OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order 03-18

BC HUMAN RIGHTS COMMISSION

Bill Trott, Adjudicator
April 30, 2003

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Summary: Applicants requested records from the Human Rights Commission about their complaint. Applicants requested, under the Act, that the Commission provide them with all the information submitted by the School District to the Commission during the course of the human rights investigation, which resulted in an investigation report. In addition, the applicants requested corrections in the investigation report. The Commission provided records. The applicants stated the Commission had not conducted an adequate search for records from the School District. Section 40 of the *Human Rights Code* operates to prohibit the application of the Act until the complaint is referred to a tribunal, dismissed, or is otherwise settled or withdrawn. The Commission met its obligation to assist the applicants and was not obligated to correct.

Key Words: duty to assist – adequacy of search – respond openly, accurately and completely – every reasonable effort; error – omission – accuracy – correction – annotation.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6 and 29; *Human Rights Code,* s. 40.

Authorities Considered: B.C.: Order 00-32, [2000] B.C.I.P.C.D. No. 35; Order 00-51, [2001] B.C.I.P.C.D. No. 55; Order 01-10, [2001] B.C.I.P.C.D. No. 11; Order 02-05, [2002] B.C.I.P.C.D. No. 5; Order 02-16, [2002] B.C.I.P.C.D. No. 16; Order 03-06, [2003] B.C.I.P.C.D. No. 6.

Cases Considered: *Human Rights Commission* v. *Human Rights Tribunal*, 2000 BCSC 1798; *West Fraser Mills Ltd. Dba Eurocan* v. *Rachel Thompson*, [2001] B.C.J. No. 1788, 2001 BCSC 1139; *Laprise* v. *British Columbia (Human Rights Commission)*, [1999] B.C.J. No. 1808 (QL) (S.C.); *MacKenzie* v. *Board of School Trustees, School District No. 48 (Howe Sound)*, [1997] B.C.J. No. 2271; 30 C.H.H.R.D./98 at D/100; *Domtar Inc*. v. *Quebec (CALP)*, [1993] 2 S.C.R.

756; *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, 2002 S.C.C. 53; [2002] S.C.J. No. 55.

1.0 INTRODUCTION

[1] The applicants are parents of a child who was formerly a student in a particular school district ("School District"). The child has learning disabilities. The applicants assert that special learning assistance was necessary for the student to enjoy an effective educational experience. They complained to the BC Human Rights Commission ("Commission") under the *Human Rights Code* ("Code"), alleging the School District had discriminated against the student by not providing special learning assistance. The Human Rights Officer ("HRO") assigned to investigate the matter issued an investigation report in 2000 ("Investigation Report").

[2] In a letter to the Commission dated June 5, 2000, the applicants requested that the report be rewritten to correct what they said were mistakes in the report. On January 12, 2001, the Commission's delegate under the Code told the applicants and the School District that, after considering the Investigation Report and the subsequent submissions (including the applicants' June 5, 2000 letter), the complaint would not be referred to the BC Human Rights Tribunal ("Tribunal") for a hearing and dismissed the applicants' complaint under s. 27(1)(c) of the Code. The delegate noted the applicants had expressed concerns about the Investigation Report, but said that his review led him to concur with it.

[3] On February 5, 2001, the applicants wrote to the Commission outlining their concerns about the delegate's January 12, 2001 letter and their concerns about facts in the Investigation Report. In doing so, the applicants referred to ss. 28 and 29 of the *Freedom of Information and Protection of Privacy Act* ("Act"). In addition, they requested, under the Act, that the Commission provide them with all the information submitted by the School District to the Commission during the course of the human rights investigation, which resulted in the Investigation Report**.** The Commission responded initially on February 26, 2001 and on March 9, 2001 when it stated that the applicants' remedy was to seek judicial review of the delegate's dismissal. On June 15, 2001, the Commission answered the request for information, but did not mention the request for correction. The Commission responded at that time by saying that,

> … in accordance with the Commission's disclosure policy, once a complaint has been disposed of under the Human Rights Code, full access to information contained in the complaint records will be granted to the parties of the complaint.

[4] The Commission advised the applicants of their right to request a review under the Act.

[5] In a letter dated July 13, 2001 the applicants requested a review by this Office of the Commission's decision of June 15, 2001, believing certain information was removed, missing or severed from the file before disclosure. The applicants stated in their request for review that they were concerned about ss. 28 and 29 of the Act. The applicants stated

they were making corrections to the Investigation Report and would submit those shortly. They requested that the Investigation Report with annotations be sent to all the parties.

[6] Because these matters did not settle in mediation, a written inquiry took place under Part 5 of the Act. As the delegate of the Information and Privacy Commissioner under s. 49(1) of the Act, I have dealt with this inquiry by making all findings of fact and law and any necessary order under s. 58 of the Act.

2.0 ISSUES

[7] The following issues arise here:

1. Do I have the jurisdiction to proceed with this inquiry?

2. If this inquiry has the jurisdiction to proceed, has the Commission, in accordance with s. 6(1) of the Act, made every reasonable effort to assist the applicants by conducting an adequate search for records and providing a complete response?

3. If this inquiry has the jurisdiction to proceed, is the Commission required under s. 29 of the Act to make the corrections requested by the applicants?

[8] The third issue encompasses the question of whether the Commission complied with its s. 29(2) obligation to annotate the applicants' personal information with the requested correction.

[9] In their initial submission, the applicants raised ss. 8(1)(c)(i) and (iii), 27(2)(a), (b) and (c), 28 and 34 of the Act. In its reply submission, the Commission objected to the applicants raising ss. 27(2)(a), (b) and (c), as they had not been set out in the notice of inquiry. I will deal with these submissions in the discussion below on jurisdiction.

[10] Previous orders have established that the public body has the burden of proving that it fulfilled its duty under s. 6(1) and also has the burden of proving that it has fulfilled its obligations under s. 29.

[11] The applicants objected to the inclusion of three records, which are attached to the Commission's initial submission, and of several paragraphs in the Commission's initial submission. The applicants objected that this material was from the mediation process this office conducted. The notice of inquiry states, at p. 2:

> If a party includes, without the written permission of the other party, any record generated by the Office of the Information and Privacy Commissioner during the mediation process, or a record provided by any party related to the mediation process, the Office will remove that mediation record from the submission and return it to the party submitting it. It will not form part of the record of proceedings before the Commissioner in the Inquiry.

[12] In accordance with this policy, two of these records were removed from the record of proceedings. The remaining record outlines the Commission's response to the applicants' request for annotations to the Investigation Report issued by the Commission. This record is dated January 5, 2002**.** I will address this issue and the paragraphs in the Commission's submission in the discussion below on jurisdiction.

3.0 DISCUSSION

[13] **3.1 Background to Inquiry** – On October 31, 1997 the applicants complained to the Commission that the School District had failed to plan for their son's medical and educational needs as well as his safety. This was classified as a complaint that the School District had discriminated against the student regarding a public service or facility because of his physical or mental disability, contrary to s. 8 of the Code. The Commission assigned a Human Rights Officer ("HRO") to investigate and sent the complaint to the School District which responded to it on January 26, 1998. The HRO issued an investigation report on May 15, 1998, recommending that the complaint be dismissed. Following submissions from the applicants and the School District, on February 26, 1999 the Commission dismissed the complaint. However, following a request for reconsideration, the Commission directed that a new HRO be assigned to investigate. This investigation led to the May 16, 2000 Investigation Report mentioned above. This report recommended that the complaint be dismissed.

[14] The applicants and the School District responded to the Investigation Report. On May 22, 2000, the applicants asked the Commission to provide "all private memos that [the] School District has submitted". The applicants listed five specific records mentioned in the Investigation Report. In a letter dated May 24, 2000, the Commission responded by providing a copy of a letter written by the applicants, but informed the applicants that s. 40 of the Code prohibited the Commission from disclosing the other information until the complaint had been referred to the Tribunal, dismissed or otherwise settled or withdrawn. In a letter dated June 5, 2000, the applicants requested that the HRO rewrite the Investigation Report, because of a number of alleged mistakes. The School District responded to the applicants' letter. On January 12, 2001, the Commission dismissed the complaint.

[15] In a letter dated February 5, 2001, the applicants set out what they considered to be a number of deficiencies in both the Investigation Report and the January 12, 2001 dismissal and requested another investigation. The applicants stated:

> … [w]hen these errors, omissions and false reports were brought to her [the HRO's] attention for corrections, as is warranted under section[s] 28 and 29, 'Accuracy of Personal Information' in the [Act], [the HRO] passed our complaint letter on to [the School District] for their opinion.

[16] The applicants said that, if the matter was concluded and the file closed, they were requesting access to "all information (including all memos and records of telephone conversations), submitted by the [School District], as is our right under the [Act]". The letter attached an "Appeal for Reconsideration of Decision – February 5, 2001."

[17] The Commission responded on March 9, 2001, refusing to grant another investigation and stating that the applicants' only option was to seek judicial review. The Commission responded again on June 15, 2001, providing "full access to information contained in the complaint record", in accordance with the Commission's disclosure policy. The disclosure included the specific records the applicants had requested on May 22, 2000. The Commission informed the applicants of their right to request a review under the Act.

[18] The applicants requested a review in a letter dated July 13, 2001. The applicants alleged they had not received all the records responsive to their request. They identified certain breaks in the recording of the file and requested access to records between certain dates. In addition, the applicants identified a number of records referred to in the disclosed records. The applicants stated they were concerned about the collection of personal information about their son from the applicants and the Ombudsman (from a previous complaint to that office) by the HRO and that the use of the information by the HRO was "neither accurate, complete or correct." The applicants stated that their requests for correction of the Investigation Report were ignored. The applicants stated they were making corrections to the Investigation Report and these would follow. They requested that the Investigation Report with annotations be sent to all parties concerned.

[19] **3.2 Background to the Human Rights Process –** As this matter concerns a search for and correction of records created during the investigation process under the Code, I will review the statutory framework for the process. It should be noted that the *Human Rights Code Amendment Act, 2002* has changed much of this framework. At all times relevant to this inquiry, however, the process was governed by the provisions of the Code in force prior to the 2002 amendments.

[20] The Code established two bodies – the Commission under s. 15 and the Tribunal under s. 31. The Code provided a complete statutory mechanism for the filing, investigation and adjudication of human rights complaints. The Commission was responsible for the investigation of complaints. The Commission would assign an HRO to investigate unless the matter could be disposed of without an investigation. Following an investigation, the issuance of an investigation report and an opportunity for the parties to respond, the Commission would decide whether to refer the complaint to the tribunal for a hearing under s. 26(4) of the Code or to dismiss the complaint under s. 27 of the Code.

[21] There was no statutory right of appeal of the Commission's decision to dismiss. The Commission explained at paras. 25 and 53 of its initial submission, however, that, in the absence of a statutory appeal to the Tribunal, it had developed a reconsideration policy. This policy had been subject to review by the British Columbia Supreme Court in *Human Rights Commission* v. *Human Rights Tribunal*, 2000 BCSC 1798. The Commission's "Information Sheet on the Reconsideration of Decisions" states that the purpose of a reconsideration was to correct a clerical error or accidental slip, to correct

a jurisdictional error, or where the interests of justice or fairness require a reconsideration.

[22] It is under the above-described processes and powers that the Commission investigated the applicants' complaint and reported its findings. These provisions also authorized the Commission to dismiss a complaint without referring it to the Tribunal. I do not need to quote those provisions, which I have considered in relation to the Commission's jurisdictional objection.

[23] The Code set out specific disclosure provisions. Section 26(4) of the Code required the Commission to provide the parties with a copy of an investigation report. Section 40 specifically limited the application of the Act to records obtained or received during the investigation stage:

> **Disclosure**
>
> 40(1) A member of the commission, a human rights officer or any person appointed, engaged or retained under section 17 must not be required in any proceedings or otherwise, except before the tribunal or in a judicial review concerning a complaint,
>
> (a) to give evidence, or
>
> (b) to produce records relating to information obtained or a communication received concerning a complaint.
>
> (2) A member of the tribunal or any person appointed, engaged or retained under section 33 must not be required in any proceedings or otherwise, except in a judicial review concerning a complaint,
>
> (a) to give evidence, or
>
> (b) to produce records relating to information obtained or a communication received concerning a complaint.
>
> (3) Subsections (1) and (2) apply despite any provision of the *Freedom of Information and Protection of Privacy Act,* other than section 44 (2) and (3) of that Act.
>
> (4) Despite subsection (3) but subject to subsection (5), the *Freedom of Information and Protection of Privacy Act* applies to information obtained or a communication received concerning a complaint but only after the complaint is
>
> (a) referred to the tribunal under section 26,
>
> (b) dismissed under section 27, or
>
> (c) otherwise settled or withdrawn.
>
> (5) The *Freedom of Information and Protection of Privacy Act,* other than section 44 (2) and (3), does not apply to information obtained or a communication received while assisting the parties to a complaint to achieve a settlement.

> (6) Subsections (3) and (5) do not apply to personal information, as defined in the *Freedom of Information and Protection of Privacy Act*, that has been in existence for 100 or more years or to other information that has been in existence for 50 or more years.

[24] Section 79 of the Act provides that, to the extent of any conflict or inconsistency between a provision of the Act and a provision of any other Act, the Act's provision prevails. It also provides, however, that if the other Act expressly provides that its provisions prevail over the Act, those other provisions prevail.

[25] **3.3 Jurisdictional Objection –** The Commission argues there is no jurisdiction to conduct an inquiry of the applicants' request for review of the issues under ss. 6 and 29 of the Act. It argues that the applicants seek remedies only available on judicial review. The Commission characterizes the applicants' request for review as a challenge to the "content and process of the investigation and the [Commission's] decision to dismiss the [applicants'] complaint" (initial submission, para. 70). The Commission argues that the applicants seek the records that "formed the observations, findings and conclusions reached by the [HRO]." This request, in the Commission's submission, is beyond the reach of any s. 6 duty. The Commission views the request for these records as tantamount to requesting that the Commission create other, new reports or the "production of a Supplemental Report or document" (Commission's initial submission, para. 72). The Commission says a court cannot, on judicial review, order a tribunal to create a new report. The Commission similarly submits that the applicants' request for correction of the Investigation Report under s. 29 of the Act amounts to seeking judicial review of the adequacy of the Commission's investigation and adjudication process.

[26] With respect to the Commission's jurisdictional argument, the applicants submit that the Commission is unclear whether a Supplemental Report exists or whether the Commission is saying that one would have to be created. The applicants argue that the Commission uses the words "production" and "create" interchangeably. The applicants state that it appeared to them that the Commission was using the word "production" when it may have meant disclosure. The applicants state, "if there are documents being withheld then they must be disclosed." If the Supplemental Report existed, then in the applicants' view, it must be disclosed under the Act. The applicants point out that their request "does not entail changing the documents into another form before disclosure." If there are records that the HRO gathered from the School District before writing the Investigation Report, those records should be disclosed. The applicants cite Order 00-32, [2000] B.C.I.P.C.D. No. 35, where the Commissioner found that the Ministry of Employment and Investment had interpreted a request too narrowly and considered a number of records outside the scope of the request.

Jurisdiction respecting adequacy of Commission's response

[27] The Commission relies on several cases to support its contention that the courts have laid down rigorous requirements before they will intervene with Commission

processes of the kind in issue here. It says these cases illustrate judicial deference to the Commission's processes and decisions and the applicants should not be allowed to use processes under the Act to achieve collaterally what they could not achieve in the courts. The Commission relies on *West Fraser Mills Ltd. Dba Eurocan* v. *Rachel Thompson*, [2001] B.C.J. No. 1788, 2001 BCSC 1139, at paras. 25-26 and 39; *Laprise* v. *British Columbia (Human Rights Commission)*, [1999] B.C.J. No. 1808 (QL) (S.C.); *MacKenzie* v. *Board of School Trustees, School District No. 48 (Howe Sound)*, [1997] B.C.J. No. 2271, 30 C.H.H.R.D./98 at D/100, para. 8 and *Domtar Inc*. v. *Quebec (CALP)*, [1993] 2 S.C.R. 756. As I understand the Commission's argument, it contends the applicants are trying to seek, through this inquiry, a remedy that is available only through judicial review, without having to meet the rigorous tests set down by the courts.

[28] In their February 5, 2001 letter to the Commission, the applicants requested the following information:

> Should this matter be concluded and the file closed; then this is notice that we request access to all information (including all memos and records of telephone conversations), submitted by the [School District], as is our right under the [Act].

[29] The Commission's June 15, 2001 response says the applicants' request was for "all information (including all memos and records of telephone conversations), submitted by the [School District]." This decision was signed by Peter Pang, Manager, Corporate Services Responsible for Access to Information.

[30] The initial request and the Commission's decision under the Act frame this review. The language of the Notice of Written Inquiry issued by this Office framed the issue as "records which formed the foundation for observations, findings and/or conclusions reached by the [HRO]." The origins of this wording are not apparent to me from the records before me. The Portfolio Officer's fact report, which this office issued to the parties, describes the request as being for:

> … all records which the public body had in its custody or control relating to the applicants' human rights complaint. In particular, the applicants sought and continue to seek, certain submissions by individuals who are referred to in the report.

[31] The applicants have identified a series of records in their request for review. The applicants identified records they sought, but which they believed had been removed or severed, as those provided by the School District, correspondence between the School District and the HRO or records indicating communication between the HRO and the School District. There is no mention of "records which formed the foundation for the observations, findings and/or conclusions reached by the [HRO]." The applicants' request for review and this inquiry are based upon the wording of the applicants' initial request for records. Whether these records in fact "formed the foundation" of the HRO's thinking should not frame the Commission's s. 6 duty. I think the applicants' intentions were, as explicitly stated in their access request, more modest.

[32] Turning to the Commission's jurisdictional argument, there is no dispute that the Commission is a public body under Schedule 2 of the Act. The initial question is whether the records fall within the wording of s. 40(4) of the Code, quoted above. Sections 40(1) and 40(2) prohibit an HRO (and others) from producing records relating to information obtained or a communication received concerning a complaint. Section 40(3) expressly states that these subsections apply despite the Act and, as s. 79 of the Act contemplates, this overrides the Act. The Code's override of the Act is, however, limited. Section 40(4) provides that the Act applies to information obtained or a communication received concerning a complaint in the following situations:

- After the complaint is referred to the tribunal under s. 26;
- After the complaint is dismissed under s. 27; or
- After the complaint is otherwise settled or withdrawn.

[33] The initial decision by the Commission, on February 26, 1999, was to dismiss the complaint. After a request from the applicants, the Commission decided to reconsider its original decision. The Commission pointed out in its initial submission that the reconsideration was based upon Commission policy, as there was nothing in the Code that provided for an appeal or review process. The Commission notes that this policy was reviewed and upheld by the courts. In this light, s. 40 of the Code operated to prevent the Act from applying during the reconsideration stage.

[34] The applicants' February 5, 2001 access request under the Act was made after the Commission's January 12, 2001 decision to dismiss the applicants' complaint, under s. 27(1)(c) of the Code, following the Commission's reconsideration of the complaint. The applicants argue that the actions of the Commission prior to the dismissal of the reconsideration should be subject to s. 6 of the Act. Section 40 prohibits the operation of s. 6 of the Act during that period. Therefore, the duties under s. 6 of the Act did not become engaged until after the January 12, 2001 decision to dismiss after reconsideration.

[35] I have interpreted s. 40 of the Code in light of the interpretation principles mentioned in, among other orders, Order 03-06, [2003] B.C.I.P.C.D. No. 6, at para. 23, which follows the approach mandated by the Supreme Court of Canada in *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, 2002 S.C.C. 53; [2002] S.C.J. No. 55. That approach applies to the Code as well as the Act. Further, the two statutes should be interpreted, wherever possible, in a manner that promotes harmony between them (especially since s. 40 of the Code explicitly relates to access to information matters and engages the Act).

[36] I have concluded that the Commission's dismissal of the complaint on January 12, 2001 triggered s. 40(4) of the Code, with the result that the Act applies to requests for records after that event. I read s. 40(4) as applying to all records created or received both before and after the triggering event. Section 40(3) holds the Act's application in

abeyance until the settlement or investigation process under the Code is complete. Once the Commission has completed that process, records in its files are subject to the provisions of the Act. Had the Legislature intended to exempt such records from the Act for all time, it would have said so explicitly.

[37] As I understand the Commission's objection, it is concerned that s. 6 of the Act would require it to produce or create a record. The request did not explicitly or implicitly ask the Commission to create records, a duty that can arise under s. 6(2) of the Act in relation to machine-readable records only. The applicants' request clearly related only to existing records submitted by the School District to the Commission as part of the Commission's processes under the Code. The request is straightforward and once the conditions of s. 40(4) of the Code were met, as they were by the January 5, 2001 letter, the Act applied to such records. The jurisdiction to conduct an inquiry under Part 5 of the Act flows from the applicants' access request under s. 4 of the Act (the February 5, 2001 letter) and the Commission's response under ss. 7 and 8 of the Act (the June 15, 2001 letter).

[38] The applicants also submit, however, that this inquiry should review the HRO's actions with respect to the applicants' request for information dated May 22, 2000. The applicants at that time asked the Commission to provide "all private memos that [the] School District has submitted." The applicants listed five specific records mentioned in the Investigation Report. In a letter dated May 24, 2000, the Commission responded by providing a copy of a letter written by the applicants, but informed the applicants that s. 40 of the Code prohibited the Commission from disclosing the other information until the complaint had been referred to the Tribunal, dismissed, or otherwise settled or withdrawn. The applicants submit that this inquiry should review the failure of the HRO to disclose all records of communications between the Commission and the School District during the investigation stage.

[39] The statement in the Commission's May 24, 2000 letter that s. 40 of the Code merely suspended the Act's application to records during the life of the processes under the Code is consistent with the interpretation of s. 40 set out above. At all events, since s. 40(4) of the Code ousts the operation of the Act during the investigation stage, there is no jurisdiction to review, in relation to s. 6 of the Act, the Commission's actions in 2000 in declining to respond to the May 22, 2000 request. In addition, the notice of inquiry identifies the June 5, 2000 letter as the request for information that gave rise to this inquiry. Given my finding on the operation of s. 40 of the Code, however, this inquiry therefore arises from, and relates solely to, the applicants' February 5, 2001 letter and the Commission's June 15, 2001 response.

Jurisdiction over request for correction

[40] The applicants state that they requested corrections in their June 5, 2000 letter and that the Commission did not respond. The Commission forwarded this letter to the School District, asking for a response, and the School District replied on June 26, 2000. Consistent with the above discussion regarding s. 6(1) of the Act and s. 40 of the Code,

I am satisfied that, before the Commission's January 12, 2001 decision to dismiss the applicants' complaint under the Code, the Act did not apply to the request for correction dated June 5, 2000 or to any Commission response up to January 12, 2001. I do not consider that the Commission's dismissal of the applicants' complaint somehow breathed life into any prior correction request or Commission response to such a request.

[41] The applicants also, however, requested corrections in their letter dated February 5, 2001. The applicants state the Commission's responses on February 26, 2001 and March 9, 2001 did not address their request for corrections.

[42] The Commission contends, again, that the applicants' request for correction is tantamount to an attempt to seek judicial review of the adequacy of the Commission's investigation and adjudication process. Consistent with what I have said above about the effect of s. 40, I accept that a request for correction under the Act prior to one of the conditions in s. 40(4) being met is premature and is not reviewable after the fact. However, once s. 40(4) is satisfied, all the provisions of the Act, including the right to request a correction of existing records, come into play. The Commission must respond to a request for correction made after the investigation process is complete, *i.e.*, after the protection of s. 40 is lost.

[43] There is, however, another aspect of the applicants' correction request that must be addressed. While the applicants' February 5, 2001 letter constituted a request for correction under the Act, the Commission's responses of February 26, 2001, March 9, 2001 and June 15, 2001 did not address the applicants' request for correction. Therefore, as of the date of the applicants' request for review, on July 13, 2001, the Commission had not made a decision on the request for correction.

[44] It appears to me that the only response from the Commission to the applicants' February 5, 2001 correction request was made just prior to the issuance of the Notice of Inquiry by this office. That response by the Commission is dated January 5, 2002. The applicants requested that I not review this record because they view it as related to mediation. It is clear, however, that this record constitutes the Commission's substantive response to the applicants' correction request made under the Act. It is not a mediation-related record in the sense intended by this office's policies and procedures. It was a decision by the public body exercising its powers, duties and functions under the Act. In a letter dated February 14, 2002 to the applicant and another to the Commission, the Registrar of Inquiries confirms that the January 5, 2002 document indicates what the public body had done in response to the request. It was on the basis of the January 5, 2002 decision, clearly, that the inquiry proceeded with respect to the correction request issue under s. 29. The parties have made submissions on the issue and I propose to consider it here.

[45] A few comments are in order here. Section 52(1) of the Act states that

> …a person who makes a request to the head of a public body…for correction of personal information may ask the commissioner to review any decision, act or failure to act of the head that relates to that request… .

[46] The review process in this case proceeded on the basis that the Commission made a decision under the Act with respect to the February 5, 2001 request for correction. This office would not normally accept a request for review where a public body had not made a decision under the Act, but in this case the operation of s. 40 of the Code appears to have muddied the waters somewhat at the outset.

Applicants' raising of other issues

[47] In addition, the applicants in their initial submission raise new arguments based upon ss. 8(1)(c)(i) and (iii), 27(2)(a), (b) and (c), 28 and 34, all with respect to the process of collecting information and the manner in which the HRO completed the Investigation Report. The Commission objects to the applicants raising the s. 27 issue after the notice of inquiry. There is, in my opinion, a more fundamental issue. The applicants' attempt to argue these sections of the Act is in fact an attempt to apply the Act to the Commission's investigative process itself, not to records created by it. In any case, s. 40 of the Code does not permit the application of the Act to actions of the Commission prior to the dismissal of January 12, 2001 and I do not therefore have the ability to consider these issues, which were also raised late and without notice to the Commission.

Conclusion on jurisdictional issues

[48] To summarize, I find that I have jurisdiction to consider whether the Commission complied with s. 6 of the Act with respect to the applicants' request for information dated February 5, 2001. In addition, I will review the Commission's January 5, 2002 response to the applicants' request for correction.

[49] **3.4 Duty to Assist** – The applicants requested "access to all information (including all memos and records of telephone conversations), submitted by the [School District]." As discussed above, this is the wording of the request and, for the purposes of this inquiry and the assessment of the public body's s. 6 duty, this is the wording which frames the issue before me as to the Commission's search and other obligations under s. 6(1).

[50] I have discussed the Commission's initial jurisdictional objection that the applicants in effect are attempting to require it to "produce" – which I take to mean 'create' – a record that it would not otherwise have to create. The s. 6(1) issue is, as noted above, restricted to the adequacy of the Commission's search for records that responded to the applicants' request. Further, the applicants' submissions here ask that this inquiry review the actions or failure of the HRO to act to disclose certain records or her reliance upon certain information. This line of inquiry is not open to me. This inquiry is, again, limited to the Commission's response to the February 5, 2001 request.

[51] The applicants' initial submission (at pp. 1-2) provides a summary of their s. 6 concerns. Under the title of "inadequate disclosure" they list the following points:

- The failure of [the HRO] to disclose all records and submissions by the School District concerning the Investigation Report in compliance with s. 6, nor give reasons in compliance with s. 8(1)(c)(i) and (iii), nor to exercise compliance in a timely fashion (s. 6).

- This failure to disclose and share all information that would be used in the [Investigation Report] by [the HRO] is not according to the principals [*sic*] of fairness and natural justice that both parties be privy to and able to weigh and make comment on such information. By not allowing us to make a submission, nor releasing the [School] District's submissions to us: [the HRO] fails to ensure that the information is accurate and complete, and is not in compliance with s. 28.

- [The HRO's] failure to disclose the memos submitted by the [School] District when we requested them after the [Investigation Report] was written impeded our ability to correct (s. 6).

- Disclosure fails to show what was or wasn't shared with the [School] District, as we had specifically requested that all third party information was to be treated as confidential and not shared with the District. [The HRO] fails to show that she protected our information by her response which shows non-compliance with ss. 22(3)(a) and (d). Disclosure also fails to show when retired [Superintendent] had ceased to be allowed access to our personal information.

[52] The applicants submit that the Commission's response to their February 5, 2001 request was inadequate. The applicants submit that the Commission has not provided all the records from the School District. In particular, the applicants submit that there are two undated reports by a "District Principal" mentioned in the Investigation Report and a report that the School District mentioned in a letter dated June 26, 2000. In addition, the applicants state that "some of the fax transmission [dated November 16, 23, and 26 from the School District] information was removed from the copies we received."

[53] In its initial submission the Commission states as follows at para. 74:

- The [applicants'] complaint file is kept in one file, pursuant to the Commission's policy to keep one file per complaint;

- The [applicants'] file was reviewed and a copy of the entire file was provided to the [applicants]

- All persons at the Commission who were connected with the [applicants'] complaint were contacted and asked if they had any documents associated with the file. All replied indicating that they did not have any documents.

[54] And at para. 78 it states:

> Commission complaint files are kept in one file. On June 15, 2001, the Commission sent the [applicants] a copy of the entire [applicants'] complaint file

> pursuant to their first request for the file. Subsequently, the Commission requested that all persons, who were involved in the [applicants'] file, search their records for any documents associated with the [applicants'] complaint. Everyone responded to that request. No additional records were found.

[55] Many orders under the Act have stated the standards public bodies must meet in searching for records. As the Commissioner said, for example, in Order 01-10, [2001] B.C.I.P.C.D. No. 11, a public body's search must be adequate. Although its search efforts need not be perfect, the search must be one that "a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive."

[56] I have reviewed the correspondence between the School District and the Commission contained in the set of records provided to this office. I have reviewed the mention of "reports" in the Investigation Report. The first is on p. 38 of the Investigation Report: "[The District Principal] stated that the School District has … ." The next reference is on p. 46: "[the District Principal] stated that the School District had … ." I have reviewed the wording in the report and the records in the file to provide some light on the statements in the report. The source for these comments is not clear in the report.

[57] The first of these two references occurs within the "Witness/Evidence" portion of the Investigation Report. It is noteworthy that all the references in the "Witness/Evidence" portion of the report are to reports or written documentation. Each section of this portion of the report begins with citing, in bold, the record's date, record description and author. This is the only reference in that portion of the report that does not appear to refer to a written record, but simply refers, in bold letters, to the School District Principal by name and position. Since this is the only instance where a report is not cited, I infer that no record indeed existed.

[58] The second reference is found in the portion of the report entitled "Analysis of Issues". In this section the HRO describes "the salient points that address the issues in this complaint." The description covers events and actions by the School District and the complainants. The analysis does not refer in all cases to specific records. The paragraph on p. 46 of the report does not refer to a record and does not state the source for the information. I am unable to conclude that a record existed or should have existed.

[59] The third reference is in a June 26, 2000 letter from the School District "[The District Principal] stands by her report to you regarding her conversation with [the family doctor]." The third reference I believe is in the context of the District's response to the applicants' response to the Investigation Report. The applicants were concerned about the HRO's reliance on information from the School District Principal about a conversation with the family doctor. There is a handwritten memo to file dated April 20, 1997 that describes a phone call between the School District Principal and the family doctor. This memorandum is quoted in full in the Investigation Report. The applicants objected to the HRO's reliance on this memo. The School District responded to that particular concern in its June 26, 2000 letter. Given the context of the June 26, 2000 letter and its specific reference to the portion of the applicants' letter listing their

concern, I take the School District's statement to refer to the April 20, 1997 memorandum and not to another record, yet to be found.

[60] In addition, the applicants state in their initial submission that they were concerned that they had not received the attachments to fax cover sheets dated November 16, 23, and 26 from the School District. In their initial submission the applicants state "we believe that the original fax transmissions will reveal that the memos were part of these submissions. Some of the fax transmission information was removed from the copies we received." I have reviewed each of these fax cover sheets and the attached pages. The fax page numbering sequence remains on the pages and all the attachments are accounted for in the records disclosed to the applicants. The applicants confirm in their letter requesting a review by this office that they believe they received all the pages from these fax transmissions.

[61] I am persuaded in the circumstances that the Commission searched in the locations where the responsive records would be expected to be found and that it has conducted an adequate search, thus meeting its s. 6(1) duty to the applicants.

[62] **3.5 Must the Commission Correct Personal Information?** – In their February 5, 2001 letter to the Commission, the applicants referred to what they contend are a number of "errors, omissions, and false reports" in the Investigation Report. (They also complained that the Commission's HRO passed on their request for corrections under s. 29 of the Act to the School District.) Their letter did not set out any specific requested corrections, but does refer to an earlier letter that the applicants provided to the Commission during its investigation of their complaint.

[63] The applicants do discuss the types of corrections sought in their July 13, 2001 request for review to this office. The "corrections" listed include concerns about how the HRO described the specific diagnosis of their son's medical condition and the means of controlling it. The applicants describe the corrections in their initial submissions in this inquiry as "regarding a medical condition and the resulting safety concerns and the learning disability." The applicants contend in their initial submission that the HRO made 76 errors of fact in the "analysis and recommendation" portion of the report and another 181 errors of fact in the investigation portion of the report. At another point in their initial submission, the applicants mention 222 errors of fact. The Commission in its initial submission says the s. 29 request alleges 366 "factual errors", which it describes as "questions and comments" and not requests for correction.

[64] The applicants argue in their initial submission that various Commission officials did not follow their responsibilities under the Act to correct personal information when the applicants pointed out errors. As I have discussed above, the Code prevented the Commission from making a decision under the Act until its investigative process was complete. The applicants invite me to reach behind the Commission's decision-making process under the Code and review the Commission's decisions prior to January 5, 2001. I cannot do this. These decisions were not made, and indeed could not have been made, under the Act.

[65] The applicants also request that the Commission annotate its original report. They argue in their reply submission that, since this would require so many annotations, the report should be rewritten, saying (at p.12):

> It is not a far stretch from destroying the document with annotations; then destroying the document. Simply annotating does not meet the requirements of s. 29(2). There is not physically enough space on the margins of the page for such an approach. It must be rewritten.

[66] The Commission takes the position that the requested corrections do not relate to personal information. It says, at p. 15 of its initial submission, that "the alleged errors deal with the nature and substance of the investigation. Most are embellishments, opinion or augmentation." The Commission states that it corrected two errors and added the applicants' annotated version of the Investigation Report to the Commission's file. The Commission argues that s. 29 covers "factual errors in personal information" not matters of opinion.

[67] I have taken the applicants' request for correction to be as set out in their annotated copy of the Investigation Report. That copy has hand-written numbers and typed notations corresponding to each of these numbers. The Commission's response to this document is its January 5, 2002 decision mentioned above.

[68] The Commissioner considered s. 29 in Order 02-16, [2002] B.C.I.P.C.D. No. 16, at para. 7:

> It is well-established that s. 29(1) only addresses factual errors or omissions in personal information. Section 29(1) is not intended to function as an avenue of appeal, or redress, for an individual who is disappointed by a decision or disagrees with it. The section does not require a public body to 'correct' opinions or any expressions of judgement based on facts and arrived at applying knowledge, skill and experience. See, for example, Order No. 124-1996, [1996] B.C.I.P.D. No. 51; Order 00-51, [2000] B.C.I.P.D. No. 55; Order 01-23, [2001] B.C.I.P.D. No. 24.

[69] The Commissioner also stated the following in Order 02-05, [2002] B.C.I.P.C.D. No. 5, at para.15:

> Section 29 allows an applicant to request correction of "personal information". It does not allow an applicant to ask that a public body change a form that it uses to record personal information. Nor is the Hospital under any duty, in this case, to revise the entries on the form by adding the wording as submitted by the applicants. The Hospital staff member who filled in the form used his professional judgement to record information that he needed to carry out his duties and it was appropriate, in my view, not to add the extraneous information the applicants requested.

[70] These and other orders dealing with s. 29 establish the following:

- s. 29 applies only to personal information;

- the right to request correction (s. 29(1)) is distinct from the duty to annotate (s.29 (2));

- the right to request correction applies only to factual errors or omissions, not to opinions or expressions of judgement; and

- the right to request correction does not entail a duty for the public body to correct, including by adding particular information requested by the applicant.

[71] I have reviewed the applicants' correction request, and the Commission's response, in light of the nature of the information in issue and the context within which it was created. The applicants' request includes as many as 330 requests for "corrections". The applicants invite me to review every request for correction against the original record. I have compared each request for correction against the report, the original record and the Commission's response. In general there are two types of corrections suggested by the applicants. The first is where they strike out a word or passage and seek to amend the wording. The second type is where they add facts, context, quotes and events to those listed in the report. The requested corrections include a number of slight editing changes, information the applicants consider should be added to the report and the identification of sources of information. Some of the requested corrections include adding text from assessment reports, where the HRO had selected certain texts or summarized the information. Other requested corrections include adding details, context, explanation, events, opinions and letters.

[72] Several of the corrections involve changing or altering the records that the HRO relied upon in the Investigation Report. The applicants submit that certain portions of the Investigation Report should be subject to correction because it had used "prediagnostic doctors' reports", omitted or misrepresented medical facts, relied on hearsay evidence and included quotes from investigative reports by the Ombudsman, which were not authorized by the Ombudsman. In addition, the applicants state they are concerned about the HRO's inclusion and reliance upon what they say were "false memos". In particular the applicants point out three memos in their initial submission which they believed were misleading. These are memos written by the School District Principal dated April 20, 1997, September 8, 1997 and September 9, 1997. They request that reference to the April 20, 1997 record in the Investigation Report be struck from the report. The applicants believe the memo is "false". They allege the date on the April 20, 1997 memo had been altered. Last, they allege the memos of September 8 and 9, 1997 were misleading. The Investigation Report quotes the April 20, 1997 memo in full and summarizes the other memos.

[73] These requests for correction deal with differences of opinion, interpretation of evidence or alteration of the evidentiary record upon which the HRO's work was based. They amount, in my view, to challenges of the HRO's actions in assembling and interpreting evidence and in stating findings or conclusions based on that evidence. Without addressing them here point-by-point, I am satisfied that the applicants' requested changes are not corrections of personal information as contemplated by s. 29 of the Act. These are not appropriate matters for correction. In large part, in my view, the applicants

seek to rewrite the report, the contents and conclusions of which clearly disappoint them. If the applicants wish to challenge the Investigation Report or other aspects of the Commission's handling of their complaint, their remedy is to seek judicial review, not re-write the Investigation Report using s. 29 of the Act. I find that the Commission has, in declining to make the requested corrections, performed its duty under s. 29.

[74] The remaining issue is whether the Commission has met its duty to annotate, under s. 29(2), by adding the applicants' annotated copy of the Investigation Report to the Commission's file. The applicants submit this is not sufficient. They state (at p. 12 of their reply submission) that "a corrected version" of the Investigation Report must exist in the place of the original. The applicants acknowledge that this requires a different approach to that taken by the Commissioner in Order 00-51, [2001] B.C.I.P.C.D. No. 55, as "it is beyond that type of correction." The applicants request that I order the Commission to destroy the original record.

[75] The Commissioner dealt with a request that he order destruction of a record in Order 02-05, where he said the following at para. 13:

> It was also entirely proper for the Hospital to refuse to destroy the medical report. Section 29 speaks to requests to correct personal information. The applicants provided no reason to justify destruction of this report and the Hospital was well within its rights to refuse to destroy it, especially when it might be used in the future for the son's health care.

[76] There is no basis whatsoever in s. 29(2) of the Act for a duty on the part of a public body to destroy a record as a means of supposedly annotating it. Destruction of a record and substitution of another in its place is not annotation. I find that the Commission's action of placing the annotated version on the file meets its s. 29(2) obligations under the Act.

[77] **3.6 Further Issues** – The applicants' initial and reply submissions raised the issue of the timeliness of the Commission's response to the applicants' letter dated May 22, 2000 seeking specific memos from the Commission's file (p. 1 and p. 6, respectively). In addition, the applicants argue the Commission did not meet its s. 6 duty to respond without delay with respect to the request for correction that they made on June 5, 2000 and July 6, 2000. As noted above, the February 5, 2001 request is the request for correction under the Act. The Commission's response is dated January 5, 2002 and was made during mediation.

[78] The issue is not identified in the Notice of Inquiry or in the Portfolio Officer's fact report. The Commission's initial and reply submissions do not address the issue. It is limited to the Commission's response to their access request, and not to the response for the corrections. I am not prepared to allow the applicants to raise these issues in this way. In any case, as found earlier, s. 40 of the Code means the Act does not apply to the activities of the Commission prior to the dismissal of the complaint on January 12, 2001. The timeliness of the Commission's response to the May 22, 2000 letter therefore cannot be addressed in this inquiry.

4.0 CONCLUSION

[79] For the reasons given above, under s. 58 of the Act, I confirm that the Commission has performed its duty to assist the applicants under s. 6(1) and its duties under s. 29 of the Act.

April 30, 2003

ORIGINAL SIGNED BY

Bill Trott
Adjudicator