Decision F10-04
(Additional to Order F08-13)

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

Celia Francis, Senior Adjudicator

March 16, 2010

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Summary: Order F08-13 required the public body to give severed access to two digital video recordings of the applicant while in detention at a correctional facility. Two applications for judicial review of that order were adjourned to permit the petitioners, the public body and a third party, to apply to the Commissioner to re-open the order to consider evidence the petitioners filed in the judicial review proceedings that was not part of the inquiry under FIPPA. The test for re-opening to consider new evidence is akin to the test for admission of new evidence on appeal and the application for re-opening must be made promptly. The new evidence here does not meet the test for re-opening Order F08-13. Other issues raised on the judicial reviews also do not trigger re-opening. Conditions attached to Order F08-13 for considering access to four remaining digital video recordings only if the applicant wished to pursue them after the issuance of Order F08-13, are a matter of continuation of the Commissioner's jurisdiction that could proceed were it not for the stay of Order F08-13 under s. 59(2) of FIPPA occasioned by the pending applications for judicial review.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 15(1)(f) & (l), s. 22(1), 22(2)(e), s. 19(1)(a), s. 58.

Authorities Considered: **B.C.:** Order F08-13, [2008] B.C.I.P.C.D. No. 21, Order No. 37-1995, [1995] B.C.I.P.C.D. No. 9; Order 01-52, [2001] B.C.I.P.C.D. No. 55; Order F09-09, [2009] B.C.I.P.C.D. No. 12; Order F09-10, [2009] B.C.I.P.C.D. No. 13; Order F08-17, [2008] B.C.I.P.C.D. No. 30; Order F08-18, [2008] B.C.I.P.C.D. No. 31; Order 03-08, [2003] B.C.I.P.C.D. No. 8; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 04-06, [2004] B.C.I.P.C.D. No. 6; Order F08-22, [2008] B.C.I.P.C.D. No. 40; Order 03-16, [2003] B.C.I.P.C.D. No. 16.

Cases Considered: *Ministry of Public Safety and Solicitor General and others v. Information and Privacy Commissioner of British Columbia and others*, SCBC Docket S085647, Vancouver Registry; *[Correctional Officer] v. Information and Privacy Commissioner of British Columbia and others*, SCBC Docket S092479, Vancouver Registry; *Ministry of Public Safety and Solicitor General and others v. Information and Privacy Commissioner of British Columbia and others*, SCBC Docket S092479, Vancouver Registry (Oral Reasons, 3 June 2009); *Chandler v. Alberta Association of Architects,* [1989] 2 S.C.R. 848; *Zhu v. Li*, 2007 BCSC 1467; *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, *supra*. 1934 S.C.R. 186; *Hodgkinson v. Hodgkinson* (2006), 267 D.L.R. (4th) 357 (B.C.C.A.); *Clayton v. British American Securities Ltd.* (1934), 49 B.C.R. 28 (B.C.C.A.); *Palmer v. The Queen*, [1980] 1 S.C.R. 759; *K.F.P. v. D.J.P* [2004] B.C.J. No. 782 (S.C.); *G.C.H. v. H.E.H* [2009] B.C.J. No. 4 (S.C.); *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2. S.C.R. 983; *Doucet -Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3; *Reekie v. Messervey*, [1990] 1 S.C.R. 219; *Guide Outfitters Association of BC v. British Columbia (Information and Privacy Commissioner)* (2004), 26 B.C.L.R. (4th) 1, 2004 BCCA 210; *Ontario (Minister of Labour) v. Big Canoe*(1999), 181 D.L.R. (4th) 603, [1999] O.J. No. 4560 (C.A.); *IMS Health Canada, Ltd. v. Information and Privacy Commissioner* 2005 ABCA 325; *Mitzel v. (Law Enforcement Review Board)* 2005 ABCA 325; *Toronto Police Services Board v. Ontario (Information & Privacy Commissioner)* (2009), 307 D.L.R. (4th) 1 (Ont. C.A.).

Authors Considered: R.W. MacAulay and J.L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, loose-leaf (Toronto: Carswell, 2004), p. 27A.36.3.

1.0 INTRODUCTION

[1] This decision concerns applications about re-opening an order Adjudicator Catherine Boies Parker (the "Adjudicator") made under s. 58 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").[1]

[2] Order F08-13 reviewed a decision of the Ministry of Public Safety and Solicitor General ("Ministry") to withhold information under ss. 15(1)(f) and (l) and s. 22(1) of FIPPA, from an individual ("Requester") who had sought access to video recordings of herself in custody at the Vancouver City Jail ("VCJ"). The Ministry had identified six digital video recordings ("DVRs") as being responsive to the access request. In her order issued on June 27, 2008, the Adjudicator treated just two DVRS as responsive because, on her review of the DVRs, only DVRs 2 and 3 appeared to her to be relevant to incidents the Requester identified.[2] The Adjudicator decided that the Ministry was not justified in withholding DVRs 2 and 3, except under s. 22(1) to the extent that disclosure would identify other individuals held in custody.

[1] Adjudicator Boies Parker, like other adjudicators employed or appointed under FIPPA, exercised the Information and Privacy Commissioner's authority to conduct inquiries and issue orders, pursuant to a delegation of powers under s. 49 of FIPPA.

[2] Order F08-13, [2008] B.C.I.P.C.D. No. 21, para. 15.

[3] Noting that the Ministry had permitted the Requester to view parts of DVRs 4 and 5 before she made her access request and that, in the inquiry the Ministry had indicated its willingness to allow her to review the DVRs in their entirety, with no apparent objection from the third-party law enforcement officers in the DVRs, the Adjudicator included a condition for the Requester to be able to review the remaining DVRs, if she wished, to determine whether she considered them relevant to incidents of interest to her and, if so, to give notice in writing of the further disclosure being pursued.[3] The final paragraph of Order F08-13 reads as follows:

> [72] For the reasons given above, under s. 58 of FIPPA, I make the following orders:
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> 1. The public body is to provide the applicant with a copy of DVR #3, edited to withhold the last portion of the tape which records the time after the applicant has left the room.
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> 2. The public body is to provide the applicant with a copy of DVR #2, edited to remove information which would identify the other person held in custody in the same cell.
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> 3. If the applicant wishes to view the remainder of the DVRs in issue in order to determine if they are relevant to the matters of interest to her, she is to make a request in writing to the public body, with a copy to this office, and the public body is to provide the applicant with access to viewing the DVRs within one week of receiving her request.
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> 4. If the applicant determines that some or all of DVRs #1, #4, #5 and #6 are relevant to her request, she is to inform this office within one week of reviewing the DVRs, and any further request for disclosure will be dealt with on an expedited basis.
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> 5. I require the Ministry of Public Safety and Solicitor General to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines “day”, that is, on or before August 12, 2008 and, concurrently, to copy the Registrar of this Office on its cover letter to the applicant, together with a copy of the records.

[4] The Requester immediately wrote to the Ministry and the Information and Privacy Commissioner (“Commissioner”) asking to view DVRs 1, 4, 5 and 6. She met with Ministry staff on July 17, 2008 to view the other DVR footage and then said in writing that she did want to pursue access to DVRs 1, 4, 5 and 6.[4]

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[3] Order F08-13, paras. 15, 72.

[4] Letters between the Requester, Commissioner’s staff and counsel for the Ministry dated July 4, 11, 28 and August 6, 2008 (reference pp. 103-112 of the affidavit of M. Dupuis, Acting Registrar of Inquiries, sworn on October 8, 2008, in the Ministry’s judicial review proceedings, SCBC Docket S085647, Vancouver Registry).

[5] On August 8, 2008, the Ministry filed an application for judicial review of Order F08-13.[5] The effect of this, under s. 59(2) of FIPPA, was a stay of the decision under review until an order of the Court otherwise. On April 1, 2009, a law enforcement officer (the "Correctional Officer") who interacted with the Requestor when she was in custody at the VCJ also filed an application for judicial review of Order F08-13.[6] The four affidavits filed in support of the two applications for judicial review consisted almost entirely of evidence that was not in the record of proceedings before the Adjudicator.[7]

[6] When the judicial reviews came on for hearing together on June 2 and 3, 2009, the Commissioner and the Requester objected to the introduction of evidence that was not in the record of proceedings before the Adjudicator. At the request of the Ministry and the Correctional Officer, the Court adjourned the judicial reviews generally, without making any findings about the grounds of judicial review or the extra-record evidence, to permit them to apply to the Commissioner, in whatever way they chose to frame it, to consider their extra-record evidence and to enable the Commissioner to consider whether there was unspent jurisdiction remaining to deal with the inquiry which resulted in Order F08-13. The Court was clear that it would be entirely open to the Commissioner to decide if and how to proceed with the applications of the Ministry and the Correctional Officer. The Court was intent on neither trammelling the Commissioner's jurisdiction nor suggesting a broader right to re-open for this case than would otherwise be so.[8]

[7] Instead of applying for re-opening, the Ministry and the Correctional Officer asked for the advice of Commissioner Loukidelis about whether Order F08-13 could be re-opened to receive evidence that was not before the Adjudicator, in which case they would make applications for a re-hearing.[9]

[8] The Ministry's intended grounds for re-opening Order F08-13, if such an application were made, mirrored most of its grounds for judicial review of that order:

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[5] *Ministry of Public Safety and Solicitor General and others v. Information and Privacy Commissioner of British Columbia and others*, SCBC Docket S085647, Vancouver Registry.

[6] *[Correctional Officer] v. Information and Privacy Commissioner of British Columbia and others*, SCBC Docket S092479, Vancouver Registry.

[7] The exception was the exhibits at pp. 1-3 of the affidavit of the Correctional Officer, sworn on April 3, 2009, supporting her application for judicial review, which were in the record of proceedings before the Adjudicator (reference pp. 37-38, 84 of the affidavit of M. Dupuis, Acting Registrar of Inquiries, sworn on October 8, 2008, in the Ministry's judicial review proceedings, SCBC Docket S085647, Vancouver Registry).

[8] *Ministry of Public Safety and Solicitor General and others v. Information and Privacy Commissioner of British Columbia and others*, SCBC Dockets S085647 and S092479, Vancouver Registry (Oral Reasons, 3 June 2009), pp. 5-7.

[9] Letters from counsel for the Ministry and counsel for the Correctional Officer dated July 14 and 16, 2009, respectively.

1. The Adjudicator applied the wrong test under s. 15 of FIPPA;
2. The Ministry could not comply with Order F08-13 because the DVRs could not be digitally severed in a fashion that complies with its obligations under FIPPA to safeguard personal information;
3. The Adjudicator had no jurisdiction to require the Requester to be permitted to view the DVRs, because they contain personal information about third parties; and
4. It was not open to the Adjudicator to resolve access to only some of the DVRs.[10]

[9] The Ministry said these errors permeate and taint Order F08-13, a situation it described as unique. It also requested to be informed "whether the issue of jurisdiction will be determined by you [Commissioner Loukidelis], by Ms. Cathie Boies Parker [the Adjudicator] or some other delegate, as that will affect our submissions."[11]

[10] The Correctional Officer intended her application for re-opening, if made, to be supported by her affidavit filed in support of her petition for judicial review and also to rely on the Ministry's grounds for re-opening, specifically grounds 1, 2 and 3 above.

[11] Commissioner Loukidelis informed the parties that it was up to the Ministry and Correctional Officer to state whatever their positions might be about his authority to re-open Order F08-13.[12] In further correspondence, he agreed with the Requester that the logical sense of the Court's ruling was that the Ministry and the Correctional Officer had been directed to make their applications to re-open by July 15 and not simply to give notice, as they had, of an intention to apply.[13] Commissioner Loukidelis also said:

> To be clear, I did not, through counsel or directly, seek or support an adjournment of the petitions for judicial review. The Ministry and [the Correctional Officer] requested adjournment of the petitions. It is up to them to make their cases on the law on re-opening and its limits and on the merits of the specific evidence they say supports re-opening of Order F08-13 and a materially different result from that which the adjudicator, Catherine Boies Parker, reached.[14]

[12] Commissioner Loukidelis established a revised schedule for submissions and directed the applications for re-opening to include any supporting evidence and argument. The Ministry and Correctional Officer were permitted to respond to each other's applications, followed by the Requester, then replies from the

[10] Letter from counsel for the Ministry dated July 14, 2009.
[11] Letter from counsel for the Ministry dated July 20, 2009.
[12] Letter from Commissioner Loukidelis to the parties dated July 17, 2009, p. 2.
[13] Letter from Commissioner Loukidelis to the parties dated July 27, 2009, p. 3.
[14] Page 4.

Ministry and Correctional Officer. On the question of who would hear the applications, he informed the parties as follows:

> At the conclusion of my scheduling letter of July 17, 2009, I said that I was not seized of the yet-to-be-made applications for re-opening, having in mind that they might be considered and decided by a delegate. In her July 20, 2009, letter, counsel for the Ministry asked me to indicate whether "the issue of jurisdiction" would be determined by me, Ms. Boies Parker or some other delegate, "as that will affect our submissions". I am not sure whether counsel intended to refer to "the issue of jurisdiction" in some way distinct from the whole of the intended application to re-open. At all events, I have decided that I do intend to hear and decide these applications myself, as Commissioner. I also have an open mind should any of the parties seek to persuade me otherwise. If this issue will affect the Ministry's submissions, as its counsel has said, then it should be addressed fully in the Ministry's main submission for August 6, 2009.[15]

[13] All this resulted in applications from the Ministry and the Correctional Officer dated August 5 and 6, 2009, respectively, followed by other submissions from the parties that concluded on September 28, 2009. The Ministry raised no issue about Commissioner Loukidelis hearing and deciding the applications.

[14] These applications were pending when Commissioner Loukidelis left office on January 19, 2010, for appointment as the Deputy Attorney General of British Columbia, effective February 1, 2010. They were reassigned to me pursuant to a delegation of the Commissioner's powers under s. 49 of FIPPA and I considered and decided this matter without consultation or input from Commissioner Loukidelis or the Adjudicator.

[15] I have before me the record of proceedings before the Adjudicator, the correspondence between the Requester, the Commissioner's staff and counsel for the Ministry in the six weeks that followed the issuance of Order F08-13[16] and the applications about re-opening, which include the affidavits of extra-record evidence that the Ministry and the Correctional Officer filed in the judicial review proceedings.[17] My review of the record of proceedings before the Adjudicator included viewing the six DVRs. I am also privy to the petitions, arguments and related filings in the judicial review proceedings.

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[15] Page 4.

[16] Letters of July 4, 11, 28 and August 6, 2008, concerning the Requester's desire to view and obtain access to the remaining DVRs.

[17] The affidavits are: affidavit of Matt Lang, a Deputy Warden with the Corrections Branch of the Ministry, sworn on July 24, 2008; affidavit of Eduardo Moniz, a Strategic Technology Advisor on contract to the Corrections Branch of the Ministry, sworn on March 13, 2009; affidavit of Joanne Gardiner, a Senior Legislative and Policy Analyst with the Ministry of Labour and Citizens' Services, sworn on April 17, 2009, all in support of the Ministry's application for judicial review, SCBC Docket S085647, Vancouver Registry; and affidavit of the Correctional Officer, sworn on April 3, 2009, in support of her application for judicial review, SCBC Docket S092479, Vancouver Registry.

[16] I also have submissions from the parties following the assignment of this matter to me.[18]

2.0 APPLICATIONS

[17] **2.1 Application of the Correctional Officer**—The Correctional Officer applied for re-opening on the basis of the affidavit she swore on April 3, 2009 in support of her petition for judicial review, where she attests to a threatening incident at another jail facility in March 2008. The incident, which did not involve the Requester, happened after the Correctional Officer made her submission in the written inquiry before the Adjudicator, but before the Adjudicator issued Order F08-13 on June 27, 2008. According to the Correctional Officer, the incident traumatized her and is relevant to risk of harm to her if the DVRs are disclosed.

[18] Acknowledging that there is no express statutory power to reconsider an order under s. 58 of FIPPA, and no right of appeal, the Correctional Officer submitted that Order F08-13 can be re-opened on the more flexible and less formalistic application of the principle of finality to administrative decision-makers that the Supreme Court of Canada explained in *Chandler v. Alberta Association of Architects*[19] ("*Chandler*"). This approach contemplates that, when a statute does not provide for reconsideration and there is no right of full appeal, the tribunal may re-hear an issue if there is new evidence that would have been admissible on an appeal.

[19] The Correctional Officer described this as an equitable jurisdiction to reconsider and receive new evidence, with the test being the one a trial judge would apply in deciding, before a formal order has been entered, whether to re-open a case to receive further evidence or argument or to vary reasons already pronounced.[20] She said that consideration of the threatening incident at another jail would change the result of Order F08-13 as regards s. 22(2)(e)[21] and s. 15(1)(f).[22] She said the re-opening should fully weigh all of the evidence, previously adduced and new, from the Correctional Officer and the Ministry.[23]

[20] **2.2 Application of the Ministry**—The Ministry submitted that Order F08-13 is a final decision, which the Commissioner has no jurisdiction to re-open unless and until a court sets aside and remits it for reconsideration. That

[18] I corresponded with the parties on January 29 and February 26, 2010. They made submissions to me dated January 29, February 10, 12, 25, 26 and March 1 and 3, 2010.
[19] [1989] 2 S.C.R. 848.
[20] Correctional Officer submission (August 6, 2009), pp. 6-7, citing the statement of that test in *Zhu v. Li*, 2007 BCSC 1467, para. 20.
[21] The relevant circumstance of whether disclosure of personal information will expose a third party unfairly to financial or other harm.
[22] Authority to refuse disclosure that could reasonably be expected to endanger the life or physical security of a law enforcement officer.
[23] Correctional Officer submission (August 6, 2009), p. 11.

has not happened, of course, as the Court adjourned the judicial review proceedings, without deciding them, for the purpose of enabling the Ministry and the Correctional Officer to apply for re-opening of the order and to allow the Commissioner to consider whether there was unspent jurisdiction in the inquiry or the implementation of the order.

[21] The Ministry, like the Correctional Officer, maintained there is no express power of reconsideration in FIPPA. It also correctly observed that the *Administrative Tribunals Act* does not apply to the Commissioner, including its provision for the correction and clarification of final decisions.[24]

[22] The Ministry said that authority to re-open Order F08-13, which it did not concede, could only come under two headings:

(a) circumstances calling the integrity of the order into question, or

(b) the more flexible and less formalistic application of the principle of finality to administrative decisions that are not subject to a full appeal.[25]

[23] Its position was summarized as follows:

> …you [the Commissioner] do not have any jurisdiction to reconsider this matter, absent an order of a Supreme Court judge. If you do have any such jurisdiction, it would arise as an example of the flexibility in the application of the doctrine of *functus officio* set out above and referred to in *Chandler*, and, as set out in *Chandler*, would require you to permit the parties to supplement the evidence and make further representations in order to enable the parties to address, frontally, the issues.
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> If, and only if, you are of the view that you have the jurisdiction to reconsider the matter afresh, addressing all of the issues raised in the judicial review, and that in doing so you would permit the parties to provide further evidence and make further representations, then you may consider this such an application. Upon your advice that this is the case, the Ministry will submit any further evidence on the matter itself and make further representations to the reconsideration.
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> This is not an application or an invitation to you to address any of the issues on an individual basis. Doing so would provide no efficiencies or economy in approach since the remaining issues would still need to proceed to judicial review. In addition, given the existence of the two outstanding petitions, doing so would dramatically add to the potential for inconsistent treatment of the records in issue.[26]

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[24] S.B.C. 2004, c. 45. Section 53 codifies for administrative tribunals the common law that permits judicial decision makers to change final decisions to correct clerical errors and accidental, inadvertent or arithmetical mistakes. Section 53 also permits a party to an administrative proceeding to apply for clarification of a final decision within 30 days of being served with it.

[25] Ministry submission (August 5, 2009), pp. 3-4.

[26] Ministry submission (August 5, 2009), p. 4.

[24] I take the Ministry to say that it would participate in a re-opening if, and only if, the Commissioner could and would re-open the order and hear the whole matter afresh. The Ministry acknowledged the issue of whether the Commissioner is *functus officio*, at the same time insisting that the Commissioner not examine whether Order F08-13 was vitiated by errors alleged in the pending applications for judicial review.

[25] **2.3 Response of the Correctional Officer to the Ministry**—In response, the Correctional Officer said that the Commissioner is not *functus officio* and she characterized the flexibility to re-open to receive new evidence when there is no right of full appeal as an implied statutory power of reconsideration:

> [The Correctional Officer] disagrees with the Ministry's position that "no reconsideration power can be implied either through specific provisions of [FIPPA] or from the overall structure of that legislation…, instead submits that your office has an implied power to rehear an issue if there is fresh evidence. As explained in the Initial Submission, the jurisdiction to re-open a decision to consider fresh evidence is implied "where there is no appellate body to which a dissatisfied party may appeal," and the dissatisfied party would otherwise have recourse only to judicial review.[27]

[26] The Correctional Officer submitted Order F08-13 could be re-opened to admit fresh evidence, to correct a fatal factual error (about camera blind spots) and to rectify patently unreasonable errors. She relied on s. 22(2)(e) of FIPPA. She also adopted the Ministry's grounds of judicial review about misapplication of s. 15, which the Correctional Officer characterized as a patently unreasonable error. And she added s. 19,[28] saying the Adjudicator ought to have considered this provision though no participant in the inquiry raised it.[29]

[27] **2.4 Response of the Ministry to the Correctional Officer**—The Ministry did not respond to the Correctional Officer's application.

[28] **2.5 Response of the Requester**—The Requester agreed with the Correctional Officer that the test for re-opening Order F08-13 to consider new evidence is the one applied by a trial judge before a formal order is entered. She said the Correctional Officer's new evidence did not meet that test, nor did alleged errors about the evidence of camera blind spots or the application of ss. 15, 19 and 22 of FIPPA.

[29] The Requester said the Ministry had forfeited its opportunity to apply for re-opening and should not be allowed to dictate further rounds of process. Alternatively, she analyzed the new evidence and grounds on which the Ministry

[27] Correctional Officer submission (August 13, 2009), p. 2.
[28] Authority to refuse disclosure of personal information that could reasonably be expected to threaten third-party safety or mental or physical health or to interfere with public safety.
[29] Correctional Officer submission (August 13, 2009), pp. 4-6.

said it would make an application for re-opening, if it came to that, and said they did not meet the necessary test. The Requester proposed the following procedure for re-opening, if that happened:

> If you disagree with [the Requester] and determine that this matter ought to be re-opened, then [the Requester] submits that while it would likely be most efficient if Ms. Boies Parker were to deal with the re-opening, there is nothing barring you or another adjudicator from taking over. This is because the entire inquiry was done in writing, so the complete record is available for examination by any decision maker responsible for tackling a re-opening.
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> As to the nature of the re-opening should you decide to go that route, [the Requester] strongly urges that any re-opening should be done on the narrow basis of the material that the parties have put forward to date in their application for re-opening. No further evidence or submissions should be permitted. The parties had a full opportunity to make submissions and bring evidence at the original inquiry, and again in the course of [the Correctional Officer's] current application to re-open. And while any decision maker dealing with a re-opening would certainly want to review the record from the initial inquiry, there is no reason for a hearing *de novo*. If you decide that a re-opening is warranted, [the Requester] submits that it can most appropriately be addressed by an addendum that supplements Order F08-13.[30]

[30] Finally, the Requester urged that "there has been very significant delay in this case already, much of which has been due to a combination of laxity and obstruction by the public body",[31] to the prejudice of Requester's interests and the benefit of the other parties. The Requestor's experience with this case--which I take to mean the course of the Ministry's response to the access request, the request for review, inquiry and issuance of Order F08-13, the applications for judicial review and their adjournment by the Court to permit applications for re-opening—is said to have shattered her confidence in the justice system.

[31] **2.6 Reply of the Ministry**—In its initial submission, the Ministry had said that, if the Commissioner decided to re-open Order F08-13, then it would provide further evidence and argument for that purpose. In reply, the Ministry added that if the Commissioner was not *functus officio*, it wanted an opportunity to participate in any process flowing from the Correctional Officer's application to re-open.[32]

[32] The Ministry responded to the Requester's concerns about delay by referring to the following passage in the Court's ruling adjourning the judicial reviews:

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[30] Requester submission (September 10, 2009), pp. 7-8.
[31] Requester submission (September 10, 2009), p. 8.
[32] Ministry submission (September 15, 2009).

> [12] Counsel for [the Requester] argues vigorously that if I find those materials [the extra-record evidence] should have been placed before the Commissioner, that I should dismiss the petition for prematurity or, in the alternative, uphold the objection to the admissibility of the extra record affidavits and continue the judicial review. She points to substantial delay which she says prejudices her client's interests. However, in respect of delay, there is very little merit in [the Requester's] position. She has an action against the petitioner, the PSSG, in the Supreme Court of British Columbia in which she is entitled to production of documents under Rule 26. If there were to be delay in production of documents such as the DVRs, she would have a right of application to the court which would ensure prompt production of relevant material. By inference, I assume that her use of this procedure before the Commissioner is to allow her to disseminate the DVRs at large which she could not do under the law governing discovery. She has also stated this intention in the materials she has submitted to the Commissioner. Therefore, her interest in obtaining the footage in a timely way is not compromised by any delay in the judicial review.[33]

[33] **2.7 Reply of the Correctional Officer**—In her reply, the Correctional Officer reiterated that her new evidence was compelling enough to change the result of Order F08-13 and the Adjudicator ought to have considered provisions of FIPPA, whether or not the Correctional Officer raised them. She also elaborated on her initial submission about the test for re-opening:

> …the discretion to re-open which is available to the Commissioner is broader and less restrictive than that imposed upon a judge for a variety of reasons, and, in particular, because of the lack of an appeal mechanism available to litigants in FOIPPA matters. The very reason that administrative tribunals' discretion is less restricted is because of the narrow grounds for review of such decisions. This was clearly articulated in *Chandler v. Association of Architects*.[34]

3.0 DISCUSSION

[34] **3.1 Framework for the Applications**—Following my assignment to this matter, I informed the parties that I anticipated that it was not going to be possible for me to analyze the implications of the *Chandler* case for the Correctional Officer's and the Ministry's applications, or any issues of unspent jurisdiction by the Commissioner, without reference to the extra-record evidence and grounds of the pending applications for judicial review. In that light, I invited the Ministry to respond to the Correctional Officer's application after all and to

[33] *Ministry of Public Safety and Solicitor General and others v. Information and Privacy Commissioner of British Columbia and others*, SCBC Dockets S085647 and S092479, Vancouver Registry (Oral Reasons, 3 June 2009), p. 6.
[34] Correctional Officer submission (September 28, 2009), p. 3.

flesh out its own application with reference to those materials.[35] The Ministry made a submission dated February 10, 2010, that is in much the same vein as its earlier submissions. As stated in the introduction, I also received further additional submissions from the parties, which I considered with care but did not find necessary to describe in detail in this decision.

[35] I decided that the course of action to take was, as anticipated, to analyze Order F08-13 and the new evidence and grounds in the applications for judicial review against the principle of finality and its exceptions.

[36] I came to this conclusion because the judicial reviews were adjourned to permit the Ministry and the Correctional Officer to apply to the Commissioner for consideration of the extra-record evidence they had filed in support of their applications for judicial review and for the Commissioner to consider any unspent jurisdiction to deal further with the matter. It was against that backdrop that the Correctional Officer had applied for re-opening of Order F08-13 on the basis of the new evidence in her affidavit supporting her application for judicial review, the Ministry's affidavits supporting its application for judicial review and errors in the order that are alleged in the judicial reviews.

[37] The Ministry applied for an affirmative ruling that the Commissioner is *functus officio* without consideration of the pending applications for judicial review. Only if the Commissioner decided to rehear the matter afresh did the Ministry intend to ask for re-opening on the grounds and new evidence in its application for judicial review[36] or to participate in a re-opening flowing from the application of the Correctional Officer.[37]

[38] *Chandler* speaks to the principle of finality and the circumstances when a tribunal may re-open or complete its jurisdiction. This involves considering whether there are conditions present that trigger an exception to the principle of finality.

[39] I perceive the Ministry's application for an affirmative ruling on *functus officio* without reference to the new evidence or applications for judicial review to be insensitive to the distinctions between: (a) re-opening a decision to consider new evidence, (b) re-opening a decision vitiated by error, (c) re-opening where an error has vitiated a whole proceeding and (d) re-opening or continuing a proceeding to complete a statutory task.[38] The Ministry's application cannot be determined in a factual or contextual vacuum any more than can the Correctional

[35] Letter to the parties (January 29, 2010).
[36] Ministry submission (August 5, 2009), p. 4.
[37] Ministry submission (September 15, 2009).
[38] *Chandler*, paras. 22-27, itself recognized the distinction between re-opening to address a change of circumstances (relief that would otherwise be available on appeal) versus a vitiating error in a decision, as well as the distinction between a fresh start to cure a breach of procedural fairness that vitiates a whole proceeding and resumption at the point of error to address a discrete failure to make a proper disposition.

Officer's application for re-opening. Both applications require consideration of if and how the extra-record evidence or other conditions raised in the judicial reviews permit re-opening of the order or relate to unspent or continuing jurisdiction for the Commissioner to deal with the inquiry or the implementation of the order.

[40] **3.2 Principle of Finality**—In *Chandler*, Sopinka J., speaking for the majority of the Court, explained that the doctrine of *functus officio*, more plainly described as the general rule that a final decision of a court cannot be re-opened, came from the nineteenth-century reform of the English judicial system that transferred the power to rehear from the trial to the appellate level. The rule of finality applied only after the formal judgement of the trial court was drawn up, issued and entered, with two exceptions: (a) a slip in drawing up the judgement or (b) an error in expressing the manifest intention of the court.[39]

[41] Sopinka J. concluded that the finality of administrative proceedings should be recognized by a more flexible and less formalistic doctrine than the English rule of *functus officio*, which was based on reluctance to amend or re-open formal judgements that are subject to a full right of appeal:

> …As a general rule, once such a tribunal has reached a final decision in respect of the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change in circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J.O. Ross Engineering Corp.*, *supra*.[40]
>
> To this extent, the doctrine of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the re-opening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be re-opened in order to enable the tribunal to discharge the function committed to it by enabling legislation….

[39] *Chandler*, para. 19.
[40] 1934 S.C.R. 186. This case held that there is no power to amend a judgement which has been drawn up and entered, except in two cases: (a) where there has been a slip in drawing it up or (b) where there has been error in expressing the manifest intention of the court.

> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to re-open proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute….
>
> In this appeal we are concerned with a failure of the Board to dispose of the matter before it in a manner permitted by the *Architects Act*. The Board intended to make a final disposition but that disposition is a nullity. It amounts to no disposition at all in law. Traditionally, a tribunal, which makes a determination which is a nullity, has been permitted to reconsider the matter afresh and render a valid decision….
>
> If the error which renders the decision a nullity is one that taints the whole proceeding, then the tribunal must start afresh. Cases such as *Ridge v. Baldwin*, [1864] A.C. 40 (H.L.); *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (S.C.B.C.) and *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330, referred to above, are in this category. They involve a denial of natural justice which vitiated the whole proceeding. The tribunal is bound to start afresh to cure the defect.
>
> In this proceeding the Board conducted a valid hearing until it came to dispose of the matter. It then rendered a decision which is a nullity. It failed to consider disposition of the matter in accordance with the Act and Regulation. This will enable the appellants to address, frontally, the issue as to what recommendations, if any, the Board ought to make.[41]

[42] The exceptions for alteration of an entered court order (accidental slip or failure to express manifest intention of the court) are not to be confused with: (a) re-opening a judicial trial before entry of the formal judgement or (b) adducing fresh evidence to an appellate court after a notice of appeal has been filed and perfected by the entry of the formal judgement of the trial court.

[43] After conclusion of a judicial trial and the pronouncement of judgement, but before entry of the formal order, the court has discretion to re-open the trial and receive additional evidence and argument. The party seeking re-opening must establish on a balance of probabilities that a miscarriage of justice would probably occur without a rehearing and that the new evidence or argument would probably have changed the result of the trial. The court's discretion, while broad, must be exercised sparingly.[42] This is the test that, by reference to *Zhu v. Li*,

[41] *Chandler*, paras. 20-27.
[42] *Hodgkinson v. Hodgkinson* (2006), 267 D.L.R. (4th) 357 (B.C.C.A.), paras. 36-37.

the Correctional Officer and the Requester suggest applies to re-opening Order F08-13.

[44] In *Clayton v. British American Securities Ltd.*,[43] McPhillips J.A. explained the distinction between a trial judge's discretion to re-open before entry of the formal judgement (which vests the right of appeal) and the admission of new evidence on appeal:

> My view has always been that the trial judge might resume the hearing of an action apart from rules until entry of judgment, but as it was vigorously combatted I have given it careful consideration. The point, as far as I know, has not been squarely decided; at least by any cases binding upon us. It is, I think, a salutary rule to leave unfettered discretion to the trial judge. He would of course discourage unwarranted attempts to bring forward new evidence available at the trial to disturb the basis of a judgment delivered or to permit a litigant after discovering the effect of a judgment to re-establish a broken-down case with the aid of further proof. If the power is not exercised sparingly and with the greatest care fraud and abuse of the Court's processes would likely result. Without that power however injustice might occur. If, *e.g.*, a document should be discovered after pronouncement of judgment, but before entry, shewing that the judgment was wrong and the trial judge was convinced of its authenticity no lack of diligence by a solicitor in not producing it earlier should serve to perpetuate an injustice. The prudent course is to permit the trial judge to exercise untrammelled discretion relying upon trained experience to prevent abuse, the fundamental consideration being that a miscarriage of justice does not occur.
>
> There are reasons for the rules governing the admission of evidence by an Appellate Court, not applicable to a trial judge. Hearing new evidence is a departure from its usual procedure and it is fitting that departures in ordinary practice should be limited by rules to prevent abuse. Entry of judgment may be merely a formality but it is necessary, that at some arbitrary point the jurisdiction of the trial judge should end. A vested right to a judgment is then obtained subject to a right to appeal and should not be lightly jeopardized. Before the gate is closed by entry a trial judge is in a better position to exercise discretion apart from rules than an Appellate Court. He knows the factors in the case that influenced his decision and can more readily determine the weight that should be given to new evidence offered. I might add that he might well be guided, although not bound by the rules referred to.[44]

[45] In *Zhu v. Li*, Ehrcke J. described the test for re-opening a trial to adduce fresh evidence after judgement has been pronounced but before the formal order is entered, as follows:

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[43] (1934), 49 B.C.R. 28 (B.C.C.A.).

[44] In *Zhu v. Li*, para. 18, Ehrcke J. noted that the "rules" referred to in the last sentence of this passage from the judgment of McPhillips J.A. are the rules for the admission of fresh evidence on appeal.

1. Prior to entry of the formal order, a trial judge has a wide discretion to re-open the trial to hear new evidence.
2. This discretion should be exercised sparingly and with the greatest care so as to prevent fraud and an abuse of the court's process.
3. The onus is on the applicant to show first that a miscarriage of justice would probably change the result.
4. The credibility of the proposed fresh evidence is a relevant consideration in deciding whether its admission would probably change the result.
5. Although the question of whether the evidence could have been presented at trial by the exercise of due diligence is not necessarily determinative, it may be an important consideration in deciding whether a miscarriage of justice would probably occur if the trial is not re-opened.[45]

[46] On the other hand, when an appeal has been perfected by the formal entry of the trial judgement, the appeal court's discretion to admit evidence that was not before the trial court is guided by the following principles:

1. The evidence should not generally be admitted if, by due diligence, it could have been adduced at trial, provided that this general principle will not be applied as strictly in criminal as in civil cases.
2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
3. The evidence must be credible in the sense that it is reasonably capable of belief.
4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.[46]

[47] In *Zhu v. Li*, Ehrcke J. considered whether the test for adducing fresh evidence on appeal applied to re-opening a trial to adduce fresh evidence after judgement had been pronounced but before entry of the formal order. He concluded that the discretion to re-open a trial to adduce fresh evidence was wider than the test to adduce fresh evidence on appeal (most notably as regards the element of whether, by due diligence, the evidence could have been adduced at trial).

[48] The Court in *K.F.P. v. D.J.P.*[47] and *G.C.H. v. H.E.H*,[48] after considering *Zhu v. Li* and other cases,[49] also concluded that a two-part test of whether the

[45] *Zhu v. Li*, para. 20.
[46] *Palmer v. The Queen*, [1980] 1 S.C.R. 759, p. 775.
[47] [2004] B.C.J. No. 782 (S.C.), paras. 32-33 (*per* Wedge J.).
[48] [2009] B.C.J. No. 4 (S.C.), para. 18 (*per* Joyce J.).
[49] Including *Hodgkinson v. Hodgkinson* and *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2. S.C.R. 983.

evidence would probably have changed the result and whether it could have been obtained before trial by the exercise of reasonable diligence, was useful but it was not determinative of the broad discretion of a trial judge to re-open and hear new evidence after judgement has been pronounced but before entry of the formal order.

[49] **3.3 Test for Re-opening**—The law is clear that an administrative tribunal that is without a statutory provision for reconsideration, and the decisions of which are not subject to a full right of appeal, can re-open its decisions to consider new evidence or argument in wider circumstances than can a court. The judicial history of the doctrine of *functus officio* and the development of finality in administrative law that flows from *Chandler* show that the more flexible application of the principle of finality to administrative tribunals is not premised on the discretion of a trial court to re-open between the pronouncement and formal entry of its judgement (the test in *Zhu v. Li*). The reason for the flexibility in administrative law is that judicial review of a tribunal decision is a more limited review than a right of full appeal of a judicial decision to a higher court. Because of the more limited nature of judicial review and its narrow scope for the admission of extra-record evidence, *Chandler* struck a more flexible application of the principle of finality, "in order to provide relief which would otherwise be available on appeal."[50]

[50] I conclude that the test for the admission of new evidence on appeal is a more relevant point of reference for re-opening Order F08-13 than the test for re-opening a judicial trial before entry of formal judgement.

[51] Admittedly, the considerations are quite similar for adducing fresh evidence on appeal and for re-opening a trial before entry of the formal order. However, the latter is a less defined and potentially broader discretion. It seems to me that a factor not to be overlooked in this is that time limits themselves promote finality and the window to apply to re-open a trial is short, often very short, because it is contained by the entry of the formal judgement and what is usually a time limit to appeal within 30 days of the pronouncement of judgement.

[52] Turning to FIPPA, the time limit for a public body or third party to bring an application for judicial review of an order requiring access to be given to records is usually 30 business days, being the point at which the public body is required to comply with the order if no application for judicial review has been made. If an application for judicial review is made before that period ends, the order, or the part of it that is in issue if the judicial review concerns only part of the order, is stayed by operation of s. 59(2). When a public body complies with an order requiring it to give access to records, the order and the ability to re-open it are spent. [51]

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[50] *Chandler*, para. 21. Also see *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, [2003] 3 S.C.R. 3, para. 79, and *Reekie v. Messervey*, [1990] 1 S.C.R. 219, para. 7.

[51] See s. 59 of FIPPA and the definition of "day" in Schedule 1.

[53] Section 59 does not limit the time for a requester to bring an application for judicial review of an order under FIPPA and s. 57 of the *Administrative Tribunals Act*[52], which provides for a 60-day time limit to apply for judicial review of final tribunal decision, does not apply to orders made by the Commissioner under FIPPA. The only time limit for the requester is in s. 11(b) of the *Judicial Review Procedure Act*,[53] which provides that an application for judicial review is not barred by the passage of time unless "the court considers that substantial prejudice or hardship will result to any other person by reason of delay."

[54] Whether the test to re-open Order F08-13 is the test for admission of new evidence on appeal, as I see it, or the test for the re-opening of a trial before entry of the formal judgement, as the Correctional Officer and Requester submitted, a necessary component of the flexible application of the principle of finality is discretion to refuse to consider re-opening after a period of time that is some reasonable parallel to the time to bring an application for judicial review of an order to comply with FIPPA or to settle and enter a trial judgement in court. I would express this as a requirement for diligence in applying for re-opening of a decision made under FIPPA.

[55] FIPPA has been in force since 1993. Applications to re-open an inquiry or order under FIPPA have not been frequent. The resulting decisions, few in number though they are, support the importance of timeliness as a factor in the flexible application of the doctrine of finality to inquiries and orders under FIPPA.

[56] In an early decision involving an application for re-opening of an inquiry to receive fresh evidence, Commissioner Flaherty said:

> I acknowledge that I may accept fresh evidence after the completion of an inquiry, where fairness requires it and particularly where I have not yet rendered my decision. However, I do not need to do so in this case, since I have already observed that evidence admitted earlier, that was of the same nature as the fresh evidence now sought to be adduced, will not change my conclusion…[54]

[57] Commissioner Loukidelis made a supplemental decision on a request to re-open Order 01-52.[55] The applicants for re-opening were petitioners for judicial review of the order. Order 01-52 issued on December 3, 2001. The applicants asked for re-opening 10 days before the applications for judicial review of the order were being heard on May 13, 2002. The requester for access was opposed to re-opening, seeing it as no more than a pretext to delay the hearing of the judicial reviews.

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[52] SBC 2004, c. 45.
[53] RSBC 1996, c. 241.
[54] Order No. 37-1995, [1995] B.C.I.P.C.D. No. 9.
[55] Supplemental decision dated May 10, 2002 to Order 01-52, [2001] B.C.I.P.C.D. No. 55.

[58] The request for re-opening turned on an issue of participatory rights in the inquiry under FIPPA. Considering the threshold question of whether the applicants for re-opening had been entitled to be notified and to participate in the inquiry under FIPPA, Commissioner Loukidelis observed that the law seemed clear enough that, if a person was not given an opportunity to be heard when that opportunity was required to be given, it was possible for the decision to be re-opened without waiting for a court order setting it aside or declaring it invalid. However, he concluded that it was not necessary to consider re-opening in that case, because no participatory rights that were due had been denied. That issue and others were considered on judicial review and on further appeal, where Order 01-52 was ultimately upheld.[56]

[59] Finally, Orders F09-09 and F09-10,[57] which I issued on May 20, 2009,[58] are re-opening decisions I made in some unusual circumstances relating to my Orders F08-17 and F08-18[59] issued on November 5, 2008. Soon after I issued Orders F08-17 and F08-18 and before the time for compliance had passed, the public body learned that a subsection of the provision of FIPPA in issue in both orders had been enacted and brought into force in 2002 but had remained unknown because it was overlooked for publication by the Queen's Printer. I decided that, even though the inquiry process had been procedurally fair, no one was at fault for being unaware of the existing but unpublished provision and that in the unusual circumstances I could and would re-open the Orders F08-17 and F08-18 to consider the implications of the "new" subsection which the public body said was material to the outcomes of the orders. Little time had passed from the issuance of the orders and the time for the public body to comply or file applications for judicial review had not even elapsed. It made sense for the Commissioner to re-open and change the outcomes of the orders, if that was called for, and to provide an adjudicative record that included consideration of the "new" subsection for purposes of judicial review if that came to pass, which it has.[60]

[60] **3.4 New evidence of the Correctional Officer**—The Correctional Officer's affidavit of new evidence (sworn on April 3, 2009 in support of her application for judicial review) begins with three paragraphs about her experience in that job. She deposes that she has been a correctional officer for 22 years during which time she has been threatened countless times and even physically assaulted. She briefly describes two physical assaults in 1999 and 2000 and

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[56] *Guide Outfitters Association of BC v. British Columbia (Information and Privacy Commissioner)* (2004), 26 B.C.L.R. (4th) 1, 2004 BCCA 210, reversing in part (2002), 6 BC.L.R. (4th) 362, 2002 BCSC 1429.

[57] [2009] B.C.I.P.C.D. No. 12 and [2009] B.C.I.P.C.D. No. 13.

[58] [2009] B.C.I.P.C.D. No. 12 and [2009] B.C.I.P.C.D. No. 13.

[59] [2008] B.C.I.P.C.D. No. 30 and [2008] B.C.I.P.C.D. No. 31.

[60] The pending application for judicial review is *Office of the Premier v. Information and Privacy Commissioner of British Columbia*, SCBC Docket 092882, Victoria Registry (filed on June 30, 2009, following the issuance of Orders F09-09 and F09-10 on May 20, 2009).

then says that correctional officers can also be targeted for violence outside the workplace and she has experienced threats of such violence.

[61] Paragraphs 5 to 12 of the affidavit turn to March 29, 2008, when an inmate warned the Correctional Officer of a plot to take her hostage and kill her because of a decision she had made in her employment at a different jail. She was told the plotters knew where she lived and she believed that associates of theirs outside the jail had followed her home. While the police were investigating the threat, they monitored her house to ensure the safety of the Correctional Officer and her family. The police report of their investigation was not released to the Correctional Officer, but she deposes that she knows that inmates who were said to be involved in the plot were moved to another jail unit. After the incident, she suffered from post-traumatic stress disorder, was treated with anti-depressants and was unable to work from April to August 2008, when she started to return to work.

[62] Paragraphs 13 to 15 of the affidavit turn to the Requester's access request. The Correctional Officer explains that, during the inquiry by the Adjudicator, she believed the DVRs could not be released because she had been cleared of the use of excessive force allegation the Requester made. With the help of her husband and a shop steward, she made her submission to the inquiry, opposing release of the DVRs because she wanted the Adjudicator to understand her feelings.

[63] The last two paragraphs of the affidavit of new evidence, under the heading "Threat to My Safety", read as follows:

> 16. Having already been singled out for violence, I am very concerned that my safety will be threatened if the Videos are released without my face being removed or blacked out. My home has already been identified and, in my opinion, it would put me at further risk if I were personally identifiable as well.
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> 17. Even if the threat of being taken hostage has passed, I have stopped inmates from smuggling drugs or other contraband. These inmates have associates outside the correctional facilities, who are no doubt angered when their plans fail. I have already been targeted outside of my place of work, and there is a real danger that I would be threatened again if the associates of inmates could be shown the Videos to learn what I look like.

[64] The Correctional Officer's one-page submission to the inquiry is dated February 20, 2007. In it, she opposed the release of DVR evidence relating to the strip search of an accused in the performance of her duties as a correctional officer. None of the DVRs contains evidence of a strip search, a fact the Adjudicator noted in Order F08-13.[61] The Correctional Officer also submitted

[61] Para. 40.

that there should be no public release of DVR evidence of her likeness or image because it was an unreasonable invasion of her privacy and there would be no ability to control use or manipulation of the image. The Ministry did not support the Correctional Officer's position that disclosure of the identities of jail staff in the context of performing their duties would be an unreasonable invasion of their personal privacy under s. 22 of FIPPA. However, it did argue that s. 15(1) authorized suppression of the DVRs in their entirety.

[65] Order F08-13 issued on June 27, 2008. The Adjudicator held that the mere fact the DVRs would identify an individual as a Ministry employee was not an unreasonable invasion of his or her personal privacy under s. 22(1) and risk of harm was not made out under s. 15(1)(f) or (l) to the physical safety of staff or others at the VCJ or the VCJ video surveillance system.

[66] The Correctional Officer's application for judicial review was not filed until April 1, 2009.

[67] The Correctional Officer says that she could not have adduced her new evidence before Order F08-13 issued because when she made her submission to the inquiry, the March 2008 threatening incident had not happened, nor had she yet suffered from depression and post-traumatic stress disorder consequent to that incident. Her new evidence would change the result of Order F08-13 because, as I read her submissions, she says it establishes that if her image in DVRs 2 and 3 is disclosed she will be endangered and unfairly exposed to physical and mental harm within the meaning of ss. 15(1)(f), 19(1)(a) and 22(2)(e) of FIPPA.[62]

[68] The Requester says Order F08-13 should not be re-opened because the March 2008 threatening incident, and its effect on the Correctional Officer in the immediately ensuing months, are not related to the Requester. The Correctional Officer started to return to work in August 2008. The Correctional Officer's affidavit did not provide evidence that her mental health is currently in jeopardy or medical evidence of her mental health and its vulnerability if her image in DVRs is released. The Requester describes the Correctional Officer's assertions of anticipated harm to her mental health as vague, general and unsubstantiated. Bearing in mind the Requester's claim that the Correctional Officer brutalized her in the VCJ, which an internal investigation did not sustain, she also makes the point that mental anguish the Correctional Officer might experience from the disclosure of her misconduct toward the Requester could not be considered an unfair exposure to harm under s. 22(2)(e) of FIPPA. Those involved in the March 2008 threatening incident identified the Correctional Officer and her home independent of anything to do with the Requester or this matter. The Correctional Officer's new evidence provides no rational reason to believe

[62] Correctional Officer submission (August 6, 2009), pp. 9-10; Correctional Officer submission (September 28, 2009), p. 2.

that disclosure of her image in the DVRs would imperil her physical safety or her health.[63]

[69] Referring to the admission of fresh evidence on appeal, the first requirement is that fresh evidence should not generally be admitted if, by due diligence, it could have been adduced at trial, provided that this general principle will not be applied as strictly in criminal as in civil cases. Here, "inquiry" must be substituted for "trial". Because the proceeding is administrative in nature and therefore civil, I would not relax the principle as might be done in a criminal case where loss of liberty and other penal sanctions are at stake. Moreover, in this administrative law context, I would include timeliness in bringing the application to re-open in the requirement for due diligence.

[70] Paragraphs 2 to 4 of the Correctional Officer's affidavit, concerning her years of experience and the two incidents of physical assault in 1999 and 2000, could have been adduced before the Adjudicator. The evidence in paragraphs 13 to 15 implies that a more comprehensive submission was not made to the Adjudicator was because the Correctional Officer did not think the DVRs could be released after she had been cleared of the Requestor's complaint against her. There is no explanation why, after Order F08-13 issued on June 27, 2008, the new evidence was not brought forward until April 2009. In my view, these circumstances do not meet the diligence requirements for an application to re-open an order to consider the evidence in these paragraphs.

[71] The evidence of the March 2008 threatening incident, in paragraphs 5 to 12 of the affidavit, obviously could not have been adduced when the Correctional Officer made her submission to the inquiry in 2007. It could have been brought forward before Order F08-13 issued on June 27, 2008. It is possible, though her affidavit does not say this, that the stress of the threatening incident and its fallout for her could justifiably explain why she did not do that. When Order F08-13 issued, it was incumbent on the Correctional Officer to come forward with her fresh evidence if she wanted it to be considered by the Adjudicator. In August 2008, she was well enough to begin returning to work. She did not bring forward her new evidence, or make her application for judicial review, until April 2009. No explanation has been given for why the new evidence was not forthcoming sooner. I also conclude that the circumstances do not meet the diligence requirements for an application to re-open an order to consider the evidence in these paragraphs.

[72] I have also concluded that the new evidence does not, in its substance, meet the test for re-opening Order F08-13. No doubt the Correctional Officer does not want her image in the DVRs to be released, but that is not the test for the admission of fresh evidence. The new evidence must be: relevant in the sense that it bears upon a decisive or potentially decisive issue in the inquiry; credible in the sense that it is reasonably capable of belief; and such that, if

[63] Requester Submission (September 10, 2009).

believed, it could reasonably be expected, when taken with the other evidence adduced in the inquiry, to have affected the result in Order F08-13.

[73] The new evidence relating to her years of experience as a Correctional Officer and the physical assaults in 1999 and 2000 is credible in the sense of being reasonably capable of belief. It does not however have bearing on a decisive or potentially decisive issue in the inquiry and it could not reasonably be expected, taken with the other evidence adduced at inquiry, to have affected the result in the order.

[74] The Correctional Officer's evidence of the March 2008 threatening incident at another jail that put her at risk of physical harm and caused harm to her mental health is reasonably capable of belief. It could have bearing on a decisive or potentially decisive issue in the inquiry if reasonably connected to risk to her physical safety or health should her DVR image be disclosed. In my view, it is at this point that the credibility of the new evidence does not bear up. The Adjudicator described the content of DVRs 2 and 3.[64] I also viewed the DVRs. I agree with the Requester that there is a lack of nexus between the threatening incident at the other correctional facility in March 2008 and risk of harm to the Correctional Officer from disclosure of her image in DVR 2. The correctional Officer's contention that the release of her image could reasonably be expected to endanger her physical safety or mental wellbeing is not reasonably capable of belief. Her subjective concerns in paragraphs 16 and 17 of affidavit, however *bona fide*, could not reasonably be expected, taken with the other evidence adduced at inquiry, to have affected the result in Order F08-13.

[75] I would not re-open Order F08-13 to consider the evidence in the Correctional Officer's affidavit.

[76] **3.5 New evidence of the Ministry**—The Ministry's new evidence is in three affidavits that were filed in support of its application for judicial review.

Affidavit of Joanne Gardiner (April 17, 2009)

[77] The affidavit of Joanne Gardiner, a Senior Legislative and Policy Analyst with the Ministry, was sworn on April 17, 2009. She deposes that she was assigned responsibility for finding current technology for severing the DVRs to comply with the disclosure to the Requester that Order F08-13 required. She does not purport or appear to have any technological expertise in her own right. Rather, her affidavit consists of the steps she took and information she gathered about the severing of faces on the DVRs. There is no clear indication of when that information was gathered. A statement that her efforts were necessitated by the issuance of Order F08-13 suggests that her involvement dates from mid-2008, but it is by no means clear that some, or most, of the information in her affidavit was not gathered six or nine months later. If the

[64] Order F08-13, paras. 16-19.

evidence was gathered earlier, there is no explanation why it was not brought forward before April 2009. If the evidence was gathered months later, there is no indication why it was not gathered earlier.

[78] Ms Gardiner deposes on information and belief from named two technical staff at the Ministry that "there is no ability to do this type of work internally".[65] She therefore she looked into outsourcing to a contractor and names several individuals in the private sector that she consulted. She was advised and believes that "none of the bonded commercial providers can provide the service requested."[66] She goes on to describe how the severing might be done if a bonded commercial provider could be found to do it, as she gleaned from her discussions with contractors and her own internet research of sources such as Wikipedia. She concludes that there is no sure existing technology to irreversibly sever images from DVRs and no certainty that such existing methods as there are will not become reversible as technology advances.

[79] The evidence in this affidavit does not qualify for admission as fresh evidence at several levels. It was not provided diligently and lacks specifics on when the evidence in it was available and gathered. There is no explanation why the evidence was not provided to the Adjudicator in the inquiry or, at the least, soon after the issuance of Order F08-13.

[80] The evidence is also expert opinion dressed up as factual observations and inquiries by Ms Gardiner, who has no relevant expertise. Ms Gardiner may be credible in terms of what she did, though we do not know when she did it, and for the sincerity of her efforts, but that does not assist the credibility or conclusiveness of the technological evidence in the crux of her affidavit about severing methods and their reversibility, for which she is not qualified to vouch.

Affidavit of Eduardo Moniz (March 13, 2009)

[81] The affidavit of Eduardo Moniz, a Strategic Technology Advisor under contract to the Corrections Branch of the Ministry, was sworn on March 13, 2009. He deposes that he has 12 years' experience as a consultant to the Corrections Branch that has given him an extensive understanding of the security features they employ and the risks posed by security breaches, including of video surveillance data. His attached *curriculum vitae* indicates that he has high school education with a year, possibly two, of criminology studies at a community college, followed by a long career in security systems, installation, implementation and design.

[82] The six-page affidavit consists of Mr Moniz's general evidence about the importance of security in a correctional facility and the "tools" used for that purpose, including monitoring systems. He states that video cameras in

[65] Para. 3.
[66] Para. 7.

correctional centres in British Columbia do not provide 100% coverage of all areas in the centre and in some cases there are camera blind spots. He gives his opinion that the public release of video footage in correction centres could result in inmates being able to position themselves to avoid surveillance or assist the planning of jailbreaks or the smuggling of contraband. His concluding opinion is that the security of correctional facilities depends on details about security systems remaining private and that unrestricted public release of that information could have disastrous consequences for the inmates, staff and visitors, as well as members of the public in the event of escape.

[83] Mr. Moniz's evidence is not time specific. The general nature of the evidence strongly suggests that it was as available in 2007 as in 2009. There is no explanation why it was not provided to the inquiry the Adjudicator conducted, or before March 2009. None of his evidence is specific to the VCJ or the DVRs in Order F08-13. There is no indication that he is familiar with either the DVRs or with the VCJ during the period of its renovation when the DVRs were taken or otherwise.

[84] I would not re-open Order F08-13 to consider the evidence in this affidavit as it was not provided diligently, is not established to have been unavailable at the time of the inquiry by the Adjudicator and, given its generality and lack of connection to any of the specific facts of that inquiry, could not reasonably be expected to have affected the result of the order.

Affidavit of Matt Lang (July 24, 2008)

[85] The affidavit of new evidence from Matt Lang, a Deputy Warden with the Corrections Branch of the Ministry, was sworn on July 24, 2008, in support of the Ministry's application for judicial review, which was filed on August 8, 2008. He has 23 years' experience working for the Corrections Branch and was Acting Warden at the VCJ at the time of the Requester's incarceration there. This affidavit is additional to an affidavit of Deputy Warden Lang, sworn on March 19, 2007, which was in evidence in the inquiry before the Adjudicator.

[86] Deputy Warden Lang's affidavit in evidence in the inquiry related that he investigated the Requester's allegations that she was mistreated at the VCJ. His investigation involved reviewing some of the DVRs with the Requester. He concluded there was no wrongdoing by any correctional officers. He deposed that he had no concerns about the Requester viewing the DVRs, but he was opposed to copies being released to her for possible wide dissemination. He also provided evidence about the DVRs and the VCJ, under the headings "Camera Limitations", "Security Features of the Jail" and "Threats of Escape". Some of Deputy Warden Lang's evidence in the five paragraphs under the heading "Camera Limitations" was specific to DVRs 2 and 3, the DVRs of the Requester's detention in cells that the Adjudicator ordered to be disclosed to her in severed form in Order F08-13. Some of his evidence was cast in wider

language, but with the implication that it applied to the cells recorded in DVRs 2 and 3. Paragraph 18 of the March 19, 2007, affidavit reads as follows:

> 18. It is not uncommon for individuals to try to break or obscure the cameras in their cells, with intent of escaping video surveillance. This occurs approximately once per month.

[87] In Order F08-13, the Adjudicator analyzed Deputy Warden Lang's evidence about DVRs 2 and 3 that was before her, as follows:

> [44] As noted above, it appears that DVRs #2 and #3 contain the information of interest to the applicant. Each of these DVRs is shot entirely within a cell. The only concern raised by the Deputy Warden specific to these DVRs is the fact that the DVRs reveal some information about the camera's limitations: first, what portion of the cell cannot be seen by the security camera; and second, that some of the images are of poor quality.
>
> [45] I agree that disclosure of gaps in the coverage of a surveillance system might compromise the effectiveness of such a system in some circumstances. However, in DVRs #2 and #3, the cells are small and the blind spots appear to be very limited. In addition, the nature of the blind spot is such that it is likely obvious to anyone who can see the camera's position and angle. Nothing in the evidence suggests that the cameras are hidden or inaccessible. Indeed, the evidence of the Deputy Warden is that inmates often try to disable the cameras. This suggests that they are easily identified. In the case of DVRs #2 and #3 then, there is nothing of significance about the cameras' limitations which will be disclosed by the footage which would not already be apparent to anyone in a position to take advantage of the blind spot. There is no clear and direct connection between the disclosure of the information in question and the alleged harm.
>
> [46] With respect to the poor quality of portions of the video, I do not accept that this is a serious limitation which would be likely to be exploited in a manner which would give rise to the concerns raised by the public body.
>
> [47] The Deputy Warden's affidavit does set out specific concerns which he has with revealing the layout and security features of the VCJ. However, none of these relates to DVRs #2 and #3. Unlike some of the other DVRs, these tapes do not show the movement of officers or personnel through various parts of the VCJ, and do not show the relationship of the various areas in the VCJ to each other. As a result, these DVRs are not likely to raise the security concerns set out in the Deputy Warden's affidavit.
>
> [48] Because DVRs #2 and #3 are limited to the interiors of single cells, they are also unlikely to give rise to the concerns cited by the public body in its submissions on the mosaic effect….

[88] Deputy Warden Lang's new evidence in his affidavit sworn on July 24, 2008 is mostly general and contextual in nature: the Ministry's goals, how

the Corrections Branch is organized, the objectives of jail security, jail security as a holistic concept, the confidential nature of security, the safety of correctional officers. The nature of this evidence, which overlaps to some extent with areas covered by his earlier affidavit that was in evidence in the inquiry, strongly indicates that it was as available in 2007 as in 2008. There is no explanation why it could not have been and was not included in the earlier affidavit. I would not re-open Order F08-13 to consider this evidence in his new affidavit, as it would have been available at the time of the inquiry by the Adjudicator. Also, given its generality, this new evidence could not reasonably be expected to have affected the result of the order.

[89] His affidavit of new evidence concludes with five paragraphs under the heading "Effect of Order". In paragraphs 38 to 40, Deputy Warden Lang expresses the view that the approach to DVR disclosure taken in Order F08-13 would interfere with the operation of correctional services in British Columbia in terms of time and cost of creating edited records for release. There is no explanation why this evidence was not included in his affidavit provided to the inquiry. The heading "Effect of the Order" might suggest that this evidence only became available or its relevance only became known after the order was issued. However, the content of the evidence itself indicates otherwise, as does the record of the inquiry where the Ministry provided two affidavits to the Adjudicator on the feasibility and reasonability of requiring it to sever and disclose the DVRs.[67] One Ministry affiant in the inquiry deposed as follows:

> 5. After becoming aware that this inquiry was proceeding, I investigated what would be required to sever the DVRs, in case the Commissioner did not agree that the records should be withheld in their entirety. I knew that it was a possibility that the Commissioner would want portions of the DVRs severed (removing and/or obscuring portions of the image) which show security features or third parties. I knew that my office does not have the technology to sever the DVRs.[68]

[90] I would not re-open Order F08-13 to consider paragraphs 38 to 40 of Deputy Warden Lang's new affidavit, as that evidence would have been available at the time of the inquiry before the Adjudicator and, in any case, could not reasonably be expected to have affected the result of the order.

[91] In paragraph 41 of his affidavit of new evidence, Deputy Warden Lang deposes that cameras in correctional facilities include fixed, pan and tilt and zoom functions that capture various angles and areas. Finally, he deposes as follows in paragraph 42:

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[67] Affidavit of Vicki Hudson, Acting Director of Privacy, Information and Records Management Division of the Ministry, sworn on March 16, 2007, and affidavit of Dorothy Fielding, Privacy Analyst with the Privacy, Information and Records Management Division of the Ministry, sworn on May 15, 2007.

[68] Affidavit of Vicki Hudson, Acting Director of Privacy, Information and Records Management Division of the Ministry, sworn on March 16, 2007.

> 42. In many facilities, including the Vancouver Jail, many of the cameras are not visible. Instead, many of the cameras are located behind barriers that allow the camera to function but hide it from view. In this way, the type of camera in an area is not identifiable, and the angle(s) it covers, and any blind spots, are not known by simple observation. For all of the cameras, the location of the blind spot is unknown until you see the image it projects.

[92] I understand the new evidence in paragraphs 41 and 42 to be directed to the issue of the visibility of the cameras for DVRs 2 and 3, because the Adjudicator is said to have had no evidence before her upon which to infer that the cameras were visible[69] when in fact they were not.[70]

[93] I would not re-open Order F08-13 to consider paragraphs 41 and 42 of Deputy Warden Lang's affidavit of new evidence for several reasons. This evidence would have been available at the time of the inquiry and there is no explanation why it was not provided at that time.

[94] In my view, this evidence also fails to meet the requirements of relevance to a decisive or potentially decisive issue and a reasonable expectation that if believed it could reasonably be expected, taken with other evidence in the inquiry, to have affected the result of Order F08-13.

[95] Careful review leads me to conclude that there was indeed support in the record of proceeding for the inquiry for the Adjudicator's finding in Order F08-13 that the evidence suggested the cameras for DVRs 2 and 3 were easily identified. The Adjudicator closely paraphrased the evidence under the heading "Camera Limitations" in Deputy Warden's affidavit about inmates in cells often trying to disable cameras and where blind spots for the cameras for DVRs 2 and 3 are also addressed. In making this observation, I am not saying that the cameras in the cells for DVRs 2 and 2 were hidden or not. I am saying there was evidence on which the Adjudicator expressly drew to reach her conclusion on this point.

[96] Which brings to me to the new evidence of Deputy Warden Lang that many cameras in use, including in the VCJ, are not visible because they are located behind barriers that obscure the type of camera and the angles it covers. This evidence is not conclusive as to the set up of the cameras for DVRs 2 and 3. It does not even address those cells and cameras. The new evidence is also not clear whether camera barriers themselves, some or all, are not visually detectable or whether the barriers are detectable in the sense that occupants of the spaces can visually observe the existence of a barrier (camera cover) knowing it likely shields a camera, with the camera itself, its type, angle

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[69] Order F08-13, para. 45.
[70] Letter from counsel for the Ministry (July 14, 2009), p. 3.

and other features being obscured by the barrier. I fail to see how this new evidence of Deputy Warden Lang bears upon decisive or potentially decisive questions about the cameras for the DVRs in Order F08-13 (whether they were hidden, the camera type, angle or other recording features) and, when taken with the other evidence in the inquiry, could be expected to have affected the result of the Adjudicator's order.

[97] **3.6 Section 15 of FIPPA**––The Ministry says that the Adjudicator used the wrong test of harm under s. 15.[71] The Correctional Officer agrees and also raises an issue about how the Adjudicator analyzed s. 15(1)(f). She says these are patently unreasonable errors and therefore matters of jurisdiction that make Order F08-13 a void decision that can be rectified by re-opening.[72]

[98] The Requester says Order F08-13 requires no clarification with respect to s. 15. She also addresses the Ministry's and the Correctional Officer's attacks on the Adjudicator's analysis of s. 15.[73] She points out that, while the Adjudicator quoted from Order 00-01, her subsequent references to later Orders 03-08 and 02-50[74] show that she was fully aware of the current cases and the reasonable expectation of harm test stated by the Ontario Court of Appeal in its 1999 decision, *Ontario (Minister of Labour) v. Big Canoe*.[75]

[99] In the Ministry submission of February 10, 2010, its counsel states that "even in April of 2009 the Ministry was not aware of this pivotal case."[76] There is no question that this Ontario case was cited and quoted in Order 02-50,[77] which the Adjudicator cited and quoted in Order F08-13,[78] as well as in other British Columbia orders.[79] I do not know, nor is it necessary to know, if or why the Ministry or its counsel did not read the British Columbia orders that discussed the Ontario case.

[100] In my view, the issues the Ministry and the Correctional Officer raise about the Adjudicator's interpretation and application of s. 15 were well within her jurisdiction and invite no scope for re-opening Order F08-13. I see no premise (accidental slip, inadvertent omission, unfairness, incomplete disposition, fresh evidence, circumstance undermining the integrity of the decision) for re-opening Order F08-13 to reconsider those matters.

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[71] Ministry submission (July 14, 2009), pp. 1-2; Ministry submission (August 5, 2009), pp. 3-4; Ministry Outline on its application for judicial review, paras. 71-80.
[72] Correctional Officer submission (August 13, 2009), pp. 5-6, referring to Order F08-13, paras. 25-28.
[73] Requester submission (September 10, 2009), pp. 6-7.
[74] Order 03-08, [2003] B.C.I.P.C.D. No. 8 and Order 02-50, [2002] B.C.I.P.C.D. No. 51.
[75] (1999), 181 D.L.R. (4th) 603, [1999] O.J. No. 4560 (C.A.).
[76] Page 3.
[77] Para. 130.
[78] Para. 27.
[79] Order No. 00-10, [2000] B.C.I.P.C.D. No. 11, para. 36; Order 04-06, [2004] B.C.I.P.C.D. No. 6, para. 55; Order F08-22, [2008] B.C.I.P.C.D. No. 40, paras. 46-47.

[101] **3.7 Sections 19 and 22**—The Correctional Officer also raises issues about s. 19 (should have been considered though not raised by any participant in the inquiry) and s. 22 (inadequate explanation of the discharge of the burden of proof; lack of evidence and wrong conclusion on the evidence).[80] I already addressed these in part through my consideration of whether the evidence in the Correctional Officer's affidavit sworn on April 3, 2009 met the test for re-opening to admit new evidence.

[102] I do not agree with the Correctional Officer's submission that these issues involve patently unreasonable errors and are therefore matters of jurisdiction that make Order F08-13 a void decision which can be re-opened for rectification. In my view, these issues, like those raised concerning s. 15, were well within the Adjudicator's jurisdiction and invite no scope for re-opening her order. I see no premise (accidental slip, inadvertent omission, unfairness, incomplete disposition, fresh evidence, circumstance undermining the integrity of the decision) for re-opening Order F08-13 to reconsider those matters.

[103] **3.8 Completion of Jurisdiction**—The Ministry maintains that the Adjudicator had to decide access to all the DVRS, not just DVRs 2 and 3, and her failure to do so was an error of jurisdiction.[81] The question at this juncture is whether Order F08-13 can and should be re-opened to complete that jurisdiction.

[104] In the final paragraph of Order F08-13, the Adjudicator ordered the Ministry to give access to DVRs 2 and 3, subject to certain conditions.[82] With respect to DVRs 1, 4, 5 and 6, she imposed terms for the Requester to be able to view the remainder of the DVRs to determine if they were of interest to her and inform the Commissioner's office within one week if she wished to pursue disclosure of any of them. The Requester took those steps.[83] Then Order F08-13 was stayed by operation of s. 59(2) of FIPPA when the Ministry filed its application for judicial review on August 8, 2008.

[105] Early in Order F08-13, the Adjudicator had noted that the request for review stated the Requester "would like a copy of the video, only as it pertains to her treatment"[84] presumably by staff at the VCJ. The Adjudicator viewed all six DVRs.[85] She decided to treat the request for review "as being for DVRs 2 and 3, since they are the only ones which appear to be relevant to the incidents identified by the applicant", observing as follows:

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[80] Correctional Officer submission (August 6, 2009), pp. 8, 10; Correctional Officer submission (August 13, 2009), pp. 4-6;

[81] Ministry petition for judicial review, p. 5, ground 4; letter from counsel for the Ministry (July 14, 2009), p. 2.

[82] Order F08-13, para. 72. Section 58(4) of FIPPA authorizes the Commissioner to impose terms or conditions in an order.

[83] Letters between the Requester, Commissioner's staff and counsel for the Ministry dated July 4, 11, 28 and August 6, 2008.

[84] Order F08-13, para. 2.

[85] Para. 11.

> As noted, the Deputy Warden has stated that the applicant and the Deputy Warden viewed parts of DVRs #4 and #5 and the public body had indicated its willingness to allow the applicant to review the DVRs in their entirety. If any of the parties have reason to believe that any of the DVRs record other aspects of the incidents referred to by the applicant, they are to notify this office within 10 business days of the date of this decision.[86]

[106] The Adjudicator focused the inquiry on the terms of the request for review. This was proper. She was as transparent as she could be about why only DVRs 2 and 3 appeared to her to be responsive to the Requester's interest in how she was treated in the VCJ. She left it open to the Requester to clarify if she was seeking some or all of DVRs 1, 4, 5 and 6. Shortly after Order F08-13 issued, the Requester did just that, but soon after that the Ministry filed its application for judicial review, which had the effect of staying Order F08-13. I consider this a circumstance of incomplete disposition where the Adjudicator fully realized that her task might not be finished, as opposed to a circumstance of re-opening a jurisdiction that she mistakenly thought was concluded.

[107] Incomplete disposition may happen when a decision maker intends to make a final disposition but, through a mistake, has failed to make a valid decision. Such was the case in *Chandler*, where the board mistakenly issued a disciplinary rather than a practice review disposition. Having made no proper disposition, *functus officio* did not prevent the board from completing its statutory task.

[108] Incomplete disposition may also happen when a decision maker simply has a statutory task that is not, or might not yet be, completed. The potential for outstanding completion, implementation and compliance issues will be unsurprising when conditions are attached to an order, as was the case here. As MacAulay and Sprague put it:

> The issuance of a conditional order may not render a decision-maker *functus* as long as the conditions remain in effect.[87]

[109] The decision of the Alberta Court of Appeal in *IMS Health Canada, Ltd. v. Information and Privacy Commissioner*[88] is an example of *functus officio* posing no impediment to the issuance of successive orders to complete the disposition of an application. In that judicial review case, the Alberta Information and Privacy Commissioner argued that a case management judge was *functus officio* after he made an order requiring the filing a supplemental return of relevant documents, also agreed to hear any later requests for clarification on what documents were to be included in the supplemental return and eventually did

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[86] Para. 15.
[87] R.W. MacAulay and J.L.H. Sprague, *Practice and Procedure Before Administrative Tribunals*, loose-leaf (Toronto: Carswell, 2004), p. 27A.36.3.
[88] 2005 ABCA 325, paras. 12, 20.

make a second order. The Alberta Court of Appeal took no exception to the reservation of authority to issue successive orders if necessary:

> The case management judge was not *functus officio* when he ordered additional items to be included in the return. In the First Order the case management judge ordered extra inclusions but also reserved the right to examine the sufficiency of the supplementary return. The Second Order was simply a clarification of the First Order. The case management judge did not, therefore issue a final Order with the First Order, rather he reserved the right to further examine the sufficiency of the material produced: see *Chandler v. Assn. of Architects*, [19889] 2 S.C.R. 848 at para 75.

[110] In Order F08-13, the Adjudicator was aware that her disposition might not be complete, so she crafted conditions that provided a path to address the Requester's right of access to the remaining DVRs, should that be necessary. To put the matter in the language of *Chandler*, the Adjudicator addressed what she believed the Requester was seeking in her request for review but left it open to clarification. The Requester then did clarify that, despite the Adjudicator's impression of the unresponsiveness of the other DVRs to the Requester's interest, she did want to pursue access to DVRs 1, 4, 5 and 6. The Adjudicator was not *functus officio* and the issuance of Order F08-13 did not prevent the task from being completed.

[111] Finally, the Ministry's position that it was a jurisdictional error in Order F08-13 for the Adjudicator not to decide access to all of the DVRs does not square with its other position that the Supreme Court must quash Order F08-13 and remit it back before the Commissioner can make a decision on the remaining DVRs.[89] In *Mitzel v. (Law Enforcement Review Board)*,[90] leave to appeal a board decision was denied when all that was required was to return to the board and allow it to complete the discharge of its function:

> …One factor to consider in granting leave is whether the applicants have an alternative, more appropriate, or more expeditious remedy available to them. In this case the obvious remedy appears to be to apply to the Board to have it provide the missing particulars.
>
> The applicants indicated that they did not pursue the obvious solution because of fear that the Board may be *functus officio*. It is, however, inconsistent to argue that the Board has failed to discharge a mandatory part of its functions, and also to argue that it cannot discharge them a "second" time. If the Board provided one set of particulars, and then purported to revisit the matter and provide a second, inconsistent set of particulars, an argument of *functus officio* might arise. But here it is suggested that the Board never exercised its jurisdiction. The Board is not being asked to revisit or change its decision, but merely to provide the substance of its decision in a more formal and detailed manner.

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[89] Ministry submission (August 5, 2009), pp. 1, 4.

[90] 2009 ABCA 288 (Slatter J.A. in Chambers).

> [passage omitted from *Chandler* at p. 862]
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> In this case the Board would not be asked to revisit its decision. Rather, it would be asked to "dispose of an issue empowered by its enabling statute", namely the provision of particulars with respect to the charges it directed should be laid. Alternatively, the inadvertent overlooking of the *Donald* case [requiring particulars to be provided] would fall into the category of a "slip or error".[91]

[112] At the end of Order F08-13, the Adjudicator stated her willingness to consider the remaining DVRs should that be necessary. The Requestor asked for that shortly after the order issued. The Ministry filed its application for judicial review, with its ground of review that the Adjudicator had erred in not dealing with access to all of the DVRs. In the absence of the pending application for judicial review and the associated stay under s. 59(2), the Requester's pursuit of the remaining DVRs could have been addressed in a further decision.

[113] **3.9 Severing DVRs 2 and 3**—The Ministry says that it cannot comply with the Adjudicator's requirement to sever DVRs 2 and 3 "in a fashion which complies with its obligations under FIPPA to safeguard personal information".[92] If the Commissioner has authority to re-open Order F08-13 on this issue, which the Ministry denies, it would apply for that. I have already described the Ministry's new evidence in this area, the affidavit of Joanne Gardiner sworn on April 17, 2009, and why it does not meet the test for re-opening Order F08-13. I will now address re-opening to amend or vacate all or part of an order that is said to be impossible of performance.

[114] In the inquiry, the Ministry provided two affidavits about severing. The first, the affidavit of Vicki Hudson, acknowledged the possibility that the Adjudicator would require severing of the DVRs and described inquiries that had been made about the technical capability of the Ministry and the provincial government to do that. The affidavit concluded as follows:

> 11. The Ministry does not have the ability to sever these records as the DVRs are an unusual medium for records of the Ministry. Based on my conversation with numerous branches of government, I am not confident that this severing could be done by any Province of British Columbia agency of ministry. I believe that severing the DVRs would require them to be sent to an outside agency or company. Therefore, I do not believe it would be reasonable to require the Ministry to sever the DVRs.[93]

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[91] paras. 3-5.

[92] Letter from counsel for the Ministry (July 14, 2009), p. 2; also, Ministry petition for judicial review, p. 5, grounds 2(e), (f) and (g).

[93] Affidavit of Vicki Hudson, Acting Director of Privacy, Information and Records Management Division of the Ministry, sworn on March 16, 2007.

[115] The second Ministry affidavit, of Dorothy Fielding, was four paragraphs long and focused on the cost of editing the DVRs. It concluded with the following information from a manager at FINALE Editworks, a film and video editing services business:

> 4. Mr. Keeling advised me, and I believe it to be true, that based on the limited information I was at liberty to give him, that it takes approximately one day to edit an hour of "avi." Video files, when the editing consisted of blurring faces and possibly other items appearing in the images. Therefore as there are 6 hours of DVRs, it could take as long as six days to process. Their fee for this kind of work is $225 per hour and $1800 per day. Therefore if FINALE needed the estimated 6 days to process the DVRs, the fee would total $10,800.00.[94]

[116] At this point in the inquiry, the Ministry's submission to the Adjudicator on severing was as follows:

> 7. The Ministry submits that not only does the Ministry lack the technical ability to sever the videos "in-house", the cost of hiring a private firm – assuming adequate security and staff screening could be established, which might prove burdensome or impossible – is prohibitive, at an estimated $10,800.00. Given that the Ministry anticipates the resulting videos would be of very poor quality or incomprehensible, the Ministry submits that it would not be reasonable to sever the videos at such high cost.[95]

[117] It will be noted that the Ministry's case on severing was that: it lacked in-house technical expertise to do it and could not confirm whether the government Public Affairs Bureau had the expertise; security arrangements to use private sector services could be a burden or problem and would be expensive; and it was not a worthwhile exercise because of the poor or incomprehensible quality of the DVRs.

[118] In the inquiry, the Ministry did not resist severing the DVRs on the ground that it was not technically possible.

[119] Two of the Requester's submissions to the inquiry responded to the Ministry on the issue of severing. In the first, she said this (unsworn):

> 14. Regarding their claims that editing the DVRs is technically complex and that it is massively time consuming given that there is more than 6 hours of recordings. They have provided no letters from these supposed companies they claim to have spoken to and were told it was impossible to do. I have been told it is a very easy process. Regarding it being massively time consuming, well what a pity, spending 57 hours falsely

[94] Affidavit of Dorothy Fielding, Privacy Analyst with the Privacy, Information and Records Management Division of the Ministry, sworn on May 15, 2007.
[95] Ministry submission to the Adjudicator (May 15, 2007), para. 7.

> imprisoned where I was also tortured and physically and mentally assaulted was very time consuming for me.[96]

[120] Her second submission on severing was longer. She questioned how six hours of video could be involved and related (again unsworn) information she said she gathered from FINALE Editworks and another film and video editing business:

> …I called FINALE Edit works myself and spoke with an employee there named Michelle and the only thing stated in the affidavit provided by Dorothy Fielding that was true and not misleading was the cost per hour of $225.00 that this company charges. She also opted to call one of the most expensive editing companies in the city. I was told that it was not difficult to blur out faces and it certainly wouldn't take an entire day to work on one hour of video footage especially since the entire hour wouldn't be spent blurring out people's faces.…
>
> I was also on the phone with his staff member Michelle for 5, 10 minutes at the most to get these same questions answered so I really don't know what Dorothy Fielding is stating in her affidavit as she states that she was necessarily vague in her description of the nature of the images she was describing the type of editing that they would require but then states that this Mr. Keeling was very accommodating and went to a lot of trouble to understand their situation and even went and discussed it with his editing technician and called her back. Well, what I would like to know is, if she was necessarily vague in her description of what needed to be done then what in the world did Mr. Keeling have to discuss with his editing technician….
>
> I even went a step further though and called another company and this company only charges $60/hr and can do all that is required for $4,000.00 or less. I spoke with Steve Cosmic who is the owner of Bushpilot Productions, a film making company and his phone number is…[97]

[121] Paragraphs 66 to 71 of Order F08-13 address severing. After canvassing the relevant evidence and submissions, the Adjudicator concluded from her review of DVRs 2 and 3 that the only required severing of DVR 3 is to cut it short, so that the end is excised where it is possible to see other people moving about when the Requester is being removed from the cell. She held that there was, "no evidence before me which suggests that this would be difficult to do."[98] For DVR 2, she concluded that the face of another prisoner in the cell would have to be blacked out or blurred for a period of less than one minute when it is visible during the Requester's altercation with a correctional officer and to the extent that the other prisoner's face may also be visible when she is brought into the cell.[99]

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[96] Requester submission to the Adjudicator (May 24, 2007), para. 14.
[97] Requester submission to the Adjudicator (March 17, 2008), pp. 1-2.
[98] Order F08-13, para. 69.
[99] Para. 70.

[122] The Adjudicator concluded that the evidence did not persuade her that the small amount of editing required to sever DVRs 2 and 3 was impossible or prohibitively expensive or that arrangements could not be made for appropriately secure outsourcing of the task.[100] She required the Ministry to provide the Requester with copies of DVRs 2 and 3, edited to withhold the indicated portions.[101] The focus of the evidence in the inquiry was on severing a digital record, but I do not read the order made to impose a condition (under s. 58(4) or direction for severing (under s. 54.1(2)(b)) that requires access be given in digital format, if another means of complying with the duty to sever under s. 4(2) turned out to be preferable, such as one involving conversion of the DVRs to an older-technology VHS analog format for editing and disclosure purposes.

[123] I have no doubt that, in a proper case, a public body faced with an order that was impossible of performance because of a truly unforeseen or new circumstance could apply for the order to be re-opened and the Commissioner, following a both purposive and flexible application of principle of finality, could re-open and amend or vacate the order. Some examples that come to mind would be where a record in issue has been accidently or inadvertently destroyed, where it is discovered that the integrity of the inquiry and order has been undermined by fraud or where the test for the admission of new evidence is met.

[124] It is my respectful conclusion that such a case for re-opening the severing aspect of Order F08-13 has not been made out.

[125] I would only add reference here to Commissioner Loukidelis's discussion of severing of electronic records in Order 03-16,[102] which concerned an electronic copy of a snapshot of a very large computerized enforcement and compliance tracking system maintained by the Ministry of Forests:

> [51] …The test under s. 4(2) is one of reasonableness. There is no presumption (explicit or implicit) in this test that it is reasonable to sever excepted information only if the public body has the "normal computer hardware and software and technical expertise" for the task. On the Ministry's interpretation of s. 4(2), a public body could replace paper records with electronic records and fail, by design or for other reasons, to develop or acquire computer software or hardware, or technical skills, to sever the electronic version of the records. This would automatically qualify as a circumstance in which information excepted from disclosure cannot be reasonably severed and there would be no right of access to the remainder of the record.
>
> [52] I am not prepared to say that the severing of an electronic record is (as the Ministry says) "qualitatively" different from paper severing in a way

[100] Para. 71.
[101] Para. 72.
[102] [2003] B.C.I.P.C.D. No. 16.

that excuses public bodies from the duty to sever electronic records or carries a lower threshold of what can reasonably be severed under s. 4(2). Nor am I prepared to say that a public body must be excused from severing under s. 4(2) if it would have to develop, acquire or engage the use of technological equipment, methods or skills in order to sever electronic records or to sever them efficiently (such as with a photocopier that has special features for producing severed copies of records).

…

[61] I would add, finally, that there is no room under s. 4(2) for drive-by assessments of whether a record is reasonably severable based (for example) on the assumptions that, because the record is of a particular type, it is unlikely to contain information that must be disclosed, or it is unlikely that excepted information can reasonably be severed. Records of all kinds and in all formats must be reviewed to determine which portions must be disclosed and which can or must be withheld. The duty to sever can only be performed case by case, in light of the contents of the record at hand, and that duty generally entails examination of each portion of the record.

[62] I will now address whether, in light of the evidence and the above observations, the requested ERA snapshot can "reasonably be severed". This case is close to the line, but I am persuaded, in the end, that the ERA snapshot cannot "reasonably be severed" within the meaning of s. 4(2) of the Act and that the Ministry is not required to sever even the truncated version of an ERA snapshot that the applicant has indicated would be acceptable.

[63] The conclusion I have reached in this case should not be taken to suggest that public bodies do not have an obligation to sever electronic records by electronic means. They do. If an electronic record is requested, then the severing has to take place, subject only to the limits of the s. 4(2) duty as determined in each case. This case involved an access request for a record that contains a very large amount of information. This aspect of the applicant's request converged with the growing pains and complexities of the Ministry's large-scale movement to electronic technology as its primary means of compiling and managing case tracking information.

[64] It is not an option for public bodies to decline to grapple with ensuring that information rights in the Act are as meaningful in relation to large-scale electronic information systems as they are in relation to paper-based record-keeping systems. Access requests like this one test the limits of the usefulness of the Act. This is as it should be. Public bodies must ensure that their electronic information systems are designed and operated in a way that enables them to provide access to information under the Act. The public has a right to expect that new information technology will enhance, not undermine, information rights under the Act and that public bodies are actively and effectively striving to meet this objective.

[126] Commissioner Loukidelis's remarks in paragraph 64, above, were quoted with approval by the Ontario Court of Appeal in its landmark decision about the re-formatting of information in an electronic database for severing purposes, *Toronto Police Services Board v. Ontario (Information & Privacy Commissioner)*.[103]

[127] **3.10 Viewing of the DVRs by the Requester**—The Ministry says that the Adjudicator could not order a viewing of the DVRs by the Requestor because they contain personal information of third parties.[104]

[128] The context for this aspect of Order F08-13 was that, when the Adjudicator viewed the six DVRs, it appeared to her that only DVRs 2 and 3 were relevant to incidents of interest to the Requester.[105] Deputy Warden Lang had deposed that he had reviewed some of the DVRs with the Requester and he had no concerns about her reviewing the DVRs, but had serious concerns about releasing copies of them to her.[106] Moreover, in its submissions to the Adjudicator, the Ministry said it was amenable to an order under s. 9(2) [*sic*] requiring it to allow the Requester to view the unsevered DVRs at a Ministry office.[107] So the Adjudicator crafted a term of her order that, if the Requester wished to view the remaining DVRs to determine if they are relevant to matters of interest to her, she could make a request in writing and the Ministry was to provide viewing access within one week.[108] The Requester did have a further viewing of the DVRs with Deputy Warden Lang soon after Order F08-13 issued, just before she gave notice that she wanted to pursue access to DVRs 1, 4, 5 and 6.[109]

[129] In my view, this part of Order F08-13 was within the Adjudicator's jurisdiction to make and it is also spent. No scope is invited for re-opening Order F08-13. I see no premise (accidental slip, inadvertent omission, unfairness, incomplete disposition, fresh evidence, circumstance undermining the integrity of the decision) for re-opening order to reconsider this issue.

[130] **3.11 The Requester's Objectives**—The Requester is greatly dismayed by the course of her request for access to records (the DVRs) under FIPPA. This needs to be put in perspective. The access request has taken longer and raised

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[103] (2009), 307 D.L.R. (4th) 1 (Ont. C.A.), para. 55.
[104] Letter from counsel for the Ministry (July 14, 2009), p. 2; Ministry petition for judicial review, p. 5, ground 3.
[105] Order F08-13, para. 15.
[106] Paras. 6, 8 of the affidavit #1 of Matt Lang, Deputy Warden with the Corrections Branch of the Ministry, sworn on March 19, 2007, in the Ministry's initial submission.
[107] Ministry submission to the Adjudicator (March 19, 2007), para. 77. The reference to s. 9(2) of FIPPA was probably intended to be to examination of a record under s. 9(3).
[108] Order F08-13, para. 72.
[109] Letters between the Requester, Commissioner's staff and counsel for the Ministry dated July 4, 11, 28 and August 6, 2008.

more complications that she, perhaps everyone, would have hoped or anticipated.

[131] The Requester made her access request for the DVRs in aid of a civil suit she brought over her allegations of mistreatment by staff at the VCJ. She clearly also wants to be able take recorded evidence of the alleged mistreatment public. Her experience with this access request is made more upsetting for her because she believes or understands that others have been able to use FIPPA easily to obtain video footage of their incarceration in jail.[110]

[132] A lawyer assisting the Requester completed, by hand, the request for review form in this case and the Requester has been represented by counsel in the applications for judicial review of Order F08-13 and on these applications about re-opening. However, she appears to have been self-represented in her submissions to the Adjudicator and she may well also be self-represented in her civil proceedings about her alleged mistreatment at the VCJ.

[133] In adjourning the Ministry's and the Correctional Officer's applications for judicial review of Order F08-13, the Chambers Judge observed that there are means under the *Supreme Court Rules* for the Requester to obtain prompt production of relevant evidence including the DVRs for purposes of her lawsuit, but not for her to disclose that evidence at large.[111] Section 3(2) of FIPPA also clearly provides that this legislation does not limit the information that is available by law to a party to a proceeding. Insofar as the Requester considers the DVRs vital to her civil lawsuit, she must accept that the rules governing discovery in the litigation process are available to her and always have been available to her, quite apart from a right of access to the DVRs under FIPPA.

[134] The right of access to records under FIPPA is a very important one, as are the limited exceptions to access that FIPPA provides for. The Requester's interest in obtaining access to DVRs of her detention at the VCJ with the ability, if she chooses, to disclose them to others or make them public is a significant interest in itself, quite independent of her litigation about the alleged mistreatment at the VCJ. The processes for exercising and contesting rights under FIPPA must be respected. Having said that, it should be acknowledged that this request for access has had unusual turns along the way and some time delays at several stages.

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[110] Requester submission to the Adjudicator (February 21, 2007), pp. 1-2; Requester submission to the Adjudicator (March 17, 2008), p. 1.

[111] *Ministry of Public Safety and Solicitor General and others v. Information and Privacy Commissioner of British Columbia and others*, SCBC Dockets S085647 and S092479, Vancouver Registry (Oral Reasons, 3 June 2009), p. 6.

4.0 CONCLUSION

[135] For the reasons given, I would not re-open Order F08-13 and I regard consideration of access to DVRs 1, 4, 5 and 6 as a continuation of the Commissioner's jurisdiction that could proceed were it not for the stay under s. 59(2) of FIPPA occasioned by the pending applications for judicial review of Order F08-13.

March 16, 2010

ORIGINAL SIGNED BY

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Celia Francis
Senior Adjudicator

OIPC File: F06-29299