

IN THE MATTER OF:

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

AND IN THE MATTER OF:

**AN ADJUDICATION UNDER SECTION 62,
REQUESTED BY [G. R.] ON
APRIL 22, 1996**

**REASONS FOR DECISION
OF THE
HONOURABLE MADAM JUSTICE LEVINE**

I. Background

(1) From March 19 to April 3, 1996, [Mr. R.] made six requests to the Information and Privacy Commissioner under section 5 of The Freedom of Information and Protection of Privacy Act, S.B.C. 1992, c. 61 as amended by S.B.C. 1993, c. 46 (now R.S.B.C. 1996, c. 165). The Commissioner replied in a single written response dated April 12, 1996. [Mr. R.] seeks an adjudication of the Commissioner's decisions in response to his requests, pursuant to section 62(1) of the **Act**.

(2) [Mr. R.] made the following six access requests:

1. Request No. 2922 (March 19, 1996): a complete list of all B.C. Supreme Court actions initiated by members of the general public or their agents on their behalf related to applications for court orders seeking compliance with the Freedom of Information and Protection of Privacy Act against any and all branches of the Government of B.C.
2. Request No. 2923 (March 27, 1996): copies of all section 43 applications made by heads of public bodies, and disposition of each application, including copies of all relevant correspondence.
3. Request No. 3000 (April 3, 1996): all notes, communications, E-mail and reports generated by Portfolio Officer Bill Trott relating to [G.R.]

4. Request No. 3001 (April 3, 1996): all documentation and communications related to a complaint filed by *[Mr. R.]* to the Commissioner concerning Portfolio Officer Kyle Friesen and all reports generated about the same.
5. Request No. 3002 (April 3, 1996): all records, notes, logs, memos, E-mail, communications related to *[Mr. R.]* produced by Portfolio Officer Kyle Friesen, or in his possession, as well as all communications related to the same from government offices.
6. Request No. 3003 (April 3, 1996): questions whether all portfolio officers are lawyers, and if so, whether they are required to hold membership in the Law Society of British Columbia, and a list of portfolio officers who are members of the Law Society of British Columbia.

(3) In response to Request 1 (No. 2922), the Office of the Commissioner informed *[Mr. R.]* by telephone and in the April 12, 1996 letter that the Commissioner is not notified of judicial reviews brought against other government agencies. The Office provided a list of decided cases on judicial reviews from the Commissioner's decisions.

(4) The Commissioner's responses to the remaining requests are summarized as follows:

Request 2 (No. 2923): The applications made by heads of public bodies under section 43 of the Act were not released because they are classified as "operational files" of the Office of the Commissioner. The Commissioner claims that, as such, they are excluded from the application of the Act pursuant to section 3(1). The Office of the Commissioner provided general information regarding section 43 applications, including the history of the four applications that had been made under section 43 at the time of Request 2.

Requests 3 and 5 (No. 3000 and No. 3002): The records were classified as operational files and excluded from the application of the Act pursuant to section 3(1) of the Act.

Request 4 (No. 3001): The only records held by the Commissioner in response to this request, namely, *[Mr. R. 's]* correspondence to the Office and the April 12, 1996 letter in response to his six requests, were correspondence already in *[Mr. R. 's]* possession.

Request 6 (No. 3003): *[Mr. R.]* was informed that the record requested, a list of portfolio officers who are members of the Law Society of British Columbia, does not exist. The Office of the Commissioner does not collect this information because a portfolio officer is not required to be a member of the Law Society of B.C.

II. Grounds of Review

(5) On April 22, 1996 *[Mr. R.]* requested a review of the Commissioner's decision by an adjudicator. *[Mr. R.]* sought the review on several grounds. First, he submits that the response violated section 6(1) of the Act which mandates that a head of a public body must make every

reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely. Second, *[Mr. R.]* alleges that the refusal of full disclosure was made in bad faith motivated by the belief that disclosure of the requested documents could prove embarrassing to the Office. Third, *[Mr. R.]* submits that section 25(1)(b) of the Act, which requires the head of a public body to disclose information that is clearly in the public interest, applies to the records he requested.

III. Powers of the Adjudicator

(6) Part 5, Division 2 of the Act provides for the appointment of an adjudicator to investigate and review complaints about the Commissioner as the head of the Office of the Information and Privacy Commissioner. An adjudicator is appointed to review decisions or omissions of the Commissioner regarding the disclosure of records in the custody or under the control of the Commissioner's office.

(7) Pursuant to section 56(3) of the Act, the Commissioner and *[Mr. R.]* were given the opportunity to make representations. Section 56(4) grants to the adjudicator the discretion to determine whether representations are to be made orally or in writing; in this adjudication, written submissions were found to be sufficient. Submissions were received from the Commissioner's counsel dated January 28, 1997. *[Mr. R.]* stated in a fax dated March 13, 1997 that he would not make any written submissions.

(8) As this review concerns a refusal of access to a record, section 57 of the Act places the burden of proof on the Commissioner to prove that the applicant has no right of access to that part of the record not disclosed.

(9) In undertaking this review, section 65(1) grants to the adjudicator the same powers and duties given to the Commissioner by section 56(1), which empowers the adjudicator to decide all questions of fact and law arising in the course of the inquiry. The materials reviewed for this adjudication include *[Mr. R. 's]* six requests for access to records of the Office of the Commissioner; the Commissioner's written response; copies of the documents released by the Commissioner; copies of the documents withheld by the Commissioner; *[Mr. R. 's]* request for a review of the Commissioner's decision and submissions of counsel for the Commissioner.

(10) Although this material was reviewed the following reasons are written in light of section 61(1) of the Act which grants an adjudicator the powers, duties and functions given to the Commissioner by various sections of the Act, including section 47(3). Section 47(3) requires the adjudicator:

In conducting an investigation, audit or inquiry under this Act and in a report under this Act... must take every reasonable precaution to avoid disclosing and must not disclose

- (a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 5...

(11) I note that section 56(6) of the Act provides that an inquiry into a matter under review must be completed within 90 days after receiving the request for the review. In this case, the adjudicator was appointed by Order-in-Council pursuant to section 60(1) of the Act on August 1, 1996, which was more than 90 days after [Mr. R. 's] request for review dated April 22, 1996. Further time transpired while the relevant documents were compiled and provided to the adjudicator by the Commissioner's Office and both parties were given the opportunity to make submissions. As neither party has raised any issue concerning the 90-day time limit, I intend to provide my findings on review though the time for doing so under the Act has passed.

IV. Section 3(1)(c) - Exclusion of Operational Records

(12) In refusing to disclose the records requested in Requests 2 (No. 2923), 3 (No. 3000) and 5 (No. 3002), the Commissioner relied on section 3(1)(c) of the Act. The refusal to disclose records on this ground is properly subject to review by an adjudicator since it is a decision of the Commissioner as a head of a public body: *In the Matter of an Adjudication under Section 62 of The Freedom of Information and Protection of Privacy Act Requested by [Mr. H.]* (6 September 1996), Esson C.J. (as he then was) [Adjudication order no. 1] at 9.

(13) Section 3(1) establishes the scope of the Act and lists a number of records to which the Act does not apply. The section states:

s. 3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

(c) a record that is created by or is in the custody of an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;....

(14) Schedule 1 to the Act defines "officer of the Legislature" as including "the Information and Privacy Commissioner". In [Mr. H.], Esson C.J. [Adjudication order no. 1] held that the Commissioner's "officer's functions" includes the duties, powers or functions of the Commissioner that he or she is capable of delegating to staff or consultants to enable the Commissioner to perform the duties of that office: (at 10).

(15) Schedule 1 to the Act defines "record" as including: "books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records". In [Mr. H.] [Adjudication order no. 1], Esson C.J. held that notes, memoranda and communications within the Commissioner's office or in the form of *aide-mémoire* by a member of the Commissioner's staff constitute "records" that relate to the Commissioner's functions under the Act (at 9- 10).

(16) Counsel for the Commissioner submits that any record that is specific to a case file is an operational record related to the exercise of the Commissioner's functions and is therefore excluded from the Act under section 3(1)(c). She points out that the Commissioner is charged with investigating and resolving complaints (section 42); considering and resolving applications to disregard requests (section 43); and conducting reviews and inquiries (Part 5) and that case files are created to process the complaints, applications and inquiries. Records specific to a case file include case management or tracking sheets and lists, notes and working papers (including draft documents) of the Commissioner or his staff, and any other case specific records received or created by the Commissioner's Office in the course of opening, processing, investigating, mediating, settling, inquiring into, considering, taking action on or deciding a case.

(17) Counsel for the Commissioner further submits that section 3(1)(c) was enacted in recognition of the fact that access rights under the Act can be incompatible with the exercise of the functions assigned to the Commissioner. In the capacity of investigator and mediator, the Commissioner conducts settlement discussions and mediations confidentially and without prejudice to any formal application or inquiry which will ensue in the event that a matter cannot be resolved informally. Counsel submits that excluding operational records from the Act therefore facilitates the Commissioner's mandate. She points out that Section 47 of the Act underscores the need for the Commissioner to perform the duties, powers and functions of his office on a confidential basis and is complementary to section 3(1)(c). Section 47 restricts disclosure of information obtained in the course of performing the duties, powers and functions of the Commissioner

(18) I agree with counsel's submissions. The Commissioner's policy (described in [*Mr. H.*] [*Adjudication order no. 1*] at 10-11) indicates that the Commissioner is aware of the limits of the exclusion granted by this section: Esson C.J. describes the policy as "not to rely on [section 3(1)(c)] unless to waive it might create some prejudice to the *conduct* of his office" (emphasis added).

(19) I have reviewed the documents provided by the Commissioner, which are in his custody, to which access was refused on the grounds that they come within section 3(1)(c). Requests 3 (No. 3000) and 5 (No. 3002) are for records that are composed mostly of Commissioner staff notes and memoranda which were correctly held to be part of an operational case file that relates to the Commissioner's function.

(20) Request 2 (No. 2923) sought all applications made by public bodies under section 43 of the Act, as well as the disposition and correspondence concerning these applications. The four files are clearly operational case files: they are composed of section 43 applications, submissions by both parties, correspondence of the Commissioner's staff with both parties, and the reasons of the Commissioner. These records fall within the purview of section 3(1)(c).

V. Grounds of Review

A. Was Section 6(1) of the Act breached?

(21) [Mr. R.] alleges that section 6(1) of the Act was breached when the Office of the Commissioner declined to grant him access to the requested records.

(22) Section 6(1) states: "The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely."

(23) I concur with the submissions of the counsel for the Commissioner that the office of the Commissioner did not breach its section 6(1) duty to assist. The Commissioner's letter was mailed within 30 days of [Mr. R.'s] first request and it complied with section 8(1) of the Act which details the minimum contents of a response from a head of a public body. Pursuant to section 8(1), the response must state: (1) whether or not the applicant is entitled to access to the record or part of the record; (2) if access to the record is refused, the reasons for refusal and the provision of the Act on which the refusal is based; (3) the name, title, business address and phone number of an officer of the public body who can answer the applicant's questions about the refusal; and (4) that the applicant is entitled to ask for a review under section 53 or section 63.

(24) The Commissioner's letter responded to those requests that the Commissioner concluded could be answered. For example, Request 1 (No. 2922) was answered to the best abilities of the Commissioner when [Mr. R.] was provided with a list of all decided cases on judicial review of the Commissioner's decisions as well as their court registry number (to facilitate their retrieval by the applicant). [Mr. R.] was also informed of all the records that were already within his possession. While Request 2 (No. 2923), which asked for copies of all section 43 applications, was denied, the history of all section 43 applications was disclosed to [Mr. R.]. Finally, the Commissioner responded to [Mr. R.'s] questions posed in Request 6 (No. 3003) despite the fact that answering such questions is not part of the mandate of the Commissioner.

B. Did the Commissioner Act in Bad Faith?

(25) [Mr. R.] submits that the Commissioner's responses to his requests were made in bad faith "as disclosure of the requested documents could prove embarrassing to the Commissioner."

(26) An allegation of bad faith is one of several means of suggesting that a person with delegated authority has acted for an improper purpose. Such an allegation is a serious charge that must be substantiated with sufficient evidence to refute the *prima facie* presumption of the regularity of the acts of public officers: *Clare v. Thompson* (1993), 83 B.C.L.R. (2d) 263 at 270 (C.A.); *Adams v. Workers' Compensation Board* (1989), 42 B.C.L.R. (2d) 228 at 230-31 (C.A.).

(27) My review of the materials does not reveal any evidence of bad faith on the part of the Commissioner. On the contrary, I find evidence of attempts to accommodate [Mr. R.'s] demands. For example, it is evident from the correspondence between [Mr. R.] and the Commissioner that [Mr. R.] was not satisfied with the conduct of a member of the Commissioner's staff. The Commissioner accommodated his request by changing his Portfolio

Officer. [Mr. R. 's] correspondence with the Commissioner's staff on this and other requests reveals no bad faith.

C. Did the Commissioner's Response Comply with Section 25(1)(b) of the Act?

(28) [Mr. R. 's] third ground for review is that the requested records should be disclosed pursuant to section 25(1)(b) which requires disclosure of all records clearly in the public interest.

(29) Section 25(1) and (2) state:

- (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
 - (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
 - (b) the disclosure of which is, for any other reason, clearly in the public interest.
- (2) Subsection (1) applies despite any other provision of this Act.

(30) Counsel for the Commissioner submits that section 25 does not apply to the present records because they are excluded from the operation of the Act under section 3. I disagree. Section 25(2) makes it clear that section 25(1) applies despite any other provision of the Act. Section 25 is accordingly paramount over section 3. However, only information, not the entire operational record, that satisfies either the significant harm or clear public interest tests must be disclosed by the Commissioner pursuant to section 25.

(31) Section 25(1)(b) applies to any situation other than those included in section (1)(a), where disclosure of information would clearly be in the public interest. Melvin J in *Clubb v. Saanich (District)* (1996), 46 C.R. (4th) 253 at 264 (B.C.S.C.) considered the meaning of "public interest" in section 25(1) of the Act and stated:

The term "public interest" in s. 25(1)(b) cannot be so broad as to encompass anything that the public may be interested in learning. The term is not defined by the various levels of public curiosity. The public is, however, truly "interested" in matters that may affect the health or safety of children.

(32) Sopinka and Cory JJ. in *RJR - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 344 considered the phrase "public interest" in the context of an application for interlocutory relief and stated that: " 'Public interest' includes both the concern of society generally and the particular interests of identifiable groups."

(33) The determination of public interest is made on a case by case basis and requires an assessment of the public interest in disclosure versus the public interest in nondisclosure. To satisfy the subsection, the public interest must be "clear", which *Black's Law Dictionary*, 6th ed. (St. Paul: West Publishing, 1990) at 250 defines as "Obvious, beyond reasonable doubt; perspicuous; plain."

(34) The information not disclosed includes internal correspondence of the Commissioner's office concerning [Mr. R. 's] file. This does not amount to information "clearly of a public interest". Nor can the information in the four "section 43 application" files requested by [Mr. R.] be said to be unmistakably of public interest. These applications were of interest to the parties involved: the applicants seeking voluminous amounts of information from a public body and the public body seeking the Commissioner's approval for the public body to deny the applicant's allegedly repetitious requests. Neither the public at large nor a group of individuals can be identified as clearly interested in the disclosure of information within these operational files.

VI. Conclusion

(35) The Commissioner was correct to exclude the disclosure of the operational records sought by [Mr. R.] in Requests 2 (No. 2923), 3 (No. 3000) and 5 (No. 3002) pursuant to section 3(1)(c) of the Act. There was no breach of section 6(1): the Commissioner's letter of April 12, 1996 responded to [Mr. R. 's] requests openly, accurately and completely. There is no evidence of bad faith. Section 25(1)(b) does not apply: the information not disclosed to [Mr. R.] is not information "about a risk of significant harm" or information "the disclosure of which is... clearly in the public interest."

(36) Pursuant to sections 65(2) and section 58(1) of the Act, I dispose of this adjudication by confirming the Commissioner's decisions to refuse access to the records requested by [Mr. R.].