ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ADJUDICATION ORDER #7

August 12, 2009

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

Note: The Adjudicator removed the Applicant's last name from this unofficial electronic version of Adjudication Order #7. The Office of the Information and Privacy Commissioner also removed the Applicant's first name and Appendices B-F, consisting of the letters cited by the Adjudicator.

Date: August 12, 2009
File Reference: 2008-P-002

IN THE MATTER OF AN INQUIRY PURSUANT to
the *Freedom of Information and Protection of Privacy Act*,
R.S.A. 2000, c. F-25
Respecting Order-in-Council 169/2009

Between:

C. B.

Applicant

- and -

Office of the Information and Privacy Commissioner

Respondent

- and -

Tesco Corporation

Third Party

Reasons for Decision
Hon. J.B. Veit, Adjudicator

APPEARANCES:

Shirish P. Chotalia, Q.C., Pundit & Chotalia LLP
for C.B.

Richard Drewry, Q.C. and Kate L. Hurlburt, Emery Jamieson LLP
for the Office of the Information and Privacy Commissioner

Caryn S. Narvey, Gowling LaFleur Henderson LLP
for Tesco Corporation

Summary

[1] On October 24, 2008, Mr. B., who was at that time self-represented, wrote to the Information and Privacy Commissioner requesting his "entire personal information request file". He stated that he was "very interested in all written correspondence from [his former employer Tesco Corporation] Privacy Officer and Tesco's external legal counsel to the Privacy Office." In answer to Mr. B.'s letter of October 24, 2008, on October 29, 2008, the Assistant Commissioner replied to Mr. B. that section 4 of the *Freedom of Information and Protection of Privacy Act*, (the FOIP Act), excludes certain types of records from the application of the Act; the Assistant Commissioner specified that records which relate to the exercise of the office of the Commissioner's functions under an Alberta statute were excluded pursuant to s. 4(1)(d) of the FOIP Act. Therefore, she continued, "we are not disclosing records you requested". The Assistant Commissioner also advised Mr. B. that, pursuant to s. 77(2) of the FOIP Act, a person who makes a request to the Commissioner for access to a record may ask for the appointment of an adjudicator to review any decision, act or failure to act of the Commissioner that relates to that request.

[2] In December 2008, pursuant to s. 77(2) of the *Freedom of Information and Protection of Privacy Act*, Mr. B. requested the appointment of an adjudicator to review the Commissioner's decision to deny him access to his file.

[3] On April 9, 2009, I was appointed as adjudicator "for the purposes of the Freedom of Information and Protection of Privacy Act". On April 21, 2009, the Order in Council appointing me as adjudicator was forwarded to me from the office of the Minister of Service Alberta, noting that I had been appointed pursuant to the provisions of section 75 of the FOIP Act.

[4] The background to the October 2008 request is that Mr. B. is a former employee of Tesco Corporation who is suing his former employer for constructive dismissal. In November 2005, pursuant to the provisions of the *Personal Information and Privacy Act* (PIPA), Mr. B. asked the Information and Privacy Commissioner for assistance in obtaining access to all his personal information in the custody of his former employer. Mr. B. had earlier requested his personal information direct from Tesco and, on two occasions, each one purportedly subsequent to a comprehensive search, Tesco provided information to Mr. B.. However, Mr. B. believed that the information disclosure was still incomplete. At that stage, he turned to the Information and Privacy Commissioner for assistance. The Information and Privacy Commissioner entered into discussions with Tesco and eventually conducted what amounted to a mediation between Mr. B. and Tesco. Although the mediation did not satisfy Mr. B., the Commissioner eventually satisfied himself that Tesco had made an adequate search for Mr. B.'s personal information and had provided Mr. B. with that information. Having received the Commissioner's denial of Mr. B.'s request for an inquiry, with the assistance of lawyers, Mr. B. reasserted his request to the Commissioner for an inquiry. In January 2007, in a reply to Mr. B. through his lawyers, the Commissioner reviewed its dealings with Tesco and declined to conduct an inquiry. The Commissioner informed Mr. B. that:

> As a result of Tesco's external legal counsel's December 20, 2006 explanation, I am satisfied that Tesco has finally conducted an exhaustive search for records and disclosed all of Mr. B.'s personal information that could be found.

[5] Indeed, the Commissioner concluded that he believed that "Mr. B. has now received more information than Tesco would have been required to produce on an access request under PIPA."

[6] In his reply to the B. lawyers, the Commissioner did not inform the lawyers of the availability of judicial review of the decision not to conduct an inquiry.

[7] Nearly two years after Mr. B. received the Commissioner's January 2007 letter stating that he would not open an inquiry, as set out above, Mr. B. wrote to the Commissioner and asked for the B. file in the Commissioner's office: in essence, Mr. B. FOIP'ed the Commissioner. Relying on s. 4(1)(d) of the *Freedom of Information and Privacy Act* which states that documents which the Commissioner receives as part of an inquiry he is conducting are not FOIPable, the Commissioner denied Mr. B.'s application for access to his file. The Commissioner also advised Mr. B., who was not represented at that time, of the potential for the appointment of an adjudicator pursuant to the provisions of s. 77(2) of the FOIP Act. Mr. B. applied to the Minister for the appointment of an adjudicator pursuant to that subsection. The Minister of Service Alberta arranged for my appointment as an adjudicator in the matter pursuant to the provisions of s. 75 of the FOIP Act.

[8] Having heard from Mr. B. and Mr. B.'s lawyer, the Commissioner, and the affected party, Tesco Corporation, for the reasons that are set out below, I have concluded that:

- in 2008, the Commissioner properly refused to produce to Mr. B. the records which his office received as a result of its investigation of Mr. B.'s original complaint: s. 4(1)(d) of FOIP, coupled with the other provisions of the statute, prohibits the Commissioner from producing those documents. The Commissioner's response to Mr. B.'s request for access was, to paraphrase the words of s. 10 of the FOIP Act, "open, accurate and complete";

- at the same time as the Commissioner informed Mr. B. that the latter was not entitled to the Commissioner's file on the B. matter, the Commissioner also brought to the attention of Mr. B. - who at that time was self-represented - the provisions of s. 77 of FOIP which allowed Mr. B. to ask for an adjudication to review the refusal. So far as the Commissioner was aware, Mr. B.'s only concern was to get access to the file: Mr. B. did not outline to the Commissioner all of the points which he later made to the Minister in support of his request for access to the B. file, which points Mr. B. subsequently described as complaints against the Commissioner. Since the Commissioner was only aware of Mr. B.'s request for access to his file, the Commissioner's identification to Mr. B. of the provisions of s. 77 of FOIP is the only review section to which the Commissioner could, and did, refer. Therefore, both as to the substantive decision and as to the procedural framework established to deal with situations where the

Commissioner's own office is the subject of a FOIP application, the Commissioner provided to Mr. B. "open, accurate and complete" information. In summary, in dealing with Mr. B.'s request for access to his file, the Commissioner did all that he was required to do;

- although it is doubtful that I have jurisdiction pursuant to this appointment to deal with the 2007 decision of the Commissioner, (Mr. B. not having asked for adjudication of the 2007 decision, Mr. B. being grossly out of time in relation to any application for adjudication of the 2007 decision, and the 2007 decision not having been made by the Commissioner as "head of the Office of the Information and Privacy Commissioner), if any such limited jurisdiction did exist, I would conclude that the Commissioner's duty of procedural fairness did not require him to provide to Mr. B.'s then lawyer information about the possibility of judicial review of the Commissioner's 2007 decision. The Commissioner should not be held to a higher standard of fairness than that of a judge; a judge does not have to explain to the recipients of the decision how to appeal it;

- Mr. B.'s letter of July 16, 2009 to the Minister does not in any way add to or expand the appointment made by the Lieutnant-Governor-in-Council on April 9, 2009.

Cases and authority cited

[9] **By Mr. B.:** *A.B. v Office of the Information and Privacy Commissioner,* Adjudication Order No. 6, 2009 01 29 *(Wittmann A.C.J.);* Office of the Information and Privacy Commissioner, *Order F2007-028,* February 14, 2008; ***Lycka v Alberta (Information and Privacy Commissioner)*** 2009 ABQB 245 (Verville J.); *Wilkinson v Director of Employment Standards* BC EST No. DO17/06 (Employment Standards Tribunal);

[10] **By the Office of the Information and Privacy Commissioner:** *Personal Information Protection Act*, 2003, c. P-6.5; Order P2006-012, March 2, 2007; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25; Adjudication Order No.1, September 6, 1996; Adjudication Order No. 6, November 10, 1997; Adjudication Order No. 7, January 5, 1998; *Syncrude Canada Ltd. v. Alberta (Human Rights and Citizenship Commission)* 2008 ABCA 217; Adjudication Order No. 10, August 4, 1998; Order 2001-032, December 28, 2001; Decision of the Law Enforcement Review Board, October 20, 2006; *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Edmonton Police Service v. Information and Privacy Commissioner and Cassels*, October 15, 2008 (transcript); Adjudication Order No. 14, November 24, 2000; Order 99-029, October 15, 1999; Adjudication Order #6, January 30, 2009; Order 97-008, July 22, 1997; *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252; Adjudication Order No.3, June 30, 1997; British Columbia *Freedom of Information and Protection of Privacy Act* [RSBC 1996] Chapter 165; IPC Order 99-011, August 18, 2009; IPC Order 2001-013, May 22, 2001; IPC Order 2000-022, November 23, 2000; *Caritas Health Group v. Office of the Information and Privacy Commissioner*, 2009 ABQB 186.

[11] **By the adjudicator:** Jones & de Villars, *Principles of Administrative Law*, Fifth ed, 2009, Carswell, at p. 238

Appendix A: Extracts from *Freedom of Information and Protection of Privacy Act*, (FOIP), and *Personal Information Protection Act*, (PIPA)
Appendix B: Letter, August 20, 2006, from Commissioner to Mr. B.
Appendix C: Letter, January 29, 2007, from Commissioner to Mr. B.'s lawyer
Appendix D: Letter, October 23, 2008, from Mr. B. to Commissioner
Appendix E: Letter, October 29, 2008, from Commissioner to Mr. B.
Appendix F: Letter, December 4, 2008, from Mr. B. to Minister, Service Alberta

1. Background

a) Factual

[12] Mr. B. was employed by Tesco Corporation from August 25, 2000 until November 2004. Mr. B. takes the position that he was constructively dismissed by Tesco and has commenced legal proceedings against his former employer. The trial of those issues has not yet taken place.

[13] After he left Tesco, Mr. B. made efforts to obtain his personal information from his former employer. Being dissatisfied with the responses that he received from Tesco in March and April, 2005, and relying on the provisions of the *Personal Information Protection Act*, PIPA, in November 2005, Mr. B., acting on his own behalf, turned to the Information and Privacy Commissioner for assistance. Protracted discussions amongst the Commissioner, Mr. B. and Tesco ensued. In April 2006, Mr. B. asked the Commissioner to conduct an inquiry into Tesco's production of personal information. In August 2006, the Commissioner replied that he would not conduct such an inquiry, but that Mr. B. was at liberty to renew his request for an inquiry once Tesco reviewed its offsite files: see Appendix B.

[14] Mr. B. was not satisfied with the information he received from Tesco after the review of offsite files and, having retained a new law firm to assist him, he renewed his request to the Commissioner for an inquiry. Mr. B.'s then lawyers specifically raised with the Commissioner concerns about both the adequacy of the search for Mr. B.'s personal information conducted by Tesco and the timeliness of Tesco's responses to both Mr. B. and the Commissioner. The Commissioner declined to initiate such an inquiry: see Appendix C.

[15] No further communications took place between the Commissioner and Mr. B. until 21 months later in October, 2008 when Mr. B. wrote to the Commissioner asking for access to the Commissioner's B. file: see Appendix D. At this time, Mr. B. was self-represented.

[16] On October 29th, 2008, in reliance on s. 4(1)(d) of the FOIP Act, the Commissioner denied Mr. B. access to the Commissioner's file. The Commissioner informed Mr. B. that he invoke s. 77(2) of the FOIP Act to ask for an adjudication on the denial: see Appendix E.

[17] In December, 2008, Mr. B. wrote to the Minister of Service Alberta asking for a s. 77(2) adjudication: see Appendix F.

[18] On April 9, 2009, I was appointed adjudicator in this matter.

[19] Although Mr. B. began this adjudication process as a self-represented litigant, prior to the completion of the written submissions and prior to the oral hearing which was held on July 27, 2009, Mr. B. became represented by a lawyer. While Mr. B. was unrepresented, he made submissions in writing which included a copy of an internal document produced within the law firm which represented Mr. B. in his 2007 dealings with the Commissioner. It should be noted that the Commissioner did not attempt to take advantage of what might possibly have been construed as a release by Mr. B. of solicitor-client privilege in relation to his 2006-2007 dealings with the Commissioner.

[20] On June 4, 2009, the Minister of Service Alberta advised the adjudicator and the parties that she had given notice to the Tesco Corporation of this adjudication and provided that corporation with an opportunity to participate in the adjudication. Tesco Corporation chose to limit its participation in the adjudication to the filing of a written submission.

[21] On July 16, 2009, Mr. B. personally wrote to the Minister of Service Alberta, copying his lawyer and others, stating that he sought "a complete investigation of the Commissioner's actions in this matter".

b) Legislative

[22] The legislative background to this adjudication is relatively complex. In Appendix A, I have attempted to set out the most pertinent sections of FOIP in a way which will make it easier to follow the interaction amongst the provisions. Access to the entire statute, and to all of the provisions of PIPA can, of course, be obtained from the Queen's Printer's website.

2. The Commissioner's 2008 decision

[23] The Commissioner's October 29, 2008 decision to deny Mr. B. access to the B. file in the Commission offices was correct.

[24] As the Commissioner's letter of October 29 pointed out to Mr. B., see Appendix E, the B. file in the Commission offices relates to the exercise of that officer's functions under the *Personal Information and Privacy Act* and is therefore not one of the records of a public body to which access can be granted. Because the statutory provision which exempts such records from disclosure is very clear, it is not necessary to review the policy decisions which must have prompted that legislative provision. Suffice it to say that such a provision is useful to encourage full and frank discussions between the Commissioner's office and the party from whom the information has been sought.

[25] Indeed, Mr. B. does not question the legal correctness of the 2008 decision.

[26] As Mr. B. was requesting access to a file, his own file in the Commissioner's office, the Commissioner was correct in his identification of s. 77(2) of the *Freedom of Information and Protection of Privacy Act* as the mechanism which Mr. B. could explore if he wanted an adjudicator to assess the Commissioner's substantive decision. Because of that request, the appointment of an adjudicator under s. 75 of FOIP allows the adjudicator to review the Commissioner's decision to deny access to the file.

[27] Indeed, Mr. B. does not formally question the completeness of the Commissioner's reference to a s. 77(2) adjudication. In the course of submissions at the hearing, Mr. B. suggested that the Commissioner's reference to s. 77(2) of the FOIP act was too narrow, given the breadth of the B. complaints. It is true, of course, that in his letter to the Minister requesting a s. 77(2) adjudication, Mr. B. advanced certain arguments in support of his request for access, and those arguments were very broad; however, since those same arguments had not been made to the Commissioner, it is understandable that the Commissioner's response was narrow and related solely to Mr. B.'s request to him.

[28] Moreover, the Minister ensured that a review was ordered under s. 75 of FOIP, which is broader than, although encompassing, s. 77. In that way, Mr. B. obtained the broadest scope of adjudication available in the circumstances.

[29] In summary, the Commissioner's dealings with Mr. B. in October 2008 were substantively and procedurally correct. The Commissioner fully met the standards set in s. 10 of the FOIP Act to "make every reasonable effort to assist [Mr. B.] and to respond to [Mr. B.] openly, accurately and completely". Mr. B. does not challenge the Commissioner's 2008 response. Rather, Mr. B. uses his 2008 request for an adjudication as a tool to review the Commissioner's 2007 denial of an inquiry into Tesco's treatment of Mr. B.'s personal information; I will therefore turn next to that issue.

3. The Commissioner's 2007 decision

[30] As outlined above, in 2007, at a time when Mr. B. was represented by lawyers, the Commissioner declined Mr. B.'s request for an inquiry into Tesco's treatment of his personal information.

a) Is there jurisdiction on this adjudication to deal with the 2007 decision?

[31] The first issue that arises in relation to the 2007 decision is jurisdiction: does my appointment as adjudicator authorize me to deal with that decision?

[32] The short answer to that question is, No. I have come to that conclusion for the following three reasons.

[33] First, Mr. B. did not ask for an adjudication of the 2007 decision. As a reading of both his request for access to the Commission file and his letter to the Minister reveal, see appendices, in 2008, Mr. B. was asking for access to the Commission file in relation to him; he was not asking for an adjudication on the 2007 decision.

[34] Second, Mr. B. did not ask for an adjudication of the 2007 decision within the time limits specified in the FOIP Act. As elsewhere in the statute, we see that the Legislature has, in s. 79 of the statute, imposed a presumptive deadline which is relatively short: generally, a request for adjudication of a decision must be made within 60 days after the notification of the decision (or such longer period allowed by the adjudicator) or, in some instances, only 20 days after notification of the decision. The 2007 decision was issued on January 29, 2007; Mr. B.'s request for the appointment of an adjudicator was made on December 4, 2008. Even if neither the January 29, 2007 decision or the December 4, 2008 adjudication request were hand delivered or faxed, we would be entitled to assume that they were delivered 7 days after posting - see *Interpretation Act*. Even if we were to double the time allotted by the *Interpretation Act*, we would quickly conclude that Mr. B. did not ask for an adjudication of the 2007 decision within the time required.

[35] Nor, might I add, has Mr. B. asked me as adjudicator for an extension of the time to allow for adjudication of the 2007 decision.

[36] On the issue of a possible extension of time, I should add that, if I had been asked by Mr. B., or his lawyer, for an extension of the time to allow for adjudication relative to the 2007 decision I would have been required to hear from Tesco Corporation concerning the propriety of granting an extension of time. Unless Tesco agreed to the granting of an extension, it is likely that I would have denied an extension for the following reasons. First, at the time of the 2007 decision, Mr. B. was represented by a law firm. Absent some explanation from Mr. B., the adjudicator is entitled to assume that the legal issues surrounding the 2007 decision were all adequately explained to Mr. B. by his then lawyer. His failure to act is a timely manner is therefore assumed to be a choice made by Mr. B.. Second, Mr. B. has not provided any explanation for his long delay in asking for an extension of time to ask for an adjudication of the 2007 decision. Third, nearly two years has elapsed from the time when the Commissioner made his decision known to Mr. B.. This is therefore not a situation like the one dealt with by Adjudicator Wittmann in the matter relating to A.B. where the delay beyond the deadline was minimal. Legal deadlines are imposed with a view to allowing persons who are involved in legal conflicts to know when they no longer have to worry about that conflict. When the deadlines have elapsed, persons are entitled to assume that the matter is concluded; they might then dispose of records relating to the conflict, etc. It is therefore presumably or presumptively prejudicial to one of the parties to grant an extension after a very long delay, as is the situation here.

[37] Dealing next with the third and last reason for concluding that I have no jurisdiction as adjudicator relative to the 2007 decision, I say that the 2007 decision was not made by the Commissioner acting "as head of the Office of the Information and Privacy Commissioner".

Only decisions made in the latter capacity are subject to an adjudication; all other decisions are subject to judicial review.

[38] In contrast to the first two reasons for concluding that I have no jurisdiction to review the 2007 decision, the third reason is more subtle and requires greater explanation. It is true that the letter in question was printed on stationery having the logo and letterhead of the Office of the Information and Privacy Commissioner, that Frank J. Work, Q.C., signed the letter and that he is designated in the letter as Information and Privacy Commissioner. However, I agree with the position taken by the lawyers for the Office of the Information and Privacy Commissioner that when Mr. Work made the January 29, 2007 decision, he was not acting as the "head of the Office of the Information and Privacy Commissioner", but as the Commissioner. The difference between the two is the difference between what Adjudicator Wittmann, quoting from the Commissioner's then position, as "legislative functions" and what might be described as "administrative functions". In the former situation, the Commissioner - or someone from that office - is making a quasi-judicial decision, i.e. he is deciding an issue contested by two competing parties. Such a decision is not subject to adjudication, it is only subject to judicial review. Being subjected to judicial review, with all that implies including publicity and potential costs, is a very effective oversight mechanism. In the latter situation, the Commissioner is making a decision in which his office is a party. As Adjudicator Wittmann has properly pointed out, it would be inappropriate for the Commissioner to evade scrutiny or oversight in the operation of his own office. In my view, the legislation establishes that the Commissioner's decision as head of the Office of the Information and Privacy Commissioner is not subject to judicial review, but is subject to adjudication. As I understand it, the adjudicator's decision then itself becomes subject to judicial review. This focus on the context of a decision establishing the character of the decision for purposes of legislative interpretation is not new.

[39] Not only is this difference in function and roles highlighted by the wording of the legislation, it is emphasized by the difference in the oversight mechanism. Section 75(2) is clear:

> An adjudicator must not review an order of the Commissioner made under this Act.

[40] In comparison, s. 77(2) states:

> A person who makes a request to the Commissioner for access to a record or for correction of personal information may ask an adjudicator to review any decision, act or failure to act of the Commissioner that relates to the request.

[41] Part of the difficulty of interpretation of the legislation lies in the fact that s. 75(1)(e) of FOIP states that an adjudicator appointed under that section may:

> review, if requested under section 77, any decision, act or failure to act of the Commissioner as the head of the Office of the Information and Privacy Commissioner.

[42] At first blush, these legislative provisions are difficult to reconcile. However, when one focusses on the distinction between the roles of the Commissioner, it becomes clear that, when the Commissioner is denying access to a record kept by his office, the Commissioner is acting as the head of the Office of the Information and Privacy Commissioner. In that role, the Commissioner - who is normally an adjudicator in a contest between two parties (here Mr. B. and Tesco) - is a contestant against another party, in this case, Mr. B.; Mr. B. wants a record and the Commissioner doesn't want to provide access to it. In such a situation, an adjudicator other than the Commissioner must be appointed since the Commissioner can't adjudicate in a matter in which he is a party. Hence, the recourse to an adjudicator who is a judge of the Court of Queen's Bench. In this case, the correct interpretation of the sections allows me, as adjudicator in this matter, to review both the 2008 decision of the Commissioner, and also to review whether the Commissioner did, in dealing with the 2008 request, comply with the requirements of s. 10 of FOIP, i.e. to make "every reasonable effort to assist [Mr. B.] and to respond to [Mr. B.] openly, accurately and completely".

[43] Mr. B. relies on a decision of Adjudicator Wittmann, issued in the matter of A.B. as Adjudication Order No. 6, in which Adjudicator Wittmann held that there was no distinction between the Commissioner and the Office of the Information and Privacy Commissioner. With respect, I disagree with the conclusion reached by Adjudicator Wittman in the A.B. decision on the issue of the difference in the roles of the Commissioner.

[44] However, I have an advantage which was not made available to Adjudicator Wittmann in that, in this hearing, I was provided with a series of British Columbia decisions which have recognized a distinction between the two types of roles of the Commissioner. Those decisions arise out of B.C. legislation that is essentially indistinguishable from Alberta's PIPA, FOIP and Information and Privacy Commission structure. I adopt the reasoning on the issue of the difference in the roles of the Commissioner as set out in those decisions, of which the following extract written by Smith J. of the B.C. superior court acting as adjudicator in Adjudication order No. 7, is representative:

> The Commissioner has two distinct roles under the Act: (1) overseeing and administering the Act and (2) acting as head of a public body. It is only the acts or omissions by the Commissioner in the latter capacity that are subject to review by an adjudicator. This is an important distinction because the bulk of the Commissioner's work, which includes monitoring compliance by other public bodies, investigating complaints and promoting public awareness of the act, is subject only to judicial review and is not reviewable by an adjudicator.

[45] The British Columbia decisions track the specific wording of the legislation and note that the Legislature's adoption of different language to identify the Commissioner and the Office of the Information and Privacy Commissioner must be respected. I agree.

[46] Indeed, the difference in characterization of the Commissioner's rulings is perhaps usefully illustrated by the roles of Court of Queen's Bench judges: when acting as judges, our

decisions can only be appealed, that is they can only be dealt with by the Court of Appeal, not by a judge of our own court. The Court of Appeal could overturn our judgments and impose its own judgment. However, when judges of this court are acting as *persona designata* of various types, including adjudicators under FOIP legislation, our decisions can be reviewed by a judge of our own court. (Parenthetically, I observe that what might appear to a lay person as a very awkward situation of a *puisne* judge of this court reviewing the decision of a colleague, or even of the judge's Chief, or Associate Chief, Justice when the latter is acting as an adjudicator could be attenuated if the legislation were, as occurs in certain other provinces, to broaden the pool of adjudicators from sitting judges of the Court of Queen's Bench to include retired judges of the Court.) If the reviewing judge concludes that the decision under review is either wrong or unreasonable, depending on the appropriate standard of review, the reviewing judge cannot issue their own decision, but, must return the issue to the adjudicator for further adjudication. In other words, in order to know where and how one obtains oversight over the decisions of a judge of the Court of Queen's Bench, one must begin by characterizing the work that is the subject of the application. A parallel analysis must be undertaken in relation to the Commissioner's decisions.

[47] Adopting the B.C. approach to the characterization of roles of the Information and Privacy Commissioner does not mean, of course, that I conclude that Adjudicator Wittmann erred in the A.B. decision. Indeed, just like FOIP, PIPA contains some provisions dealing with the Commissioner *qua* adjudicator, and others dealing with the Commissioner as party. It may well be that the specific situation in the matter of A.B. is one of the former type - where the oversight mechanism is adjudication.

[48] Mr. B. states that the wording of the legislation is attributable to the fact that, when the Office of the Information and Privacy Commissioner was first established, the individual who occupied the office also served in other capacities. I accept the correctness of the historical gloss on the legislation provided by Mr. B.. However, with respect, I am of the view that this historical gloss is irrelevant.

[49] As a last comment on this specific issue, I note that although the distinction in the roles of the Commissioner is clear to lawyers, since many lay people have recourse to privacy legislation, it would perhaps be useful if the Legislature were to re-word the legislation so as to make the two roles of the Commissioner more comprehensible to the average reader.

[50] In summary on this point, for the three reasons set out above, I have concluded that I do not have jurisdiction on this adjudication to review the 2007 decision of the Commissioner in the B. matter.

[51] If, however, I were wrong in my assessment of the jurisdictional issue, I would then go on to consider Mr. B.'s specific objection to the 2007 decision.

b) Assuming jurisdiction over the 2007 decision, did the Commissioner fail to grant Mr. B. procedural fairness by failing to tell Mr. B.'s lawyer about the potential for judicial review?

[52] The short answer to that question is that, in 2007, the Commissioner was not, as a matter of procedural fairness, required to tell Mr. B.'s lawyer about the mechanism of judicial review.

[53] Before turning to an analysis of the duty to be fair as it applied to the Commissioner in the 2007 decision, let me briefly review some of the arguments made by Mr. B. before he was represented by a lawyer. Wisely, those arguments were not pressed at the hearing itself.

[54] Mr. B. states over and over again that the Commissioner should have imposed sanctions on Tesco for its failure to provide personal information in a prompt, fulsome and straightforward way. Unfortunately, Mr. B. leapfrogs too easily on the one hand from Tesco's delay in responding to the imposition of a fine on Tesco for the delay, and, on the other, from an inquiry by the Commissioner into Tesco's treatment of the disclosure request to an order rectifying whatever prompted the delay in replying to the registration of that order in this court as a basis for a request for damages. With respect, Mr. B.'s argument in this area is simply wrong. For a start, the Commissioner has no jurisdiction to impose penalties, including fines, for delay. Any penalties that might be imposed would be imposed by a court hearing charges brought by the Commissioner. Where, as here, the information was eventually provided even though it was not provided in a timely manner, it is far from certain that a court would impose conviction for what appears to be the only offence which might be charged - that of obstructing the Commissioner in the performance of his duties: s. 59(1)(d) of PIPA.

[55] Indeed, Tesco's argument on this point has some merit:

> The receipt of an access request may be when a corporation is first alerted to institutional deficiencies that exceed the ambit of an individual access request. An inadequate response to an access request must be remedied and, therefore, it must be appreciated than an access request may elicit communications between OIPC and an organization that fall outside the parameters of the particular access request.

[56] In fact, the offences section of PIPA must be read in the context of s. 57 of that act which provides that no action lies and no proceeding may be brought against an organization like Tesco for damages resulting from:

> the disclosure of or failure to disclose, in good faith, all or part of a record or personal information under this Act . . .

[57] Similarly, the offences section itself states:

> 59(4) Neither an organization nor an individual is guilty of an offence under this Act if it is established to the satisfaction of the court that the organization or individual, as the case may be, acted reasonably in the circumstances that gave rise to the offence.

[58] Circumspection is therefore a key component of the enforcement of the legislation. The explicit emphasis in the legislation is on a reasonable response to the legislation.

[59] In this case, the circumstances include not only the fact that the was information eventually provided, but the additional facts that:

- there is no hard and fast statutory deadline for production as suggested by Mr. B. in his material, because the timelines in the statute being subject to extension; and,

- Mr. B. himself highlights some of the factors that might tend to explain Tesco's tardiness in replying, including the existence of litigation and the presence of off-site records. As Mr. B. is aware, subparagraph 14(d) of the *Personal Information Protection Act* allows an organization to collect personal information about an individual without the consent of that individual if the collection of the information is reasonable for the purposes of an investigation or a legal proceeding. Similar provisions are found in relation to the collection of personal information about an employee: ss. 15(1)(a) and 15(4).

[60] In this context as well, it is important to remember that the Commissioner's only tool is to order the organization to perform its duty by conducting an adequate search for records. Having satisfied himself that the organization in question, Tesco Corporation, had conducted an adequate search, the Commissioner's own powers were effectively exhausted.

[61] Mr. B. asks why he is not allowed access to Tesco's explanation. The short answer is that, in s. 4(1)(d) of FOIP, the Legislature has stated that he is not entitled to access to that record. The policy which underlies subparagraph 4(1)(d) is also contained in s. 57 of FOIP: see Appendix A.

[62] The public policy reasons which underlie these sections of the legislation are obvious: it is better to encourage full and frank discussions between the Commissioner's office and contesting parties than to allow full disclosure of all communications. Although an adjudicator should presumably not comment on the government's legislative policy, I might add that the policy which underlies these sections is similar to the policy which underlies the privilege recognized in common law as protecting settlement negotiations. In its written submissions on this hearing, Tesco Corporation noted that disclosure of the records request in 2008 would reveal to Mr. B. information that is prejudicial to Tesco's interests because there are likely to be communications that refer to wider organizational matters and the records are also likely to contain without prejudice and privileged communications that are in the nature of settlement negotiations. Indeed, section 3 of PIPA explicitly outlines the competing social values which it must assess in each of the contests over which it must adjudicate:

> The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes **both** the right of an individual

> to have his or her personal information protected and the need of organizations collect, use or disclose personal information for purposes that are reasonable.
>
> [Emphasis added]

[63] Mr. B. asks why he was denied access to the reasons for the Commissioner's decision not to hold an inquiry. I note that the Commissioner's reasons not to hold an inquiry are contained in his two communications to Mr. B. on that topic, and include a copy of the statutory declaration filed by Tesco. If Mr. B. was dissatisfied with the reasons given by the Commissioner not to hold an inquiry, Mr. B. could have had the matter judicially reviewed. In 2007, Mr. B. chose not to exercise his legal right to do so; it is too late to change his mind.

[64] Mr. B.'s suspicions, for which he does not provide any basis whatever, obviously do not establish any basis for action by anyone.

[65] At the adjudication hearing, Mr. B.'s lawyer's argument concerning the Commissioner's decision in 2007 is narrowed down to this: when the Commissioner declined to hold an inquiry into Tesco's treatment of Mr. B.'s personal information, the Commissioner should have told Mr. B.'s lawyer that the decision could be judicially reviewed.

[66] With respect, that position is incorrect. I begin by noting that Mr. B. himself could not point to any decision in which a court recognized an obligation to advise a litigant of an appeal route. The absence of existing case law only means that we must turn to first principles for assistance in determining the correct standard to apply to the Commissioner.

[67] The Commissioner owes a duty of fairness to those who invoke his authority to settle a dispute. The gold standard for fairness is the duty to act judicially: see *Principles of Administrative Law* at p. 238. As the case law on the duty of fairness underlines, that duty requires different conduct in different situations. However, we can begin the analysis of the duty to act fairly in relation to information about appeal by asking: "What are judges required to do when they issue decisions?" The answer is that they are required to give reasons for their decision but they are not required to tell the affected parties how to appeal the decision. When issuing decisions under PIPA, the Commissioner is likewise not required to tell parties how to have the decision reviewed.

[68] There are many reasons why judges are not required to tell litigants how to appeal the decisions which they have just issued. On a psychological level, this information might be misconstrued as an invitation to appeal the decision. Any such misunderstanding would have negative consequences including not only the undermining of the authority of the decision just issued but the potential expenditure of money and emotional capital in an appeal procedure which might be doomed to failure. Legislative policy in supporting the finality of a final decision of the Commissioner is found in s. 53 of PIPA which states:

> An order made by the Commissioner under this Act is final.

[69] Further, under the common law, people are presumed to know the law, including the provisions made for challenge of the decision of a court or other tribunal.

[70] Finally, if the Legislature, or Parliament, concluded that the public must be informed of post-decision alternatives or challenges, then the legislative body could specify those requirements. Neither FOIP nor PIPA have such requirements.

[71] The Commissioner's decision not to disclose the Commission file on the B. matter to Mr. B. does include information to Mr. B. about the way in which Mr. B. can apply for an adjudication of the decision to deny him access to the Commission's file on his matter. Without pronouncing on whether such information is required to be given by the Commissioner to every self-represented person who is dealing with the Commissioner in the Commissioner's capacity as head of the Office of the Information and Privacy Commissioner, I am of the view that there are two obvious distinctions between the 2008 situation - where information about a further step is given - and the 2007 situation - where no such information was provided. The main distinction arises from the difference in the roles of the Commissioner as set out above. When the Commissioner is acting as the head of the Office of the Information and Privacy Commissioner, he is a party litigant rather than an adjudicator. When the Commissioner provides information about adjudication, he is doing so with a view to providing information about finalizing available internal procedures under the legislation. This is important because, as a matter of law, a court will not typically exercise its discretion to grant judicial review of an administrative tribunal's decision unless the applicant for judicial review has exhausted all available internal review procedures. Once the internal steps have concluded, however, the decision stands as the final decision which, typically in relation to administrative tribunals, can only be issued by the administrative tribunal itself. As indicated above, when a superior court reviews the final decision of an administrative tribunal, all the court can do if the decision is wrong or unreasonable is to return the matter to the administrative tribunal for further consideration. In 2008, the Commissioner gave information to Mr. B. about the adjudication process so that Mr. B. could, if he chose, pursue the last step in obtaining a final decision on his access request.

[72] In 2007, the final decision had been made by the Commissioner acting as adjudicator between Tesco and B.. The internal route was completed. The final decision was known. The Commissioner had no further duty to Mr. B. to ensure that Mr. B. was able, if he chose, to exercise his legal right to have a final decision judicially reviewed.

[73] The second distinction between the information content of the 2008 decision and that of the 2007 decision is the fact that, in 2008 Mr. B. was self-represented whereas in 2007 Mr. B. was represented by a lawyer. A court is entitled to assume that a lawyer knows the law. As recent case law has established, a court may be required to provide information to a self-represented litigant concerning the court's procedures, etc., but it is not required to provide such information to a lawyer. Even though a court is required to provide information to a self-represented litigant concerning the procedures in which the litigant is involved, as Mr. B. has acknowledged, the court is not required to provide a self-represented litigant with information about how to appeal the court's decision. Similar provisions apply to the Commissioner.

4. The July 16, 2009 letter

[74] Lastly, it might go without saying that Mr. B.'s letter of July 16, 2009 to the Minister, a letter written long after the appointment of an adjudicator in this matter, simply can have no effect on the appointment itself or on its scope.

5. Conclusion

[75] For the reasons set out above, I have concluded that, within the jurisdiction which I have been given, the Commissioner has not acted improperly in the B.-Tesco matter.

Heard at the City of Edmonton, Alberta on the 27th day of July, 2009.
Dated at the City of Edmonton, Alberta this 12th day of August, 2009.

Hon. Joanne B. Veit
Adjudicator

Appendix A

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:

. . .

(d) a record that is created by or for or is in the custody or under the control of an officer of the Legislature and relates to the exercise of that officer's functions under an Act of Alberta;

Division 2
Complaints About and Reviews of the Commissioner's Decisions as Head of a Public Body

Adjudicator to investigate complaints and review decisions

75(1) The Lieutenant Governor in Council may designate a judge of the Court of Queen's Bench of Alberta to act as an adjudicator

(a) to investigate complaints made against the Commissioner as the head of the Office of the Information and Privacy Commissioner with respect to any matter referred to in section 53(2),

. . .

(e) to review, if requested under section 77, any decision, act or failure to act of the Commissioner as the head of the Office of the Information and Privacy Commissioner,

. . .

75(2) An adjudicator must not review an order of the Commissioner made under this Act.

53(2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that

(a) a duty imposed by section 10 has not been performed,

(b) an extension of time for responding to a request is not in accordance with section 14,

(c) a fee required under this Act is inappropriate,

(d) a correction of personal information requested under section 36(1) has been refused without justification, and

(e) personal information has been collected, used or disclosed by a public body in contravention of Part 2.

1994 cF-18.5 s51;1995 c17 s16;
1999 c23 s28

Part 1
Freedom of Information

Division 1
Obtaining Access to Records

Duty to assist applicants

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

(2) The head of a public body must create a record for an applicant if

(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and

(b) creating a record would not unreasonably interfere with the operations of the public body.

Right to ask for a review

77(1) This section applies

(a) to a decision, act or failure to act of the Commissioner when acting as the head of the Office of the Information and Privacy Commissioner, and

...

(2) A person who makes a request to the Commissioner for access to a record or for correction of personal information may ask an adjudicator to review any decision, act or failure to act of the Commissioner that relates to the request.

...

Statements made to the Commissioner not admissible in evidence

57(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.