

Date: 20070712
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 (D.) on 18 January 2006

Reasons for Decision

of the

Honourable Mr. Justice Bauman

Counsel for the Commissioner

S. E. Ross

On his own behalf:

(D.)

Written Submissions Received:
(on behalf of the Commissioner)

21 December 2006 and
12 February 2007

Written Submissions Received:
(on behalf of the applicant)

10 November 2006, 11 January and
21 March 2007

[1] I have now had an opportunity to review the submissions of the parties in this matter. The facts allow for the application of well established law under the legislation. Accordingly, in the interests of privacy, it will not be necessary to set out in any detailed way the factual background and my detailed conclusions.

[2] In the Commissioner's submission of 21 December 2006, the facts are summarized in paragraphs 1 to 6. This summary accurately outlines the essential facts and I will not repeat it here. In particular I accept the Commissioner's submission of 12 February 2007 that this adjudication concerns the applicant's access request to the Commissioner of 20 December 2005 in these terms:

I would like to submit to your office at this time a Freedom of information request. To receive all records, files, information that your office has on this matter. This will include all communications between members of your office and Translink and all other people that are aware of this matter.

[3] The Commissioner's position is that the request of the applicant is for records which fall under s. 3(1)(c) of the **Act**.

[4] That section 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) 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;

[5] The cases in support of the Commissioner's position are cited in his submission of 21 December 2006. I accept those submissions and conclude that the Commissioner was correct in his disposition.

[6] The applicant invokes the provisions of s. 25(1)(b) and (2) of the **Act**:

25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

...

(b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

[7] On first reading I quickly concluded that because the **Act** does not apply to the requested records by virtue of s. 3(1)(c), s. 25 can neither have application.

[8] However, counsel for the Commissioner notes Justice Levine's decision (sitting as an Adjudicator) in Adjudication Order No. 3 where the learned Adjudicator concluded that because the Commissioner's office is a public body under the **Act** and section 25(2) states that section 25(1) applies despite any other provision of the **Act**, the Commissioner could be required by s. 25(1) to make public interest disclosure of records that section 3(1)(c) excludes from the scope of the **Act**.

[9] Counsel submits that while the decision of another Adjudicator is persuasive authority, as an administrative decision maker I am not strictly bound by such an earlier decision.

[10] Counsel then urges me not to follow Adjudication Order No. 3 on this point arguing:

- The words in section 25(2)—"despite any other provision of this Act"—make public interest disclosure under section 25(1) paramount to *any otherwise applicable provision of the Act*, such as a requirement to protect personal privacy in Part 3 of the Act. Those words have no effect on section 3 or records that are excluded from the scope of the Act by section 3(1).

[Emphasis in original]

[11] I respectfully agree.

[12] Counsel notes that the "scope defining" provisions of s. 3(1)(c) have been expressly qualified by the legislature adding s-s. 3(3) in 2004. Ms. Ross then submits:

22. Section 3(3) demonstrates that when the Act intends provisions to apply in relation to records that are otherwise excluded from the scope of the Act by section 3(1)(c), it does so unequivocally within section 3.

It is noted that this amendment postdates Justice Levine's earlier decision.

[13] Ms. Ross concludes:

24. ... [S]ection 25(2) does not displace the express jurisdiction-defining effect of section 3(1) or expand public interest disclosure under section 25(1) so that it applies to records that section 3(1) has already expressly excluded from the scope of the Act's application (including the application of s. 25).

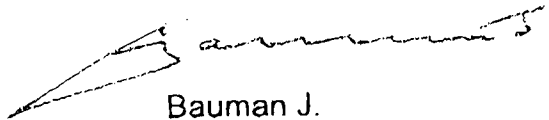
25. On the contrary, the words in section 25(2)—"despite any other provision of this Act"—make public interest disclosure under section 25(1) paramount to *any otherwise applicable provision of the Act*, such as a requirement to protect personal privacy in Part 3 of the Act. Those

words do not effect section 3 or records that are excluded from the scope of the Act by section 3(1).

[Emphasis in original]

[14] Once again, I respectfully agree with each of these submissions.

[15] It follows that I confirm the Commissioner's disposition of this citizen's access request in this matter.

A handwritten signature in black ink, appearing to read "Bauman J.", written over a horizontal line.

Bauman J.