

Adjudication Order No. 17
October 8, 2003



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 MR. AND MRS. Y. ON MAY 20, 2003

REASONS FOR DECISION
OF THE
HONOURABLE MADAM JUSTICE D. SMITH

Introduction

[1] Mr. and Mrs. Y (the "Applicants") have 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 decisions made by the Information and Privacy Commissioner (the "Commissioner") in response to their request for disclosure of records in the custody and control of the Commissioner.

[2] On April 4, 2003, the Applicants made the following request for records:

This letter is a formal request pursuant to s. 5 [of the Act] to get a copy of the following files that are in your custody: 16423, 16448, 15962.

[3] On May 1, 2003, the Commissioner responded to their request as follows:

Any records indicated in your request are contained in files created by this Office and relate to the Office's function under the Act. They are therefore subject to section 3(1)(c) of the Act. Section 3(1)(c) states that a record created by or for or in the custody or control of an officer of the Legislature and which relate to the exercise of that officer's function under an Act are not subject to the Act. The Information and Privacy Commissioner is an 'Officer of the Legislature' as defined in the Act. As the record(s) requested by you are outside the scope of the Act, we would not be providing you with access.

[4] On May 20, 2003, the Applicants wrote to the Minister responsible for the Act, requesting that the Minister review the decision of the Commissioner to refuse access to the requested records and to conduct an investigation into another matter that is not the subject of this adjudication. Attached to his letter was the Commissioner's response of May 1, 2003.

[5] The matter was referred to me as Adjudicator under s. 62 of the Act. I advised both parties that the hearing would proceed by means of written submissions. I received written submissions from the Applicants and the Office of the Information and Privacy Commissioner (the "OIPC").

The Issue

[6] The issue in this adjudication is whether the Commissioner correctly refused access to the records requested by the Applicants. Specifically to be determined is whether the requested records are exempt from the disclosure requirements of the Act by virtue of s. 3(1)(c).

Background

[7] On August 13, 2002, the OIPC opened File #15962 in response to the Applicant's request that the Commissioner review a decision of the Saanich Police Department (the "SPD") regarding an access to records request made by the Applicants. Similarly, the OIPC opened files in response to complaints made by the Applicants against the SPD (File #16423) and the Capital Regional District (the "CRD") (File #16448), both on October 16, 2002.

[8] The files related to complaints to the SPD and the CRD made by tenants in the same building as the Applicants, as to the smell of marijuana emanating from the Applicants' apartment. The Applicants requested information about an incident wherein the SPD attended their residence (File #15962) and subsequently alleged the SPD and CRD had disclosed confidential information that affected their privacy interests (Files #16448 and #16423).

[9] In due course, the matters in each file were dealt with to the satisfaction of the Applicants and the OIPC. The last file was closed February 14, 2003. On April 4, 2003, the Applicants requested copies of the contents of each of the files.

[10] The Applicants claim they have been treated unfairly by various public agencies, including the OIPC. This allegation was made apparent in a letter dated May 20, 2003, from the Applicants to the Minister of Management Services, which reads, in part, as follows:

The Commissioner has refused us access to records containing personal information held by his office, said records containing inaccurate information and unsubstantiated claims against us.

These records are very pertinent to public matters as they relate to investigations of our complaints stemming from discrimination that we have experienced since September 2001 over [Mr. Y's] use of medicinal cannabis, said discrimination being perpetrated by government agencies including the Office of the Information & Privacy Commissioner.

[11] The Applicants' claim of "discrimination" reflects their motivation and perspective in seeking this adjudication. However, matters of discrimination are far beyond the scope of a review of an Adjudicator under s. 62 of the Act. The role of an adjudicator is confined to a review of the decision of

the Commissioner and a determination of whether the Commissioner's decision was made in accordance with the Act.

Discussion

[12] The Applicants made their request for records pursuant to s. 4 of the Act. Section 4 reads as follows:

4(1) A person who makes a request ... has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

[13] Schedule 1 of the Act defines a "public body," in part, as follows:

"public body" means

[...]

(b) an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2...

[14] Schedule 2 of the Act lists the OIPC as a "public body". As such, a person is entitled to make a request for records from the OIPC under s. 4(1). In this way, the Commissioner's Office is no different than any other public body.

[15] Section 3(1) of the Act lists various types of records to which the Act does not apply. Specifically, s. 3(1)(c) reads, in part:

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 for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

[16] Schedule 1 of the Act provides a definition of "officer of the Legislature":

"officer of the Legislature" means the Auditor General, the Commissioner appointed under the *Members' Conflict of Interest Act*, the police complaint commissioner appointed under Part 9 of the *Police Act*, the Information and Privacy Commissioner, the Chief Electoral Officer or the Ombudsman;

[17] It has long been established that the Commissioner's "functions under the Act" include acts carried out by the Commissioner's delegates: ***M.H. v. Information and Privacy Commissioner*** (September 6, 1996), Esson C.J.S.C. as Adjudicator (at ¶21). This is significant to this adjudication as the decision to refuse access was made not by the Commissioner, but by his delegates.

[18] Read together, these sections create two distinct classes of records in the custody and control of the OIPC: those that relate to the Commissioner's functions under the Act and those

that do not. Previous adjudications have described these classes of records as "operational" and "administrative", respectively: **Mr. G. v. Information and Privacy Commissioner** (November 10, 1997), Bauman J. as Adjudicator (at ¶11-16).

[19] "Administrative" records do not relate to the Commissioner's functions under the Act and, as such, are not excluded from the Act by virtue of s. 3(1)(c). As administrative records are within the scope of the Act, an individual has the right to request these records from the OIPC under s. 4.

[20] "Operational" records, by contrast, are captured by s. 3(1)(c) and are exempt from the legislative scheme as they do relate to the Commissioner's functions under the Act. Accordingly, operational records cannot validly be the subject of a request for records under s. 4 and need not be disclosed if such a request is made.

[21] To the extent the case files requested by the applicants are "operational" in nature, they have been properly withheld by the OIPC.

[22] In **Mr. R. v. Information and Privacy Commissioner** (April 22, 1996), Madam Justice Levine as Adjudicator discussed the nature of "operational" records for the purposes of

s. 3(1)(c). Levine J. found that any record specific to a case file is an operational record related to the Commissioner's functions under the Act and is therefore excluded from the legislative scheme. Records specific to a case file were held by Levine J. to include (at ¶16-18):

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.

[23] This description of what constitutes operational records within a case file has been adopted in other reported adjudications under s. 62 of the Act: ***C.F. v. Information and Privacy Commissioner*** (July 28, 2003), Smith J. as Adjudicator; ***F.G.B. v. Information and Privacy Commissioner*** (May 17, 2000), Levine J. as Adjudicator; ***Mr. M. v. Information and Privacy Commissioner*** (January 5, 1998) Smith J. as Adjudicator.

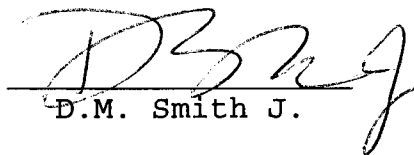
[24] Based on the provisions of the Act and the reported adjudications interpreting the Act, the contents of the requested files will be outside the scope of the Act to the extent they can be described as "operational".

[25] I have examined the records which are the subject of the Applicant's request and they are clearly operational in

nature. The records requested by the Applicants are case files created by the Commissioner's Office in response to inquiries made by the Applicants under the Act. Specifically, the files are comprised of records related to the opening, processing, investigating and deciding of matters specific to the Applicants' case files. The records are "operational" as they relate directly to the Commissioner's functions under the Act and are therefore excluded under s. 3(1)(c) and not properly the subject of a request for access under s. 4 of the Act.

Conclusion

[26] For the reasons outlined above, I dispose of this adjudication pursuant to ss. 58(1) and 65(2) of the Act by confirming the Commissioner's response to the Applicant's request.


D.M. Smith J.