

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)**

BETWEEN:

**INFORMATION AND PRIVACY COMMISSIONER OF ONTARIO
(DIANE SMITH, ADJUDICATOR)**

APPELLANT
(Respondent)

AND

MINISTER OF FINANCE FOR THE PROVINCE OF ONTARIO

RESPONDENT
(Appellant)

AND BETWEEN:

JOHN DOE, REQUESTER

APPELLANT
(Respondent)

AND

MINISTER OF FINANCE FOR THE PROVINCE OF ONTARIO

RESPONDENT
(Appellant)

AND:

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OFFICER] FOR NOVA SCOTIA, INFORMATION AND PRIVACY COMMISSIONER
OF PRINCE EDWARD ISLAND, BRITISH COLUMBIA FREEDOM OF
INFORMATION AND PRIVACY ASSOCIATION, INFORMATION AND PRIVACY
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INTERVENERS

**FACTUM OF THE INTERVENER, THE BRITISH COLUMBIA FREEDOM OF
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(pursuant to rules 42 and 55 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW OF THIS INTERVENER’S POSITION

1. Indisputably, “Parliament or a provincial legislature is often well advised to allocate an administrative decision to someone other than a judge.”¹ The assignment of adjudicative responsibilities to an administrative decision-maker allows for specialization, innovation and initiative.² When a court on judicial review fails to accord deference to such a tribunal’s determination of a matter, and substitutes its own views, this serves to retard the often flexible and progressive impetus of the legislature’s chosen scheme. It is violative of legislative supremacy.

2. All parties before the Court are agreed that the present case attracts a “reasonableness” standard of review. With respect, however, neither the parties nor the Court of Appeal appear to embrace the deferential approach that standard entails. While this Court has recognized that there may be multiple valid interpretations of a statutory provision, the parties focus on the “true” construction of s. 13(1) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).³

3. The British Columbia Freedom of Information and Privacy Association (“BC FIPA”) takes the position that access to information legislation, such as in Ontario and British Columbia, fulfils a particularly critical role in nourishing our democracy. It creates specialized tribunals, which are independent of government, yet which enjoy quantitative and qualitative experience with the *workings of government*. The Commissioners are officers of the legislature⁴ and are undeniably expert as concerns the interpretation and application of the various exceptions to access rights.

4. The Adjudicator in the present case relied on a body of prior administrative decisions. Her reasons are transparent and intelligible, providing ample justification for the result she reached. The reversible error here was the Court of Appeal’s. Much like its British Columbia counterpart did in *College of Physicians*,⁵ the Court of Appeal in the present case misconceived its role in the

¹ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 123, [2008] 1 S.C.R. 190, Binnie J. (“*Dunsmuir*”) [BC FIPA Book of Authorities (“FIPA BOA”), Tab 8].

² See, P.W. Hogg, *Constitutional Law of Canada*, vol. 1, loose-leaf, 5th ed. Supplemented (Toronto: Carswell, 2007) at 7-43 and 7-44 [FIPA BOA, Tab 25]; *Dunsmuir*, at para. 49 [Appellants’ Joint Book of Authorities (“JBOA”), vol. 1, Tab 11].

³ R.S.O. 1990, c. F.31. See, e.g.: Factum of Appellant John Doe (“John Doe Factum”), para. 54; Factum of Appellant Commissioner (“OIPC Factum”), para. 36; Respondent’s Factum, para. 37.

⁴ FIPPA, s. 4(1); *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (“BC Act”), s. 37(2).

⁵ *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (“*College of Physicians* (BCCA)”) [JBOA, vol. 1, Tab 8].

administrative process. It adopted an unjustifiably court-centric stance and engaged in a probing review of the Adjudicator's decision. Ultimately, the court substituted its own views of the legislative purpose and "the role of the civil service" for those of the expert tribunal.⁶

5. On judicial review, an Information Commissioner's adjudicative expertise is exchanged for the perspective of a non-specialist judge. When the court then asserts its own preferred interpretation of access legislation (or determination of a particular access request), it denies not only the Commissioner's expertise but also the adjudicative scheme set up by the legislature. To the extent that different judges may emphasize different contextual factors on review, certainty and predictability in the law suffer.⁷ Moreover, in practical terms, more aggressive judicial intervention serves to increase the costs borne by the access requester, who must decide whether to retain counsel for assistance in navigating the court system. All of this is retrograde, and ought not to be countenanced. This intervener, then, submits that this appeal is another in the line of administrative law cases where the Court must reiterate the concept of deference.

PART II – POSITION WITH RESPECT TO THE APPELLANTS' QUESTIONS

6. The Appellants' questions (and the Respondent Minister's response) focus on the "correct" interpretation of s. 13(1). BC FIPA submits, however, that the proper question is whether the Adjudicator's interpretation of s. 13(1) was *reasonable*. If it was, then the Court of Appeal had no basis to intervene on judicial review, and its decision must be set aside.

PART III – STATEMENT OF ARGUMENT

A. Introduction

7. The relevant background to this case can be stated in what BC FIPA submits are three uncontroversial propositions.

⁶ *Ontario (Finance) v. Ontario (Information and Privacy Commissioner)*, 2012 ONCA 125, 109 O.R. (3d) 757 ("ONCA Reasons") at para 17 [**Joint Record of Appellants ("JR"), vol. 1, Tab 6, at 60**].

⁷ This Court has striven to explain that reasonableness reviews are of consistent intensity: e.g. *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 47, [2011] 3 S.C.R. 654, Rothstein J. ("*Alberta Teachers*") [**FIPA BOA, Tab 2**]. However, reasonableness is essentially a contextual inquiry (*Dunsmuir*, at para 64, Bastarache and LeBel JJ. [**FIPA BOA, Tab 8**]; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para 59, [2009] 1 S.C.R. 339, Binnie J. [**FIPA BOA, Tab 4**]), which gives reviewing judges a potentially broad discretion to determine what factors they deem apposite to the review.

- (i) Access to information legislation serves to facilitate the democratic process and can be described as “quasi-constitutional” in nature.⁸
- (ii) The creation of the office of the Information and Privacy Commissioner, and the decision to place adjudicative power over disclosure of government information in the Commissioner’s hands, represent sovereign choices of the legislature.⁹
- (iii) The Commissioner and her delegates have significant experience and expertise with the workings of the constituting legislation.

8. It is similarly uncontroversial that the Adjudicator’s decision in the present case is entitled to curial deference, and that the appropriate standard of review is “reasonableness”.¹⁰ But to the extent that there may be consensus between the parties as to what a reasonableness review entails, BC FIPA submits that they – like the court below – suppose an approach (a) that merges with “correctness” and (b) that fails to take the legislature’s choice, and this Court’s administrative law jurisprudence, into account.

B. Lessons from *Dunsmuir* and Its Progeny Have Not Been Fully Absorbed

9. Five years after this Court’s judgment in *Dunsmuir* and almost two years after *Alberta Teachers*, there can be no dispute that “reasonableness” describes the default standard of review for an administrative decision-maker working within its “home statute”. At the same time, however, the present case stands as another example of lingering uncertainty with the *practical application* of deference in the judicial review context. This Court’s further guidance would be of assistance.

10. The message of *Dunsmuir* is that the superior courts, sitting in judicial review of administrative decision-makers, are required to “be sensitive ... to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.”¹¹ In this connection, “the courts do not have a monopoly on deciding all questions of law”; recognition of this fact serves to affirm legislative

⁸ See: *FIPPA*, s. 1(a); *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para 61, La Forest J. (dissenting, but not on this point) [Appellants’ Joint Book of Authorities (“JBOA”), vol. 1, Tab 9]; *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23 at para. 1, [2010] 1 S.C.R. 815 [JBOA, vol. 1, Tab 21]; *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 22, [2012] 1 S.C.R. 23 [JBOA, vol. 1, Tab 13]; John Doe Factum, paras. 16, 59, 82-87; OIPC Factum, paras. 1, 38-41; Respondent’s Factum, paras. 40-45, 95.

⁹ *FIPPA*, ss. 1(a), 4, 8, 52-54. See also BC Act, ss. 2(1), 37, 41-44.2, 56-58.

¹⁰ See: *Alberta Teachers*, at para. 39, Rothstein J. [FIPA BOA, Tab 2].

¹¹ *Dunsmuir*, at para. 27, Bastarache and LeBel JJ. [FIPA BOA, Tab 8].

supremacy and rein in “the court-centric conception of the rule of law”.¹²

11. *Dunsmuir* explains that, where the reasonableness standard applies, the court’s appreciation of and sensitivity to the administrative process is manifested through a review that focuses primarily on “the existence of justification, transparency and intelligibility within the decision-making process.”¹³ Indeed, since the decision in *Dunsmuir*, this Court has repeatedly reviewed administrative decisions through the lenses of justification, transparency and intelligibility.¹⁴

12. Justice Abella, for a unanimous Court, synthesized the proper approach in *Nurses’ Union*:

In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show “respect for the decision-making process of adjudicative bodies with regard to both the facts and the law” (*Dunsmuir*, at para. 48). This means that courts should not substitute their own reasons, but they may, if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.

Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees’ International Union, Local No. 333 v. Nipawin District Staff Nurses Ass.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

The fact that there may be an alternative interpretation of the [legal instrument] to that provided by the [decision-maker] does not inevitably lead to the conclusion that the [decision-maker’s] decision should be set aside if the decision itself is in the

¹² *Dunsmuir*, at para. 30, Bastarache and LeBel JJ., citing Hon. T.A. Cromwell, “Appellate Review: Policy and Pragmatism”, in *2006 Pitblado Lectures, Appellate Courts: Policy, Law and Practice* (Winnipeg: Law Society of Manitoba, 2006) V-1 at V-12. See also *Dunsmuir*, at para. 125, Binnie J.: “It is sometimes said by judges that an administrator acting within his or her discretion ‘has the right to be wrong’. This reflects an unduly court-centred view of the universe. *A disagreement between the court and an administrator does not necessarily mean that the administrator is wrong.*” (Emphasis added.) [FIPA BOA, Tab 8].

¹³ *Dunsmuir*, at para. 47 [JBOA, vol. 1, Tab 11].

¹⁴ See, e.g.: *Khosa*, at para 59, Binnie J. [FIPA BOA, Tab 4]; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at para. 62, [2011] 1 S.C.R. 160, Fish J. [FIPA BOA, Tab 24]; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59 at para. 58, [2011] 3 S.C.R. 616 [FIPA BOA, Tab 12]; *Alberta Teachers*, at para. 72, Rothstein J. [FIPA BOA, Tab 2]; *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras. 11-13, [2011] 3 S.C.R. 708 (“*Nurses’ Union*”) [FIPA BOA, Tab 11]; *Halifax (Regional Municipality) v. Canada (Public Works and Government Services)*, 2012 SCC 29 at para. 44, [2012] 2 S.C.R. 108 [FIPA BOA, Tab 9].

realm of reasonable outcomes. Reviewing judges should pay “respectful attention” to the decision-maker’s reasons, and be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful.¹⁵

13. Stated otherwise, “the reviewing court must consider the tribunal’s decision as a whole, in the context of the underlying record”¹⁶ and ask “whether there was any reasonable basis on the law or the evidence” for the conclusion reached.¹⁷ The Court of Appeal failed to follow this approach. It defined the issue in a manner that ignored the administrative expertise and that permitted what was essentially a *de novo* consideration of that same issue.

C. “Court-Centric” Characterization of the Issue & Denial of Tribunal Experience/Expertise

14. The Court of Appeal either (a) mischaracterized the Adjudicator’s reasons or (b) misunderstood the administrative process, when it described the Adjudicator as having relied upon Court of Appeal jurisprudence in this case.¹⁸

15. Appreciated in their entirety, the Adjudicator’s reasons did not turn on a simple interpretation or application of the two earlier Court of Appeal judgments.¹⁹ Rather, the Adjudicator relied on a body of prior decisions issuing from the Commissioner’s office.²⁰ In this, the reasons in this case rest on a wealth of institutional expertise concerning the theoretical and practical facets of access to information law, including a rich appreciation for what s. 13(1) means, and how it finds application to government records.

16. The statutory scheme is, at least mechanically, straightforward. *FIPPA* provides for a broad right of access, and states expressly that exemptions from that right should be both limited and

¹⁵ *Nurses’ Union*, at paras. 15-17 [FIPA BOA, Tab 11]. See also: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 51-53 (“*Agraira*”) [FIPA BOA, Tab 1].

¹⁶ *Agraira*, at para 53 [FIPA BOA, Tab 1].

¹⁷ *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10 at para. 45, [2012] 1 S.C.R. 364 [FIPA BOA, Tab 10]. See also: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65 at para 3 [FIPA BOA, Tab 7].

¹⁸ ONCA Reasons, at para. 1 [JR, vol. 1, Tab 6, at 53].

¹⁹ *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.) (“*MOT*”) [JBOA, vol. 1, Tab 19] and *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2005] O.J. No. 4048 (C.A.) (“*MNDM*”) [JBOA, vol. 1, Tab 17].

²⁰ Order PO-2872 (18 February 2010) at 4-9 [JR, vol. 1, Tab 2, at 7-12] and Reconsideration Order PO-2899-R (5 July 2010) at 16- 18 [JR, vol. 1, Tab 3, at 38-40].

specific.²¹ Section 13 provides that, subject to express exceptions,²² government may refuse disclosure of a record that “would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.”²³

17. “Advice” and “recommendations” are superficially broad terms. Depending on the context, they may take on a range of different meanings.²⁴ This highlights the value of the Commissioner’s everyday experience with the legislative regime. In that connection, a review of the Appellant Commissioner’s decisions indicates that, since the late 1980s, she has issued over 500 orders involving the interpretation or application of s. 13(1). Only a fraction of those decisions have been the subject of judicial review. On a purely quantitative plain, then, the Commissioner has considerably more experience with s. 13(1) – both in terms of its interpretation and its application to different types of government records – than do the courts.

18. Qualitatively, and employing a purposive interpretation of s. 13(1), the Commissioner established several significant propositions regarding the scope of the exception as early as 1989: (i) “advice or recommendations” should be interpreted with a view to whether disclosure could reasonably be expected to inhibit the free flow of information to policy-makers and decision-makers within the government;²⁵ (ii) to qualify as “advice or recommendations”, information must have

²¹ *FIPPA*, s. 1(a); BC Act, ss. 2(1)(a), (c).

²² *FIPPA*, s. 13(2); BC Act, s. 13(2).

²³ *FIPPA*, s. 13(1). See, to similar effect: BC Act, s. 13(1).

²⁴ To the non-expert, the terms may also appear to bleed into one another. As Owen-Flood J. held in *College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 726 at para. 133, 90 B.C.L.R. (3d) 299 (“*College of Physicians (BCSC)*”) [**FIPA BOA, Tab 5**], rev’d by *College of Physicians (BCCA)* [**JBOA, vol. 1, Tab 8**]:

[T]he distinction between “advice” and “recommendations” can be difficult to describe with clarity. In Samuel Beckett’s *Waiting for Godot*, (New York: Random House, 1954) Estragon would be giving Vladimir “advice” if he said, “Vladimir, I have considered at length the life you lead on this bitch of an earth, and I am of the opinion that you should hang yourself tomorrow.” However, Estragon would be providing Vladimir with a “recommendation” if he proposed the following: “Vladimir, I have tested the willow’s branch and I am sure that your neck will break before it does. I suggest that you reinforce the branch, find a stepladder so that you can reach it, and proceed with the hanging tomorrow at sundown.”

²⁵ Order 94, *Ministry of Labour*, [1989] O.I.P.C. No. 58 at p. 3 [**JBOA, vol. 1, Tab 24**]. See also Order PO-2028, *Ministry of Northern Development and Mines*, [2002] O.I.P.C. No. 103 at para. 31 [**JBOA, vol. 1, Tab 32**], upheld on judicial review in *MNDM* [**JBOA, vol. 1, Tab 17**].

been demonstrably communicated from one person to another;²⁶ and (iii) generally speaking, advice and recommendations “pertai[n] to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process”.²⁷

19. Over time, the Commissioner has had the opportunity to apply s. 13(1) to various fact patterns and in respect of a wide variety of records. Her office has accordingly developed particular experience applying the above propositions and others, and in drawing reasonable distinctions between documents that are properly characterized as “advice or recommendations” and those that are not.²⁸ In the course of her decisions on the matter, the Commissioner has flatly rejected the argument, repeatedly advanced by public bodies, that any expressions of opinion by a public employee on a policy-related matter constitute that employee’s “advice or recommendations”.²⁹

20. In this vein, the Commissioner has significant exposure to, and experience with, the arguments advanced by public bodies to justify withholding records from disclosure under s. 13(1). Nevertheless, the Respondent Minister submitted below that the Commissioner “fundamentally misconceive[d] the role of the civil service”; the Court of Appeal’s acceptance of that submission is essentially an *a priori* denial of the empirical knowledge and expertise that the Commissioner clearly developed and exercised in keeping with the legislative scheme.³⁰

21. The Adjudicator’s reliance on the existing body of administrative decisions was entirely reasonable in this case. The decisions embody the Commissioner’s expertise and reinforce the appropriateness of curial deference. The fact that the Court of Appeal upheld two of the prior

²⁶ Order 94 at p. 3 (QL) [**JBOA, vol. 1, Tab 24**]. See also: Order 58, *Ministry of Labour*, [1989] O.I.P.C. No. 22 at p. 6 (QL) [**FIPA BOA, Tab 14**]; Order 92, *Ministry of Labour*, [1989] O.I.P.C. No. 56 at p. 4 (QL) [**FIPA BOA, Tab 15**]; Order P-1341, *Ontario Human Rights Commission*, [1997] O.I.P.C. No. 32 at para. 19 [**JBOA, vol. 1, Tab 30**].

²⁷ Order 118, *Ministry of Transportation*, [1989] O.I.P.C. No. 81 at p. 3 (QL) [**JBOA, vol. 1, Tab 25**]; Order P-632, *Stadium Corporation of Ontario Limited*, [1994] O.I.P.C. No. 60 at p. 3 (QL) [**FIPA BOA, Tab 19**]; Order PO-2028 at paras. 13-29 [**JBOA, vol. 1, Tab 32**], upheld on judicial review in *MNDM* [**JBOA, vol. 1, Tab 17**].

²⁸ Order P-278, *Ministry of Financial Institutions*, [1992] O.I.P.C. No. 22 at pp. 5-6 (QL) [**FIPA BOA, Tab 17**]; Order P-398, *Ministry of Health*, [1993] O.I.P.C. No. 8 at p. 2 (QL) [**FIPA BOA, Tab 18**]; Order P-872, *Ministry of Community and Social Services*, [1995] O.I.P.C. No. 79 at pp. 2-3 (QL) [**FIPA BOA, Tab 20**]; Order PO-1690, *Ministry of the Environment*, [1999] O.I.P.C. No. 87 at paras. 5-13 [**FIPA BOA, Tab 21**]; Order PO-2355, *Ontario (Ministry of the Environment)*, [2004] O.I.P.C. No. 305 at paras. 9-36 [**FIPA BOA, Tab 23**].

²⁹ See e.g.: Order PO-1993, *Ministry of Transportation*, [2002] O.I.P.C. No. 29 at paras. 81-82 [**FIPA BOA, Tab 22**], upheld on judicial review in *MOT* [**JBOA, vol. 1, Tab 19**].

³⁰ ONCA Reasons, paras. 15, 17 [**JR, vol. 1, Tab 6, at 59-60**]. See also Respondent’s Factum, para. 71.

decisions does not make it *per se* unreasonable for the Adjudicator to refer or rely on the broader wealth of Commissioner’s decisions. Nor do the two earlier Court of Appeal decisions negate the Commissioner’s experience or transform her role.

22. This Court recently confirmed in *CEPU* that consistency in arbitral adjudication is “a valuable benchmark against which to assess” the reasonableness of a particular decision.³¹ As the dissenting Justices in that case noted:

Respect for prior arbitral decisions is not simply a nicety to be observed when convenient. On the contrary, where arbitral consensus exists, it raises a presumption – for the parties, labour arbitrators, *and the courts* – that subsequent arbitral decisions will follow those precedents. Consistent rules and decisions are fundamental to the rule of law.³²

BC FIPA submits that the same logic necessarily applies to other administrative decision-makers, such as the various Information Commissioners across Canada. An approach that is blind to a consistent body of administrative decisions and that perceives only judicial pronouncements is not consonant with deference as explained in this Court’s cases.

D. Perceived Incorrectness as Unreasonableness

23. Having defined the issue as the interpretation and application of the two Court of Appeal judgments, Rosenberg J.A. held that “the Adjudicator misinterpreted and misapplied the decisions of this court with the result that she arrived at an unreasonable decision.”³³ With respect, this is simply “incorrectness” going by the label “unreasonableness”.

24. At numerous points in its judgment, the Court of Appeal presented issues in binary form, as if there were but one right answer. For instance, the Court analyzed the parties’ approaches for “consisten[cy] with the holdings in *MOT* and *MNDM*”: the Minister’s was found to be consistent, the Adjudicator’s not.³⁴ Likewise, the Court provided what it clearly took to be the proper (correct) interpretation of s. 13(1).³⁵ Nowhere in the judgment is there any acknowledgement “that there

³¹ *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at para. 6, Abella J. (“*CEPU*”). See also *ibid.*, para. 16 [**FIPA BOA, Tab 6**].

³² *CEPU*, at para. 78, Rothstein and Moldaver JJ. [emphasis added]. See also *ibid.*, paras. 75-77, 79 [**FIPA BOA, Tab 6**].

³³ ONCA Reasons, at para. 2 [**JR, vol. 1, Tab 6, at 53**].

³⁴ ONCA Reasons, at para. 17 [**JR, vol. 1, Tab 6, at 60**].

³⁵ ONCA Reasons, paras. 25-30 [**JR, vol. 1, Tab 6, at 65-67**].

might be multiple valid interpretations” of s. 13(1) or multiple “answers to [the] legal dispute”³⁶ over the disclosability of the documents at issue.

25. With respect, the judgment of the Court of Appeal in the present case is a “textbook illustration” of a court purporting to apply a reasonableness standard of review, but instead substituting its own views for those of the administrative actor tasked by the legislature to determine the issue. It recalls Justice Binnie’s warning in *Dunsmuir* that reviewing judges may (wrongly) understand reasonableness as “an invitation ... to reweigh the input that resulted in the administrator’s decision as if it were the judge’s view of ‘reasonableness’ that counts.”³⁷

26. In British Columbia, the Court of Appeal’s judgment in *College of Physicians*³⁸ presents a striking parallel. To the extent that the Respondent Minister presently seeks to draw guidance from that case,³⁹ its efforts are misplaced. Rather, the B.C. case illustrates what may befall a legislative scheme when reviewing courts permit “relitigation” and substitute their own views.

E. *College of Physicians and Surgeons of British Columbia*

27. The B.C. Information Commissioner in the *College of Physicians* case applied his experience and specialized knowledge to interpret the “advice or recommendations” exception. He found it inapplicable to the records before him.⁴⁰ The first judicial review court, although (erroneously) applying a non-deferential correctness standard to the Commissioner’s interpretation, nevertheless found no basis for intervention.⁴¹ The Court of Appeal reversed.

28. The Court of Appeal’s judgment reflects a bygone era in administrative law. The reasons do not engage those provided by the B.C. Commissioner, but present the Court’s own perspective.⁴²

³⁶ *Dunsmuir*, at para. 41 [JBOA, vol. 1, Tab 11].

³⁷ *Dunsmuir*, at para. 141, Binnie J. [FIPA BOA, Tab 8].

³⁸ *College of Physicians* (BCCA) [JBOA, vol. 1, Tab 8].

³⁹ See Respondent’s Factum, paras. 56, 77, 86 and 108.

⁴⁰ Order 00-08, *College of Physicians and Surgeons of British Columbia*, [2000] B.C.I.P.C.D. No. 8 at paras. 139-52 [FIPA BOA, Tab 13].

⁴¹ *College of Physicians* (BCSC), at paras. 120-30. The Court also held that the Commissioner’s application of s. 13(1) to the facts met the applicable “reasonableness *simpliciter*” standard: see paras. 120-21, 131-32 [FIPA BOA, Tab 5].

⁴² *College of Physicians* (BCCA), at paras. 103-13 [JBOA, vol. 1, Tab 8]. What is more, in approaching that task, the Court of Appeal proceeded mechanically, as if statutory interpretation were the mere application of prescriptive strictures rather than a more contextual and nuanced process that might lead to a range of reasonable outcomes.

The upshot of the decision was to insert the (more access restrictive) judicial interpretation into the administrative process. While that would be appropriate and desirable if the Commissioner had come to an unreasonable decision, such was not the case in *College of Physicians*. Indeed, while courts in British Columbia now accept (a) that the Court of Appeal applied a correctness standard of review in *College of Physicians* and (b) that the Commissioner is in fact properly entitled to deference in her interpretation and application of s. 13,⁴³ they have nevertheless been reluctant to reconsider *College of Physicians*. The Commissioner and courts are now bound by that case's broad interpretation of the s. 13 exception to disclosure⁴⁴ – contrary to that which the Commissioner reached through her own experience and expertise – leaving access requesters in the perverse (and practically impossible) position where, to advocate for a more restrictive interpretation, they must show that the Commissioner was unreasonable in relying on the Court of Appeal decision.

29. The B.C. and Ontario Commissioners interpreted s. 13(1) as protecting a critical, but narrow, aspect of the governmental deliberative process. This reasonably allowed public servants to provide advice or recommendations freely and candidly, while ensuring that the exception is not overbroad or susceptible to manipulation. BC FIPA submits that the Commissioners' decisions were, in fact, correct. That is not, however, the issue. Respect for the rule of law and legislative supremacy requires the courts to show deference to the tribunals' expertise, and to intervene only in cases where they have acted unreasonably. Neither in *College of Physicians* nor here was there a basis for intervention: the reasonableness of the Commissioners' approaches merits this Court's endorsement.

PART IV – SUBMISSIONS ON COSTS

30. BC FIPA does not seek costs and asks that no costs be ordered against it.

PART V – ORDER SOUGHT

31. BC FIPA seeks leave to present oral argument not exceeding ten minutes at the hearing.

DATED: 17 July 2013


Brent B. Olthuis


Andrea A. Glen

Counsel for the Intervener, BC FIPA

⁴³ *B.C. Freedom of Information and Privacy Assn. v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 1162 at paras. 22, 34, 16 Admin. L.R. (5th) 268 (“*FIPA*”) [FIPA BOA, Tab 3].

⁴⁴ See: Order F09-02, *Re British Columbia (Ministry of Labour and Citizens' Services)*, [2009] B.C.I.P.C.D. No. 3 at para. 13 [FIPA BOA, Tab 16], upheld on judicial review in *FIPA* [FIPA BOA, Tab 3].

PART VI – TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph(s)</u>
<i>Agraira v. Canada (Public Safety and Emergency Preparedness)</i> , 2013 SCC 36	12, 13
<i>Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association</i> , 2011 SCC 61, [2011] 3 S.C.R. 654	5, 8, 9, 11
<i>B.C. Freedom of Information and Privacy Assn. v. British Columbia (Information and Privacy Commissioner)</i> , 2010 BCSC 1162, 16 Admin. L.R. (5th) 268	28
<i>Canada (Citizenship and Immigration) v. Khosa</i> , 2009 SCC 12, [2009] 1 S.C.R. 339	5, 11
<i>College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)</i> , 2001 BCSC 726, 90 B.C.L.R. (3d) 299	17, 27
<i>College of Physicians and Surgeons of British Columbia v. British Columbia (Information and Privacy Commissioner)</i> , 2002 BCCA 665	4, 17, 26, 28
<i>Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.</i> , 2013 SCC 34	22
<i>Construction Labour Relations v. Driver Iron Inc.</i> , 2012 SCC 65	13
<i>Dagg v. Canada (Minister of Finance)</i> , [1997] 2 S.C.R. 403	7
<i>Dunsmuir v. New Brunswick</i> , 2008 SCC 9, [2008] 1 S.C.R. 190	1, 5, 9-12, 24, 25
<i>Halifax (Regional Municipality) v. Canada (Public Works and Government Services)</i> , 2012 SCC 29, [2012] 2 S.C.R. 108	11
<i>Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)</i> , 2012 SCC 10, [2012] 1 S.C.R. 364	13
<i>Merck Frosst Canada Ltd. v. Canada (Health)</i> , 2012 SCC 3, [2012] 1 S.C.R. 23	7
<i>Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)</i> , 2011 SCC 62, [2011] 3 S.C.R. 708	11, 12
<i>Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals</i> , 2011 SCC 59, [2011] 3 S.C.R. 616	11
<i>Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)</i> , [2005] O.J. No. 4048 (C.A.)	15, 18, 24
<i>Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)</i> , [2005] O.J. No. 4047 (C.A.)	15, 19, 24

<i>Ontario (Public Safety and Security) v. Criminal Lawyers' Association</i> , 2010 SCC 23, [2010] 1 S.C.R. 815	7
Order 00-08, College of Physicians and Surgeons of British Columbia, [2000] B.C.I.P.C.D. No. 8	27
Order 118, <i>Ministry of Transportation</i> , [1989] O.I.P.C. No. 81	18
Order 58, <i>Ministry of Labour</i> , [1989] O.I.P.C. No. 22	18
Order 92, <i>Ministry of Labour</i> , [1989] O.I.P.C. No. 56	18
Order 94, <i>Ministry of Labour</i> , [1989] O.I.P.C. No. 58	18
Order F09-02, <i>Re British Columbia (Ministry of Labour and Citizens' Services)</i> , [2009] B.C.I.P.C.D. No. 3	28
Order P-1341, <i>Ontario Human Rights Commission</i> , [1997] O.I.P.C. No. 32	18
Order P-278, <i>Ministry of Financial Institutions</i> , [1992] O.I.P.C. No. 22	19
Order P-398, <i>Ministry of Health</i> , [1993] O.I.P.C. No. 8	19
Order P-632, <i>Stadium Corporation of Ontario Limited</i> , [1994] O.I.P.C. No. 60	18
Order P-872, <i>Ministry of Community and Social Services</i> , [1995] O.I.P.C. No. 79	19
Order PO-1690, <i>Ministry of the Environment</i> , [1999] O.I.P.C. No. 87	19
Order PO-1993, <i>Ministry of Transportation</i> , [2002] O.I.P.C. No. 29	19
Order PO-2028, <i>Ministry of Northern Development and Mines</i> , [2002] O.I.P.C. No. 103	18
Order PO-2355, <i>Ontario (Ministry of the Environment)</i> , [2004] O.I.P.C. No. 305	19
<i>Smith v. Alliance Pipeline Ltd.</i> , 2011 SCC 7, [2011] 1 S.C.R. 160	11
<u>Secondary Sources</u>	
P.W. Hogg, <i>Constitutional Law of Canada</i> , vol. 1, loose-leaf, 5th ed Supplemented (Toronto: Carswell, 2007) at 7-43 and 7-44	1

PART VII – CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Freedom of Information and Protection of Privacy Act, RSO 1990, c F.31

Purposes

1. The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public,

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government[.]

[...]

**PART I
ADMINISTRATION**

Information and Privacy Commissioner

4. (1) There shall be appointed, as an officer of the Legislature, an Information and Privacy Commissioner to exercise the powers and perform the duties prescribed by this or any other Act.

Appointment

(2) The Commissioner shall be appointed by the Lieutenant Governor in Council on the address of the Assembly.

Term and removal from office

(3) The Commissioner shall hold office for a term of five years and may be reappointed for a further term or terms, but is removable at any

Loi sur l'accès à l'information et la protection de la vie privée, LRO 1990, c F.31

Objets

1. La présente loi a pour objets :

a) de procurer un droit d'accès à l'information régie par une institution conformément aux principes suivants :

(i) l'information doit être accessible au public,

(ii) les exceptions au droit d'accès doivent être limitées et précises,

(iii) les décisions relatives à la divulgation de l'information ayant trait au gouvernement devraient faire l'objet d'un examen indépendant du gouvernement[.]

[...]

**PARTIE I
APPLICATION DE LA LOI**

Commissaire à l'information et à la protection de la vie privée

4. (1) Il est nommé en qualité de fonctionnaire de la Législature un commissaire à l'information et à la protection de la vie privée qui exerce les attributions que lui confère la présente loi ou toute autre loi.

Nomination

(2) Le commissaire est nommé par le lieutenant-gouverneur en conseil sur adresse de l'Assemblée.

Mandat et destitution

(3) Le mandat du commissaire est d'une durée de cinq ans et peut être reconduit plusieurs fois. Sur adresse de l'Assemblée, le lieutenant-

time for cause by the Lieutenant Governor in Council on the address of the Assembly.

Assistant Commissioners

(4) From the officers of the Commissioner's staff, the Commissioner shall appoint one or two Assistant Commissioners and may appoint an Assistant Commissioner of Personal Health Information.

Nature of employment

5. (1) The Commissioner shall work exclusively as Commissioner and shall not hold any other office under the Crown or engage in any other employment.

Not a public servant

(2) The Commissioner is not a public servant within the meaning of the *Public Service of Ontario Act, 2006*. [...]

Staff

8. (1) Subject to the approval of the Lieutenant Governor in Council, the Commissioner may employ mediators and any other officers and employees the Commissioner considers necessary for the efficient operation of the office and may determine their salary and remuneration and terms and conditions of employment. [...]

**PART II
FREEDOM OF INFORMATION**

ACCESS TO RECORDS

Right of access

10. (1) Subject to subsection 69(2), every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

(a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or

gouverneur en conseil peut cependant destituer le commissaire en tout temps pour un motif valable.

Commissaires adjoints

(4) Le commissaire nommé, parmi les membres de son personnel, un ou deux commissaires adjoints et il peut nommer un commissaire adjoint aux renseignements personnels sur la santé.

Nature du poste

5. (1) Le commissaire se consacre exclusivement à ses fonctions. Il ne peut exercer d'autres fonctions pour la Couronne ni occuper d'autre poste.

Non un fonctionnaire

(2) Le commissaire n'est pas un fonctionnaire au sens de la *Loi de 2006 sur la fonction publique de l'Ontario*. [...]

Personnel

8. (1) Sous réserve de l'approbation du lieutenant-gouverneur en conseil, le commissaire peut engager les médiateurs, les fonctionnaires et les autres employés qu'il estime nécessaires au fonctionnement efficace du bureau et fixer leur traitement et leur rémunération ainsi que leurs conditions d'emploi.

**PARTIE II
ACCÈS À L'INFORMATION**

ACCÈS AUX DOCUMENTS

Droit d'accès

10. (1) Sous réserve du paragraphe 69 (2), chacun a un droit d'accès à un document ou une partie de celui-ci dont une institution a la garde ou le contrôle, sauf dans l'un ou l'autre des cas suivants :

a) le document ou la partie du document fait l'objet d'une exception aux termes des articles 12 à 22;

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

b) la personne responsable est d'avis, fondé sur des motifs raisonnables, que la demande d'accès est frivole ou vexatoire.

Severability of record

(2) If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions. [...]

EXEMPTIONS

Advice to government

13. (1) A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

Exception

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

- (a) factual material;
- (b) a statistical survey;
- (c) a report by a valuator, whether or not the valuator is an officer of the institution;
- (d) an environmental impact statement or similar record;
- (e) a report of a test carried out on a product for the purpose of government equipment testing or a consumer test report;

Extrait du document

(2) Si une institution reçoit une demande d'accès à un document qui contient des renseignements faisant l'objet d'une exception aux termes des articles 12 à 22 et que la personne responsable de l'institution n'est pas d'avis que la demande est frivole ou vexatoire, elle divulgue la partie du document qui peut raisonnablement en être extraite sans divulguer ces renseignements. [...]

EXCEPTIONS

Conseils au gouvernement

13. (1) La personne responsable peut refuser de divulguer un document qui aurait pour effet de révéler les conseils ou les recommandations émanant d'un fonctionnaire, d'une personne employée par une institution ou d'un expert-conseil dont les services ont été retenus par cette institution.

Exceptions

(2) Malgré le paragraphe (1), la personne responsable ne doit pas refuser, en vertu de ce paragraphe, de divulguer un document qui comporte l'un des éléments suivants :

- a) de la documentation portant sur des faits;
- b) un sondage statistique;
- c) le rapport d'un estimateur, que ce dernier soit ou non un dirigeant de l'institution;
- d) un rapport sur d'éventuelles répercussions sur l'environnement ou un document semblable;
- e) le rapport qui porte sur l'essai d'un produit relié à la mise à l'épreuve de pièces d'équipement appartenant au gouvernement ou le résultat d'un test mené

(f) a report or study on the performance or efficiency of an institution, whether the report or study is of a general nature or is in respect of a particular program or policy;

(g) a feasibility study or other technical study, including a cost estimate, relating to a government policy or project;

(h) a report containing the results of field research undertaken before the formulation of a policy proposal;

(i) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program, whether or not the plan or proposal is subject to approval, unless the plan or proposal is to be submitted to the Executive Council or its committees;

(j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;

(k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

(l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise

à l'intention des consommateurs;

f) le rapport ou le résultat d'une étude relative au rendement ou à l'efficacité d'une institution, que ce rapport ou cette étude soient d'ordre général ou portent sur un programme ou une politique en particulier;

g) une étude de faisabilité ou autre étude technique, y compris une estimation des coûts, reliée à une politique ou à un projet gouvernementaux;

h) le rapport qui comporte les résultats d'une recherche effectuée sur le terrain préalablement à la formulation d'une politique proposée;

i) la proposition ou le plan définitifs en vue de la modification d'un programme existant ou de l'établissement d'un nouveau programme d'une institution, y compris son estimation budgétaire, que cette proposition ou ce plan soient subordonnés ou non à une approbation quelconque, sauf s'ils doivent être présentés au Conseil exécutif ou à ses comités;

j) le rapport du groupe de travail d'un comité interministériel ou d'une entité semblable ou celui d'un comité ou d'un groupe de travail internes d'une institution chargés de dresser un rapport sur une question précise, sauf si ce rapport doit être présenté au Conseil exécutif ou à ses comités;

k) le rapport d'un comité, d'un conseil ou d'une autre entité liés à une institution et constitués dans le but de mener des enquêtes suivies de rapports ou de recommandations destinés à cette institution;

l) les motifs à l'appui de la décision, de l'arrêté, de l'ordonnance, de l'ordre ou de la directive définitifs du dirigeant d'une

of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,

- (i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person, or
- (ii) were given by the officer who made the decision, order or ruling or were incorporated by reference into the decision, order or ruling.

Idem

(3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy. [...]

ACCESS PROCEDURE

Request

24. (1) A person seeking access to a record shall,

- (a) make a request in writing to the institution that the person believes has custody or control of the record;
- (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
- (c) at the time of making the request, pay the fee prescribed by the regulation for that purpose. [...]

institution et rendus à la fin ou au cours de l'exercice d'un pouvoir discrétionnaire conféré par un texte législatif ou un projet mis en application par cette institution, ou en vertu de ceux-ci, qu'il soit permis ou non aux termes du texte législatif ou du projet d'interjeter appel de ces décisions, arrêtés, ordonnances, ordres ou directives. Ce qui précède s'applique, que ces motifs :

- (i) figurent ou non dans une note de service qui émane de l'institution ou dans la lettre d'un dirigeant ou d'un employé de cette institution, destinée à une personne donnée,
- (ii) aient été ou non exposés par le dirigeant qui a rendu cette décision ou directive ou cet ordre que ces motifs y soient incorporés par renvoi ou non.

Idem

(3) Malgré le paragraphe (1), la personne responsable ne doit pas refuser, en vertu de ce paragraphe, de divulguer un document si le document date de plus de vingt ans ou si la personne responsable l'a publiquement cité comme ayant servi de fondement à une décision ou à la formulation d'une politique. [...]

PROCÉDURE D'ACCÈS

Demande

24. (1) L'auteur de la demande d'accès à un document :

- a) s'adresse par écrit à l'institution qui, à son avis, a la garde ou le contrôle du document;
- b) fournit les détails suffisants permettant à un employé expérimenté de l'institution, à la suite d'une démarche normale, d'identifier le document;
- c) au moment de présenter la demande, verse les droits prescrit par les règlements à cette fin. [...]

**PART IV
APPEAL**

**PARTIE IV
APPELS**

Right to appeal

50. (1) A person who has made a request for,

(a) access to a record under subsection 24 (1);

[...]

...may appeal any decision of a head under this Act to the Commissioner.

Fee

(1.1) A person who appeals under subsection (1) shall pay the fee prescribed by the regulations for that purpose.

Time for application

(2) An appeal under subsection (1) shall be made within thirty days after the notice was given of the decision appealed from by filing with the Commissioner written notice of appeal.

Immediate dismissal

(2.1) The Commissioner may dismiss an appeal if the notice of appeal does not present a reasonable basis for concluding that the record or the personal information to which the notice relates exists.

Non-application

(2.2) If the Commissioner dismisses an appeal under subsection (2.1), subsection (3) and sections 51 and 52 do not apply to the Commissioner.

Notice of application for appeal

(3) Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned of the notice of appeal and may also inform any other institution or person with an interest in the appeal, including

Droit d'appel

50. (1) La personne qui a présenté une demande, selon le cas :

a) d'accès à un document aux termes du paragraphe 24 (1);

[...]

...peut interjeter appel devant le commissaire de toute décision de la personne responsable.

Droits

(1.1) La personne qui interjette appel en vertu du paragraphe (1) verse les droits prescrits par les règlements à cette fin.

Délai imparti

(2) L'appel aux termes du paragraphe (1) est interjeté par le dépôt auprès du commissaire d'un avis d'appel écrit, dans les trente jours de l'avis de la décision qui en fait l'objet.

Rejet immédiat

(2.1) Le commissaire peut rejeter l'appel si l'avis d'appel ne présente aucun motif valable qui permet de conclure que le document ou les renseignements personnels auxquels l'avis se rapporte existent.

Non-application

(2.2) Si le commissaire rejette l'appel visé au paragraphe (2.1), le paragraphe (3) et les articles 51 et 52 ne s'appliquent pas au commissaire.

Avis d'appel

(3) Dès la réception de l'avis d'appel, le commissaire en informe la personne responsable de l'institution concernée et peut en informer toute autre institution ou personne qui a un intérêt dans l'appel, y compris une

an institution within the meaning of the *Municipal Freedom of Information and Protection of Privacy Act*, of the notice of appeal.

Ombudsman Act not to apply

(4) The *Ombudsman Act* does not apply in respect of a complaint for which an appeal is provided under this Act or the *Municipal Freedom of Information and Protection of Privacy Act* or to the Commissioner or the Commissioner's delegate acting under this Act or the *Municipal Freedom of Information and Protection of Privacy Act*.

Mediator to try to effect settlement

51. The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal.

Inquiry

52. (1) The Commissioner may conduct an inquiry to review the head's decision if,

(a) the Commissioner has not authorized a mediator to conduct an investigation under section 51; or

(b) the Commissioner has authorized a mediator to conduct an investigation under section 51 but no settlement has been effected.

Procedure

(2) The *Statutory Powers Procedure Act* does not apply to an inquiry under subsection (1).

Inquiry in private

(3) The inquiry may be conducted in private.

institution au sens de la *Loi sur l'accès à l'information municipale et la protection de la vie privée*.

La Loi sur l'ombudsman ne s'applique pas

(4) La *Loi sur l'ombudsman* ne s'applique pas à la plainte qui peut faire l'objet d'un appel en vertu de la présente loi ou de la *Loi sur l'accès à l'information municipale et la protection de la vie privée*. Il en est de même du commissaire ou de son délégué lorsqu'ils exercent leurs fonctions en vertu de la présente loi ou de la *Loi sur l'accès à l'information municipale et la protection de la vie privée*.

Tentative de règlement par le médiateur

51. Le commissaire peut autoriser un médiateur à enquêter sur les circonstances qui entourent l'appel et à tenter de parvenir au règlement de la question qui en fait l'objet.

Enquête

52. (1) Le commissaire peut mener une enquête afin de réexaminer la décision de la personne responsable dans l'un ou l'autre des cas suivants :

a) il n'a pas autorisé un médiateur à mener l'enquête visée à l'article 51;

b) il a autorisé un médiateur à mener l'enquête visée à l'article 51, mais aucun règlement n'est intervenu.

Procédure

(2) La *Loi sur l'exercice des compétences légales* ne s'applique pas à l'enquête menée en vertu du paragraphe (1).

Enquête à huis clos

(3) L'enquête peut se dérouler à huis clos.

Powers of Commissioner

(4) In an inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution, despite Parts II and III of this Act or any other Act or privilege, and may enter and inspect any premises occupied by an institution for the purposes of the investigation.

Record not retained by Commissioner

(5) The Commissioner shall not retain any information obtained from a record under subsection (4).

Examination on site

(6) Despite subsection (4), a head may require that the examination of a record by the Commissioner be of the original at its site.

Notice of entry

(7) Before entering any premises under subsection (4), the Commissioner shall notify the head of the institution occupying the premises of his or her purpose.

Examination under oath

(8) The Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have information relating to the inquiry, and for that purpose the Commissioner may administer an oath.

Evidence privileged

(9) Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court.

Protection

(10) Except on the trial of a person for perjury in respect of his or her sworn testimony, no statement made or answer given

Pouvoirs du commissaire

(4) Malgré les parties II et III de la présente loi, et toute autre loi ou privilège, le commissaire peut, dans le cadre d'une enquête, exiger que lui soit communiqué un document dont une institution a la garde ou le contrôle et en faire l'examen. Il peut de même aux fins de l'enquête pénétrer dans les locaux d'une institution et en faire l'inspection.

Le commissaire ne conserve pas le document

(5) Le commissaire ne doit pas conserver les renseignements consignés dans un document communiqué en vertu du paragraphe (4).

Consultation sur place

(6) Malgré le paragraphe (4), la personne responsable peut exiger que le commissaire consulte sur place l'original du document.

Avis de consultation

(7) Avant de pénétrer dans des locaux en vertu du paragraphe (4), le commissaire informe la personne responsable de l'institution qui les occupe de l'objet de sa visite.

Interrogatoire sous serment

(8) Le commissaire peut assigner à comparaître et interroger sous serment la personne qui, à son avis, pourrait avoir des renseignements relatifs à l'enquête. Il peut faire prêter serment à cette fin.

Éléments de preuve privilégiés

(9) Les paroles prononcées, les renseignements fournis, les documents communiqués ou les objets produits par une personne au cours de l'enquête menée par le commissaire en vertu de la présente loi sont privilégiés, comme s'il s'agissait d'une instance devant un tribunal.

Protection

(10) Sauf à l'occasion du procès d'une personne par suite d'un parjure au moment de son propre témoignage sous serment, nulle

by that or any other person in the course of an inquiry by the Commissioner is admissible in evidence in any court or at any inquiry or in any other proceedings, and no evidence in respect of proceedings before the Commissioner shall be given against any person.

Protection under Federal Act

(11) A person giving a statement or answer in the course of an inquiry before the Commissioner shall be informed by the Commissioner of his or her right to object to answer any question under section 5 of the *Canada Evidence Act*.

Prosecution

(12) No person is liable to prosecution for an offence against any Act, other than this Act, by reason of his or her compliance with a requirement of the Commissioner under this section.

Representations

(13) The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under subsection 50 (3) shall be given an opportunity to make representations to the Commissioner, but no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made.

Right to representation

(14) Each of the following may be represented by a person authorized under the *Law Society Act* to represent them:

1. The person who requested access to the record.
2. The head of the institution concerned.

déclaration ou réponse faite par cette personne ou une autre personne au cours d'une enquête menée par le commissaire n'est admissible en preuve devant un tribunal, dans le cadre d'une enquête, ou au cours d'une instance. Aucun témoignage rendu en cours d'instance devant le commissaire ne peut servir de preuve contre qui que ce soit.

Protection en vertu de la loi fédérale

(11) Le commissaire informe la personne qui fait une déclaration ou donne une réponse au cours de l'enquête menée devant lui, de son droit en vertu de l'article 5 de la *Loi sur la preuve au Canada*, de s'opposer à répondre à une question.

Poursuite

(12) Nul n'est passible de poursuite relativement à une infraction à une loi autre que la présente loi, pour s'être conformé à une exigence du commissaire aux termes du présent article.

Observations

(13) Il doit être fourni à la personne qui a présenté la demande d'accès au document, à la personne responsable de l'institution concernée et à toute autre institution ou personne informée de l'avis d'appel en vertu du paragraphe 50 (3) l'occasion de présenter leurs observations au commissaire. Toutefois, nul n'a le droit d'avoir accès aux observations faites au commissaire par une autre personne ou de les commenter, ni d'être présent lors de leur présentation.

Droit à la représentation

(14) Chacune des personnes ou institutions suivantes peut être représentée par une personne autorisée à la représenter en vertu de la *Loi sur le Barreau* :

1. La personne qui a présenté la demande d'accès au document.
2. La personne responsable de l'institution

3. Any other institution or person informed of the notice of appeal under subsection 50 (3).

Burden of proof

53. Where a head refuses access to a record or a part of a record, the burden of proof that the record or the part falls within one of the specified exemptions in this Act lies upon the head.

Order

54. (1) After all of the evidence for an inquiry has been received, the Commissioner shall make an order disposing of the issues raised by the appeal.

Idem

(2) Where the Commissioner upholds a decision of a head that the head may refuse to disclose a record or a part of a record, the Commissioner shall not order the head to disclose the record or part.

Terms and conditions

(3) Subject to this Act, the Commissioner's order may contain any terms and conditions the Commissioner considers appropriate.

Notice of order

(4) The Commissioner shall give the appellant and the persons who received notice of the appeal under subsection 50 (3) written notice of the order.

Confidentiality

55. (1) The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any information that comes to their knowledge in the performance of their powers, duties and functions under this or any other Act.

Not compellable witness

(2) The Commissioner or any person acting on

concernée.

3. Toute autre institution ou personne informée de l'avis d'appel en vertu du paragraphe 50 (3).

Fardeau de la preuve

53. Lorsque la personne responsable refuse l'accès à la totalité ou à une partie d'un document, c'est à elle que revient le fardeau de prouver que ce dernier constitue une exception précisée par la présente loi.

Ordonnance

54. (1) Lorsque la preuve est close dans le cadre de l'enquête, le commissaire rend une ordonnance qui règle les questions soulevées par l'appel.

Idem

(2) Si le commissaire confirme la décision de la personne responsable de refuser la divulgation d'un document en totalité ou en partie, il ne doit pas enjoindre à celle-ci de divulguer le document ou la partie visée.

Conditions

(3) Sous réserve de la présente loi, le commissaire peut assortir l'ordonnance des conditions qu'il juge pertinentes.

Avis de l'ordonnance

(4) Le commissaire donne par écrit avis de l'ordonnance à l'appelant ainsi qu'aux personnes qui ont reçu l'avis d'appel en vertu du paragraphe 50 (3).

Caractère confidentiel

55. (1) Le commissaire ou la personne qui agit pour son compte ou sous son autorité ne peuvent divulguer les renseignements portés à leur connaissance dans l'exercice de leurs attributions en vertu de la présente loi ou de toute autre loi.

Témoin non contraignable

(2) Le commissaire ou la personne qui agit

behalf or under the direction of the Commissioner is not compellable to give evidence in a court or in a proceeding of a judicial nature concerning anything coming to their knowledge in the exercise or performance of a power, duty or function under this or any other Act.

Proceedings privileged

(3) No proceeding lies against the Commissioner or against any person acting on behalf or under the direction of the Commissioner for anything done, reported or said in good faith in the course of the exercise or performance or intended exercise or performance of a power, duty or function under this or any other Act.

Delegation by Commissioner

56. (1) The Commissioner may in writing delegate a power or duty granted to or vested in the Commissioner to an officer or officers employed by the Commissioner, except the power to delegate under this section, subject to such limitations, restrictions, conditions and requirements as the Commissioner may set out in the delegation.

Exception re records under s. 12 or 14

(2) The Commissioner shall not delegate to a person other than an Assistant Commissioner his or her power to require a record referred to in section 12 or 14 to be produced and examined.

[...]

**PART V
GENERAL**

[...]

Powers and duties of Commissioner

59. The Commissioner may,

- (a) offer comment on the privacy protection implications of proposed legislative schemes or government

pour son compte ou sous son autorité ne sont pas contraignables aux fins de témoigner en justice ou lors d'une instance de nature judiciaire relativement à ce qui est porté à leur connaissance dans l'exercice de leurs attributions en vertu de la présente loi ou de toute autre loi.

Immunité dans l'exercice des attributions

(3) Sont irrecevables les instances introduites contre le commissaire ou contre la personne qui agit pour son compte ou sous son autorité relativement à ce qui est fait, relaté ou dit de bonne foi dans l'exercice ou l'exercice prévu de leurs pouvoirs ou de leurs fonctions en vertu de la présente loi ou de toute autre loi.

Délégation par le commissaire

56. (1) Sauf en ce qui a trait à son pouvoir de délégation aux termes du présent article et sous réserve des limitations, restrictions, conditions et exigences qu'il peut imposer dans le mandat, le commissaire peut, par écrit, déléguer tout ou partie de ses pouvoirs ou de ses fonctions à un ou plusieurs fonctionnaires de la commission.

Exception relative aux documents en vertu de l'art. 12 ou 14

(2) Le commissaire ne doit pas déléguer son pouvoir d'exiger la présentation ou l'examen du document visé à l'article 12 ou 14, sauf à un commissaire adjoint.

[...]

**PARTIE V
DISPOSITIONS GÉNÉRALES**

Attributions du commissaire

59. Le commissaire peut :

- a) présenter ses commentaires sur l'incidence des projets législatifs ou des programmes gouvernementaux proposés

programs;

(b) after hearing the head, order an institution to,

- (i) cease collection practices, and
- (ii) destroy collections of personal information,

that contravene this Act;

(c) in appropriate circumstances, authorize the collection of personal information otherwise than directly from the individual;

(d) engage in or commission research into matters affecting the carrying out of the purposes of this Act;

(e) conduct public education programs and provide information concerning this Act and the Commissioner's role and activities; and

(f) receive representations from the public concerning the operation of this Act.

sur la protection de la vie privée;

b) après avoir entendu la personne responsable, enjoindre à une institution :

- (i) d'une part, de renoncer à certains modes de collecte de renseignements,
- (ii) d'autre part, de disposer des fiches de renseignements personnels,

qui contreviennent à la présente loi;

c) dans les cas appropriés, autoriser la collecte de renseignements personnels d'autres sources que du particulier lui-même;

d) entreprendre ou commander des recherches sur les questions qui ont une incidence sur la réalisation des objets de la présente loi;

e) instituer à l'intention du public des programmes d'information et fournir des renseignements relatifs à la présente loi ainsi qu'au rôle et aux activités du commissaire;

f) recevoir les observations du public relativement à l'application de la présente loi.

Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165

PART 1 – INTRODUCTORY PROVISIONS

Purposes of this Act

2. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

- (a) giving the public a right of access to records,
- (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
- (c) specifying limited exceptions to the rights of access,
- (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(e) providing for an independent review of decisions made under this Act.

[...]

PART 2 – FREEDOM OF INFORMATION

DIVISION 1 – INFORMATION RIGHTS AND HOW TO EXERCISE THEM

Information rights

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

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

(3) The right of access to a record is subject to the payment of any fee required under section 75.

How to make a request

5. (1) To obtain access to a record, the applicant must make a written request that

(a) provides sufficient detail to enable an experienced employee of the public body, with a reasonable effort, to identify the records sought,

(b) provides written proof of the authority of the applicant to make the request, if the applicant is acting on behalf of another person in accordance with the regulations, and

(c) is submitted to the public body that the applicant believes has custody or control of the record.

(2) The applicant may ask for a copy of the record or ask to examine the record.

DIVISION 2 — EXCEPTIONS

[...]

Policy advice or recommendations

13 (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

(2) The head of a public body must not refuse to disclose under subsection (1)

(a) any factual material,

(b) a public opinion poll,

(c) a statistical survey,

(d) an appraisal,

(e) an economic forecast,

- (f) an environmental impact statement or similar information,
- (g) a final report or final audit on the performance or efficiency of a public body or on any of its policies or its programs or activities,
- (h) a consumer test report or a report of a test carried out on a product to test equipment of the public body,
- (i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,
- (j) a report on the results of field research undertaken before a policy proposal is formulated,
- (k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,
- (l) a plan or proposal to establish a new program or activity or to change a program or activity, if the plan or proposal has been approved or rejected by the head of the public body,
- (m) information that the head of the public body has cited publicly as the basis for making a decision or formulating a policy, or
- (n) a decision, including reasons, that is made in the exercise of a discretionary power or an adjudicative function and that affects the rights of the applicant.

(3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[...]

PART 4 – OFFICE AND POWERS OF INFORMATION AND PRIVACY COMMISSIONER

Appointment of commissioner

37. (1) On the recommendation of the Legislative Assembly, the Lieutenant Governor must appoint as the Information and Privacy Commissioner a person who has been unanimously recommended by a special Committee of the Legislative Assembly for the appointment.

(2) The commissioner is an officer of the Legislature.

(3) Subject to section 38, the commissioner holds office for a term of 6 years.

Resignation, removal or suspension of commissioner

38 (1) The commissioner may resign at any time by notifying the Speaker of the Legislative Assembly or, if there is no speaker or the speaker is absent from British Columbia, by notifying the clerk of the Legislative Assembly.

(2) The Lieutenant Governor in Council must remove the commissioner from office or suspend the commissioner for cause or incapacity on the recommendation of 2/3 of the members present in the Legislative Assembly.

(3) If the Legislative Assembly is not sitting, the Lieutenant Governor in Council may suspend the commissioner for cause or incapacity.

Staff of commissioner

41 (1) The commissioner may appoint, in accordance with the *Public Service Act*, employees necessary to enable the commissioner to perform the duties of the office.

(2) The commissioner may retain any consultants, mediators or other persons and may establish their remuneration and other terms and conditions of their retainers.

(3) The *Public Service Act* does not apply in respect of a person retained under subsection (2).

(4) The commissioner may make a special report to the Legislative Assembly if, in the commissioner's opinion,

(a) the amounts and establishment provided for the office of commissioner in the estimates,
or

(b) the services provided by the BC Public Service Agency
are inadequate for fulfilling the duties of the office.

General powers of commissioner

42 (1) In addition to the commissioner's powers and duties under Part 5 with respect to reviews, the commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may

(a) conduct investigations and audits to ensure compliance with any provision of this Act or the regulations,

(b) make an order described in section 58 (3), whether the order results from an investigation or audit under paragraph (a) or an inquiry under section 56,

(c) inform the public about this Act,

(d) receive comments from the public about the administration of this Act,

(e) engage in or commission research into anything affecting the achievement of the purposes of this Act,

(f) comment on the implications for access to information or for protection of privacy of proposed legislative schemes or programs or activities of public bodies,

(g) comment on the implications for access to information or for protection of privacy of automated systems for collection, storage, analysis or transfer of information,

(h) comment on the implications for protection of privacy of using or disclosing personal information for data linking,

(i) authorize the collection of personal information from sources other than the individual the information is about, and

(j) bring to the attention of the head of a public body any failure to meet the prescribed standards for fulfilling the duty to assist applicants.

(2) Without limiting subsection (1), the commissioner may investigate and attempt to resolve complaints that

- (a) a duty imposed under this Act has not been performed,
- (b) an extension of time for responding to a request is not in accordance with section 10 (1),
- (c) a fee required under this Act is inappropriate,
- (d) a correction of personal information requested under section 29 (1) has been refused without justification, and
- (e) personal information has been collected, used or disclosed in contravention of Part 3 by
 - (i) a public body or an employee, officer or director of a public body, or
 - (ii) an employee or associate of a service provider.

Power to authorize a public body to disregard requests

43 If the head of a public body asks, the commissioner may authorize the public body to disregard requests under section 5 or 29 that

- (a) would unreasonably interfere with the operations of the public body because of the repetitious or systematic nature of the requests, or
- (b) are frivolous or vexatious.

Powers of commissioner in conducting investigations, audits or inquiries

44 (1) For the purposes of conducting an investigation or an audit under section 42 or an inquiry under section 56, the commissioner may make an order requiring a person to do either or both of the following:

- (a) attend, in person or by electronic means, before the commissioner to answer questions on oath or affirmation, or in any other manner;
- (b) produce for the commissioner a record in the custody or under the control of the person, including a record containing personal information.

(2) The commissioner may apply to the Supreme Court for an order

- (a) directing a person to comply with an order made under subsection (1), or
- (b) directing any directors and officers of a person to cause the person to comply with an order made under subsection (1).

(2.1) If a person discloses a record that is subject to solicitor client privilege to the commissioner at the request of the commissioner, or under subsection (1), the solicitor client privilege of the record is not affected by the disclosure.

(3) Despite any other enactment or any privilege of the law of evidence, a public body must produce to the commissioner within 10 days any record or a copy of any record required under subsection (1).

(3.1) The commissioner may require a person to attempt to resolve the person's request for review or complaint against a public body in the way directed by the commissioner before the commissioner begins or continues an investigation under section 42 or an inquiry under section 56.

(3.2) Subsection (3.1) applies whether or not a mediator has been authorized under section 55.

(4) If a public body is required to produce a record under subsection (1) and it is not practicable to make a copy of the record, the head of that public body may require the commissioner to examine the original at its site.

(5) After completing a review or investigating a complaint, the commissioner must return any record or any copy of any record produced by the public body concerned.

Maintenance of order at hearings

44.1 (1) At an oral hearing, the commissioner may make orders or give directions that he or she considers necessary for the maintenance of order at the hearing, and, if any person disobeys or fails to comply with any order or direction, the commissioner may call on the assistance of any peace officer to enforce the order or direction.

(2) A peace officer called on under subsection (1) may take any action that is necessary to enforce the order or direction and may use such force as is reasonably required for that purpose.

(3) Without limiting subsection (1), the commissioner, by order, may

(a) impose restrictions on a person's continued participation in or attendance at a hearing, and

(b) exclude a person from further participation in or attendance at a hearing until the commissioner orders otherwise.

Contempt proceeding for uncooperative person

44.2 (1) The failure or refusal of a person subject to an order under section 44 to do any of the following makes the person, on application to the Supreme Court by the commissioner, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court:

(a) attend before the commissioner;

(b) take an oath or make an affirmation;

(c) answer questions;

(d) produce records in the person's custody or under the person's control.

(2) The failure or refusal of a person subject to an order or direction under section 44.1 to comply with the order or direction makes the person, on application to the Supreme Court by the commissioner, liable to be committed for contempt as if in breach of an order or judgment of the Supreme Court.

(3) Subsections (1) and (2) do not limit the conduct for which a finding of contempt may be made by the Supreme Court.

Statements made to the commissioner not admissible in evidence

45 (1) A statement made or an answer given by a person during an investigation or inquiry by the commissioner is inadmissible in evidence in court or in any other proceeding, except

- (a) in a prosecution for perjury in respect of sworn testimony,
- (b) in a prosecution for an offence under this Act, or
- (c) in an application for judicial review or an appeal from a decision with respect to that application.

(2) Subsection (1) applies also in respect of evidence of the existence of proceedings conducted before the commissioner.

Protection against libel or slander actions

46 Anything said, any information supplied or any record produced by a person during an investigation or inquiry by the commissioner is privileged in the same manner as if the investigation or inquiry were a proceeding in a court.

Restrictions on disclosure of information by the commissioner and staff

47 (1) The commissioner and anyone acting for or under the direction of the commissioner must not disclose any information obtained in performing their duties, powers and functions under this Act, except as provided in subsections (2) to (5).

(2) The commissioner may disclose, or may authorize anyone acting on behalf of or under the direction of the commissioner to disclose, information that is necessary to

- (a) conduct an investigation, audit or inquiry under this Act, or
- (b) establish the grounds for findings and recommendations contained in a report under this Act.

(2.1) The commissioner and anyone acting for or under the direction of the commissioner must not give or be compelled to give evidence in court or in any other proceedings in respect of any records or information obtained in performing their duties or exercising their powers and functions under this Act.

(2.2) Despite subsection (2.1), the commissioner and anyone acting for or under the direction of the commissioner may give or be compelled to give evidence

- (a) in a prosecution for perjury in respect of sworn testimony,
- (b) in a prosecution for an offence under this Act,
- (c) in an investigation, a determination or a review referred to in section 60 (1), or
- (d) in an application for judicial review of a decision made under this Act.

(2.3) Subsections (2.1) and (2.2) apply also in respect of evidence of the existence of proceedings conducted before the commissioner.

(3) In conducting an investigation, audit or inquiry under this Act and in a report under this Act, the commissioner and anyone acting for or under the direction of the commissioner must take every reasonable precaution to avoid disclosing and must not disclose

- (a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 5, or
- (b) whether information exists, if the head of a public body in refusing to provide access does not indicate whether the information exists.

(4) The commissioner may disclose to the Attorney General information relating to the commission of an offence against an enactment of British Columbia or Canada if the commissioner considers there is evidence of an offence.

(5) The commissioner may disclose, or may authorize anyone acting for or under the direction of the commissioner to disclose, information in the course of a prosecution, application or appeal referred to in section 45.

Protection of commissioner and staff

48 No proceedings lie against the commissioner, or against a person acting on behalf of or under the direction of the commissioner, for anything done, reported or said in good faith in the exercise or performance or the intended exercise or performance of a duty, power or function under this Part or Part 5.

Delegation by commissioner

49 (1) Subject to this section, the commissioner may delegate to any person any duty, power or function of the commissioner under this Act, other than the power to delegate under this section.

(1.1) The commissioner may not delegate the power to examine information referred to in section 15 if the head of a police force or the Attorney General

- (a) has refused to disclose that information under section 15, and
- (b) has requested the commissioner not to delegate the power to examine that information.

(1.2) Despite section 66, the head of a police force may not delegate the power to make a request under subsection (1.1) (b).

(1.3) Despite section 66, the Attorney General may only delegate the power to make a request under subsection (1.1) (b) to the Assistant Deputy Attorney General, Criminal Justice Branch.

(2) A delegation under subsection (1) must be in writing and may contain any conditions or restrictions the commissioner considers appropriate.

PART 5 – REVIEWS AND COMPLAINTS

DIVISION 1 – REVIEWS BY COMMISSIONER

Right to ask for a review

52 (1) A person who makes a request to the head of a public body, other than the commissioner or the registrar under the *Lobbyists Registration Act*, for access to a record or 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, including any matter that could be the subject of a complaint under section 42 (2).

(2) A third party notified under section 24 of a decision to give access may ask the commissioner to review any decision made about the request by the head of a public body, other than the commissioner or the registrar under the *Lobbyists Registration Act*.

How to ask for a review

53 (1) To ask for a review under this Division, a written request must be delivered to the commissioner.

(2) A request for a review of a decision of the head of a public body must be delivered within

- (a) 30 days after the person asking for the review is notified of the decision, or
- (b) a longer period allowed by the commissioner.

(3) The failure of the head of a public body to respond in time to a request for access to a record is to be treated as a decision to refuse access to the record, but the time limit in subsection (2) (a) for delivering a request for review does not apply.

Notifying others of review

54 On receiving a request for a review, the commissioner must give a copy to

- (a) the head of the public body concerned, and
- (b) any other person that the commissioner considers appropriate.

Order for severing of records

54.1 (1) After the head of a public body has responded to a request under section 5 and a request for review of that response has been received under section 52, the commissioner may, at any time, by order,

(a) confirm that the head of a public body has failed to sever the records that are the subject of the review, as required by this Act, and

(b) require the head of the public body to sever the records in accordance with the directions and within the period set out in the order.

(2) The commissioner may not set a period for severing a record under subsection (1) that is less than 30 days after the date a copy of the order is given to the head of the public body concerned.

Mediation may be authorized

55 The commissioner may authorize a mediator to investigate and to try to settle a matter under review.

Inquiry by commissioner

56 (1) If the matter is not referred to a mediator or is not settled under section 55, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

(2) An inquiry under subsection (1) may be conducted in private.

(3) The person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review must be given an opportunity to make representations to the commissioner during the inquiry.

(4) The commissioner may decide

(a) whether representations are to be made orally or in writing, and

(b) whether a person is entitled to be present during or to have access to or to comment on representations made to the commissioner by another person.

(5) The person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review may be represented at the inquiry by counsel or an agent.

(6) Subject to subsection (8), an inquiry into a matter under review must be completed within 90 days after receiving the request for the review.

(7) If the commissioner has required a person to attempt to resolve a matter under section 44 (3.1), the commissioner may defer beginning or may adjourn an investigation under section 42 or an inquiry under this section to enable the resolution of the matter in the way required under section 44 (3.1).

(8) The period of an adjournment or deferral under subsection (7) must not be included for the purpose of calculating a deadline under subsection (6).

Burden of proof

57 (1) At an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part.

(2) However, if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

(3) At an inquiry into a decision to give an applicant access to all or part of a record containing information that relates to a third party,

(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and

(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part.

Commissioner's orders

58 (1) On completing an inquiry under section 56, the commissioner must dispose of the issues by making an order under this section.

(2) If the inquiry is into a decision of the head of a public body to give or to refuse to give access to all or part of a record, the commissioner must, by order, do one of the following:

(a) require the head to give the applicant access to all or part of the record, if the commissioner determines that the head is not authorized or required to refuse access;

(b) either confirm the decision of the head or require the head to reconsider it, if the commissioner determines that the head is authorized to refuse access;

(c) require the head to refuse access to all or part of the record, if the commissioner determines that the head is required to refuse access.

(3) If the inquiry is into any other matter, the commissioner may, by order, do one or more of the following:

(a) confirm that a duty imposed under this Act has been performed or require that a duty imposed under this Act be performed;

(b) confirm or reduce the extension of a time limit under section 10 (1);

(c) confirm, excuse or reduce a fee, or order a refund, in the appropriate circumstances, including if a time limit is not met;

(d) confirm a decision not to correct personal information or specify how personal information is to be corrected;

(e) require a public body or service provider to stop collecting, using or disclosing personal information in contravention of this Act, or confirm a decision of a public body or service provider to collect, use or disclose personal information;

(f) require the head of a public body to destroy personal information collected in contravention of this Act.

(4) The commissioner may specify any terms or conditions in an order made under this section.

(5) The commissioner must give a copy of an order made under this section to all of the following:

(a) the person who asked for the review;

(b) the head of the public body concerned;

(b.1) any service provider to whom the order is directed;

(c) any person given notice under section 54;

(d) the minister responsible for this Act.

Duty to comply with orders

59 (1) Subject to subsection (1.1), not later than 30 days after being given a copy of an order of the commissioner, the head of the public body concerned or the service provider to whom the order is directed, as applicable, must comply with the order unless an application for judicial review of the order is brought before that period ends.

(1.1) If the commissioner gives the head of a public body a copy of an order made under section 54.1, the head of the public body must comply with the order within the period set out in the order, unless an application for judicial review of the order is brought before that period ends.

(2) Subject to subsection (3), if an application for judicial review is brought before the end of the period referred to in subsection (1) or set out in an order given under section 54.1, the order of the commissioner is stayed for 120 days, beginning on the date the application is brought, unless a court makes an order shortening or extending the stay.

(3) If a date for hearing the application for judicial review is set before the expiration of the stay of the commissioner's order referred to in subsection (2), the stay of the commissioner's order is extended until the judicial review is completed or the court makes an order shortening the stay.

Enforcement of orders of commissioner

59.01 (1) Subject to subsection (3), the commissioner may file a certified copy of an order made under section 54.1 or 58 with the Supreme Court.

(2) Subject to subsection (3), a party affected, or a person designated, by an order made under section 58 may file a certified copy of the order with the Supreme Court.

(3) An order may be filed under subsection (1) or (2) only if

(a) the order is not, or is no longer, the subject of an application for judicial review, or the subject of an appeal or further appeal, as the case may be, from a decision on judicial review in respect of the order,

(b) the date by which a person must comply with the order under section 59 (1) or (1.1), as the case may be, has occurred, and

(c) the period for commencing an appeal or further appeal, as the case may be, from a decision on judicial review in respect of the order has expired.

(4) An order filed under this section has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.