

SUPREME COURT
OF
BRITISH COLUMBIA

SEAL
03-Jul-24

Vancouver
REGISTRY



No. *Court File No.* **VLC-S-S-244398**

Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

**In the Matter of the decision of the Office of Information and Privacy
Commissioner dated June 19, 2024, in OIPC File No. F24-52, and in the
matter of the *Judicial Review Procedure Act*, RSBC 1996, c 241**

BETWEEN:

MINISTER OF ATTORNEY GENERAL OF BRITISH COLUMBIA

PETITIONER

AND:

INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA

RESPONDENT

PETITION TO THE COURT

ON NOTICE TO:

INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA
4th Floor – 947 Fort Street
Victoria, B.C. V8V 3K3
info@oipc.bc.ca

And

KEVIN ALLAN EDWARD REGAN
365 East 59th Avenue
Vancouver, BC
V5X 1X8
Kevregan365@gmail.com

The petitioner estimates that the hearing of the petition will take 1 day

This matter is an application for judicial review.

This matter is not an application for judicial review.

This proceeding is brought by the Petitioner 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
 - (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 petitioners,

- (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 FOR SERVICE of the Petitioner is: Ministry of Attorney General Legal Services Branch PO Box 9280 STN PROV GOVT Victoria, British Columbia, V8W 9J7 Fax number address for service of the Petitioner: 250-356-8653 E-mail address for service (if any) of the Petitioner:
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	Julie.Gibson.Service@gov.bc.ca Matthew.Fingas@gov.bc.ca
(2)	The name and office address of the petitioner's lawyer is: Julie K. Gibson and Matthew Fingas Ministry of Attorney General Legal Services Branch PO Box 9280 STN PROV GOVT Victoria, British Columbia, V8W 9J7

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. An order in the nature of *certiorari* under section 2(2)(a) of the *Judicial Review Procedure Act*, RSBC 1996, c.241 (the "**JRPA**"), quashing the Order of the Information and Privacy Commissioner for British Columbia (the "**Commissioner**"), OIPC File No. F21-85628, Order F24-52 (the "**Order**"), except those portions of the Order relating to sections 14 and 22 of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 ("**FOIPPA**").
2. A declaration under section 2(2)(b) of the *JRPA* that in the present case, the Minister of Attorney General (the "**Ministry**") is not required to produce information subject to section 15(1)(g) of *FOIPPA* (prosecutorial discretion privilege) to the Commissioner under section 44 of *FOIPPA*.
3. A declaration under section 2(2)(b) of the *JRPA* that in the present case, the Ministry is not required to provide access to information withheld pursuant to section 16(1)(b) of *FOIPPA* (information that would be harmful to intergovernmental relations) to Kevin Allan Edward Regan (the "**Applicant**").
4. Alternatively, an order remitting this matter back to the Commissioner for a rehearing in light of this Court's reasons.
5. Such further and other relief as this Honourable Court may deem just.

Part 2: FACTUAL BASIS

The parties

1. The Ministry is a “public body” as defined in Schedule 1 of *FOIPPA*. The petitioner, Minister of Attorney General, is its Minister.
2. The Ministry is comprised of several different branches, including its Criminal Justice Branch. The Criminal Justice Branch of the Ministry appoints criminal justice prosecutors, otherwise known as Crown counsel, and assigns cases to these Crown counsel.
3. The functions and responsibilities of the Criminal Justice Branch are set out in section 2 of the *Crown Counsel Act* RSBC 1996, c.87. These responsibilities include approving and conducting, on behalf of the Crown, all prosecutions for offences in British Columbia.
4. The respondent Commissioner is an independent Officer of the Legislature who oversees the information and privacy practices of public bodies and private organizations. The Commissioner is responsible for the administration of *FOIPPA*.

The Inquiry

5. On December 2, 2020, the Applicant made an access to information request to the Ministry under *FOIPPA* for all records held by the Ministry relating to him.
6. On March 4, 2021 the Ministry disclosed some responsive records with some information redacted pursuant to s. 22(1) of *FOIPPA*. The Ministry withheld the balance of the responsive records (the “**Disputed Information**”) in their entirety under s. 15(1)(g) of *FOIPPA*. The Ministry also took the position that ss. 14, 16(1)(b) and 22(1) applied to some of these records.
7. On March 24, 2021, the Applicant requested that the Commissioner review the Ministry’s decision to withhold information. Mediation did not resolve the disputed issues and the matter proceeded to an inquiry under s. 56 of *FOIPPA* (the “**Inquiry**”).
8. On February 16, 2023, the Commissioner issued a Notice of Inquiry.
9. On April 6, 2023, the Ministry provided the Commissioner with its initial submissions. The Ministry also provided a copy of the information withheld under ss. 16(1)(b) (i.e. harm to intergovernmental relations), and 22(1) (unreasonable invasion of privacy) for the Commissioner’s review during

the Inquiry. However, the Ministry chose not to provide a copy of the Disputed Information withheld under ss. 14 (solicitor-client privilege) and 15(1)(g) (prosecutorial discretion privilege) to the Commissioner. Instead, the Ministry provided an affidavit from a Ministry of Attorney General Crown counsel, in which the affiant described the rationale for the ss. 14, 15(1)(g), 16(1)(b), and 22 claims over the withheld information (the “**Legal Counsel Affidavit**”).

10. Between May 19 and June 7, 2023, the Applicant provided responding submissions to the Commissioner in a series of email messages.
11. On March 13, 2024, the Commissioner wrote to the Ministry requesting that the Ministry provide additional submissions regarding its claim to withhold the Disputed Information pursuant to s. 14 of *FOIPPA*.
12. On April 10, 2024, the Ministry provided additional submissions and a second affidavit sworn by the same Crown counsel of the Ministry further addressing the Ministry’s claim to withhold the Disputed Information under s. 14 of *FOIPPA*.

The Order

13. On June 19, 2024, the Commissioner’s delegate D. Hans Hwang (the “**Adjudicator**”), issued the Order.
14. The Petitioner does not take issue with the Adjudicator’s findings related to ss. 14 and 22 of *FOIPPA*.
15. With regard to the information withheld by the Ministry under s. 16(1)(b) of *FOIPPA*, the Adjudicator concluded that a record obtained by the Vancouver Police Department (the “**VPD**”) accessed from the Canadian Police Information Centre database (“**CPIC**”) did not meet the criteria set out in section 16(1)(b) of *FOIPPA* because the Ministry had not established that the VPD qualified as a government, council, or organization as defined in s.16(1)(a), and thus ordered that the CPIC record be disclosed to the Applicant by August 1, 2024.
16. With regard to the information withheld by the Ministry under section 15(1)(g) of *FOIPPA*, the Adjudicator concluded that they could not determine whether the criteria of s.15(1)(g) had been met without seeing the information in dispute and ordered that those records be produced to the Adjudicator for review by July 4, 2024 to determine whether s. 15(1)(g) of *FOIPPA* applied.

Part 3: LEGAL BASIS

17. The Petitioner brings this petition under the *JRPA* and Rules 2-1(2)(b) and 16-1 of the *Supreme Court Civil Rules*.
18. The impugned portions of the Order must be set aside because:
 - a. the Adjudicator erred at law in concluding that the Disputed Information, particularly the CPIC record, did not meet the criteria under s.16(1)(b) of *FOIPPA* and therefore was not exempt from disclosure to the Applicant;
 - b. The Adjudicator's analysis on the *FOIPPA* s.16(1)(b) issue contradicts the statutory language in that section;
 - c. the Adjudicator erred at law in concluding that he could not determine whether the information withheld under s.15(1)(g) of *FOIPPA* met the criteria of being withheld due to prosecutorial discretion without review of those records, when the Legal Counsel Affidavit described those records in sufficient detail to establish that prosecutorial discretion applied;
 - d. the Adjudicator applied an incorrect and unreasonable standard of proof in the analysis under s. 15(1)(g), where the Petitioner had established that disclosure to the Applicant could "reasonably be expected" to reveal information related to or used in the exercise of prosecutorial discretion;
 - e. the Adjudicator failed to properly consider or weigh s.15(1)(g) evidence, including the uncontested Legal Counsel Affidavit;
 - f. the Adjudicator failed to decide the s. 15(1)(g) prosecutorial discretion issue in a manner consistent with a body of prior OIPC decisions;
 - g. the Adjudicator erred in law in concluding that s.44 of *FOIPPA* granted the Commissioner the authority to require the production of records over which prosecutorial discretion privilege is asserted, or in the alternative, the Adjudicator's production order under s.15(1)(g) was an unreasonable exercise of the Commissioner's discretionary power under *FOIPPA* s. 44(1); and
 - h. the Adjudicator's decision, on both ss. 16(1)(b) and 15(1)(g), fails to account for considerable practical impediments it would impose for Crown and police processes essential to providing fair and effective criminal justice.

19. The Petitioner does not challenge the Adjudicator's conclusions on the application of ss. 14 and 22 of *FOIPPA* to the applicable portions of the Disputed Information.

Statutory Scheme

20. *FOIPPA* establishes that the public has a right of access to information held by "public bodies" including the Ministry.
21. Sections 3 to 11 of *FOIPPA* describe the kinds of records available through the *FOIPPA* process and provide a mechanism by which a person may request to access such information.
22. Sections 12 to 22.1 of *FOIPPA* set out mandatory and discretionary exceptions to the public's right of access to information under which a public body must or may refuse to disclose information.
23. Section 15(1)(g) of *FOIPPA* provides that: "the head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to ... (g) reveal any information relating to or used in the exercise of prosecutorial discretion".
24. Section 16(1)(b) of *FOIPPA* provides that: "the head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to ... (b) reveal information received in confidence from a government, council, or organization listed in paragraph 16(a) or their agencies."
25. Section 16(1)(a) of *FOIPPA* lists several government agencies, including at subparagraph (i) the government of Canada or a province of Canada.
26. A person who requests records from a public body under *FOIPPA* may request that the Commissioner review the public body's response to that request. Sections 52 to 59.01 of *FOIPPA* set out the procedure for seeking such a review, including, at s. 56, that the Commissioner may conduct an inquiry in certain circumstances.
27. Sections 37 to 51 of *FOIPPA* set out the office and powers of the Commissioner.
28. Relevant here is s. 44(1) of *FOIPPA*, which provides, among other things, that for the purposes of conducting an inquiry under s. 56, the Commissioner may order the production of records to the Commissioner.

29. Section 44 (2) of *FOIPPA* provides that the Commissioner may apply to the Supreme Court for an order directing a person to comply with a s. 44(1) order.

Standard of Review

30. The *Administrative Tribunals Act*, SBC 2004, c.45 does not apply to the Commissioner. As a result, the appropriate standard of review must be determined based on the common law alone.

British Columbia (Office of the Premier) v. British Columbia (Information & Privacy Commissioner), 2011 BSC 112, para 44

Standard of Review on Issue 1 – Application of s.16(1)(b) of FOIPPA

31. The Adjudicator’s application of section 16(1)(b) of *FOIPPA* is reviewable on the reasonableness standard.

Edmonton (City) Police Service v. Alberta (Information and Privacy Commissioner) 2022 ABQB 397, para 12

32. The purpose of reasonableness review is to “give effect to the legislature’s intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law.” A reviewing court’s focus is on the decision made by the tribunal, both the reasons and the outcome. The reviewing court does not decide the issue itself and measure the tribunal’s result against the outcome that would be reached by the court. Rather, a reasonable decision is one “based on an internally coherent and rational chain of analysis that is justified in relation to the facts and law that constrain the decision maker.”

Vavilov v. Canada (Minister of Citizenship and Immigration), 2019 SCC 65 (“**Vavilov**”), paras 82 and 85

Standard of Review on Issue 2 – Prosecutorial Discretion - Application of s.15(1)(g) of FOIPPA

33. Prosecutorial discretion is a fundamentally important component of a properly functioning criminal justice system, needed to ensure Crown counsel’s independence in conducting criminal prosecutions. Prosecutorial discretion’s importance lies in advancing the public interest by enabling

prosecutors to fulfil their professional obligations without fear of judicial or political interference, in their quasi-judicial role as ‘ministers of justice’. Prosecutorial discretion also constitutes an indispensable device for the effective enforcement of criminal law.

R. v. Anderson [2014] 2 SCR 167 (“*Anderson*”) at paras. 37 & 39;

R v. Cluett, 2021 BCSC 885 at paras. 14-15

34. The issue of whether section 15(1)(g) of *FOIPPA* applies to the Disputed Information, and whether the Adjudicator erred in concluding that the records withheld under this statutory provision must be produced for the Adjudicator’s review, concern fundamental principles that are centrally important to the Canadian legal system as a whole. Such questions require a final and determinate answer, meaning that a correctness standard of review applies, by analogy to case law involving judicial review of the application of solicitor-client and cabinet privilege to information and privacy access requests.

British Columbia (Children and Family Development) v. British Columbia (Information and Privacy Commissioner), 2024 BCCA 190 (CanLII) at para. 26;

IPC Alberta v. Calgary, 2016 SCC 53 at para. 20;

Ontario (AG) v. Ontario (Information and Privacy Commissioner), 2024 SCC 4 at paras. 67-71;

British Columbia (Minister of Public Safety) v. British Columbia (Information and Privacy Commissioner), 2024 BCSC 345 at paras. 46-59

35. The assessment and exercise of prosecutorial discretion is uniquely reserved to Crown counsel. Judicial review of an exercise of prosecutorial discretion is only available where there is an abuse of process referring to Crown conduct that is “egregious and seriously compromises trial fairness and/or the integrity of the justice system.” This status of prosecutorial discretion at common law supports a correctness standard of review in the access to information context involving prosecutorial discretion grounds for non-disclosure of records.

Anderson at para. 51

36. When applying the correctness standard, the reviewing court may choose either to uphold the decision maker’s determination or to substitute its own

view. While the reviewing court should take the decision maker's reasoning into account – and indeed, it may find the reasoning persuasive and adopt it – the reviewing court is empowered to reach its own conclusions.

Vavilov, para 54

The Adjudicator's decision regarding s.16(1)(b) of FOIPPA was unreasonable

37. Section 16(1)(b) of *FOIPPA* provides that a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal information received in confidence from a government, council, organization listed in paragraph 16(1)(a), or their agencies.
38. The record in question was accessed through the CPIC database, which is a database controlled by the Royal Canadian Mounted Police (the "**RCMP**"). CPIC information is confidential, and Crown Counsel received this record in confidence from the VPD, who accessed the record from the RCMP.

Affidavit # 1 of Tammy Fritz at Exhibit "D" page 45, paras. 35 and 36;
Investigation Report F14-01; British Columbia (Re) 2014 BCIPC 14 at paras 54 -56

39. In past decisions, the Commissioner has consistently found that the RCMP is a federal agency that meets the criteria of being a government agency contemplated in section 16(1)(a) of *FOIPPA*.

Order F23-103; Burnaby (City) (Re) 2023 BCIPC 119, para 67

40. The Adjudicator concluded that the s.16(1)(b) exception did not apply because the VPD accessed the document and provided it to Crown Counsel, and the VPD did not qualify as a governmental agency as contemplated by s.16(1)(a). Thus section 16(1)(b) did not apply to the record at issue.
41. This analysis improperly imports a requirement into s. 16(1)(b) of *FOIPPA* that the information must be received directly from a government agency. Directness is not required by the language of s.16(1)(b), and the Adjudicator did not engage in any exercise of statutory interpretation in their analysis.
42. Had the CPIC record at issue been received by Crown Counsel directly from the RCMP, rather than by a member of the VPD accessing this record as a matter of investigative and jurisdictional practicality, the Commissioner's

past decisions make clear that disclosure would not be required under s.16(1)(b) of *FOIPPA*.

Order F17-56; Delta Police Department (Re)
2017 BCIPC 61 at paras 81-96

43. The evidence in this matter establishes that the Ministry received this information in confidence from a qualifying government agency (the RCMP), albeit through an intermediary (the VPD). The Commissioner has previously decided that information supplied to a public body through an intermediary fit within the meaning of “supplied in confidence” under section 21(1)(b) of *FOIPPA*.

Order F20-52 Vancouver (City) (Re) 2020 BCIPC 61

44. The legislature’s intent was to protect confidential information from disclosure where a public body receives that information in confidence from a government agency. As a matter of practicality, the information was accessed from the RCMP by a municipal police force and disclosed to the Ministry in confidence.

45. The Commissioner’s decision on this issue unreasonably imported a requirement that the record at issue must be received directly from a government agency where that is not a stated requirement of *FOIPPA* s.16(1)(b). This analysis leads to inconsistent protection of information across public bodies in the sense that CPIC records obtained by municipal police forces in confidence, would not be protected by s.16(1)(b) of *FOIPPA*, but CPIC records obtained directly by the RCMP would attract that protection. The Adjudicator’s decision on this issue should be set aside.

The Adjudicator erred at law by issuing the section 44 order relating to the records withheld under s.15(1)(g) of *FOIPPA*

46. In the Order, the Adjudicator determined that some information over which prosecutorial discretion had been claimed under s. 15(1)(g) must be produced to him by July 4, 2024.

47. This aspect of the Order is in error because:

(a) it is inconsistent with the common law around the treatment of prosecutorial discretion,

(b) the reasoning runs contrary to a significant body of prior OIPC Decisions and Orders,

(c) the Adjudicator failed to consider at all or account for the evidence in the Legal Counsel Affidavit,

(d) the Adjudicator treats the Legal Counsel Affidavit differently for purposes of the s.15(1)(g) analysis than for other aspects of the Order, without reasonable explanation, and

(e) the Adjudicator failed to apply the correct standard of proof in his analysis, namely whether disclosure “could reasonably be expected to” reveal information related to or used in the exercise of prosecutorial discretion.

Ontario (Community Safety and Correctional Services)
v. Ontario (Information and Privacy Commissioner),
2014 SCC 31 at para. 54;

British Columbia Hydro and Power Authority v.
British Columbia (Information and Privacy Commissioner),
2019 BCSC 2128 at para. 88. Emphasis in original.

48. The result of the Order would be to inappropriately prefer the Adjudicator’s own views on prosecutorial discretion over those of Crown counsel qualified and experienced in that assessment.

University of British Columbia v. Lister,
2018 BCCA 139, at para. 47 and para. 50;

College of Physicians and Surgeons of British Columbia v.
British Columbia (Information and Privacy Commissioner),
2019 BCSC 354, at para. 99

49. While the Commissioner has the power to order production of records under s. 44(1) of *FOIPPA*, in prior IPC decisions adjudicators decided not to order this further level of inquiry because s. 15(1)(g) was found to apply to the records at issue, based on the Adjudicator’s review and acceptance of Crown counsel’s affidavit evidence.

Order F07-05; Vancouver Police Department (Re) 2007 CanLII 35474

50. Affidavit evidence on the application of s.15(1)(g) of *FOIPPA* (i.e. prosecutorial discretion) has been held to be definitive in several prior

Orders of the Commissioner. The Adjudicator incorrectly and unreasonably failed to provide an analysis on the sufficiency of the Legal Counsel Affidavit to determine whether s. 15(1)(g) applied to the Disputed Information without ordering production of the records to himself, contrary to earlier OIPC Orders and Decisions.

For example, see *Order F16-21; Vancouver Police Department (Re)* 2016 BCIPC 23 at paras. 14-17;

Order F15-72; British Columbia (Ministry of Public Safety) (Re) 2015 BCIPC 78 at para. 39;

Decision F07-05; Vancouver Police Department (Re) 2007 CanLII 35474, paras 17-19;

Order F15-55; British Columbia (Ministry of Justice) (Re) 2015 BCIPC 58 at paras. 12 and 14;

British Columbia (Ministry of Attorney General) (Re) 2004 CanLII 23112 (BC IPC) Order 04-13 at para 15; and

Personal Information In Ministry of Attorney General Records (Re) 2000 CanLII 8819 (BC IPC) Order 00-02 at para 4

51. The Adjudicator also treated the Legal Counsel Affidavit inconsistently in the s.15(1)(g) analysis when comparing it to the analysis relating to ss. 14 and 22 of *FOIPPA* in the same Order.

Affidavit #1 of Tammy Fritz, at Exhibit "G", paras. 20, 21, 85 and 101-102

52. Contrary to the Adjudicator's analysis, records may be withheld in their entirety where affidavit evidence establishes that s.15(1)(g) of *FOIPPA* applied. For example, the following types of documents have been withheld in their entirety:

a) reports to Crown Counsel;

Order F15-55; British Columbia (Ministry of Justice) (Re) 2015 BCIPC 58;

Personal Information In Ministry of Attorney General Records (Re) 2000 CanLII 8819 (BC IPC) Order 00-02

b) witness statements;

Order F16-21, Vancouver Police Department (Re) 2016 BCIPC 23;

*British Columbia (Ministry of Attorney General)
(Re) 2004 CanLII 23112 (BC IPC) Order 04-13);*

c) police interview transcripts and summaries; and

*Order F16-21; Vancouver Police
Department (Re) 2016 BCIPC 23*

d) Crown Counsel notes.

*Personal Information In Ministry of Attorney General
Records (Re) 2000 CanLII 8819 (BC IPC) Order 00-02*

53. Since judicial review of an exercise of prosecutorial discretion is only available where there is an abuse of process referring to Crown conduct that is “egregious and seriously compromises trial fairness and/or the integrity of the justice system”, the Order creates an illogical inconsistency with the common law by requiring disclosure to an adjudicator in the access to information context where a court would not be in a position to order production of and review those same records.

Anderson, para. 51

Remedy

54. The Petitioner says this Court should issue:

- a. An order in nature of *certiorari* under s. 2(2)(a) of the *JRPA* quashing the Order, with the exception of the portions of the Order relating to ss. 14 and 22 of *FOIPPA*;
- b. A declaration under s. 2(2)(b) of the *JRPA* that in the present case, the Ministry is not required to produce information subject to s. 15(1)(g) of *FOIPPA* (prosecutorial discretion privilege) to the Commissioner under section 44 of *FOIPPA*.
- c. A declaration under s. 2(2)(b) of the *JRPA* that in the present case, the Ministry is not required to provide access to the information

withheld pursuant to s. 16(1)(b) of *FOIPPA* (information that would be harmful to intergovernmental relations) to the Applicant.

55. Alternatively, an order remitting this matter back to the Commissioner for a rehearing in light of this Court's reasons.

56. The Petitioner does not seek its costs and asks that no costs be ordered against it.

18320 Holdings Inc. (c.o.b. Automotive Training Centres)
v. Thibeau 2014 BCCA 494;

Lang v. British Columbia (Superintendent of Motor Vehicles), 2005 BCCA 244 at paras. 46-48

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit # 1 of Tammy Fritz made on July 3, 2024.
2. Such further and other material as counsel may advise and this Honourable Court may accept.

Date: July 3, 2024



Signature of Matthew S. Fingas
 petitioner lawyer for petitioner(s)

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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...

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...

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...

Date:[<i>date</i>]..... Signature of [] Judge [] Associate Judge
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