

IN THE MATTER OF:

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

IN THE MATTER OF:

**AN ADJUDICATION UNDER SECTION 62, REQUESTED BY [C. M.] ON SEPTEMBER
18, 1996**

**REASONS FOR DECISION OF
THE HONOURABLE MADAM JUSTICE D. SMITH**

[1] *[Mr. M.]* has applied pursuant to s. 62 of the Freedom of Information and Protection of Privacy Act (the "Act") for a review of the decisions made by the Office of the Information and Privacy Commissioner (the "Commissioner") in response to his access requests.

[2] On July 11, 1996, *[Mr. M.]* requested the following records:

1. "...disclosure of any and all information generated by, and/or in the custody and control, of the Office of the Information and Privacy Commissioner relating to me and/or my complaints regarding the WCB in any way."
2. "...any information exempt from disclosure under the *Freedom of Information and Protection of Privacy Act* be provided to me, as a party to a proceeding, in accordance with the rules of natural justice."
3. "...a detailed summary of complaints, and requests for review, registered in my name as well as a summary and status of any investigations or inquiry on my behalf related to my complaints."
4. "...copies of any drafts or reports which should have been provided as required under the Office of the Information and Privacy Commissioner's Policy and Procedures."

[3] In a letter dated August 19, 1996, the Commissioner refused the first two requests on the grounds that such records were operational records and, as such, fall outside the scope of the Act by virtue of s. 3(1)(c).

[4] In response to [Mr. M. 's] third request, the Commissioner enclosed a computer printout listing the complaints and requests for review registered in [Mr. M. 's] name. The list indicated the request number, the date, the initials of the officer responsible, the public body in question, the case type, the status of the request, and relevant dates and deadlines.

[5] In reply to [Mr. M. 's] fourth request, the Commissioner informed [Mr. M.] that there were no relevant policies and, therefore, no documents could be provided.

[6] [Mr. M.] made his application for review on September 18, 1996. In that letter, he states:

I am requesting a review of the Office of the Information and Privacy
Commissioner's response to my Request of Records: Reference Number 3490,
(attached).

I am also requesting an overall review of the Office of the Information and
Privacy Commissioner's application of policy and procedure with respect to the
handling of my complaints.

[7] The Minister responsible for appointing adjudicators under the Act properly allowed the review to proceed only on the request for records and not in respect of an "overall review" of the Office of the Information and Privacy Commissioner's application of policies and procedure in relation to [Mr. M. 's] application. Such an overall review clearly falls outside the scope of s. 62 of the Act.

[8] [Mr. M.] has been granted a number of time extensions in order to prepare written submissions in support of his application for review. He has also been given time to seek the advice of counsel. At the time of this decision, almost a year and a half after [Mr. M. 's] request for a review, no submissions have been received from him. I note that the Commissioner's written submissions were received on July 28, 1997. With all of this in mind, it is appropriate that a decision be rendered at this time.

THE SCOPE OF ADJUDICATION:

[9] The Commissioner has two distinct roles under the Act: (1) overseeing and administering the Act, and (2) acting as head of a public body. It is only the acts or omissions by the Commissioner in the latter capacity that are subject to review by an adjudicator. This is an important distinction because the bulk of the Commissioner's work, which includes monitoring compliance by other public bodies, investigating complaints, and promoting public awareness of the Act, is subject only to judicial review and is not reviewable by an adjudicator.

[10] In the first s. 62 decision, *In the Matter of an Adjudication under Section 62 of the Freedom of Information and Protection of Privacy Act Requested by [Mr. H.]* (6 September, 1996), Esson C.J. (as he then was) [Adjudication order no. 1] held that a decision not to disclose records on the ground that they fall outside the scope of the Act is a decision of the Commissioner as head of a public body.

THE REQUESTS:

[11] *[Mr. M. 's]* first request was refused on the ground it concerns operational records which, by virtue of s. 3(1)(c), fall outside the scope of the Act.

[12] Section 57 of the Act places the burden of proof on the Commissioner to prove that the applicant has no right of access to the undisclosed record.

[13] In seeking to discharge that burden in this case, the Commissioner relies on s. 3(1)(c) which provides:

(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 in the custody of an officer of the Legislature and that relates to the exercise of that officer's functions under an Act.

[14] The Commissioner is designated an officer of the Legislature pursuant to Schedule 1 to the Act. Any record specific to a case file is an operational record related to the exercise of the Commissioner's functions and is therefore excluded from the legislative scheme pursuant to s. 3(1)(c): ***In the Matter of an Adjudication under Section 62 of the Freedom of Information and Protection of Privacy Act Requested by [Mr. R.]*** (30 June, 1997) *per* Levine J *[Adjudication order no. 3]*. Records specific to a case file were held by Levine J. to include the following:

Case management or tracking sheets and lists, notes and working papers (including draft documents) of the Commissioner or his staff, and any other case specific records received or created by the Commissioner's Office in the course of opening, processing, investigating, mediating, settling, inquiring into, considering, taking action on or deciding a case *[Mr. R.]*, *supra*, at 9-10) *[Adjudication order no. 3]*.

[15] *[Mr. M. 's]* first request is for records concerning his case file. They are clearly of an operational nature and are thus excluded from the scope of the Act pursuant to s.3(1)(c).

[16] In making his second request, *[Mr. M.]* seeks to rely on s. 3(2) of the Act which provides:

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

[17] This section merely recognizes that parties to legal proceedings are entitled to records which may be inaccessible to the public under the Act. It simply confirms those rights This recognition by Parliament does nothing to expand the access rights guaranteed in the Act. The

Commissioner properly refused disclosure on this basis.

[18] *[Mr. M.]* has raised no ground of review in relation to his third and fourth requests. The OIPC complied with his request for a detailed summary of his complaints and, in response to his fourth request, the OIPC informed him that no policy or procedure relevant to his request existed.

[19] I therefore dispose of this adjudication pursuant to sections 58(1) and 65(2) by confirming the decision of the Commissioner to respond to *[Mr. M.'s]* requests for records in the manner in which he did.

D. SMITH J.

Adjudication No. 7
February 5, 1998

ADDENDUM TO THE
REASONS FOR DECISION OF THE
HONOURABLE MADAM JUSTICE D. SMITH

[1] In my decision regarding the above adjudication, I made note that *[Mr. M.]* failed to make formal written submissions in advance of the decision, although invited to do so. Subsequently, however, *[Mr. M.]* did submit a letter which was received by fax on January 6, 1998. I have reviewed and considered that letter. I have determined that nothing in it affects my decision.

D. SMITH J.