

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 *[F.M.]* ON NOVEMBER 13, 1996

REASONS FOR DECISION
OF THE
HONOURABLE MADAM JUSTICE LEVINE

I. INTRODUCTION AND BACKGROUND

[1] On November 13, 1996, *[Mr. M.]* requested a review of the response of the Information and Privacy Commissioner to *[Mr. M.'s]* request for a record relating to two inquiries held on April 19, 1996. *[Mr. M.'s]* request for review was forwarded to me for adjudication under section 62 of the Freedom of Information and Protection of Privacy Act.

[2] The two inquiries were conducted by the Commissioner under section 56 of the Act with respect to requests by *[Mr. M.]* for review of decisions of the Ministry of Finance and Corporate Relations and the Vancouver School Board. The Commissioner issued orders under section 58 of the Act on May 29 and June 5, 1996, in both cases confirming the decisions of the heads of these public bodies.

[3] On September 23, 1996, *[Mr. M.]* wrote to the Commissioner requesting "a copy of any record which shows all the documents submitted to, and considered by the Commissioner in respect of the above-mentioned inquiries." The Commissioner replied in writing on October 22, 1996 and provided "a copy of the Tables of Contents for the binder that the Commissioner reviewed in respect to" each of the orders. In addition, the Commissioner provided a copy of a letter received from each of the School Board and the Ministry in respect of each inquiry.

II. GROUNDS OF REVIEW

[4] *[Mr. M.]* claims that the Commissioner's response to his request was not adequate. He alleges that the Commissioner breached his duties as the head of a public body under section 6(1) of the Act to "make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely" and under section 6(2) to

create a record for an applicant if

(a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

A. Creating a Record

[5] *[Mr. M.]* complains that instead of creating a record of the documents submitted to and considered by the Commissioner in respect of the inquiries, the Commissioner merely provided the Tables of Contents from the relevant binders.

[6] In his request for a record of documents, *[Mr. M.]* requested "a copy of any record which shows all the documents...". He did not request that a record be created. There was no requirement to create a record when a record existed which contained the information requested. There is no breach of section 6(2).

B. Delay

[7] *[Mr. M.]* says that the Commissioner did not reply "without delay" as he took the full 30 days allowed by section 7 of the Act to respond and then provided Tables of Contents taken from binders that were under his control and custody.

[8] In my view, *[Mr. M.]* is correct. The fact that section 7 provides 30 days for the head of a public body to respond to a request (unless an extension is granted or the matter has been transferred to another body) does not mean that the requirement to respond "without delay" is satisfied if the response is made on the last day of the 30-day period. Where the record requested is in the custody of the public body and does not have to be created in order to respond to the request, and there are no other circumstances which explain the delay. It is reasonable to expect the response before the last day of the 30-day period. Where, as here, however, the response is made within the 30-day period and there is no evidence to indicate undue prejudice to the applicant from a failure to respond earlier, there is no remedy or order necessary to correct the breach.

C. Openly, Accurately and Completely

[9] *[Mr. M.]* claims that the Commissioner did not respond "openly, accurately and completely". He alleges the Tables of Contents are incomplete and that in stating that the Commissioner had "reviewed" the documents in respect of the "orders", the Commissioner's response did not answer

[*Mr. M. 's*] request for a record of documents "submitted to, and considered by" the Commissioner in respect of the Commissioner's "inquiries".

[10] [*Mr. M.*] submits that certain letters he submitted to the Commissioner's Office in respect of the inquiries are not included in the documents listed in the Tables of Contents. He suggests that the Commissioner may have overlooked objections he made to the procedure adopted on the inquiries.

[11] Furthermore, [*Mr. M.*] submits that the Commissioner's letter tells him only which documents were seen or "viewed" by the Commissioner on the inquiry, not which documents were submitted and then considered by him. He says that when he requested the records, "in the back of his mind" he was asking which records were "viewed attentively or contemplated mentally" by the Commissioner. He suggests that the use of the word "review" indicates that the Commissioner delegates to a staff member the task of assessing material submitted to an inquiry and "at the end of the day, the Commissioner merely browses through the relevant material, reads the assessment report and then writes his order".

[12] [*Mr. M. 's*] submissions to me included details of his objections to the procedure followed by the Commissioner in conducting the inquiries. He interprets the response of the Commissioner to his request in the context of these objections.

[13] As I understand the Commissioner's response on its face, the Commissioner reviewed the material in the binders in conducting the inquiries and the orders he made were based on that review. In that respect, I find the Commissioner's response is accurate, open and complete.

[14] If the Commissioner's response discloses to [*Mr. M.*] that there were flaws in the Commissioner's procedure in conducting the inquiries of which he was not previously aware, [*Mr. M. 's*] remedy is to seek judicial review of the Commissioner's orders under section 59 of the Act. This adjudication is limited to a review of the Commissioner's act as the head of a public body in responding to [*Mr. M. 's*] request for certain information. I have no jurisdiction in this adjudication to consider the procedure followed by the Commissioner in conducting the inquiries and making the order that followed.

III. SECTION 3(1)(c) OF THE ACT

[15] The Commissioner's counsel raised as a preliminary point in her submissions an argument that the Commissioner was not required to respond to [*Mr. M. 's*] request for the record of documents submitted to and considered on the inquiries because those records are operational records of the Commissioner's Office excluded from the jurisdiction of the *Act* under section 3(1)(c).

[16] [*Mr. M.*] objected to this argument, quite properly in my view, on the grounds that the Commissioner did not invoke section 3(1)(c) in response to [*Mr. M. 's*] request. If the Commissioner volunteers to respond to a request, it is incumbent upon him to comply with the provisions of the Act that govern the manner in which the response is to be made.

[17] It is not necessary for me to decide, in this case, whether section 3(1)(c) applies to the record provided by the Commissioner to *[Mr. M.]*.

IV. CONCLUSION

[18] I find that the Commissioner responded openly, accurately and completely to *[Mr. M.'s]* request. While he delayed somewhat in responding, no order is necessary in respect of that breach. There was no need for the Commissioner to create a record in order to meet the request

[19] I therefore dispose of this adjudication pursuant to sections 58(1) and 65(2) by confirming the decision of the Commissioner to respond to *[Mr. M.'s]* request for a record in the manner that he did.