



October 27, 2003

Mr. David MacLean
105 - 438 Victoria Avenue East
REGINA, Saskatchewan
S4N 0N7

Dear Mr. MacLean

Re Yourself and Saskatchewan Industry and Resources
Our File: E 2003/053 RPR

Enclosed herewith is a copy of a Report that I have finalized respecting the above matter.

Yours truly,

A handwritten signature in black ink, appearing to read "RPR", with a stylized flourish.

Richard P. Rendek, Q.C.
Acting Freedom of Information
and Privacy Commissioner
Province of Saskatchewan

RPR/dg
Enclosure

**REPORT WITH RESPECT TO THE APPLICATION
FOR REVIEW OF DAVID MACLEAN IN RELATION TO INFORMATION
REQUESTED FROM SASKATCHEWAN INDUSTRY AND RESOURCES**

[1] David MacLean (the “Applicant”) forwarded an undated Access to Information Request Form to Saskatchewan Industry and Resources (the “Respondent”) whereby he requested the following:

“Initial budget and communication (November, 2002) plan for “Our future is wide open” campaign, and all other related documents, briefing notes and backgrounders.”

[2] The Respondent replied by letter dated August 22, 2003 which stated, in part:

“Your request for access to records regarding the initial budget and communication plan for the “Our Future is Wide Open” campaign, and all other related documents, briefing notes and backgrounders was received in our office on July 30, 2003.

As to the “initial budget and communication plan” for the campaign, this is to advise you that the record cannot be released. The record you have requested falls under Clause 16(1)(a) of The Freedom of Information and Protection and Privacy Act [sic], which states:

A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including . . . records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees.

With respect to the part of your request asking for “all other related documents, briefing notes and backgrounders”, you have not provided enough detail for us to identify the records which may contain the information required. Please advise us if you are looking for records pertaining to the “initial budget and communication plan” or to the “Our Future is Wide Open” campaign.

. . .”

[3] The Applicant then submitted a Request for Review dated August 28, 2003 to my office, as a result of which I wrote to the Applicant on September 4, 2003, as follows:

"I acknowledge receipt of your Request For Review with respect to your Application Number IR15-03G Request to Saskatchewan Industry and Resources.

Before proceeding with my review, I would ask that you clarify exactly what record or information you are requesting from the Department. I note from their letter to you of August 22, 2003, that they requested additional detail from you in order that they could identify the records which may contain the information that you required.

Upon receipt of your clarification I shall proceed to process your request."

[4] The Applicant replied by letter, dated September 8, 2003 which states as follows:

"Thank you for your prompt reply. The exact record I'm looking for in my request to Industry and Resources is the original budget for the "Our Future is Wide Open" campaign.

While I did request other documents in my request, the primary purpose was to access documents that would allow me to know how much was budgeted for the campaign. That would mean that the spending estimates would be dated around the time the campaign was announced and launched.

As I mentioned in my request for review, I'm certain the public has the right to know how much is budgeted for any public program. The government's refusal to release the budget under Clause 16(1)(a) of the Freedom of Information and Protection of Privacy Act is not legitimate.

It is possible that my request for the communications plan for the campaign can be legitimately denied under the aforementioned Clause (although I would ask for your ruling on this matter as well), but this is not true in regard to the budget – which may or may not be a component of the communication plan."

[5] I then sent a letter to the Respondent on September 9, 2003 which states as follows:

"I am in receipt of an Application for Review with respect to the above matter an [sic] enclose herewith the yellow copy of same.

I also enclose copy of the letter to the applicant dated September 4, 2003 and the applicant's response, which was faxed to me on September 8.

I hereby advise you of my intention to conduct a review in this matter but before proceeding with same, I would appreciate your advising me of your position with respect to access in light of the comments contained in the fax forwarded to me by the applicant.

If it is still you [sic] intention to deny access, I would appreciate your forwarding to me the documents in question together with your reasons for denying access to same.

I make this request pursuant to the provisions of The Freedom of Information and Protection of Privacy Act."

[6] On September 24, 2003, the Respondent responded by letter, as follows:

"I have received your September 9, 2003, letter and documents pertaining to a Request for Review on the above application.

Following consultation on the Application for Access (copy attached) with our Crown Solicitor at Justice, we agreed that the description of the records being requested was somewhat vague. Justice concurred with the approach taken in our response of August 22, 2003, wherein we treated the request as having the following two components:

1. "initial budget and communication plan for the 'Our Future is Wide Open' campaign"; and
2. "all other related documents, briefing notes and backgrounders".

As to the record described as the "initial budget and communication plan", we identified our Cabinet Decision Item entitled "Creating a Positive Attitude in Saskatchewan" as the record which would respond to the request. This item was created for our Minister to make a submission to Executive Council with recommendations and analyses on all aspects of the "Our

Future is Wide Open" campaign; therefore, it was exempted pursuant to Clause 16(1)(a) of *The Freedom of Information and Protection of Privacy Act*. A copy of the record denied is attached.

It is now clear from Mr. MacLean's letter received by you on September 8 that he is looking for access to "documents that would allow [him] to know how much was budgeted for the campaign". Contrary to Mr. MacLean's statement, we have not refused access to the campaign "budget" – rather, access to the record we felt responded to the request was denied.

With respect to "all other related documents, briefing notes and backgrounders", additional detail was requested of Mr. MacLean prior to our response on these records. At this time, I wish to point out to you that this advertising campaign has generated a considerable amount of records and a request for "all" other related records could prove to be onerous both in terms of searching for and identifying all of those records, and the cost of doing so.

I believe that precise clarification from the applicant and possibly a simplification of the request in terms of the amount and nature of records requested, may allow us to identify other documents which may contain the information being sought on both the budget and the communication plan.

I look forward to hearing from you shortly on how you wish to proceed."

[7] On September 25, 2003, I sent a copy of the Respondent's letter without the attachment to the Applicant and advised:

"You will note that the letter suggests that a precise clarification and a simplification of your request would allow them to identify other documents which may contain the information that you are seeking on both the budget and the communication plan.

Accordingly before proceeding with my review, I would appreciate any comment you might have in this connection."

[8] By fax dated October 1, 2003, the Applicant replied as follows:

"As per your attached letter, and the comments from Industry and Resources, I'm happy to provide further clarification.

In the interest of simplifying my request for Industry and Resources staff, I will modify its wording:

I would like to be granted access to the "Creating a Positive Attitude in Saskatchewan" document, as described in the letter from Industry and Resources September 24, 2003.

I assume that is the original communications plan for the campaign, and as such will outline both the original amount budgeted for the "Our Future is Wide Open" campaign, and the communications strategy.

If it is your judgment that the entire communications plan can not be made public under the Act, the budget portion of the plan should be made available.

For the record, we are concerned that Industry and Resources is unfairly using the Act to delay release of the records in questions. Our original request was clear enough to be at least partially granted by the department. The fact that no information has been granted despite of the obvious nature of the request indicates to us that the department is using repeated requests for clarification, and the resultant deadline extensions, as delay tactic. We hope that a possible provincial election is not the underlying reason for their tactics.

We respectfully ask that our information request be granted expeditiously."

[9] I forwarded this letter from the Applicant to the Respondent who replied by fax, dated October 16, 2003. which states:

"I am writing in response to your letter of October 2, 2003, regarding Mr. MacLean's further correspondence on the above matter.

Mr. MacLean's letter states that he is modifying his original request to us to read as follows:

"I would like to be granted access to the 'Creating a Positive Attitude in Saskatchewan' document, as described in the letter from Industry and Resources September 24, 2003."

It is our position that access to the Cabinet Decision Item, "Creating a Positive Attitude in Saskatchewan", must be denied in accordance with Clause 16(1)(a) of *The Freedom of Information and Protection of Privacy Act* (Act) . . .

Clearly, under the provisions of the Act, this particular exemption does not afford Industry and Resources any discretionary powers to grant access to any Cabinet documents.

I would also like to address the balance of Mr. MacLean's comments in his most recent letter, as well as his concerns about Industry and Resources' handing [sic] of the original request.

Mr. MacLean's assumption is correct when he states that the original communications plan for the "Our Future is Wide Open" campaign is the Cabinet Decision Item entitled "Creating a Positive Attitude in Saskatchewan".

We do not agree that Mr. MacLean's original request was "clear enough" and "obvious". The department's legal counsel at Justice was consulted to obtain his interpretation of the request – specifically on the second part requesting "all other related documents, briefing notes and backgrounders". Justice agreed that the wording was not precise enough for an exact interpretation and felt that clarification was indeed warranted.

As to Mr. MacLean's claim that "a possible provincial election could be the underlying reason" for not granting access to any records or, in his words, to "delay release of the records in question", this is completely unfounded. We had responded to Mr. MacLean on August 22, 2003 – within 23 days of his request and actually one week less than the 30-day timeframe permitted in the Act. At no time did Mr. MacLean respond to us to provide the clarification we needed to identify any other relevant records that may or may not have been accessible. Had he done so, this matter could have been taken care of in advance of the election announcement made just last week. It is our feeling that the applicant himself has delayed the process by not clearly stating his original request, not providing us with clarification as requested, and dealing through your office rather than directly with Industry and Resources.

Additionally, we have not at any time relayed to the applicant that we required an extension to our deadline as alluded to by Mr. MacLean.”

[10] Since the Applicant has modified his request to the document entitled “Creating a Positive Attitude in Saskatchewan”, I intend to limit my review to whether this document should be released to him. I have reviewed this document and found it contains several sections containing recommendations, advice, proposals, some background information and some budget proposals. The document was clearly produced for presentation to Executive Council for a decision on the proposals and recommendations.

[11] The Respondent has claimed that the document, in its entirety, is exempt pursuant to section 16(1)(a) of *The Freedom of Information and Protection of Privacy Act* which states:

“16(1) A head shall refuse to give access to a record that discloses a confidence of the Executive Council, including:

(a) records created to present advice, proposals, recommendations, analyses or policy options to the Executive Council or any of its committees;”

It is significant that this section is mandatory. The head has no discretion to release the documents that are covered by this section. It is also significant that unlike section 17, there is no exception to the exemption for background research or statistical surveys.

[12] Clearly, the portions of the document containing proposals, recommendations, analyses and policy options are exempt from disclosure pursuant to section 16(1)(a). As the Applicant has speculated, portions of the document contain budgetary considerations but all of these are in the form of proposals and are exempt from disclosure. There is no exception to the exemption for budgetary proposals.

[13] These portions that are clearly exempt form the major part of the document. The only question remaining is whether the portions that purport to discuss “background” issues should be severed and released.

[14] In *Weidlich v. Saskatchewan Power Corporation* (1998), 164 Sask. R. 204, Mr. Justice Geatros of the Saskatchewan Court of Queen’s Bench dealt with an appeal of SaskPower’s decision to withhold certain documents despite the Information and Privacy Commissioner’s recommendation that they should be released. Mr. Justice Geatros examined the meaning of “analyses” under section 17 of the Act and held:

“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 *Moodie (J.R.) Co. v. Minister of National Revenue*, [1950] 2 D.L.R. 145 (S.C.C.), at p. 148.

The court also found that where facts and opinions are so intertwined in a document that they cannot be intelligently separated, the documents “must be disclosed *in toto* or not at all”.

[15] Following the *Weidlich* decision and its definition of “analyses”, I find that the portions of the document that are entitled background information really contain analyses as these sections provide counsel and opinion for the Executive Council to assist in making its decision. If there are purely factual references in these portions, those facts are so intertwined with the analyses as to make it impossible for them to be severed from the rest of the document. I therefore find that the document “Creating a Positive Attitude in Saskatchewan” is entirely exempt from disclosure under section 16(1)(a).

[16] For the reasons outlined above, it is my view that the Respondent was justified in denying access to the document and I would accordingly recommend that the Respondent continue to deny access to the Applicant to the information requested.

[17] Dated at Regina, in the Province of Saskatchewan, this 27th day of October, 2003.

A handwritten signature in black ink, appearing to read 'R. P. Rendek', written over a horizontal line.

RICHARD P. RENDEK, Q.C.
Acting Commissioner of Information
and Privacy for Saskatchewan