



Court File No. **VIC-S-S-200745**

No.
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

**In the Matter of the Decision of the Office of Information and Privacy
Commissioner dated January 7, 2020, in OIPC File Nos. F16-66709 and F16-66361
and in the matter of the *Judicial Review Procedure Act*,
R.S.B.C. 1996, c. 241**

Between

MINISTER OF ATTORNEY GENERAL

Petitioner

and

INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA and
RICARDO CANOVAS

Respondents

ON NOTICE TO:
Information and Privacy Commissioner of British Columbia
4th Floor – 947 Fort Street
Victoria BC V8V 3K3

Ricardo Canovas
404 – 2488 Welcher Avenue
Port Coquitlam, BC V3C 1X7

PETITION TO THE COURT

This proceeding has been started by the petitioner(s) for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and

- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

- (a) if you were served the petition anywhere in Canada, within 21 days after that services,
- (b) if you were served the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 850 Burdett Avenue Victoria BC V8W 1B4
(2)	The ADDRESS FOR SERVICE of the petitioner is: Ministry of Attorney General Legal Services Branch PO Box 9280 Stn Prov Govt 1001 Douglas Street Victoria BC V8W 9J7 Fax number address for service (if any) of the petitioner: 250-356-9154 E-mail address for service (if any) of the petitioner(s): N/A
(3)	The name and office address of the petitioner's lawyer is: J. Alexander Dutton Ministry of Attorney General Legal Services Branch PO Box 9280 Stn Prov Govt 1001 Douglas Street Victoria BC V8W 9J7

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. An order in the nature of *certiorari* setting aside those portions of Order F20 – 01 of the Information and Privacy Commissioner for British Columbia dated January 7, 2020, requiring the Ministry of Attorney General to provide the applicant with information the Ministry withheld pursuant to section 22 of the *Freedom of Information and Privacy Protection Act*, RSBC 1996, c 165 (“*FIPPA*”); and/or
2. An order remitting this matter back to the Commissioner for redetermination by the Commissioner, or a different delegate, together with directions as to the whether the Ministry is required or entitled to file further evidence or submissions; and/or
3. Such further and other relief as this Honourable Court deems just.

Part 2: FACTUAL BASIS

A. The Parties

1. The Ministry of Attorney General is established by the *Attorney General Act*, RSBC 1996, c 22 (the “Ministry”).
2. The Ministry is a “public body” as defined by *FIPPA*.
3. The Ministry of Advanced Education, Skills & Training administers the regulation of private training institutions in British Columbia, by way of the Private Training Institutions Branch and pursuant to the *Private Training Act*, SBC 2015, c.5 (“*AVED*”).
4. *AVED* is also a “public body” as defined by *FIPPA*.
5. The respondent Information and Privacy Commissioner is an independent Officer of the Legislature that oversees the information and privacy practices of public bodies and private organizations.

6. When an applicant seeks information from a public body and is dissatisfied with the information received, they may request the Commissioner hold an Inquiry into the public body's application of sections 12-22.1. At the conclusion of the Inquiry, the Commissioner, through adjudicators with delegated authority, will render a decision and may order that the public body release additional information (the "Delegate").
7. The respondent Richard Canovas requested records from the Ministry and AVED ("Canovas").

B. Background and Procedural History

8. The records at issue in this matter relate to what the Canovas termed "legal procurement practices" between AVED and the Ministry relating to two private post-secondary institutions (the "Records").
9. Canovas made two access requests (the "Access Requests") on the following dates:
 - a. September 15, 2015: Commissioner's File No. F16-66709 /Ministry's File No. JAG-2015-53071
 - b. October 30, 2015: Commissioner's File No. F16-66361/Ministry's File No. JAG-2015-53457
10. The Access Requests both cover a time period from January 1, 2007 to October 29, 2015.
11. The Ministry withheld the Records responsive to both requests in their entirety pursuant to sections 14 (solicitor-client privilege) and 22 (personal information) of *FIPPA*.
12. Canovas requested that the Commissioner review the Ministry's decision to withhold information in the Records on each of the two Access Requests. Mediation failed to resolve the matters. Canovas requested the matter proceed to Inquiry.

13. On May 5, 2017, the Commissioner issued a Notice of Written Inquiry (the “Notice”) and the Investigator’s Fact Report.
14. The Ministry and Canovas made written submissions to the Commissioner with respect to the disclosure of the Records. Specifically, it was the Ministry’s position that the Records were exempt from disclosure to because they were subject to sections 14 and 22 of *FIPPA*. The Ministry provided affidavit evidence, descriptions of the records at issue, and legal authority in support of its position.
15. After the Notice was issued, the Ministry disclosed some portions of the Records to Canovas. The Ministry also determined additional records to be responsive to the Access Requests and withheld them pursuant to sections 14 and 22 of *FIPPA*.
16. At various times prior to issuing its decision, the Commissioner requested further submissions from the Ministry on issues related to sections 14 and 22 on *FIPPA*, and the Ministry responded. In addition, the Commissioner issued an order for production of certain records pursuant to section 44 of *FIPPA* and the Ministry complied with that order.
17. On December 1, 2019, Canovas confirmed he was not seeking personal information of other parties as part of his Access Requests.

C. The Delegate’s Decision

18. On January 7, 2020, the Delegate rendered her decision (the “Decision”). Among other things, the Delegate confirmed parts of the Ministry’s decision to refuse access to information withheld pursuant to sections 14 and 22.
19. The Delegate also found that the Ministry was not authorized pursuant to section 22 of *FIPPA* to refuse access to the certain information and ordered disclosure of that information to Canovas and the Commissioner pursuant to section 59 of *FIPPA*.

20. The Delegate confirmed in her decision that Canovas did not want any personal information about third parties and that personal information was not in dispute in the inquiry. She went on to say:

Given this, I will confine my s. 22 analysis to a determination of whether the information the Ministry withheld under s. 22 qualifies as personal information. If it does, then it is not in dispute because the applicant does not want it. Therefore, the Ministry can withhold it for that reason and I will make no determination as to whether s. 22(1) applies. However, if the information does not qualify as personal information, then s. 22 does not apply and the Ministry must release the information to the applicant.

Decision, paras 85 – 86

21. The Delegate stated then that she reviewed each page of the Records to which the Ministry applied section 22 and made a determination as to what information qualified as personal information and what did not. She stated: “I have highlighted the information that qualifies as personal information in the copy of the records the Ministry will receive with this order.”

Decision, para 88

22. In a footnote, the Delegate expands on her highlighting practice:

Put simply, any information I have not highlighted must be released to the applicant. To clarify with more specificity, I used pink highlighting to show what information s. 14 applies to and used yellow or green highlighting to show what information qualifies as personal information and therefore is not in dispute. For most of the file documents and additional records (i.e. the records described in Lawyer DS Affidavit #1, para. 19, Exhibit A PDFs 1-7 and Exhibit E), I used yellow highlighting but had to use green for PDF 8 (of Lawyer DS Affidavit #1 Exhibit A) because this PDF already contained yellow highlighting. In short, the Ministry can withhold everything I have highlighted in the records either because s. 14 applies (pink) or because it is not personal information (yellow or, in PDF 8, green).

Footnote 100, Decision, para 88

23. The Delegate states that some of the information withheld under section 22 does not qualify as personal information because it is contact information, or because it is general information about one of the institutions or other organizations, or because it does not specifically relate to identifiable individuals on its own or when combined with information from other available sources.

Decision, para 92

24. The Delegate confirms the highlighting practice again:

As mentioned, I have highlighted all the information that qualifies as personal information in the copy of the records the Ministry will receive with this order. The Ministry must release the balance of the information on those pages because it does not qualify as personal information, therefore s. 22(1) does not apply to it.

Decision, para 93

25. On February 10, 2020, the Ministry sought clarification from the Delegate with respect to the highlighting practice in order to disclose the Records in accordance with the Decision. The Ministry raised 24 questions with respect to why the same pieces of personal information were highlighted in certain parts of the Record but not others.

Exhibit "T", Rasmussen Affidavit

26. In response to 20 of these questions, the Delegate indicated there had been an oversight or a mistake with respect to what personal information the Ministry was required to disclose.

Exhibit "T", Rasmussen Affidavit

27. The Ministry made further efforts to comply with Decision but became aware of additional inconsistencies in the Delegate's highlighting practice and inconsistencies between the reasons of the Decision and the highlighting.

Part 3: LEGAL BASIS

A. Grounds for Review

1. This petition is brought pursuant to the *Judicial Review Procedure Act*, RSBC 1996, c 241 and Rules 2-1(2)(b) and 16-1 of the *Supreme Court Civil Rules*.
2. The Petitioner says the Decision must be set aside for the following reasons:
 - a. The Decision is internally inconsistent rendering it unreasonable; and/or,
 - b. The Decision failed to address the application of the presumptions set out s.22(3) rendering it unreasonable.

B. Standard of review is reasonableness

3. The Supreme Court of Canada recently reiterated in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, that there is a presumption that the reasonableness standard will apply to the judicial review of administrative decisions.

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC
65, para 10

4. This presumption is only rebutted where there is either a rule of law issue (constitutional question, question of central importance to the legal system as a whole or question of jurisdictional boundaries) or express legislative intent (statutory appeal mechanism or applicable standard of review is provided for in statute).

Vavilov, paras 17, 69

5. This case does not give rise to a rule of law issue nor does is there express legislative intent that rebuts the presumption of reasonableness and, therefore, the reasonableness presumption applies.

C. What is reasonableness?

6. In *Vavilov*, the Supreme Court of Canada also provided further guidance with respect to the application of the reasonableness standard. The majority stated:

In order to fulfill *Dunsmuir's* promise to protect “the legality, the reasonableness and the fairness of administrative process and its outcomes”, reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions (citation omitted)

Vavilov, para 13

7. The focus of a reasonableness review is the decision made by the decision maker. This first focuses on the written reasons, if issued, and also considers the outcome of the decision.

Vavilov, paras 83-84

8. The purpose of the written reasons is to “demonstrate justification, transparency and intelligibility”.

Vavilov, para 81, relying on *Newfoundland Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62

9. To be considered reasonable, a decision should be rational, logical, internally consistent and the outcome should logically follow from the reasons issued.

Vavilov, paras 102 - 103

D. Personal Information in the context of *FIPPA*

10. Section 22 of *FIPPA* is a mandatory exception to the general rule requiring disclosure and provides that:

(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be a unreasonable invasion of a third party's personal privacy.

(emphasis added)

11. Schedule 1 to *FIPPA* defines “personal information” as “recorded information about an identifiable individual other than contact information”. Schedule 1

defines “contact information” as “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”.

12. Generally speaking the public body bears the burden of proving that the applicant does not have a right to access the information. However, where the information is the personal information of a third party (which is protected by s.22), the applicant bears the burden of proving that the disclosure would not be an unreasonable invasion of the third party’s personal privacy.

FIPPA, s 57

13. Section 22(4) provides a list of circumstances where the disclosure of personal information would not be unreasonable. Subsection (3) provides a list of circumstances where the disclosure is presumed to be unreasonable. Subsection (2) then provides a list of considerations to be taken into account when a public body relies on subsection (3).
14. In its submissions, the Ministry identified a number of subsection (3) circumstances relevant to the Inquiry. Specifically, the Ministry relied on:

- (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,

- (e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax.

15. Canovas, who bore the burden of proving he should be granted access to the personal information, made no submissions with respect to the Ministry’s

application of s.22 and confirmed that he was not seeking access to any educational, financial, medical and employment history that is personal information.

Decision, para 6

Exhibit “P”, Rasmussen Affidavit

16. Ultimately, the Delegate held that, because the applicant did not provide any submissions discharging his burden, so long as the information was personal information, it could be withheld.

Decision, para 8

E. The Delegate’s Decision was Unreasonable

17. A decision has two aspects: the reasons and the outcome. As stated above, both are examined as part of a reasonableness review. In this case, the Decision is made up of the lengthy written reasons and the highlighted records provided by the Delegate which represent the outcome.

Footnote 100, Decision, paras 88, 93
Vavilov, paras

18. While a delegate is, perhaps, not required to parse through “every document, affidavit, table, submission, case law reference and piece of evidence” in their written reasons, for a delegate’s decision to be reasonable, the written reasons must be intelligible, consistent and coherent and the outcome must logically follow those reasons.

Decision, para 16
Vavilov, paras 122, 128

(a) The Decision is internally inconsistent

19. At paragraphs 88 and 93, the Delegate states that she has highlighted all information that may be withheld as it qualifies as personal information within

the meaning of s.22. However, in providing further detail in Footnote 100 at paragraph 88, the Delegate states:

Put simply, any information I have not highlighted must be released to the applicant. To clarify with more specificity, I ... used yellow or green highlighting to show what information qualifies as personal information and therefore is not in dispute. ...In short, the Ministry can withhold everything I have highlighted in the records ... because it is not personal information...

(emphasis added)

20. In the first statement, any information that has not been highlighted can be released, implying that the information that is highlighted is personal information within the meaning of s.22. In the second statement, any information that has been highlighted can be withheld, because it is not personal information. If the information that has been highlighted is not personal information, the Ministry is not authorized by s.22 to withhold it.
21. Where a decision is internally inconsistent, it is necessarily unreasonable because it is not intelligible.
22. The Delegate states in the reasons that, “broadly speaking”, the personal information is related to the educational, financial, medical and employment history of identifiable individuals or is relates to identifiable individuals on its own or when in combination with information from other available resources.

Decision, paras 91-92
23. While this is, broadly speaking, a correct statement of law, in the highlighted records, the Delegate does not apply that law consistently to the records, rendering the Decision unreasonable. For example:
 - a. In some records student names are withheld and on identical records those same student names are not withheld;

- b. In some records more details of employment history are withheld than in others;
- c. In some records student ID numbers are withheld and in others they are not; and,
- d. In some records the names and personal contact information of third parties are withheld and in other cases they are not.

24. The Delegate went on to state that “some information”, like general information about Rutherford or other organizations, is not personal information and should be released. However, the Delegate then proceeded to highlight general and publicly available information like biographies of instructors at Rutherford and other organizations, indicating it should be withheld. Another example of this type of inconsistency is the name of the Registrar. In some records the name is withheld and in some it is not. However, the Delegate provides no explanation in her reasons to explain these decisions.

Decision, para 92

25. The Delegate’s reasons only discuss one specific argument made by the Ministry, that the identification of countries of origin may identify an individual. After rejecting this argument, the Delegate then did not consistently apply this conclusion to the records.

Decision, para 92

26. Where the reasons are not intelligible, consistent and coherent and the outcome (as captured by the highlighted records provided by the Delegate) does not logically follow reasons, the Decision is unreasonable.

Vavilov, paras 102-103

(b) Decision does not address the s. 22(3) presumptions raised by the Ministry

27. Section 22(3) sets out circumstances where the release of personal information is presumed to be an unreasonable invasion of a third party's privacy. The determination of whether or not the information is personal information can be highly contextual.

28. For example, Section 22(3)(d), which was discussed by the Ministry in its submissions, states that the release personal information relating to employment, occupational or educational history is presumed to be an unreasonable invasion of a third party's privacy. If the information is gathered as part of a workplace investigation, information which may otherwise not be considered personal information (like contact information) will be subject to the presumption in (d).

Order No. 01-53, para 40, Order F08-04, paras 23 – 27

29. In addition to a contextual approach that protects personal information created or gathers as part of a workplace investigation, recent decisions by the OIPC have held that, "student names; student numbers; and information related to students' academic performance is presumed to be an unreasonable invasion of personal privacy because this information relates to the educational history of those students."

Order 19-27, para 54

30. Yet, as noted above, there are internal inconsistencies in the highlighting provided by the Delegate and circumstances where academic transcripts have not been withheld. Because the Delegate failed to provide any reasons to explain why some of the information is personal information and may be withheld and some is not, the Decision is unintelligible and therefore unreasonable.

31. Section 22(3)(e), which was also raised by the Ministry in its submissions, states that personal information obtained on a tax return or gathered for the purpose of collecting tax is presumed to be an unreasonable invasion of a third party's privacy. Again, information which in another context may not be considered to be personal information, may be personal information in the context of tax collection. Again, the Delegate has highlighted some information as personal information on tax related documents and not highlighted other identifying information without explanation.

32. Without reasons to demonstrate that the decision-maker has accounted for the central issues and arguments raised by the parties, in this case the Ministry's reliance on section 22(3) presumptions. If the reasons fail to fulfill their purpose of ensuring "justification, transparency and intelligibility" the decision is, ultimately, unreasonable.

Vavilov, para 81

33. Furthermore, the failure by a decision-maker to address issues and arguments raised by the parties may call into question whether the decision maker was alert to the issues before them.

Vavilov, paras 127 - 128

34. Given the lack of reasons, the internal inconsistencies and potential oversights outlined above, it is impossible to know whether the Delegate took the presumptions raised by the Ministry into account and was fully alert to the issues before them.

F. Remedy

35. The petition should be allowed and the following orders should be granted:

- c. an order in the nature of *certiorari* setting aside those portions of Order F20 – 01 of the Commissioner dated January 20, 2020, requiring the Ministry to provide the applicant with information the Ministry withheld pursuant to section 22 of the *FIPPA*; and/or
- d. an order remitting this matter back to the Commissioner for redetermination by the Commissioner, or a different delegate, together with directions as to the whether the Ministry is required or entitled to file further evidence and/or or submissions; and/or
- e. Such further and other relief as this Honourable Court deems just.

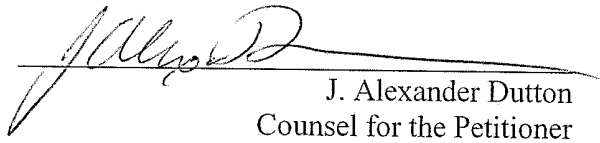
36. The Minister does not seek costs and asks that no order of costs be made against him.

Part 4: MATERIAL TO BE RELIED ON

- 37. Affidavit #1 of Shauna Rasmussen, made February 19, 2020; and,
- 38. Such further and other material as counsel may advise and this Honourable Court may accept.

The petitioner estimates that the hearing of the petition will take **one day**.

Date: February 19, 2020


J. Alexander Dutton
Counsel for the Petitioner

No be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this petition

with the following variations and additional terms:

.....
.....
.....

Date:[dd/mmm/yyyy]..... . _____

Signature of Judge Master