ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

DECISION P2011-D-001

May 5, 2011

ALBERTA TEACHERS' ASSOCIATION

Case File Number P1216

Office URL: www.oipc.ab.ca

Summary: The Complainant complained that the Alberta Teachers' Association (the "Organization") contravened the *Personal Information Protection Act* (the "Act") when it mailed information regarding a reassessment of her teaching qualifications to a third party. She requested a review, then an inquiry, by the Commissioner.

The Organization objected to the inquiry proceeding, on the basis that the nature of the complaint did not warrant conducting an inquiry. The Organization also objected to the matter being heard by the Adjudicator to whom the Commissioner had delegated the matter. The Court of Queen's Bench had earlier found that there was a reasonable apprehension of bias on the part of the Commissioner against the Organization, and the Organization argued that, in the Adjudicator's exercise of the Commissioner's adjudicative function, there was no real independence from the Commissioner's oversight, management or influence.

Considering the scheme of the Act under which the office of the Commissioner operates, and section 43(1) allowing the Commissioner to delegate to any person, the Adjudicator found that the intention of the Legislature was to permit the Commissioner to delegate the matter to someone within his office, even in view of the earlier finding in relation to bias. Further, there was an appropriate degree of independence and impartiality on the part of the Adjudicator, given the nature of the decision being made by him, the importance of it to the Organization, and the procedures followed in making it. Finally, the Adjudicator found that, in the circumstances of the particular case, there was no reasonable

apprehension of bias or suspicion of bias on his part, as he had had no prior involvement in the matter, no discussions about it at any time with the Commissioner, and a new and separate file had been created for him following his delegation. The Adjudicator therefore concluded that he should not recuse himself from the matter.

The Adjudicator also found that an inquiry was warranted under section 50(1) of the Act. Although the Organization argued that the complaint involved an isolated clerical error that had been remedied, the alleged contravention of the Act involved the disclosure of the Complainant's sensitive personal information, and there were unresolved questions about whether the Organization had made all reasonable security arrangements to protect it. The Organization also argued that the Complainant had not made her complaint to the Commissioner's office within a reasonable time, but the Adjudicator found that she had.

Statutes and Regulations Cited: AB: *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 34, 43, 43(1), 43.1, 43.1(2)(b), 43.1(2)(d), 47, 49.1, 50(1), 50(1)(d) and 50(5); *Personal Information Protection Amendment Act, 2009*, S.A. 2009, c. 50; *Government Organization Act*, R.S.A. 2000, c. G-10, s. 9(1); *Police Act*, R.S.A. 2000, c. P-17, s. 45(3); *Police Service Regulation*, Alta. Reg. 356/90, s. 14.

Decisions and Investigation Reports Cited: AB: Decision P2010-D-001; Investigation Reports F2004-IR-001 and F2007-IR-002.

Cases Cited: AB: *Wimpey Western Ltd. v. Alberta (Director of Standards and Approvals, Department of the Environment*) (1982), 37 A.R. 303 (Q.B.); *Northeast Bottle Depot Ltd. v. Alberta (Beverage Container Management Board)*, 2000 ABQB 572; *Robertson v. Edmonton (City) Police Service*, 2004 ABQB 519; *Milner Power Inc. v. Alberta (Energy and Utilities Board)*, 2007 ABCA 265; *Searles v. Alberta (Health and Wellness)*, 2008 ABQB 307; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2010 ABCA 26, leave to appeal to the S.C.C. granted [2010] S.C.C.A. No. 100 (QL); *Searles v. Alberta (Health and Wellness)*, 2010 ABQB 157; *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)*, 2011 ABQB 19. **CAN:** *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52; *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29; *Sam Lévy & Associés Inc. v. Canada (Superintendent of Bankruptcy)*, 2005 FC 702.

Other Source Cited: William Wade and Christopher Forsyth, *Administrative Law*, 7th ed. (Oxford: Clarendon Press, 1994).

I. BACKGROUND

[para 1] In a letter dated January 26, 2009, the Complainant complained that the Alberta Teachers' Association (the "Organization", the "Association" or the "ATA")

contravened the *Personal Information Protection Act* (the "Act" or "PIPA") when it mailed information regarding a reassessment of her teaching qualifications to a third party.

[para 2] The Commissioner authorized a portfolio officer to investigate and attempt to resolve the matter. This was not successful, and the Complainant requested an inquiry by correspondence dated June 4, 2009. By letter dated March 10, 2010, the Commissioner advised the parties that an inquiry would proceed.

[para 3] In a letter dated March 19, 2010, the Organization objected to the inquiry proceeding, on the basis that the timelines and rules for extending a review under section 50(5) of the Act had been breached by the Commissioner, and on the basis that the nature of the complaint did not warrant conducting an inquiry. The Complainant responded by letter dated March 30, 2010.

[para 4] In Decision P2010-D-001 dated April 27, 2010, the Commissioner decided that the inquiry could proceed, as there had been no breach of the timelines and rules set out in section 50(5) of the Act. The Organization brought an application for judicial review of the Decision.

[para 5] In *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)* dated January 12, 2011 (the "Judicial Review Decision"), Graesser J. of the Court of Queen's Bench quashed Decision P2010-D-001, on the basis that there was a reasonable apprehension of bias demonstrated by comments of the Commissioner in the Decision. Graesser J. remitted the matter back to the Commissioner, at para. 174, as follows:

> The matter is remitted to the Commissioner to appoint a delegate to deal with all issues arising out of [the Complainant's] complaint. The delegate will initially have to decide whether the complaint should proceed to an Inquiry, over the ATA's objections.

[para 6] In a Delegation dated February 8, 2011, the Commissioner delegated this matter to me, as Adjudicator.

II. ISSUES

[para 7] In a letter to the parties dated February 9, 2011, I framed a first preliminary issue in this matter as follows:

> Should an inquiry be conducted under section 50(1) of the Act?

[para 8] In my letter, I did not propose to address any issue in relation to the timelines and rules under section 50(5) of the Act, as it is appropriate to wait for a relevant decision of the Supreme Court of Canada – namely the outcome of the appeal from the decision of the Court of Appeal of Alberta in *Alberta (Information and Privacy*

Commissioner) v. Alberta Teachers' Association, 2010 ABCA 26, leave to appeal to the S.C.C. granted [2010] S.C.C.A. No. 100 (QL). The Supreme Court heard the appeal on February 16, 2011.

[para 9] In my letter, I also invited the parties to raise any other preliminary or procedural matters that they wanted me to address. Following an exchange of correspondence between the Organization and me, which I discuss in more detail below, the Organization made a formal objection to my appointment as Adjudicator. I have therefore added the following additional preliminary issue:

> Should I recuse myself from this matter?

[para 10] I will discuss the second issue first because, if I were to find that I should recuse myself, it means that I would not be deciding the other preliminary issue set out above.

III. DISCUSSION OF ISSUES

A. Should I recuse myself from this matter?

[para 11] In the Judicial Review Decision, Graesser J. made the following comments regarding bias on the part of this office against the Organization, and set out the following approach, according to which the Commissioner was to delegate this matter to someone else, and either party could raise an objection regarding the chosen delegate's appointment (at paras. 152 to 159):

> … On the materials and submissions before me, I am not satisfied that there is a "suspicion" of bias tainting the entire Commissioner's office. That is an issue that would have to be raised when and if the Commissioner delegates the matter to someone in his office.
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> […]
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> The Commissioner notes that he delegates many matters to others within his office. There is no power to delegate his power to delegate, so the Commissioner is the one who must decide who to delegate the matter to. He may choose to delegate that power to someone in his office (obviously other than [the portfolio officer who investigated the complaint]) or he may choose to delegate that power to someone outside his office. If he considers that it is appropriate for him to delegate this matter to someone in his office, that is his decision to make in the first instance. If either party objects to the appointment of such delegate, any objections should be made to the delegate.
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> The Commissioner submits that his budget does not permit him to delegate outside his office. Budget is not, in my view, a valid criteri[on] for determining the appropriateness of a delegate. If there is any concern on the Commissioner's part that someone in his office may not be appropriate or comfortable with making a decision in this case, the matter should obviously be referred outside. It

> is no answer to an apprehension of bias that there was not enough money in the budget to have a completely unbiased person deal with a matter.
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> […]
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> The ATA seeks an order of prohibition against the Commissioner and his office from taking any further action in relation to the matter under inquiry. As a result of my findings on bias, the ATA is entitled to an order of prohibition against the Commissioner (but not the office of the Commissioner) from taking any further action in relation to [the Complainant's] complaints, other than the appointment of a delegate to deal with the matter. The ATA has not made out its case that the entire Commissioner's office is tainted with a reasonable apprehension of bias or a reasonable suspicion of bias. I do not see that under PIPA, anyone other than the Commissioner can appoint a delegate.

[para 12] In a letter dated February 21, 2011, the Organization asked me a series of questions "in order for the Association to be able to determine what our response should be to the Commissioner's delegation to you as an adjudicator within the Commissioner's office". In a letter dated February 24, 2011, I answered some of the questions because they pertained directly to this matter, being Case File Number P1216, and my answers would provide both parties with information about my previous involvement in the matter (which is none) and information about my approach now that it had been delegated to me. I explained as follows:

> *I have provided no assistance to the Commissioner in relation to Case File Number P1216, including when he rendered Decision P2010-D-001. I have read Decision P2010-D-001, to which the Court referred in Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner). This was not on the recommendation or at the direction of the Commissioner. Because Decision P2010-D-001 has been quashed, I will be disregarding it for the purposes of my own decisions in Case File Number P1216.*
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> *I did not participate, even informally, in the investigation/mediation of Case File Number P1216. I have not had, and will not be having, any discussions about the outcome of Case File Number P1216 with the Portfolio Officer who investigated/mediated this case, whether formally or informally. No personnel or resources outside the Office of the Information and Privacy Commissioner have been made available to me for the purposes of carrying out my delegated functions in this case.*

[para 13] I declined to answer any other questions from the Organization, even following two further requests from it in letters dated February 28 and March 4, 2011. Although I personally wrote to the parties when I was providing them with the information pertaining directly to Case File Number P1216 above, I arranged for an Inquiries Clerk to respond, on February 28 and March 7, 2011, to the Organization's two subsequent letters.

1. The Organization's objection based on my refusal to answer questions

[para 14] The Organization objects to my delegation from the Commissioner, in part, on the following basis:

> *As directed in the Judgment, at para. 155, if either party objects to the appointment of such delegate, any objections should be made to the delegate [emphasis of the Organization], and the Association continues to do so, in particular because, although Mr. Raaflaub was initially helpful in answering some of its questions, Mr. Raaflaub has now declined even to respond directly or to answer questions that are at the heart of the "completely unbiased person" issue.*

[para 15] First, my decision to arrange for the Inquiries Clerk to respond to the second and third letters of the Organization, rather than respond directly myself, was merely out of administrative ease. I sometimes send correspondence under my own signature, and I sometimes arrange for information to be conveyed to the parties by other staff, depending on factors such as the length of the correspondence and its substantive content. I do not find that I should recuse myself because I arranged for an Inquiries Clerk to respond to some of the Organization's correspondence.

[para 16] Second, objecting to me about my appointment as Adjudicator, as contemplated in the approach set out by Graesser J., does not mean that I have to answer the Organization's questions. In *Milner Power Inc. v. Alberta (Energy and Utilities Board)*, 2007 ABCA 265 at para. 42, Slatter J.A. of the Court of Appeal of Alberta wrote as follows:

> … It is inappropriate to examine the members of the tribunal even to reach issues of bias: *Robertson v. Edmonton (City) Police Service*, 2004 ABQB 519, 39 Alta. L.R. (4th) 263, 362 A.R. 44, 19 Admin. L.R. (4th) 1, at paras. 118-23, appeal dismissed as moot, 2006 ABCA 302. If issues of bias and natural justice that are not on the record are to be brought forward, they must be brought forward by affidavit evidence, and not by an examination of the tribunal or its staff.

[para 17] In *Robertson v. Edmonton (City) Police Service*, 2004 ABQB 519 at para. 122, Slatter J., then of the Court of Queen's Bench of Alberta, had earlier written:

> Great mischief arises from subjecting adjudicators to cross-examination, which is why many statutes contain specific provisions stating that members of tribunals are not compellable witnesses. One important reason to deny cross-examination is to protect the finality of decisions: *Agnew v. Ontario Association of Architects* (1987), 64 O.R. (2d) 8, 26 O.A.C. 354 (Div. Ct.). Another is to protect the decision-making process within the tribunal: *Ellis-Don Ltd. v. Ontario (Labour Relations Board)* (1994), 16 O.R. (3d) 698 (Div. Ct.). Where bias is alleged as a preliminary issue, these factors are perhaps not as compelling. However even when the issue is bias there are good reasons for not subjecting the adjudicator to cross-examination. The adjudicator is a neutral party in the process, yet cross-examination is a fundamentally adversarial procedure. […]

[para 18] The Organization's questions to me amount to an attempt to cross-examine me, which the cases above indicate to be inappropriate. I therefore do not find that I should recuse myself because I declined to answer questions that the Organization posed to me.

2. The Organization's objection based on my alleged lack of independence

[para 19] I now turn to the Organization's argument that I should recuse myself on the basis that I lack independence from the Commissioner. The Organization notes that, in the Judicial Review Decision, Graesser J. contemplated the appointment of a "completely unbiased person". With respect to its objection to my delegation, it writes as follows:

> *The objection stems from the Association's initial concern that, as employees of the Commissioner in a small unit of persons to whom the Commissioner delegates some but not all of his adjudicative power on a case-by-case basis (as in this matter) and in which he continues to share adjudicative responsibilities, there can be no real independence from the Commissioner's oversight, management, or influence upon the delegates' exercise of the Commissioner's adjudicative function.*

[para 20] As part of its submissions to me, the Organization attached a letter that it wrote to Graesser J., dated October 20, 2010, on the issue of whether he should require the Commissioner to delegate this matter to someone outside his office. Portions of the letter make assertions regarding the level of independence of adjudicators, such as me, from the Commissioner. They read as follows:

> *We point out the concern with each of those descriptions [as set out in a letter from the office of the Commissioner's outside legal counsel] in that they speak to interdependence with the Commissioner, not the independence necessary to overcome a suspicion of bias or the taint of actual or apprehended bias:*
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> *…the Adjudicators are "on staff with the Commissioner's Office"; that is, they are employees of the Commissioner, with all that that entails for their subordinate and dependent status. The OIPC Annual Report for 2007-2008 refers to having set "performance targets" for Adjudicators, a common practice of employers in monitoring their employees. What authority to adjudicate the Adjudicators have is derived from the Commissioner's delegated authority. […]*
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> *…the Commissioner, the Director of Adjudication, and the Adjudicators form a single "unit", which is termed the "Adjudication Unit"… it has been clear that files are transferred from one Adjudicator to another and from an Adjudicator to the Commissioner during a single case and at the Commissioner's pleasure. Moreover, these delegations are, to our knowledge, typically for a particular case only or for a particular function related to a case and nothing in section 43 [of PIPA, which gives the Commissioner the ability to delegate] prevents the delegation from being removed by the Commissioner by simply revoking the delegation, hardly a mark of independent adjudication. […]*

[…]

Even apart from what that now-assigned Adjudicator may have been told about the reasons for such delegation, including the potential finding of bias on the part of the Commissioner, the Adjudicator is faced with ruling on the ATA's objection (or a similar objection) [to the inquiry proceeding] when the Commissioner has already rejected the objection, or part of it, in the impugned decision [P2010-D-001].

[The letter of from the office of the Commissioner's legal counsel] goes on to suggest, apparently, that if the Court makes a finding of bias against the Commissioner, the Court should order that still another Adjudicator, presumably a second one, from the Commissioner's office hear the matter. That Adjudicator would then be receiving the file because of a finding that the Commissioner was biased, and would still inherit the problems the other Adjudicator would face in any event. There is no way either of the Adjudicators, employees of the Commissioner in a small Adjudication Unit of four adjudicators and the Director of Adjudication … could have been or could now be insulated from the ramifications of these events and such findings. […]

[para 21] While the Organization alleges facts to establish that I should recuse myself from this matter, it provides very little legal argument to support its view. In particular, it did not draw my attention to any cases dealing with the issue of whether a reasonable apprehension of bias in a particular matter on the part of the head of an agency or tribunal means that others within that same agency or tribunal should not hear the matter. In the next part of this Decision, I will set out some general principles regarding the required level of independence and impartiality of decision-makers in an administrative law context, including where they receive their authority to decide from another person who a party alleges to have an improper interest in the matter.

[para 22] With respect to this issue, the Complainant wrote the following, which she attached to her submissions to me, in response to the Organization's objection to the appointment of a previous adjudicator in this matter:

Judge Graesser made it very clear during the [Judicial] Review that a prospective determination of a reasonable apprehension of bias on the part of [Commissioner] Frank Work QC (towards the ATA) would certainly <u>not</u> [emphasis of the Complainant] mean that all members of the OIPC are biased (against the ATA). For the ATA to request that you recuse yourself from the proceedings suggests that anyone in the OIPC who has ever had dealings with the ATA should be ineligible to conduct or be involved in information and privacy related complaints against it (the ATA).

In its continuing quest to avoid justifiable scrutiny or, at the very least, to secure an ATA friendly adjudicator, however, the ATA goes a significant step further in requesting that the Commissioner "choose to delegate [his] power to someone outside his office" – this request seems not only inappropriate but precedent setting. If this request is granted, the ATA will have successfully placed itself beyond the scrutiny of the very office that has been empowered to deal with

> *complaints such as mine – there will be one rule for the ATA and another for all others! It is hard to imagine how the OIPC can fulfill its mandate under such circumstances.*

[para 23] Bearing in mind the arguments of both parties, I will now review what I consider to be some relevant case law and then proceed to apply it to the present matter.

a) Some relevant case law and general principles

[para 24] In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52 at paras. 20 to 27, McLachlin C.J. of the Supreme Court of Canada wrote as follows:

> … It is well established that, absent constitutional constraints, the degree of independence required of a particular government decision maker or tribunal is determined by its enabling statute. It is the legislature or Parliament that determines the degree of independence required of tribunal members. The statute must be construed as a whole to determine the degree of independence the legislature intended.
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> Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice: *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495, at p. 503; *Law Society of Upper Canada v. French*, [1975] 2 S.C.R. 767, at pp. 783-84. In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision maker, one of the fundamental principles of natural justice: *Matsqui*, *supra* (*per* Lamer C.J. and Sopinka J.); *Régie*, *supra*, at para. 39; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405. Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make": *Régie*, at para. 39.
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> However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication. See generally: *Innisfil (Corporation of the Township of) v. Corporation of the Township of Vespra*, [1981] 2 S.C.R. 145; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Ringrose v. College of Physicians and Surgeons (Alberta*), [1977] 1 S.C.R. 814; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105. Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.
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> This principle reflects the fundamental distinction between administrative tribunals and courts. Superior courts, by virtue of their role as courts of inherent

jurisdiction, are constitutionally required to possess objective guarantees of both individual and institutional independence. The same constitutional imperative applies to the provincial courts: *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (the "*Provincial Court Judges Reference*"). Historically, the requirement of judicial independence developed to demarcate the fundamental division between the judiciary and the executive. It protected, and continues to protect, the impartiality of judges – both in fact and perception – by insulating them from external influence, most notably the influence of the executive: *Beauregard v. Canada*, [1986] 2 S.C.R. 56, at p. 69; *Régie*, at para. 61.

Administrative tribunals, by contrast, lack this constitutional distinction from the executive. They are, in fact, created precisely for the purpose of implementing government policy. Implementation of that policy may require them to make quasi-judicial decisions. They thus may be seen as spanning the constitutional divide between the executive and judicial branches of government. However, given their primary policy-making function, it is properly the role and responsibility of Parliament and the legislatures to determine the composition and structure required by a tribunal to discharge the responsibilities bestowed upon it. While tribunals may sometimes attract Charter requirements of independence, as a general rule they do not. Thus, the degree of independence required of a particular tribunal is a matter of discerning the intention of Parliament or the legislature and, absent constitutional constraints, this choice must be respected.

In the present case, the legislature of British Columbia spoke directly to the nature of appointments to the Liquor Appeal Board. Pursuant to s. 30(2)(a) of the [*Liquor Control and Licensing Act*, R.S.B.C. 1996, c. 267], the chair and members of the Board "serve at the pleasure of the Lieutenant Governor in Council". In practice, members are appointed for a one-year term (pursuant to an Order-in-Council), and serve on a part-time basis. All members but the chair are paid on a *per diem* basis. The chair establishes panels of one or three members to hear matters before the Board "as the chair considers advisable": s. 30(5).

The Court of Appeal, *per* Huddart J.A. concluded that this appointment scheme effectively deprived Board members of security of tenure, an essential safeguard of their independence. Relying on *Preston v. British Columbia* (1994), 92 B.C.L.R. (2d) 298, she held that Board members could be removed at pleasure, although they would be entitled to payment for the fixed term of their appointment. In her view, however, the additional protection offered by the fixed term of employment was illusory. Since the chair has an absolute discretion over the composition of hearing panels, it is possible that members might not be assigned to any cases, thus depriving them of work and remuneration. Thus part-time, fixed term appointments to the Board are indistinguishable from appointments "at pleasure". Both raise a reasonable apprehension that Board members may be unduly influenced by the threat of removal should they render unsatisfactory decisions in the eyes of the executive.

In my view, the legislature's intention that Board members should serve at pleasure, as expressed through s. 30(2)(a) of the Act, is unequivocal. As such, it does not permit the argument that the statute is ambiguous and hence should be read as imposing a higher degree of independence to meet the requirements of

> natural justice, if indeed a higher standard is required. It is easy to imagine more exacting safeguards of independence – longer, fixed-term appointments; full-time appointments; a panel selection process for appointing members to panels instead of the Chair's discretion. However, in each case one must face the question: "Is this what the legislature intended?" Given the legislature's willingness to countenance "at pleasure" appointments with full knowledge of the processes and penalties involved, it is impossible to answer this question in the affirmative. Huddart J.A. concluded that the tenure enjoyed by Board members was "no better than an appointment at pleasure" (para. 27). However, this is precisely the standard of independence required by the Act. Where the intention of the legislature, as here, is unequivocal, there is no room to import common law doctrines of independence, "however inviting it may be for a Court to do so": *Re W. D. Latimer Co. and Bray* (1974), 6 O.R. (2d) 129 (C.A.), at p. 137.

[para 25] Subsequently, in *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 at paras. 116 to 126 , Binnie J. of the Supreme Court of Canada wrote:

> The Ontario Court of Appeal concluded that the Minister had a "significant and direct interest" in the outcome of the arbitral awards (para. 21). […] At the very least, there was an appearance that he had a significant interest in outcomes as well as process.
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> The legal answer to this branch of the unions' argument, however, is that the legislature specifically conferred the power of appointment on the Minister. Absent a constitutional challenge, a statutory regime expressed in clear and unequivocal language on this specific point prevails over common law principles of natural justice, as recently affirmed by this Court in *Ocean Port Hotel*, *supra*.
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> […]
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> In the case of tribunals established, as here, to adjudicate "interest" disputes between parties, it is particularly important to insist on clear and unequivocal legislative language before finding a legislative intent to oust the requirement of impartiality either expressly or by necessary implication.
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> In this case, however, the legislature's choice of the Minister as the proper authority to exercise the power of appointment is clear and unequivocal.
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> […]
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> I therefore conclude that the Minister's perceived interest in the outcome of s. 6(5) [of the *Hospital Labour Disputes Arbitration Act*, R.S.O. 1990, c. H.14] arbitrations does not bar him from exercising a statutory power of appointment conferred on him in clear and unequivocal language.

[para 26] In *Robertson v. Edmonton (City) Police Service*, 2004 ABQB 519 at para. 42, Slatter J., then of the Court of Queen's Bench of Alberta, noted some of the above commentary taken from *Ocean Port* and *C.U.P.E.*. Then, in respect of the facts in the matter before him, he wrote at paras. 66 to 72 and 125:

Institutional Bias

It is convenient to first deal with the argument of institutional or structural bias. The Applicant noted that under the scheme set out in the Act and the Regulation, the chief of police can himself initiate the complaint, as he did in this case. He is then required to determine under s. 45 whether the complaint is serious enough to justify a hearing. The chief of police is then required to appoint the presiding officer under s. 45(5). It is contemplated that the presiding officer might be somebody in the police service that reports to the chief of police. The chief of police then has other involvement in the process; for example, under Regulation 17(4) the presiding officer can consult with the chief of police about the appropriate punishment. The Applicant argues that this system lacks "institutional independence" or "institutional impartiality".

It is true that under the legislative scheme the chief of police wears many hats. However, that scheme has been authorized by the Legislature, and accordingly it does not create a "bias" recognized by the law: see the discussion, *supra*, paras. 40-42, and particularly *C.U.P.E., supra*, at paras. 117-122. As long as the scheme of the *Police Act* survives constitutional challenge, then the proceedings cannot be attacked on the basis that the chief of police performs many functions. Likewise, just because the structure of the Act and Regulation may create a reasonable apprehension of bias does not justify intervention; the Legislature has provided for the structure, whatever appearances may arise from it.

Failure to Use External Personnel

Section 45 of the Act contemplates that disciplinary matters in a police service will be conducted internally. The Act does however provide in s.s. 45(5) that the chief of police can obtain an investigator, a presiding officer or a presenting officer from another police service when that would be in the public interest. The Applicant argues that in this case the Respondent Chief should have obtained all of those persons from outside the E.P.S., due to the particular nature of the charges against him. The Applicant argues that the Respondent Chief should also have engaged someone from outside the E.P.S. to perform the functions of the "chief of police" under s. 45, but I note that that is not authorized by s.s. 45(5). I will deal later with the particular allegations against the Respondent Presiding Officer (see *infra*, paras. 142-54).

The Applicant argues in part that the very structure of this internal type of disciplinary process is flawed because the presenting and presiding officers are subordinates of the chief of police. Likewise many witnesses will be subordinates of the presiding officer. A number of the charges were initiated by the former chief of police and other senior officers. The Applicant argues that the hierarchal structure in the police services deprives the various actors of the necessary degree of independence. This argument is answered at the administrative law level by the *Brosseau* principles (*supra*, para. 41): the Legislature has set this procedure, and absent a Charter challenge the regime prevails over any common law standards. The Charter challenge is answered by the decision in *Ocean Port* (*supra*, para. 42).

> The particular decision of the Respondent Chief to use internal resources is a discretionary one, and is entitled to a high degree of deference under the test in *Baker*. With respect to the investigator, I see no basis for concluding that the decision to appoint Inspector Gagnon was unreasonable. He was sufficiently removed from the dispute to conduct a proper investigation, and there is no other reason to disqualify him: see *infra*, paras. 127 ff. While the Respondent Chief could have asked for an external investigator, his decision not to do so was not patently unreasonable.
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> With respect to the Presenting Officers, the Respondent Chief appointed an internal employee of the E.P.S., and retained outside counsel to assist as contemplated by Regulation 14. The specific complaints about the persons selected are dealt with *infra*, paras. 166 ff, but apart from those complaints there is nothing unreasonable about these appointments either. Indeed the Respondent Chief has, to some extent, gone outside the E.P.S. in retaining outside counsel.
>
> In summary, there is no basis for challenging the decision of the Respondent Chief not to make further use of s.s. 45(5) of the Act. The Respondent Chief was able to find legally qualified persons within the E.P.S. to perform each of the required functions, without there being any reasonable apprehension of bias, and the decision to use those persons is not unreasonable.
>
> […]
>
> The Applicant argued that the Respondent Presiding Officer is biased. Part of this bias was alleged to be a structural or institutional bias, in the sense that the Presiding Officer in this case is also an officer of the E.P.S. He reports to the Respondent Chief. At some time in the past they briefly served in the same division of the E.P.S. It is alleged that as a result the Presiding Officer will be inclined to agree with the Chief's initial assessment that the complaint has some merit, and justifies holding a hearing. He knows some of the officers against whom the Applicant has made allegations of misconduct, and he knows many of the officers who will testify before him. Traditionally these features of discipline in a hierarchical command structure have not been seen as a source of bias: *R. v. MacKay*, [1980] 2 S.C.R. 370 at pp. 403-4; *Van Rassel v. Canada*, [1987] 1 F.C. 473 at para. 39; *Schick v. R.* (1987), 4 C.M.A.R. 540. It is also clear that the Act and the Regulation contemplate that the presiding officer will usually be a member of the same police service as the chief of police and the cited officer. This is abundantly clear from Regulation 13 and s. 45(5) of the Act. I accordingly reject these arguments on the basis previously discussed, *supra*, paras. 41-2.

[para 27] In *Searles v. Alberta (Health and Wellness)*, 2008 ABQB 307 at paras. 26 to 28, Burrows J. of the Court of Queen's Bench of Alberta likewise noted much of the commentary that I have excerpted from *Ocean Port Hotel Ltd.* and then noted the following from *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817:

> In *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817 L'Heureux-Dubé J. said:

> … The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness. (para. 20)
> …
>
> The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. … "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness. … (para. 21)
>
> Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances.

L'Heureux-Dubé J. went on to discuss several factors which can affect the content of the duty of fairness as it applies in a given context. These were:

- the nature of the decision being made and process followed in making it;
- the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- the importance of the decision to the individual or individuals affected;
- the legitimate expectations of the person challenging the decision;
- the procedural choices made by the deciding agency.

[para 28] In respect of the facts in the matter before him, Burrows J. wrote as follows at paras. 40 to 46:

> Dr. Searles submitted that features of Ms. McKay's situation as an employee of the Department of Health and Wellness compromised her independence and impartiality to such an extent as to constitute a breach of the principle of natural justice that the decider be independent and impartial.
>
> Dr. Searles submitted that the following features of Ms. McKay's position, which were identified in the answers to interrogatories which are, by agreement, part of the record, made her susceptible to the influence of the Minister in her decision, or predisposed in favour of a reassessment decision:
>
> - Ms. McKay was designated the Minister's delegate by virtue of her position in the department. She held that designation in effect at the pleasure of the Minister. She had, therefore, limited security of tenure.
> - The Minister had power to influence her individual compensation since her compensation package includes an individual discretionary bonus based on performance.

- Ms. McKay is employed by the Minister's department – the same department which, through other actors, investigates billing anomalies and seeks a reassessment when it finds them.
- Ms. McKay's job description says that she is to prepare "consistent, professionally developed cases that are solid enough to stand up in court when required".

I am unable to accept Dr. Searles' submissions in this regard. As I read it, the Act does not require that the Minister's delegate have any greater a degree of independence than Ms. McKay has.

Though the Act expressly assigns the reassessment task to the Minister, the legislature must have intended the Minister to delegate the decision. The *Government Organization Act*, R.S.A. 2000, c. G-10, s. 9(1) provides:

> A Minister may in writing delegate any power, duty or function conferred or imposed on the Minister by this Act or any other Act or regulation to any person.

In my view, by assigning the decision to the Minister and not to someone external to the Department of Health and Wellness, the legislature must be taken to have intended that the reassessment decision be made within the department and not by someone independent of the department. The intention must have been that the decision be made by a person who is obliged to pursue the goals of the department and whose compensation might be determined in part by her success in doing so.

Indeed, I see no basis for the suggestion implicit in Dr. Searles' submission that either Ms. McKay's position as a department official or the Minister's influence on her compensation give rise to a concern about structural bias against Dr. Searles. As I observed above, in my view the Minister's main interest is in maintaining the integrity of the health care insurance system and the confidence of the public and medical profession in it. The Minister's interest is that the result of the reassessment be fair and be seen to be fair – that the physician's compensation be just. Ms. McKay's duty must be to serve that interest. That cannot prejudice Dr. Searles.

In any event, in my view, the statute must be read as authorizing that the decision be made by a department official. Any deviation from the principles of natural justice and procedural fairness which results is authorized by the statute.

Further, that Ms. McKay holds her position subject to the Minister's pleasure does not introduce a degree of structural bias unauthorized by the statute. The Minister himself holds his office at the pleasure of the Premier and ultimately the people. He has no more security of tenure than Ms. McKay. The legislature did not intend the decision be made by someone with greater security of tenure than Ms. McKay.

[para 29] In the companion case of *Searles v. Alberta (Health and Wellness)*, 2010 ABQB 157 at paras. 25 to 28, Thomas J., also of the Court of Queen's Bench of Alberta, wrote as follows:

> Not only do I choose to follow the decision of Burrows J. in *Searles #1* on this issue as a matter of judicial comity, I also agree with his reasoning in holding that there is no degree of structural bias which is not authorized by the Act simply because the Minister's delegate is a department official who holds her designation at the pleasure of the Minister and whose compensation may be influenced by the Minister.
>
> Section 18 of the Act specifically assigns the reassessment task to the Minister. Section 9(1) of the *Government Organization Act* allows the Minister to delegate any power, duty or function conferred or imposed on the Minister under that Act or any other Act. In this case, the Minister delegated the task to Ms. Bouwsema, the Acting Assistant Deputy Minister.
>
> Dr. Searles contends that there is an appearance of dependence and partiality when any employee of Alberta Health and Wellness renders a decision on a dispute between the Minister and a physician over the physician's billings. However, the Minister's delegate is acting for the Minister in rendering a decision under s. 18 of the Act and not as an adjudicator of a dispute between the Minister and the physician.
>
> I find that there has been no reasonable apprehension of bias not authorized by the Act and the appeal is dismissed.

[para 30] Finally, I note *Sam Lévy & Associés Inc. v. Canada (Superintendent of Bankruptcy)*, 2005 FC 702 at paras. 111 and 112, in which Martineau J. of the Federal Court of Canada wrote as follows:

> In general, the requirements of independence and impartiality are related. They are two components of the rule of objectivity expressed by the Latin maxim *Nemo debet esse judex in propria sua causa* (*Bell Canada v. Telephone Employees Association, supra*). However, the requirements of independence and impartiality are not identical. As Le Dain J. indicated in *R. v. Valente*, [1985] 2 S.C.R. 673, at 685 (cited by Gonthier J. in *2747-3174 Québec Inc., supra*):
>
> > Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word "impartial" …. connotes absence of bias, actual or perceived. The word "independent" in s. 11(d) reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees. [Emphasis omitted.]

> As mentioned earlier, assessing the impartiality of a tribunal requires consideration of the decision-maker's "state of mind", or the "state of mind" which can be collectively attributed to a class of decision-makers. Whether the impartiality is structural or individual, the particular circumstances of each case must always be considered to determine whether there is a reasonable apprehension of bias. […]

b) Application of the general principles to this case

[para 31] While I acknowledge that there are some legislative and factual distinctions between the cases that I have cited above and the present matter, the cases set out some general principles regarding the required level of independence and impartiality of a decision-maker in an administrative law context. Further, in *Ocean Port Hotel Ltd., supra* at para. 32, the Supreme Court of Canada wrote as follows [my underline]:

> Lamer C.J. [in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3] also supported his conclusion with reference to the traditional division between the executive, the legislature and the judiciary. The preservation of this tripartite constitutional structure, he argued, requires a constitutional guarantee of an independent judiciary. The classical division between court and state does not, however, compel the same conclusion in relation to the independence of administrative tribunals. As discussed, such tribunals span the constitutional divide between the judiciary and the executive. <u>While they may possess adjudicative functions, they ultimately operate as part of the executive branch of government, under the mandate of the legislature</u>. They are not courts, and do not occupy the same constitutional role as courts.

[para 32] I have underlined the sentence above because some of the cases that I cited earlier reviewed the degree of independence required of a decision-maker vis-à-vis a Minister (i.e., the two *Searles* cases) or a Chief of Police (i.e., the *Robertson* case). I take these individuals to be part of the executive branch, whereas my role is vis-à-vis the Commissioner, who reports to the Legislature. However, there is a constitutional separation of the judiciary from *both* the executive *and* the legislature. I therefore find *Robertson* and the two *Searles* cases to be analogous and therefore to set out some additional propositions that are applicable to the present matter.

[para 33] In *Robertson*, a cited officer alleged bias on the basis that the presiding officer and presenting officer in his disciplinary hearing would be influenced by their Chief of Police, who had initiated the complaint against the cited officer and decided that the charges warranted a hearing in the first place. Section 45(3) of the *Police Act* allowed the Chief of Police to designate the presiding officer, and section 14 of the *Police Service Regulation* allowed the Chief to appoint the presenting officer. In the two *Searles* cases, a physician alleged bias on the basis that government officials responsible for reassessing his billings were influenced by their Minister. Section 9(1) of the *Government Organization Act* allowed the Minister, as in section 43(1) of PIPA, to "delegate any power, duty or function … to any person". Given various propositions stated in these matters, and the aforementioned analogy between these matters and the present one, I

find that there is no reasonable apprehension of bias or partiality on my part simply because I am the Commissioner's "subordinate", there is a "hierarchal structure", I "report" to him, my delegation is at the Commissioner's "pleasure", I am his "employee", or he might "influence" my compensation [*Robertson, supra* and the two *Searles, supra*]. In *Robertson*, the Court of Queen's Bench expressly rejected that the particular Chief of Police was required to retain external personnel to perform the various required functions relating to the disciplinary proceeding. In the *Searles* matter, the Court similarly stated that the particular Minister did not have to assign the matter to someone external to his department.

[para 34] Rather, absent constitutional constraints or a constitutional challenge, the degree of independence required of me is determined by PIPA, construing the statute as a whole, bearing in mind any necessary implication, and discerning the intention of the Legislature [*Ocean Port Hotel Ltd., supra* and *C.U.P.E., supra*].

[para 35] Section 43 and 43.1 of PIPA read as follows:

> *43(1) The Commissioner may delegate to any person any duty, power or function of the Commissioner under this Act except the power to delegate.*
>
> *(2) A delegation under subsection (1) must be in writing and may contain any conditions or restrictions the Commissioner considers appropriate.*
>
> *43.1(1) In this section,*
>
> > *(a) "extra-provincial commissioner" means a person who, in respect of Canada or in respect of another province of Canada, has duties, powers and functions similar to those of the Commissioner;*
> > …
>
> *(2) The Commissioner may, where the Commissioner considers it appropriate to do so, do one or more of the following:*
> > …
> >
> > *(b) subject to clause (d), make a delegation under section 43 to an extra-provincial commissioner;*
> > …
> >
> > *(d) in the case of a matter that is the subject of an investigation or a review referred to in section 36 or 46 or an inquiry referred to in section 50 and that also comes within the jurisdiction of an extra-provincial commissioner, delegate the matter to that extra-provincial commissioner for the purposes of conducting an investigation, a review or an inquiry;*
> > …

> *(3) Notwithstanding section 36, 46 or 50, where, under subsection (2)(d), the Commissioner delegates a matter to an extra-provincial commissioner, the matter is not to be further dealt with under section 36, 46 or 50, as the case may be, at any time during which the delegation remains in effect.*

[para 36] The Commissioner's delegation of this matter to me was under section 43(1). While I have reproduced, for context, portions of section 43.1 that also deal with delegations by the Commissioner, I do not find section 43.1 particularly helpful in ascertaining the Legislature's intention in enacting section 43(1). The ability of the Commissioner to delegate to an extra-provincial commissioner appears to be limited, given sections 43.1(2)(b) and 43.1(2)(d), so it would be section 43(1) that is the only relevant section here. Further, the Organization focuses on the fact that section 43(1) permits the Commissioner to delegate to "any person", whether someone inside or outside his office. In other words, the Organization appears to likewise take the position that the question of which person may, or should, receive the Commissioner's delegation in the present matter is answered in reference to section 43(1), not section 43.1.

[para 37] In my view, in enacting section 43(1) of PIPA, the Legislature intended for the Commissioner to be able to delegate the matter to me in this particular case. In *Ocean Port Hotel Ltd., supra* at para. 27, and *C.U.P.E, supra* at para. 122, legislation granting a person the power to appoint other persons to perform a function was considered clear and unequivocal. The impugned appointments were therefore found to be valid, despite the argument, in *Ocean Port Hotel Ltd.*, that the appointees were not independent and the argument, in *C.U.P.E*, that the person appointing had an interest in the outcome of the underlying dispute.

[para 38] If section 43(1) of PIPA is not so clear and unequivocal on the question of whether the Commissioner may delegate this matter to me, given an actual finding of a reasonable apprehension of bias on his part, I find that he may still do so, by necessary implication. Where it is inappropriate for the Commissioner, for whatever reason, to perform a duty, power or function himself, I believe that the Legislature intended for delegation to one of his adjudicators to be a proper alternative. I say "for whatever reason" because the Commissioner could, for instance, have a personal relationship with a party that precludes him from deciding a matter, yet many of the Organization's same concerns could be raised regarding aspects of adjudicators' employment, reporting structure, performance evaluation, the size of the Adjudication Unit, sharing of adjudicative responsibilities, the Commissioner's ability to remove a delegation, and the potential for communication with the Commissioner. However, I do not think that the Legislature would have intended for the Commissioner to be required to delegate the particular matter outside his office. It seems reasonable that the Legislature would consider that an adjudicator within the Commissioner's office could carry out the necessary functions without any improper influence from the Commissioner, despite his possible bias in favour of a particular party. I believe the same to be true in cases where, as here, there is a finding of a reasonable apprehension of bias on the part of the Commissioner against a particular party.

[para 39] To put the point another way, I see no difference between the ability of the Commissioner to delegate within his office if he, himself, recognizes a conflict on his part, and his ability to delegate within his office following a court finding that he should not personally deal with the matter. The result should be the same, and it would be unreasonable, in my view, to say that the Legislature's intended result is for the Commissioner to delegate all matters outside his office where he, or anyone else, sees a conflict or reasonable apprehension of bias on his part.

[para 40] I further note that many of the Organization's arguments could also be made in respect of an outside delegation, for instance a delegation to a person engaged by contract with the Commissioner's office to decide this matter. Such a person would be responsible to the Commissioner in the performance of his or her task, could potentially communicate with him about the matter, might have the delegation taken away, and he or she would be subject to a "performance evaluation" in terms of obtaining future contracts.

[para 41] The scheme of PIPA is also such that the Commissioner may routinely choose to perform a particular function himself, and then delegate another function in the same matter to one of his staff, at which point he is entrusted, by the Legislature and the principles of procedural fairness, not to exert any inappropriate "oversight, management, or influence", to use the Organization's words. For instance, he might accept a request for review of an access request late, on the basis of a preliminary assessment of its merits and importance, but then step aside while one of his portfolio officers investigates the matter independently, or one of his adjudicators decides it independently.

[para 42] Given the scheme of PIPA, and due to clear and unequivocal wording or alternatively by necessary implication, I believe that the intention of the Legislature in section 43(1) was to permit the Commissioner to delegate a matter to someone within his office in a variety of contexts. This includes situations in which, given the polycentric nature of PIPA and the multiple roles of the Commissioner, he is not himself involved in a particular aspect of a matter (e.g., where he assigns a portfolio officer to investigate a matter but then subsequently adjudicates the matter himself), and it includes situations in which procedural fairness dictates that he not be involved in any of the matter short of delegating it to one of his staff (e.g., where he has an actual bias in the form of a personal conflict of interest or, as here, there is a finding of a reasonable apprehension of bias on his part). I therefore conclude that I may receive the Commissioner's delegation, under section 43(1), in this case.

[para 43] In reaching the foregoing conclusion, I am cognizant of the Organization's view that this is a case of "attitudinal" rather than "institutional" bias. In its letter of October 20, 2010 to Graesser J. during the Judicial Review, the Organization wrote:

> *This is not, as was recognized during the hearing, a case of "institutional bias", but of "attitudinal bias" which is patent and potentially affects the subsequent process if carried forward by the Commissioner's own employees/delegates because their subordinate status and the derivative nature of their adjudicative authority casts at least a suspicion of bias…*

However, as already noted, the Organization provided me with no case law discussing the extent to which a "subordinate" delegate may carry out a power, duty or function of a person where there was a finding of a reasonable apprehension of bias on the part of that person, in the attitudinal sense or otherwise. On my review of the case law cited above, I find that sufficient analogies can be made between this matter and those involving only an allegations of bias, or an allegation of a reasonable apprehension of bias.

[para 44] I also note the following comments of Slatter J. (as he then was) in *Robertson, supra* at para. 49:

> The fourth type of bias is attitudinal bias. This arises when the decision-maker has previously expressed opinions on an issue, thereby showing a predisposition in favour of one side or the other. Whatever issues of this nature arise in these proceedings overlap sufficiently with other types of bias that they do not require separate discussion.

I likewise consider that, for the purpose of deciding whether I should recuse myself from this matter, nothing significant turns on whether I am alleged to be partial and dependent on the Commissioner in the institutional sense, or alleged to be partial and dependent on the Commissioner in view of the finding of a reasonable apprehension of attitudinal bias on his part. Both characterizations require resolution of the question of whether I am sufficiently impartial and independent to decide the present matter. In any event, the Organization has not explained to me the significance of its distinction between institutional and attitudinal bias, and how it might affect my disposition of the issue of my recusal.

[para 45] Further, there are other factors that bear on this case, regardless of the nature or characterization of the Organization's objection to my delegation. The precise standard of independence required of me depends on all the circumstances, and in particular on the language of PIPA, the nature of the task that I am performing, and the type of decision that I am required to make [*Ocean Port Hotel Ltd., supra*, citing *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919]. In terms of assessing whether there is a sufficient degree of independence and impartiality insofar as they are general requirements of procedural fairness, factors for me to consider are the nature of the decision being made by me, the process followed by me in making it, the nature of the scheme in PIPA and its terms under which this office operates, the importance of the decision that I am making to the Organization, its legitimate expectations, and the procedural choices made by this office [*Baker, supra*].

[para 46] As for the legitimate expectations of the Organization, I acknowledge the uniqueness of this case, in that it may not be unreasonable for the Organization to expect that a matter in which there has been a finding of a reasonable apprehension of bias on the part of the Commissioner be delegated outside his office. However, I find that this is, at most, the only aspect of the case militating in favour of my recusal. I have already discussed the Legislature's intention behind section 43(1) of PIPA, the nature of the scheme in PIPA and the terms under which this office operates, all of which I find

militate in favour of a conclusion that the Commissioner is permitted to delegate this matter to me.

[para 47] As for the nature of the decisions that I am or will be making, and their importance to the Organization, I find that they are not so important as to require the Commissioner to delegate this matter to someone outside his office. This is particularly so when compared to some of the cases cited above, and in which the particular Court found an appropriate degree of independence and impartiality. In *Ocean Port Hotel Ltd., supra* at paras. 6 and 7, the decision was the suspension of a liquor licence, affecting the operations of a business. In *Robertson, supra* at para. 1, the decision was in the context of disciplinary proceedings having implications on a police officer's employment. In the *Searles* cases, the decision was to reassess a physician's billings, which was said, in the first *Searles* at para. 35, to have serious financial implications and the potential to affect his livelihood. Here, I am deciding matters relating to the Organization's alleged failure to protect the Complainant's personal information.

[para 48] I also consider the process set out by me in this matter to ensure independence and impartiality. For instance, I requested additional submissions from the parties following Graesser J.'s decision, rather than rely solely on the previous submissions that the parties made to the Commissioner in March 2010. Indeed, short of its objection to my delegation and refusal to answer questions, the Organization states in its submissions that it "was satisfied with the way in which Mr. Raaflaub initially set out the process to be followed". Further, both before and after the Commissioner's delegation of this matter to me, I have had no discussions with him about it.

[para 49] In terms of other procedural choices made by this office, there has been a physical separation of files in that I have only seen, for the purpose of making my decision on whether this matter should proceed to an inquiry, the material that Greasser J. required that I consider (being the Organization's initial objection to an inquiry proceeding and the Complainant's response), the documents that set out this office's jurisdiction and the scope of the matter (being the Complainant's initial complaint and her request for an inquiry), and the parties' subsequent correspondence and submissions intended directly for me. In order to ensure that my deliberations are independent and impartial, all material that the parties previously received from this office, or previously submitted to the Commissioner, the Adjudication Unit or any previously assigned adjudicator, has not been transferred to me. Rather, such material is only before me if either party has chosen to place it before me (subject to any objection to its admissibility by the other party, but there have been no such objections).

[para 50] Given all of the foregoing, I conclude that the Organization's arguments and alleged facts regarding my perceived lack of independence from the Commissioner do not mean that I should recuse myself from this matter. On consideration of the scheme of PIPA and the existence of section 43(1), which allows the Commissioner to delegate to any person, I find that the intention of the Legislature is to permit the Commissioner to delegate the matter to me, even in view of the finding of Graesser J. in relation to bias. Further, there is an appropriate degree of independence and impartiality

on my part, due to the nature of the decisions being made and the procedures that have been, and will be, followed in making those decisions.

[para 51] Therefore, the approach to take, regardless of the nature of my alleged impartiality, is to consider the particular circumstances of this case in order to determine whether there is a reasonable apprehension of bias on my part [*Sam Lévy & Associés Inc., supra*]. In the Judicial Review Decision at para. 143, Graesser J. repeated the following test for a reasonable apprehension of bias as follows:

> The test for a reasonable apprehension of bias has been set out in the dissenting reasons of de Grandpre J. in *Committee for Justice and Liberty v. Canada (National Energy Board),* [1978] 1 S.C.R. 369 at 394:
>
> > .. .the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude[?] Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly[?"]

Graesser J. further noted, at para. 142, that the burden of proof is on the party alleging a real or apprehended breach of the duty of impartiality by establishing a reasonable apprehension of bias.

[para 52] The Organization's concerns about my delegation – as apparent from its earlier submissions to Graesser J., the questions that it posed to me after my delegation, and its submissions directly to me on the issue – relate to the following facts, alleged facts or suggestions: I am an employee of the Commissioner and therefore subordinate to him; I am supervised by him and the Director of Adjudication; I have performance targets; I am part of a small unit of individuals to whom the Commissioner delegates matters on a case-by-case basis; the Commissioner and his adjudicators might have meetings or engage in discussions on a general or case-specific topic; the Commissioner performs adjudicative responsibilities himself; matters are occasionally re-delegated to a different adjudicator for various reasons; staff assist the Commissioner in deciding whether a matter proceeds to inquiry; I am aware that Graesser J. found that there is a reasonable apprehension of bias on the part of the Commissioner against the Organization; and I am aware of how the Commissioner ruled in Decision P2010-D-001.

[para 53] Many of the Organization's points are similar to those that have been found in other cases to be insufficient as grounds to show a reasonable apprehension of bias. I noted earlier that the Court of Queen's Bench has found that an employment relationship, hierarchal or reporting structure, or the fact that a delegation is at pleasure, does not mean that there is a reasonable apprehension of bias on the part of the delegate [*Robertson, supra* and two *Searles, supra*].

[para 54] Further, regardless of whether the points made by the Organization are an accurate reflection of how this office operates, the following facts are true: before my delegation, I had no prior involvement in this matter, whether during the portfolio officer's investigation, when the Commissioner initially screened this matter and decided that it would proceed to inquiry, or when the Commissioner wrote and issued Decision P2010-D-001; I have had no discussions about this case, at any time, with the Commissioner, the Director of Adjudication or any adjudicator previously involved in the matter; and a new and separate physical file has been created for my purposes. In short, a "firewall" has been created, and this office and I are capable of maintaining it.

[para 55] Essentially, the underlying suggestion of the Organization is that either the Commissioner has told, or will tell me, how to rule on the various aspects of this matter, or I will rule in the same manner as he did for fear of some sort of reprisal from him. To suggest this is to allege that neither the Commissioner nor I am capable of adhering to the letter and spirit of Graesser J.'s decision. I am required by Graesser J. to decide the issues before me in an impartial and independent matter, and indeed, I routinely do so as part of my adjudicative responsibilities. The Commissioner is required not to influence my decision, whether directly or indirectly. In short, it is in some ways the very existence of Graesser J.'s decision that ensures that I will decide this matter independent of any oversight, management or influence on the part of the Commissioner. It both mandates and empowers me to do so.

[para 56] Therefore, considering all of the circumstance of the present case, I believe that an informed person, viewing this matter realistically and practically, would conclude that I am more likely than not to decide fairly. There is therefore no reasonable apprehension of bias on my part.

[para 57] I have also considered whether there is a lesser "suspicion of bias" on my part that would warrant my recusal from this matter. In the Judicial Review Decision at para. 159, Graesser J. stated that "[t]he ATA has not made out its case that the entire Commissioner's office is tainted with a reasonable apprehension of bias or a reasonable suspicion of bias". Here, I similarly find that the Organization has not established that I am tainted with a suspicion of bias. Apart from placing before me the very submissions that it already made directly to Graesser J., the Organization has added very little to its case. All that it has done is to ask me questions, which essentially allude to the same concerns raised before Graesser J. and which he found to be unsatisfactory for the purpose of establishing a suspicion of bias on the part of an adjudicator of this office to whom the Commissioner might delegate this matter.

[para 58] Given the foregoing, I conclude that I should not recuse myself on the basis of a reasonable apprehension of bias or suspicion of bias on my part. The Organization has not met the burden of establishing either of these in the circumstances of this particular matter. Although it has made arguments and assertions regarding my alleged lack of independence from the Commissioner in a more general sense, I explained earlier that this is also insufficient to warrant my recusal.

B. Should an inquiry be conducted under section 50(1) of the Act?

[para 59] Because I am currently deciding whether this matter should proceed to an inquiry, I will set out sections 49.1 and 50(1) of PIPA as they currently exist:

> *49.1(1) Without limiting section 36(2), the Commissioner may refuse to conduct an investigation or review or may discontinue an investigation or review if the Commissioner is of the opinion that*
>
> > *(a) the written request for review or the written complaint is frivolous or vexatious or is not made in good faith, or*
> >
> > *(b) the circumstances warrant refusing to conduct or to continue an investigation or review.*
>
> *(2) The Commissioner must give written notice of a decision under subsection (1) to*
>
> > *(a) the individual who requested the review or initiated the complaint,*
> >
> > *(b) the organization concerned, if the organization was given a copy of the written request for review or written complaint by the Commissioner under section 48, and*
> >
> > *(c) any other person to whom the Commissioner gave a copy of the written request for review or written complaint under section 48.*
>
> …
>
> *50(1) If a matter under review or relating to a complaint*
>
> > *(a) is not referred to mediation,*
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> > *(b) is not settled pursuant to mediation under section 49,*
> >
> > *(c) is not resolved, or*
> >
> > *(d) is not the subject of a notice under section 49.1(2),*
>
> *the Commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.*

[para 60] Section 49.1 of PIPA came into effect on May 1, 2010 following enactment of the *Personal Information Protection Amendment Act, 2009,* S.A. 2009, c. 50. Section 50(1)(d) came into effect, at the same time, to reflect the new section 49.1. However, even without section 49.1, the two criteria set out in that section would have been relevant, in the past, to the question of whether an inquiry should be conducted

under section 50(1). Here, the Organization argues that the Complainant's complaint is "frivolous" or that the "circumstances [otherwise] warrant refusing" to continue the review.

[para 61] The present matter was not settled pursuant to mediation, was not otherwise resolved, and was not the subject of a notice under section 49.1. Section 50(1) therefore permits me to conduct an inquiry, although it does not require me to do so.

[para 62] The Organization notes that, in exercising my discretion to conduct an inquiry, it is necessary to take into account the circumstances of the particular case, consider the boundaries imposed by the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter (*Baker, supra* at para. 56). It is a fundamental rule for the exercise of discretionary power that discretion must be brought to bear on every case, in that each one must be considered on its own merits and decided as the public interest requires at that time [*Northeast Bottle Depot Ltd. v. Alberta (Beverage Container Management Board)*, 2000 ABQB 572 at para. 61, citing William Wade and Christopher Forsyth, *Administrative Law*, 7th ed. (Oxford: Clarendon Press, 1994) at p. 360]. The Organization notes that, if a statutory delegate fails to adhere to the foregoing, he or she will have rejected or declined the jurisdiction provided by the statute [*Wimpey Western Ltd. v. Alberta (Director of Standards and Approvals, Department of the Environment*) (1982), 37 A.R. 303 (Q.B.) at paras. 40 to 48].

[para 63] This case involves the Organization's misdirection of mail, intended for the Complainant in Edmonton, to a third party in Red Deer. The fact that the mail was sent to the third party is not in dispute. Rather, the possible issue to be addressed in an inquiry is whether the Organization complied with the requirements of section 34 of PIPA, which reads as follows:

> *34 An organization must protect personal information that is in its custody or under its control by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure, copying, modification, disposal or destruction.*

[para 64] The Organization submits that, in this particular case, the nature of the Complainant's complaint is *de minimus* (i.e., too trivial), or else too frivolous, to warrant an inquiry. It says that the complaint relates to one piece of misdirected mail resulting from an isolated clerical error that was corrected as soon as possible. On noticing the error, the Organization contacted the unintended recipient, who subsequently returned the mail, which was redirected to the Complainant. The Organization explains that there was a rare failure in the "double-check" system in place at the time. For multiple mailings, one employee would match letters to envelopes and then a supervisor would confirm that the matches were correct. The Organization says that it implemented a stronger such system after the Complainant's complaint. It says that, because the matter has been remedied, and an apology offered to the Complainant, no order from this office is warranted.

[para 65] The Complainant responds that she does not consider her complaint to be *de minimus,* trivial or insignificant. Rather, she believes that there has been serious violation of her privacy. She writes that there are real and potential consequences of the fact that the Organization sent her personal information to a complete stranger combined with the failure of its security arrangements to prevent the occurrence. She says that this takes the matter well beyond *de minimus*.

[para 66] The Organization argues that no prejudice may come to the Complainant if an inquiry is not held, given its view of the sensitivity of her personal information contained in the misdirected mail. It says that there is no possibility of the personal information being misused, as the unintended recipient returned the mail to the Organization.

[para 67] The Complainant responds that her personal information in the misdirected letter consists of sensitive employment and educational information relating to the reassessment of her teaching qualifications. She writes that the assessment "is a very serious document with a potential impact on a teacher's future". She says that we are living in a time of increasing identity theft. She calculates the period between receipt of the mail by the unintended recipient and the return of the mail to the Organization to be at least nine days. She notes that the mail was opened before it was returned to the Organization and therefore could have been seen by anyone.

[para 68] The misdirected mail consists of a cover letter, a "Statement of Qualifications" and a "Teacher Qualification Service Evaluation Summary". The Complainant's personal information in the latter two items includes her full name, profession, educational institutions attended, the years that she attended them, and the degrees and certificates conferred. The cover letter reveals that the Complainant requested a reassessment of her qualifications and indicates the result of the reassessment, as compared to the previous assessment. The purpose of the Statement of Qualifications is to enable an employing school board to know where the Complainant should be placed on a collective agreement salary grid. Therefore, it is possible that the unintended recipient, another teacher, now knows the Complainant's salary. I find that the nature of the Complainant's personal information in the misdirected mail militates in favour of, not against, conducting an inquiry.

[para 69] The Organization believes that the Complainant is overestimating the possibility of identity theft, as it says that the information accidentally disclosed would not appear to have any financial or other value. However – and I make no comment, at this point, on the likelihood that the following occurred here – it is possible for a third party to use the Complainant's educational and employment information to impersonate her and obtain other information about her, for instance by telephoning or writing to her past educational institutions in an effort to learn other facts about her. Regardless, there does not actually have to be a risk that the Complainant will suffer consequences, such as identity theft, as a result of the Organization's alleged contravention of PIPA. A possible contravention of PIPA is, in and of itself, something that can warrant an inquiry, as the

objective of this office is, among other things, to ensure and encourage compliance with the legislation.

[para 70] Similarly, an effort to remedy a breach of PIPA does not necessarily mean that an inquiry is unwarranted. The Organization says that it apologized to the Complainant (which she disputes) and that it implemented a stronger double-check mailing system following the Complainant's complaint. However, the Complainant disagrees that a double check system is even satisfactory. As explained below, she suggests that there should have been other actions taken by the Organization to protect her personal information. The Organization also notes that it extended the period in which the Complainant could appeal the reassessment of her teaching qualifications. However, this merely remedied the delay in sending the reassessment to her, not the alleged privacy violation.

[para 71] The Organization argues that an inquiry is not warranted on the basis of the likely outcome. It says that one piece of misdirected mail, due to a clerical error, is no indication that the Organization failed to make reasonable security arrangements, as required by section 34 of PIPA. It submits that it has taken its duties under the legislation seriously, and has invariably successfully protected the personal information of teachers and others over many years. It says that the events giving rise to the Complainant's complaint were fully described in the portfolio officer's investigation report, the portfolio officer found no breach of PIPA, and the Complainant has registered her dissatisfaction with that outcome. The Organization is of the view that no further action on the part of this office is required.

[para 72] However, the Complainant raises questions about the security arrangements that were in place at the time of the events in question, which I find to warrant an inquiry. She notes that the Organization was aware that the mail was sent to the wrong address shortly after it was sent, and that it contacted the unintended recipient. The Complainant accordingly asks whether section 34 of PIPA required the Organization to describe the envelope to the unintended recipient and instruct the recipient not to open it but rather to return it to the Organization sealed. The Complainant asks whether section 34 required the Organization, after receiving the envelope opened, to contact the unintended recipient to determine whether anyone else had seen its contents. She asks whether PIPA, as it existed at the time, required the Organization to voluntarily and immediately notify her of the misdirected mail, rather than only after she contacted the Organization herself looking for the expected mail. The Complainant argues that the existence of the Organization's double-check system for multiple mailings was and remains insufficient for the purpose of complying with its duty under section 34. Finally, she disputes the veracity of certain aspects of the Organization's version of events.

[para 73] The Organization cites Investigation Report F2007-IR-002, which reviewed the disclosure of substantial amounts of sensitive personal information of many individuals on a web site. It argues that the present case is nowhere near as serious as to warrant an inquiry. However, the matter in Investigation Report F2007-IR-002 was one in which the Commissioner decided, of his own motion and based on somewhat different

considerations, to conduct an investigation of the particular public body's practices. The present matter is one individual's complaint about disclosure of her own personal information, which type of matter often proceeds to inquiry even though it involves only one individual and a relatively limited amount of personal information. As just discussed, the Complainant's complaint here involves facts and issues that justify an inquiry. The Organization also distinguishes its alleged contravention of PIPA from the contravention found in Investigation Report F2007-IR-002 on the basis that the public body, in that case, failed to follow its own processes and, moreover, those processes were outdated. Again, however, the Complainant has nonetheless raised questions, in this case, that make it arguable that the Organization's security arrangements were not reasonable, as required by section 34 of PIPA.

[para 74] The Organization argues that an inquiry and order by this office can provide no directions that could prevent the clerical error that occurred in this instance. However, this matter also raises questions about how the Organization dealt with the clerical error, as part of its security arrangements. In this respect, an order from this office might provide guidance to the Organization, and other organizations, in future cases.

[para 75] The Organization cites Investigation Report F2004-IR-001, in which it was found that no further action by this office was warranted, as the public body was proceeding to address the matter. However, that case involved only the issue of an improper disclosure of personal information, not the issue of reasonable security arrangements. The public body there appears to have admitted that it improperly disclosed personal information, making further action by this office unnecessary in the view of the Commissioner's delegate in that case. Here, while the Organization has conceded that it disclosed the Complainant's personal information, it has not conceded that it failed to make reasonable security arrangements to protect her personal information. There is therefore an outstanding issue to address in an inquiry, unlike in Investigation Report F2004-IR-001.

[para 76] On consideration of all of the circumstances of this particular case, I find that an inquiry under section 50(1) of PIPA is warranted. The Organization's alleged contravention of the Act involves the disclosure of the Complainant's sensitive personal information, and there are outstanding questions of fact and law to resolve in relation to whether the Organization complied with the requirement to make reasonable security arrangements under section 34. The Organization's strengthened double-check system for multiple mailings has not necessarily remedied the matter, and an inquiry may lead to guidance to other organizations in similar situations involving an inadvertent disclosure of personal information. In short, there is a matter to adjudicate regarding the scope of an organization's duty under section 34. Of course, my view at this point is only that the Complainant has made out an arguable case; the merits have yet to be decided following further submissions from the parties.

[para 77] The Organization alternatively submits that I should not conduct an inquiry because the Complainant made her complaint to this office too late, and therefore

did not comply with section 47 of PIPA. Section 47 was also amended by the *Personal Information Protection Amendment Act, 2009.* However, because the Complainant made her complaint prior to the amendment, I will reproduce section 47 as it existed then. In any event, I do not find that the relevant parts of section 47 were amended in any important substantive way. At the time of the Complainant's complaint, it required her to initiate it both "as soon as reasonable" and "within a reasonable time". Section 47 now says only "within a reasonable time".

[para 78] At the time of the Complainant's complaint, the relevant parts of section 47 of PIPA read as follows:

> *47(1) To ask for a review or to initiate a complaint under this Part, an individual must, as soon as reasonable, deliver a written request to the Commissioner.*
> …
>
> *(3) A written request to the Commissioner initiating a complaint must be delivered within a reasonable time.*

[para 79] The Organization submits that the Complainant did not initiate her complaint as soon as reasonable or within a reasonable time, given that the erroneous mailing occurred in May 2008, yet the Complainant did not complain to this office until January 2009. It says that the Complainant bided her time for eight-and-half months, providing no explanation for the delay.

[para 80] In the Judicial Review Decision, at paras. 118 and 119, Graesser J. stated that the Organization should have raised its concern about the timeliness of the Complainant's complaint much earlier than it did. However, he also said, at para. 149, that the timeliness of the complaint "might be addressed" on the rehearing or reconsideration of the matter.

[para 81] I likewise find that the Organization raised its concern about the timeliness of the Complainant's complaint too late for me to conclude that an inquiry is not warranted on that basis. If the Organization took the view that the complaint in January 2009 was not delivered within a reasonable time, it should have said so at the earliest reasonable opportunity, rather than proceed to participate in the portfolio officer's investigation of the matter, and then proceed to receive and accept, without any objection, letters indicating that the matter was at the Adjudication Unit, including one explicitly saying that consideration would be given to whether the matter was appropriate for an inquiry.

[para 82] Even if the Organization had raised its concerns in a more timely way, I still would have found that the Complainant delivered her written request to the Commissioner initiating the complaint within a reasonable time, in accordance with section 47 of the Act. In a letter of September 21, 2010 to this office, the Complainant explains that she had appealed the reassessment of her teaching qualifications and did not want to jeopardize the evaluation of her credentials by making a complaint about the

Organization to this office. Once the appeal concluded in December 2008, she made her complaint the following month. I considered whether the Complainant actually made her complaint as a result of the outcome of the appeal. However, on my review of the Complainant's material and the events that occurred in May 2008, I believe that the Complainant was genuinely concerned about the misdirected mail at that time, but opted to defer a complaint to this office until the appeal of her reassessment was complete.

[para 83] Given the foregoing, I do not agree with the Organization that an inquiry is unwarranted on the basis of the timing of the Complainant's complaint.

[para 84] I conclude that an inquiry should be conducted under section 50(1) of the Act. However, this is subject to my decision as to whether the timeline and rules set out in section 50(5) have been breached, which I will make following the Supreme Court of Canada's pending relevant decision.

[para 85] Further, if an inquiry is conducted, its scope will be restricted to the Complainant's concerns in relation to the misdirected mail. In her initial complaint, she also discussed a telephone conversation that she had with a representative of the Organization. However, she indicated that it was for the purpose of providing background and not the primary reason for her complaint. She reiterated this in her request for an inquiry when she wrote that the matter of the telephone conversation was a "side-bar" and not the focus of her complaint.

[para 86] The inquiry will also not review the propriety of the Organization's conduct in relation to matters that arose after the Complainant's initial complaint of January 26, 2009. In her submissions, she raises concerns about the Organization's "subsequent and related transgressions", such as in relation to its service of court documents on her in September 2010. However, I have no jurisdiction in the inquiry to make any order in relation to these subsequent matters. The timing is such that they do not fall within the scope of the complaint that has proceeded thus far. Having said this, I acknowledge the Complainant's view that some of the Organization's subsequent conduct might inform the question of whether it had proper processes in place to protect her personal information in the misdirected mail. Still, I will only consider any of the subsequent events to the extent that I find them relevant, if at all, to the issue in the inquiry and the facts that form the subject-matter of the complaint of January 26, 2009.

[para 87] Finally, although the Complainant requests a formal letter of apology from the Organization in her request for an inquiry, I will not consider this possibility during the inquiry. To my knowledge, this office has never ordered an apology. While there may be legal or factual arguments to the effect that I have the authority to order one, I do not find this an appropriate case in which to explore those arguments. First, the Complainant requests an apology for what she perceives to be improper conduct on the part of the Organization subsequent to the events giving rise to her complaint, but I have just explained that this falls outside the scope of my jurisdiction in this case. Second, the Complainant requests an apology for the Organization's "initial transgression", but I find that it has already given her one. A letter of March 30, 2011 from the Organization

indicates that its counsel apologized to the Complainant in the course of the Judicial Review. The Complainant disputes that there was a proper apology during the hearing, as she says that the Organization apologized only for the misdirected mail, not the violation of her privacy. However, I take the Organization's apology to be for disclosing the Complainant's personal information to the third party. If the Complainant is seeking an apology for the Organization's alleged lack of reasonable security arrangements, that issue has not yet been decided and I decline to add any issue regarding an apology to it.

IV. DECISION

[para 88] I conclude that I should not recuse myself from this matter.

[para 89] I conclude that an inquiry should be conducted under section 50(1) of the Act, subject to my later decision on whether the timelines and rules under section 50(5) have been met.

Wade Riordan Raaflaub
Adjudicator