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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 152-1997
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INQUIRY RE: A decision of the Ministry of Attorney General to exclude judges' records from disclosure under section 3(1)(a) of the Act

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner on December 10, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision of the Ministry of Attorney General to exclude records from disclosure under section 3(1)(a) of the Act.

2. Documentation of the review process

On December 4, 1995 the applicant requested an opportunity to examine the minutes of the Supreme Court Rules Revision Committee from its inception to the time of the examination.

On January 10, 1996 the Ministry of Attorney General extended the time for responding by thirty days under section 10 of the Act, due to the large number of records requested. On February 6, 1996 the applicant narrowed his request to any records, including minutes of the Rules Revision Committee, regarding Rule 18A which deal with Summary Trials. My Office subsequently granted the Ministry a further extension of sixty days, bringing the deadline for a response to April 12, 1996.

On June 21, 1996 the Ministry disclosed some records to the applicant. It withheld some records under sections 12 (Cabinet confidences), 13 (policy advice or recommendations), 14 (solicitor-client privilege), and 22 (unreasonable invasion of the personal privacy of a third party).

On July 15, 1996 the applicant requested a review of the Ministry's decision. During the review period, the Ministry disclosed further records to the applicant on the advice of my Office.

On October 10, 1996 the applicant requested an inquiry into the Ministry's decision to exclude the memo of Mr. Justice Bouck and "any like memos and information" under section 3(1)(a) of the Act. The parties consented to an extension of the deadline for the inquiry to December 4, 1996.

3. Issues under review at the inquiry and the burden of proof

The issue to be reviewed in this inquiry is the Ministry's decision to exclude certain records under section 3(1)(a) of the Act, which reads in part as follows:

Scope of this Act ....

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(a) a record in a court file, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts;

Section 57 of the Act establishes the burden of proof in the inquiry. Under section 57(1), where access to information in the records has been refused, it is up to the public body, in this case the Ministry, to prove that the applicant has no right of access to the records.

4. The records in dispute

The records in dispute consist of six records of correspondence to and from judges and others with respect to Rule 18A of the Rules of the Supreme Court of British Columbia.

5. The Ministry's case

The Ministry basically submits that each of the six records in dispute in this inquiry is a record of a judge of the Supreme Court of British Columbia. (Submission of the Ministry, paragraph 5.02) The Ministry states that the rationale behind the exclusion of the records of a judge from the scope of the Act is the independence of the judiciary:

> This fundamental principle recognizes that disclosure of judges' records would interfere with the independence and intellectual freedom of judicial decision makers by revealing their personal decision-making processes and by causing them to alter the manner in which they arrive at decisions. (Submission of the Ministry, paragraph 5.03)

The Ministry's submission reviewed a number of judicial decisions discussing the concept of judicial independence in terms of both an adjudicative and administrative privilege. (Submission of the Ministry, paragraphs 5.04-5.07)

The Ministry submits that each of the records in dispute is a record written from a judge or to a judge. It argues that in excluding records of a judge from the scope of the Act in section 3(1)(a), "the Legislature is presumed to have intended for something other than judges' personal notes, communications or draft decisions while acting in a judicial capacity to be excepted from the scope of the Act." (Submission of the Ministry, paragraphs 5.08 and 5.09)

6. The applicant's case

The applicant states that on June 7, 1995 the Honourable Mr. Justice Bouck of the Supreme Court of British Columbia submitted a memorandum concerning his view of the Summary Trial Rule (18A of the Rules of Court) to the Chair of the Rules Revision Committee of the Attorney General. The applicant subsequently requested an opportunity to review the minutes of this Committee but did not receive the Bouck memorandum (which is what he is especially seeking now).

The applicant's argument is that the Rules Revision Committee is "a public body by virtue of the fact that it is a committee appointed by a minister of the government ... The Act applies to all records of public bodies including court administration records." (Submission of the Applicant, p. 3) In his view, the "memorandum of a judge submitted to the Rules Committee becomes a record in the custody of a public body."

> In this case, the request for the memorandum of the Honourable Mr. Justice Bouck June 7th 1995, was a request for a record of a public body - the Rules Committee - and was not a request for a record of a judge. (Submission of the Applicant, p. 4)

In addition, the applicant submits that the records in dispute are not held within the jurisdiction of a court, such as a courthouse or court administration, but are among the records of a public body, the Ministry.

In response to arguments about judicial independence, the applicant submits that none of the requirements for judicial independence are threatened by the release of the communications of judges with the Rules Revision Committee. In fact, the judiciary have "an ongoing interdependent relationship with executive through the Rules Committee. It

takes the form of the drafting of new rules which form the Rules of Court." (Submission of the Applicant, p. 5)

The applicant is seeking access to the Bouck memorandum and the submissions of any other judges concerning Rule 18A of the Rules of Court.

7. Discussion

The applicant is attempting to lead a crusade to overturn Rule 18A, because it prevented him from having a jury trial in a civil lawsuit for an assault against him that he brought against his employer and a supervisor. A B.C. Supreme Court Justice evidently determined that he was only entitled to a summary trial, by judge alone, under Rule 18A. I note that a revised version of this rule came into effect on July 1, 1996.

Custody and control of the records in dispute

The Ministry submits that whether or not the Ministry has control or custody of a record is irrelevant for the purposes of the application of section 3(1)(a) of the Act: "The only relevant test in this inquiry is whether the records at issue are records of a judge." (Rebuttal Submission of the Ministry) I agree with the Ministry that since the Act does not apply to "a record in a court file, a record of a judge of the Court of Appeal, Supreme Court or Provincial Court, a record of a master of the Supreme Court, a record of a justice of the peace, a judicial administration record or a record relating to support services provided to the judges of those courts," it is not material that the record is in the custody of a public body.

Second stage of the inquiry

On January 23, 1997 I sent to the Ministry a series of questions about the origins and accessibility of the records in dispute. The applicant then furnished me with a commentary on the Ministry's responses.

I learned that the Rules Revision Committee is made up of judges, lawyers, a master, a registrar, and a legal officer, who are appointed by the Attorney General:

> The ongoing mandate of the Committee is to evaluate the Rules of Court and, either on its own initiative or in response to recommendations or questions from practitioners, judges or the Attorney General, to recommend amendments to the Rules of Court to the Chief Justice of the Supreme Court. (Further Submissions for the Ministry, p. 2)

The Attorney General subsequently consults with the appropriate Chief Justice before recommending changes to the Rules of Court to Cabinet (*Court Rules Act*, section 6)

The Ministry acknowledges that the Committee is a public body under the Act: "Therefore, applicants have a right of access to Committee records that do not fall outside the scope of the FOI Act or that do not fall under one of the exceptions in the FOI Act. " (Further Submissions for the Ministry, p. 3)

The applicant has already received 130 pages of records relating to Rule 18A, including schedules of amendments to the Rules, severed minutes of the Rules Revision Committee, severed agendas of the Committee, briefing notes, and letters and memos from private practitioners and the Law Society of British Columbia to the Committee. (Further Submissions for the Ministry, p. 3)

The Ministry further points out that the authors of the six records in dispute are either current or former members of the Rules Revision Committee, and provided some input to colleagues on the Committee, or were the recipient of recommendations by the Committee. The applicant has not received the contributions to the debate over Rule 18A authored by judges, but has received a substantial amount of information that was not accessible before the Act came into force.

The applicant has claimed that the Ministry has in fact released to him "several communications from Judges." He submitted to me what appear to be the titles of two documents, one involving a Supreme Court Justice as part of a four person team comprised of members of the Rules Committee, and another "overview paper" concerning the individual calendar system of case management prepared by the same Supreme Court Justice. (Applicant's Further Reply, Schedule A) But, based on my review of the records released to the applicant, it is evident that he received only these title pages. In his reply submission of February 7, 1997, the applicant refers to having received a "communication from Mr. Justice Legg to Mr. Justice Catliff of March 14, 1988." He did not append a copy of this record to his submissions, as he did with the other records he referred to, and I could not find such a document in the released records.

It is evident that the Rules Committee functioned in relative isolation from public scrutiny until the Act went into force in 1993. Its work is now admittedly subject to the same rules of public scrutiny as any other records of a public body.

The application of section 3(1)(a)

Section 3(1)(a) excludes three main categories of records from the Act:

- records in court files,
- records of judges at all three court levels, masters and justices of the peace, and
- judicial administration records and records relating to support services to judges.

In my opinion, a record of a judge is a record written by or to a judge about a matter that relates to his or her function as a judge. Providing comments to the Rules Revision Committee about aspects of the Rules falls within a judge's function. This kind of record

is separate from a court file or a judicial administration record as listed in section 3(1)(a). Since judges are in a position to apply and interpret the Rules, it is important to the judicial function and to judicial independence that they be free to provide comments to the Rules Revision Committee in confidence.

This judicial function is kept separate from the Executive and legislative branches of government by the structure and purpose of the Committee. As the Ministry pointed out in its submission of January 31, 1997, the Committee provides advice and recommendations to the Chief Justice of the Supreme Court. The Attorney General, in turn, must consult with the Chief Justice before Cabinet is permitted to make Rules of Court or amendments to Rules (see pp. 2, 3 of the Ministry's Submission and section of the *Court Rules Act*).

Review of the records in dispute

It is evident from my review of the small number of records in dispute that they were prepared as part of the work of the Rules Revision Committee, which invited commentary on existing rules, in this case Rule 18A, which originated in 1983. The letters or memoranda are primarily from or to a judge.

My review of the records in dispute indicates that learned judges are sharing their views with their Rules Revision Committee colleagues or simply expressing their opinions at the request of the Committee. They are discussing the realities of the functioning of Rule 18A and how it might be reformed. There is a difference between a judge and a lawyer sharing their views within the Rules Revision Committee about the functioning of a Rule and releasing the recorded views of such a judge to an outsider. The judge may have to interpret that Rule in a later case, or make a determination based on the rule. If judges' views are considered important to the Chief Justice in subsequent consultations with the Attorney General, it is important that judges are free to express their views confidentially. That, to me, is one of the policy reasons for excluding the records of a judge from the Act.

Accordingly, I agree with the Ministry that the Act does not apply to the records in dispute, since they are the records of a judge under section 3(1)(a) of the Act.

8. Order

I find that the Ministry has properly applied section 3(1)(a) of the Act and is authorized to refuse access to the records in dispute. Under section 58(2)(b), I confirm the decision of the Ministry of Attorney General to refuse access.

David H. Flaherty — March 4, 1997
Commissioner