IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***B.C. Teachers' Federation, Nanaimo District Teachers' Association et al. v. Information and Privacy Commissioner (B.C.) et al.,*** 2006 BCSC 131

Date: 20060127
Docket: L040803
Registry: Vancouver

In the matter of the ***Judicial Review Procedure Act,*** R.S.B.C., 1996, c. 241, and the ***Freedom of Information and Protection of Privacy Act,*** R.S.B.C., 1996, c. 165 (as amended), and in the matter of Order No. 04-04 and No. 04-05 of the Delegate of the Information and Privacy Commissioner of British Columbia

Between:

British Columbia Teachers' Federation, Nanaimo District Teachers' Association and The Third party

Petitioners

And

Information and Privacy Commissioner for British Columbia, Board of School Trustees of School District No. 68 and The Applicant

Respondents

- and -

Docket: L040802
Registry: Vancouver

Between:

British Columbia Teachers' Federation, Nanaimo District Teachers' Association and The Third party

Petitioners

And

Information and Privacy Commissioner for British Columbia, Board of School Trustees of School District No. 68 and The Applicants

Respondents

Before: The Honourable Madam Justice Garson

(In Chambers)

Reasons for Judgment

Counsel for the Petitioners:	J. MacTavish
Counsel for the respondent, Information and Privacy Commissioner for British Columbia:	S. E. Ross
Counsel for the respondent, Board of School Trustees of School District No. 68:	K. Mitchell
Counsel for the respondent, Attorney General of British Columbia:	J. Tuck
Date and Place of Hearing:	January 3, 4, 5 and 6, 2006
	Vancouver, B.C.

INTRODUCTION

[1] These judicial reviews arise from two decisions made by the delegate of the Information and Privacy Commissioner pursuant to the ***Freedom of Information and Protection of Privacy Act***, R.S.B.C., 1996, c. 165 ("***Privacy Act*** ") to release severed copies of investigation reports, meeting minutes, and memoranda concerning the investigations of complaints made by parents about their children's teacher. The first decision is Order 04-04 cited at [2004] B.C.I.P.C.D. No.4. The second decision under review is Order 04-05 cited at [2004] B.C.I.P.C.D. No. 5. The Petitioners, (the teacher, the teacher's union and local teacher's association) contend that all the information contained in the reports and memoranda is the teacher's personal and employment information and should not be released to the parents. The respondents say that the decision of the Commissioner to release the information in severed form, thus removing the teacher's personal information, was a reasonable exercise of the Commissioner's statutory duties and should not be overturned or remitted back to the Commissioner for further consideration, by this court.

[2] The issues for determination are the following:

- What is the correct standard of review?
- Applying that standard of review did the Commissioner commit a reviewable error?
- If so, what is the appropriate remedy?

Facts

[3] During the 2000/2001 school year the respondent school board, (the "School Board"), received complaints from parents about the conduct of the teacher. The School Board retained an investigator who investigated these complaints and issued a report dated May 25, 2001. The report is the subject of Order 04-05 of the Commissioner.

[4] During the 2001/2002 school year the School Board received further complaints from parents about the same teacher. The School Board retained an investigator to investigate the complaints who issued a report dated February 14, 2002. This report is the subject of both Order 04-05 and Order 04-04.

[5] Pursuant to the Collective Agreement between the respondent School Board and the Petitioner Union, the School Board held special closed meetings in both 2001 and 2002 regarding the teacher. The notes and in camera minutes of those meetings are also the subject of the aforementioned Orders.

[6] The School Board received a request from three different parents ("the applicants") under the ***Privacy Act***, for copies of the investigation report; findings in connection with the investigation and hearing about the teacher; and copies of minutes of meetings pertaining to the student and the parent complainants.

[7] The School Board granted partial access to the documents but withheld a significant amount of information. The School Board advised the applicants that the severed information contained in the report was personal information of the teacher and, therefore, protected from release under s. 22 of the ***Privacy Act***.

[8] The British Columbia Teachers' Federation, representing the teacher and the Nanaimo District Teachers' Association, requested, pursuant to ss. 52 and 53 of the ***Privacy Act,*** a review of the School Board's decision to release partially severed versions of three investigation reports concerning the teacher, on the grounds that those reports, even with the severed information removed, contained personal and employment information about the teacher.

[9] The dispute about the appropriate disclosure was mediated pursuant to s.55 of the ***Privacy Act*** at which time the School District decided to disclose more information from the investigation report and hearing records. The Petitioners, on behalf of the teacher, continued to object to this disclosure.

[10] As the dispute was not resolved through mediation, the parties made submissions in response to an inquiry by the Commissioner. The Petitioners made submissions on their own behalf and on behalf of the teacher. The Petitioners also provided an *in camera* submission. As a result, the Commissioner issued Orders requiring the School District to give partial information to the applicants, somewhat different than the information originally agreed to be disclosed by the School Board.

[11] It is these two decisions of the Commissioner to grant partial disclosure of the disputed information that are the subject matter of these applications for judicial review. There are two Orders of the Commissioner and two applications for judicial review because there were separate applications made by different parents but all the applications concern the same teacher.

[12] In Order 04-04 the applicant parent submitted two requests in May 2002 under the ***Privacy Act*** to the School District for records concerning investigations and hearings from 2001 and 2002 including interviews with students and parents, and copies of records that were sent to the College of Teachers. The second request of this parent was for a "2002 investigation and disciplinary hearing" regarding the named teacher. The parent asked for the investigation report. The parent also asked for "a copy of any discussion from the hearing" concerning the applicant and her son.

[13] In Order 04-05 the access request concerned the same teacher. One set of parents requested a copy of the investigation report and hearing regarding the named teacher and copies of any discussion from the hearing pertaining to themselves and their son. The second

set of parents referred to two separate hearings related to the same teacher. They requested copies of investigation reports from the two investigations and a copy of any discussion from the second hearing pertaining to themselves and their child.

[14] The documents that are requested are the following:

In Order 04-04

1. Report of February 14, 2002;
2. Minutes of *in camera* meeting;
3. Typed notes of February/March 2002 meeting;
4. E-mail of February 25, 2002;
5. Question and Answer document.

In Order 04-05

1. Report of February 14, 2002;
2. Report of May 4, 2001.

[15] At the commencement of this application for judicial review, the Petitioners raised a preliminary objection to the scope of the submissions filed by the Commissioner. I issued Reasons for Judgment on November 3, 2005, (2005 BCSC 1562) in which I concluded that the Commissioner's submissions had not over-stepped the proper role of a tribunal appearing at the judicial review of its own decision. Of particular importance to my decision was the fact that the parents, the original applicants, did not participate in the judicial review and without the participation of either the Commissioner in a fulsome way, or the parents, the application for judicial review would be more or less unopposed. I held that constraining the role of the Commissioner in the manner contended for by the Petitioners would have left the court without the benefit of balanced submissions and could lead the court into error. Accordingly, I dismissed the preliminary objection made by the Petitioners and the parties reappeared before me to argue the judicial review.

Errors Alleged by the Petitioners

[16] The Commissioner conveniently summarizes the errors alleged by the Petitioners and the issues that arise from those alleged errors, as follows:

Issue No. 1 – Personal Information of the Teacher

The Petitioners say the Commissioner erred in concluding that the disclosure of some of the Teacher's personal information known to the respective access applicants or their children would not be an unreasonable invasion of the Teacher's personal privacy under s. 22(1). They would fault the Commissioner for not requiring the access applicants to adduce evidence or argument discharging the burden of proof under s. 57 on this point.

Issue No. 2 – Personal information

The Petitioners say the Commissioner erred in failing to conclude that Reports 1 and 2 consisted, in their entirety, of the Teacher's personal information.

Issue No. 3 – Availability of s. 12(3)(b) and s. 13(1) to third parties

The Petitioners say the Commissioner erred in concluding that the disclosure exceptions in s. 12(3)(b) and s. 13(1) could not be invoked by a third party.

Issue No. 4 – Compiled and identifiable as part of an investigation into a possible violation of the law

The Petitioners say the Commissioner erred in finding it unnecessary to consider whether the Teacher's personal information in the requested records was compiled and identifiable as part of an investigation into a possible violation of law under s. 22(3)(b) of the *Act*.

Issue No. 5 – Supplied in confidence

The Petitioners say the Commissioner erred in failing to conclude that information provided by the Teacher and the Teacher's union was supplied in confidence under s. 22(2)(f) because of Article 16 of the collective agreement between the School District and the Teacher's union.

Issue No. 6 – Confidentially-supplied third party labour relations information

The Petitioners say the Commissioner erred in concluding that information in the requested records was not "labour relations information" (s. 21(1)(a)(ii)) and was not "supplied" or supplied "in confidence" (s. 21(1)(b)), and in concluding that the investigators were not appointed to inquire into a labour relations dispute (s. 21(1)(c)(iv)).

[17] The Petitioners agree with the Commissioner's statement of the issues or alleged errors.

[18] Before examining the alleged errors it is necessary to decide the standard of review to be applied to the judicial review of the decisions of the Commissioner's Orders. I refer throughout these Reasons for Judgment to the decision, or Orders of the Commissioner, for convenience. I recognize that the Orders were in fact made by the Commissioner's delegate.

Standard of Review

[19] The Petitioners say that the alleged errors all involve questions of law and statutory interpretation and therefore the standard of review is correctness. The Commissioner says that the issues raise questions of mixed fact and law and therefore the appropriate standard is more deferential to the Commissioner, that is, one of reasonableness.

[20] The Supreme Court of Canada in ***Dr. Q. v. College of Physicians and Surgeons of British Columbia***, [2003] 1 S.C.R. 226, 223 D.L.R. (4th) 599, confirmed that the pragmatic and functional approach should be used in determining the appropriate standard of review and also confirmed the factors which are to be considered in undertaking such an inquiry. At ¶ 26 McLachlin C.J. stated the test that must be applied:

> In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors -- the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and

> the provision in particular; and, the nature of the question -- law, fact, or mixed law and fact.

Analysis of the four factors of the pragmatic and functional approach

1. Privative Clause or Right of Appeal

[21] The ***Privacy Act*** does not contain a privative clause and it does not provide for a right of appeal from the Commissioner's decisions.

[22] The Commissioner argues that silence on these matters is neutral.

[23] The Petitioner argues that because s. 59 of the ***Privacy Act*** provides for an automatic stay of a decision of the Commissioner once an application for judicial review has been commenced, a less deferential standard is appropriate. The Petitioner says that without s. 59 the judicial review would be moot. I think the Petitioner's point is that the section appears to contemplate judicial review and thus I should infer that there is a right of review or appeal contemplated by the Act and thus a less deferential standard should be applied.

[24] Section 59 of the ***Privacy Act*** requires a public body to comply with an order of the Commissioner within thirty days unless an application for judicial review is brought before that period ends, in which case the Commissioner's order is stayed until a court orders otherwise. Section 59 makes it unnecessary for a Petitioner seeking judicial review of a Commissioner's order to make a motion under s. 10 of the ***Judicial Review Procedure Act***, R.S.B.C. 1996, c. 241 for an interim stay of the Commissioner's order pending the disposition of the judicial review. Rather the stay is automatic upon the application for judicial review.

[25] The Commissioner says, and I agree, that the purpose of the stay provision in s. 59 is to give breathing space for a judicial review proceeding to be brought on for hearing. I also agree with the Commissioner that it has no significance for the curial deference analysis.

[26] In summary, I conclude that the absence of a privative clause or right of appeal is a neutral factor in consideration of the appropriate standard of review. That has been the conclusion of this court and the British Columbia Court of Appeal in the following cases concerning judicial reviews of the Information and Privacy Commissioner, although the argument about s. 59 was not raised in those cases: ***Architectural Institute of British Columbia v. British Columbia (Information and Privacy Commissioner)***, [2004] BCJ No. 465; ***Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)***, [2001] BCJ No. 79; ***British Columbia (Minister of Water, Land and Air Protection), v. British Columbia (Information and Privacy Commissioner)***, 2004 BCCA 210 at ¶33.

2. Expertise of the Tribunal

[27] The Supreme Court of Canada considered the question of expertise in the case of ***Zenner v. Prince Edward Island College of Optometrists***, [2005] SCJ No. 80 at ¶ 22:

> The analysis of the expertise of the tribunal has three dimensions. The court must:
>
> (i) characterize the expertise of the tribunal,
>
> (ii) consider its own expertise relative to the tribunal; and
>
> (iii) identify the issue relative to that expertise: ***Dr. Q***, at ¶ 28.

[28] The Commissioner says, in his submissions, that it is now beyond debate that provincial information and privacy commissioners have general expertise in the field of access to information and protection of privacy, including the interpretation and application of disclosure exceptions and the conduct of inquiries under their legislation, given (a) the breadth of their mandates under the ***Act*** (including their appointment to provide an independent, non-judicial avenue of review of access decisions by public bodies), (b) the accumulated experience and institutional expertise gained in carrying out that mandate, and (c) the Supreme Court's recognition in ***Macdonell v. Quebec (Commission d'acces a l'information***), [2002] 3 S.C.R. 661 of the general expertise associated with the mandate of the Quebec Commissioner.

[29] In ***Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)***, [2004] O.J. No. 4813 at paragraphs 28, 31 and 32 the court described the expertise of the Ontario Privacy Commissioner, who has similar powers to the British Columbia Commissioner, in the following way:

> The second contextual factor is the relative expertise of the Commissioner and the court both in relation to the *Act* generally and to the particular decision under review. One of the principles the *Act* is expressly founded on is that disclosure decisions should be reviewed independently of government. It creates the office of the Commissioner to deliver on that principle and gives to the Commissioner broad and unique powers of inquiry to review those decisions. It constitutes the Commissioner as a specialized decision maker. In my view, this implies that the legislature sees the Commissioner as the appropriate reviewer of disclosure decisions by government. The very structuring of the office and the specialized tools given to it to discharge one of the *Act's* explicit objectives suggests that the courts should exercise deference in relation to the Commissioner's decisions.
>
> In every review of disclosure decisions by government, the Commissioner is required by the *Act* to strike the delicate balance required between its two fundamental purposes, providing the public with the right of access to information held by government and protecting of the privacy of individuals with respect to that information. This is not a task for which the courts can claim the same familiarity or specialized experience.
>
> The disclosure decision under review here required the striking of that delicate balance in the specific context of s. 21(5). The elaboration of the requirements of that subsection undertaken by the Commissioner constitutes an interpretation by him of his constituent legislation. Where a tribunal with broad relative expertise must bring that expertise to the task of interpreting a specific provision of its own legislation, the courts should exercise considerable deference. See *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 114 D.L.R. (4th) 385.

[30] I do not understand the Petitioner to dispute these general statements about the expertise of the Commissioner but he says that the issues at the heart of this matter involve the interpretation of external statutes including the ***School Act***, R.S.B.C. 1996, c.412, the ***Teaching Professions Act***, R.S.B.C. 1996, c.449, and the ***Labour Relations Code,*** R.S.B.C. 1996 c.244. The Petitioner argues that these are not statutes with which the Commissioner or his delegate has experience and thus they have no expertise in interpreting them, relative to the court. The Petitioner also argues that the Commissioner was called upon to interpret and apply a defined term – "personal information" – which is a question of statutory interpretation. The Petitioner argues that even though "personal information" is defined in the Commissioner's own

statute, upon which he does have expertise, "he must get it right" and therefore a less deferential standard is appropriate.

[31] In ***Zenner,*** Major J. stated that the third factor in determining the expertise of the tribunal requires the reviewing court "to identify the issue relative to that expertise". Identification of the issue is also a required fourth step in the functional and pragmatic analysis. In this case there is an overlap between the functional and pragmatic analysis factors of the 'expertise of the tribunal' and the 'nature of the question. Consequently, I will return to the question of the tribunal's expertise after I consider the nature of the issues.

3. Purposes of the legislation

[32] The Petitioner argues correctly that this part of the pragmatic and functional analysis requires the court to examine the purpose of the legislation as a whole and also as to the specific provision(s) at issue (see ***Zenner*** at ¶ 20 and ***Dr. Q*** at ¶26)

[33] The Petitioner says that the nature of this dispute is bi-polar, not polycentric. The Petitioner says that the case involves a dispute between a group of parents who want personal information about a teacher and a teacher and his union who do not want their information disclosed. The Petitioners argue that the Commissioner's role was to resolve the dispute in accordance with the provisions of the ***Privacy Act*** and that such a bi-polar dispute suggests a less deferential standard of review than a polycentric one.

[34] In my preliminary ruling cited at 2005 BCSC 1562 I found that the purpose of the ***Privacy Act*** as a whole was polycentric. The inquiry at this stage of the proceeding requires a further analysis as to whether the specific issues under consideration are polycentric rather than bi-polar. The Commissioner relies on the judgment of Metzger J. in ***Architectural Institute of British Columbia; Shields v. Information and Privacy Commissioner***, [2004] AJ No. 762; and ***Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)***, [2004] O.J. No. 4813 (C.A.). The argument favouring a polycentric characterization of the functions of the Commissioner is succinctly described in the Ontario case just mentioned at ¶ 34:

> The third contextual factor is the broad purpose of the Act as a whole and of s. 21(5) in particular. In my view, the Act is conceived as a mechanism to advance the right of the public to access information in the hands of government, to protect the privacy of individuals with respect to that information, and to balance the tension between those two objectives. The Commissioner's role is central to advancing this legislative purpose both by resolving particular disputes and by providing general policy advice. In resolving disputes such as this one, the Commissioner is not addressing a binary dispute between two private individuals. The dispute is not limited to the Ministry and the requesters because it involves the privacy of another individual. All three made representations to the Commissioner. More fundamentally however, it is a conflict between the public interest and access to information and the individual interest in personal privacy. This requires the consideration of much broader interests than just those of two opposing litigants and reflects a dispute that is more polycentric than bipolar. Thus, the broad purpose of the *Act* as a whole and s. 21(5) in particular is consistent with a less searching rather than a more searching standard of review.

[35] The Petitioner relies on ***Aquasource Ltd. v. British Columbia (Information & Privacy Commissioner)*** (1998) 58 B.C.L.R. (3d) 61 (C.A.) where Donald J.A. said at ¶ 24:

> In this matter Aquasource sought information which the government was unwilling to divulge. The Commissioner's role was to resolve the dispute in accordance with the *Act*. This conflict resolution was much more "bipolar" than "polycentric".

[36] Ms. Ross, counsel for the Commissioner argues that the approach taken in ***Aquasource*** "has been eclipsed by the more nuanced approach introduced in ***Dr. Q***. where the Supreme Court found that the mixed polycentric and bipolar legislative purposes of the legislation governing the mandate of the College of Physicians and Surgeons neutralized the purposes factor in the standard of review analysis." (at ¶ 37). I agree with the Commissioner. The role of the Commissioner does resolve party disputes but overlying that dispute resolution role are the public policy objectives mandated by the ***Privacy Act***. Those policy objectives are polycentric and inform the Commissioner's decisions about the application of the ***Privacy Act*** to the dispute before him. I would conclude that the Commissioner's role is polycentric.

4. Nature of the Problem before the Tribunal

[37] In this case the nature of the problem that was before the Commissioner is perhaps the most heavily weighted of the four factors in the pragmatic and functional approach to determining the standard of review. In ***Dr. Q*** McLachlin C.J. said this at ¶34:

> When the finding being reviewed is one of pure fact, this factor will militate in favour of showing more deference towards the tribunal's decision. Conversely, an issue of pure law counsels in favour of a more searching review. This is particularly so where the decision will be one of general importance or great precedential value: *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 23. Finally, with respect to questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive, and less deference if it is law-intensive.

[38] I shall now turn to a consideration of the issues that were before the tribunal and the errors that are alleged to have been made in deciding those issues in order to determine if the question is one of fact, law, fact intensive mixed fact and law, or law-intensive mixed fact and law.

Review of Alleged Errors

Issue No. 1 – Personal Information of the Teacher

The Petitioners say the Commissioner erred in concluding that the disclosure of some of the Teacher's personal information known to the respective access applicants or their children would not be an unreasonable invasion of the Teacher's personal privacy under s. 22(1). They would fault the Commissioner for not requiring the access applicants to adduce evidence or argument discharging the burden of proof under s. 57 on this point.

Issue No. 2 – Personal information

The Petitioners say the Commissioner erred in failing to conclude that Reports 1 and 2 consisted, in their entirety, of the Teacher's personal information.

[39] I shall consider these two issues together. The parties have referred throughout the hearing to these issues as "the s. 22 issues." The Petitioners say that the Commissioner erred in failing to conclude that Reports 1 and 2 consisted, in their entirety, of the teacher's personal information. The Commissioner ordered that the two reports be disclosed in severed form. The Commissioner withheld what he determined was personal information but ordered that those portions of the report that were the applicant's own information, or were no-one's personal information be revealed. Parenthetically, I say that the Petitioners do not accept that this is what the Commissioner did. The Petitioners say that the Commissioner ordered disclosure of considerable personal information about the teacher that was not the applicant's own information or previously known to the applicant nor could it be considered no-one's personal information. I consider this argument below. In other words, where the report replicated the complaints of the parent or the child, the Commissioner decided that, this was not the teacher's personal information. Where the report recited the investigation methodology the Commissioner determined that was no one's personal information. The Petitioner says that the Commissioner failed to first decide what was personal information and then failed in his application of the proper definition of personal information to the information that was the subject of the request. The Petitioner says this is a question of statutory interpretation. The Commissioner says this is a question of mixed fact and law. The reports are voluminous. The Commissioner painstakingly reviewed every line and every word in making a determination of what should be severed. This sometimes daunting task of reviewing the documents is very much within the core expertise of the Commissioner and goes well beyond a narrow question of statutory interpretation.

[40] The third issue as framed by the parties also concerns s. 22. The Petitioner says that the Commissioner failed to apply the burden of proof correctly which according to s. 57 is on the applicant parents. The Petitioner says "Not only did the applicant fail to adduce any evidence or argument in support of the position that she was entitled to receive personal information about the third party teacher there is very little analysis of this issue in the decision."

[41] At the time these Orders were made, "Personal Information" was defined in the ***Privacy Act*** as follows:

> "personal information" means recorded information about an identifiable individual.

[42] Section 4 of the ***Act*** requires the public body to sever information from a record otherwise not disclosable if it can reasonably be done:

> 4(1) A person who make 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 of the 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.

[43] Section 22 is a provision designed to protect individuals' personal privacy from harm. It states at ss. (1) and (2):

> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of third party's personal privacy.

(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether [emphasis added]

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable, and

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

[44] Section 22(3) provides that:

A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if [I reproduce only the relevant subsections]

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,

(d) the personal information relates to employment, occupational or educational history,

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

(h) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation, character reference or personnel evaluation,

[45] The operation of s. 22(1) to (4), which come into play after first determining if the information requested is personal information of the third party, may be summarized as follows:

- Section 22(1) creates a mandatory duty on the public body to refuse to disclose personal information to an access applicant if disclosure would be an unreasonable invasion of the third party's personal privacy.
- Section 22(3) creates a rebuttable presumption that the disclosure of personal information of certain kinds or in certain circumstances would be an unreasonable invasion of third party personal privacy.

- Section 22(2) requires the public body, in determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of third party personal privacy, to consider all the relevant circumstances including a series of listed ones.
- Section 22(4) acts as an exclusion to subsections (1), (2) and (3), by conclusively deeming that the disclosure of personal information of certain kinds or in certain circumstances not to be an unreasonable invasion of third party personal privacy.

(See Adjudication Order No.2 (June 19, 1997), Bauman J., sitting as a Commissioner appointed under s. 60 of the Act, pp. 6, 7)

[46] Overlying the operation of s. 22 is the requirement of s. 4(2) that permits the public body to sever information that is not personal information from a record containing personal information.

[47] At ¶ 48 of Order 04 – 04 the Commissioner determined that s. 22(3)(d) applied to the requested records but he also decided he should nevertheless release to the applicants their own information. He stated:

> In this case, the investigator's report reveals that the applicant is aware of her own complaints and allegations against the teacher where they involve herself and her child, information on her own interactions with the teacher and her comments about the teacher's behaviour as regards her son, because she provided this information to the investigator or the School District. While the teacher's information falls under s. 22(3)(d), its disclosure to the applicant would not, in my view, unreasonably invade the teacher's personal privacy. I therefore agree with the School District's decision to release this information to the applicant. I have added to this a few items which the School District proposed to withhold but which are similar in nature to those which the School District had marked for release elsewhere.

[48] Section 22(3)(d) creates a rebuttable presumption that disclosure of personal information relating to employment, occupational or educational history is an unreasonable invasion, in this case of the teacher's, privacy. The applicant did not provide evidence to rebut this presumption. (See ¶ 23 of Order 04 – 04). The Commissioner nevertheless held that information already known to the applicant would not unreasonably invade the third party's personal privacy. I do not understand the Commissioner to have found that information already known to the applicant was <u>not</u> personal information of the teacher but rather that, although it is not explicitly stated in the ***Privacy Act***, the s. 22(3) presumption was rebutted by the finding that the information was the information of the applicant. The Commissioner referred to an earlier ruling on this point, in Order 03 – 04 where the Commissioner was considering the application by a patient of a psychologist for disclosure of the complaint file and investigation report of the College of Psychologists of British Columbia. At ¶ 55 of that Order the Commissioner held that:

> It is well established, however, that a public body has the burden of proving why an applicant should not have access to her or his own personal information….I do not consider that disclosure to the applicant of her own personal information would unreasonably invade the third party's personal privacy and it follows that the College cannot refuse under s. 22 to disclose the applicant's own personal information to her.

[49] In this case the Petitioner argues that the ***Privacy Act*** does not create such an exception. I understand the submissions of the Petitioner to be that once the Commissioner

agreed that s. 22(3)(d) applied to the investigation report then there is no basis in the ***Privacy Act*** to create an exception for information already known to the applicant, and to then sever parts of the report for disclosure to the applicant. The Petitioner says that the Commissioner should first have analyzed what was personal information as defined by the ***Act***. The Commissioner did not explicitly do so. I infer from the Commissioner's reasons in both Orders that he must have determined first that all six records were personal information. In any event, based on ¶ 48 of Order 04 – 04, it does seem as if his decision to disclose the personal information was not premised on the basis that some of the information in the investigation report was not the teacher's personal information but rather that similar to Order 03 – 24 the Commissioner found that disclosure of information that was the applicant's own information was not an unreasonable invasion of the third party's (that is in this case the teacher's) privacy.

[50] The question is therefore, whether this class based exception created by the Commissioner within the ambit of s. 22 is a reasonable interpretation of the ***Privacy Act.*** As noted above, s. 4(2) requires the public body to sever information that is the applicant's own personal information, from a record if the record is exempt from disclosure under s. 22. Importantly, this section differentiates between a "record" and "information" within that record. The definition of "personal information" in the ***Privacy Act*** refers to information, not the entire record in which the information is contained. In other words, s. 22 of the ***Privacy Act*** does not contemplate exceptions to disclosure of records, but rather to information. The public body from whom the disclosure is requested, is obliged to examine all the information in a record to determine if it is, in this case, personal information of the teacher, and then to consider if it can be severed without revealing personal information or if it does so, if the disclosure is not an unreasonable invasion of the teacher's privacy.

[51] The Commissioner says that s. 22 does not protect against the access applicant's invasion of his or her own personal privacy. He says personal information is defined in the ***Privacy Act*** to mean information about an identifiable individual. He says s. 22 applies only to personal information, and if information that is excepted from disclosure (under s. 22 or any other disclosure exception) can be reasonably severed from a requested record the access applicant has the right under s. 4(2) to be given access to the remainder of the record. I agree with this statement.

[52] The Petitioners say this alleged misinterpretation of the statute can only be reviewed on a standard of correctness. The Commissioner says that this is a question of the application of the statute to the facts, which is a question of mixed fact and law attracting a standard of reasonableness. I conclude that this alleged error involves a question of statutory interpretation, a question of law.

[53] There is another class based exception that the Commissioner ordered to be disclosed. That is information he called "no-one's information." At ¶ 29 of Order 04 – 04 the Commissioner stated:

> I have reviewed the report and agree with the School District that some of the information it contains is no one's personal information in that it consists of general information about the terms of reference for the investigation, the investigator's methodology and documentation she reviewed. In addition, some of the information in the methodology section consists of aggregate references to students, staff or parents being interviewed. I agree with the School District that these types of information should be disclosed. I have added to this information a phrase or two which the School District had not marked for release – perhaps through an oversight – but which, in my view, are also not personal information.

[54] At ¶ 27 of Order 04-05 the Commissioner stated:

> I have reviewed the reports and agree that some of the information they contain is no one's personal information, for example, general information about the terms of reference for the investigations, the investigators' methodologies and, in the case of Report 2, documentation the investigator reviewed. In addition, some of the information in the methodology section of Report 2 is aggregate reference to students, staff or parents being interviewed. I agree with the School District that these types of information should be disclosed.

[55] It is difficult to determine precisely what portions of the documents were ordered disclosed to the applicants on the grounds of a "no-one's personal information" classification.

[56] The Petitioners contend that details of the investigation report are clearly information relating to the investigation of the teacher and how that investigation was carried out, what people were interviewed or documents were reviewed and in its entirety cannot be considered anything but personal information relating to the teacher's employment. For example on page three of the 04-04 report, the Commissioner marks for disclosure information about the methodology including the identification of the category of persons interviewed. The Petitioners say that this type of information must be considered personal information of the teacher and the seriousness with which the complaints against him were being treated.

[57] In summary, the Petitioners contend that the Commissioner failed to explain why he considered the information classed as "no-one's personal information" or why if it was personal information, its disclosure was proven by the applicants not to be an invasion of the teacher's privacy.

[58] This question concerns the interpretation of the ***Privacy Act*** and its application to a specific category of information. I conclude it is a question mixed fact and law.

[59] Lastly, I note that the Petitioner asserts some of the information marked for disclosure could not be characterized as either the applicant's own information or no-one's information. There is no explanation in the Commissioner's reasons for such disclosure.

Issue No. 3 – Availability of s. 12(3)(b) and s. 13(1) to third parties.

[60] The Petitioners say the Commissioner erred in concluding that the disclosure exceptions in s. 12(3)(b) and s. 13(1) could not be invoked by a third party.

[61] Section 12(3)(b) and s. 13(1) state:

> 12(3)(b) The substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or regulation under this Act authorizes the holding of that meeting in the absence of the public.
>
> 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.

[62] The Commissioner's decision on this issue is found at ¶ s 71 – 73 and 96 of Order 04 – 04 and ¶ s 11 and 12 of Order 04 – 05. The School Board invoked s. 12(3)(b) in respect of only two of the documents, the meeting minutes and the question and answer document. In Order 04-04, the School Board was ordered by the Commissioner to reconsider its decision to withhold the *in camera* minutes as a whole (¶ 85 of Order 04-04). The Commissioner determined that the School Board should reconsider the exercise of its discretion not to sever information that is the applicant's own information "as if it were a class-based exemption applying to *in camera* minutes as a whole". The School Board does not object to this Order of the Commissioner.

[63] I would frame the question as follows: Did the Commissioner correctly interpret s. 12(3)(b) and s. 13(1) as discretionary provisions that may only be invoked by the public body at its own discretion, in which case did he correctly hold that the third party cannot compel the public body, in this case the School Board to exercise its discretion in a particular way? This issue is a pure question of interpretation of the ***Privacy Act.***

Issue No. 4 – Compiled and identifiable as part of an investigation into a possible violation of the law

The Petitioners say the Commissioner erred in finding it unnecessary to consider whether the Teacher's personal information in the requested records was compiled and identifiable as part of an investigation into a possible violation of law under s. 22(3)(b) of the *Act*.

[64] In ¶ 40 the Commissioner said that he had found the personal information in the report was exempt under s. 22(3)(d) and (g) and so it was unnecessary for him to consider another ground of exception, s. 22(3)(b), since he had already decided it was exempt from disclosure. The Petitioner contends that in doing so he was not correct because he had also decided that some of the information in the report was not exempt on the basis that it was the applicant's own information or no-one's information, and should be severed and disclosed. The Petitioners say that the Commissioner ought to consider if he should apply the mandatory rebuttable presumption to the whole report if the whole report was "part of an investigation into a possible violation of law" under s.22(3)(b). The Petitioners say that because the Commissioner decided that he did not have to consider s. 22(3)(b) he unreasonably failed to consider if the whole or part of the investigation report and other documents were exempt from disclosure, under that section. This question primarily involves a question of the correct interpretation of the ***Privacy Act***.

Issue No. 5 – Supplied in confidence

The Petitioners say the Commissioner erred in failing to conclude that information provided by the Teacher and the Teacher's union was supplied in confidence under s. 22(2)(f) because of Article 16 of the collective agreement between the School District and the Teacher's union.

[65] I quote from the relevant portion of the Orders :

> Order 04-04
>
> ¶ 41 Turning to a consideration of the relevant circumstances, the third party asserted that
>
> ss. 22(2)(e)-(h) are relevant. The School District said it took into account only the relevant factor in s. 22(2)(f), saying that the personal information was supplied in confidence to the investigator. The School District supplied no evidence to support this contention, for example, in the form of policies it may have on complaint investigations or affidavit evidence from the teacher or others involved in the investigation. The School District also said, again without expanding, that it did not consider that there are any relevant factors rebutting the presumption of privacy.
>
> ¶ 42 Regarding s. 22(2)(f), the third party argued that the personal information in the report was supplied in confidence in accordance with

the express provisions of Article 16 of the relevant collective agreement. The third party supported this argument with affidavit evidence by the NDTA's communications director who deposed in her public affidavit that discipline of NDTA members is dealt with "in a confidential manner" at *in camera* meetings of the School Board. She did not explain what she meant by "a confidential manner".

> ¶ 43 Attached to this affidavit was a copy of Articles 15 and 16 of the collective agreement. The first of these describes the process for dismissal of teachers based on performance while the second sets out the process for the discipline and dismissal of teachers based on misconduct. Article 16 also acknowledges that the parties will treat dismissal and disciplinary matters confidentially and will not disclose such matters to the public or media except by agreement. This does not, however, mean that parties to the investigation and related matters supplied information in confidence.
>
> ¶ 44 The investigator's report itself casts no light one way or the other on the confidentiality issue. The investigator does not, for example, state whether or not she conducted her interviews on a confidential basis. There is also no mention in the report that students, parents and others agreed to be interviewed under conditions of confidentiality.
>
> ¶ 45 There is no basis in the material before me on which I can conclude that the personal information in the investigator's report was supplied in confidence. I say this bearing in mind Article 16 of the collective agreement, which does not suffice, in my view, to establish confidentiality of supply within the meaning of s. 22(2)(f). I therefore do not consider that
>
> s. 22(2)(f) is a relevant circumstance here.

[66] The Commissioner stated in Order 04-05

> ¶ 35 …The third party made the same arguments about s. 22(2)(f) as he did in Order 04-04.
>
> ¶ 36 I noted in Order 04-04 that Report 2 itself casts no light one way or the other on the confidentiality issue. The same applies here to both reports, although Report 1 has been stamped "confidential". The investigators do not, for example, state whether or not they conducted their interviews on a confidential basis. There is also no mention in the reports that students, parents and others agreed to be interviewed under conditions of confidentiality.
>
> ¶ 37 There is no basis in the material before me on which I can conclude that the personal information in Reports 1 and 2 was supplied in confidence. I find that s. 22(2)(f) is not a relevant circumstance here.

[67] In my view these are findings of fact.

Issue No. 6 – Confidentially-supplied third party labour relations information

The Petitioners say the Commissioner erred in concluding that information in the requested records was not "labour relations information" (s. 21(1)(a)(ii)) and was not "supplied" or supplied "in confidence" (s. 21(1)(b)), and in concluding that the

investigators were not appointed to inquire into a labour relations dispute (s. 21(1)(c)(iv)).

[68] On this issue I quote from the Commissioner's written submissions on this judicial review:

> The Petitioners say the Commissioner erred in concluding that information in the requested records involved was not "labour relations information" (s. 21(1)(a)(ii)) and was not "supplied" or "in confidence" (s. 21(1)(b)), and in concluding that the investigators were not appointed to inquire into a labour relations dispute (s. 21(1)(c)(iv)).
>
> Paragraphs (a), (b) and (c) of s. 21(1) constitute a three-part test, each element of which must be satisfied before a public body is required to refuse disclosure of information. The Commissioner found that none of the paragraphs in s. 21(1) were established. Therefore, in order for the Petitioners to succeed in this issue on judicial review, they must establish that the Commissioner made reviewable error in respect of each of the three paragraphs. If the Commissioner's conclusion is undisturbed with respect to any one element, then the disclosure exception cannot apply.
>
> As the Commissioner noted (Order 04-04 ¶ 100; Order 04-05 ¶ 45), the burden of proving that s. 21(1) applies rests with the third party claiming it, not with the access applicant (Act, s. 57(3)(b)). On the burden of proof for s. 21(1), also see, Order F05-02 ¶¶ 91-94.
>
> With respect to s. 21(1)(a)(ii), the Commissioner concluded that it did not apply to the interests of the Teacher in the requested records, which were purely personal. As for the Teachers' unions, the Commissioner found that "labour relations information" refers to the collective relationship between an employer and its employees and, although the NDTA had represented the Teacher in connection with the investigations, the requested records did not contain information related to the NDTA's or the BCTF's role or position in the collective bargaining process with the employer or other general labour relations matters (Order 04-04 ¶ 107, 108; Order 04-05 ¶¶ 45, 47).
>
> With respect to the s. 21(1)(b) requirement of confidential supply of information, the Commissioner adopted her previous conclusion respecting s. 22(2)(f) that neither Article 16 of the collective agreement nor the requested report themselves established that "people involved in the investigation had provided information in confidence" (Order 04-04 ¶ 109, 110; Order 04-05 ¶ 47). The Commissioner also concluded that: "Much of the information in the reports was not in fact supplied to the School District by the third party unions but by other third parties. Other information was created by the School District." (Order 04-04 ¶ 111; Order 04-05 ¶ 47).
>
> With respect to s. 21(1)(c)(iv), the Commissioner concluded that the investigators' fact-finding mandates did not constitute appointments to "resolve or inquire into" a labour relations dispute (Order 04-04 ¶ 117-122, Order 04-05 ¶ 47).

[69] The facts which underlie this matter stem from a complaint by parents and children about the behaviour of a teacher. It is contended by the respondents that, these facts may have implications for the teacher that lead to a process governed by a collective agreement but the

underlying facts are not a labour dispute. As Mr. Mitchell, for the School Board said, the case is about the disclosure of six documents. Each of the six documents must be examined by the Commissioner in order to determine if information to be disclosed is exempt from disclosure under the three part test in s. 21(1)(c)(iv). The Commissioner determined that the information sought was not covered by the three subsections of (iv). I conclude that the Commissioner's reasons for declining to exempt production on this ground, (s. 21(1)) is a question of mixed fact and law.

Conclusion as to the standard of review

[70] I do not think that any of the issues under review are so discrete that it is appropriate to apply different standards of review to the different issues.

[71] In British Columbia, courts have decided that pure questions of law that limit or define the scope of the ***Privacy Act*** or that are not regarded as essential to core expertise of the Commissioner such as issues of solicitor client privilege and Cabinet deliberative secrecy have attracted the correctness standard of review. ***Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*** (1998), 58 B.C.L.R. (3d) 61 (C.A.); ***British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)***, [2004] B.C.J. No. 2534 (S.C.)

[72] Decisions on matters within the Commissioner's core expertise-for example, fact-intensive questions and the interpretation and application of disclosure exceptions, the burden of proof in s. 57, and the Commissioner's discretionary powers concerning his own process (notice and receipt of *in camera* evidence) have been reviewed on the reasonableness standard. ***Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)***, [2001] B.C.J. No. 79 (S.C.) ¶¶ 31, 32; ***British Columbia (Minister of Water, Land and Air Protection) v. British Columbia (Information and Privacy Commissioner)***, [2002] B.C.J. No. 2307 ¶¶ 6-9, rev'd in part [2004] B.C.J. No. 735 (C.A.); ***Architectural Institute of British Columbia v. British Columbia (Information and Privacy Commissioner)***, [2004] B.C.J. No. 465 (S.C.)

[73] In this case, the most important of the issues under review concerns the application of the disclosure exceptions under s. 22. Those issues, at least at the first stage of the analysis, involve questions of statutory interpretation, for instance whether s. 4 permits the severing of non-personal information from personal information in a record that the Petitioner contends is in its entirety, exempt from disclosure under s.22(3)(d). The application of that statutory interpretation to the documents under review is a question of mixed fact and law. I conclude that these questions of statutory interpretation are questions that engage the core expertise of the Commissioner. They are not pure questions of law outside of his expertise.

[74] In ***Aquasource,*** Donald J.A. said: "The Commissioner possesses no special expertise in statutory interpretation which would justify according deference to his interpretation of a provision such as s. 12:

[75] That statement must be considered to have been overtaken somewhat by subsequent Supreme Court of Canada dicta in which that court acknowledged expertise and deference to a tribunal in the interpretation of its own statute. In ***Moreau-Berubé v. New Brunswick (Judicial Council)*** [2002] 1 S.C.R. 249 at ¶61 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*, … "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."

[76] The Commissioner does have specialized expertise accumulated by his office in the operation of the Act generally, and specifically in applying the presumptions and exceptions in sections 21 and 22. The title of the Act, ***Freedom of Information and Protection of Privacy,*** illustrates the tension between disclosure of information in the possession of public or government bodies, and the protection against the invasion of the privacy of individuals. The careful balancing of those competing policy objectives is the task of the Office of the Commissioner.

[77] Accordingly even on the questions of statutory interpretation I find that the Commissioner is entitled to deference based on his expertise and his polycentric functions. Considering all the factors mandated by the functional and pragmatic analysis as set out above and the weight of the judicial authority just quoted, I conclude that the appropriate standard of review is reasonableness.

Reasonableness Standard

[78] The Supreme Court of Canada, in ***Canada (Director of Investigation and Research) v. Southam Inc.***, [1997] 1 S.C.R. 748 described the reasonableness standard at ¶ 56;

> An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. [Emphasis added.]

[79] In ***Law Society of New Brunswick v. Ryan***, [2003] 1 S.C.R. 247, the Supreme Court of Canada elaborated on the requirements of the reasonableness standard for a reviewing court;

> ¶ 49 …the reasonableness standard requires a reviewing court to stay close to the reasons given by the tribunal and "look to see" whether any of those reasons adequately support the decision. Curial deference involves respectful attention, though not submission, to those reasons...
>
> ¶ 50 At the outset it is helpful to contrast judicial review according to the standard of reasonableness with the fundamentally different process of reviewing a decision for correctness. When undertaking a correctness review, the court may undertake its own reasoning process to arrive at the result it judges correct. In contrast, when deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been. Applying the standard of reasonableness gives effect to the legislative intention that a specialized body will have the primary responsibility of deciding the issue according to its own process and for its own reasons. The standard of reasonableness does not imply that a decision-maker is merely afforded a "margin of error" around what the court believes is the correct result.
>
> …
>
> ¶ 55 A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere (see *Southam*, at para. 56). This means that a decision may satisfy the

> reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling (see *Southam*, at para. 79).
>
> ¶ 56 This 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.

Review of Alleged Errors

[80] Applying the reasonableness standard of review to each of the alleged errors leads me to the following conclusions in respect to each of the alleged errors.

Issues No.1 and No.2

Issue No. 1 – Personal Information of the Teacher

The Petitioners say the Commissioner erred in concluding that the disclosure of some of the Teacher's personal information known to the respective access applicants or their children would not be an unreasonable invasion of the Teacher's personal privacy under s. 22(1). They would fault the Commissioner for not requiring the access applicants to adduce evidence or argument discharging the burden of proof under s. 57 on this point.

Issue No. 2 – Personal information

The Petitioners say the Commissioner erred in failing to conclude that Reports 1 and 2 consisted, in their entirety, of the Teacher's personal information.

Applicant's own information

[81] The Commissioner's decision could reasonably be supported by a logical interpretation of s. 4 and s. 22(3)(d) when read in combination. Although it is not clear from the Commissioner's reasons if the applicant's own information is severed because it was not the personal information of the teacher or because revealing the information is not an unreasonable invasion of the teacher's privacy under s. 22(3)(d), the result is a reasonable interpretation of those sections.

[82] Applying a reasonableness standard of review to this issue, I would not disturb the finding of the Commissioner that the applicant's own information should be severed from the information otherwise excluded from disclosure under s. 22(3)(d).

No-one's personal information

[83] The second alleged error concerns information classified by the Commissioner as "no-ones information." (see ¶ 29 of Order 04 – 04 and ¶ 27 in Order 04-05 set out above)

[84] The Commissioner failed to explain why he considered the information "no-one's personal information" and not the teacher's personal information. Nor did the Commissioner

give any reasons why he decided it was not an invasion of the teacher's personal privacy to disclose the information. The burden of proof was on the applicant to prove that it was not an invasion of the teacher's privacy. I see no reasons that adequately support this part of the Commissioner's decision. Moreover, the Commissioner only listed examples of information considered "no-one's personal information". It is not therefore possible to determine on what basis disclosure of information was made. Examples given by the Petitioners in this category of information that they say is personal information, but was nevertheless ordered disclosed are found on page 3, 4 and 6 of Report dated February 14, 2002, and marked Exhibit A of the in camera affidavit of Maria Dupuis, in 04-05 in which the author of the report describes her methodology. (See also page 2 of the same report but marked Exhibit C in which for some reason the number of children interviewed is disclosed to a different parent applicant.) There may well be reasons for all these disclosures but those reasons cannot be discerned from the Orders.

[85] Lastly, the Petitioner's assert that some of the information marked for disclosure could not be characterized as either the applicant's own information or no-one's information. There is no explanation in the Commissioner's reasons for ordering such disclosure. One example of such information is found on page 14 of the Report at Exhibit A in Order 04 -05 under the heading "The Teacher - Prior Knowledge." The author of the report makes a summary statement of the preceding discussion about the substantive results of those interviews. These interviews were not limited to the applicant's own information and could not be described as no-one's personal information. They are about the teacher. There are no reasons in the Commissioner's Orders that support the decision to disclose this type of information other than the statement that aggregate references to students, staff, or parents being interviewed are marked for disclosure to the applicants. The Commissioner does not explain why aggregate references to interviews and the results of those interviews about the teacher is either not the teacher's personal information or is not excepted from disclosure in s. 22(3)(d). Similarly, on page 15 and 16 of Exhibit A of the in camera affidavit in 04-05, the Commissioner orders information disclosed about the results of interviews of parents who are not applicant parents. I believe these interviews are the views of other parents about the teacher. I conclude that the Commissioner's decision to release information he classified as "no-one's personal information" is not supported by his reasons and requires reconsideration.

[86] I do not propose to review the entirety of the reports and other documents that are the subject of this petition. Rather I believe that the appropriate remedy is to return the matter to the Commissioner to reconsider his Orders in light of these reasons. The Commissioner should consider specifying what information is ordered disclosed on what basis. I would expect that the Commissioner would provide some explanation for the information ordered disclosed, if any, consistent with these Reasons for Judgment.

Issue No.3 – Availability of s. 12(3)(b) and s. 13(1) to third parties

The Petitioners say the Commissioner erred in concluding that the disclosure exceptions in s. 12(3)(b) and s. 13(1) could not be invoked by a third party.

[87] The Petitioners say the Commissioner erred in concluding that the disclosure exceptions in s. 12(3)(b) and s. 13(1) could not be invoked by a third party.

[88] It is not an unreasonable interpretation of the ***Privacy Act*** to find that these provisions are discretionary provisions that may only be invoked by the public body at its own discretion. The third party cannot compel the public body, in this case the School Board to exercise its discretion in a particular way. Accordingly I would dismiss this ground of review.

Issue No. 4 – Compiled and identifiable as part of an investigation into a possible violation of the law

The Petitioners say the Commissioner erred in finding it unnecessary to consider whether the Teacher's personal information in the requested records was compiled and identifiable as part of an investigation into a possible violation of law under s. 22(3)(b) of the *Act*.

[89] Section 22(3)(b) creates a rebuttable presumption that disclosure of personal information relating to the specified investigation is presumed to be an invasion of the privacy of the teacher (in this case). The Commissioner reasoned that he did not have to consider the applicability of this subsection because he had already determined that s. 22(3) applied because of ss. (d),(g), and (h). I cannot understand from the reasons of the Commissioner if he applied the presumption in s. 22(3), or if he decided the presumption was rebutted. It is possible that he applied s. 4, severed the applicant's own information and no-one's information, and then left everything else as not disclosable on the basis of s. 22(3). The reasoning of the Commissioner is not clear on this point. Section 22(3)(b) is a presumption that the teacher is entitled to. The Commissioner unreasonably failed to consider if the whole investigation report was exempt under that section. Accordingly, the Commissioner must reconsider his decision on this ground raised by the Petitioner.

Issue No. 5 – Supplied in confidence

The Petitioners say the Commissioner erred in failing to conclude that information provided by the Teacher and the Teacher's union was supplied in confidence under s. 22(2)(f) because of Article 16 of the collective agreement between the School District and the Teacher's union.

[90] In my view these are findings of fact that I would not disturb on judicial review.

Issue No. 6 – Confidentially-supplied third party labour relations information

The Petitioners say the Commissioner erred in concluding that information in the requested records was not "labour relations information" (s. 21(1)(a)(ii)) and was not "supplied" or supplied "in confidence" (s. 21(1)(b)), and in concluding that the investigators were not appointed to inquire into a labour relations dispute (s. 21(1)(c)(iv)).

[91] I conclude that the Commissioner's reasons for declining to exempt production on this ground, (s. 21(1)) is a reasonable interpretation of his own legislation and that is a matter within his core expertise. He is entitled to deference from this Court on that point.

Disposition

[92] Pursuant to s. 5 of the ***Judicial Review Procedure Act***, I direct the Commission to reconsider and determine the following in accordance with these Reasons for Judgment:

1. Issue No's. 1 and 2

   Reconsider the disclosure of information described as "no-one's personal information";

Reconsider the disclosure of information identified by the Petitioner as not falling within either of the exceptions of the “applicant’s own information” or “no-one’s information.”

2. Issue No. 4

Reconsider his decision as to the applicability of s. 22(3)(b).

“N. Garson, J.”
The Honourable Madam Justice N. Garson