

Citation: Minister of Small Business, Tourism and Date: 20000615  
Culture et al v. The Information and  
Privacy Commissioner of the Province of  
British Columbia et al  
2000 BCSC 929 Docket: 99 2641

Registry: Victoria

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

**IN THE MATTER OF THE JUDICIAL REVIEW PROCEDURE ACT, R.S.B.C. 1996, Chap. 241  
AND IN THE MATTER OF THE DECISION OF THE INFORMATION AND PRIVACY  
COMMISSIONER OF BRITISH Columbia (Order No. 308-1999), DAED MAY 7, 1999,  
MADE UNDER THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT,  
R.S.B.C. 1966, Chap. 165**

BETWEEN:

**MINISTER OF SMALL BUSINESS, TOURISM AND CULTURE AND THE ATTORNEY GENERAL OF  
BRITISH COLUMBIA**

PETITIONERS

AND:

**THE INFORMATION AND PRIVACY COMMISSIONER OF THE PROVINCE OF BRITISH COLUMBIA  
AND SVEND KJONG**

RESPONDENTS

**REASONS FOR JUDGMENT  
OF THE  
HONOURABLE MR. JUSTICE SHABBITS  
IN CHAMBERS**

Counsel for petitioners

J.M. Loenen

Counsel for the Information and Privacy  
Commissioner

S.E. Ross

The respondent S. Kjong  
Date and Place of Hearing:

S. Kjong - In person  
February 16, 2000  
Victoria, BC

[1] The petitioners apply for an order in the nature of certiorari, quashing that part of an order made by the Information and Privacy Commissioner for British Columbia ("the Commissioner"), dated May 7, 1999, which requires the Liquor Distribution Branch, Ministry of Small Business, Tourism and Culture (the "L.D.B.") to respond to Mr. Svend Kjong's request for access to a diary of one Virginia Fisher. Ms. Fisher is store manager of the L.D.B.'s facility in Powell River. Mr. Kjong's request for access to her diary was made under the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c 165 ("the Act").

[2] The facts giving rise to the petition are these: Mr. Kjong is a long-term customer of the L.D.B. store in Powell River. In recent years, Mr. Kjong's comments, correspondence and behaviour became a cause for concern for certain of the employees of the L.D.B., including Ms. Fisher, the store manager in Powell River. Ms. Fisher became concerned for her own safety, and communicated with the local RCMP about Mr. Kjong's actions. By March of 1998, Ms. Fisher came to the conclusion that Mr. Kjong was stalking her. She began to keep a handwritten diary about Mr. Kjong's behaviour. Ms. Fisher was not required by the L.D.B. to keep this diary. She maintained the diary so that she would have a personal record of what was happening. She maintained this diary for about three months. It is this diary which is the subject of this application. Mr. Kjong was eventually banned from the L.D.B. store in Powell River for 30 days. On September 11, 1998, Mr. Kjong made a written request to the L.D.B. for all information about him from the Powell River store. L.D.B. took the position that the store manager's diary was not a record within its custody and control, and therefore, was a record outside the scope of the Act. During the period of time that the diary was being maintained by Ms. Fisher, and at other times, Mr. Kjong's behaviour and conduct were formerly recorded in Branch Incident Reports and in the Store Log, which was a running account of events at the store.

[3] Section 3(1) of the Act provides that the Act applies to all records in the custody or under the control of a public body, but does not apply to certain records which are listed in section 3. None of the listed exceptions are of relevance to this application. Section 3(2) provides as follows:

The Act does not limit the information available by law to a party to a proceeding.

[4] The Commissioner found that that diary was a record in the custody or under the control of L.D.B. for the purposes of s. 3(1) of the Act, and under s. 58(3) (a), required the head of the L.D.B. to respond under ss. 4(2) and 8(1) of the Act to Mr. Kjong's request for access to the diary.

[5] I find that the L.D.B. is a public body and that the Act does apply to all records of the L.D.B. in its custody or under its control, including all such records within its Powell River store.

[6] In considering whether Ms. Fisher's diary was in the custody or under the control of the L.D.B., within the meaning of section 3 of the Act, the Commissioner considered both open submissions tendered by the petitioner as well as *in-camera* evidence.

[7] On May 7, 1999, the Commissioner issued order number 308-1999. It is that order which has led to this application for judicial review. In dealing with Ms. Fisher's diary, the Commissioner found that the diary was a record which the L.D.B. had under its "control" within the meaning of section 3 of the Act. In so finding, he said this:

I have read all of the store manager's twelve pages of handwritten entries, prepared over the course of three months, about the behaviour of the applicant in this inquiry. (I regret that I cannot describe the diary and its circumstances in greater detail without revealing *in camera* submissions.) It is evident that

she was keeping this "record" about a customer in the context of her employment as store manager of this particular store. I note that there is nothing in the "diary" about anything other than the series of episodes involving this applicant, which makes it quite an unusual "diary" in the normal sense of the term. It is a record pertaining to a particular customer and various employees of the Liquor Distribution Branch. The record was created within the employment relationship and for purposes related to the store manager's role. As such, the Liquor Distribution Branch has the legal right to obtain a copy of the record to respond to this request under the Act.

I find that the store manager's diary is a record under the Act and is in the custody, or under the control, of the Liquor Distribution Branch. The Liquor Distribution Branch must now apply the exceptions under the Act to this record and then provide the applicant with a decision regarding its disclosure.

#### **STANDARD OF REVIEW**

[8] The issue on this application is whether the record created by Ms. Fisher, that being her "diary", was a document within the custody or under the control of the L.D.B. The Commissioner's fact finding giving rise to his ruling is not at issue. The dispute is solely whether the diary was a record within the scope of section 3.

[9] The interpretation of section 3 is a question of law.

[10] In *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)* 1999 O.J. No.4072, Mr. Justice O'Connor, who delivered the judgment of the Ontario Court of Appeal, adopted this analysis of the law (paragraph 20)

The single issue before the Inquiry Officer was whether the backup tapes were records to which there was a right of access within the meaning of s.10 (1) of the Act. That section limits the jurisdiction of the Board. Records in the custody or under the control of an institution are subject to the access provisions in the Act. Records that are not fall outside the scope of the Act. This court has held that a decision by the Commissioner or his designate under s.10(1) of the Act is to be reviewed on a standard of correctness, not reasonableness: *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.). The reasoning behind this decision was threefold: section 10(1) is jurisdiction limiting; the interpretation of the "custody or control" test does not require specialized expertise; and there is no privative clause.

[11] I am of the opinion that in determining whether the Commissioner's order in respect of the diary should be set aside, that the standard of review is whether he was correct in ruling that the diary was either within the custody or under the control of the L.D.B.

#### **CUSTODY AND CONTROL OF THE STORE MANAGER'S DIARY**

[12] The Commissioner noted that an applicant could only obtain access, under the Act, to a record that was within the custody or under the control of a public body.

[13] The Commissioner accepted that custody of records requires more than that the records be located on particular premises.

[14] The Commissioner accepted that in order for a public body to have custody of records, the public body must have immediate charge and control of the records, including some legal responsibility for their safe keeping, care, protection or preservation.

[15] The Commissioner noted that "custody" in the Act reflects a choice by the Legislature to limit the Act's application to "government" records, and not to personal records of employees that happen to be located on public body premises.

[16] The Commissioner accepted that in order for a public body to have control over a record, the public body must have a legal right to obtain a copy of the record.

[17] I have concluded that the crux of the Commissioner's decision, was his determination that the L.D.B. had a legal right to obtain a copy of the store manager's diary. When deciding that L.D.B. had a legal right to obtain a copy of the diary, the Commissioner noted that the diary was a record relating to a particular customer's dealings with various employees of the L.D.B., and included nothing other than entries relating to a series of episodes involving Mr. Kjong. These two observations relate to what is within the document at issue. They do not provide an answer to the question as to whether the L.D.B. has a legal right to obtain a copy of the record.

[18] In my opinion, an analysis of the Commissioner's reasons disclose that he considered that the L.D.B. had a legal right to obtain a copy of the record, for the reason that Ms. Fisher kept the "record" about a customer in the context of her employment as store manager of the Powell River store, and for the reason that the record was created within the employment relationship and for purposes related to the store manager's role.

[19] In ***Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*** supra, the Ontario Court of Appeal determined that backup audio tapes prepared by a court reporter at disposition hearings before the Ontario Criminal Code Review Board were under the control of the Board, giving rise to a right of access under the Ontario *Freedom of Information and Protection of Privacy Act*. The Ontario Court of Appeal found that Board could legally require the production of those backup tapes to it. Mr. Justice O'Connor noted that the Review Board was required to keep a record of its proceedings, and that those records included stenographic tapes and court reporter's notes. He concluded that whatever materials a court

reporter chose to produce in connection with making an accurate record, was part of that record. That included backup audio tapes and that was so, even though the court reporter was not required to have backup audio tapes recorded. He said that it was not an answer to say that some court reporters do not employ a backup system to assist with the accuracy of a record. The sole purpose for creating backup tapes was to keep an accurate record. He concluded that the Board must have access to all of the records prepared by a court reporter in the event that an issue arose about the accuracy of either the record or a transcript. It was for those reasons that he decided that the Ontario Privacy Commissioner was correct in concluding that the Ontario Criminal Code Review Board had a legal right to require production to it of the backup tapes.

[20] In **Neilson v. Office of the Information and Privacy Commissioner (Board of School Trustees School District No. 5 -South East Kootenay, intervenor)** Vancouver Registry No. A962846; July 8, 1999, Madam Justice Dorgan considered whether notes kept by a school counsellor were notes within the custody or control of the Cranbrook School District. The school counsellor's notes were kept by her in her personal note books, and stored at her residence when not in use during counselling sessions with students. They were not intended to be used by or provided to any person or body other than the school counsellor. The school counsellor submitted that the nature of her work required confidentiality, and that she had ethical obligations regarding confidentiality.

[21] Madam Justice Dorgan concluded that the counsellor's notes were within the control of the school board. She referred to **Canada Post Corporation v. Canada (Ministry of Public Works)** 1995 30 admin L.R. (2d) 242, and noted that a broad, liberal, purposive approach to the interpretation of access to information legislation is to be taken. Madam Justice Dorgan said this at paragraph 31 and 35:

The petitioner argues that she is not required by the Principal, the School District, or the Minister of Education, to maintain her raw notes. However, as a counsellor and as a teacher within the School district, she is required to write reports in respect of the children she counsels. Presumably, such reports are prepared in part by relying on the notes she keeps and therefore the notes are implicitly required to be taken and retained.

In my view, the facts in this case support the correctness of the Commissioner's finding that the counsellor's disputed notes are under the control of the School District as contemplated by the Act. The petitioner counsellor is not an independent contractor; she is an employee of the School District. During the course of her employment she makes notes. These notes are relied upon in the preparation of school records, which preparation is a requirement of her employment. The notes are created by an employee of a public body and used to make periodic reports, possession of which is held by the public body.

[22] It appears to me from Mr. Kjong's submissions that he intends to commence legal proceedings for relief against Ms. Fisher personally. That may partially explain Mr. Kjong's interest in obtaining a copy of her diary. Ms. Fisher's concern that she might personally become involved in legal proceedings involving Mr. Kjong may also explain why she kept a diary relating to her involvement with Mr. Kjong.

[23] I have come to the conclusion that Ms. Fisher's diary is not a record either within the custody or under the control of the L.D.B. Although it is true that the record was created by Ms. Fisher during her employment as a store manager of the L.D.B., the record was created by Ms. Fisher not in fulfillment of any employment duty, but as an aid memoir relating to her personal involvement with Mr. Kjong.

[24] Unlike the school counsellor's records in *Rae Neilson v. B.C. (I.P.C.) supra*, the diary was never used or intended to be used by Ms. Fisher for any purpose related to her employment. The diary was not used by her for the preparation of the Branch Incident Reports, nor was it used for the preparation of entries in the Store Log. Had Ms. Fisher used her diary for those purposes, her employer, the L.D.B., could have compelled her to produce the diary in order to verify the accuracy of the Branch Incident Reports and the Store Log. That, however, was neither the reason for the making of the diary, nor the manner in which it was used.

[25] The decision to maintain a diary or record, was solely that of Ms. Fisher. What she included within it was entirely of her own choosing. The L.D.B. had no authority to regulate or control her use or disposition of the diary. I see no basis on which the L.D.B. had a legal right to obtain a copy of Ms. Fisher's diary. I am of the opinion that the store manager's diary has never been in the custody or in the control of the L.D.B., nor has the L.D.B. ever had the right to compel its production. The diary is not a record within the scope of section 3 of the Act.

[26] As I noted earlier, the Act does not limit disclosure of information, which is compellable in other proceedings. In my opinion, it is the rules which relate to such disclosure, which should determine the nature and extent of disclosure of Ms. Fisher's diary.

[27] I am of the opinion that the application must be allowed. I so order.

[28] The material in front of me included an in-camera affidavit of Helga Driedger sworn February 14, 2000. That affidavit shall be placed in an envelope within the file of these proceedings marked, "No Search". The contents of the envelope are not to be disclosed, other than by order of a Master or a Judge of this court.

"S.J. Shabbits, J."  
The Honourable Mr. Justice S.J. Shabbits

June 26, 2000 -- Corrigendum issued by Mr. Justice Shabbits advising that Paragraph 27 inadvertently mis-states the finding of the court. The paragraph should read:

"I am of the opinion that the application must be allowed. I so order."