IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *B.C. Freedom of Information and Privacy Association v. British Columbia (Information and Privacy Commissioner),* 2010 BCSC 1162

Date: 20100818
Docket: S-097178
Registry: Vancouver

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996 c. 241 (as amended)

And in the Matter of the *Freedom of Information and Privacy Act*, R.S.B.C. 1996 c. 165 (as amended)

And in the Matter of Decision No. F09-02 of the Information and Privacy Commissioner of British Columbia

Between:

B.C. Freedom of Information and Privacy Association

Petitioner

And

Information and Privacy Commissioner for British Columbia

Respondent

And

Her Majesty the Queen in the Right of British Columbia as Represented by the Ministry of Labour and Citizens' Services

Respondent

Before: The Honourable Madam Justice Gropper

Reasons for Judgment

Counsel for the Petitioner:	T. C. Boyar C. M. Joseph
Counsel for the Respondent, Information and Privacy Commissioner for British Columbia:	S. E. Ross
Counsel for the Respondent, Her Majesty the Queen in the Right of British Columbia as	J. M. Walters J. M. Tuck

represented by the Ministry of Labour and Citizens' Services:

Place and Date of Trial/Hearing:	Vancouver, B.C. April 26 and 27, 2010
Place and Date of Judgment:	Vancouver, B.C. August 18, 2010

Introduction

[1] The petitioner, B.C. Freedom of Information and Privacy Association ("FIPA") applies under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 ("JRPA") to review the decision of the delegate of the Information and Privacy Commissioner of British Columbia ("adjudicator") dated January 27, 2009 (decision), filed as order F09-02.

Issues

[2] The issues for determination are:

1. What is applicable standard of review?

2. Applying of that standard of review, did the Commissioner commit a reviewable error?

3. If so, what is the appropriate remedy?

Background

[3] The petitioner sought records from the Ministry of Labour and Citizens' Services, now the Ministry of Citizens' Services, ("Ministry") under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("Act"). Those records were stakeholder submissions concerning potential amendments to the Act ("records").

[4] The Ministry, through its IM-IT Privacy and Legislation Branch ("Branch"), is responsible for the Act and all policy, standards and directives flowing from the Act. The Branch sought input from stakeholders on a number of occasions regarding potential amendments to the Act or its Regulations. The consultations have taken place intermittently since between 2002 and 2007. The petitioner seeks the records provided by stakeholders in relation to amendments to the Act in 2006. The records include submissions provided by stakeholders to the Ministry. The stakeholders' comments were provided verbally at meetings or by written comments to the Branch.

[5] On April 21, 2006, the petitioner requested the Ministry to produce records relating to recent amendments to the Act including copies of the stakeholders' submissions.

[6] In early November 2006, certain of the stakeholders' submissions were released to the petitioner in three stages, while others were withheld from the petitioner by the Ministry on the basis that those submissions fell within ss. 13(1), 14 and 22 of the Act and because certain stakeholders objected to their submissions being released ("undisclosed submissions"). Those stakeholders who objected to release of their records were the Insurance Corporation of British

Columbia, B.C. Hydro, the Canadian Bar Association's British Columbia Branch, the B.C. College of Physicians and Surgeons, Royal Roads University, Vancouver Coastal and Fraser Valley Health Authorities, the Provincial Health Service Authority and the B.C. Association of Municipal Chiefs of Police.

[7] On November 16, 2006, the petitioner requested the Commissioner to review the Ministry's decision to withhold the undisclosed submissions. The Ministry submitted the records to the adjudicator during the course of the inquiry. The adjudicator determined that the Ministry had properly withheld information from the records under s. 13 of the Act. The adjudicator held that the stakeholders' submissions on the proposed amendments were exempt from disclosure under s. 13 on the basis that they would reveal advice or recommendations developed by or for a public body or Minister.

Freedom of Information and Protection of Privacy Act

[8] The relevant provisions of the Act are as follows:

> 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,
>
> ...
>
> (c) specifying limited exceptions to the rights of access,
>
> ...
>
> for an independent review of decisions made under this Act.
>
> ...
>
> 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.
>
> (2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.
>
> ...
>
> 5 (1) To obtain access to a record, the applicant must make a written request that
>
> (a) provides sufficient detail to enable an experienced employee of the public body, with a reasonable effort, to identify the records sought,
>
> (b) provides written proof of the authority of the applicant to make the request, if the applicant is acting on behalf of another person in accordance with the regulations, and
>
> (c) is submitted to the public body that the applicant believes has custody or control of the record.
>
> ...
>
> 12 (1) The head of a public body must refuse to disclose to an applicant information that would

> reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.
>
> ...
>
> 13 (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.
>
> (2) The head of a public body must not refuse to disclose under subsection (1)
>
> (a) any factual material,
>
> (b) a public opinion poll,
>
> (c) a statistical survey,
>
> (d) an appraisal,
>
> (e) an economic forecast,
>
> (f) an environmental impact statement or similar information,
>
> (g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,
>
> (h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,
>
> (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
>
> (j) a report on the results of field research undertaken before a policy proposal is formulated,
>
> (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
>
> (l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,
>
> (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
>
> (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.
>
> ...

[9] Section 14 of the Act provides that a head of a public body may refuse to disclose to an applicant information that is subject to solicitor/client privilege. Sections 15 - 22 set out other exceptions to the right of access set out in s. 4.

The Adjudicator's Decision

[10] After considering the provisions of s. 13 of the Act and reviewing the submissions from the parties, the adjudicator commented on the Ministry's submission at para. 17:

> [17] Moreover, said the Ministry, it is clear from the records themselves that they were created for the purpose of giving the Minister "advice relating to which courses of action in relation to amending the Act were preferred", advice which Ministry officials were free to

> accept or reject, and that the withheld information therefore falls under s. 13(1). It does not matter who created the advice or recommendations, the Ministry argued, and s. 13(1) can therefore apply to advice or recommendations provided by a public body employee or a private citizen. [23]
>
> [23] Paras. 4.15-4, 18, initial submission. The Ministry referred to Order 03-22, [2003] B.C. I.P.C.D. No. 22, at para. 18 for support of this last argument. I agree with it on this last point.

[11] In her analysis, the adjudicator stated at para. 24:

> [24] The stakeholders frequently express simple agreement or support (or lack thereof) proposed amendments. Disclosure of these comments would, in this case, reveal implicit advice or recommendations to government to proceed or not proceed with those proposed amendments. In some cases, the stakeholders also express their views or opinions on the positive or negative implications of certain proposals or on the consequences of past FIPPA [the Act] amendments which stakeholders want addressed. Disclosure of these implications and consequences would, in this case, allow the drawing of accurate inferences about the underlying advice or recommendations to government as to whether or not to amend FIPPA. In a handful of other cases, stakeholders also provide explicit recommendations in the form of suggested alternative wording or ideas for proposed amendments. I find that all of these types of information fall under s. 13(1).

[12] Notwithstanding the adjudicator's decision on the application of s. 13, she found that the Ministry failed to exercise its discretion properly in deciding to withhold information under s. 13 (1). The adjudicator explained that the Ministry did not provide any direct evidence from the stakeholders about their concerns over disclosure of their comments; and did not mention having considered any other factors in exercising its discretion, including the purpose of the legislation, the promotion of public confidence; the nature and sensitivity (or lack thereof) of the information; and the passage of time. The adjudicator stated:

> [32] In failing to consider additional relevant factors, I conclude that the Ministry has not exercised its discretion properly in deciding to withhold information under s. 13(1). I therefore order it below to reconsider its decision to withhold the information that I found falls under s. 13(1).

[13] The adjudicator made the following orders under s. 58 of the Act:

> 1. Subject to para. 2 below, I confirm that the Ministry is authorized to withhold the information it withheld under s. 13(1).
> 2. I require the Ministry to give the applicant access to the following type of information, wherever it withheld them under s. 13(1): where stakeholders said they had no comments or no opinion on the proposed amendments; any requests, or comments on the need for, clarification of a proposal.
> 3. I require the Ministry to reconsider its decision to withhold the information described in para. 1 above and to provide the applicant and me with its decision, together with its reasons, including an account of the factors it considered in exercising its discretion.
> 4. I require the Ministry to give the applicant access to the information described in para. 2 above, together with any additional information it decides to disclose after

> reconsidering its decision under para. above, within 30 days of the date of this order, as FIPPA defines "day", that is, on or before March 10, 2009 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records it is disclosing.

What is the Applicable Standard of Review?

Reasonableness and Correctness

[14] As a first step, I must determine the proper level of deference to the adjudicator's decision. The *Administrative Tribunals Act*, S.B.C. 2004 c. 45 does not apply to the Commissioner, and thus the determination of the standard of review falls to be determined on the basis of the common law alone: *Weyerhauser Company Ltd. v. British Columbia (Assessor of Area No. 4 - Nanaimo Cowichan),* 2010 BCCA 46 at para. 32.

[15] The petitioner suggests that the existing case law determines that correctness is the applicable standard. The respondents assert that the standard of review applicable is reasonableness.

[16] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada clarified the analytical framework for ascertaining the standard of review. There are two standards: correctness and reasonableness. A two stage analysis is required:

> [62] ... First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of defence to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[17] At para. 64, the Court states:

> [64] The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[18] *Dunsmuir* defines the correctness standard as that which is to be used where the reviewing court does not show deference to the decision makers reasoning process. The court undertakes its own analysis of the question. The court will decide whether it agrees with the decision maker's determination or, if not, the court will substitute its own view. The specific circumstances where the correctness standard might apply is where the decision turns on a constitutional question regarding the division of powers, the jurisdiction of the decision maker to decide a particular matter, or where the question of issue is one of general law, important to the

legal system as a whole and outside the decision maker's specialized area of expertise (*Dunsmuir* paras. 50 and 58).

[19] Reasonableness is the standard to be used in all other circumstances where the court must defer to the decision maker's decision, in particular where the question is one of fact, discretion or policy or where legal and factual issues cannot be easily separated. As *Dunsmuir* states at para. 47:

> [47] ... Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Existing Jurisprudence

[20] In *Aquasource Ltd. v. British Columbia (Information and Privacy Commission)* (1998), 58 B.C.L.R. (3d) 61 (CA), the court held that the correctness standard of review applied to construing cabinet deliberations in the exception to disclosure under s. 12 of the Act, because it was a question of statutory interpretation. At para. 22, the court expressed its view that it was as "well equipped" to determine the meaning of s. 12. It continued: "This is the traditional role of the Court. The Commissioner possesses no special expertise in statutory interpretation which would justify according deference to his interpretation of a provision such as s. 12."

[21] The petitioner asserts that if correctness is the appropriate standard of review for the interpretation of s. 12, the same must be true for s. 13, which in the petitioner's view merely extends the exemption for deliberate secrecy to information that would reveal advice or recommendations developed for a public body or a minister (as opposed to Cabinet).

[22] In *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 726, the court determined the appropriate standard for review for the interpretation of s. 13 was correctness (at paras. 120 and 121). The judgment was overturned by the Court of Appeal (2002 BCCA 655). The appeal decision does not address the standard of review, nor identify which standard it is applying, however the review appears to be on a standard of correctness.

[23] The Court of Appeal considered the applicable standard of review in *British Columbia (Minister of Water, Land and Air Protection) v. British Columbia (Information and Privacy Commissioner)*, 2004 BCCA 210. At para. 33, the court considered the relevant factors to determine which standard of review ought to apply and states:

> [33] In the instant case there is neither a privative clause nor a right of appeal. The

> absence of such clauses in itself is not determinative; this is somewhat of a neutral factor. However, the statute is the constituent legislation of the tribunal. This latter circumstance could be said to indicate a more deferential standard of review. The relative expertise of the tribunal also falls to be considered. This area of access to information is a fairly specialized area and one with which the Commissioner will, over time, gain a familiarity. He is well situated to appreciate the issues and concerns that have arisen and will arise in the operation of the Act. The continuing administration of the Act will cause the Commissioner to be alive to issues such as the parameters of likely concern by those who could be potentially affected by decisions relating to the release of information under the Act. There is in my respectful opinion an obvious factual component to any decision made by the Commission under s. 54 concerning notice and participation. The effective administration of the Act requires that the Commissioner be afforded a reasonable ambit of discretion in deciding who it is appropriate to notify and to allow to formally participate in any inquiry. In Macdonell v. Quebec (Commission d'accs à l'information), [2002] 3 S.C.R. 661, 2002 SCC 71 [Macdonell], a case where a limited right of appeal in the legislation could have been indicative of a less deferential standard of review, Gonthier J., speaking for the majority, had this to say, at para. 8, regarding the expertise of privacy commissioners:
>
> > The Quebec Commission d'accs à l'information has no special interest in the decision it must make, and so it is able to play its role independently. By virtue of the fact that it is always interpreting the same Act, and that it does so on a regular basis, the Quebec Commissioner develops general expertise in the field of access to information. That general expertise on the part of the Commission invites this Court to demonstrate a degree of deference.
>
> In Macdonell, the court found it appropriate to apply a standard of reasonableness to the decision of the Commissioner.

[24] In *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, 2006 BCSC 131, the court summarized the evolution and the current state of the standard of review jurisprudence, and observed that in British Columbia, the courts have decided that pure questions of law that limit or define the scope of the Act and are not regarded as essential to the core expertise of the Commissioner attract a correctness standard. Decisions on matters within the Commissioner's core expertise must be reviewed as on a reasonableness standard (at paras. 71 and 72).

[25] At para. 75, the Court describes the conclusion of the court in *Aquasource* that a correctness standard was applicable, as having been "overtaken somewhat" by subsequent Supreme Court of Canada dicta in *Moreau-Berubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249 at para. 61 where Arbour J. stated:

> However, questions of law arising from the interpretation of a statute within the tribunal's area of expertise will also attract some deference ... As Bastarache J. noted in Pushpanathan, [1998] 1 S.C.R. 982 "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention."

[26] Ultimately, the Court concluded that the reasonableness standard of review was the

appropriate standard by which to consider both s. 12 and s. 13 of the Act.

[27] The existing case law establishes, in my view, that reasonableness is the proper standard of review for the interpretation and application of s. 13 of the Act.

Four-factor Analysis

[28] As directed in *Dunsmuir*, I will apply the second step, factor analysis described in *Dunsmuir*. The four factors to be considered are:

1. The presence or absence of a privative clause;

2. Purpose of the decision-maker as determined by the interpretation of the enabling legislation;

3. The nature of the question; and

4. The expertise of the decision maker.

[29] As noted in *British Columbia (Minister of Water, Land, and Air Protection)*, the Act does not contain a privative clause or a right of appeal and therefore a neutral factor.

[30] Regarding the purpose of the decision maker, the Act creates a discrete and specialized administrative regime concerning the rights of access to information in records held by public bodies, the limited exceptions to those rights, and the Commissioner's independent oversight of the administration of the Act. The Act also provides for an independent review of decisions made under the Act (s. 2(1)(e)). The Act provides specialized tools and powers to the Commissioner. The Commissioner has multiple roles under the Act for education, research, public information, policy advice, compliance investigations and audits, complaint and review investigations and mediations, inquiries and order making. The Commissioner is charged to ensure public bodies comply with the Act to review their decisions about access requests. The Commissioner's responsibilities are not similar to the normal role of a court. This factor favours a deferential approach to the Commissioner's interpretation and application of the statutory machinery for access requests and reviews under the Act, including the disclosure exception in s. 13.

[31] The nature of the question, whether s. 13 protects submissions provided by stakeholders in the public consultation process, is an issue of interpretation and application within the parameters of the administration of the Act and the Commissioner's responsibility to monitor compliance with it. It is not the type of question, for example general law, which is of essential importance to the legal system as a whole or outside the Commissioner's specialized area of

expertise. This factor favours the application of the correctness standards.

[32] The expertise of the decision maker was considered in *British Columbia Teachers' Federation*, at para. 27, which points out that the expertise must be considered in three dimensions: the characterization of the expertise of the tribunal; the courts own expertise relative to the tribunal; and the identification of the issue relative to that expertise. The Act describes a complex administrative scheme where the Commissioner is an independent officer of the legislature. He or she is legislatively chosen to monitor the administration of the Act, ensure compliance by public bodies, and review their decisions about access requests. The creation of the Commissioner's position and mandate to oversee access in privacy compliance under the Act through a range of specific tools is an expressed legislative statement of expertise: *Dunsmuir* para. 49.

[33] The four-factor analysis satisfies me that the reasonable standard of review is appropriate for this case. Three of the four factors support such a conclusion; the fourth factor (lack of a privative clause) is neutral.

Decision

[34] I have concluded that the existing jurisprudence and the application of the four-factor analysis amply demonstrate that reasonableness is the appropriate standard of review.

Did the Commissioner commit a reviewable error?

Position of the Parties

Petitioner

[35] The petitioner asserts that while s. 13(1) exempts from disclosure "information that would reveal advice or recommendations developed by or for a public body or Minister", s. 13(2) describes exceptions to those exemptions. Section 13(1) would exempt information that would reveal the internal deliberation of public bodies, but submissions made by stakeholders in a consultation process do not qualify as such; they are more in the nature of the items listed in s. 13(2) (a) through (n), which the head of a public body must not refuse to disclose.

[36] The petitioner refers to general interpretive principles, citing Driedger, Elmar A., *Construction of Statues,* 2nd ed. (Toronto: Butterworths, 1983) to assert that the words of the Act should be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament, and to the *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8 which provides that the words "must be construed as being remedial and given a fair, large and liberal construction."

[37] The petitioner argues that the purpose of s. 13 is to allow for full and frank discussion of policy issues within the public service. It protects the public servants who have decision-making responsibility. It can be extended to include others, for example, third party experts as in the *College of Physicians* at paras. 104 and 105. The information in question must reveal or suggest a course of action that would ultimately be accepted or rejected by the recipient during the deliberative process of government policy making and decision making: *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (2005) 203 O.A.C 30 at para. 9.

[38] The petitioner submits that the exemption under s. 13 allows decision makers the ability to discuss the issues freely in order to arrive at a well-reasoned decision: *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C.R. 245 at para. 31. These policy considerations are not present when the government invites input from members of the public or organizations who have no decision-making responsibility, as it did here. The comments and suggestions provided by the stakeholders are only relevant to the internal deliberative process if that advice or recommendations are incorporated.

[39] The practical effect of the adjudicator's decision, the petitioner suggests, extends the protection of s. 13 to external institutions and processes, which unduly broadens what has been considered a limited exception to disclosure.

[40] The petitioner argues that the adjudicator's decision primarily concerns whether the Minister properly exercised his discretion under s. 13. The issue, the petitioner argues, is whether the input that the Ministry receives from outside sources can ever be within the ambit of s. 13. The adjudicator does not discuss the nature of internal as opposed to external advice, the decision-making responsibility, or the interest of the stakeholders. The adjudicator simply reaches a conclusion that it falls under s. 13.

[41] In the petitioner's application and reply to the adjudicator, it specifically addressed whether outside stakeholders are entitled to s. 13 protection. The adjudicator apparently reached that conclusion, as an aside, in the last sentence of para. 17, when she states that it does not matter who created the advice or recommendations and whether they were provided by a public body employee or a private citizen. The adjudicator refers to order 03-22 [2003] B.C.I.P.D. No. 22 for support of the argument. Order 03-22 deals with whether the City of Vancouver and Translink's discussions concerning a municipal property tax dispute are included within the ambit of s. 13. At para. 18 of order 03-22, the Commissioner states: "if requested information qualifies as 'advice or recommendations' developed 'by or for a public body' - and Translink is a public body - it does not matter who created the advice or recommendation for the public body." The petitioner says that order 03-22 refers to shared

information between public bodies involved in a deliberative process, which is not the case here.

[42] The petitioner argues that the adjudicator's decision is not within the range of reasonable alternatives. It is far outside the scope of protection and there is no reason why the Ministry's decision concerning amendments of the Act would be affected by the disclosure of the information. The petitioner emphasizes that this is a public consultation process. The Ministry sought input from a variety of stakeholders on issues that would affect them. The stakeholders voluntarily provided input. Their input provides no insight into the decision making process within the public service. The Ministry can ignore or accept a stakeholder's input. The relevance is whether the disclosure would impede the decision making process in the future.

[43] The petitioner argues that while there may be a principled basis for extending the protection under s. 13 to include advice and recommendations given by outside experts, the rationale for extending the ambit of s. 13 in that context does not exist in the context of the consultation process, where interested stakeholders provide comments and suggestions to the Ministry on policy options. The comments and suggestions provided by interest groups, whose aim is to influence decision makers, is not comparable to advice provided to members of the public service, and cannot be protected by s. 13. That view, taken to its logical conclusion, would mean that any input received by a Minister in any context (whether in a consultation process or on a campaign trail) would be protected.

[44] The adjudicator, the petitioner asserts, does not deal with the issue before her, which is whether submissions by outside stakeholders in the context of public consultation are excluded from disclosure under s. 13(1). The adjudicator does not address the particular circumstances that existed here, including the stakeholders have no decision-making responsibility; the stakeholders have no obligation to provide advice or recommendation, it is voluntary; the comments or suggestions provided by the stakeholders are only relevant to the internal deliberative process of the Ministry if they are incorporated into policy options which are then outlined for the Minster; and the Ministry is free to accept or reject the proposals made by the various stakeholders. In essence, s. 13 is concerned about the free flow of information within the Ministry. Stakeholders' submissions do not fall into that category.

[45] The petitioner argues that the adjudicator is not entitled to deference. The reasons are not transparent, justifiable, or intelligible. The adjudicator does not provide any reasoning; she merely reaches a conclusion. The decision is not based on specific expertise or experience. The adjudicator has interpreted the Act in a manner that is not reasonable.

Respondents

[46] The respondent, Information and Privacy Commissioner for British Columbia, made no submission in respect of this issue.

[47] The respondents Her Majesty the Queen in the Right of British Columbia (HMTQ) and Attorney General of British Columbia (AGBC) (collectively "the respondents") summarize the position of the plaintiff as asserting that the source of the advice or recommendations must be considered in determining whether s. 13(1) provides an exemption from disclosure. The adjudicator was correct to reject the argument. Neither the words of s. 13 of the Act nor the purpose of that section leads to the result that advice or recommendations received from outside the public service are not included in the words of s. 13. The respondents rely on the *College of Physicians* decision to support that assertion. The case is binding on the adjudicator and its principle is to the contrary: advice and/or recommendations received from outside the public service are not excluded from the meaning of "advice or recommendations" in s. 13 of the Act.

[48] The respondents assert that the adjudicator correctly identified the genesis of the disputed records as being an invitation by the Ministry for "input" by stakeholders on at least 120 proposed amendments to the Act. She also identified that the purpose of s. 13(1) was to "protect a public body's internal decision making and policy making processes by encouraging a free and frank flow of advice recommendations." The adjudicator also acknowledged a number of orders of the Commissioner which have interpreted s. 13(1) and applied the principles set out in those orders (at para. 10). The adjudicator clearly adopted the Ministry's submission to her which was that, for the purposes of s. 13(1). It does not matter who created the advice or recommendations. She adopts a previous order of the Commissioner in that regard (order 03-22).

[49] The respondents assert that para. 24 of the adjudicator's decision outlines the nature of the information in the disputed records and the implications for disclosure. The reasons for the decision are thorough, transparent and intelligible and fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law as a standard as described in *Dunsmuir*. The decision properly takes into account the words of the legislation, the purpose of the legislation and the existing case law in determining that information in the disputed records constitute "advice or recommendations" (for the purposes of s. 13(1) of the Act).

[50] The respondents say that the adjudicator's conclusion that the type of information in the records fall under s. 13(1) is supported by the relevant principles of statutory interpretation. They assert that the words of s. 13(1) do not include the words "receive from the public service" to limit the source of the advice or recommendations. The opening words of s. 13: "head of a public body may refuse to disclose to an applicant information that would reveal advice or

recommendations developed by or for a public body or Minister" includes, in this case, the intended recipient, the Ministry.

[51] Further, the respondents argue, s. 13 clearly provides that there are two categories of "advice" that are protected under the section. There is advice developed by a public body or Minister and there is advice that is developed for a public body or Minister. In this case, as noted, the recipient of the advice is the public body or the Ministry.

[52] The respondents argue that a principle of statutory interpretation is a presumption against adding or deleting words: Cote, Pierre-Andre, *Interpretation of Legislation* (3d ed.), pages 275-276. Words should not be read into a statute to determine its meaning when it is not necessary: *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94 at para. 15.

[53] Applying those principles, the respondents assert the petitioner's position that s. 13 does not extend to external stakeholders would be compelling if s.13 said:

> The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by a public body or a minister.
>
> or
>
> The head of the public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by and for a public body or Minister.
>
> (emphasis in the respondents' submission).

[54] The respondents assert that the purpose of s. 13(1) was considered in the case of *College of Physicians.* The record in issue were documents summarizing expert opinions from four outside experts and a letter received from the College from one of the experts. At paras.104 and 105, the court articulated that the purpose of s. 13(1) was to foster the decision making process by allowing some degree of deliberative secrecy. With that purpose in mind, the court reasoned that s. 13(1) contemplated a broad range of information, as there was nothing in the words or the purpose of the section that would necessitate reading in the specific limitations. If the limitations in the interpretation that were argued were intended by the legislature, those limiting words would have been included in the section (at paras. 106 and 108). The respondents argue that as can be seen from the court's reasoning, it was not concerned with the source of the "advice or recommendations; it was concerned with the nature of the information provided." The court also notes at para**.** 11, that s. 13(2) excludes many other kinds of reports and information. The court states:

> [I]f the legislature did not intend the opinions of experts obtained to provide background explanations of analysis necessary to the deliberative process of a public body, to be included in the meaning of "advice" for the purpose of s. 13, it could have explicitly excluded them.

[55] On that latter point, the respondents assert that if stakeholders' submissions were not to be excluded, the legislation would have stated so expressly.

[56] The respondents point out that the previous decisions of the Commissioner hold that advice or recommendations referred to in s. 13(1) they come from other public bodies: order number 03-22.

[57] In response to the petitioner's argument that the practical effect of the impugned order is to extend the s. 13 protection to external institutions the respondents assert that the order actually protects the Ministry's deliberative process. The adjudicator specifically addressed this in para. 24 of the decision when she stated:

> Disclosure of these implications and consequences would, in this case, allow the drawing of accurate inferences about the underlying advice or recommendations to government as to whether or not to amend FIPPA.

[58] The respondents argue that these sentences clarify that the adjudicator found s. 13 permitted the Ministry to protect its own deliberative process, a process that included obtaining the advice of external stakeholders, by protecting that advice from other stakeholders. The respondents also assert that the adjudicator correctly noted that the disclosure of the stakeholders' views or opinions on the positive or negative implications of certain proposals or consequences of past amendments to the Act would allow "the drawing of accurate inferences about underlying advice or recommendations to the government as to whether or not to amend FIPPA".

[59] The respondents submit that the drawing of the distinction between (1) advice received from experts and (2) experts retained by a public body would undermine the objective of s. 13 given that the release of advice provided from either will equally permit the drawing of accurate inferences about the deliberative process of the Ministry concerning potential amendments to the Act.

[60] In response to the petitioner's submission that the decision is unreasonable for the reason that the reasons are insufficient, the respondents refer to *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, where Groberman J.A. outlined the "correct approach" to the question of "whether these reasons, taken as a whole, are tenable as support for the decision" (at para. 55 and 56). The court stated:

> 55 The correct approach to the matter was articulated by the Supreme Court of Canada in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at para. 56:
>
> > [The fact that the reviewing court must look to the reasons given by the tribunal to determine reasonableness] does not mean that

> every element of the reasoning given must independently pass a test for reasonableness. The question is rather whether the reasons, taken as a whole, are tenable as support for the decision. At all times, a court applying a standard of reasonableness must assess the basic adequacy of a reasoned decision remembering that the issue under review does not compel one specific result. Moreover, a reviewing court should not seize on one or more mistakes or elements of the decision which do not affect the decision as a whole.
>
> 56 A court assessing an administrative tribunal's decision on a standard of reasonableness owes the tribunal a margin of appreciation. The court should not closely parse the tribunal's chain of analysis and then examine the weakest link in isolation from the reasons as a whole. It should not place undue emphasis on the precise articulation of the decision if the underlying logic is sound. On the other hand, a court does not have *carte blanche* to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result.

[61] The respondent points out that the purpose of providing reasons is described in *Lake v. Canada (Minister of Justice)*, 2008 SCC 23; [2008] 1 S.C.R. 761 at para. 46:

> The purpose of providing reasons is twofold: to allow the individual to understand why the decision was made; and to allow the reviewing court to assess the validity of the decision.

[62] The respondents submit that the adjudicator's decision was reasonable and dealt with the points raised by the petitioner. The petitioner has asserted that one point was referenced in a footnote. However, in the footnote the adjudicator makes it clear that she accepted as authoritative, previous jurisprudence of the Commissioner on the point of the source of documents covered by s. 13(1). The respondents submit that the reasons on that point generally support the finding that the decision making process was justifiable, transparent and intelligible, as required by *Dunsmuir*. The reasons are tenable to support the decision, and it can be understood from the reasons why the decision was made. They allow the reviewing court to assess the validity of the decision.

Decision

[63] Applying the standard of reasonableness, I find that the adjudicator's decision demonstrates a chain of reasoning which meets the *Dunsmuir* test in that it provides "justification, transparency and intelligibility within the decision making process." The decision is one that was open for the adjudicator to make.

[64] The adjudicator specifically addressed the purpose of s. 13 at para. 10 of the decision. She states that its purpose "is to protect a public body's internal decision-making and policy-making processes by encouraging the free and frank flow of advice and recommendations."

[65] The adjudicator goes on to consider the applicability of s. 13(1) in paras. 11 through 19. She discusses the petitioner's submission in paras.11 to 15. She describes those submissions

and indentifies the arguments which the petitioner made, including that exceptions under s. 13 (1) should be narrowly construed, although exemptions under s. 13(2) should not be; that the submissions from stakeholders were not the subject of a confidentiality agreement; that the *College of Physicians* was wrongly decided; and that the Ministry's refusal to disclose the records was inconsistent with the practices of other ministries.

[66] I agree with the petitioner that the question of whether outside stakeholders are entitled to protection under s. 13 is dealt with by a reference to the Ministry's submissions and a brief footnoted reference to order 03-22. I disagree that the adjudicator dealt with this question in a manner that gave short shrift to the question of whether outside stakeholders are entitled to protection under s. 13. The decision is clear that that was not a vexing question for the adjudicator and had been settled by order 03-22. Order 03-22 cites the *College of Physicians* and states that, as the adjudicator notes, that "it does not matter who created the advice or recommendations … " Section 13(1) can therefore apply to advice or recommendations provided by a public body, employee or a private citizen. The adjudicator is following existing jurisprudence.

[67] As the petitioner notes, the adjudicator does not specifically address whether stakeholders' submissions in the context of public consultation, which are voluntary and do not oblige the Ministry to accept or reject any of the suggestions made in those submissions are excluded from disclosure under s. 13(1), or fall within the types of exemptions listed in s. 13(2). The adjudicator was not in a position to determine if stakeholder submissions, made voluntarily, would generally be subject to disclosure under the Act or would always be considered as "advice and recommendations." She addressed the issue that was before her: whether the record (undisclosed submissions) was subject to disclosure. She considered that the stakeholders' submissions were not analogous to a public opinion poll or a focus group at paras. 21 and 22.

[68] The petitioner asserts that information that is protected from disclosure is that which would reveal or suggest a course of action that would ultimately be accepted or rejected by the recipient during the deliberative process of government policy and decision-making. It is only relevant, the petitioner says, if the advice or recommendations are incorporated. The adjudicator addressed that position specifically. At para. 24, the adjudicator specifically refers to this type of recommendation or advice. She determines that disclosure of the comments would, in this case, reveal implicit advice or recommendations to government to proceed or not to proceed with those proposed amendments and that disclosure of the stakeholders' submissions would "allow the drawing of accurate inferences about the underlying advice or recommendations to government as to whether or not to amend the [Act]."

[69] The petitioner suggests that such a concern is speculation: even if one could infer from the stakeholders' submissions which advice or recommendations was considered by the Minister in determining whether to amend the *Act*, does not impede public servants from giving frank advice to the Minister in the future. Public servants and/or the Minister can accept or reject the stakeholders' input. Nevertheless, the disclosure of the stakeholders' submissions would tend to reveal recommendations made by a particular stakeholder, which were incorporated into amendments to the Act.

[70] While I accept that the purpose of the Act is to allow access to information held by public bodies, the adjudicator's decision that the stakeholders' submissions are entitled to s. 13(1) protection is in accordance with the provisions of the Act, the jurisprudence of the court (*College of Physicians*) and that of the Commissioner (order 03-22).

[71] The adjudicator's decision, as I have stated, reflects a chain of reasoning, and is one that was open to her based on the facts presented to her, the statutory provisions, and the jurisprudence.

[72] On this basis, I find that the adjudicator's decision is within the scope of the reasonableness standard, and that the disputed records were properly withheld from disclosure under s. 13(1) of the Act.

What is the appropriate remedy?

[73] As I have concluded that the adjudicator, the delegate of the Commissioner, did not commit a reviewable error, I will not address this third issue.

Summary

[74] The applicable standard of review in this case is reasonableness. The adjudicator, sitting as the Commissioner's delegate, did not commit a reviewable error. The petition is dismissed.

"Gropper J."