ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-025

September 8, 1999

ALBERTA JUSTICE

Review Number 1538

I. BACKGROUND

[para 1.] In January 1995, the Sheriff of Alberta (Civil Enforcement) refused the Applicant's request to be appointed as a Civil Enforcement Bailiff under the Alberta *Civil Enforcement Act* 1994 c. C-10.5. The Applicant appealed the Sheriff's decision. An Appeal Panel consisting of three individuals heard evidence regarding this issue on six different days between December 16, 1996 and March 2, 1998. On March 18, 1998, the Appeal Panel rendered its decision, refusing to appoint the Applicant as a Civil Enforcement Bailiff.

[para 2.] On December 14, 1998, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Justice (the "Public Body") for:

> *Any and all information that the Appeal Panel has in their possession with regards (sic) to their decision to refuse me a bailiffs (sic) badge. Including their notes, their written accounts of all of the witnesses testimony etc.*

[para 3.] On January 7, 1999, the Applicant agreed to revise the access request to exclude any records from the Applicant or the Applicant's counsel to the Appeal Panel and from the Appeal Panel to the Applicant or the Applicant's counsel.

[para 4.] On January 11, 1999, the Public Body advised the Applicant that, in response to the access request, it would disclose some of the records, but would not disclose the handwritten notes taken by the Appeal Panel members during the hearing.

[para 5.] On January 20, 1999, the Applicant requested a review of the Public Body's decision. Mediation was unsuccessful and the matter was set down for a written inquiry.

[para 6.] This Order proceeds on the basis of the Act as it existed before the amendments to the Act came into force on May 19, 1999.

II. RECORDS AT ISSUE

[para 7.] The records at issue consist of notes of Appeal Panel members that were taken during the Appeal Panel hearing. In this Order, I will refer to those notes as the "Records".

III. ISSUE

[para 8.] The issue in this inquiry is whether section 4(1)(b) excludes the Records from the application of the Act.

IV. DISCUSSION - Does section 4(1)(b) exclude the Records from the application of the Act?

[para 9.] If a record falls under section 4, the Act does not apply to the record, and there is no obligation on the Public Body to give the Applicant access to the record.

[para 10.] Section 4(1)(b) states:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> > *(b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity including any authority designated by the Lieutenant Governor in Council to which the Administrative Procedures Act applies;*

[para 11.] In order for a record to fall under this section, two requirements must be fulfilled:

> (A) the record must be a personal note, communication or draft decision; and
>
> (B) the record must be that of a person who is acting in a judicial or quasi-judicial capacity including any authority designated by the Lieutenant Governor in Council to which the *Administrative Procedures Act* applies.

(A) Are the Records a personal note, communication or a draft decision?

[para 12.] In my opinion, the Records are "personal notes" of members of the Appeal Panel, for the following reasons.

[para 13.] The Canadian Oxford Dictionary defines the term "personal" as meaning "one's own; individual; private" and "intended for a particular person rather than a group". A "personal note" under section 4(1)(b) would therefore include the notes taken by an individual as long as those notes were intended only for that individual's use.

[para 14.] The records fulfill this definition. The sole function of the Records was to assist each of the Appeal Panel members in making up their own minds in order to make a collective decision. There is no evidence in this inquiry that suggests these notes were intended for any other purpose.

(B) Are the Records those of a person who is acting in a judicial or quasi-judicial capacity including any authority designated by the Lieutenant Governor in Council to which the *Administrative Procedures Act* applies?

> (i) Does section 4(1)(b) apply to all persons who act in a judicial or quasi-judicial basis or only to authorities designated under the *Administrative Procedures Act?*

[para 15.] The Public Body states that in order to fulfill section 4(1)(b), the Public Body must only prove that the Appeal Panel was acting in a "judicial or quasi-judicial capacity". The Public Body argues that an entity does not need a designation under the *Administrative Procedures Act* to fulfill this section. The Public Body states that the word "including" in section 4(1)(b) functions to enlarge the meaning of the words "judicial or quasi-judicial capacity" to include authorities under

the *Administrative Procedures Act,* but not limit those words to just those authorities. In support of this argument the Public Body cites the Supreme Court of Canada decision of *National Bank of Greece (Canada)* v. *Katsikonouris (1990) 74 D.L.R. (4th) 197,* where the court stated:

> *"Whatever the particular document one is construing, when one finds a clause that sets out a list of specific words followed by a general term, it will normally be appropriate to limit the general term to the genus of the narrow enumeration that precedes it. But it would be illogical to proceed in the same manner when a general term precedes an enumeration of specific examples. In this situation, it is logical to infer that the purpose of providing specific examples from within a broad general category is to remove any ambiguity as to whether those examples are in fact included in the category. It would defeat the intention of the person drafting the document if one were to view the specific illustrations as an exhaustive definition of the larger category of which they form a part."*
>
> (emphasis added)

[para 16.] After reviewing section 4(1)(b) and the decision of the Supreme Court of Canada in *National Bank of Greece (Canada)* v. *Katsikonouris*, it is my opinion that section 4(1)(b) should be interpreted as applying to all entities that act in a judicial and quasi-judicial capacity, whether or not they are designated as an authority under the *Administrative Procedures Act*. I agree that the reference to designated authorities in this section functions to provide specific examples of authorities who act in a "judicial or quasi-judicial capacity", but does not limit the application of this section to just those authorities.

> (ii) Are the Records those of a person who acts in a judicial or quasi-judicial capacity?

[para 17.] In *Minister of National Revenue* v. *Coopers & Lybrand* (1978) 92 D.L.R. (3d) 1, the Supreme Court of Canada stated that in order to determine whether an entity is acting in a judicial or quasi-judicial capacity, the following non-exhaustive list of factors should be weighed and evaluated, with no one factor being necessarily determinative of the issue:

> (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?

(2) Does the decision or order directly or indirectly affect the rights and obligations of persons?

(3) Is the adversary process involved?

(4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

[para 18.] In this inquiry, sections 22(2), 29(3) and 29(4) of the *Civil Enforcement Act* Regulation 276/95 (the "Regulation") are relevant in determining whether the Appeal Panel acted in a judicial or quasi-judicial capacity. They read as follows:

22(2) The sheriff may

(a) with respect to a person who has applied for appointment as a bailiff, make whatever inquiry and investigation that the sheriff considers appropriate, and

(b) make or refuse to make the appointment when in the opinion of the sheriff that action is in the public interest.

29(3) Within 30 days from the day that the sheriff was served with a notice of appeal, the Minister must appoint an appeal panel to hear the appeal.

29(4) The appeal panel may

(a) confirm, reverse or vary the decision of the sheriff, and

(b) make any decision with respect to the subject-matter of the appeal that the sheriff was entitled to make in the first instance.

[para 19.] After reviewing these sections of the Regulation, and weighing the factors listed in *Minister of National Revenue* v. *Coopers & Lybrand*, I find that the Appeal Panel members are persons who acted in a judicial or quasi-judicial capacity, for the following reasons.

[para 20.] First, it is clear that the Appeal Panel had a duty to hold a hearing into the Applicant's application to become a bailiff. Section 29(3) of the Regulation states that the Minister must appoint an Appeal Panel to "hear the appeal" within 30 days from the day the Sheriff is served with a notice of appeal.

[para 21.] Second, the Appeal Panel's decision affected the rights of the Applicant. The *Canadian Oxford Dictionary* defines a "right" as "a thing one may legally or morally claim; the state of being entitled to a privilege or immunity or authority to act". Similarly, *Black's Law Dictionary* defines a "right" as "a power, privilege, or immunity guaranteed under a constitution, statutes or decisional laws, or claimed as a result of long usage." In this appeal, the Appeal Panel was given the authority under section 29(4) of the Regulation to confirm, vary or reverse the decision of the Sheriff, and make any decision with respect to the subject matter of the appeal that the Sheriff was entitled to make in the first instance, including the authority to decide whether the Applicant would be given the authority or power to exercise the duties of a Civil Enforcement Bailiff under the *Civil Enforcement Act.* As such, the Appeal Panel's decision not to make the Applicant a Civil Enforcement Bailiff affected the rights of the Applicant.

[para 22.] Third, the Appeal Panel used an adversary process or proceeding to decide the issue before it. *Black's Law Dictionary* defines an "adversary proceeding" as "one having opposing parties, contested, as distinguished from an ex parte hearing or proceeding". The Applicant and the Sheriff were opposing parties at the Appeal Panel hearing. Each party was represented by counsel, presented witnesses and cross-examined the other party's witnesses.

[para 23.] Fourth, the Appeal Panel had an obligation to apply substantive rules to individual cases. Substantive rules are that part of the law that create, define and regulate rights and duties of parties. Sections 22(2)(b) and 29(4) of the *Civil Enforcement Act* Regulation require the Appeal Panel to apply substantive rules to individual cases. These sections give the Appeal Panel the mandate to confirm, reverse, vary a decision of the Sheriff and to make a decision that the Sheriff was entitled to make in the first instance. In this case, the Appeal Panel confirmed the sheriff's decision in the Applicant's individual case.

V. ORDER

[para 24.] For the reasons stated in this Order, I find that the Records fall under section 4(1)(b) and are excluded from the application of the Act. As the Act does not apply to the Records, there is no obligation on the Public Body to provide the Applicant with access to the Records.

Robert C. Clark
Information and Privacy Commissioner