

IN THE SUPREME COURT OF BRITISH COLUMBIA

COPY

Date: 20081205
Place: Vancouver

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 J. and D.S. on March 8, 2008

**Reasons for Decision
of the
Honourable Mr. Justice Pearlman**

Counsel for the Commissioner

S.E. Ross

On their own behalf:

J. and D. S.

Written Submissions Received:
(on behalf of the Commissioner)

October 16, 2008

Written Submissions Received:
(on behalf of the Applicants)

October 2 and
October 24, 2008

Introduction

[1] J. and D.S. (the "Applicants") have applied pursuant to s. 62 of the *Freedom of Information and Privacy Act*, R.S.B.C. 1996, c. 165 (the "Act") for review of a decision made by the Information and Privacy Commissioner (the "Commissioner")

denying their request for access to information used by the Office of the Commissioner ("OIPC") in its investigation into their complaint under the **Act** against School District No. 40, New Westminster.

[2] In January 2007, the Applicants made a privacy complaint to the Commissioner against School District No. 40. This was one of a number of processes initiated by the Applicants in response to what they regard as the wrongful suspension of their 14 year old son, A.S., in February, 2004 from a school within School District 40.

[3] The OIPC opened file F07-30805 in response to the Applicants' complaint, and assigned Portfolio Officer Caitlin Lemiski to investigate. She determined that the complaint raised four issues:

1. Did School District No. 40 have the authority under the **Act** to collect a document supplied by the parent of another student?
2. Did School District No. 40 have the authority under the **Act** to collect a document supplied by the New Westminster Police Service?
3. Did School District No. 40 have the authority under the **Act** to disclose a psychological assessment of A.S. to the New Westminster Police Service?
4. Did the faxing of personal information by School District No. 40 on February 24, 2004 comply with s. 30 (protection of personal information) of the **Act**?

[4] On August 1, 2007, after inviting and receiving written submissions from the Applicants and School District No. 40, the Portfolio Officer concluded that School District No. 40 had the authority to collect and disclose the personal information in

question, and that the faxing of the personal information complied with the **Act**. She therefore denied the Applicants' complaint and advised the parties that she was closing the file.

[5] On August 25, 2007, the Applicants requested a reconsideration. The Commissioner assigned the reconsideration to Manager of Investigations and Mediation Catherine Tully. On December 5, 2007, after reviewing the file, Ms. Tully concluded that no further action was warranted and that the OIPC's file on the Applicants' complaint regarding School District No. 40 would remain closed.

[6] By letter dated January 26, 2008, the Applicants took issue with Ms. Tully's conclusion. They made lengthy submissions in support of their allegations that School District No. 40 had not only failed to comply with the letter and the spirit of the **Act**, but had also attempted, in various ways, to mislead them. The Applicants requested that the Commissioner provide to them "information", "evidence", and "records" from his complaint investigations file.

[7] By letter dated February 11, 2008, the Commissioner's delegate, Executive Director Mary Carlson, informed the Applicants that although they had not filed a specific request under the **Act**, the OIPC was treating their correspondence as a formal access request under s. 5 of the **Act**. She went on to inform the Applicants that their request for evidence and records pertaining to their privacy complaint against School District No. 40, and the Commissioner's investigation of that complaint, was denied. Ms. Carlson made her decision on the ground that the

records requested by the Applicants were operational records of the Commissioner exempt from disclosure by virtue of s. 3(1)(c) of the **Act**.

[8] Ms. Carlson concluded by informing the Applicants that after reviewing the file, the findings of the Portfolio Officer, and the reconsideration decision of Ms. Catherine Tully, she was satisfied that the matter had been properly concluded and that the Commissioner's files would remain closed.

[9] In their letter of March 8, 2008 to the Minister requesting the appointment of an Adjudicator under s. 62(1) of the **Act**, the Applicants referred to their attempts to obtain records from School District No. 40 relating to their son's suspension. They referred to the records they were requesting from the Commissioner as "records which [School District No. 40] has provided to the OIPC and which the OIPC has used as the basis for their findings in our complaints". The Applicants also made the submission that:

The process does not seem fair to us when both [School District No. 40] and the OIPC deny us the right to examine and question the evidence we have requested. The process is not fair if the OIPC is able to use the evidence provided by [School District No. 40] as the basis of their findings against us and we are not allowed to see or question this evidence.

[10] This matter was referred to me as an Adjudicator under s. 62 of the **Act**. I informed both parties that the hearing would proceed by way of written submissions. I have received written submissions from the Applicants and from counsel for the Commissioner.

Issue

[11] The issue that I am required to address on this Adjudication is whether the Commissioner was correct in refusing the Applicants access to the records they requested on the ground that the requested records are exempt from disclosure under the **Act** pursuant to s. 3 (1)(c). Before turning to s. 3(1)(c) of the **Act**, I will comment briefly on my jurisdiction as an adjudicator in this matter.

Jurisdiction of Adjudicator

[12] My role as an Adjudicator appointed under s. 62(1) of the **Act** is confined to reviewing the decision of the Commissioner to determine whether that decision was made in accordance with the **Act: Y v. Information and Privacy Commissioner** (D. Smith J., October 8, 2003) at para. 11. As an Adjudicator appointed under the **Act**, I have no jurisdiction to inquire into or determine the Applicants' complaint against School District No. 40 or to conduct a judicial review of the process by which OIPC determined the Applicants' privacy complaint against School District No. 40.

[13] An Adjudicator acting under ss. 60 and 62 of the **Act** reviews a decision by the Commissioner as "head of a public body" and in doing so, performs a statutory function similar to the investigation and review by the Commissioner of decisions by other heads of public bodies: **RG v. Information and Privacy Commissioner** (Bauman J., November 10, 1997) at para. 23. My jurisdiction as an Adjudicator does not extend to reviewing decisions of the Commissioner or his delegates for procedural fairness or any alleged breach of the requirements of natural justice.

Discussion

[14] Ms. Carlson treated the Applicants' request for records as a request made under s. 5 of the **Act**, pursuant to the right of access provided in s. 4. Section 4(1) of the **Act** provides:

Information rights

4. (1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

[15] Under Schedule 1 of the **Act**, a "public body" is defined as follows:

"public body" means

...

(b) an agency, board, commission, corporation, office or other body designated in, or added by regulation to, Schedule 2, ...

[16] Schedule 2 of the **Act** lists the OIPC as a "public body". Therefore, a person may make a request for records from the OIPC under s. 4(1).

[17] However, s. 3(1) of the **Act** specifies various categories of records to which the **Act** does not apply. In particular, s. 3(1)(c) provides in part:

Scope of this Act

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 function under an Act;

[18] Under Schedule 1 of the **Act**, "an officer of the Legislature" is defined as:

"officer of the Legislature" means the Auditor General, the Commissioner appointed under the *Members' Conflict of Interest Act*, the police complaint commissioner appointed under Part 9 of the *Police Act*, the Information and Privacy Commissioner, the Chief Electoral Officer, the merit commissioner appointed under the *Public Service Act*, the Representative for Children and Youth or the Ombudsman.

[19] It is well established that these sections of the **Act**, when read together, create two classes of records in the custody and control of the OIPC: operational records and administrative records.

[20] Administrative records, which do not relate to the Commissioner's functions under the **Act**, are not excluded from the **Act** by s. 3(1)(c), and may be requested by a person under s. 4.

[21] Operational records fall within s. 3(1)(c), and are exempt from production under s. 4 because they relate to the Commissioner's functions under the **Act**. *RG v. Information and Privacy Commissioner* (Bauman J., November 10, 1997) at paras. 11-16; *C.M. v. Information and Privacy Commissioner* (Smith J., January 5, 1998) at paras. 14-15.

[22] In *Mr. R. v. Information and Privacy Commissioner* (April 22, 1996) at paras. 16 to 18, Madam Justice Levine, sitting as an Adjudicator under the **Act**, held

that any record specific to a case file is an operational record relating to the Commissioner's functions under the **Act** and is excluded from the **Act**. She described records specific to a case file as 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.

[23] This definition of operational records has been consistently followed and applied in subsequent adjudications under s. 62 of the **Act**: **RG v. Information and Privacy Commissioner** (November 10, 1997); **Mr. M. v. Information and Privacy Commissioner** (January 5, 1998); **C.J. v. Information and Privacy Commissioner** (July 28, 2003); **F.G. B. v. Information and Privacy Commissioner** (May 17, 2000).

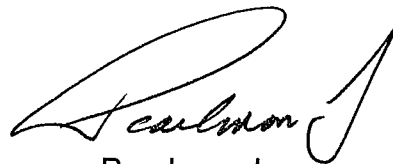
[24] Accordingly, the records requested by the Applicants from the Commissioner's files will be excluded from the **Act** and are not subject to production to the extent that they are operational records.

[25] At my request, the Commissioner provided to me, on a confidential basis, the files from the OIPC containing the records which are the subject of the Applicants' request. I have examined those records and have determined that they are operational records. The records sought by the Applicants are case-specific records received or created by the OIPC which relate to the opening, processing, investigating and deciding of matters specific to the Applicants' case. These records

are directly related to the Commissioner's functions under the **Act** and as operational records, are excluded from the **Act** under s. 3(1)(c). As such, they are not subject to a request for access under the **Act**.

Conclusion

[26] For the foregoing reasons, I dispose of this Adjudication pursuant to ss. 58(1) and 65(2) of the **Act** by confirming the Commissioner's response to the Applicants' request.

A handwritten signature in black ink, appearing to read "Pearlman J.", written in a cursive style.

Pearlman J.