



No. 49730
Penticton Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BRADLEY H. BESLER

Petitioner

and

**OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER OF BRITISH
COLUMBIA and DISTRICT OF SUMMERLAND**

Respondents

PETITION TO THE COURT

ON NOTICE TO:

Office of the Information and Privacy Commissioner
PO Box 9038, Str. Prov. Govt.
Victoria, BC V8W 9A4
Attn: Celia Francis

AND ON NOTICE TO:

District of Summerland
PO Box 159
13211 Henry Ave
Summerland, BC V0H 1Z0
Attn: Graham Statt

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

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 on at the hearing.

Orders, including orders granting 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,

- (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, and
- (d) If the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: Penticton Courthouse 100 Main St. Penticton, British Columbia V2A 5A5
(2)	The ADDRESS FOR SERVICE of the petitioner is: 18816 Garnet Valley Road Summerland, British Columbia V0H 1Z3

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. The Petitioner, Bradley H. Besler seeks:
 - (a) That the orders set out in paragraph 76 of Order F24-15 (the “Order”) issued by Celia Francis, adjudicator (the “Adjudicator”), Office of the Information and Privacy Commissioner for British Columbia (the “OIPC”) and dated February 29, 2024, be set aside;
 - (b) A declaration that the Petitioner’s family members were denied their right to procedural fairness during the Inquiry; and
 - (c) A declaration that Celia Francis is ineligible to act as an adjudicator, convener, or participant otherwise in any matters concerning the Petitioner or his family members’ information access files or inquiries.
2. Costs; and
3. Such further and other relief as this Honourable Court deems just.

Part 2: FACTUAL BASIS

The Parties

1. The Petitioner, Bradley H. Besler is a long-time Summerland resident, owner/operator of Big Dog Fencing, and moderator of the Facebook page “The REAL Summerland.”
2. The Respondent, Office of the Information and Privacy Commissioner for British Columbia (the “OIPC”) is an officer of the Legislature appointed pursuant to and with the powers conferred by the *Freedom of Information and Privacy Protection Act* (“FIPPA”).
3. The Respondent, District of Summerland (the “District”) is the applicant to the Order under review, and is the local government in Summerland, British Columbia.

The Nature of this Petition

4. Celia Francis, an adjudicator of the OIPC (the “Adjudicator”), issued Order 24-15 (the “Order”) on February 29, 2024.
5. The Order was issued following an Inquiry held pursuant to the provisions of *FIPPA* and as a result of the District’s section 43 application to the OIPC made on November 9, 2023.
6. This petition is an application for judicial review of the Order.

Background

7. On October 24, 2019 the Petitioner, his mother and his brother filed a Notice of Civil Claim against the District for negligence, defamation, misfeasance in public office, and conspiracy. The Plaintiffs are self-represented in that ongoing litigation (Penticton Registry No. 45001).
8. The Petitioner is a long-time Summerland resident who has become known as a community watchdog regarding local issues, including with regards to local government. He operates the Facebook page ‘The REAL Summerland’, which is a modern-day news media source for the public.
9. In the fall of 2022 the Petitioner ran in Summerland’s Municipal election for a seat on Council. The Petitioner was motivated to bring transparency and accountability to Municipal Hall.
10. On September 29, 2022, during the Municipal election, the District’s Chief Administrative Officer Graham Statt (“Graham Statt”) held a meeting with Corporate Officer Kendra Kinsley to discuss “firewalling” the Petitioner from obtaining information.

Petitioner’s affidavit, Ex. B

2023

11. In June 2023 the District published its 2022 Statement of Financial Information, which revealed that Councillor Erin Trainer’s (“Erin Trainer”) expenses were significantly higher than other Councillors. The Petitioner then submitted an FOI request to the District for an itemized list of Councillor expenses, which revealed Erin Trainer’s hotel expenses for the 2022 UBCM in Whistler, BC were double the cost that other Councillors expensed. The

Petitioner discovered that Erin Trainer booked a two-bedroom suite in the Delta Hotel Whistler for her, her husband, her mother, and three children, which was in violation of District policies 100.1 and 100.6.

Petitioner's submissions, at paras. 56, 57

12. District policy 100.1(7) 'Reimbursement of Expenses' states "Spouses expenses are not eligible for reimbursement." District policy 100.6(c) 'Council Travel and Conference Expenses' states Councillors are eligible for "Single room hotel accommodations, as receipted."

Petitioner's affidavit, Ex. K

13. On June 24, 2023 the Penticton Herald newspaper published an article about Erin Trainer's 2022 hotel expenses.

Petitioner's supporting documents from submissions, Ex. P

14. After this information was published, the Petitioner submitted new FOI requests to the District for a variety of topics, including information related to Erin Trainer's UBCM hotel booking for 2023 to determine if she was again booking a two-bedroom suite in violation of District policy. The Petitioner also submitted FOI requests for information related to the District's firing of a long-term employee, government contracts, projects the District is involved in, and more. However, the District did not provide any FOI response packages to any of the Petitioner's ten FOI requests at issue after June 24, 2023, the date Erin Trainer's policy violation was published in the media.

15. On September 12, 2023 the OIPC granted the District a time-extension for FOI 2023-33 to November 15, 2023. The District told the OIPC that 1500 pages needed to be reviewed.

Petitioner's affidavit, Ex. E

16. On September 25, 2023 the OIPC granted the District a time-extension for FOI 2023-32 to December 6, 2023. The District told the OIPC that 1334 pages needed to be reviewed.

Petitioner's affidavit, Ex. F

17. On October 12, 2023 the OIPC granted the District time-extensions for the Petitioner's FOI requests 2023-37, 2023-38, 2023-39, 2023-40, 2023-45, and 2023-46. The time-extensions ranged from December 28, 2023 to June 13, 2024. At this time, the District confirmed that "Records have been retrieved, sorted chronologically, and initial duplicates have been removed" for all of the listed FOI requests.

Petitioner's affidavit, Ex. G

18. On October 17, 2023 at a Summerland Council meeting, the Petitioner asked Graham Statt if, in addition to being the District's CAO, he conducts private pharmaceutical consulting. Graham Statt confirmed to the Petitioner that he is a private pharmaceutical consultant, that Council is aware of his private consulting, and that it is included in his employment contract with the District.

19. On November 7, 2023 at a Summerland Council meeting, the Petitioner asked Graham Statt if he would provide a copy of his District employment contract, and specifically where it refers to his private consulting. Graham Statt instructed the Petitioner to file an FOI request for the information.

20. On November 8, 2023 the Petitioner filed an FOI request for “A copy of Graham Statt’s employment contract, including benefits and any permission to offer outside consulting services. All documents that confirm Graham Statt is permitted to offer private consulting services outside his duties as the District of Summerland’s CAO. I would like to see if there are any limitations placed on Graham Statt’s consulting.”
21. On November 9, 2023 the District made its s. 43 application to the OIPC to disregard ten of the Petitioner’s outstanding FOI requests. The District alleged that the Petitioner’s requests were frivolous and/or vexatious in nature, excessively broad, repetitious and/or systematic, and responding to the requests would unreasonably interfere with the operations of the public body.
22. On November 29, 2023 the District made its initial submissions for this Inquiry.
23. On November 30, 2023 the Petitioner made his submissions.
24. On December 12, 2023 the District made its reply submissions.

2024

25. On February 6, 2024 at the Summerland Council meetings, Graham Statt appeared remotely because he was in Edmonton, Alberta for a pharmaceutical event unrelated to his District duties; the pharmaceutical event was held on February 7th.
26. This resulted in the Petitioner researching Graham Statt’s pharmaceutical activities while he has been the District’s CAO, and the Petitioner discovered multiple videos online that showed Graham Statt conducting his private pharmaceutical consulting in his District office during his District hours of employment. This information was published on The REAL Summerland and printed in the Penticton Herald. Many Summerland residents expressed concern that Graham Statt was abusing his position as CAO and misusing District resources; the Petitioner’s mother was one of the concerned residents.
Petitioner’s affidavit, Ex. H

27. On February 14, 2024 the Petitioner’s mother submitted two FOI requests to the District seeking documents related to Graham Statt’s private pharmaceutical consulting and his District employment schedule, to confirm if Graham Statt was misusing District resources during his District hours of employment.
28. On February 15, 2024 the District asked the OIPC that it be allowed to add the two new FOI requests made by the Petitioner’s mother to the s. 43 application. The OIPC informed the parties that the Adjudicator’s decision was expected next week, and the Adjudicator would not be adding additional requests to the s. 43 application. However, on February 20, 2024 the Adjudicator changed her mind and agreed to the District’s request to append two additional FOI access requests to the s. 43 application.
Petitioner’s affidavit, Ex. J

The Adjudicator’s Order

29. On February 29, 2024 the Adjudicator released her Order, which contained the reasons for her decision. The Adjudicator found the ten FOI requests at issue are both “systematic” and

“excessively broad” and that responding to them would unreasonably interfere with the District’s operations. The Adjudicator found the District had met its burden and that s. 43(c)(i) and (ii) applied to the ten outstanding requests that were subject to the s. 43 application.

30. The Adjudicator made the following authorizations under s. 43 of *FIPPA*:

1. The District was authorized to disregard requests 2023-32, 2023-33, 2023-37, 2023-38, 2023-39, 2023-40, 2023-45, 2023-46, 2023-48 and 2023-68.
2. For a period of three years from November 9, 2023, regarding open and future access requests made by the Petitioner or his family members on his behalf, the District was authorized
 - a. To respond to one open request at a time;
 - b. To determine what a request is; and
 - c. To spend no more than 8 hours responding to each request.

Order, at para. 76

Part 3: LEGAL BASIS

1. The Petitioner relies on:

- (a) *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 as amended;
- (b) *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Rules 2-1(2)(b), 14-1, and 16-1;
- (c) *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 as amended, Sections 2, 3, 4, 5, 6, 43, 65;
- (d) The inherent jurisdiction of this Honourable Court.

Grounds for Review

2. *FIPPA* does not grant a right of appeal on an Order of the OIPC. A review of the Order must be undertaken pursuant to a judicial review brought by petition to this Court.

FIPPA
Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, at s. 2(1)

The Statutory Provision Under Review

3. Section 43 of *FIPPA* states “If the head of a public body asks, the commissioner may authorize the public body to disregard a request under section 5 or 29, including because: (a) the request is frivolous or vexatious, (b) the request is for a record that has been disclosed to the applicant or that is accessible by the applicant from another source, or (c) responding to the request would unreasonably interfere with the operations of the public body because the request (i) is excessively broad, or (ii) is repetitious or systematic.”

Standard of Review

4. The Petitioner seeks a judicial review of the Order based on the ‘reasonableness’ and ‘correctness’ standards of review, and the duty of procedural fairness.

'Reasonableness' Standard of Review

5. The standard of review that applies to decisions of the OIPC in relation to an access request is 'reasonableness.'

Plenary Group (Canada) Ltd. v. British Columbia (Minister of Technology, Innovation and Citizen's Services), 2018 BCSC 444

6. In order to be upheld as reasonable, the reasons underlying the statutory or administrative decision must be both rational and logical, and the decision itself must be justifiable in light of the relevant facts and the law.

Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, at paras. 101-106

7. In reviewing an administrative decision-maker's decision and written reasons, the reviewing court must ask whether the decision bears the hallmarks of reasonableness, namely justification, transparency and intelligibility, and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision.

Vavilov, at para. 99

8. An administrative decision-maker's decision should be set aside where there are sufficiently serious shortcomings or flaws that are sufficiently central to render the decision unreasonable. Such sufficiently serious shortcomings or flaws include, but are not necessarily limited to (a) a failure to rationality internal to the reasoning process, and (b) when a decision is in some respect untenable in light of relevant factual and legal constraints that bear on it.

Vavilov, at paras. 100, 101

9. For a decision to be reasonable, it must be based on reasoning that is both rational and logical. The reviewing court must be able to trace the decision-maker's reasoning without encountering any fatal flaws in its overarching logic and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived".

Vavilov, at para. 102

10. The internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. The reviewing court must ultimately be satisfied that the decision-maker's reasoning "adds up".

Vavilov, at para. 104

11. An administrative decision-maker must take the evidentiary record into account and the general factual matrix that bears on its decision into account; the decision must be reasonable in light of them. A decision may be unreasonable where a decision-maker has shown that their conclusions and/or decision were not based on the evidence that was actually before them.

Vavilov, at paras. 125-126

12. The principles of justification and transparency require that an administrative decision-maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in

the right to be heard. A decision-maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision-maker was actually alert and sensitive to the matter before it.

Vavilov, at paras. 127,128

'Correctness' Standard of Review

13. The 'correctness' standard is not deferential to the decision-maker. Rather, it allows the reviewing Court to make an assessment on its own accord based on the evidentiary record that was before the decision-maker:

[54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir*, at para. 50. While it should take the administrative decision maker's reasoning into account – and indeed, it may find that reasoning persuasive and adopt it – the reviewing court is ultimately empowered to come to its own conclusions on the question.

Vavilov, at para. 54

Duty of Procedural Fairness

14. A statutory or administrative decision-maker must also comply with the applicable duty of procedural fairness, including the right to be heard.
15. In this context, the duty of procedural fairness includes, amongst other obligations, the right to have key submissions and evidence seriously considered and the key matters at hand grappled with by the decision-maker. That is because to "solicit the representations of a party and, subsequently, to fail to consider them, renders hollow the hallowed principle of the right to be heard."
- Ayr Motors Express Inc. v. Canada (Employment Workforce Development and Labour)*, 2017 FC 514, at para. 29.
16. The principles of procedural fairness relating to the right to have submissions and evidence substantively heard and considered by the decision-maker can often overlap with the reasonableness standard, and in particular the obligation to issue a decision that reasonably responds to the key submissions of the parties and the relevant evidence before the decision-maker.
17. Therefore, it is clear that the failure to consider key evidence or submissions is sufficient to have a decision quashed on judicial review, whether as a matter of procedural fairness or as a matter pertaining to the unreasonableness of the decision.
18. The standard of review applicable to questions of procedural fairness is 'correctness.'
- Mission Institution v. Kehla*, 2014 SCC 24, at para. 79
19. The Supreme Court of Canada's decision in *Vavilov* dealt with the review of the merits of an administrative tribunal's decision, and as such, the standard of review with respect to procedural fairness remains unchanged.

FIPPA Sections 2, 3, 4, 5, 6 and 65

20. Section 2 of *FIPPA* refers to the purposes of the *Act*, which are to make public bodies more accountable to the public and to protect personal privacy by giving the public a right of access to records and giving individuals a right of access to, and a right to request correction of, personal information about themselves.
21. Section 3 states *FIPPA* applies to all records in the custody or under the control of a public body. This applies to all employees, officers and directors of a public body.
22. Section 4 states an applicant who makes a request under section 5 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant. The right of access to a record is subject to the payment of fees, if any, required under section 75.
23. Section 5 states that to obtain access to a record, the applicant must make a written request that provides enough detail to enable an experienced employee of the public body.
24. Section 6 refers to the duty to assist applicants, stating the head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.
25. Section 65 states that it is an offence to wilfully mislead the commissioner or an adjudicator. Section 65.6 describes the financial penalties for such offences.

Application of Legal Principles

26. The burden of proof is on the District to show that its s. 43 application should be granted.
Order, at para. 14
27. For the reasons set out below, the Order was unreasonable and rendered in a manner that breached the duty of procedural fairness, and must be set aside.

The Adjudicator relied on her own opinions, assumptions, bias, speculation and conjecture, rather than considering and interpreting the evidence that was on the record in the Inquiry. The Adjudicator failed to consider relevant factors, evidence and submissions.

28. The Petitioner alleges the Adjudicator displayed unmistakable bias in favor of the District with her assessments of the evidence. The Adjudicator's assumptions and opinions always favored the District, whereas she ignored or dismissed the Petitioner's key arguments. The Adjudicator failed to carefully consider the Petitioner's evidence.
29. A decision can be unreasonable if the decision-maker fails to consider, or gives insufficient weight to, key factors, evidence, or submissions of the parties.
30. In this case, the Petitioner submits that the Adjudicator unreasonably failed to take into account, or to give sufficient weight to, a number of essential arguments or considerations, rendering her decision unreasonable.

'47,000 documents'

31. The Adjudicator relied on the District's assertion that nine of the ten requests at issue resulted in nearly 47,000 responsive records.
32. The District gave the example that if a 150-page attachment was included in the Petitioner's FOI request for four District staff, that would increase the responsive records by 600 pages. However, the District's consultant has specialized software that can immediately remove duplicates and attachments from FOI searches.

Order, at para. 33

33. In the Order, the Adjudicator referred to a table that stated FOI 2023-32 resulted in 1661 pages and 2023-33 resulted in 2584 pages. However, the District told the OIPC on September 11, 2023 that FOI 2023-32 only resulted in 1334 pages. Further, on September 12, 2023 the District told the OIPC that FOI 2023-33 only resulted in roughly 1500 pages of responsive records.

Order, para. 34
Petitioner's affidavit, Ex. E, F

34. Further, the table referenced in the Order above states FOI 2023-46 resulted 10,167 pages of documents to review. However, in October 2023 the District confirmed that FOI 2023-46 only produced 5631 responsive records after duplicates were removed by software.

Order, at para. 34
Petitioner's affidavit, Ex. G

35. The District intentionally provided the OIPC with misleading information regarding the number of responsive records that staff would need to review for the ten FOI requests at issue.

'After-the-fact' explanation

36. The Adjudicator inferred that "in some cases, the [Petitioner] was interested in knowing what District staff and councillors said about him (e.g., 2023-37, 2023-38) or what District staff was doing about his complaints about his neighbour (e.g., 2023-68). In others, however, without the respondent's after-the-fact explanation, I am left to guess at what he is actually interested in (e.g., 2023-32, 2023-33)."

Order, at para. 38

37. However, the Petitioner's submissions provided clear reasons for why the FOI 2023-32 and 2023-33 requests were submitted, including relevant context and supporting documents.

Petitioner's submissions, at paras. 27-42

38. The Petitioner was never asked to provide reasons for his FOI requests before the District made its s. 43 application.

Petitioner called "disingenuous"

39. On November 4, 2023 the District held a referendum to borrow \$50 million for a new aquatic/recreation centre; the referendum was defeated. The District's Corporate Officer, Deputy Corporate Officer, and Corporate Services Coordinator were the District staff

responsible for holding the referendum, which took significant time and resources in the preceding three months to prepare for. The three District staff responsible for processing FOIs were the same three staff members responsible for organizing and running the referendum.

40. The Petitioner noted in his submissions that District staff have more time to process FOI requests now that they are no longer occupied with conducting the \$50 million referendum, which took three months to prepare for.

Order, at para. 65

41. In 2023 the District received FOI requests from other applicants unrelated to the Petitioner, including significant responsive records, that were related to Summerland's proposed and existing aquatic/recreation centres, such as usage rates and maintenance costs.

42. However, the Adjudicator claimed the Petitioner was "being disingenuous in suggesting that District staff now have more time to spend on his requests since the referendum finished."

Order, at para. 68

Past behaviour of District with respect to Petitioner's FOI requests

43. The Adjudicator stated "Several of the [Petitioner's] FIPPA access requests have led to OIPC files and orders."

Order, at para. 22

44. However, the Adjudicator did not provide any context on these previous OIPC files and orders, despite the direct relevance to the s. 43 application. The Petitioner's submissions described in detail, with supporting documents, how District staff previously provided incomplete responses, withheld records, and violated OIPC directions in bad faith with regards to the Petitioner's FOI requests.

Petitioner's submissions, at paras. 4-19

Reasons for Keyword Requests

45. The keyword searches were essential in obtaining responsive records, given the District's repeated attempts to provide incomplete response packages to the Petitioner.

46. The Petitioner's submissions explained how keyword searches have been very effective in producing documents that would not be obtained otherwise, such as an email that referred to him and his family as "radicals and nutcases."

Order, at para. 50

47. The keywords included in the Petitioner's FOI requests are not random. The reason each keyword is included in each of the ten requests at issue was explained in the Petitioner's submissions. For example, including the keyword "Besler" in an FOI search of Graham Statt's communications from September 2022 revealed a document that showed Graham Statt and Corporate Officer Kendra Kinsley met to discuss "firewalling" the Petitioner from obtaining information. This document would not have been obtained without a specific keyword search.

Petitioner's affidavit, Ex. B

48. The keyword searches allow specific documents to be found that would otherwise be too onerous for the District to go through manually to locate. Further, the District acknowledged that searching electronic records is not as labour-intensive as it would be with paper records.

Order, at para. 63

49. Also, the Petitioner previously asked the Corporate Officer if his FOI requests should include all variations of word, such as stress, stressed, stressful, or only the base word, such as stress, for a keyword search. The Corporate Officer instructed the Petitioner to submit all variations of the word.

Lawsuit against District

50. The Order refers to the civil claim where the Petitioner, his mother and his brother are plaintiffs and the District is a defendant. The plaintiffs in that civil claim are advancing strong claims for negligence, defamation, misfeasance in public office, and conspiracy against the District.

51. In a different BC Supreme Court decision for *Greengen Holdings Ltd. v. British Columbia (Ministry of Forests, Lands and Natural Resource Operations)*, 2023 BCSC 1758, it stated at para. 72 that “Many of the documents which were tendered by the plaintiff in the action were obtained as the result of requests under the *Freedom of Information and Protection of Privacy Act*.” On October 10, 2023 the plaintiff was awarded \$10.125 million in damages in that case.

52. The Petitioner, his mother and his brother have obtained the majority of their documents for their civil claim against the District through FOI requests. Given the contentious litigation, the keywords are how the Petitioner can ensure documents are within the search parameters, rather than relying on District staff to interpret which documents are relevant to an FOI request, given the appearance of a conflict of interest.

53. Since September 2022 or earlier, Graham Statt and the Corporate Officer have conspired to ‘firewall’ the Petitioner from obtaining information relevant to the lawsuit.

Petitioner’s affidavit, Ex. B

54. The District said the Petitioner’s FOI requests were for the same records as the Petitioner’s Demands for Documents in his civil claim against the District. However, that is false.

Order, at para. 19

The Adjudicator failed to undertake proper analysis of the ten outstanding FOI requests at issue

55. The Adjudicator failed to carefully assess *each* of the 10 outstanding FOI requests at issue in her Order when choosing to disregard them. Each request needed to be individually assessed on the basis that it is excessively broad, systematic, and would unreasonably interfere with District operations.

56. The Petitioner provided clear explanations, along with supporting documents, for why each of the ten FOI requests were submitted.

Petitioner’s submissions, at paras. 27-93

57. Further, in October 2023 the District confirmed that all “Records have been retrieved, sorted chronologically, and initial duplicates have been removed.” By the time the Order was released on February 29, 2024, 6 of the 10 requests at issue were already due to be provided.

Petitioner’s submissions, Ex. G

Requests Were Not ‘Excessively Broad’

58. *FIPPA* s. 43(c)(i) refers to excessively broad FOI requests. In the case of s. 43(c)(i), the District must show that *each* request is “excessively broad.”

Order, at para. 29

59. *FIPPA* does not define “excessively broad”, but OIPC Order F23-98 considered the interpretation for the first time. The adjudicator in that case said that the first part of the test is whether the *request itself* is excessively broad and thus would result in an “overwhelming” or “inordinate” volume of responsive records. Order F23-98 also clarified that the term “excessively broad” does not refer to the volume of records a public body must search through to identify the responsive records.

Order, at paras. 30, 31

60. The District claims the Petitioner’s FOI requests for “all records” do not lend themselves to narrowing, and that the responsive records are likely to result in the retrieval of many thousands of pages, which include many duplicates and attachments. But the District’s consultant PrivacyWorks Consulting has software that automatically “de-duplicates” the records.

Order, at paras. 33, 63

61. The Adjudicator acknowledged that the ten FOI request at issue were for a variety of subjects, and that “some requests can span two or three weeks, others cover several months and, in some cases, a full year.” The Petitioner explained “The FOI requests at issue in this inquiry are specific to activities, topics, and subject matter involving the District.” The Petitioner said the way he has worded his requests, with named individuals, specific time frames and key words, is intended to make it easier for District staff to identify the requested information.

Order, at paras. 37, 65

62. The Adjudicator stated that “rather than simply asking for records about the topics of interest to him, for a reasonable time frame, the respondent took a scattergun approach of requesting records containing many names and seemingly unrelated “key words,” many of them routine or common words and terms, covering a lengthy period in many cases.”

Order, at para. 38

63. However, the Adjudicator completely ignored the fact that District staff have refused to help the Petitioner with his FOI requests in the past. The Adjudicator failed to acknowledge that District staff have previously provided incomplete response packages and withheld documents in bad faith from the Petitioner. Further, the words included in keyword searches were not random, but rather directly related to a subject the Petitioner is seeking information on.

64. The Adjudicator was unreasonable when she found that “all ten of the outstanding requests at issue are excessively broad.”

Requests Were Not ‘Systematic’

65. *FIPPA* s. 43(c)(ii) refers to “systematic” FOI requests. In the case of s. 43(c)(ii), the District must show that *each* request is “systematic.”
Order, at para. 29
66. The Adjudicator acknowledged that the Petitioner’s access requests are for a wide-variety of subjects. The Petitioner provided explanations for why the information in each of the ten requests was sought.
Order, at paras. 26, 36
67. The Adjudicator stated “It is necessary to consider past requests when deciding whether an access request is systematic.” The Adjudicator stated that “The requests at issue follow the same method and pattern the [Petitioner] used in making the past requests, that is, requesting “all” records about the same individuals and about essentially the same topics, using key words, for various time frames.”
Order, at paras. 44, 53
68. The Petitioner says the Adjudicator must also consider the past actions of the District related to the Petitioner’s FOI requests, such as withholding records and providing incomplete response packages, which provide key context to this matter.
Petitioner’s submissions, at paras. 5-19
69. The Adjudicator noted that two of the Petitioner’s FOI requests “flowed from” the Petitioner’s interactions at Council meetings. The Adjudicator was unreasonable to imply that the Petitioner was being systematic by submitting FOI requests for documents related to his specific interactions at Council meetings.
Order, at para. 51
70. The Adjudicator was unreasonable when she found “that each of the [Petitioner’s] ten requests is “systematic”, for the purposes of s. 43(c)(ii).”
Order, at para. 58

Requests Do Not ‘Unreasonably Interfere’ with District Operations

71. That Adjudicator stated that unreasonable interference with a public body’s operations rests on an *objective assessment* of the facts. It will vary, depending on the size and nature of operation.
Order, at para. 60
72. It is not sufficient for the District to claim the Petitioner’s FOI requests would interfere with operations; rather, the District must show that each request would *unreasonably* interfere with operations.
73. The Order relied on the District’s claim that the “FOI Head is one of three staff and he has other duties besides managing the District’s responses to access requests.” Graham Statt is designated as the District’s FOI Head. The Adjudicator referred to the “small size of the District’s staff” when claiming she was “satisfied that responding to the ten requests at issue would unreasonably interfere with the District operations.”
Order, at paras. 62, 68

74. However, to be clear, the District has significantly more than three staff at Municipal Hall. Further, Graham Statt does not process FOI requests; that responsibility has been delegated to the District's Corporate Officer, Deputy Corporate Officer, Corporate Services Coordinator, and the District's two IT staff, along with PrivacyWorks Consulting.

Petitioner's affidavit, Ex. L

75. When District staff receive an FOI request, the Corporate Officer sends the request to the relevant department(s), such as the Building Department.

Petitioner's affidavit, Ex. H

Processed similar FOI requests since 2019

76. The District said that the Petitioner and his family members have submitted 79 access requests since 2019; 18 of which were from the Petitioner's family members.

Order, at para. 23

77. The Adjudicator stated, based on her review, that she found "that most of the 62 closed requests were worded and structured similarly to the requests at issue" in the s. 43 application.

Order, at para. 26

78. This shows that the District is capable of completing the Petitioner's FOI requests. The ten FOI requests would not "unreasonably interfere" with District operations because the District has been processing similar FOI requests from the Petitioner since 2019. Further, the District is experienced with this process and should be efficient when acting in good faith.

'100% of Employee's time'

79. The District said that the Petitioner's requests have increased in volume, culminating in "a massive spike" in 2023. The District said the increase in the number of requests from the Petitioner has meant that Graham Statt "must spend 100% of his time on FOI-related matters, leaving the other staff to fulfill his duties, along with their own."

Order, at paras. 18, 62

80. The Adjudicator stated that the "flow of requests increased in 2023" and "The District's table shows that the [Petitioner] sent it 30 access requests in 2023." The Adjudicator determined that some of the Petitioner's requests in 2023 "are multi-part, so they amount to 35 requests in 2023 and 22 in 2022."

Order, at para. 56

81. It must be noted that the District only processed 13 of the Petitioner's FOI requests in 2023 before submitting its s. 43 application to the OIPC, and some of these 13 closed FOI responses were under five pages of documents.

82. On July 5, 2023 the Petitioner submitted a request for FOI 2023-32, which sought specific communications from the District's HR Manager Marnie Manders related to the questionable firing of a long-term District employee; the employee sued the District for wrongful dismissal. The Petitioner explained the context of this FOI request in his submissions for this Inquiry, including how Marnie Manders was involved in a different wrongful firing case in 2020 that the District lost, where the Arbitrator described her actions as "unreasonable", "arbitrary" and "extremely suspicious."

Petitioner's submissions, at paras. 27-35

83. After FOI 2023-32 was submitted, the District did not provide any further FOI response packages that contained communications involving District staff or Council.
84. However, despite allegedly having an employee spend 100% of their work hours processing the Petitioner's FOI requests, and despite the District hiring PrivacyWorks Consulting for \$100,000 in 2023 to help process FOI requests, the District was unable to process 1334 pages from July 5, 2023 to November 9, 2023 for FOI 2023-32.
85. Further, the OIPC has repeatedly instructed the District that the "public body should release records to the applicant in stages as its review progresses. The public body should not delay releasing records merely to permit a "bulk release" unless it is absolutely necessary."
Petitioner's affidavit, Ex. E, F, G
86. The District's own submissions indicated that the proportion of hours the Petitioner's FOI requests have required has decreased from 2021 onwards, compared to those of other applicants.
Order, at para. 66
87. The District did not provide the OIPC with an estimate of the amount of time the Petitioner's ten FOI requests would take, which demonstrates that the District did not even start processing any of the requests after 2023-32 was submitted on July 5, 2023.
Order, at para. 67
88. The District must provide an affidavit from the employee who claims the Petitioner's FOI requests consumed 100% of their hours of employment in 2023, including the number of hours the employee spent processing the Petitioner's FOI requests after the District received FOI 2023-32 on July 5, 2023.

No fee estimates

89. From 2019 until June 2023 the District provided the Petitioner with fee estimates for his FOI requests when they exceeded three hours to prepare. After receiving fee estimates, the Petitioner has either paid the full fee estimate or reduced the scope of his requests. Since 2019 the Petitioner has paid thousands of dollars to the District for FOI requests.
90. The Petitioner has previously reduced search parameters when provided high fee estimates for other keyword searches with the District, including for FOI 2020-10.
Petitioner's affidavit, Ex. A
91. In the Adjudicator's view, a public body is required to "communicate with the [Petitioner], if necessary, to clarify the request" and "assess any fees."
Order, at para. 61
92. The Adjudicator provided the District guidance on managing current and future FOI requests made by applicants, "including the [Petitioner] and his family on his behalf." The guidance referred to the District's ability to "charge certain fees" and "encourage applicants to narrow their future requests." The Adjudicator noted how these things could lead to narrowing requests and reduce the burden on the District in responding.
Order, at para. 75

93. Prior to July 2023 the District provided the Petitioner with fee estimates for his FOI requests. For example, the Petitioner's request for FOI 2023-04 was estimated to take 6.5 hours of staff time to process, so the fee estimate for the response package was \$105. The Petitioner paid the fee for the FOI request, which provided 1300 pages of documents.

Petitioner's affidavit, Ex. C

94. It was the District's responsibility to provide the Petitioner with a fee estimate if a request took longer than three hours to process, as the District had done with many previous FOI requests from the Petitioner.

95. The Adjudicator failed to grapple with why the District never provided the Petitioner with any fee estimates since FOI 2023-32 in July 2023, which, if high, would have resulted in the Petitioner reducing search parameters, which then would have reduced the number of responsive records, which would have ultimately reduced workload on staff.

Not asked to reduce scope

96. The District said it is often difficult to tell what the Petitioner wants in his FOI requests.

Order, at para. 63

97. However, the District did not seek clarification on any of the ten FOI requests made by the Petitioner on July 5, 2023 and after. The Petitioner informed the OIPC that the District has not asked him to reduce the scope of his requests.

Order, at para. 35

98. Also, the Petitioner could not know how many responsive records would be produced in an FOI request before submitting it.

99. For example, for FOI 2023-46, the Petitioner was seeking documents to determine if Councillors were discussing his criminal charges for Penticton Court File 46826, of which the Petitioner was fully acquitted of in BC Supreme Court on March 25, 2022. After now seeing that the request resulted in 10,167 responsive records (5631 after duplicates were removed), the Petitioner has concluded that many of the responsive records for the keyword "charges" likely related to District charges, such as utility charges. If the Petitioner was initially provided a fee estimate for this FOI request, the words "charges" and "charged" would have been removed from the search parameters.

100. Further, the Petitioner proactively removed the word "Brad" from the FOI 2023-37 request when he realized the search parameters would then capture all of the District's Director of Development Services Brad Dollevoet's emails. The Petitioner was not seeking Brad Dollevoet's communications for that FOI request, but rather documents related to the Petitioner.

Petitioner's affidavit, Ex. D

Budget constraints

101. The District said it does not have the budget to sustain the cost of the consultant or hire an internal employee, just to solely handle the Petitioner's FOI requests. However, Summerland Council approved an additional \$100,000 to the 2024 budget for FOI related costs.

102. Further, as OIPC Order F23-81 revealed, the District spent nearly \$100,000 in legal fees in 2020 for the wrongful dismissal of a long-term female employee. The Arbitrator in that matter determined the District's actions were "unreasonable" and "extremely suspicious" and ordered the District to rehire the employee.

Petitioner's submissions, at paras. 20-24

Requests after November 9, 2023

103. On February 15, 2024 the District asked the OIPC to add two new FOI requests from the Petitioner's mother to its s. 43 application.

Order, at para. 10

104. The Adjudicator noted that "over three months have since passed [since the s. 43 application] and I do not consider it appropriate to permit the District to add new requests at this late date." The Adjudicator noted that the FOI requests submitted by the Petitioner's mother "consist of requests for records on the District's Chief Administrative Officer".

Order, at para. 12, 28

105. The District told the OIPC that the Petitioner had three follow-up questions after November 9, 2023, which the District suggested shows the Petitioner has "no intention of stopping the flow of requests." The Adjudicator stated "the [Petitioner] has continued to submit requests since the District's s. 43 application. As with earlier requests, these requests exhibited systematic characteristics, in that they led to further questions and access requests."

Order, at paras. 48, 49, 57

106. The Adjudicator found that relief was warranted to deal with outstanding requests that were made by the Petitioner, "or his family on his behalf," between November 9, 2023 and the date of the Order was issued. The Adjudicator's reasons referred to the "continued flow of requests from the [Petitioner] and his family since the District made its s. 43 authorization."

Order, at paras. 73, 74

107. However, to be clear, the Petitioner did not submit any FOI requests after November 9, 2023, and the Petitioner's mother only submitted two FOI requests in February 2024, over three months after the s. 43 application. There was not a "continued flow of requests."

The Adjudicator breached her duty of procedural fairness

108. The Petitioner says that the Adjudicator made a number of unreasonable conclusions in support of her Order, including adopting the unreasonable interpretation that FOI requests submitted by the Petitioner's family members were made *on his behalf*.

109. The District told the OIPC that since 2019 the Petitioner has made 79 FOI requests, of which the District alleged his family members made 18 *on his behalf*. The Order referred to 18 FOI requests submitted by the Petitioner's family members from 2019-2022, and states "The [Petitioner] admitted that some of the requests came from his family." But at no time did the Petitioner say the FOI requests from his family members from 2019-2022 were submitted on his behalf. The Adjudicator said the family members' requests were similarly worded and structured to those of the Petitioner, so she accepted that the Petitioner's family members made them *on his behalf*.

Order, at paras. 7, 9

110. The Adjudicator found “it is reasonable to authorize the District, for a period of three years from the date of this authorization, to process only one new access request at a time made by the [Petitioner] (or his family on his behalf).”

Order, at para. 74

111. The Adjudicator’s view that the Petitioner’s family members submitted FOI requests *on his behalf* was central to her decision to apply the Order to all members of the Petitioner’s family for a period of three years. And since the Adjudicator made a ruling that applies to the Petitioner’s family members for a period of three years, the Petitioner’s family members should have been able to make fulsome representations to the Adjudicator in the course of the Inquiry.

112. The Adjudicator breached her duty to procedural fairness by not requesting submissions from the Petitioner’s family members in order to properly consider and evaluate her Order.

113. On February 15, 2024, in response to the District’s attempt to add her two new FOI requests to the s. 43 application, the Petitioner’s mother sent an email to the OIPC that stated “I object to my two FOI requests being included in the District’s application. I didn’t submit any FOI requests in 2023, and I have only submitted two requests in 2024. And the two requests in 2024 were made after allegations of misconduct and conflict of interest with Summerland’s CAO were published. The documents are in the public interest. I have lived and owned property in Summerland since 1985 and I have a right to submit FOI requests. I feel like this is an abuse by the District of Summerland to withhold documents.”

Petitioner’s affidavit, Ex. J

114. The District noted that around February 20, 2024 it received almost identical requests from a member of the public, compared to the Petitioner’s mother’s requests from February 14, 2024, but the District said it planned to respond to the member of the public’s requests in line with *FIPPA* timelines. This shows how the District is able to process the Petitioner’s family members’ FOI requests, but choose not to.

Order, at para. 10

115. The Adjudicator said the District’s evidence showed the Petitioner “or his family members submitted 30 requests in 2023”. However, the Petitioner’s family members did not submit any of the 30 requests referred to in 2023.

Order, at para. 23

116. The Adjudicator erred in finding that the Petitioner’s family members submitted FOI requests *on his behalf*. While requests may be worded similarly, it was unreasonable for the Adjudicator to assert that the FOI requests were submitted on the Petitioner’s behalf. Other family members are independent citizens who do not live with or on the same property as the Petitioner, which the Adjudicator failed to mention. As a matter of public policy, the Court should reject the evidentiary standard established by the Adjudicator with respect to the Petitioner’s family members, specifically with respect to the claim that they submitted FOI requests *on his behalf*.

117. Further, this interpretation of family members applies so broadly that it is unreasonable, unfair, and prejudicial. The Adjudicator’s failure to acknowledge the harm that will flow from her decision to issue such an excessively broad application to all the Petitioner’s family members was reckless.

The reasons for the Adjudicator's decision do not "add up"

118. The Adjudicator is a very experienced adjudicator at the OIPC. She has written decisions for the OIPC since 2003 or earlier.
119. However, the Adjudicator failed to carefully consider the Petitioner's key arguments regarding the District's previous bad faith with respect to the Petitioner's FOI requests, despite the Petitioner providing clear evidence in his submissions.
120. The Adjudicator failed to acknowledge that the Petitioner's lawsuit against the District is for negligence, defamation, misfeasance in public office, and conspiracy. Further, she failed to acknowledge that the majority of documents listed in the Petitioner's List of Documents for that civil claim have been obtained through previous FOI requests to the District.
121. The Adjudicator failed to grapple with why the District stopped providing fee estimates to the Petitioner and stopped calculating processing hours for the Petitioner's FOI requests after FOI 2023-32 was submitted on July 5, 2023.
122. The Adjudicator failed to consider how the Petitioner's FOI requests were in the public interest, such as 2023-32 that related to the wrongful dismissal of a long-term employee and 2023-38 that related to a Councillor violating District expense policies. The Petitioner clearly explained that if the information in the ten FOI requests were disclosed, it would reveal information that is in the public interest.
123. The Adjudicator failed to grapple with the Petitioner's valid explanation and reasons for *each* FOI request, despite the requirement to assess *each* FOI request independently. Instead, the Adjudicator found that the request to disregard all ten of the outstanding requests was a reasonable remedy.
124. The Adjudicator failed to properly consider how the Petitioner runs a modern-day news site on Facebook, The REAL Summerland, that focuses on local politics and events.
125. It appears the District was able to imprint a negative bias on the Adjudicator in regards to the Petitioner. The District stained the Petitioner's reputation by including unrelated documents in its submissions, including social media posts regarding an unrelated criminal trial that the Petitioner was involved in for Penticton Court File 46826.
126. With respect to that criminal trial, context matters. The Petitioner and his brother were wrongly charged with mischief and criminal harassment in 2019. The brothers represented themselves throughout the proceedings, made a number of successful disclosure applications, and were acquitted of criminal harassment after a 12-day trial and acquitted of mischief after a 1-day appeal. Further, the Petitioner and his brother filed complaints to the Civilian Review and Complaints Commissioner for the RCMP (the "CRCC") regarding the RCMP's misconduct in that investigation. In May 2022, the CRCC independently confirmed that the RCMP violated their disclosure obligations by withholding exculpatory evidence from the Court. This resulted in the RCMP's lead investigator Luc Rioux being transferred to Pemberton, BC shortly after.
127. Overall, the Adjudicator's decision-making process and written reasons are not reasonable, contradicted by evidence, contain internal inconsistencies, and do not "add up."

Dangerous Precedent

128. Section 43 of *FIPPA* gives the Adjudicator the power to “grant the extraordinary remedy of authorizing a public body to disregard an access request.”

Order, at para. 15

129. The Adjudicator referred to OIPC Order F23-98, which stated “Given that relief under s. 43 curtails or eliminates the rights to access information, s. 43 applications must be carefully considered. Granting s. 43 applications should be the “exception” and not a mechanism for public bodies to avoid their obligations under *FIPPA*.”

130. The Adjudicator did not verify if District staff would actually need to review 46,791 pages for nine of the requests at issue. The evidence shows that the District intentionally inflated those numbers in its s. 43 application to mislead the Adjudicator, which the Adjudicator blindly accepted as true. Further, it is an offence under s. 65 of *FIPPA* to mislead the OIPC or an adjudicator.

Order, at paras. 16, 34
Petitioner’s affidavit, Ex. E, F, G

131. The Petitioner provided the OIPC with explanations, along with supporting documents, regarding the District’s previous bad faith with respect to the Petitioner’s FOI requests. The Adjudicator was made well-aware of the District’s previous attempts to withhold records, provide incomplete responses packages, and violate OIPC directions related to the Petitioner’s requests.

132. The District said that the respondent is “an active member and frequent critic” of the District and that he uses *FIPPA*, social media, Council meetings, complaints and litigation to raise issues with the District. The Petitioner is a long-time Summerland resident and moderator of the local news source, the Facebook page The REAL Summerland. The District is taking the position that it does not need to answer questions from the public related to the local government, which is unreasonable and can have a “chilling effect” on citizen journalism. The Petitioner has also helped members of the public through the FOI process, because it is not common knowledge for citizens to know how to submit FOI requests to public bodies.

133. The District’s motivation for its s. 43 application was not cost related, nor was it related to unreasonable interference with District operations. The District’s true motivation for its s. 43 application was to withhold documents that would reveal misconduct or unprofessional behaviour from District staff or Council. The Petitioner has already discovered misconduct and policy violations at Municipal Hall through his FOI requests.

134. The Adjudicator’s decision to limit the Petitioner or any of his family members’ FOI requests to a maximum of 8 hours each was wholly unreasonable and punitive. It enables the District to provide incomplete response packages, even if the Petitioner is willing to pay higher fees for larger responses. There is no logic in preventing the Petitioner from paying a higher fee if the FOI response package takes more than 8 hours to process. The Petitioner has a years-long history of paying thousands of dollars to the District in fees for other FOI requests. Further, the Petitioner has always been patient with the District when extension requests for larger responses were needed. The District did not even seek to limit the time on each of the Petitioner’s FOI requests.

135. The Order directly contradicts the primary purpose of *FIPPA*, which is to hold public bodies accountable to the public. If the Order is allowed to stand, it will set a very dangerous precedent.

In Closing

136. The Adjudicator's reasons have serious shortcomings and flaws that are central to her ultimate decision with respect to disregarding ten FOI requests and limiting the Petitioner and any family members to one open FOI request total at a time for the next three years.

137. In failing to meaningfully grapple with the key evidence and submissions of the Petitioner in this context, the Adjudicator breached the duty of procedural fairness owed to the Petitioner and his family members, or, in the alternative, rendered an unreasonable decision.

138. As such, the Petitioner respectfully requests that the Order be quashed, without a rehearing.

Part 4: MATERIALS TO BE RELIED ON

1. Petitioner's affidavit #1, made on March 11, 2024.
2. The complete record of the proceedings before the OIPC in the Inquiry.
3. Such further and other material as the Petitioner may advise and this Honourable Court may allow.

The Petitioner estimates that the hearing of the petition will take 2 days.

Date: March 11, 2024



Brad Besler, 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:

Date: _____

Signature of Judge Master

No.
Penticton Registry

In the Supreme Court of British Columbia

Between

BRADLEY H. BESLER

Petitioner

And

THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
and THE DISTRICT OF SUMMERLAND

Respondents

PETITION

Petitioner's Contact Information:

18816 Garnet Valley Road
Summerland, BC V0H 1Z3
Telephone: (250) 494-4177
Email: bbeslera@gmail.com
Attention: Brad Besler