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In the Matter of:

**The *Freedom of Information and Protection of Privacy Act*,
R.S.B.C. 1996, c. 165 (the "Act")**

And in the Matter of:

An Adjudication Under Section 62 of the *Act*,

Requested by A.V. on November 13, 2007

Reasons for Decision

of the

Honourable Madam Justice Gerow

Counsel for the Commissioner

S.E. Ross

On his own behalf:

A.V.

Written Submissions Received:
(on behalf of the Commissioner)

August 8, 2008

Written Submissions Received:
(on behalf of the applicant)

September 5, 2008

INTRODUCTION

[1] A.V. wrote to the Office of the Information and Privacy Commissioner (the "OPIC") on June 4, 2007 requesting the "correction of personal information" in records in the custody or under the control of the OPIC citing s. 29 of the *Freedom of Information and Privacy Act* (the "*FIPPA*").

[2] The records referred to by A.V. are a number of OPIC documents relating to requests made by A.V. On June 25, 2007, the Executive Director of OPIC replied to A.V. denying the request for correction on the basis that the records are excluded from the *FIPPA* by virtue of s. 3(1)(c). The Commissioner takes the position that this matter is not susceptible to adjudication because the records are excluded from the *FIPPA*'s scope and therefore s. 29 has no application. Further, the Commissioner takes the position that A.V.'s request is an abuse of process because a similar request made by A.V. in 2006 was ruled outside the jurisdiction of the adjudicator, and A.V. commenced an action in the Supreme Court dealing with the same subject matter that was dismissed in May 2007.

[3] This request for adjudication has been referred to as OPIC file F07-32344. A.V. purports to address his submissions to another OPIC file, that being OPIC file F08-33717. However, A.V.'s submissions address the arguments advanced on behalf of the Commissioner in OPIC file F07-32344 and deal with the request by A.V. to correct personal information, which is the subject of that file and I have considered his submissions in relation to OPIC file F07-32344.

ISSUE

[4] The issue is whether the Commissioner correctly denied A.V.'s correction request on the basis that the corrections requested of operational records of an officer of the legislature and therefore excluded from the *FIPPA* by virtue of s. 3(1)(c).

ANALYSIS

[5] The relevant sections of the *FIPPA* are ss. 3(1)(c), 29, 62 and 64, which provide:

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) subject to subsection (3), a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

...

29 (1) 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.

(2) If no correction is made in response to a request under subsection (1), the head of the public body must annotate the information with the correction that was requested but not made.

(3) On correcting or annotating personal information under this section, the head of the public body must notify any other public body or any third party to whom that information has been disclosed during the one year period before the correction was requested.

(4) On being notified under subsection (3) of a correction or annotation of personal information, a public body must make the correction or

annotation on any record of that information in its custody or under its control.

...

62 (1) 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).

...

64 On receiving a request for a review, the minister responsible for this Act must promptly forward the request to an adjudicator and must give a copy to

- (a) the commissioner, and
- (b) any other affected person.

[6] "Personal information" is defined in Schedule 1 of the ***FIPPA***:

"personal information" means recorded information about an identifiable individual other than contact information;

[7] A.V. has requested correction of the following OPIC records:

- two letters to A.V. from an OPIC intake officer – one for OPIC complaint file F05-26631 dated September 28, 2005 and one for OPIC request for review file F05-26993 dated November 2, 2005;
- a letter to A.V. from the Portfolio officer assigned to handle the request for review file F05-26993 dated December 6, 2005;
- the Notice of Written Inquiry and accompanying Portfolio Officer's fact report respecting the inquiry for the review of A.V.'s request F05-26993; and

- a letter from the OPIC's Registrar of Inquiries dated January 25, 2006 and a Notice of Cancellation of Written Inquiry dated January 26, 2006 for file F05-26993.

[8] The Commissioner takes the position that these documents were received or created by the OPIC for the purpose of and in the course of opening, processing, investigating, attempting to mediate or settle, inquiring into, considering, taking action on or deciding a complaint and subsequent request for review under the ***FIPPA*** relating to A.V.

[9] On June 25, 2007, OPIC denied A.V.'s request on the basis that the records in issue were excluded pursuant to s. 3(1)(c) from the ***FIPPA***. On July 25, 2007, A.V. requested a review by an adjudicator. On September 18, 2007, counsel for the Commissioner wrote to the Minister of Labour and Citizen's Services requesting that the matter not be sent to an adjudicator as the records were clearly excluded from the ***FIPPA*** as they related to operations. Counsel acknowledged that the executive director of the Office of the Commissioner had earlier erroneously said that a review by an adjudicator would be requested.

[10] The matter was subsequently referred for adjudication under s. 64.

[11] A.V. applies for the following:

1. a ruling that s. 3(1)(c) is not a barrier sheltering the OIPC against accountability; and

2. commencement of due process to decide the “threshold issues” arising from the affidavit of the Registrar of Inquiries for the OIPC.

[12] On March 12, 2007, Bauman J. (as he then was) dealt with a similar request from A.V. for correction of personal information in the custody of the Commissioner. As stated in the decision, the nub of A.V.’s complaint was that the Commissioner had allegedly altered A.V.’s statement of claim filed in connection with a complaint to OIPC. Bauman J. found that he was without jurisdiction to entertain the complaint because earlier decisions had confirmed that the Commissioner has no authority under s. 29 of the *FIPPA* to correct personal information if the record in issue is excluded from the *FIPPA* by virtue of s. 3(1)(c): *V. (A.N.T.) v. Information and Privacy Commissioner* (March 12, 2007).

[13] A.V. asserts that the Commissioner has altered and falsified his complaint, and that s. 3(1)(c) should not be applied to protect the Commissioner’s actions from adjudication. As well, A.V. argues that the onus is on the OPIC to prove that the records are “operational” and that it has not done so. Finally, he argues that s. 30 of the *FIPPA* is applicable and that the Commissioner breached the section by failing to protect A.V.’s personal information from falsification and using the information without authorization to frustrate his application.

[14] Section 30 provides:

30 A public body must protect personal information in its custody or under its control by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or disposal.

[15] In my view, s. 30 applies to the physical security arrangements for records in OPIC's control and does not apply in the circumstances of this case. Section 29 is the operational section and does not have application if the records are excluded under s. 3(1)(c): ***V. (A.N.T.) v. Information and Privacy Commissioner*** (March 12, 2007). Although s. 3(3) provides that certain of the ***FIPPA***'s provisions apply to OPIC, s. 29 is not one of them.

[16] Operational records have been defined as records specific to a case file and include case management or tracking records of the Commissioner and his staff, and any other case specific documents created by the OPIC in the course of opening, processing, investigating, mediating, settling, inquiring into, considering, taking action on or deciding a case: ***Mr. R. v. Information and Privacy Commissioner*** (April, 1996); ***Mr. and Mrs. Y. v. Information and Privacy Commissioner*** (October, 2003).

[17] I have examined the records which are the subject of A.V.'s request and determined that they are operational in nature. The documents were received or created by the OPIC in relation to a complaint and subsequent request for review made by A.V. In my view, none of these records are subject to the ***FIPPA***. The Commissioner has no authority under s. 29 to correct personal information if the record is excluded by virtue of s. 3(1)(c), and he is not therefore required to respond to A.V.'s request for correction: ***J.A. B-A. v. Freedom of Information and Privacy Act*** (November, 2000). This is so regardless of how the "error" is characterized.

[18] A.V. makes certain policy arguments regarding whether the Commissioner should be entitled to rely on s. 3(1)(c). Those, in my view, are not matters I can deal with as an adjudicator. Rather, those issues would be more appropriate dealt with in a political forum.

CONCLUSION

[19] Having concluded that the ***FIPPA*** has no application to the records to which A.V. requests correction, I dispose of this application for review pursuant to ss. 65(2) and 58(1) of the ***FIPPA***, by confirming the decision of the Commissioner.

