, acknowledged in its September 20, 2004 letter to this office however that *"matters have now been administratively resolved"*. In

[42] In addition, this section 18(1)(d) exemption in FOIP was considered in Reports 92/009, 94/002, 95/019, 2000/031, 2001/004 and 2001/009.
[43] Report 2004-007 at para. 22.

the submission, the Applicant contended that the section 17(1)(d) exemption should no longer apply to the record.

[136] In any event, I find that there has been no persuasive evidence that there is a reasonable expectation that disclosure of the letter from A would in any way interfere with contractual or other negotiations of the University.

Letter of Resignation of B

[137] Section 17(1)(d) has been cited by the University in respect to paragraph three on page 4 of the record and paragraphs one and two on page 5. The comments above in respect of the letter of A apply equally to the letter of B.

Letter of Resignation of C

[138] Section 17(1)(d) has been cited by the University in respect to paragraphs two, three, four and five. The comments above in respect of the letters of A and B apply equally to the letter of C.

(b) Section 17(1)(f) of the Act

[139] This section was cited in the March 12, 2004 letter from the University to the Applicant responding to the access request but the University has not linked it to any specific portion of the record.

[140] A former Acting Commissioner considered section 17(1) of the Act in Report 2001/027. In that case, the records in question related to contracts between a retailer and an operator on the one hand and a school division on the other for the operation of school buses. The Acting Commissioner treated sections 17(1)(d),(f) and (g) of the Act together and concluded that disclosure of the contractual documents could interfere with future contractual negotiations with the school

division and could also result in undue benefit to persons competing for the school division's future contracts. He found that the record should be withheld.

[141] The counterpart section 18(1)(f) in FOIP was last considered by this office in Report F-2006-002 [104] to [111].[44]

[142] I have seen no evidence that there would be a reasonable expectation of prejudice to the economic interest of the University. The University is a public institution funded with public finances and one which should as much as possible be operated and governed in a transparent manner. The exemptions to disclosure should be approached with caution and not given any wider scope than necessary to achieve the purpose.

[143] No substantive arguments or submissions have been forthcoming from the University to support that particular exemption. Since this is a discretionary exemption, I have no hesitation in finding that the University has not met the burden of proof with respect to section 17(1)(f) of the Act.

7. Did the University properly apply section 18(1)(c) of *The Local Authority Freedom of Information and Protection of Privacy Act* to the record withheld?

[144] The relevant provision in the Act is as follows:

> ***18****(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:*
>
> *…*
>
> *(c) information, the disclosure of which could reasonably be expected to:*
>
> *(i) result in financial loss or gain to;*
>
> *(ii) prejudice the competitive position of; or*
>
> *(iii) interfere with the contractual or other negotiations of;*
>
> *a third party;*

[44] Section 18(1)(f) of FOIP has also been considered in Reports 92/009, 94/002, 96/010, 2001/009, 2002/041 and 2004/034.

[145] Section 18(1)(c) of the Act has been invoked in respect of the letters from A, B and C.

[146] As a former Commissioner indicated in 1996, the injury must be to a third party. Section 2(k) of the Act defines "*third party*" as "*a person, including an unincorporated entity, other than an applicant or a local authority*".

[147] In Report 2001/047 section 18(1)(c) of the Act was considered by this office.[45] A former Commissioner found that the disclosure of the information exempted by the University of Saskatchewan in that case could reasonably be expected to result in financial loss to, prejudice the competitive position of, or interfere with the contractual or other negotiations of a third party. He noted that in view of differences in the Act from other provinces' access legislation it is not necessary to find that these expected results be "significant" or "undue". He also concluded that the requirement for information being "supplied in confidence" only applies to section 18(1)(b) and that it does not apply to section 18(1)(c). He further concluded that disclosing portions of the Coca Cola agreement with the University could reasonably be expected to interfere with future negotiations involving the third party and to impact upon the third party's financial well-being if the information was released to a direct competitor.

Letter of Resignation of A

[148] It has been invoked in respect of the A letter, specifically page 2, paragraph two of that document. The only loss or prejudice in the University's materials is conjecture. I am guided by the following observation by a former Commissioner in his Report 96/021:

[45] Section 18(1)(c) of the Act was also considered in Report 2001/027. The counterpart to section 18(1)(c) in the Act is section 19(1)(c) in FOIP, which was considered by this office in Report 2004-007, [35] to [46]. Section 19(1)(c) of FOIP was also considered in Reports 92/009, 92/015, 92/023, 93/001, 93/009, 93/012, 94/002, 94/011, 95/023, 96/002, 96/021, 96/023, 2000/025, 2001/036, 2002/004, 2002/037, 2004/055.

> *The sole question for consideration is whether disclosure of the information requested will prejudice the competitive position of, or interfere with contractual or other negotiations of the third parties or either of them. Certainly it is neither obvious or apparent that this would be the case, and in the result neither of the third parties has made any effort to establish that either of these events would occur.*[46]

[149] No third party in relation to the section 18(1)(c) exemption has been identified in the submission of the University.

[150] I find that the burden of proof has not been met for the section 18(1)(c) exemption.

Letter of Resignation of B

[151] This exemption was invoked by the University in respect to paragraph two on page 4 of the record. After a careful review of the paragraph I cannot find any reasonable basis for finding that the disclosure of this paragraph could reasonably be expected to create the kind of harms described in section 18(1)(c).

Letter of Resignation of C

[152] This exemption was invoked by the University in respect to paragraph seven on page 6 of the letter of C. After the severing already recommended on account of personal information, there would be nothing left that would found a reasonable expectation of the harm to a third party required by the section.

V. ACKNOWLEDGEMENT

[153] I wish to acknowledge and thank both the Applicant and the FOIP Coordinator (former and current) of the University for their arguments and submissions as well as their patience.

[46] SK OIPC Report 96/021 at 2.

VI. FINDINGS

[154] I find that the mandatory exemption in section 28 of the Act does apply in respect of the personal information of third parties that is included in the letters from A, B and C.

[155] I find that section 16(1)(a) of the Act only applies to the first and second paragraphs on page 2 of the letter of A.

[156] I find that section 16(1)(b) of the Act does not apply to the record withheld.

[157] I find that section 14(1)(d) of the Act does not apply to the record withheld.

[158] I find that sections 17(1)(d) and (f) of the Act do not apply to the record withheld.

[159] I find that section 18(1)(c) of the Act does not apply to the record withheld.

VII. RECOMMENDATION

[160] I recommend that the University provide the Applicant with access to the record after severing the personal information of third parties as indicated on a copy of the record that I am supplying to the University together with this Report and also after severing the first and second paragraphs on page two by reason of section 16(1)(a) of the Act.

Dated at Regina, in the Province of Saskatchewan, this 1st day of October, 2007.

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