



Order F23-20

## **SIMON FRASER UNIVERSITY**

Jay Fedorak  
Adjudicator

March 24, 2023

CanLII Cite: 2023 BCIPC 23  
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 23

**Summary:** An applicant requested records relating to two courses offered at Simon Fraser University (SFU). SFU responded providing access to records but withheld some information under s. 22(1) (unreasonable invasion of third-party personal privacy). The adjudicator found that SFU had correctly applied s. 22(1) to the personal information at issue, but that it had incorrectly applied it to information that was not personal information. The adjudicator ordered SFU to disclose the information that was not personal information.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 22(1), 22(2)(a), 22(2)(c), 22(2)(e), 22(2)(f), 22(2)(h), 22(3)(a), 22(3)(d), 22(3)(g), 22(4).

### **INTRODUCTION**

[1] A former graduate student and employee (applicant) of Simon Fraser University (SFU) requested access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to records held in the office of the department where he worked and the office of the Dean. The requested records related to two courses offered during a particular semester, one of which the applicant taught. SFU responded providing copies of records while withholding some information under s. 22(1) (unreasonable invasion of third-party privacy) and s. 3(1)(e)(iii) (outside the scope of FIPPA).

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review this response. As a result of mediation, SFU disclosed additional records and ceased to rely on s. 3(1)(e)(iii). Mediation failed to resolve the remaining issue and the matter proceeded to an inquiry.

## Preliminary Issue

[3] The notice of inquiry and the investigator's fact report indicate clearly that s. 22(1) is the only matter at issue in this inquiry. SFU's submission address only the application of s. 22(1). Consequently, I was surprised to observe that in the copy of the records that SFU produced for my review during the inquiry, SFU had withheld a short sentence on page 179 under s. 15(1)(l) (harm to law enforcement). When the OIPC registrar asked about this, SFU confirmed the application of s. 15(1)(l) to page 179 was not an error. However, it did not explain why it never mentioned that exception in its decision letter, during the OIPC's investigation and mediation or in its inquiry submissions. There is also no indication that SFU formally reconsidered its severing decision and informed the applicant that it had decided to withhold information under s. 15(1)(l).

[4] SFU has not requested permission to introduce the application of a new exception as an issue in this inquiry. As previous orders have indicated, parties must request and receive permission from the OIPC to introduce new issues at an inquiry.<sup>1</sup> SFU has not done so in this case. I see no compelling reason to allow SFU to introduce this new issue into the inquiry at this late stage. Therefore, I decline to add, or consider, s. 15(1)(l). Section 15(1)(l) is not at issue in this Inquiry and, therefore, SFU cannot withhold the sentence on page 179 under this exception. However, I will consider below whether s. 22(1) might apply to this information, given that is the exception that SFU is relying on to refuse access to all of the other information in the records.

## ISSUE

[5] The issue to be decided in this inquiry is whether s. 22(1) requires SFU to withhold the information at issue. Section 57(2) indicates that the applicant has the burden to prove that disclosure would not be an unreasonable invasion of the personal privacy of a third party under s. 22(1).<sup>2</sup>

## DISCUSSION

[6] **Background** – The applicant was a former doctoral student and sessional instructor at SFU. The applicant filed a grievance against an employee in the department where he worked for unfair labour practices and harassment. He later withdrew his grievance. He also filed a lawsuit for defamation against SFU regarding his relationship with another individual. The department terminated the

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<sup>1</sup> For example, see Order F12-07, 2012 BCIPC 10, para. 6; Order F10-27, 2010 BCIPC 55, para. 10; Decision F07-03, 2007 BCIPC 30393 (CanLII), paras. 6-11; and Decision F08-02, 2008 BCIPC 1647 (CanLII).

<sup>2</sup> However, the public body has the initial burden to show that the information it is withholding under s. 22(1) is personal information: Order 03-41, 2003 BCIPC 49220 (CanLII), paras. 9-11.

applicant's employment for serious professional misconduct. The BC Supreme Court dismissed the action for defamation.

[7] **Records and Information at issue** – The 471 pages of records consist of: email and other electronic correspondence; records relating to sessional instructor assignments; a report of student responses to a course assessment survey; a report on student grades from a course; a seniority list for members of the union representing sessional instructors; the agenda and minutes of a departmental meeting; records relating to faculty leave; records relating to the provision of examinations; records relating to workshops. SFU withheld information on 222 pages of the records.

***Section 22(1) – unreasonable invasion of third-party privacy***

[8] The proper approach to the application of s. 22(1) of FIPPA is described in Order F15-03, where the adjudicator stated the following:

This section only applies to “personal information” as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.<sup>3</sup>

[9] I have taken the same approach in considering the application of s. 22(1) here.

***Step 1: Is the information “personal information”?***

[10] Under FIPPA, “personal information” is recorded information about an identifiable individual, other than contact information. “Contact information” is “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.”<sup>4</sup>

[11] SFU submits that the information it has withheld under s. 22(1) consists of the personal information of individuals other than the applicant.

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<sup>3</sup> Order F15-03, 2015 BCIPC 3 (CanLII), para. 58.

<sup>4</sup> FIPPA provides definitions of key terms in Schedule 1.

[12] The applicant does not contest SFU's assertion that this information constitutes personal information.

[13] I can confirm that the information about identified individuals to which SFU has applied s. 22(1) constitutes recorded information about identifiable individuals other than contact information. Therefore, I find that it meets the definition of personal information.

[14] SFU has also applied s. 22(1) to aggregate information about unnamed students. It has not explained why it has applied s. 22(1) to this information. With respect to the information about unnamed students, it is not clear that this information could be used to identify the students. The information includes:

- Numbers of students and information in a report about students who responded to a course assessment survey.<sup>5</sup>
- Statistics on grades achieved in a course.<sup>6</sup>
- Speculation as to the interest of unidentified students in particular courses.<sup>7</sup>

[15] While it may be true in some cases that disclosures about a small number of unnamed individuals could lead to someone identifying them, such cases are circumstance specific. It is necessary to demonstrate why in a particular case the disclosure of information about unnamed individuals could subsequently lead them to be identified.

[16] SFU has not explained why disclosure of the information at issue about unnamed individuals could lead to them being identified. While the applicant has the burden of proof with respect to whether disclosure of personal information would be an unreasonable invasion of privacy, SFU has the burden of proving that the information is personal information.

[17] I find that SFU has not met its burden to prove that the information about the unnamed individuals is about identifiable individuals. Therefore, this information is not personal information and s. 22(1) does not apply. This information appears on pages: eight, 33-35, 50, 52, 113-116, 118-121, 127, 393-396, 398-401, 403-406. SFU is not authorized to refuse to disclose this information under s. 22(1). The only exceptions are that pages 114 and 395 also contain the name computing ID and student number of an identifiable student. This information is personal information for the purposes of FIPPA.

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<sup>5</sup> Responsive records, pp. 8, 33-35.

<sup>6</sup> Responsive records pp. 50, 52, 113-116, 118-121, 393-396, 398-401, 403-406.

<sup>7</sup> Responsive records p. 127.

[18] As I noted above, SFU had also withheld a sentence on page 179. This sentence contains no personal information and s. 22(1) does not apply. SFU is not authorized to refuse to disclose this information under s. 22(1).

*Step 2: Does s. 22(4) apply?*

[19] SFU submits that s. 22(4) does not apply to any of the personal information at issue. The applicant does not contest this point.

[20] There is no evidence before me that any of the provisions of s. 22(4) apply in this case. Therefore, I find that none of the information falls within s. 22(4).

*Step 3: Does s. 22(3) apply?*

[21] The relevant provisions read as follows:

22 (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if:

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation;

...

(d) the personal information relates to employment, occupational or educational history.

...

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

[22] **Section 22(3)(a) (medical history)** – SFU submits that some of the information at issue consists of names and medical information of students and employees. This information relates to reasons expressed for student accommodations in courses and employee absences. The applicant makes no submission with respect to the application of s. 22(3)(a).

[23] It is obvious on the face of the record that some information constitutes the names and medical information of third parties. I find that s. 22(3)(a) applies to this information and disclosure is presumed to be an unreasonable invasion of privacy.

[24] **Section 22(3)(d) (educational and employment history)** – SFU submits that some of the information to which it applied s. 22(1) constitutes staff employment history.<sup>8</sup> It asserts that some of this information includes

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<sup>8</sup> SFU's initial submission, paras. 41-42.

correspondence relating to a workplace complaint involving third parties and other information relates to employee workplace accommodations for employees. The applicant does not contest the application of s. 22(3)(d).

[25] It is evident on the face of the record that some information about SFU employees constitutes their employment history. This includes information about a workplace complaint against a third party. It also includes offers of sessional appointments and provisional course schedules identifying the instructors proposed to teach the courses.

[26] I find that s. 22(3)(d) applies to this information and disclosure is presumed to be an unreasonable invasion of privacy.

[27] I also note that SFU has applied s. 22(1) to information about the educational history of students, including the courses they took and the grades they received. While there were no submissions on this issue, it is clear from the face of the record that this constitutes educational history. I find that s. 22(3)(d) applies to this information and disclosure is presumed to be an unreasonable invasion of privacy.

[28] **Section 22(3)(g) (personal evaluations)** – SFU submits that this provision applies to performance reviews of employees. It asserts that some of the information at issue includes the opinions about a third party's work performance by the employee's supervisor and others.<sup>9</sup> The applicant does not contest the application of s. 22(3)(g).

[29] It is evident on the face of the record that some of the information at issue consists of personal opinions about a third-party employee. This includes feedback from faculty and students about the performance of an employee.

[30] I find that s. 22(3)(g) applies to this information and disclosure is presumed to be an unreasonable invasion of privacy.

[31] SFU has also applied s. 22(1) to information about students nominated for an academic prize, including personal evaluations of those candidates. While there were no submissions on this issue, it is clear from the face of the record that the information consists of personal evaluations of those students.

[32] I find that s. 22(3)(g) applies to this information and disclosure is presumed to be an unreasonable invasion of privacy.

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<sup>9</sup> SFU's initial submission, paras. 44-45.

[33] SFU has also applied s. 22(1) to information where none of the provisions in s. 22(3) apply. This is information about students and employees in their personal capacities.

*Step 4: do the relevant circumstances in s. 22(2) rebut the presumption of unreasonable invasion of privacy?*

[34] The relevant provisions read as follows:

22 (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

...

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant

[35] **Section 22(2)(a)(public scrutiny)** – The applicant asserts that disclosure is desirable for the purpose of subjecting SFU to public scrutiny. He submits:

Disclosure is very desirable for the purpose of subjecting the activities of SFU, within the meaning of s. 22(2)(a), not only regarding SFU's reaction to the disclosure of their support for agents of a terrorist regime (as set out in the Notice of Claim in the SFU Action) but also including, among other things, the matters of procedural malpractices, lack of due process, and the institutional abuse of public resources to satisfy the illegitimate personal desires and intents of certain individuals within the SFU administration and community.<sup>10</sup>

[36] SFU denies that this provision applies.<sup>11</sup>

[37] The applicant has not established why disclosure would be desirable for subjecting SFU to public scrutiny. He had provided no evidence to substantiate his allegations. I have reviewed the information at issue, and I cannot see how

<sup>10</sup> Applicant's response submission, paras. 25 and 32.

<sup>11</sup> SFU's reply submission, para. 60.

this provision would apply. There is nothing in the records that relates to the applicant's allegations.

[38] I find that s. 22(2)(a) does not apply in this case.

[39] **Section 22(2)(c) (fair determination of an applicant's rights)** – This provision applies to personal information that is relevant to a fair determination of the applicant's rights. Previous OIPC orders have established the following test for s. 22(2)(c) to apply:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;
2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;
3. The personal information sought by the applicant must have some bearing on, or significance for, the determination of the right in question; and
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.<sup>12</sup>

[40] The applicant submits that disclosure of the information at issue is necessary for a fair determination of his rights. He asserts that he has attempted to obtain this information through the court discovery process in several court actions but has been unsuccessful. He states that further discovery processes are no longer available to him. He also declares he is contemplating appealing one of the court decisions to the Supreme Court of Canada (SCC) and is considering launching an action for defamation and the records at issue are necessary to establish his claim.<sup>13</sup>

[41] The applicant submits s. 22(2)(c) applies in this case and that the withheld information is required for the following five existing or contemplated legal actions:

1. An appeal to the SCC of a decision of the BC Supreme Court that dismissed the applicant's lawsuit against the University. The BC Court of Appeal upheld the lower court's decision. The applicant says he plans to appeal to the SCC.
2. An injunction application involving the abovementioned BC Supreme Court decision.

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<sup>12</sup> Order F23-13, 2022 BCIPC 15 (CanLII) (hereafter cited as Order F23-10), para. 120; Order 01-07, 2001 BCIPC 21561 (CanLII), para. 31.

<sup>13</sup> Applicant's response submission, para. 26.

3. A civil claim for defamation against a local newspaper.
4. A complaint to the Canadian Judicial Council: The applicant says he submitted a complaint to the Canadian Judicial Council about the BC Supreme Court judge who decided the SFU Action.
5. A defamation action: The applicant plans to sue an individual for defamation.

[42] SFU submits the applicant has failed to demonstrate that all four parts of the test apply. SFU accepts that the applicant's claims involve legal rights but insists the applicant has not shown how the personal information in the disputed records has any bearing on the determination of his rights or how it is necessary in order to prepare for any of the proceedings listed above or to ensure a fair hearing. Moreover, with respect to his appeal to the SCC, he has exceeded the statutory time limit for launching his appeal.<sup>14</sup>

[43] I will address the four elements of the test below.

#### Legal right

[44] The first part of the test relates to whether the right in question is a legal right drawn from the common law or a statute as opposed to a non-legal right based on moral or ethical grounds. SFU agrees that the five claims at issue involve legal rights in accordance with this test.

[45] I find that the applicant's claims involve legal rights, such as the right to appeal, the right to sue for defamation and the right under a statute to submit a complaint to a designated regulatory or oversight body.

#### Proceeding under way or contemplated

[46] The second part of the test relates to whether a proceeding is either under way or contemplated. Previous OIPC orders have established that an applicant only needs to establish that they are intently considering the commencement of a proceeding.<sup>15</sup> This provision does not apply, however, to a proceeding that has already been completed.

[47] SFU accepts four of the applicant's claims satisfy this portion of the test. It submits the applicant has failed to show that his proposed appeal to the SCC is veritably in contemplation given that he has failed to file within the statutory timelines or obtained an extension.

[48] I find that, with the exception of the appeal to the SCC, the applicant's

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<sup>14</sup> SFU's reply submission, paras. 18-22.

<sup>15</sup> For example, Order F23-13, para. 126; Order F16-36, 2016 BCIPC 40 (CanLII), para. 50.

claims meet the test for being in contemplation. The applicant provided no evidence to show that he filed his request for leave to appeal to the SCC in the allotted time or that he was given an extension. If the applicant has missed the appeal deadline, then he is unable to commence those proceedings.

Information has a bearing on the legal right

[50] The third part of the test involves whether the personal information at issue has some bearing on, or significance for, a determination of the legal right in question.

[51] I find the legal rights engaged here are to sue for defamation and to present a case at a future injunction application.

[52] With respect to the applicant's legal right to sue for defamation, there are three elements a plaintiff must prove: (1) that the impugned words were defamatory, (2) that the words in fact referred to the plaintiff; and (3) that the words were communicated to at least one person other than the plaintiff.<sup>16</sup>

[53] The personal information at issue is entirely about third-party students and employees. There are no direct or indirect references to the applicant of any kind. Therefore, I find that there is no information at issue that has any bearing on any suit for defamation.

[54] With respect to the applicant's legal right to present his case at a future injunction application, the applicant does not explain how the information at issue in this inquiry has any bearing on a determination of his right to present his case at any future injunction application. On the face of the record, it appears unlikely that the information at issue would be relevant for this purpose. As a result, I find that the third part of the test does not apply.

[55] Given that I have found that the information at issue has no bearing on any of the applicant's legal rights, I do not need to consider whether the information would be necessary for the applicant to prepare for a hearing.

[56] In summary, I find that s. 22(2)(c) does not apply in this case.

[57] **Section 22(2)(e) (unfair harm)** – This provision applies where disclosure of a third party's personal information would unfairly expose the third party to financial or other harm. Previous OIPC orders have established that "other harm" includes "serious mental distress or anguish or harassment."

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<sup>16</sup> Order F23-13, para. 133; *Grant v. Torstar Corp.*, 2009 SCC 61 (CanLII), para. 28; *Christian Advocacy Society of Greater Vancouver v. Arthur*, 2013 BCSC 1542 (CanLII) with test set out at para. 45.

However, such mental harm must exceed “embarrassment, upset or a negative reaction to someone’s behaviour.”<sup>17</sup>

[58] SFU submits “The applicant has a history of publishing threatening and misogynistic public statements online relating to his disputes with the public body and third parties.”<sup>18</sup> SFU suggests that the applicant may use any personal information he obtains from his access requests to cause the third parties personal harm and damage their reputations. In addition, disclosure of performance reviews or complaints about a third party may cause embarrassment, stigma and damage to reputation.<sup>19</sup> SFU supports its case with reference to the comments of the judge about the applicant’s online posts in the decision of a proceeding in the BC Supreme Court between it and the applicant.

[59] The applicant does not address the application of s. 22(3)(e).

[60] I have reviewed the information at issue. It includes personal evaluations of employee performance and the medical information of students and employees. Disclosure of this type of information could cause stigma and damage to their reputations. Given the practice of the applicant in posting information online, there is a likelihood of widespread public disclosure. Therefore, I find that s. 22(2)(e) is a relevant circumstance favouring withholding the information.

[61] **Section 22(2)(f) (supplied in confidence)** – SFU’s submissions with respect to this provision focus on policies of confidentiality relating to harassment complaints.<sup>20</sup> The applicant denies that the information was supplied in confidence because he asserts that it was supplied for the purpose of covering up wrongdoing.<sup>21</sup>

[62] SFU’s submissions relating to harassment complaints is surprising considering that the information at issue does not relate to any harassment complaints. Some of the records concern complaints, but not relating to harassment. Nevertheless, I find it reasonable to conclude that the same principles would apply to the collection of personal information for all categories of complaints or records relating to human resources issues.

[63] Therefore, I find that some personal information was supplied in confidence and that is a relevant consideration favouring withhold the information.

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<sup>17</sup> Order F15-29, 2015 BCIPC 32 (CanLII), para. 32; Order 01-15, 2001 BCIPC 21569 (CanLII), para. 49.

<sup>18</sup> SFU’s initial submission, para. 49.

<sup>19</sup> SFU’s initial submission, paras. 51-52.

<sup>20</sup> SFU’s initial submission, paras. 54-55.

<sup>21</sup> Applicant’s response submission, paras. 33-34.

[64] **Section 22(2)(h) (damage to reputation)** – SFU grouped its submission with respect to s. 22(2)(e) and 22(2)(h) together. I have described its arguments above.<sup>22</sup> The applicant submits that it is absurd to conclude that comments that third parties made about the applicant would damage their own reputations.<sup>23</sup>

[65] The information at issue does not contain any comments about the applicant. It does contain critical comments that third parties made about other third parties. I agree that disclosure of these comments could unfairly damage the reputations of the third-party subjects of the comments.

[66] Therefore, I find that s. 22(2)(h) is a relevant consideration favouring withholding the information.

[67] **Other relevant considerations** – The information at issue also includes information about the personal and family lives of students and employees to which no presumption applies. While there are no submissions on this issue, it is clear from the face of the records that this information relates to the personal and family lives of third parties.

[68] Therefore, I find that this is a relevant consideration favouring withholding the information.

### **Conclusion on s. 22(1)**

[69] I found above that some of the information in dispute is personal information. I have found that none of the provisions in s. 22(4) apply that would have excluded the application of s. 22(1).

[70] I have found that the records at issue contain information relating to the medical history of students and employees and that disclosure is presumed to be an unreasonable invasion of her personal privacy under s. 22(3)(a). I have found that some of the information about SFU employees constitutes their employment history under s. 22(3)(d). I have also found that some information constitutes personal evaluations of third parties provided by other third parties and disclosure would be an unreasonable invasion of privacy under s. 22(3)(g).

[71] I find that there are relevant circumstances favouring withholding information. The disclosure of some of the personal information could cause

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<sup>22</sup>Para. 58

<sup>23</sup> Applicant's response submission, para. 27.

unfair harm or damage to the reputations of third parties in accordance with ss. 22(2)(e) and (h). I also find that some of the information was submitted in confidence in accordance with s. 22(3)(f).

[72] There is personal information relating to the personal lives of students and employees where no presumption applies. I find that the fact this information relates to the personal lives of individuals is a relevant circumstance favouring withholding the information.

[73] I find that there are no relevant circumstances that support disclosing the information. Therefore, there are no relevant circumstances in this case that rebut the presumption that disclosure would be an unreasonable invasion of the third parties' personal privacy.

[74] I also find that the applicant did not make a case that disclosure of the personal information of the third parties would not be an unreasonable invasion of privacy of the third party. The burden of proof lies with the applicant on this issue, and he has not met his burden of proof.

[75] In conclusion, I find that s. 22(1) applies to the personal information at issue.

## **CONCLUSION**

[76] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. Subject to item 2 below, I confirm SFU's decision to refuse access to the information withheld in the records under s. 22(1).
2. SFU is not required by s. 22(1) to withhold the information on pages: eight, 33-35, 50, 52, 113-116, 118-121, 127, 179, 393-396, 398-401, 403-406. The only exceptions are that pages 114 and 395 contain the name computing ID and student number of an identifiable student. I have highlighted in yellow the information that SFU must withhold in copies of pages 114 and 395 that will be provided to SFU with this order.
3. I require the University to give the applicant access to the information in the responsive records that it is not authorized or required to withhold.

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4. SFU must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the pages described at item 2 above.

[77] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **May 9, 2023**.

March 24, 2023

**ORIGINAL SIGNED BY**

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Jay Fedorak, Adjudicator

OIPC File No.: F20-83947