

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.G.B. ON SEPTEMBER 5, 1997

REASONS FOR DECISION  
OF THE  
HONOURABLE MADAM JUSTICE LEVINE

I. INTRODUCTION AND BACKGROUND

[1] Mr. B. requested information from the Information and Privacy Commissioner of British Columbia in a letter dated September 5, 1997. The stated purpose for the request was to assist Mr. B. in preparing his submissions in response to an application by the City of Vancouver under section 43 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, that the city be authorized to disregard all past, present and future requests from Mr. B. for records related to the City's hiring or employment practices. The Commissioner's office responded to Mr. B.'s access request in a letter dated September 15, 1997.

[2] On October 15, 1997, Mr. B. requested that the Commissioner's response of September 15, 1997, be reviewed by an adjudicator under s. 62(1) of the *Act*.

[3] In his letter of September 5, 1997, Mr. B. asked for assistance as follows:

- Obtaining the background history of all Section 43 applications made at the Office of the Information and Privacy Commissioner. A review of Adjudication Order No. 3 (dated June 30, 1997) indicates the Information and Privacy Commissioner publicly disclosed this in an April 12, 1996 communiqué.
- Obtaining copies of all correspondence, including e-mail between the Office of the Information and Privacy Commissioner and the City of Vancouver that has not been released to me which pertain to my submissions and requests made under the Freedom of Information and Protection of Privacy Act (the *Act*). I feel Section 3(2) of the *Act* could further warrant this disclosure.

I will refer to the two components of the access request as "Request 1" and "Request 2". The reference in Request 1 to Adjudication Order No. 3 is to my adjudication decision in *[Mr. R.] v.*

*Information and Privacy Commissioner (30 June 1997).*

[4] In its letter of September 15, 1997, the Commissioner's office responded to Request 1 as follows:

The background history you are requesting from the April 12, 1996 letter is duplicated below:

"Our office is unable to release these documents to you as they are considered the *operational* files of the Information and Privacy Commissioner. As such, they are excluded from coverage by the Act pursuant to section 3(1)(c) of the Act. Section 3(1)(c) of the Act states that 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 Act," is outside the scope of the Act.

I can, however, provide you with some general information concerning section 43 applications. To date, the Office of the Information and Privacy Commissioner has received four applications from public bodies under section 43 of the Act. As you are probably aware, section 43 of the Act allows a public body to ask the commissioner to "authorize the public body to disregard requests under section 5 that, because of their repetitious or systematic nature, would unreasonably interfere with the operations of the public body". Of those four applications, one is still in process, two were resolved by this office without the commissioner having to make a decision, and in one case, the commissioner authorized the public body to disregard requests from the applicant for a specific period of time."

To update the above information the Office has now received a total of seventeen applications from public bodies under section 43 of the Act. Of those seventeen applications, one was withdrawn, three are still in process, four were resolved by this Office without the Commissioner having to make a decision, and in nine cases, the Commissioner authorized the public body to disregard requests from the applicant for a specific period of time.

[Emphasis in original]

[5] The Commissioner's Office refused any disclosure under Request 2. The letter of September 15, 1997 stated:

With the exception of copies of documents normally provided during the mediation and inquiry process of a Section 43 ... all the remaining documents are considered case files of the Office of the Information and Privacy Commissioner and relate to this Office's function under the Act.

Those documents will not be released to you because of the application of Section 3(1)(c) of the *Freedom of Information and Privacy Act*. Section 3(1)(c) of the Act states a record

that "is created by or in the custody of an officer of the legislature and that relates to the exercise of that officer's functions under the Act," is outside the scope of the Act.

[6] The City's section 43 application was granted in reasons given by the Commissioner on October 22, 1997.

## II. GROUNDS OF REVIEW

[7] In his request for review of October 15, 1997, Mr. B. claimed that the Commissioner's response to his access request was inadequate. The only ground of review stated by Mr. B. at that time was that further releases of records and information were warranted by s. 3(2) of the Act, which provides that the Act "does not limit the information available by law to a party to a proceeding."

[8] In her submissions dated March 3, 1998, counsel for the Commissioner responded to Mr. B.'s argument that section 3(2) applied to warrant further release of records and information, relying on the exemption from disclosure of operational records in section 3(1)(c).

[9] In his submissions dated April 3, 1998, in reply to the Commissioner's counsel's submissions, Mr. B. advanced the following additional grounds for review:

- the Commissioner's previous disclosures, as referred to in [*Mr. R.*] [*Adjudication Order No. 3*] and in [*Mr. H.*] v. *Information and Privacy Commissioner* (6 September 1996) *Esson C.J.S.C. [Adjudication order No. 1]* as Adjudicator;
- section 2(1)(a) of the *Act*;
- sections 2(1)(b) and 4(1) of the *Act*; and
- the rules of natural justice.

He also provided a detailed, itemized list of statistical information about section 43 applications that he says ought to be disclosed by the Commissioner in response to Request 1. He submits that this information falls within the class of administrative records that are not excluded from the operation of the *Act* under section 3(1)(c).

[10] Counsel for the Commissioner made further written submissions, dated May 1, 1998, responding to the new grounds raised by Mr. B. Mr. B. was given a further opportunity to reply, which he did in written submissions dated May 29, 1998.

[11] Mr. B. requested an oral hearing on this matter. The Act provides in section 56(4) that the adjudicator may determine whether submissions are made orally or in writing. In this, as in all of the adjudications under the Act to date, the procedure adopted has been to receive written submissions. Having reviewed the extensive and thorough written submissions submitted by both parties, I have determined that there are no factual issues in dispute that require evidence to be heard orally, the legal issues have been fully canvassed, and an oral hearing is not necessary in order for me to make a decision in this case.

### III. THE MERITS

#### A. Section 3(1)(c) -- Operational Records and Administrative Records

[12] Section 3(1)(c) of the *Act* provides:

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;

[13] The Commissioner is an officer of the Legislature, according to both Schedule 1 and section 37 of the Act. Any record created by or in the custody of the Commissioner (or his delegate) that relates to the Commissioner's functions under the *Act* as an officer of the Legislature is therefore exempt from the access rights established by the Act, by virtue of section 3(1)(c). Such records are referred to as operational records: [*Mr. G.*] v. *Information and Privacy Commissioner*, (10 November 1997) Bauman J. as Adjudicator, [*Adjudication order no. 6*] at para. 16.

[14] The Commissioner is also the head of a "public body", namely Records that relate to the Commissioner's role as head of a public body, as opposed to his role as an officer of the Legislature, are subject to the access rights established by the Act and are not exempted under section 3(1)(c). Such records are referred to as administrative records. The administrative records of the Commissioner's Office include records related to the management of its facilities, property, material, finances, personnel or information systems.

[15] Thus, the section 3(1)(c) exemption of operational records reflects the distinction between the Commissioner's separate roles under the Act as an officer of the Legislature and as head of a public body. In general, it is only the Commissioner's acts or omissions in his role as head of a public body that are subject to review by an adjudicator. Most of the Commissioner's work involves his role as an officer of the Legislature, including monitoring compliance by other public bodies, investigating complaints, promoting public awareness of the *Act*, and deciding on section 43 applications whether to authorize other public bodies to disregard access requests. This work is subject only to judicial review and is not reviewable by an adjudicator [*Mr. M.*] v. *Information and Privacy Commissioner* (5 January 1998), D.M. Smith J. as Adjudicator [*Adjudication order no. 7*].

[16] A decision by the Commissioner to refuse access to records on grounds that they are operational records protected by section 3(1)(c) is a decision of the Commissioner as head of a public body and is reviewable by an adjudicator: [*Mr. H.*], at para. 18 [*Adjudication order no. 1*].

Under section 57(1) of the Act, the burden of proof is on the Commissioner to establish that the records or parts of records in issue are operational records.

[17] In the present case, there appears to be no dispute that the records and information requested under Request 2 are operational records falling within section 3(1)(c). The issue with respect to section 3(1)(c) is whether there were any records, documents or other information that are properly characterized as administrative records that should have been disclosed to Mr. B. by the Commissioner's Office in response to Request 1.

[18] In my view, there are no undisclosed administrative records in this case to which Mr. B. ought to have been given access in response to Request 1.

[19] First, I find that the Commissioner's Office did, in fact, disclose exactly what was requested by Request 1: namely, the background history of section 43 applications as was previously disclosed in the Commissioner's letter of April 12, 1996, in *[Mr. R.] [Adjudication order no. 3]*. The Commissioner's letter to Mr. B. of September 15, 1997 quoted verbatim the relevant passage from the letter of April 12, 1996, and supplemented that passage with additional, updated background information. In my view, this was a complete response to Mr. B.'s original Request 1 in his letter of September 5, 1997.

[20] Moreover, none of the additional background information on section 43 applications that Mr. B. says ought to be disclosed is, in my view, an administrative record. As I held in *[Mr. R.]* at para. 20, *[Adjudication order no. 3]* applications by public bodies under section 43 of the Act, as well as the correspondence, the parties' submissions, and the Commissioner's reasons concerning such applications, are operational records that fall within the purview of section 3(1)(c). The detailed statistical information now sought by Mr. B. similarly constitutes case specific information that has been received or created by the Commissioner's Office in the course of receiving, processing, settling or deciding upon section 43 applications. This information constitutes part of the operational records of the Commissioner's Office and falls within section 3(1)(c).

B. Section 3(2)

[21] Section 3(2) of the Act provides:

3(2) This Act does not limit the information available by law to a party to a proceeding.

[22] As *[Mr. G.] [Adjudication order no. 6]* and *[Mr. M.] [Adjudication order no. 7]* clearly establish, section 3(2) does nothing to expand or enlarge the rights of access to information that are guaranteed by the Act. Section 3(2) merely confirms that the Act does not derogate from any other existing right to information that a party to a proceeding might enjoy, whether under another statute or at common law.

[23] Mr. B. seeks to distinguish or to impugn the decisions in *[Mr. G.] [Adjudication order no. 6]* and *[Mr. M.] [Adjudication order no. 7]* on several grounds. First, he says that the decision in *[Mr. G.]* is inconsistent with my decision in *[Mr. R.] [Adjudication order no. 3]* and ought

not to be followed. Second, he submits that [Mr. G] [Adjudication order no. 6] and [Mr. M.] [Adjudication order no. 7] are distinguishable from this case since they did not consider the rules of natural justice in conjunction with section 3(2). Third, he suggests that [Mr. M.] [Adjudication order no. 7] is weak authority because the applicant in that case was unable to complete his submissions for the adjudicator. Finally, he says that [Mr. G] [Adjudication order no. 6] and [Mr. M.] [Adjudication order no. 7] are distinguishable from this case because neither case involved an applicant who was a party to a section 43 proceeding.

[24] I find no merit to any of these submissions. First, there is no inconsistency between [Mr. G] [Adjudication order no. 6] and [Mr. R] [Adjudication order no. 3]. In [Mr. R's.], I held that, despite section 3(1)(c), an adjudicator has jurisdiction to review the Commissioner's compliance with section 25(1) of the Act. Section 25(1) requires disclosure of all records clearly in the public interest, regardless of whether such records are operational or administrative in nature. This is because section 25(2) provides expressly that section 25(1) applies despite any other provision of the Act. The analysis of section 25 in [Mr. R's] [Adjudication order no. 3] has no bearing on Mr. Justice Bauman's interpretation of section 3(2) in [Mr. G] [Adjudication order no. 6]. The exemption from disclosure provided in section 3(1) (c) may be overridden by section 3(2) where a party to a proceeding is entitled by law to information, but section 3(2) does not, in and of itself, grant any rights to access under the Act.

[25] Second, Mr. Justice Bauman did, in fact, consider the rules of natural justice in conjunction with section 3(2) in [Mr. G] [Adjudication order no. 6] , at para. 19. He concluded, and I agree, that he had no jurisdiction as an adjudicator to review an alleged breach of the rules of natural justice in a proceeding before the Commissioner under section 29 of the Act. The question of whether the applicant in [Mr. G.] had a right to disclosure under the rules of natural justice was a matter to be determined only on an application to the British Columbia Supreme Court for judicial review of the Commissioner's decision under section 29. It was not a matter for an adjudicator, who is, in the words of Mr. Justice Bauman, "*persona designata* exercising a limited jurisdiction under the Act": [Mr. G.] [Adjudication order no. 6] at para. 25.

[26] Third, whether or not the applicant in [Mr. M.] [Adjudication order no. 7] completed his submissions has no bearing on the persuasive or precedential value of Madam Justice Smith's reasons on the section 3(2) issue in that case.

[27] Finally, the fact that Mr. B. access request was made in the context of a section 43 proceeding does not assist him in his attempt to rely on section 3(2). As a party to a section 43 proceeding, Mr. B. might well have a right to disclosure of certain operational records of the Commissioner's Office under general principles of administrative law. However, such a determination is not within my jurisdiction as an adjudicator under the Act; it is purely a matter for judicial review.

[28] I note that section 43 authorizations have been the subject of judicial review in *Crocker v. British Columbia (Information and Privacy Commissioner)* ( 1997 ), 155 D. L. R. 220 ( B. C. S. C. ), per Coultas J., and in *Mazhero v. British Columbia (Information and Privacy Commissioner)* ( 24 June 1998), Vancouver Registry No. A980731 (B.C.S.C.), per Tysoe J.

These cases may provide some guidance to Mr. B. if he wishes to seek judicial review of the section 43 authorization granted to the City on October 22, 1997.

### C. The Commissioner's Previous Disclosures

[29] Mr. B. submits that the decisions in *[Mr. H.] [Adjudication order no. 1]* and *[Mr. R'.s] [Adjudication order no. 3]* indicate that the Commissioner's Office has previously released the same type of records and correspondence as he has requested here. He says that if this was done before, the Commissioner's Office should be required to do it again "to ensure the spirit and intent of this Antis upheld", provided that this would not prejudice the privacy rights of any third party.

[30] I reject this submission. The fact that the Commissioner has voluntarily disclosed documents or information on one occasion does not create any obligation, enforceable by an adjudicator, that the Commissioner disclose the same type of documents or information on any subsequent occasion: *[Mr. H.]* at para. 14 *[Adjudication order no. 1]*. In particular, the fact that the Commissioner may have previously disclosed records similar to the records sought here by Mr. B. does not convert any of those records from operational to administrative in nature and does not bring them within the scope of the access rights established by the Act.

[31] Mr. Justice Esson's comments in *[Mr. H.] [Adjudication order no. 1]* on the privacy rights of third parties are relevant in the context of voluntary disclosures by the Commissioner. They do not create any positive obligation on the Commissioner to make such disclosures where there is no prejudice to third parties, as Mr. B. submits.

[32] Mr. B. has also made submissions in regard to background information about section 43 applications that is publicly available to anyone who has the means to access it on the Commissioner's Office's Internet website ([www.oipc.bc.org/orders/section43](http://www.oipc.bc.org/orders/section43)) Mr. B. claims that he does not have such means and requests that the Commissioner at least provide him, for an appropriate fee, with a hard copy of the information available at the website.

[33] Mr. B.'s claim that he is unable to access the Commissioner's website is surprising to me. He has obvious skills, means and abilities, demonstrated in the sophisticated written submissions he has prepared for this adjudication. I am not aware of any reason why he is unable to obtain a printout of the material on the website at a public library with the assistance of librarians. Be that as it may, the mere fact that the Commissioner's Office has voluntarily disclosed those records on the Internet does not, in my view, convert those records from operational to administrative in nature or create any obligation on the Commissioner to provide, or any Jurisdiction in me to compel the Commissioner to provide, the printout requested by Mr. B.

D. Sections 2(1)(a), 2(1)(b) and 4(1)

[34] Section 2(1) sets out the Act's purposes. In particular, it provides:

2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

- (a) giving the public a right of access to records,
- (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
- (c) specifying limited exceptions to the rights of access,

[35] These statements of purpose do not create any independent access right to operational records exempted from the Act under section 3(1)(c). Indeed, section 2(1)(c) recognizes that the purposes of the Act include specifying limited exceptions to access rights as is done by section 3(1).

[36] The reason for the enactment of section 3(1)(c) is that the Legislature recognized that access rights under the Act can be incompatible with the exercise of the functions assigned to officers of the Legislature under their constituent statutes: *[Mr. R.'s] [Adjudication order no. 3]* at paras. 17-18. Besides the Information and Privacy Commissioner, Schedule 1 of the Act (as amended by the *Children's Commission Act*, S.B.C. 1997, c. 11) defines five other officers of the Legislature. These are the Auditor General, the Child, Youth and Family Advocate, the Commissioner appointed under the *Members' Conflict of Interest Act*, R. S. B. C. 1996, c. 287, the Chief Electoral Officer, and the Ombudsman. In my view, section 3(1)(c) accomplishes the purpose set out in section 2(1)(c).

[37] Section 4(1) creates access rights under the Act. It provides:

4(1) A person who makes a request under section 5 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.

[38] This section does not assist Mr. B. The access rights created by section 4(1) are subject to the exceptions set out in section 3(1), and in particular section 3(1)(c). Section 4(1) does not establish any access rights to operational records of the Commissioner's Office.

E. Natural Justice

[39] Mr. B. submits that he was entitled to disclosure of the requested records and

correspondence under the rules of natural justice in the course of the section 43 proceedings against him.

[40] As discussed above, whether or not there was a violation of the rules of natural justice in the section 43 proceedings is a matter to be considered on judicial review of those proceedings. As an adjudicator under the Act, I have no jurisdiction to address this question.

[41] This is not a mere technicality. The purpose and scope of an adjudication under the Act is limited to reviewing the actions of the Commissioner as the head of a public body. The adjudicator performs the function the Commissioner performs when he reviews the decisions of heads of other public bodies. The adjudicator stands in the place the Commissioner stands because the Commissioner cannot stand in review of himself. The adjudicator happens to be a judge of the Supreme Court because the Act provides for the appointment of persons who are Supreme Court judges as adjudicators. In exercising the function of an adjudicator, however, that person does not exercise the powers of the Supreme Court but only those powers specifically given an adjudicator under the Act.

[42] The question of whether the Commissioner followed the rules of natural justice while performing a function as an officer of the Legislature is within the clear jurisdiction of a judge of the Supreme Court acting in his or her capacity as a judge. It is not within his or her jurisdiction as an adjudicator, since an adjudicator has no authority to review decisions of the Commissioner acting as an officer of the Legislature. Section 43 proceedings fall within the Commissioner's role as an officer of the Legislature.

#### **IV. ANONYMIZING OF ADJUDICATORS DECISIONS**

[43] The Commissioner has requested that I adopt the practice, as an adjudicator under the Act, of anonymizing my decisions with respect to the identity of applicants and third parties. The Commissioner submits that the restrictions on disclosure of information under section 47 of the Act make this a desirable, if not a required, procedure. Under section 61(1) of the Act, section 47 (except section 47(2)(b)) is binding on me as an adjudicator.

[44] The requirement to anonymize adjudication decisions was not previously brought to my attention and I agree that the provisions of section 47 may apply. I therefore refer to the applicant only by his initials throughout these reasons.

#### **V. CONCLUSION**

[45] It follows from these reasons that the Commissioner's response to Request 1 was an adequate and complete response and the Commissioner was authorized to refuse to disclose the correspondence requested by Mr. B. in Request 2, on the grounds that they are exempt from disclosure under section 3(1)(c) of the Act.

[46] Pursuant to sections 65(2) and 58(1) of the Act, I dispose of this adjudication by confirming the Commissioner's decision to respond to Mr. B.'s access request in the manner that he did.