**Adjudication Order No. 12**
**March 1, 1999**

**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 F.G.B. ON JANUARY 22, 1998.**

**REASONS FOR DECISION**
**OF THE**
**HONOURABLE MADAM JUSTICE LEVINE**

## I. INTRODUCTION

[1] On January 22, 1998, F.G.B. requested a review by an adjudicator of the response by the Information and Privacy Commissioner to F.G.B.'s request for records and information made on November 24, 1997.

[2] The review by an adjudicator is provided for in section 62 (1) of the *Freedom of Information and Protection of Privacy Act*, R. S. B. C. 1996, c. 165;

> A person who makes a request to the Commissioner as head of a public body for access to a record or for correction of personal information may ask an adjudicator to review any decision, act or failure to act of the commissioner that relates to the request, including any matter that could be the subject of a complaint under section 42 (2) (a) to (d).

[3] Counsel for the Commissioner and F.G.B. made extensive written submissions to the adjudicator. Of 15 requests and questions originally submitted by F.G.B. on November 24, 1997, four outstanding requests for records or information remain in dispute.

[4] The four outstanding requests for records or information are:

> (a) a copy of the OIPC's "case management system" and all other records (e.g. notes and working documents) that pertain to [F.G.B.]'s (or the organization he represents) submissions involving the City of Vancouver that were not covered in his September 5, 1997 written request to the OIPC.

(b) Copies of internal City of Vancouver correspondence that pertain to [F.G. B.]'s, or his organization's, submissions made under the ***Act*** which he did not receive.

(c) Written acknowledgment from the OIPC of the date(s) of their receipt of [F.G.B.]'s March 17, 1994 report and March 28, 1994 letter, and whether they are still retained by the OIPC.

(d) Copies of the following pertaining to the Information and Privacy Commissioner's June 5, 1996 decision made under Order No. 110-1996 and/or an August 30, 1996 written authorization submitted under s. 43 of the ***Act***:

(i) All correspondence, including e-mail, between the OPIC and the Ontario Information and Privacy Commissioner's office.

(ii) Excluding the Vancouver School Board, all written communiqués and correspondence between the Information and Privacy Commissioner (or his office) and public bodies as defined under the ***Act***

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(5) In refusing F.G.B.'s request for access to the records, the Information and Privacy Commissioner relied on section 3 (1) (c) of the ***Act***, 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.

[6] F.G.B.'s request for the records or information is made on the following grounds:

(a) section 3(2) of the ***Act***;

(b) the Commissioner's policy with respect to his reliance on section 3 (1) (c) of the ***Act***;

(c) section 7 of the ***Canadian Charter of Rights and Freedoms***.

## II. ANALYSIS

[7] F.G.B.'s submissions are, in essence, an attack on the scope and application of section 3 (1) (c) of the ***Act***,

[8] There is no dispute that the Information and Privacy Commissioner is an officer of the

Legislature. Nor, as I understand F.G.B.'s submissions, is there any dispute that the records requested by him are records that relate to the exercise of the Commissioner's functions under the ***Act*** and are therefore described by section 3 (1)(c). These records have been defined to include any record that is specific to a case file, including 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: see ***[Mr. H.] v. Information and Privacy Commissioner*** (6 September 1996), Esson (then C. J. S. C.) as Adjudicator; ***[Mr. G.] v. Information and Privacy Commissioner*** (10 November 1997), Bauman J. as Adjudicator; ***[Mr. R.] v. Information and Privacy Commissioner*** (30 June 1997), Levine J. as Adjudicator; ***[Mr. R.] v. Information and Privacy Commissioner*** (22 September 1997), Bauman J. as Adjudicator.

[9] Rather, F.G.B. argues that in relying on section 3 (1) (c) in refusing to disclose the records requested, the Commissioner failed to consider the application of section 3 (2) of the Act, the Commissioner' s policy with respect to the release of records described by section 3 (1) (c), and section 7 of the ***Canadian Charter of Rights and Freedoms***, and as a result, the Commissioner's decisions, acts, or failures to act are reviewable by an adjudicator under section 62 of the ***Act***.

A. Section 3 (2) of the ***Act***

[10] Section 3 (2) of the ***Act*** provides:

> This Act does not limit the information available by law to a party to a proceeding.

[11] F.G.B. claims that section 3 (2) confers a right to access to records that are otherwise exempt from disclosure under the ***Act*** by virtue of section 3 (1) (c), where the person requesting the records is intending to become a party to a proceeding for judicial review of a decision of the Commissioner under section 43 of the ***Act***.

[12] In my Reasons for Decision released August 4, 1998, in the matter of the adjudication requested by F.G.B. on September 5, 1997, I reviewed and rejected F.G.B.'s submissions that section 3 (2) applied to expand or enlarge the rights of access to information guaranteed by the ***Act***. In those reasons, I cited the adjudication decisions in **[Mr. G.]**, supra, and **[Mr. M.] v. Information and Privacy Commissioner** (5 January 1998), D.M. Smith J. as Adjudicator, as authorities for my decision that section 3 (2) does not, in and of itself, grant any rights to access under the ***Act***.

[13] My reasons in that previous matter apply equally to this adjudication. The fact that F.G.B. intends to become a party to a judicial review proceeding does nothing to add to his previous submissions with respect to section 3 (2). If section 3 (2) has any application with respect to his proposed judicial review proceeding, that decision will be made by the judge who hears the application for judicial review and not by me as an adjudication under the ***Act***.

B. The Commissioner's Policy

[14] In my Reasons for Decision released August 4, 1998, referred to above, I dealt with F.G.B.'s submissions concerning the Commissioner's previous disclosures. ***[Mr. H.]***, supra, is clear authority that the voluntary disclosure by the Commissioner of records that fall within section 3 (1)(c) does not create any positive obligation on the Commissioner to make any other disclosures.

[15] The reference in ***[Mr. H.]***, supra, to the Commissioner's "policy not to rely on [section 3 (1) (c)] unless to waive it might create some prejudice to the conduct of his office", does not, as F.G.B. argues, make the Commissioner accountable or require the Commissioner to explain his policy. Whatever policy the Commissioner may have with respect to the voluntary disclosure of documents otherwise excluded from the application of the ***Act***, that "policy" is clearly distinguishable from the statutory procedures provided under the Police (Discipline) Regulations made under the ***Police Act***, at issue in ***Carpenter v. Vancouver Police Board*** (1986), B. C. L. R. (2d) 99 (C.A.), cited by F.G.B. in support of his submissions.

[16] In ***Carpenter***, the City of Vancouver, acting on erroneous legal advice, failed to follow the procedures provided in the Regulations for dismissing a police officer from employment. The Court of Appeal held the City was required to follow the procedure set out in the Regulations and ruled that the dismissal was a nullity.

[17] In this case, the statutory direction to the Commissioner is contained in section 3 (1) (c). It provides that the records in question are excluded from the application of the ***Act***. If the Commissioner is required to adhere strictly to the statute, he could make no voluntary disclosures. Clearly his decision to disclose certain records in certain circumstances does not create an exception to section 3 (1) (c) that can be enforced with respect to other records in other circumstances.

[18] F.G.B. submits that section 57 (1) of the ***Act*** "warrants" the release of the requested information and section 4 (2) requires the Commissioner to sever from the records requested any information that would prejudice any party or individual.

[19] Section 57 (1) imposes on the Commissioner the burden to prove that F.G.B. has no right of access to the "record or part" to which access has been refused. Section 4 (2) provides:

> The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

[20] The Commissioner meets the burden imposed on him by showing that the requested record is an operational record described in section 3 (1) (c) and is therefore exempt from the application of the ***Act***. Section 4 (2) applies to records which are subject to the ***Act***, but are specifically exempted from disclosure under Division 2 of Part 2 of the ***Act***. Division 2 applies to such records as cabinet and local public body confidences; policy advice, recommendations and draft regulations developed for a public body or a minister; disclosures harmful to law enforcement, intergovernmental relations or negotiations, individual or public safety, personal

privacy or the interests of third parties, and other such records. Section 4 (2) has no application to the records requested by F.G.B.

## C. Section 7 of the Canadian Charter of Rights and Freedoms

[21] F.G.B. submits that the Commissioner's refusal to grant access to F.G.B.'s personal information infringes his "right to life, liberty and security of the person" under section 7 of the ***Charter***. F.G.B. submits that the right to privacy which is entrenched under section 7 includes the right to control and protect information about one's self and the Commissioner's decision deprives him of that right.

[22] F.G.B. claims that he does not challenge the constitutional validity of the ***Act***, but rather the constitutionality of the Commissioner's actions in refusing access. He submits that in deciding whether to refuse access to records described in section 3 (1) (c) of the ***Act***, the Commissioner must balance the applicant's privacy rights against the interests and integrity of the Commissioner's Office.

[23] F.G.B.'s challenge, however, necessarily raises the constitutional validity of section 3 (l) (c), which limits the application of the ***Act*** with respect to the operational records of the Commissioner' s Office. If F.G.B.'s submissions are found to be correct, the result would logically be a finding that section 3 (1) (c) is either wholly invalid or must be "read down" to accommodate the balancing of interests sought by F.G.B.

[24] Counsel for the Commissioner raised two objections to F.G.B.'s submissions with respect to the ***Charter***. First, she argued that F.G.B. had not given the notice required under section 8 (2) of the ***Constitutional Question Act***, R. S. B. C., 1996, c. 68. On November 5, 1998, F.G.B. met this objection by providing notice under the ***Constitutional Question Act*** to the Attorney General of Canada and the Attorney General of British Columbia. He provided a copy of the notice to the adjudicator and to counsel for the Commissioner.

[25] Commissioner's counsel's second objection is that an adjudicator does not have jurisdiction to decide if a limiting provision, such as section 3 (1) (c) of the ***Act***, offends section 7 of the ***Charter***. She relies on the decision of the Supreme Court of Canada in ***Cooper v. Canada (Human Rights Commission)*** (1996), 140 D. L. R. (4th) 193.

[26] In ***Cooper***, the Supreme Court considered whether a tribunal has jurisdiction to consider the constitutional validity of a limiting provision of the statute under which it is created. La Forest J., for the majority, analyzed the question on the basis of whether the legislation creating the tribunal expressly or implicitly authorized the tribunal to consider general questions of law. He concluded that while the ***Canadian Human Rights Act***, R .S. C. 1985, c. H-6, confers no explicit power on a tribunal appointed under that ***Act*** to determine questions of law, "it is implicit in the scheme of the ***Act*** that a tribunal possess a more general power to deal with questions of law" (at p. 220). After considering a number of factors, including the lack of special expertise on the part of the tribunal to consider ***Charter*** arguments, the loss of efficiency when "the inevitable judicial review proceeding" is brought in court, the unfettered ability of a tribunal to accept any evidence it sees fit, and the effect on the intended efficient and timely adjudication of human rights

complaints of the added complexity, cost and time involved in having a tribunal hear a constitutional question, La Forest J. concluded (at p. 221) that:

> ...while a tribunal may have jurisdiction to consider general legal and constitutional questions, logic demands that it has no ability to question the constitutional validity of a limiting provision of the Act.

[27] Lamer C.J.C. delivered separate reasons concurring in the result. He expressed the view (at p. 198) that as a matter of constitutional principle, the power to determine the constitutional validity of a statute should be reserved to courts. He referred (at p. 207) to the two fundamental principles of the Canadian constitution, the separation of powers and Parliamentary democracy.

[28] An adjudicator has the powers granted under section 65 of the ***Freedom of Information and Protection of Privacy Act***. These powers include the power to "decide all questions of fact and law arising in the course of the inquiry" (section 56 (1)). On the basis of this explicit power and a narrow reading of the decision of the majority in ***Cooper***, it could be argued that an adjudicator has the jurisdiction to consider the ***Charter*** questions raised by F.G.B. The "logic" referred to by La Forest J. In his conclusion quoted above could be read as a reference to the specific circumstances of a tribunal appointed under the ***Canadian Human Rights Act*** (see Cooper at pp. 119-120, para. 63). Furthermore, not all of the factors considered by La Forest J. in determining the extent of the implicit powers of a human rights tribunal to consider constitutional questions are applicable to an adjudicator under the ***Act***. Under section 60 of the ***Act***, an adjudicator must be a judge of the Supreme Court of British Columbia and therefore has the assumed expertise to consider ***Charter*** arguments.

[29] A broader reading of both the majority decision and the reasons of Lamer C.J.C., however, leads to the conclusion that the power of an adjudicator to decide questions of law does not extend to deciding the validity of the limiting provision in question here, section 3 (1) (c) of the Act. Three of the four factors considered by La Forest J. in coming to the conclusion that a tribunal has no ability to question the constitutionality of a limiting provision of an ***Act*** apply to the review by an adjudicator under the ***Act***. The decision of an adjudicator is subject to judicial review (sections 65 (3) and 59 of the ***Act***); nothing in the ***Act*** limits the evidence an adjudicator may accept; an adjudication is intended to be timely and efficient (sections 65 (1) and 56 (6) of the ***Act***). The constitutional principles considered by Lamer C.J.C. also apply to the power of an adjudicator.

[30] F.G.B. referred in his submission to the decision of the Commissioner in Order 27-1994 dated October 24, 1994 as an example of the exercise of the Commissioner ' s (and by reference, an adjudicator's) jurisdiction under section 56 (1) to decide questions of law arising in the course of an inquiry. In that inquiry, the Commissioner considered section 2 (b) of the ***Charter*** in the context of the burden of proof imposed on an applicant under section 57 (2) of the ***Act***. The Commissioner's analysis of the ***Charter*** in that case did not, however, address the validity of a limiting provision of any statute.

[3t] 1 am confirmed in my conclusion that as an adjudicator I shou1d decline jurisdiction to consider F.G.B.'s submissions with respect to the Charter by the fact that F.G.B. has indicated

that he intends to initiate judicial review proceedings in respect of the Commissioner's section 43 order, to which this and the previous adjudication relate. As indicated by the decisions of Lamer C.J.C. and La Forest J. in ***Cooper***, that is the proper forum for consideration of the issues raised with respect to the constitutional limits of section 3 (1) (c).

## III Summary

[32] For the reasons given, I confirm the Commissioner's refusal to release the records requested by F.G.B.

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