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COMMISSIONER
— for —
British Columbia

Order 01-16

SIMON FRASER UNIVERSITY

David Loukidelis, Information and Privacy Commissioner
April 20, 2001

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Summary: The applicant requested access to her own personal information from SFU in 1998 and at that time requested a review of SFU's decision to refuse access to certain information. That request for review was settled during mediation, during which SFU disclosed further information. Applicant later changed her mind and, in 2000, made the same access request to SFU for the same record. SFU refused to process the request or issue a decision. SFU argued that, because the matter was resolved during previous review request's mediation, commissioner had (under the *functus officio* doctrine) no jurisdiction to conduct this inquiry. SFU also argued this inquiry could not question earlier mediation outcome on the bases of *res judicata* and issue estoppel. Settlement during mediation is not a 'decision' to which doctrines of *functus officio*, issue estoppel or *res judicata* apply. The commissioner has the authority, however, to control abuse of the Part 5 process by applicants. The Commissioner can, in an inquiry, decline to order a public body to process an access request where a number of conditions are met. Fairness is the touchstone in determining whether a later request should be allowed. Here, applicant's second request was, in the circumstances, an abuse of that process and fairness does not require that the applicant be permitted to insist that the second request proceed. SFU not required to process second request.

Key Words: issue estoppel – *res judicata* – abuse of process.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 7 and 8, Part 5.

Authorities Considered: B.C.: Order 01-03, [2001] B.C.I.P.C.D. No. 3. **Ontario**: Order PO-1755, [2000] O.I.P.C. No. 29; Order M-938, [1997] O.I.P.C. No. 128; Order PO-1676, [1999] O.I.P.C. No. 69; Order M-618, [1995] O.I.P.C. No. 385.

Cases Considered: *Chandler* v. *Association of Architects of Alberta*, [1989] 2 S.C.R. 848, [1989] S.C.J. No. 102; *Saskatoon Credit Union Ltd.* v. *Central Park Enterprises Ltd.* (1988), 22 B.C.L.R. (2d) 89 (S.C.); *Reddy* v. *Oshawa Flying Club* (1992), 11 C.P.C. (3rd) 154 (Ont. C.J.);

British Columbia (Minister of Forests) v. *Bugbusters Pest Management Inc.*, [1998] B.C.J. No. 1043 (C.A.); *Bell Canada* v. *Canada (Canadian Radio-Television & Communications Commission)*, [1989] 1 S.C.R. 1722; *Cdn. Broadcasting League* v. *Canadian Radio-television & Telecommunications Commission*, [1983] 1 F.C. 182 (appeal dismissed, [1985] 1 S.C.R. 174); *Sawatsky* v. *Norris*, [1992] O.J. No. 1253; *Nisshin Kisen Kaisha Ltd.* v. *Canadian National Railway Co.*, [1981] F.C. 293 (T.D.) (aff. [1982] 1 F.C. 530 (C.A.)); *Vogel* v. *Manitoba* (1992), 90 D.L.R. (4th) 84 (Man. Q.B.); *S.G.E.U.* v. *Wascana Hospital* [1998] S.J. No. 286 (Sask. C.A.); *Kaloti* v. *Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 390 (C.A.).

1.0 INTRODUCTION

[1] In Order 01-03, [2001] B.C.I.P.C.D. No. 3, I dealt with the question of whether the common law principles of issue estoppel or *res judicata* apply where an inquiry has been held under Part 5 of the *Freedom of Information and Protection of Privacy Act* ("Act") and an order has been made under s. 58 of the Act. That case was the first in which the issue had arisen since the Act came into force. This inquiry raises the same issues – and others.

[2] It also raises, directly, the novel question of whether the common law doctrine of *functus officio* applies to actions taken by staff in this Office during mediation under s. 55. That question, in turn, involves the issue of whether a public body can refuse to respond to a request, including on the ground that it repeats a request that this Office settled in mediation.

[3] These issues arise because the applicant made an access to information request last year in the same terms as one she made to Simon Fraser University ("SFU") in 1998. Dissatisfied with SFU's first response, given in 1999, the applicant requested a review of SFU's decision. As a result of mediation by this Office, SFU disclosed further information to the applicant.

[4] This was foreshadowed by a June 30, 1999 letter to the applicant from the portfolio officer in this Office who handled the mediation. The letter said SFU would make a second disclosure, clearly as a result of mediation, and that the applicant should contact the Portfolio Officer by July 9, 1999 with any questions, failing which no further action would be taken. By a letter dated July 7, 1999, SFU made a secondary disclosure of information. In its letter, it said SFU considered "the review resolved" and that SFU had "closed our file." The letter invited the applicant to contact its writer if she had any questions. A July 13, 1999 e-mail from the Portfolio Officer alludes to a conversation between the applicant and the Portfolio Officer, in which the applicant apparently expressed some unhappiness with the secondary disclosure. The e-mail indicates this Office's file on the matter was closed, the applicant having said she understood that she had received everything she could under the Act.

[5] On March 3, 2000, the applicant made her second request for access to the same information. That request lists reasons for the "new request", as the letter puts it, none of which alleges the applicant had laboured under some mistake of fact or disadvantage in relation to the 1999 request for review and mediated settlement. SFU responded to the second request in a letter dated March 31, 2000, in which it refused to reopen the original

access request or open a new request to (as SFU's letter to the applicant put it) "review this record again and provide you with another decision." The following passage, from p. 2 of SFU's letter, elaborates on this:

> You are attempting to make the same claim (i.e. the University improperly severed information from the record) by making the same request a second time. You cannot assert a right or claim that contradicts what you have done before. You could have pursued that claim further during your original request for review but you decided not to do so. Instead, you accepted the outcome of the mediation that nothing further could be disclosed to you under the Act. The fact that you may continue to be or are now unhappy with the outcome and that you now object to the severing does not release you from responsibility for your original decision. You gave up your legal right to pursue the matter any further when you decided to accept the mediated resolution. You do not have the right to try again.
>
> The reasons you give in your letter for renewing your request for access to the same information are not relevant to any current decision, action or omission by the University relating to a request for records under the Act and the administration of information rights. It is the University's position that you previously exercised your right to request access and a review, you accepted a mediated settlement, and you freely decided not to proceed to an inquiry before the Commissioner. The University is not prepared to revisit the matter because you failed to exercise a right at the correct point in time or if you now decide that you made a bad decision at the time.

[6] Of course, SFU could have responded to the new request by issuing a new decision, presumably in the same terms as its 1999 decision (perhaps slightly modified to account for SFU's secondary release of information during this Office's mediation of the 1999 request for review). On the reasonable assumption that the applicant would not have been satisfied with this decision, the applicant likely would have requested a review of that decision and, failing settlement in mediation, this inquiry would be concerned, at last, with the merits of SFU's decision. Instead, SFU refused, apparently as a matter of principle, to process the request at all. This case turns, accordingly, on whether SFU was justified in doing this because of what happened in 1999. This decision does not address the merits of its 1999 decision to refuse access.

2.0 ISSUES

[7] The issues before me are as follows:

1. Is the commissioner *functus officio* in respect of this matter?
2. Is this matter *res judicata* or an abuse of process?

[8] If the answer to both of these questions is 'no', the question arises whether SFU has complied with its duties under ss. 6 and 8 of the Act, *i.e.*, to respond to the applicant openly, accurately and completely and to provide the applicant with a decision on her 2000 access request and reasons for that decision.

[9] SFU characterizes the first issue as a jurisdictional point. It says that, if *functus officio* applies, I have no jurisdiction to proceed with the inquiry. As I see it, if I am *functus officio*, then that is the end of the matter. But I have jurisdiction to assess that issue – whether the commissioner, not SFU, is *functus officio*.

[10] Last, the applicant objected to SFU's use of material related to mediation of the 1999 request for review, arguing this was contrary to this Office's policies and procedures for inquiries. Those materials are essential for SFU's case on *res judicata* and *functus officio*. They do not relate to the merits of any substantive issue before me respecting the 2000 access request. I find these materials are properly before me for the purposes of this case.

3.0 DISCUSSION

[11] **3.1** ***Functus Officio*** – SFU argues that, because the applicant's 1999 request for review was 'settled' as a result of mediation, by a portfolio officer from this Office under s. 55 of the Act, the common law doctrine of *functus officio* applies and deprives me of the jurisdiction to conduct this inquiry. According to SFU's initial submission, that doctrine provides that, "once an adjudicator has done everything necessary to perfect a decision, the adjudicator is barred from revisiting that decision other than to correct clerical or technical errors" (para. 31). It says that the status of the disputed record was resolved during mediation of the 1999 request for review and cannot be revisited here. My inquiry jurisdiction under Part 5 of the Act is said to be of a "limited nature" and that, where a request for review has been 'settled' by mediation under s. 55, I have no jurisdiction to conduct an inquiry under s. 56. As SFU puts it, at para. 28 of its initial submission, the Act "does not grant any permissive jurisdiction to the Commissioner to conduct an inquiry where neither of the factors in section 56 exists." It also says, at para. 28, that the Act "does not grant jurisdiction to re-hear matters that have already been determined under the procedures provided in the Act."

[12] SFU's argument, as I see it, really boils down to the contention that, because it has already made a decision on the applicant's request, SFU is not required to deal with it again. In effect, SFU is saying that it has acted appropriately here, by refusing to decide again something it has already decided. By answering the applicant's 1998 request, SFU says, it has discharged its statutory duties and powers and cannot be required to do so again. For the reasons given below, I conclude that I am not *functus officio*. As for SFU's obligation to respond to the repeat request, I conclude that I have the authority under the Act to permit a public body to refuse to respond again to a request that has been settled in mediation by this Office. This is also discussed below.

[13] According to *Black's Law Dictionary* (6th ed., 1991), the Latin phrase *functus officio* denotes an (official) task that has been performed. The legal effect of the phrase is that, where an administrative tribunal or court has rendered a decision in a matter, subject to certain exceptions and to any contrary express or implied statutory power, the court or tribunal ceases to have any authority to deal again with the matter that has been already decided.

[14] In *Chandler* v. *Association of Architects of Alberta*, [1989] 2 S.C.R., [1989] SCJ No. 102, the Supreme Court of Canada considered whether the Practice Review Board of the Alberta Association of Architects could continue proceedings against an architectural firm after it had delivered a report on the firm's practices leading up to its bankruptcy. Writing for the majority, Sopinka J. said that, in the absence of any statutory authority for the board to vary or reconsider any of its final decisions, it was necessary to consider whether it had made a final decision and was therefore *functus officio*. He characterized *functus officio* as a rule that "a final decision of a court cannot be reopened" unless there has been a slip in drawing up the formal judgement of the court or where there has been an error in expressing the manifest intention of the court. Sopinka J. also adverted to the policy reason for recognizing, through *functus officio*, the finality of proceedings before administrative tribunals. At para. 20 (S.C.J.), he said the following:

> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can do so only if authorized by statute or if there has been a slip or error within the exception enunciated in *Paper Machinery Ltd.* v. *J.O. Ross Engineering Corp.*, [1934] S.C.R.186.

[15] I accept that *functus officio* – which favours the finality of proceedings – applies to the commissioner under the Act. The Supreme Court of Canada in *Chandler* made it clear, however, that application of the rule "must be more flexible and less formalistic in respect to the decisions of administrative tribunals. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available only on appeal." As Sopinka J. said, at para. 22 (S.C.J.),

> … the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation.

[16] SFU's reliance on the doctrine of *functus officio* is, in my view, misplaced on two grounds. For one thing, SFU's case ignores the fact that the 1999 request for review – which, as a result of mediation by this Office, did not proceed to inquiry – is not the basis on which this inquiry is held. In response to SFU's refusal to deal with the applicant's *new* March 3, 2000 access request, a new request for review was made to this Office by the applicant, dated April 20, 2000. The 1999 access request and the 1999 request for review are, for the purposes of the Act, separate in every significant respect from the access request and request for review made in 2000. The fate of the 1999 request for review has no bearing on my jurisdiction to proceed with this inquiry with respect to the 2000 request.

[17] Further, the doctrine of *functus officio* does not apply here because no decision or determination was made by the previous commissioner, or any of his delegates, for the purposes of that rule. It is clear from the Supreme Court of Canada decision in *Chandler* and other authorities that *functus officio* applies only where a final decision has been made. It is abundantly clear from the material before me that no decision or

determination of any description was made, in respect of the applicant's 1999 request, by my predecessor or any of his delegates. The fact that the matter was mediated by a portfolio officer acting under s. 55 of the Act does not transmute the outcome of that mediated resolution into an order by the commissioner. Just because the 1999 review request was, in some sense, 'resolved' does not mean the commissioner's authority under the Act to make findings under s. 56 or an order under s. 58 was exercised in that process.

[18] This is amply reflected, among other things, in this Office's published policies and procedures, which make it clear that a portfolio officer assists the parties in attempting to settle their differences through mediation. This is not changed, as SFU argues, by virtue of reference in this Office's 1998-1999 annual report to the fact that, if parties "agree to a mediated settlement, the request for review is closed." Nor is the situation changed by SFU's characterization of a mediated outcome as the 'resolution' or 'settlement' of a request for review. The truth is that, if a request for review is withdrawn or considered closed because the parties reach some sort of settlement through mediation, this Office has made no decision that can be the basis for application of the doctrine of *functus officio*.

[19] SFU relies on the following observations by Sopinka J., at para. 23 (S.C.J.) of *Chandler*:

> If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection.

[20] SFU cites this passage as support for the proposition that, since the applicant's 1999 request for review was sent to mediation under s. 55 of the Act, and since the matter was resolved through mediation, the 1999 mediation constitutes selection of a 'remedy' that now precludes me from embarking on an inquiry under s. 56 of the Act.

[21] These comments by Sopinka J. do not assist SFU. *Chandler* was concerned with the failure of the Practice Review Board to dispose of the matter before it in a manner permitted by the *Architects Act* (Alberta). As Sopinka J. noted, this meant the Board's intention to make a final disposition had been thwarted, since it had acted under the wrong statutory provision in choosing the 'remedy' of recommendations. Sopinka J. clearly was referring to "remedies" in the sense of the means by which an administrative tribunal is statutorily authorized to dispose of a matter (*e.g.*, by interlocutory order, final order or otherwise). Section 58 of the Act is an example of a statutory remedial power, in this case to make orders and attach conditions.

[22] Last, SFU says it has been decided in Ontario that "generally, issues resolved during mediation are not re-considered during an inquiry." It relies on the following passage, from pp. 2 and 3 of Order PO-1755, [2000] O.I.P.C. No. 2:

> When a file is placed in mediation, the task of the mediator is to attempt to identify and clarify issues and records, and to attempt to settle all or some of them. There is a recognition, however, that in many cases an appeal will not be completely mediated but will be narrowed to fewer issues or records. The general expectation

> is that the parties, having agreed to participate in the mediation process, will honour or adhere to agreements reached in mediation. In the absence of clearly articulated disagreement from a party regarding the results of mediation, the appeal will proceed to inquiry on that basis.
>
> …
>
> The appellant has essentially stated to me that he withdraws any agreements he made during mediation. In my view, it is too late to make such a claim at this stage in the process, particularly in light of the steps taken by the Mediator to clarify his concerns. In so finding, I am not saying that a party may not change his or her mind and back away from an agreement made in mediation, but that a decision must be made in a timely fashion and within the procedures which have been established by this office and which have been clearly communicated to the parties. To find otherwise would not only delay the inquiry process in that I would be required to essentially start the inquiry over again in order to introduce the new issues, but it would compromise the integrity of the appeals process itself by allowing a party to unilaterally frustrate the timely and orderly resolution of the appeal.

[23] The situation addressed in this passage is clearly not the one at issue here. In that case, the question was whether the applicant could, having agreed to certain things during the mediation phase, renege and insist on altering the scope of the subsequent inquiry. Order PO-1755 – which is not a case about *functus officio* – does not assist SFU with its *functus officio* argument. (I note, in passing, that the *functus officio* doctrine has been applied under the Ontario legislation, but not in a case such as this one. See, for example, Order M-938, [1997] O.I.P.C. No. 128, and Order PO-1676, [1999] O.I.P.C. No. 69.)

[24] For the reasons given above, I find that I am not *functus officio* and can therefore conduct this inquiry.

[25] **3.2** ***Res Judicata*** – As I noted earlier, Order 01-03 deals at some length with the doctrine of *res judicata* (and the related rule of issue estoppel). I will not repeat the discussion in that decision of those rules. In this case, SFU contends the applicant is barred by *res judicata* from "disputing SFU's decision of July 7, 1999" (para. 40 of its initial submission). It says, in the same paragraph,

> … that the adequacy of the disclosure of the Report [the disputed record] was resolved by agreement in a previous proceeding and the Applicant is barred from raising the issue again.

[26] Citing *Saskatoon Credit Union Ltd.* v. *Central Park Enterprises Ltd.* (1988), 22 B.C.L.R. (2d) 89 (S.C.), SFU says, at para. 41 of its initial submission, that *res judicata* "prohibits a party to a proceeding from raising an issue that has already been decided between the parties in a previous proceeding." It goes on to say that *res judicata* is similar to the principle of abuse of process, "which extends to prohibit raising [*sic*] issues in a proceeding where the issue has been settled between the parties during a previous proceeding" (para. 43). SFU also cites the Ontario decision in *Reddy* v. *Oshawa Flying Club* (1992), 11 C.P.C. (3rd) 154 (Ont. C.J., Gen. Div.).

[27] SFU's characterization of *res judicata* and abuse of process consistently focuses on the deciding of an issue "between the parties" in previous proceedings. This is understandable, since the applicant's 1999 request for review did not proceed to an inquiry. For the reasons given above, it is my view that no final decision or determination was made by my predecessor, or any of his delegates, on the merits of the previous matter. As the authorities cited in Order 01-03 indicate, the principles of *res judicata* and issue estoppel apply only when there has been a decision of a court or administrative tribunal of competent jurisdiction on the cause of action or issue before the tribunal in later proceedings.

[28] The fact that the applicant's 1999 request for review was considered closed by SFU – or by this Office, for that matter – does not qualify as a decision by this tribunal. The authorities cited in Order 01-03 require that there be a final judicial decision before *res judicata* or issue estoppel applies. Those authorities include *British Columbia (Minister of Forests)* v. *Bugbusters Pest Management Inc.*, [1998] B.C.J. No. 1043 (C.A.), and *Saskatoon Credit Union*.

[29] **3.3 Abuse of Process** – SFU limited its abuse of process argument to the contention that it is a principle similar to *res judicata* and that it prohibits a party from raising issues that have been settled between the parties during a previous proceeding. SFU relies on *Reddy*, above, as authority for this proposition.

Issue Estoppel and Abuse of Process

[30] Nothing in *Reddy*, *Saskatoon Credit Union* or other cases upon which SFU relies supports SFU's contention that the applicant's 2000 request for review, and this inquiry, should be halted as an abuse of process as characterized in those cases. I reach this conclusion because, as is noted above, nothing has happened in respect of the 1999 request for review that resulted in a determination, or decision, on the merits of the case.

Controlling Abuse Under the Act

[31] That is not, however, the end of the issue. This case raises the question of whether I have the authority to control abuses of process under the Act, including on the authority of the abuse of process cases cited by SFU. I sought further submissions from the parties on that question. Both parties provided further written submissions and replies to each other's further submissions.

[32] Section 43 of the Act provides an explicit statutory basis on which I can offer public bodies relief, in the right case, from a specified abuse of the access rights conferred by the Act. The applicant argues that s. 43 of the Act is exhaustive of my authority to curb abuse of the rights extended by the Act. The applicant contends that the Legislature intended to give the commissioner broad powers to control public bodies, but only the narrow, specific power in s. 43 to curb abuse of the rights conferred by the Act. Section 43 is said to be "controlling" of the commissioner's authority and I can act in this case only if the test under s. 43 is met.

[33] For its part, SFU relies on cases and legal texts which deal with abuse of process in the sense discussed above, *i.e.*, as another name for *res judicata* or as a doctrine very closely tied to *res judicata*. At para. 13 of its reply submission, SFU argues that I have only the "jurisdiction" – the context makes it clear SFU means 'authority' – that is expressly given to me in the Act. This sits uncomfortably with SFU's contention that I have the authority to apply principles of *res judicata*, issue estoppel and abuse of process. It also accords with the applicant's view on the abuse of process question at hand.

[34] At all events, the cases relied on by SFU in its supplementary submission are of no real assistance on the abuse of process issue, since they turn on there having been a previous decision by a court or tribunal that truly decided the matter or issue. In this case, of course, there is only the previous mediated resolution of the applicant's first request for review, involving the applicant's first access request.

[35] The express authority found in s. 43 does not, in my view, mean I cannot also have an implied authority to control other abuses of process, such as the kind of abuse alleged here. The fact that the Legislature has explicitly addressed one set of circumstances in s. 43 – which deals with access requests at the public body stage – does not necessarily exclude the possibility of other, implicit authority to deal with abuses of the Part 5 process where an applicant repeats a request that was resolved by mediation under Part 5.

[36] As Gonthier J. noted in *Bell Canada* v. *Canada (Canadian Radio-television & Communications Commission)*, [1989] 1 S.C.R. 1722,

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the Act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

In that case, admittedly, the issue was whether the CRTC had a power ancillary to an express statutory power to make orders. Gonthier J.'s comments are, nonetheless, apposite in light of the scheme and substance of Part 5.

[37] The Federal Court of Canada has, moreover, confirmed that powers conferred by an enabling statute such as the Act include those expressly granted and, by implication, those that are reasonably necessary to achieve the legislative objective intended to be secured. See *Cdn. Broadcasting League* v. *Canadian Radio-television & Telecommunications Commission*, [1983] 1 F.C. 182 (appeal dismissed, [1985] 1 S.C.R. 174). There is also judicial authority for the proposition that an administrative tribunal has an implied power to counteract an abuse of process. In *Sawatsky* v. *Norris*, [1992] O.J. No. 1253 (Ont. C.J.), Misener J. observed, at p. 8, that a review board under the *Mental Health Act* (Ontario) "has the common law right to prevent abuse of its process, absent an express statutory abrogation of that right." Addy J. also commented on this possibility, in passing, in *Nisshin Kisen Kaisha Ltd.* v. *Canadian National*

Railway Co., [1981] F.C. 293 (T.D.) (aff. [1982] 1 F.C. 530 (C.A.), without discussion of this point). See, also, *Vogel* v. *Manitoba* (1992), 90 D.L.R. (4th) 84 (Man. Q.B.), and *S.G.E.U.* v. *Wascana Hospital* [1998] S.J. No. 286 (Sask. C.A.). The Federal Court of Appeal recently alluded to this issue, in *Kaloti* v. *Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 390, at paras. 10 and 11.

[38] In Ontario Order M-618, [1995] O.I.P.C. No. 385, Commissioner Wright held that, despite the absence of express statutory authority, he had the implied power under Ontario's *Freedom of Information and Protection of Privacy Act* to control a requester's abuse of his rights under that Act. He was dealing there with a requester's admitted attempt to harass and effectively shut down a police force's operations by (among other things) making hundreds of access requests. Commissioner Wright adverted to the practical necessity of controlling the process at both the request and appeal stages of the continuum.

[39] I concur with Commissioner Wright's concerns about ensuring that appeal processes – under our Act, the review and inquiry processes under Part 5 – do not bog down or waste public resources through abuses of process by applicants or public bodies. In light of the role and powers given to the commissioner under the Act, as well as the Act's structure and purpose, I conclude that I have the authority to control abuse of process in the context of reviews and inquiries under Part 5 of the Act.

[40] The integrity of the process for mediating requests for review made under Part 5 is important to the Act's efficient and fair functioning. Abuse of the review and inquiry processes under Part 5 of the Act calls that process into question. In the context of this case, it is also relevant, to my mind, that the remedies under s. 58(3) of the Act are discretionary. In my view, an abuse of process by the applicant is a proper factor to take into account when deciding whether to make an order under s. 58(3).

[41] I conclude that it is open to me, in an inquiry under Part 5, to decline to order a public body to process an access request where all of the following apply:

1. The present access request is, in substance, for the same records as a previous access request made by the same applicant to the same public body,
2. The previous access request was the subject of a request for review under Part 5 of the Act,
3. The previous request for review under Part 5 was settled or resolved by mediation by this Office under Part 5, and
4. The present applicant agreed to, or accepted the resolution or settlement of, the previous request for review through mediation by this Office under Part 5.

[42] This authority will be exercised in a way that respects the rights of access to information granted by the Act, especially in light of the legislative purposes set out in s. 2(1) of the Act. I expect there will be relatively few cases in which abuse of the Part 5 process warrants my intervention in the circumstances just described. Even in cases where the applicant agreed to or accepted the outcome of the earlier mediation, fairness

will be – to borrow a phrase – the touchstone in deciding whether a public body should, in effect, be excused from responding again to the same (previously mediated) access request. In such cases, I will consider whether, in fairness, the applicant should be held to the previous mediated outcome. It is not possible to exhaustively describe what is meant by 'fairness' in such cases. That determination will have to be made in light of the circumstances of each case.

[43] Having carefully considered the material filed in response to my invitation for further submissions, I have concluded that the applicant is now seeking to avoid her acceptance of the previous mediation's outcome by making a second, identical request, for the same record that she requested before. She does not appeal to any considerations that, in fairness, lead to the conclusion that she should be able to do so in this case.

[44] It does not, in my view, matter that the applicant may not have, in the strict sense, agreed to settle the previous review request in a legally binding way. I reject the applicant's contention that effect cannot be given to the previous mediation's outcome unless there was a clear and explicit agreement in writing to give up future rights. I am satisfied that the applicant accepted the outcome of the previous mediation, perhaps grudgingly. She has now simply changed her mind not long after she accepted the mediated outcome.

[45] Nor do I find the applicant's arguments persuasive that there are supposed technical deficiencies in SFU's final letter to her – in which it disclosed further information and referred to the mediated resolution of the case – which mean she should not be held to the previous outcome. The applicant's argument that the record in dispute is fairly brief, and that SFU will therefore not be overly burdened by having to respond a second time, carries some weight, but it does not carry the day.

[46] In the circumstances, the applicant's present pursuit of the review and inquiry process under Part 5 of the Act warrants my intervention. This decision does not mean a public body can avoid processing an access request simply because it repeats an earlier access request where no review was sought under Part 5 respecting that earlier request. That is the province of s. 43, which addresses "repetitious" or systematic access requests. The principle discussed above deals only with cases where a request duplicates an earlier access request that was resolved by mediation by this Office under Part 5. In the case of repeat requests, with or without previous mediation, it should be noted that a second request may have very different implications on its merits, including owing to the passage of time, changes in public body circumstances relevant to harm or changes in third-party circumstances relevant to harm. (The short time between the first and second requests in this case works against such a conclusion here.)

[47] For clarity, I emphasize that, in the rare case where a public body receives an access request that it believes warrants the commissioner's intervention on the basis outlined above, it is obliged to tell the applicant why it refuses to process the request and, consistent with s. 8(1)(c) of the Act, it must inform the applicant of her or his right to request a review under Part 5. If I ultimately find that the public body is not authorized

to refuse to respond on the basis outlined above, I will order it – under s. 58(3)(a) of the Act – to perform its duty to respond under Part 2 of the Act.

[48] **3.4 Has SFU Complied With its Statutory Obligations?** – In light of my finding above, I need not deal with whether SFU has complied with its obligations under ss. 6 and 8 of the Act.

4.0 CONCLUSION

[49] In light of my finding that the applicant's pursuit of the review and inquiry process under Part 5 of the Act is, in this case, an abuse of that process, no order is called for under s. 58(3) of the Act. SFU is not required to further process the applicant's second access request.

April 20, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia