IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Labour and Citizens' Services) v. British Columbia (Information and Privacy Commissioner),* 2009 BCSC 1700

Date: 20091210
Docket: S086470
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 Protection of Privacy Act*, R.S.B.C. 1996 c. 165 (as amended)

And in the Matter of Decision F08-07 of the Information and Privacy Commissioner for British Columbia

Between:

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

Petitioner

And

Information and Privacy Commissioner of British Columbia and BC Freedom of Information and Privacy Association

Respondents

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Petitioner:	E. W. Hughes D. Billo
Counsel for the Respondent Information & Privacy Commissioner:	S. E. Ross
Counsel for the Respondent BC Freedom of Information & Privacy Association:	B. B. Olthuis T.C. Boyar

Place and Date of Hearing:	Vancouver, B.C. September 1, 2009
Place and Date of Judgment:	Vancouver, B.C. December 10, 2009

INTRODUCTION

[1] This petition is brought by Her Majesty the Queen in Right of the Province of British Columbia, represented by the Ministry of Labour and Citizens' Services. It seeks judicial review of Decision F08-07 ("the decision") of the Information and Privacy Commissioner of British Columbia ("the Commissioner"), in relation to an access request made by the respondent BC Freedom of Information and Privacy Association ("FIPA").

[2] The access request was for production of a record referred to as the "Workplace Support Services Contract" between the Ministry of Management Services and IBM Canada Ltd. The contract governs IBM's provision of computer support services to the Ministry.

[3] The decision culminated in a Disclosure Order issued by the Commissioner on July 28, 2009. This order required the Ministry to respond to FIPA's request with the exception of those parts of the requested records that IBM contends are protected from disclosure, notwithstanding that the Commissioner had not yet completed his statutory review of IBM's position.

[4] The issue turns on the proper interpretation of s. 7(6) of the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165 (the "*Act*" or "FIPPA"). The petitioner contends for an interpretation based upon what it says is the ordinary meaning of the words in the section. The respondents argue for a contextual interpretation that, they submit, accords with the purpose and scheme of the legislation.

[5] The parties agree, and I so find, that the standard of review is that of reasonableness.

[6] I propose to review the relevant portions of the *Act* along with the facts that provide the background to this case.

LEGISLATION AND BACKGROUND

[7] The purposes of the *Act* that are relevant to this application are described in s. 2 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
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> (a) giving the public a right of access to records,
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> ....
>
> (c) specifying limited exceptions to the right of access,
>
> ... and
>
> (e) providing for an independent review of decisions made under this Act.

[8] By letter dated December 9, 2004, FIPA submitted a request to the Ministry for access to a record described as the Workplace Support Services Contract between the Ministry and IBM. That request was submitted pursuant to s. 5 of the *Act*, which provides as follows:

> **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 a public body, with a reasonable effort, to identify the records sought,
>
> ... and
>
> (c) is submitted to the public body that the applicant believes has custody or control of the record.
>
> (2) The applicant may ask for a copy of the record or ask to examine the record.

[9] The contract in question consists of more than 600 pages, including recitals, 32 articles, and 26 schedules. The request for access to it under s. 5 triggered the somewhat complex process set out in the legislation, beginning with s. 7(1):

> **7** (1) Subject to this section and sections 23 and 24(1), the head of a public body must respond not later than 30 days after receiving a request described in section 5 (1).

As the subsection indicates, the 30 day time limit is subject to the further provisions of s. 7, and the provisions of sections 23 and 24(1). The latter two provisions flow from 21 and 22 which discuss information which *must not* be disclosed to a party requesting access to a record.

[10] Section 21 provides that the head of a public body "must refuse to disclose to an applicant" information that, in essence, would be harmful to the business interests of a third party (such as IBM in this case).

[11] Section 22 provides that the head of a public body "must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy".

[12] Sections 23 and 24 govern the notice to be given to the third party referred to in sections 21 and 22, and the applicable time limits, as follows:

> **23** (1) If the head of a public body intends to give access to a record that the head has reason to believe contains information that might be excepted from disclosure under section 21 or 22, the head must give the third party a written notice under subsection (3).
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> (2) If the head of the public body does not intend to give access to a record that contains information excepted from disclosure under section 21 or 22, the head may give the third party a written notice under subsection (3).
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> (3) The notice must
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> ...
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> (c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or may make written representations to the public body explaining why the information should not be disclosed.
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> (4) When notice is given under subsection (1), the head of the public body must also give the applicant a notice stating that
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> ...
>
> (c) a decision will be made within 30 days about whether or not to give the applicant access to the record.
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> **24** (1) Within 30 days after notice is given under section 23(1) or (2), the head of the public body must decide whether or not to give access to the record or to part of the record, but no decision may be made before the earlier of
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> (a) 21 days after the day notice is given, or

> (b) the day of response is received from the third party.
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> (2) On reaching a decision under subsection (1), the head of the public body must give written notice of the decision to
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> (a) the applicant, and
>
> (b) the third party.
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> (3) If the head of the public body decides to give access to the record or to part of the record, the notice must state that the applicant will be given access unless the third party asks for a review under section 53 or 63 within 20 days after the day notice is given under subsection (2).

[13] Where the head of the public body decides to give access under s. 24, the third party may ask the Commissioner to review that decision pursuant to s. 52(2). Section 53 provides that the request for review must be made in writing, within 30 days after the third party has been notified of the decision it wants reviewed, unless a longer period is allowed by the Commissioner.

[14] The effect of these sections is to extend the 30 day period for responding to a request set out in s. 7(1). This process is different from that which applies to information which the public body *may* refuse to disclose under provisions such as sections 13 through 20. Where the public body decides not to disclose information pursuant to one or more of those sections, it so advises the applicant in its response under sections 7 and 8. The applicant may ask the Commissioner to review that decision under s. 52(1).

[15] In this case, the Ministry provided a complete certified copy of the contract to the Commissioner, at his request, on February 16, 2005. On February 17, 2005, it gave notice to both FIPA and IBM under s. 23, and invited IBM to provide its view as to whether any of the information in the contract was exempt from disclosure under s. 21.

[16] IBM responded on March 16, 2005, and on April 4, 2005, the Ministry advised IBM of its decision to provide FIPA with "partial access" to the requested records. The information which the Ministry proposed to release included some of the information that IBM maintained should be exempt from disclosure.

[17] Accordingly, on April 29, 2005, IBM gave notice in writing to the Commissioner requesting a review of the Ministry's proposal pursuant to sections 52(2) and 53 of the *Act*. To this point, no disclosure had been made to FIPA.

[18] In these circumstances, the Ministry relied on s. 7(6) of the *Act*, which provides as follows:

> (6) If a third party asks under section 52(2) that the commissioner review a decision of the head of a public body, the 30 days referred to in subsection (1) do not include the period from the start of the day the written request for review is delivered to the commissioner to the end of the day the commissioner makes a decision with respect to the review requested.

[19] The Ministry interpreted this subsection as meaning that the running of time under s. 7(1) would accordingly be suspended until the Commissioner made his decision with respect to IBM's review request under s. 52(2). It therefore concluded that it need not respond to FIPA's request for access until after that time.

[20] Section 55 of the *Act* permits the Commissioner to authorize a mediator to investigate and to try to settle a matter under review. If that does not occur or is unsuccessful, s. 56 permits the Commissioner to conduct an inquiry into the matter under review, which, according to s. 56(6), is to be completed within 90 days after receiving the request for the review. Section 58 then sets out the orders that the Commissioner may make upon completing a s. 56 inquiry, including requiring the head of a public body to give the applicant access to all or part of the record "if the commissioner determines that the head is not authorized or required to refuse access" (s. 58(2)(a)).

[21] On May 3, 2005, the Office of the Information & Privacy Commissioner ("OIPC") advised FIPA that IBM had requested a review of the Ministry's decision, and that the *Act* provided 90 days to resolve the review. It was noted that the first 68 days of the review period would involve mediation and/or negotiation in an attempt to facilitate the settlement of the issues to ensure that any disclosure of information was in accordance with the *Act*. The letter went on to state:

> As this case is presently under review by the Office of the Information and Privacy Commissioner, no information from the records that you requested will be disclosed to you until the parties reach an agreement or the Commissioner or his delegate issues an order.

[22] The ensuing mediation was unsuccessful, and no inquiry was completed within (or, indeed, well beyond) the 90 day period. On September 26, 2007, a portfolio officer in the OIPC prepared a report in which he noted, among other things, the following:

> 8) The public body provided the OIPC with an unsevered copy and a severed copy of the requested records. The parts of the severed records that are to be withheld are annotated according to the disclosure exceptions applied by the public body – s. 15, s. 17, s. 21 and s. 22 [sections 15 and 17 permit, as opposed to require, the public body to refuse to disclose information on certain grounds relevant to law enforcement and the public body's economic interests].
>
> 9) Mediation has not resolved the third party review.
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> 10) The public body has disclosed no requested records to the applicant pending the disposition of the third-party review and inquiry. ...
>
> 11) The applicant [FIPA] has requested the release of information in the requested records that is neither in dispute in the third party review nor excepted from disclosure under s. 15, s. 17 or s. 22 .... it has requested the third party inquiry to consider and resolve the public body's application of s. 21, and s. 15 and s. 17, to the requested records.
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> 12) The outstanding issues are:
>
> > a) whether the public body must immediately release the parts of the requested records to which it has not applied s. 15, s. 17, s. 21 or s. 22, and the third party has not claimed that s. 21 applies;
> >
> > b) the public body's application of s. 21, and the third party's claim that s. 21 applies, to parts of the requested records;
> >
> > c) the public body's application of s. 15 and s. 17 to parts of the requested records;
> >
> > d) whether the public body's application of s. 15 and s. 17 to parts of the requested records can and should be determined in the inquiry arising from the third party review.

[23] The Ministry responded to this report by indicating that it did not agree that the inquiry should go forward on the four issues described by the portfolio officer. In particular, the Ministry noted the following:

> While we understand the desire of the Applicant to receive the records given the time that has passed since the request, the Ministry takes the position that the *Freedom of Information and Protection of Privacy Act* (the "*Act*") anticipates, or at the very least permits, that a public body need not respond to an Applicant until a third party review process is complete. The *Act* does not require the release of unsevered information from the requested records in advance of that response. We believe it is premature for the Commissioner to deal with the question of whether the Ministry properly applied exceptions other than s. 21, as those other exceptions will only be invoked by the Ministry of the time that it responds to the Applicant's request.

[24] Notwithstanding the Ministry's position, the OIPC issued a notice of written inquiry identifying four issues, including

> 4. Whether the Ministry is required to disclose to the Applicant the parts of the requested records that are not withheld by the Ministry under a disclosure exception or not disputed by IBM with respect to the Ministry's application of s. 21.

[25] Both the Ministry and IBM made a number of objections to the inquiry notice, the first of which was summarized by the Commissioner as follows:

> 1. The Ministry maintains that it has not and will not make a partial release of the requested records to the applicant on the ground that [the *Act*] permits a public body to make no record release of any kind so long as there is a third-party review pending in respect of any part of the requested records.

[26] It is the Commissioner's decision on this issue which is the subject of this petition for judicial review.

THE DECISION

[27] In considering this objection, the Commissioner said this (paras. 31-35):

> The outcome of this issue rests largely on interpretation of s. 7(6). There is some scope for interpreting that section, standing alone, so as to relieve a public body of its duty to respond to an access request pending the result of a third-party requested review. For the reasons given below, however, I have decided that, when ss. 7, 23 and 24 of [the *Act*] are read together harmoniously, and when s. 58 is also taken into account, the most sensible, reasonable and just interpretation of s. 7(6) is one that suspends the time to respond to an access request only to the extent that the response would nullify the ss. 23 and 24 notification and decision provisions and a third party's right of review under s. 52(2).

Put another way, while IBM's review is pending, the Ministry could not release the parts of the requested records to which IBM has claimed s. 21 applies. On this interpretation, a public body would still be required to make a decision and provide a response to the applicant about the application of other disclosure exceptions, such as ss. 15, 17 and 22. Even where a third party and public body disagree on s. 21 in part, such a response to the applicant would cover the application of s. 21 where both the public body and third party agree. In such a case, the public body would not release portions of the requested records that are the subject of a third-party notice and any third-party requested review. These decisions by the public body would trigger both the applicant's right to request a review under s. 52(1) and the third party's right to request a review under s. 52(2) so that, in the event reviews are sought by both, all of the issues relating to proposed severing or release could be dealt with in one inquiry.

Analysis of this issue must begin by once more acknowledging a fundamental yet simple principle of statutory interpretation. It is well established that a statutory provision ... should not be interpreted in isolation. Its words are to be read in their grammatical and ordinary sense, but they must also be considered and interpreted in their entire context, harmoniously with the statute's scheme and object, and the Legislature's intention [footnote omitted]. Section 7(6) should therefore be considered, not just on its own, but within its context in s. 7 and having particular regard to ss. 23, 24, 57 and 58 of FIPPA. ...

If one accepts the interpretation of s. 7(6) advanced by the Ministry and IBM, a public body's obligation to respond to an access request is suspended pending any third-party review. Such a suspension of the public body's duty to respond regarding all disclosure exceptions does not protect any third-party interest served by these third-party notice or request for review processes. By contrast, it has possibly Draconian effects for the applicant and the right of access under FIPPA. For one thing, the applicant's right of access to information in the records that FIPPA does not except from disclosure is denied for a potentially extended period of time. For another, the applicant's right to request a review of the public body's application of other disclosure exceptions to the records cannot begin until the public body issues an access decision following the completion of the review process relating to the third party's request for such a review.

Under this interpretation, third party could make a request for review that is very broad, but which is later narrowed in mediation by this office, or because of submissions in an inquiry, to just a small amount of information, perhaps even a line or two. Yet even then, as the Ministry and IBM would have it, the public body could continue to deny the applicant a decision on the other disclosure exceptions until the completion of the third-party review process. Such an interpretation is one that, in my view, runs contrary to the duties placed on public bodies under FIPPA to respond without delay, the specific timelines for responding to access requests and one of the paramount purposes of FIPPA, which is to give "the public" a right of access to records in order to make public bodies "more accountable to the public".

[28] The Commissioner then commented that the legislative history around the 2002 amendments to the *Act*, viewed collectively, supported the view that the suspension under s. 7(6) was intended to relate only to the release of records or parts of records affected by the s. 21 or s. 22 third party review. He went on to note in paras. 40 and 41 as follows:

> ... s. 7(6) applies to third-party reviews relating to either s. 21 (third-party business interests) or s. 22 (third-party personal privacy interests). Sections 23 and 24 are only triggered in respect of these two types of third-party interests. Section 24 (1) requires a public body to "decide whether or not to give access to the record or part of the record". The implication of a decision about giving access or not is that it is about all disclosure exceptions which the public body intends to apply in order to deny access to all or part of the records, not just s. 21 or s. 22. ...
>
> ... Put another way, the portion of the requested records to which the ss. 23 and 24 process applies is effectively carved out from the other responsive information until the third-party notice obligations are spent and, where a third-party review is requested, until mediation resolves the issue or an order is made under s. 58 in respect of that review. In such a case, the public body is telling the third party that it has decided to release that information, but it cannot do so until these processes are spent without rendering ss. 23 and 24 meaningless.

[29] The Commissioner concluded his decision on this issue with the following comments (paras. 44 and 45):

> To summarize, I do not accept that the Legislature intended by its 2002 amendments to s. 7 to create a cumbersome staggered review process with, from the perspective of an applicant and the s. 2(1) purposes of FIPPA, denial of timely access to information that is not in issue in the third-party review and is not properly withheld under FIPPA and exceptions. Nor did the Legislature intend by those amendments to create a review process that, from the perspective of FIPPA's administration, entails inefficiencies in the use of my office's limited resources. Nor can I think of any plausible policy reason for such an approach.
>
> Taking all of this into account, I am of the view that the best interpretation of s. 7(6) is that which limits that section's suspension of the response period for the access request to a stay of the subject-matter of the third-party review, without which the third party's right to request a review under s. 52(2) would be defeated before the review could be completed. This interpretation makes the most sense, is the most compatible with the ss. 23 and 24 third-party notice provisions, best fits with FIPPA's emphasis on timely responses to access requests, and best fits with the various aspects of s. 58. For these reasons, I reject the interpretation of s. 7(6) that has been advanced by the Ministry and IBM. ...

[30] The result was that the Ministry was ordered to provide the applicant with its s. 8 response within 20 days of the decision, providing to the applicant those portions of the information in the requested records that were neither at issue in IBM's review nor severed and withheld by the Ministry under sections 15 and 17 of the *Act*.

DISCUSSION

[31] The issue, then, may be restated as follows.

[32] A public body faced with a request for access to a record will have to consider whether certain information in the record should not or must not be disclosed in accordance with the statute.

[33] Where certain third party business interests are involved, which are protected from disclosure under s. 21, sections 23 and 24 provided for a process that allows the third party to put forward its position as to what must not be disclosed. If there is a disagreement between the public body and the third party in that regard, it falls to be resolved by a review.

[34] What is the public body's obligation pending the completion of that review? Must it proceed with its response to the request, disclosing all information (a) not in dispute in the review, and (b) which the public body has not otherwise decided to withhold pursuant to the discretionary exceptions outlined in the *Act*? That is the contention of the Commissioner and the respondents, which the petitioner describes as contrary to the plain and ordinary meaning of s. 7(6). The petitioner described this as an unjustifiably bifurcated process, requiring partial disclosure before completion of the review, and further disclosure afterwards.

[35] Alternatively, is the public body's obligation to respond completely suspended by s. 7(6) until the review has been completed? It would follow from the latter that after the review, the public body would be in a position to respond with its discretionary exceptions, if any, which response would be subject to further review in

the event that the applicant disagreed with the public body's position. It is this latter process which the Commissioner described as bifurcated, and contrary to the purpose and policy of the *Act*, but which the petitioner maintains is the inescapable result of applying the subsection.

[36] The question of statutory interpretation, of course, is not an either/or proposition. The principle known as "Driedger's modern principle of statutory interpretation" has been oft-cited and approved as the preferred approach both by the Supreme Court of Canada and our Court of Appeal. It provides as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with this scheme of the Act, the object of the Act, and the intention of Parliament.

See, for instance, *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, and E. A. Driedger, *Construction of Statutes* (Toronto: Butterworths, 1974) at 67.

[37] In this judicial review, I am not called upon to interpret the statutory provisions in question *de novo*, but rather to decide whether the Commissioner's interpretation was reasonable. The cases make it quite clear that the reviewing court should show deference in a case such as this to the Commissioner's interpretation of his home statute, based on his expertise and his polycentric functions: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, and *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner),* 2006 BCSC 131.

[38] I am unable to fault the approach taken by the Commissioner in this case. As Mr. Loukidelis noted in his decision, it would be quite wrong to view s. 7(6) in isolation as the petitioner would suggest. It is but a subsection of s. 7, which itself is part of a complex statutory scheme. Section 7 begins in subsection (1) by providing for a time period of 30 days for a response to a request subject to "this section and

sections 23 and 24(1)". Subsections (2) through (5) deal with various extensions agreed to by the Commissioner, or where fees are charged. Subsection (6) harkens back to the reference in subsection (1) to sections 23 and 24(1) by referring to a third party request for a review under s. 52(2).

[39] In my view, taking into account this context, and the scheme and the object of the *Act* as reviewed by the Commissioner and set out above, it is eminently reasonable to interpret the postponement of time in subsection (6) to apply only to those matters that are the subject of the third party review. This is because what is postponed is the running of the "30 days referred to in subsection (1)". In subsection (1), that 30 day period is subject to sections 23 and 24(1), which give rise to the review process discussed in subsection (6).

[40] Reading these subsections together, it is reasonable to conclude that those records or parts of a record that are not subject to sections 23 and 24(1) remain subject to the 30 day response provision with which s. 7 opens. Further, it is reasonable to conclude that where the records or parts of a record *are* subject to sections 23 and 24(1), then once the process contemplated by those sections is complete, those portions as to which there is no dispute to be resolved by mediation or inquiry should then be produced. Those records or parts of a record that are the subject of the third party review contemplated by subsection (6) will attract that subsection's further extension.

[41] Although I was referred to portions of *Hansard* in which the 2002 amendments to the *Act* were discussed, (the parties had not argued this point before the Commissioner), I was unable to conclude that the discussions therein recorded should inspire a different interpretation.

[42] The petitioner argued that this interpretation does violence to the statutory scheme that provides for one response under sections 7 and 8 to one request under sections 4 and 5. On this analysis, the public body should not have to respond piecemeal. In my view, this depends too much upon the use of the singular "record", and is inconsistent with the public body's duty under s. 6 to "make every reasonable

effort to assist applicants and to respond without delay to each applicant openly, accurately and completely." Moreover, as counsel for FIPA pointed out, this would put too much emphasis on how the applicant framed the request. In this case, for instance, had the applicant requested access to six of the contract's schedules, none of which was disputed by IBM, then the petitioner would have been obliged to respond within the 30 day period. The obligation should not be different just because the applicant requests additional documentation that does give rise to a dispute. Nothing in the statute compels such an interpretation.

[43] Although the public body may be required to respond more than once, this avoids the risk of bifurcated inquiries and lengthy delays that flows from postponing the whole of the response until the s. 52(2) inquiry is complete. As noted by the Commissioner, once the public body responds following completion of the s. 52(2) inquiry, the applicant may well request a s. 52(1) inquiry, preventing the Commissioner from disposing of all of the issues under s. 58.

[44] The fact is that on either interpretation, there arises some risk of the process being extended. All else being equal, the interpretation that would allow for prompt access to uncontroversial information should be preferred over the interpretation that would delay all access to the very end of the process.

[45] Finally, the petitioner argues that the Commissioner's interpretation ignores the fluidity of the process. By this, I understood counsel for the petitioner to mean that the position initially taken on what is or is not prohibited from disclosure is necessarily a fluid one by reason of the process set out in sections 23 and 24(1). As is usual in the field of fluid dynamics, however, the flow is in one direction. The process does not increase the amount of information in issue, but rather reduces it.

[46] Accordingly, once the process contemplated by sections 23 and 24(1) is complete, the public body will be in a position to respond in relation to that information that is not subject to any third party requested review, specifying as always whether it chooses to withhold information under the discretionary exceptions set out in sections 13-20. Its position with respect to information that is found

through the review process not to be protected by the third party business interest exception will necessarily be taken once that process is complete.

CONCLUSION

[47] Taking into account the modern principles of statutory interpretation, and giving appropriate deference to the Commissioner in the interpretation of his home statute, I conclude that the order made by the Commissioner in Decision F08-07 was reasonable. I also consider it to have been correct. The petitioner's application for judicial review of that decision is accordingly dismissed, with costs.

"GRAUER, J."