Adjudication Order No. 1
September 6, 1996

IN THE MATTER OF:

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

AND IN THE MATTER OF:

AN ADJUDICATION UNDER SECTION 62,
REQUESTED BY *[M. H.]* ON NOVEMBER 17, 1995

REASONS FOR DECISION OF THE HONOURABLE THE CHIEF JUSTICE

1. The Freedom of Information and Protection of Privacy Act (the "Act") provides for the appointment of an adjudicator who has certain investigative and review authority in relation to the Information and Privacy Commissioner (the "Commissioner"). That authority is set out in Part 5, Division 2 of the Act. The most significant provision is s. 60(1):

> 60.(1) The Lieutenant Governor in Council may designate a person who is a judge of the Supreme Court to act as an adjudicator and
>
> (a) to investigate complaints made against the Commissioner as head of a public body with respect to any matter referred to in section 42(2),
>
> (b) to review, if requested under section 62, any decision, act or failure to act of the Commissioner as head of a public body.

2. The powers of the adjudicator, and the procedure which he is required to follow, are essentially those of the Commissioner in reviewing the decisions of "heads" under Division 1 of Part 5.

3. I first heard of this matter in December 1995 when the Deputy Attorney General requested me to designate a judge to act as adjudicator in relation to a request which had been made. As this was a novel area of endeavor for members of the court, I designated myself.

4. By Order in Council No. 0003 passed January 11, 1996, I was designated as adjudicator. Some time later, I received a copy of that Order in Council and a copy of the request for review which was sent to me by the office of the Minister of

Government Services, the minister then responsible for the Act. I thus learned something of the request and, for the first time, became aware that the request was made by *[Mr. H.]* of whose activities I had gained some knowledge, as had a number of other judges and masters of the court who have been called upon to deal with his numerous applications for indigent status and for various kinds of relief against the Ministry of Social Services and the Commissioner. As that history has some relevance to this proceeding, I will outline it.

5. *[Mr. H.]* is entitled to certain benefits under the GAIN legislation administrated by that ministry. In recent years, he has engaged in much controversy with the ministry workers and officials who have not always agreed with him as to the level of benefits to which he is entitled. Such differences of opinion are of course an inevitable aspect of the administration of such a scheme which confers on the ministry a considerable area of discretion in deciding what benefits may be conferred. The Act provides a mechanism for internal review which is the only feasible method for resolving most such disputes. But for the last two years or more, *[Mr. H.]* has largely ignored that procedure in favour of pursuing in this court petitions for judicial review.

6. From July 14, 1994 to April 24, 1995, *[Mr. H.]* commenced a total of nine proceedings against the Minister of Social Services. In all but one, he was granted indigent status which relieves him from paying filing and hearing fees. In all but one, the proceeding was either dismissed or discontinued; proceeding No. A946819 may still be pending. There no doubt would have been more proceeding had it not been for the fact that Mr. Justice Hall, on dismissing the ninth one on June 2, 1995, ordered that *[Mr. H.]* be enjoined from bringing further proceedings against the Ministry of Social Services without first obtaining leave to do so. Such orders are rarely made and are made only upon proof that the person sought to be enjoined has persisted in bringing proceedings which are, in the legal sense of the term, frivolous and vexatious.

7. That order appears to have been effective in relieving the Ministry of Social Services from *[Mr. H.'s]* issuance of petitions against it. But by September 1995 he had taken to issuing similar process against the Commissioner. His first such proceeding was dismissed by Mr. Justice Scarth. He launched a further petition against the Commissioner on December 5, 1995. That matter came on hearing before Mr. Justice Lowry on December 15, 1995. Mr. Justice Lowry dismissed the petition and ordered that *[Mr. H.]* be precluded from bringing any new proceedings against the Commissioner or his office without special leave.

8. Until recently, I was unaware of the existence of that proceeding in which, from a review of the court file, it would appear that his complaints and requests were essentially the same as those upon which he based his request for the appointment of an adjudicator. I mention these matters to illustrate *[Mr. H.'s]* tendency (and capacity) for piling legal proceeding upon legal proceeding in a way that promotes much confusion. I must add to this catalogue one further such matter which looms

large in *[Mr. H.'s]* view. On April 15, ignoring the proper procedure for making an application to the Court, he sent directly to me an application to grant him indigent status and for leave to proceed with a fresh petition against the Ministry of Social Services. I did not deal with that application but referred it to Mr. Justice Hall. His response, dated May 14, 1996 reads:

> I see no basis for granting leave to proceed or for the granting of indigent status herein so the leave application is not granted.

9. That decision was duly communicated to *[Mr. H.]* by the registry. His next step, by letter dated June 10, 1996, was to complain to the Canadian Judicial Council that I have been guilty of misconduct, apparently in not responding directly to his application. On the basis of that, he has asked that I "recuse" myself as adjudicator "due to the conflict resulting from the CJC Inquiry." Again, this is but another example of *[Mr. H.'s]* ability, by piling proceeding upon proceeding, to create confusion as well as waste time and resources all of which must be met from the hard pressed public purse. In the circumstances, I decline to disqualify myself from dealing with this matter.

10. At the outset, I directed that this matter be heard by written submissions. I was aware that *[Mr. H.]* had expressed a preference for oral hearings but, particularly having regard to the novelty of the proceeding, I considered that it would be more fair to all concerned to deal with it in writing, leaving open the possibility of a later oral hearing. I have seen no reason to amend my initial decision. *[Mr. H.]*, however, has declined to put forward any submissions despite several extensions of time. I will therefore deal with the issue on the submissions which have been received.

11. I turn then to the matters upon which I am required to adjudicate. *[Mr. H.'s]* request to the Commissioner for access was by way of a letter dated October 18, 1995, to the Commissioner's office. A copy is attached. Reasonably enough, the Commissioner's office interpreted that as a request for access to all records in its custody or control relating to *[Mr. H.]* from July 19, 1994, when he first had contact with it to the date of the request.

12. On November 16, the Commissioner's office replied stating that the only records held by it in relation to *[Mr. H.]* were those arising out of:

    (a) the mediation and investigation of *[Mr. H.'s]* requests for review under the Act (s. 52);

    (b) the investigation of *[Mr. H.'s]* complaints under the Act (s. 42);

    (c) litigation commenced by *[Mr. H.]* against the Commissioner's Office.

The Commissioner's Office said that records in classes (a) and (b) were not subject to the Act because they related to the exercise of the functions of the Commissioner or his staff under the Act, and were thus excluded from the scope of the Act by s. 3(1)(c). The Commissioner's Office said that records in class (c), apart from filed pleadings and correspondence to and from *[Mr. H.]*, copies of which he already had, were excepted from disclosure under s. 14 of the Act on the ground of solicitor client privilege.

13. Without conceding that any of the documents were properly subject to disclosure, the Commissioner's Office made the following available to *[Mr. H.]*:

(a) correspondence from the Commissioner's Office to *[Mr. H.]*;

(b) correspondence from the Commissioner's Office to the Ministry of Social Services;

(c) records of the Commissioner's case management system in relation *[Mr. H.'s]* request for review and complaints.

The offer to make the Class (b) documents available was made after obtaining consent of the Ministry of Social Services.

14. I see no legal significance in the matter of the Commissioner's office having made voluntary disclosure of some documents. That cannot preclude the Commissioner from taking the position that other records are not subject to disclosure, even if they be of the same kind or class. Before the passage of the Act, it was open to a public office to make voluntary disclosure if it saw fit to do so. That continues to be the case subject to the qualification that, because the purposes of the Act include protection of privacy, care must be taken to avoid prejudicing a third party who may be entitled to protection of privacy. That was done here by obtaining consent of the Ministry of Social Services.

15. I have noted that access to two of the three classes of documents sought by *[Mr. H.]* was refused on the ground that they were covered by s. 3(1)(c) which provides:

> 3. (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> . . .
>
> (c) a record that is created by or is in the custody of an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

16. Schedule 1 of the Act defines "public body" to mean "...an agency, board, commission, corporation, office or other body designated in... Schedule 2." Schedule 2 includes the Office of the Commissioner, designating the Commissioner as its head. "Officer of the Legislature" is defined in Schedule 1 to mean the Auditor General, the Commissioner appointed under the Members Conflict of Interest Act, the Information and Privacy Commissioner, the Chief Electoral Officer or the Ombudsman.

17. I have received submissions from the Auditor General and the Ombudsman who take the position that I have as adjudicator no power to review a decision based on s. 3(1)(c). Counsel for the Commissioner has made submissions to the contrary. The submission of "no jurisdiction" rests upon the language of s. 3(1)(c) which provides that the Act does not apply to records created by or in the custody of an officer of the Legislature if they relate to the exercise of that officer's functions. The Auditor General and the Ombudsman submit that the effect of that section is to exempt from review under the Act any decision to refuse access in reliance on the section. They argue that, subject to the possibility of judicial review, the officer of the Legislature must have the final word on the question.

18. Section 60(1)(b) provides for the review by an adjudicator of "...any decision... of the Commissioner as head of a public body". The refusal to disclose records to *[Mr. H.]* on the ground that they are protected by s. 3(1)(c) is a decision of the Commissioner as head of a public body. Clearly this decision is subject to review by an adjudicator.

19. I turn to the question whether any grounds have been shown for interfering with the Commissioner's decision. I take my powers to be those conferred on the Commissioner by s. 56(1) i.e. to "decide all questions of fact and law arising in the course of the inquiry." I have been provided with copies of all documents to which access was refused on the ground that they come within s. 3(1)(c). In the main, they consist of notes, memoranda, and communications within the Commissioner's office or in the form of aide-mémoire by a member of the Commissioner's staff. The only requirement of s. 3(1)(c) is that the document relate to the officer's functions under an act. It seems clear that all of these documents relate to that function.

20. The function was not carried out by the Commissioner personally but by others to whom the task was delegated. Given the volume and scope of work performed by the Commissioner's office, it is unavoidable that most of it be done by staff members. I accept Ms. Ross' submission that an "officer's functions under an act" extend to a duty, power or function of the officer that is capable of being delegated or otherwise performed by others, including staff or consultants appointed or retained to enable the officer to perform the duties of that office. That is borne out by the following provisions of the Act:

> 41.(1) The commissioner may appoint in accordance with the Public Service Act, employees necessary to enable the Commissioner to perform the duties of the office.
>
> (2) The Commissioner may retain any consultants, mediators or other persons and may establish their remuneration and other terms and conditions of their retainers.

21. In the written submission of the Commissioner, there is an expression, if not of apology then of regret, that the Commissioner relied on the s. 3(1)(c) ground to the extent that he did in refusing access. It is apparently his policy not to rely on that provision unless to waive it might create some prejudice to the conduct of his office. His counsel explains the Commissioner's position thus:

> Under normal circumstances, regardless of the exemption, the Commissioner's Office would be responsive to a request by a person for confirmation that their correspondence to the Office had reached its destination and would provide a copy to the sender if they had misplaced their own copy. *[Mr. H.]* is an exception in that he has deluged the Commissioner's Office with correspondence and copies of correspondence in a manner that can only be characterized as an abuse of process.
>
> From the Summer of 1994 to early October 1995, the Commissioner's Office received 160 pieces of correspondence from *[Mr. H.]* relating to his complaints and requests for review: Affidavit of William Trott, para. 2, sworn October 2, 1995, and filed October 5, 1995, in Action A953022. That figure has now risen to approximately 190 pieces of correspondence received. In these unique and egregious circumstances, the Commissioner does not believe it is in the interest of the effective and responsible functioning of his Office to overlook the exemption in s. 3(1)(c) of the Act and provide voluntary disclosure to *[Mr. H.]* of his own multiplicitous correspondence to the Commissioner's Office.

22. I consider that view of the matter to be entirely justified by the applicant's course of conduct.

23. I have reviewed the submissions on the subject of privilege which is, by s. 14 of the Act, expressly made a ground for non-disclosure. There is some overlap between that ground and the s. 3(1)(c) ground. But I see no reason to doubt that the denial of access was reasonable and proper. I therefore dispose of the issues by confirming the Commissioner's decision to refuse access.