

No. VLC-S-S-20111219  
Vancouver Registry

**IN THE SUPREME COURT OF BRITISH COLUMBIA**

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*,  
R.S.B.C. 1996 C. 241

AND IN THE MATTER OF THE *FREEDOM OF INFORMATION AND PROTECTION OF  
PRIVACY ACT*, R.S.B.C. 1996 C. 165

AND IN THE MATTER OF ORDER F20-39 OF THE DELEGATE  
OF THE INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA

BETWEEN:

**BONNIE-GALE BAUN**

PETITIONER

AND:

**INFORMATION AND PRIVACY  
COMMISSIONER FOR BRITISH COLUMBIA**

RESPONDENT

AND:

**WORKERS' COMPENSATION BOARD  
OF BRITISH COLUMBIA**

RESPONDENT

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**AMENDED PETITION TO THE COURT  
(Original filed October 21, 2020)**

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ON NOTICE TO:

Office of the Information and Privacy Commissioner for British Columbia  
4<sup>th</sup> Floor, 947 Fort Street  
Victoria, B.C. V8V 3K3

AND ON NOTICE TO:

Workers' Compensation Board of British Columbia  
6951 Westminster Highway  
Richmond, B.C. V7C 1C6

AND ON NOTICE TO:

Attorney General for British Columbia  
Legal Services Branch  
6<sup>th</sup> Floor, 1001 Douglas Street  
Victoria, B.C. V8V 1X4

This proceeding is brought for the relief set out in Part 1 below, by

[x] the person named as petitioner in the style of proceedings above.

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
  - (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, by

- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with 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.

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1	<p>The address of the registry is:</p> <p>The Law Courts 800 Smithe Street Vancouver, B.C. V6Z 2E1</p>
2	<p>The ADDRESS FOR SERVICE of the petitioner is:</p> <p>14 -- 1800 Parkview Crescent Kelowna, B.C. V1X 7G6</p> <p>Fax number for address for service of the petitioner: none</p> <p>E-mail address for service of the petitioner: none</p>
3	<p>The name and office address of the petitioner's lawyer is:</p> <p>Not applicable</p>

## Claim of the Petitioner

## Part 1: ORDERS SOUGHT

## 1. The Petitioner seeks the following orders:

- a. A declaration pursuant to sections 2 and 7 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 that the decision in Order F20-39 of the Delegate of the Information and Privacy Commissioner made under section 43 of the *Freedom and Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 authorizing the Workers' Compensation Board of British Columbia to disregard the petitioner's past and future access requests and corrections requests made under the *Freedom and Information and Protection of Privacy Act* be set aside;
- b. In the alternative, a declaration pursuant to section 5 of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 that the Office of the Information and Privacy Commissioner reconsider and determine the Workers' Compensation Board of British Columbia's application under 43 of the *Freedom and Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 for a decision authorizing it to disregard the petitioner's past and future access requests and corrections requests made under the *Freedom and Information and Protection of Privacy Act*;
- c. An order that the record of the proceedings before the Office of the Information and Privacy Commissioner be filed in the court and served on the petitioner;

- d. Costs; and
- e. Such further relief as this Honourable Court considers just.

## Part 2: FACTUAL BASIS

1. The petitioner has made nine claims for compensation from the Workers' Compensation Board of British Columbia ("WorkSafeBC") and (the "WCB Claims"). The petitioner never had a portal account with WCB and did not have access to WorkSafeBC online after 2015 as there is no email or internet at her home.

*Order F20-39, paragraph 10*

2. From in or about 2012 to the present, the petitioner has made numerous requests for access to records and for corrections to records in the possession of WorkSafeBC pursuant to the *Freedom and Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ("*FIPPA*") and which relate to the WCB Claims (the "*FIPPA* Requests"). Access requests are those relating to access to information (see section 5). Correction requests are those relating to factual errors or omissions in an individual's personal information (see section 29). Many correction requests have not yet be made. The formaldehyde readings for claim 15786760 of over 1.00 ppm given to WCAT Campbell on 31 March 2015 were placed on to claim 13364479, but need to be moved to the correct claim and WorkSafeBC is refusing. There was a poisoning investigation and the petitioner was added to the WorkSafeBC toxicology exposure program and that report has not yet been added to the petitioner's claim. Dr. Barlow's form 72 on claim 13364479 have yet to put into the medical section of the petitioner's claim, nor have the ICD codes been put into the petitioner's claim. The petitioner is concerned about cancer and these are just examples of why the petitioner makes the requests.

*Order F20-39, paragraphs 1 and 15*

3. In or about December 2019, WorkSafeBC made an application to the Office of the Information and Privacy Commissioner ("*Commissioner*") pursuant to section 43 of *FIPPA* requesting authorization to disregard the petitioner's outstanding and future access requests and correction requests (the "*Application*").

*Order F20-39, paragraphs 15 to 18*

4. On or around September 8, 2020, the Commissioner granted the Application pursuant to section 43(a) of *FIPPA* and ordered that:
  - a. WorkSafeBC may disregard all ten of the petitioner's outstanding *FIPPA* requests.
  - b. For the remainder of 2020, WorkSafeBC may disregard any *FIPPA* requests the petitioner, or someone acting on her behalf, may make.
  - c. Beginning in 2021 and continuing indefinitely, WorkSafeBC may disregard any future access requests the petitioner, or someone acting on her behalf, may make seeking information that is available to the petitioner through the WorkSafeBC portal or WorkSafeBC Disclosures Department.

- d. Beginning in 2021 and continuing indefinitely, WorkSafeBC may disregard any future correction requests that the petitioner, or someone acting on her behalf, may make seeking to change someone else's opinions or decisions respecting the petitioner's claims. In other words, WorkSafeBC may disregard any future correction requests that do not involve the correction of factual information. WorkSafeBC may determine, in light of its section 28 [FIPPA] duty to ensure that personal information is accurate and complete, whether a correction request seeks to correct factual personal information.
- e. Beginning in 2021 and continuing for a period of two years, WorkSafeBC may disregard any FIPPA requests in excess of one open access request and one open correction request at a time made by the petitioner, or someone acting on her behalf.
- f. When responding to the one open access request and one open correction request specified in paragraph e immediately above, the following apply:
  - i. WorkSafeBC is not required to spend more than 7 hours responding to each request;
  - ii. WorkSafeBC is not required to respond to any access request that seeks records that have already been provided to the petitioner through the Disclosures Department or previous responses to FIPPA requests;
  - iii. WorkSafeBC is not required to respond to any new correction request that duplicates any past correction request;
  - iv. WorkSafeBC may determine, in light of its section 6(1) [FIPPA] duties to the petitioner, what is a single access or correction request for the purposes of this authorization; and
  - v. An "open access request" is a request for records under section 5 [FIPPA] that WorkSafeBC has not yet responded to under section 8 [FIPPA]. An "open correction request" is a request for a correction under section 29(1) [FIPPA] that WorkSafeBC has not yet acted upon under section 29(2) [FIPPA].

5. WorkSafeBC is not in compliance with the petitioner's correction requests because there are no annotations on her WorkSafeBC claim as is required under section 29 of the FIPPA.

### Part 3: LEGAL BASIS

6. The nature of the relief sought is set out in Part 1.
7. The grounds on which the relief is sought is set out in Part 3.
8. The petitioner relies on the following enactments:
  - a. *British Columbia Supreme Court Civil Rules*, B.C. Reg. 168/2009;
  - b. *Judicial Review Procedures Act*, R.S.B.C. 1996 c. 241;
  - c. *Interpretation Act*, R.S.B.C. 1996, c. 238;
  - d. *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165; and
  - e. *Workers Compensation Act*, R.S.B.C. 1996, c. 492.

### ***Standard of Review***

9. The law with respect to appeals from administrative tribunals was substantially rewritten in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 65.
  - a. The starting point for judicial review is reasonableness (paragraphs 10 and 23).
  - b. The reasonableness standard may be rebutted in two types of situations:
    - i. Where the legislature intends a different standard (paragraphs 10 and 17); and
    - ii. Where the rule of law requires the standard of correctness (paragraphs 10, 17 and 23).
  - c. The legislature may demonstrate the intent by express legislation or by providing a statutory appeal mechanism thereby signally the application of the appellate standard of review (paragraphs 33 to 52).
  - d. The rule of law rebuttal includes general questions of law of central importance to the legal system as a whole (paragraphs 53 to 64).
  - e. Appeals on questions of law, including statutory interpretation and the scope of the decision maker's authority, use the standard of correctness (paragraph 37).
  - f. A reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (paragraph 85). A reasonable outcome cannot be "reached on an improper basis" (paragraph 86). A reasonable decision cannot be based on an "unreasonable chain of analysis" (paragraph 96). A decision is justified where it complies the governing statutory scheme (paragraphs 105 to 110), is consistent with applicable common law principles, and follows binding precedent (paragraphs 111 to 114). The decision maker must use proper statutory interpretation techniques (paragraph 119).
10. A review of the Commissioner's decision is governed by the statutory appeal mechanism set out in the *Judicial Review Procedures Act*, R.S.B.C. 1996 c. 241. As such, the standard of review is the appellate standard.
11. Consistent with the appellate standard, the proper meaning to be given to the provisions of section 43 of the *FIPPA* is a question of law, the application of the tests to the facts is a question of mixed law and fact, and the exercise of and fashioning a remedy is a question of law. The ruling on "reasonableness simpliciter" in *Crocker v. BC* has been superseded by *Vavilov, supra*.

*Crocker v. BC*, [1997] B.C.J. No. 2691 at paragraph 31

### ***The relevant purposes, rights and responsibilities under the FIPPA***

12. The purposes of the *FIPPA* are set out in section 2 of the *FIPPA* as follows:
  - 2(1) The purposes of the Act are to make public bodies more accountable to the public and to protect personal privacy by
    - (a) giving the public a right to access to records,
    - (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,

- (c) specifying limited exceptions to the rights of access,
- (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
- (e) providing for an independent review of decisions made under this Act.

13. The ability to gain access is consider "a right of access" pursuant to section 4(1) of the *FIPPA* (see also section 57(1)). The ability to seek corrections is to help a pubic body "make every reasonable effort to ensure that the personal information is accurate and complete" pursuant to section 28.

*Order F20-39, paragraph 20*

14. Pursuant to section 43, a public body may bring an application to the Commissioner to be authorized to disregard requests under section 5 and section 29 but only if the request:
- (a) would unreasonably interfere with the operations of the public body because of the repetitious or systemic nature of the requests, or
  - (b) are frivolous or vexatious.

***The onus of proof***

15. WorkSafeBC has the onus of proof when seeking relief under section 43 of the *FIPPA*.

*Order F20-39, paragraph 8*

***Application of the law to the decision***

16. As a starting point, the petitioner wishes to emphasize that WorksafeBC is not in compliance with her correction requests because there are no annotations on my WorkSafeBC claim as is required under section 29 of the *Freedom of Information and Protection of Privacy Act*.
17. The Order was granted pursuant to s. 43(a) of *FIPPA* and, as such, the Commissioner did not consider the application of s. 43(b) of *FIPPA*.

*Order F20-39, paragraph 58*

18. The petitioner submits that the onus was therefore on WorkSafeBC to demonstrate:
- a. Each request would unreasonably interfere with the operations of WorkSafeBC because of the repetitious nature of the requests; or
  - b. Each request would unreasonably interfere with the operations of WorkSafeBC because of the systematic nature of the requests.

19. The petitioner submits that the Commissioner erred in law in introducing into the definitions a requirement of "good faith".

*Order F20-39, paragraphs 21*

***WorkSafeBC failed to satisfy the onus on it that each request when added to the others rose to the level of repetitious***

20. *The New Shorter Oxford English Dictionary* defines "repetitious" as characterized by tedious or unnecessary repetition.

*The New Shorter Oxford English Dictionary*, page 2549

21. The petitioner submits that it is not sufficient for WorkSafeBC to show repetition, it was necessary to show tedious or unnecessary repetition. The provision is designed to "curb abuse of the right of access".

*Crocker, supra*, at paragraph 42

22. The petitioner submits that the Commissioner erred in law in defining "repetitious" as "requests made more than once".

*Order F20-39*, paragraph 26

23. The petitioner submits that the Commissioner erred in law in concluding that the *FIPPA* Requests were repetitious in nature by finding that a request has been made more than once without considering whether they are also either "tedious or unnecessary".

***WorkSafeBC failed to satisfy the onus on it that each request when added to the others became systematic***

24. *The New Shorter Oxford English Dictionary* definition of "systematic" that is applicable is "habitual, deliberate, premeditated; acting or carried out with malicious intent". A similar definition was adopted in *Crocker, supra*, at paragraph 55.

*The New Shorter Oxford English Dictionary*, page 3193

25. The petitioner submits that it is not sufficient for WorkSafeBC to show only multiple requests, it was necessary to show an element of improper intent. The provision is designed to "curb abuse of the right of access". For example, in *Crocker, supra*, at paragraphs 11 and 42, the applicants were found to be "using the Act as a weapon of information warfare".

*Crocker, supra*, at paragraph 42

26. The petitioner submits that the Commissioner erred in law in defining "systematic" as "a method or plan of acting that is organized and carried out according to a set of rules or principles".

*Order F20-30*, paragraph 28

27. The petitioner notes the term "systematic" is to be used to deny the applicant the right to access records. There is nothing wrong with using a method or plan of accessing records that is organized and carried out according to a set of rules or principles. The petitioner submits that this approach is to be encouraged. The definition of "systematic" that is found in section 43 of the *Act* that is to be used to deny the applicant the right to access records must go further and this is why the definition from *The New Shorter Oxford Dictionary* above



is the proper definition because it imports the element of "acting or carried out with malicious intent".

28. The petitioner submits that the Commissioner erred in law in concluding that the *FIPPA* Requests were systematic in nature.
29. At paragraph 29 of the Order, the Commissioner found that requesting records based on what the applicant sees in records she already has is something to be criticized. With respect this behavior is reasonable on its face taking into account the nature of the concerns identified in the records. The petitioner would be remiss in not getting to the bottom of these serious complaints. The Commissioner appears to have accepted the sincerity of the basis for the petitioner's requests at paragraphs 47 to 48.
30. At paragraph 30 of the Order, the Commissioner finds that combing over records deliberately is to be criticized. The petitioner submits with respect that deliberate review should be expected. For example, the petitioner's name must match precisely the MSP printouts. WorkSafeBC stated to the petitioner in a 2016 letter to her that it does not have to read everything to make a disclosure. As a result the disclosures could be incomplete requiring the petitioner to be deliberate.
 

***WorkSafeBC failed to satisfy the onus on it that each request would unreasonably interfere with the operations of WorkSafe BC***
31. The petitioner submits that it is not sufficient for WorkSafeBC to merely demonstrate that each request would interfere with the operations, it was necessary to demonstrate that each request would unreasonably interfere.
32. The petitioner submits that the compliance with the *FIPPA* interferes with the operations of a public body, but that is specifically contemplated in the legislation. A public body may charge fees to cover some or all of the costs pursuant to section 75 of the *Act*. A public body is entitled to extra time to comply with requests until the fees are paid pursuant to section 7. In the present case, WorkSafeBC did not provide evidence that any increase in costs to it could not be addressed in fees. The petitioner submits the Commissioner erred in law in failing to consider the petitioner's argument to this effect at paragraph 37 of the Order. At paragraph 39, the Commissioner erred in law in finding that the records being sought could be obtained by other means. With respect, the petitioner cannot know she has all documents without seeking access under the *Act*. Disclosure is a partial release, not a complete release from ~~all~~ departments.
33. The petitioner submits that the Commissioner took into account irrelevant information when determining at paragraphs 44 to 45, and 54 to 55 that the petitioner has other avenues to obtain information, particularly in this case where the petitioner's evidence is she does not have internet at home.
34. The petitioner submits that the Commissioner erred in concluding that the *FIPPA* Requests would unreasonably interfere with WorkSafeBC's operations.
35. In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, at paragraph 27, the Supreme Court emphasized that the failure to apply the proper test to a set of facts is an error in law.

36. The petitioner submits that the foregoing errors in law resulted in the Order authorizing WorkSafeBC to disregard outstanding requests, and therefore it must be set aside.

***The Order was wholly disproportionate to the harm***

37. In *Crocker, supra*, at paragraphs 54 to 59, the court held that an order under section 43 must be proportionate to the harm.
38. In order to justify authorizations to disregard future requests, an applicant must show that the person seeking access "...so abused his or her right of access to records that the Commissioner is able to conclude with reasonable certainty from the nature of the previous requests that any future request by the applicant would unreasonably interfere with the operations of the public body."

***Mazhero v. BC, [1998] B.C.J. No. 1539 (S.C.) at paragraphs 27 to 32***

39. The Commissioner appears to have accepted the sincerity of the basis for the petitioner's requests at paragraphs 47 to 48, yet this was used against her as a basis for authorizing WorkSafeBC to disregard future requests.
40. The petitioner submits the Commissioner failed to properly consider the test for future requests and erred in law with respect to them and they should be set aside.
41. The Commissioner may only allow WorkSafeBC to disregard *FIPPA* requests for corrections before the application date with respect to section 43 of the *Act*. The petitioner's requests were well in advance of the application.
42. In Order F07-08 the Commissioner held that section 43 of the *Act* does not apply to requests for information or routinely available records like a claim file as it is routine to provide the file when making a decision. The *FIPPA* policy that can be obtained from the WorkSafeBC site states that a worker is entitled to ask for their claim as many times as they like.

***In the alternative, the Order is unreasonable***

43. In the alternative, in the event this Honourable Court finds that the standard of review is reasonableness, for the foregoing reasons, the petitioner submits that the Order is unreasonable. The evidence did not rise to the level of an "abuse of the right of access".
44. The Order was not based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law. It was made on an improper basis. It was made on an unreasonable chain of analysis. It cannot be justified because it does not comply with the governing statutory scheme. It does not follow binding precedent and the decision maker did not use proper statutory interpretation techniques.

***In the alternative, the matter should be returned to the Commissioner***

45. The petitioner submits, in the event this Honourable Court finds the Order should not be set aside, the matter should be returned to the Commissioner to be reconsidered and determined according to the proper principles and tests. The petitioner submits that, in the event that this Honourable Court finds that the tests under section 43 of the *Act* were

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satisfied, the Order in the present case was wholly disproportionate to harm and the matter should be returned to the Commissioner to be reconsidered and determined with respect to the proper terms of the Order.

- 46. The Commissioner cannot consider a WorkSafeBC request for an extension of time to respond to a request after the original response period of 30 days under section 10 of the *FIPPA*.

**Part 4: MATERIAL TO BE RELIED ON**

- 1. The affidavit of Bonnie-Gale Baun sworn December 14, 2021.
- 2. The records of proceedings before the Commissioner.

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

Date: December 16, 2021

  
\_\_\_\_\_  
Signature of petitioner

To 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:

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Date: _____	_____
	Signature of <input type="checkbox"/> Judge <input type="checkbox"/> Master