

**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 [M.H.] ON MAY 27, 1997.**

**REASONS FOR DECISION  
OF THE  
HONOURABLE MADAM JUSTICE D. SMITH**

[1] *[Mr. H.]* has applied pursuant to s. 62 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (the "Act") for a review of the decision made by the Information and Privacy Commissioner (the "Commissioner") in response to his access request.

[2] On April 1, 1997, *[Mr. H.]* requested a number of records from the Office of the Information and Privacy Commission (the "OIPC"). He requested access to:

1. ... all records in your possession concerning me.
2. ... communications to or from the Attorney General but... not on the question of the Attorney General obtaining illegally my records from the Ministry of Social Services under s. 33 falsely.
3. ... dealings with you which occurred in or about December 1995 and may have occurred in March 1996 and possibly in between. There may also have been relevant events starting in September 1995.
4. The ministry of the Attorney General, and the Legal Services Branch, has had communications with you [OIPC] not on the "s. 33" matter referred to supra. I am aware that, probably December 1995 (or from September onwards), the Legal Services Branch faxed documents to you which you were not entitled or had asked for. They are documents concerning me and have my name on; clearly.
5. ... copies of any documents transmitted to you [OIPC] with any cover sheets, letters regarding the documents and any similar correspondence. ...copies of your [OIPC] incoming fax machine records showing the transmissions with the dates, times, number of pages and sender's number.

6. ... copies of any communications, telephone calls with notes, memos and the like from you or your office to anyone in the Attorney General's office regarding this subject.

[3] On May 1, 1997, the Commissioner replied:

After completing a thorough search of files held in this Office, including various Requests for Review files, Freedom of Information request files, Judicial review files, fax log sheets for the requested time period and files held in our legal counsel offices, the following records have been identified as falling within the criteria you have stipulated above:

- two fax cover sheets, one with attachments dated October 4, 1996
- one set of attachments, no cover sheet located
- one fax cover sheet with attachments dated December 4, 1996

The above records fall under s. 14 of *the Freedom of Information and Protection of Privacy Act*, Legal Advice. The above records fall under the solicitor-client privilege and were prepared in contemplation of litigation. Specifically these records fall under the work product/lawyer brief rule. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege. The Office is prepared, in this case, to waive the solicitor client privilege with respect to the above listed records and release them to you.

[4] By letter dated May 27, 1997, [Mr. H.] requested a review by an adjudicator under s. 62(1) of the Act, of the Commissioner's response to a request for records. The request was made as follows:

1. My complaint for review by the adjudicator is that David Flaherty collected and used my personal information from the Ministry of the Attorney General in contravention of FIPP act s. 2(1) (d), 26(a), 32 and 33.
2. The Attorney General disclosed my records to David Flaherty. There was no request from David Flaherty under FIPP s. 5 and neither party is exempted under FIPP Act s. 33(g), 33(k), 14 et al. There was no Inquiry on my behalf in process with David Flaherty.
3. The OIPC letter paragraph 4 suggests that the records (in the OIPC) are subject to FIPP Act s. 14 and that may apply to the records themselves within that public body. The point at issue is that the records were improperly obtained from another public body. Whereas another party (applicant) may not obtain access to these records (those in the OIPC) due to section 14 they are originally records with the Attorney General to which David Flaherty has no right of access.

4. Taking the original source of the records being the Attorney General another party (applicant) could not have access to them without a formal request under FIPP Act s. 5 subject to a third party notice under s. 23. Neither was done.

[5] Following my appointment as an adjudicator in this matter, the Commissioner informed me in a letter dated September 22, 1997, that his office would be making a jurisdictional objection to this review. I directed, by letter dated December 8, 1997 to the Commissioner and to [Mr. H.], that the matter proceed by way of written submissions on both jurisdictional and substantive issues. Submissions on behalf of the Commissioner were received on December 31, 1997.

[6] [Mr. H.] applied for indigent status in this matter on January 15, 1998. He was informed by Supreme Court Law Officer, Kathryn Sainty, on January 29, 1998, that because the adjudication is not a "proceeding" within the definition of the *Rules of Court*, there is no provision for indigent status. His application for indigent status was refused. In any event, there are no fees set forth in Appendix C, Schedule 1 of the *Rules of Court* and, as such, no need to exempt [Mr. H.] from the payment of any fees. I note that [Mr. H.] has applied for indigent status in a s. 62 adjudication on at least one other occasion, an application which was dismissed by Hall J. on May 14, 1996.

[7] [Mr. H.] was advised on January 29, 1998 that he had an additional two weeks from the date of that letter in which to respond in writing to the submissions of the Commissioner. No submissions have been received from [Mr. H.].

#### **BACKGROUND:**

[8] [Mr. H.] has a long history of making access requests under the Freedom of Information and Protection of Privacy Act. In fact, the first adjudication under s. 62 of the Act was requested by [Mr. H.] on November 17, 1995 [Adjudication order no. 1]. In his reasons in that matter, Esson C.J. (as he then was) made reference to [Mr. H.'s] "ability, by piling proceeding upon proceeding, to create confusion as well as waste time and resources all of which must be met from the hard pressed public purse": *In the Matter of an Adjudication under Section 62 of the Freedom of Information and Protection of Privacy Act Requested by [Mr. H.]* (September 6, 1996) at 5 [Adjudication order no. 1].

[9] Esson C.J. noted that, between July 14, 1994 and April 24, 1995, [Mr. H.] had commenced a total of nine judicial review proceedings against the Ministry of Social Services. He was granted indigent status in all but one proceeding and all were discontinued or dismissed. In dismissing the ninth one, Hall J. ordered that [Mr. H.] be enjoined from bringing further proceedings against the Ministry of Social Services without obtaining special leave of the Court.

[10] [Mr. H.] then began to initiate a number of judicial review proceedings against the Commissioner. On December 15, 1995, Lowry J. dismissed [Mr. H.'s] petition against the Commissioner and ordered that [Mr. H.] be precluded from bringing any new proceedings against the Commissioner without first obtaining leave of the Court to do so.

[11] It now appears that [Mr. H.] seeks to use the provisions of the *Freedom of Information and Protection of Privacy Act*, including the adjudication process, as a means of challenging the decisions of the Commissioner and officials in other government bodies on a wide variety of issues falling into the broad category of access to information. In recent years, both the Ministry of Human Resources and the OIPC have been flooded with access requests and review requests from [Mr. H.].

[12] On October 16, 1997, the Commissioner granted a rare application by the Ministry of Human Resources pursuant to s. 43 of the Act authorizing the Ministry to disregard requests under s. 5 that, because of their repetitious or systemic nature, would unreasonably interfere with the operations of the Ministry. In his reasons for granting the application, the Commissioner found that [Mr. H.] was "not using the Act in good faith" but was, instead, "using the Act as a weapon against the Public Body because he is unhappy with the Public Body's decisions about his entitlement to income assistance benefits." I understand that [Mr. H.] has applied for judicial review of that decision.

#### **THE SCOPE OF ADJUDICATION:**

[13] The Commissioner has two distinct roles under the Act: (1) overseeing and administering the Act, and (2) acting as head of a public body. It is only the acts or omissions of the Commissioner in the latter capacity that are subject to review by an adjudicator. This is an important distinction because the bulk of the Commissioner's work, which includes monitoring the compliance of other public bodies, investigating complaints against public bodies, and promoting awareness of the Act, is subject only to judicial review and is not reviewable by an adjudicator.

#### **THE REQUESTS:**

[14] The essence of [Mr. H.'s] complaint is that the Commissioner collected and used his personal information from the Ministry of the Attorney General in contravention of ss. 2(1)(d), 26(a), 32 and 33 of the Act. As noted by the Commission in its submissions, [Mr. H.] does not seek a review of the adequacy of the information disclosed; rather, he requests a review of the manner in which the Commissioner's counsel acquired the information.

[15] The Commissioner's position is that, as an adjudicator, I have no jurisdiction to review the actions of the Commissioner in the manner requested by [Mr. H.] because the records are excluded from the operation of the Act and were not acquired by the Commissioner as head of a public body. Further, it is submitted that an adjudicator has no jurisdiction to review a complaint under s. 42(2)(e) that personal information has been collected, used, or disclosed by the Commissioner as head of a public body in contravention of Part 3 of the Act.

[16] The information at issue was obtained by the Commissioner (through counsel) in order to defend litigation initiated by [Mr. H.] to challenge actions of the Commissioner *qua* Commissioner and not as head of a public body. An adjudicator has no jurisdiction under ss. 60 or 62 to investigate the actions of the Commissioner in this capacity.

[17] It is also important to note that an adjudicator is given the powers, duties, and functions of the Commissioner under s. 42(2)(a) to (d), but specifically is not given authority under s. 43(2)(e), namely authority to "investigate ... complaints that personal information has been collected, used or disclosed by a public body in contravention of Part 3." This is precisely what *[Mr. H.]* has asked me to do in this case.

[18] Even if I had the jurisdiction to review *[Mr. H.'s]* request, I would find that the records at issue are clearly excluded from the legislative scheme and operation of the Act as records relating to the exercise of the Commissioner's functions under the Act pursuant to s. 3(1)(c). I reiterate, however, that I have no jurisdiction to review the actions of the Commissioner in relation to these records which were obtained in order to defend litigation concerned with the Commissioner's functions under the Act.

[19] I am also in agreement with the Commissioner's submission that, in any event, the "personal information" *[Mr. H.]* alleges was improperly collected or used, consists of publicly accessible pleadings, orders, reasons for judgment and court submissions which had *[Mr. H.'s]* name on them. Even if this is "personal information", it was properly collected and used by the Commissioner pursuant to ss. 26 and 27 of the Act.

[20] In my view, this is another example of *[Mr. H.'s]* tendency to pile (often ill-founded and unnecessary) proceeding upon proceeding. The Commissioner has dealt with Mr. H.'s numerous requests in a fair and even-handed manner, even providing access to information he has no obligation to provide, yet *[Mr. H.]* insists on bring a flood of frivolous legal proceedings against him at great expense to the public purse. The fact that, as in the 1996 *[Mr. H.]* adjudication, *[Mr. H.] [Adjudication order no. 1]* filed no written submissions to support his application is significant when compared to the level of effort, time and expense required by the Commissioner, the Commissioner's counsel, and myself as an adjudicator in reviewing the matter and providing submissions and reasons.

[21] For the reasons outlined above, I dispose of this adjudication pursuant to ss. 58(1) and 65(2) by confirming the Commissioner's response to *[Mr. H.'s]* requests for the records.

D. Smith, J.