

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 J.A. B-A. ON APRIL 24, 1998**

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

The Issues

[1] Mr. B-A has applied pursuant to s. 62 of the *Freedom of Information and Protection of Privacy Act* (the "Act") for a review of decisions made by the Information and Privacy Commissioner (the "Commissioner") in response to Mr. B-A's requests for disclosure of certain information.

[2] On March 5, 1998, Mr. B-A made the following requests:

(1) ...a complete copy of the entire *in camera* basis written submission that Mr. Mochrie and or anybody else from the PSERC wrote to you, in order to support the Section 43 application that Mr. John A. Mochrie made in his letter of May 15, 1997.

(2) ...under section 29(1) of the *Act*, a letter of correction, in which you yourself must state perfectly clear, that Mr. John A. Mochrie, Commissioner of the Public Service Employee Relations Commission, wrote a letter to you, on May 15, 1997, in which Mr. Mochrie deliberately lied to you, in order to obtain from you, fraudulently and under false pretences, the section 43 authorization order, that Mr. Mochrie requested, and that he got from you, Mr. Flaherty.

(3) ...under section 74, subsection (2) of the **FOIPP Act**, that you order Mr. John A. Mochrie, Commissioner of the Public Service Employee Relations Commission of the Province of B.C. to pay out of his personal income, a fine of five thousand dollars...

[3] On March 19, 1998, the Commissioner made the following responses to each request:

(1) During the inquiry process you were provided with copies of Submissions made by the Public Body.

You were not, however, provided with copies of the public body's *in camera* submission for the above noted inquiry.

These records will not be released to you because of the application of Section 3(1)(c) of the ***Freedom of Information and Protection of Privacy Act***. Section 3(1)(c) of the ***Act*** states 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***," is outside the scope of the ***Act***.

In camera submissions are not copied to the other parties involved in the Inquiry process, they are for the Commissioner only. For your information, I have attached a copy of the Office of the Information and Privacy Commissioner, Policy and Procedures that explains *in camera* submissions as well as the section on *in camera* submissions contained in the Notice of Written Inquiry.

(2) This office has considered your request for correction even though it is not required to do so under the ***Freedom of Information and Protection of Privacy Act*** (the ***Act***). Section 3(1)(c) of the ***Act*** states 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***," is outside the scope of the ***Act***. This section means that the provisions of the ***Act*** covering correction and annotation (section 29) do not apply to operational records either created by this Office or in the custody of this office. Operational records are the records relating to the exercise of this Office's functions under the ***Act***. The section 43 records you are requesting be corrected with a letter from the (sic) Mr. Flaherty are operational records of this Office and therefore outside the scope of the ***Act***.

We will not be creating a letter of correction, but we will put a copy of your letter in the binder.

(3) Section 74 of the ***Act*** sets out offences and penalties which are governed by the procedures under the ***Offence Act***. Section 74 does not give the Commissioner authority to charge and fine individuals.

[4] Attached to the Commissioner's response were the copies of the documents to which he referred.

[5] On April 24, 1998, Mr. B-A wrote to the Minister responsible for the *Act* requesting that the Minister “designate and appoint an adjudicator” to conduct an investigation into the lengthy complaints Mr. B-A makes in that letter against the Commissioner. Attached to his letter was the Commissioner's letter of March 19, 1998.

[6] When the matter was referred to myself as Adjudicator, I advised both parties that the hearing would proceed by means of written submissions. I received written submissions from counsel for the Commissioner. I have also received lengthy letters from Mr. B-A. Although requested, I have not received any written submissions from him.

The Scope of Adjudication

[7] As I stated in *[C.M.] v. Information and Privacy Commissioner* (5 January 1998) at para. 9 and *[M.H.] v. Information and Privacy Commissioner* (23 March 1998) at para. 13, the Commissioner exercises a dual role. On one hand, as the administrator of the *Act* he is the arbiter of matters arising under the *Act*, on the other hand, he is the head of a public body, namely the Office of the Information & Privacy Commission.

[8] In the latter capacity, the Commissioner is no different than the head of any other public body. It would not be procedurally fair for the Commissioner to be the final arbiter of decisions made while he was acting as the head of that public body. In such circumstances, the *Act* provides for the appointment of an adjudicator, with essentially the same powers as the Commissioner, to review decisions of the Commissioner while he is acting in his capacity as the head of a public body: see *[R.G.] v. Information and Privacy Commissioner (10 November 1997)* Bauman, J. as Adjudicator at para. 23.

The Applicant's Request for the *in camera* Submissions

[9] Mr. B-A's first request is the only one that seeks access to any records. This request arises from an application by the Public Service Employee Relations Commission ("PSERC") on May 15, 1997, for authorization to disregard requests from Mr. B-A under s. 43 of the *Act*. The Commissioner granted PSERC's application on August 18, 1997.

[10] The Commissioner refused Mr. B-A's request on the basis that applications made by the heads of public bodies such as PSERC under s. 43 are excluded from the act by operation of s. 3(1)(c).

[11] It is well settled that a decision by the Commissioner not to disclose records on the ground that they are excluded from the *Act* by virtue of s. 3(1)(c) is a decision the Commissioner makes

in his capacity as the head of a public body. Therefore, this is a decision that is subject to review by an adjudicator: see *[M.H.] v. Information and Privacy Commissioner (17 November 1995)* Esson C.J.B.C. (as he then was) as Adjudicator.

[12] It is also well settled that documents created for the purposes of a s. 43 application are "operational records". Such records are created by or in the custody of the Commissioner in his role as administrator of the *Act*, and therefore are not subject to the operation of the *Act* by virtue of s. 3(1)(c): see *[F.G.B.] v. Information and Privacy Commissioner (4 August 1998)* Levine J. as Adjudicator at paragraphs 13-15.

[13] The Commissioner's function in s. 43 applications does not involve him acting as the head of a public body. As the request by Mr. B-A explicitly requests documents that are tied necessarily and by definition to the class of records which are excluded by s. 3(1)(c) of the *Act*, the Commissioner, acting in his capacity as administrator of the *Act*, had the authority to refuse to disclose the records requested by Mr. B-A.

The Applicant's Request for a Letter of Correction under s. 29 of the *Act*

[14] The second request of Mr. B-A is for a letter of correction under s. 29 of the *Act*. Section 29(1) of the *Act* states:

An applicant who believes there is an error or omission in his or her personal information may request the head of the public body that has the information in its custody or under its control to correct the information.

[15] "Personal information" is defined under Schedule 1 of the *Act* to mean:

recorded information about an identifiable individual, including

- (a) the individual's name, address or telephone number,
- (b) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,
- (c) the individual's age, sex, sexual orientation, marital status or family status,
- (d) an identifying number, symbol or other particular assigned to the individual,
- (e) the individual's fingerprints, blood type or inheritable characteristics,

- (f) information about the individual's health care history, including a physical or mental disability,
- (g) information about the individual's educational, financial, criminal or employment history,
- (h) anyone else's opinions about the individual, and
- (i) the individual's personal views or opinions, except if they are about someone else

[16] Again, the Commissioner considered the documents that Mr. B-A referred to in his second request to be operational records under s. 3(1)(c). Since the Commissioner considered PSERC's letter to be part of a s. 43 application, it was excluded from the requirements of the *Act* and the Commissioner had no authority to make the correction requested. While the Commissioner concluded the PSERC letter was not subject to the *Act*, he nevertheless included a copy of Mr. B-A's letter in "the binder," presumably in satisfaction of the requirement of s. 29(2) to "annotate the information with the correction that was requested but not made."

[17] While the Commissioner stated in his response to Mr. B-A that he was not obligated to consider the request under s. 29, it would be more correct to say that the Commissioner is not obligated to consider a request for the correction of personal information that is not subject to the *Act*. In fact, the Commissioner did consider such a request. I am of the view that the proper procedure should be to first determine whether the record is excluded from the *Act* under s. 3(1), and second, whether the request is a "correction" to "personal information", before making any changes to the record.

[18] It is questionable whether Mr. B-A's request was for a mere "correction" or whether it met the definition of "personal information." While the PSERC letter does include information about Mr. B-A and states opinions about Mr. B-A, Mr. B-A does not ask for changes regarding "personal information." Instead, he appears to be requesting a written statement of fact or an opinion from the Commissioner.

[19] The Commissioner has no authority under s. 29 to correct personal information if a record is excluded by virtue of s. 3(1)(c). The letter from PSERC was created for the Commissioner. It was to be used by the Commissioner in the exercise of his duty as an officer of the Legislature under s. 43. As with the documents in the first request, the PSERC letter is an operational record and the Commissioner was right to refuse to make the requested correction.

The Applicant's Request for Penalties under s. 74 of the *Act*

[20] Mr. B-A's third request is for remedies under the offence and penalty provisions of s. 74 of the *Act*.

[21] The Commissioner refused this request for lack of jurisdiction. The provisions of s. 74 are not remedies available to an applicant under the *Act*; rather, these are quasi-criminal prosecutions and are governed by the *Offence Act*.

[22] There is no authority under the *Act* for an adjudicator to impose penalties under s. 74. An adjudicator only has those powers as set out in s. 62 of the *Act*. These do not include the power to impose penalties or fines.

[23] Furthermore, an adjudicator acting under s. 60(1)(b) may only review a decision of the Commissioner where the Commissioner is acting as the head of a public body. Here, Mr. B-A is asking for a review of the Commissioner's decision where the Commissioner is acting in his role as a Legislative Officer. Such a determination is more properly the subject of judicial review.

[24] As a result, Mr. B-A's third request must be denied as an adjudicator has no authority to review a decision of the Commissioner when he is acting in his capacity as administrator of the *Act*. As well, I can see no authority under the *Offence Act* for the Commissioner to grant Mr. B-A his request under s. 74 of the *Act*. Nothing under the general powers of the Commissioner specified under s. 4a(a) indicates that the Commissioner has any power under s. 74 to order penalties.

Conclusion

[25] For the reasons outlined above, I dispose of this adjudication pursuant to ss. 58(1) and 65(2) of the *Act* by confirming the Commissioner's response to Mr. B-A's first two requests. I further confirm the Commissioner's ruling that he has no jurisdiction under s. 74 of the *Act* to make a determination in respect to Mr. B-A's third request.

ORIGINAL SIGNED BY

D. Smith J.