

April 18, 2018

Office of the Information
and Privacy Commissioner
503-1801 Hamilton Street
REGINA SK S4- 4B4

Attention: Alyx Larocque

via email: alarocque@oipc.sk.ca

Re: Draft Review Report 298-2017
University of Saskatchewan File 2017-015

Thank you for the opportunity to review the draft review report in the above-noted matter dated April 12, 2018.

The request under review was not received July 6, 2017, but was received August 23, 2017, and requested access to the "Audio recording of proceedings, "Symposium: Research Management and the Right to Know," 2 Dec 2015", rather than what was misquoted at paragraph 1 of the draft report.

There was no clarifications sought as alluded to in paragraph 2 of the draft report; there was a suspension of time with respect to receipt of the deposit on processing fees and one extension of time due to the need to transcribe the recording.

With respect to the Chatham House Rule, discussed at paragraphs 11 and 12 of the draft report, the university explicitly acknowledged in its submissions that the rule does not override access to information legislation. The argument put forth by the university, which is not addressed in the draft report, is that it is evidence in support of the application of subsections 16(1)(a) and (b). We object to the implication that the university relied on the Chatham House Rule to evade access to information, and we also object to the fact that our argument that the invocation of the Chatham House Rule is evidence in support of the application of subsections 16(1)(a) and (b) was completely disregarded.

With respect to the personal information of non-university employees, Review Report LA-2012-002, referred to at paragraph 19 of the draft report, pertained to the employment information of employees of the local authority in question, not employees of another organization. Section 23(2) explicitly excludes certain information about local authority employees from the definition of personal information, including employment responsibilities and personal opinions given in the course of employment. This should lead to the conclusion that this same information about non-local authority employees *is* included in the definition of protected personal information.

The university concedes that the responsibilities and work product of university employees is not protected personal information. However, the university submits that the Commission places undue emphasis on the criteria, “personal in nature,” and maintains that information about non-university employees, including what they do during the course of their employment with another entity, is protected personal information. The paramountcy of privacy over access to information is confirmed in *Dagg v. Canada (Minister of Finance)* 1997 CanLII 358 (SCC), and the Commission should not interpret personal information so narrowly as to favour access over the privacy of non-university employees. The university is not in a position to disclose the fact that non-university employees attended this meeting or the opinions they gave at this meeting.

With respect to the interpretation and application of section 16(1)(a), I wish to draw your attention to the recent Court of Queen’s Bench decision in *Britto v. University of Saskatchewan* 2018 SKQB 92, where Mr. Justice Danyliuk rejects the relatively narrow test set out by the Commissioner in the Guide to Exemptions, stating at paragraph 83:

...the “three part test”... reflects language and considerations not contained in s. 16. The statute’s language is broad; the Commissioner’s attempt to refine or define a single applicable test to apply to a myriad of situations seems to me to be a stretch. Sometimes the considerations identified by the Commissioner...will be applicable, but sometimes the facts will be such that those considerations will not apply.

Specifically with respect to “advice,” Danyliuk, J. stated, at paragraph 81, “The Commissioner’s view is that “*advice* includes the analysis of a situation or issue that may require action and the presentation of options for future action”. Well, sometimes it will include that. But other times it will not.” The university, in its submissions dated January 5, 2018, also referred to the Federal Court of Appeal decision in 3430901 Canada Inc. v Canada (Minister of Industry), 2001 FCA 254 (CanLII), [2002] 1 FCR 421 [*Telezone*], where it was found that advice includes “an expression of opinion on policy matters” – a broader interpretation of advice than that in the Guide to Exemptions and used by the Commission in this matter. With respect to section 16(1)(b), Danyliuk, J. also found the Commissioner’s interpretation in the Guide to Exemptions as being unduly restrictive.

The university submits that the Commission is taking an unduly restrictive approach to the interpretation and application of subsection 16(1)(a) and (b) and is overlooking the intent of the provision, which is to allow candor and encourage frank discussions by protecting internal decision-making and policy-making processes. Again, the nature of this meeting and the application of section 16(1)(a) and (b) is supported by a plain reading of the transcript and the invocation of the Chatham House Rule.

A plain reading of the transcript shows that the entire conversation involved, interchangeably and indistinguishably, advice, proposals, recommendations, analyses and policy options and consultations and deliberations, and that it involved university employees for the benefit of university employees (as well as others). The university will not review the transcript on a word by word, line by line basis in order to prove beyond a reasonable doubt that these provisions apply. The appropriate burden of proof is the balance of probabilities. Further, the university put forth *Telezone* and *Merck Frosst Ltd. v. Canada*

(Health) 2012 SCC 3 [*Merck*] in support of the broad severing of information, which argument was not addressed in the draft report.

Sincerely,

A handwritten signature in blue ink, appearing to read "R. Johnston". The signature is written in a cursive, somewhat stylized font.

Rayelle Johnston
Access and Privacy Officer