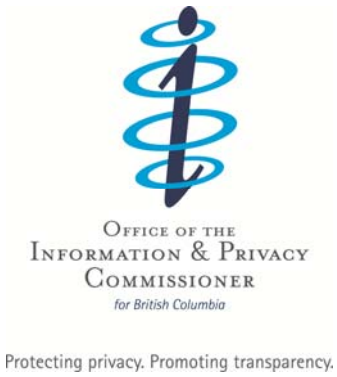

Order F11-21

MINISTRY OF EDUCATION

Jay Fedorak, Adjudicator

August 18, 2011

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Summary: An education data analyst complained about the refusal of the Ministry of Education to grant him access to identifiable student exam results under s. 35 of FIPPA. The Ministry was found to have exercised discretion appropriately in refusing a previous request for the same data. The Ministry is not required to re-exercise its discretion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 35.

Authorities Considered: **B.C.:** Order F09-21, [2009] B.C.I.P.C.D. No. 27; Order F10-29, [2010] B.C.I.P.C.D. No. 41; Decision F10-08, [2010] B.C.I.P.C.D. No. 42; Order 00-36, [2000] B.C.I.P.C.D. No. 39; Order F07-06, [2007] B.C.I.P.C.D. No. 8; Order F10-43, [2010] B.C.I.P.C.D. No. 52; Order No. 154-1997, [1997] B.C.I.P.C.D. No. 12; Order 02-38, [2002] B.C.I.P.C.D. No. 38. **Ont.:** Order P-58 (unreported), May 16, 1989; Order PO-2693, [2008] O.I.P.C. No. 133.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* 2010 SCC 23.

INTRODUCTION

[1] An educational data analyst ("complainant") challenged the refusal of the Ministry of Education ("Ministry") to grant him access to individually identifiable student results of the province-wide Foundation Skills Assessment ("FSA") tests through a research agreement under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). He sought this information to include with other data in

information packages that he sells to Boards of Education in British Columbia. The complainant had received similar information from the Ministry under research agreements during previous years, but the Ministry subsequently refused to enter into any more research agreements. The reason it gave initially was that the proposed use of the student results did not constitute "research".

ISSUE

[2] The question I must decide is whether the Ministry appropriately exercised its discretion in deciding not to renew its research agreement with the complainant.

[3] After the Office of the Information and Privacy Commissioner ("OIPC") re-issued the hearing notice in November 2010, the Ministry objected to the issue as characterized and requested that the scope of the hearing be changed to whether the complainant's intended use of the information constituted "research". The OIPC declined to reframe the issue, stating that this was a concern that the Ministry could address in its submission to the hearing.

DISCUSSION

[4] **Background**—For more than 10 years, the complainant has been conducting analysis on a wide range of data relating to students and teachers in the British Columbia school system. He analyses the data for the purpose of producing reports that he makes available for purchase to various Boards of Education in British Columbia, many of which buy the reports. He obtained some data in aggregate form and other data that is identifiable by student. During the first few years, he received student information including demographics, school and course enrolment, graduation, as well as examination and coursework performance. The information on teachers is aggregate employment information including salary.

[5] The complainant takes the information he receives from the Ministry and verifies the accuracy. He then presents the information in tables and graphs that facilitates comparisons over time, as well as at a school, district and provincial level. This enables Boards of Education to compare results between schools in their own districts and see how they compare with other districts and the provincial average.

[6] Originally, the Ministry provided him with aggregate data and student level data through a research agreement in accordance with s. 35 of FIPPA. It later decided that it would no longer provide the complainant with student level data, but would continue to provide aggregate data. The complainant has continued to produce reports annually for his clients using the aggregate data only. He has also continued, unsuccessfully, his attempts to persuade the Ministry to provide him with identifiable information through a research agreement.

[7] The Ministry's decision to cease providing him with identifiable data through a research agreement coincided with its development of a new policy on the provision of personally identifiable data to outside researchers in accordance with s. 35 of FIPPA ("Data Policy"). The complainant met with Ministry staff to discuss the new policy and whether it would affect his requests for research agreements. He submits that, in response to one of his requests, the Ministry's Director of Information Management told him that the new policy did not apply to his project because the Ministry did not consider it to be research. He added that the Ministry said it would not renew the research agreement because it was "unlawful", although it did not say why.[1] The complainant continued to pursue a new research agreement with the Ministry's Director of Information and Privacy, as well as the Director of Information Management. The Director of Information and Privacy indicated that the Ministry did not consider his project to constitute research because it was a "commercial enterprise".[2]

[8] The applicant then made a formal request for access to all of the information that he required for his information packages. The Ministry refused access to some of the information, including all of the identifiable FSA test results, on the grounds that disclosure would constitute an unreasonable invasion of the students' personal privacy, under s. 22.

[9] The complainant requested a review by the OIPC of the refusal of the Ministry to provide him with the personal information that he sought. The OIPC subsequently created two files: one relating to whether disclosure would be an unreasonable invasion of the students' personal privacy, and the other relating to the Ministry's exercise of discretion in refusing to grant him a research agreement. The OIPC dealt with the first issue in Orders F09-21[3] and F10-29[4]. Adjudicator Francis found that the Ministry was required to withhold some, but not all, of the information because disclosure would be an unreasonable invasion of the personal privacy of third parties. As a result, the applicant was granted access to some further data.

[10] The complainant continued to request access to student-level data and complained to the OIPC about the Ministry's refusal.[5] In the meantime, the complainant met with the Ministry's new Director of Information and Privacy to discuss a new agreement that he was proposing. He based the proposal on agreements that he had in place with more than twenty Boards of Education.

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[1] Complainant's initial submission, affidavit of complainant, paras. 34-35.
[2] Complainant's initial submission, affidavit of complainant, Exhibit X.
[3] [2009] B.C.I.P.C.D. No. 27. The OIPC intended to deal with the s. 22 and s. 35 issues in the same inquiry, but decided to separate the issues after the Ministry raised the jurisdictional issue.
[4] [2010] B.C.I.P.C.D. No. 41.
[5] Complainant's initial submission, affidavit of complainant, paras. 46-73.

[11] The Director of Information and Privacy indicated that the Ministry had once again rejected the proposal, this time for the following reasons:

1. That student level data was not necessary to achieve his purpose, and the Ministry was providing him with summary data at the school and district level, which was all that he required;

2. He had not submitted a research proposal to an ethical review committee at a public post secondary institution; and

3. The Ministry had concerns about the security of the data, if it was in his custody.[6]

[12] Prior to the hearing on the present inquiry, the Ministry raised a preliminary objection that the OIPC lacked the jurisdiction to investigate the Ministry's exercise of discretion in declining the complainant's request for access to data through a research agreement. This led to a hearing that resulted in Decision F10-08[7], in which Adjudicator Francis found that the decision to refuse to release information for statistical or research purposes is properly reviewable by the Commissioner.

Legislative Context

[13] Under Part 2 of FIPPA, all applicants have a right of access to information held by public bodies, subject to limited exceptions. The information which the complainant seeks to obtain pursuant to a research agreement is third party personal information that Order F09-21 has already held to be excepted from the general right of access.[8]

[14] Part 3 of FIPPA places limitations on the collection, use and disclosure of personal information by public bodies during the normal course of their business. It permits the collection, use and disclosure of personal information only in specific, identified circumstances and under certain conditions. One example of disclosure that Part 3 permits is the research agreement provision, which grants limited authority to a public body to disclose, to a researcher, third party personal information that FIPPA would otherwise not permit the public body to disclose.

[6] Complainant's initial submission, affidavit of complainant, para. 80.
[7] [2010] B.C.I.P.C.D. No. 42.
[8] Orders F09-21 and F10-29.

[15] Section 35 provides:

> 35(1) A public body may disclose personal information or may cause personal information in its custody or under its control to be disclosed for a research purpose, including statistical research, only if
>
> (a) the research purpose cannot reasonably be accomplished unless that information is provided in individually identifiable form or the research purpose has been approved by the commissioner,
>
> (a.1) the information is disclosed on condition that it not be used for the purpose of contacting a person to participate in the research,
>
> (b) any record linkage is not harmful to the individuals that information is about and the benefits to be derived from the record linkage are clearly in the public interest,
>
> (c) the head of the public body concerned has approved conditions relating to the following
>
> (i) security and confidentiality;
>
> (ii) the removal or destruction of individual identifiers at the earliest reasonable time;
>
> (iii) the prohibition of any subsequent use or disclosure of that information in individually identifiable form without the express authorization of that public body, and
>
> (d) the person to whom the information is disclosed has signed an agreement to comply with the approved conditions, this Act and any of the public body's policies and procedures relating to the confidentiality of personal information.

[16] Section 35 thus provides a public body with the discretion to disclose information pursuant to a research agreement only if the requirements set out in s. 35(1)(a)-(d) are met. Public bodies are accountable for the disclosure of third party personal information through a research agreement and could be subject to a complaint, in the event they disclosed personal information that was not in compliance with all of the requirements of s. 35.

[17] A key element of s. 35 is that in no circumstances does it ever require a public body to disclose third party personal information, even if the project meets all of the required conditions. There is no right of access to third party personal information through a research agreement under s. 35 of FIPPA in the same way that there is a right of access to information under Part 2 of FIPPA. Rather, s. 35 provides that, if the specified conditions in the provision are met, the public body has the option to enter into a research agreement, and thereafter

is permitted to disclose, pursuant to that agreement, information which it would otherwise be required to withhold.

[18] When a public body considers whether to approve or refuse a research proposal that meets the requirements of s. 35, their decision cannot be capricious, arbitrary. It cannot be made in bad faith or for an improper purpose. It must be justifiable on appropriate operational and public policy considerations, taking into account all relevant considerations. This grants to public bodies considerable latitude in their exercise of discretion.[9]

[19] Thus, a public body makes two distinct types of decisions when it decides whether to enter into a research agreement. First, it must determine whether the proposed agreement meets all of the criteria of s. 35(1)(a)-(d). Only if these criteria are met, will the public body then be required to exercise its discretion on proper principles to decide whether to enter into the agreement.

[20] The OIPC has jurisdiction to review both types of decisions. The first kind of decision, for example, might be the subject of a complaint made by either someone in the same position as the complainant in this case, who was denied a research agreement or, in other circumstances, by a third party who argues that their personal information was improperly disclosed pursuant to a research agreement which had been entered into by a public body. If, upon review, it is determined that a public body was wrong in its interpretation of the statutory prerequisites, the appropriate order would vary with the circumstances. If a public body had wrongly held that a prerequisite in s. 35 did not apply, and thus had not gone on to exercise its discretion under s. 35, the appropriate order might be to require that the public body exercise its discretion. If the review took place in the context of a complaint about the improper disclosure of personal information, the appropriate order might be to cease disclosing the information pursuant to the agreement.

[21] Upon review of the second, discretionary decision, it is generally accepted that, if the Commissioner or her delegate finds that the head of a public body has improperly failed to exercise his or her discretion, or has exercised the discretion improperly, the appropriate order is to send the matter back to be considered by the head of the public body on proper principles. The Supreme Court of Canada has recently confirmed the importance of reviewing whether the exercise of discretion by a public body is reasonable in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*.[10] The Court quoted with approval from an Ontario decision by former Information and Privacy Commissioner Linden, who explained the scope of his authority in reviewing this exercise of discretion:

[9] See para. 30, Decision F10-08 for similar observations.
[10] 2010 SCC 23.

> In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis added; p. 11.][11]

[22] The Court confirmed the authority to quash a decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations.[12]

[23] **Preliminary Issue**—As noted above, the Ministry had previously raised a preliminary objection in this matter, arguing that this office had no jurisdiction to review its exercise of discretion under s. 35. Both parties made submissions and Adjudicator Francis rendered a decision.

[24] The issue in this case, as the Notice of Hearing identified, was whether the Ministry appropriately exercised its discretion in deciding not to renew its research agreement with the complainant. The complainant focused his submission squarely on this issue. The Ministry focused its submission squarely on the issue as to whether the complainant's purpose for requesting the information constituted a "research purpose". In its initial submission, the Ministry took a position, for the first time, that it has not made a discretionary decision because, once it had determined that, in its opinion, the complainant's purpose for obtaining the information was not a research purpose, it had no authority to make a discretionary decision.

[25] The Ministry had any number of opportunities throughout the investigation period to raise this concern earlier. These included when the OIPC opened the original complaint file, which identified the issue as the Ministry's exercise of discretion; when it challenged the OIPC's jurisdiction to investigate a discretionary decision under s. 35 of FIPPA; and when the OIPC set the dates for the hearing. The fact that the Ministry failed to take advantage of any of these opportunities (waiting instead, until the hearing, to take this position) has affected the completeness of the parties' submissions.

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[11] Ontario Order P-58 (unreported), May 16, 1989.
[12] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, para. 71.

[26] As a result, it was reasonable for the complainant to concentrate his submission on the exercise of discretion, rather than on whether the criteria of research purpose were met. The Ministry, on the other hand, submitted very little on the issue of the exercise of discretion. Consequently, I did not have the benefit of full submissions from both parties on both issues.

[27] However, I agree with the Ministry that a necessary precondition for the application of s. 35 of FIPPA is that the intended use of the information be a research purpose. Before properly exercising its discretion to disclose personal information in accordance with a research agreement, the Ministry must first find that the disclosure is for a research purpose and that it meets the requirements of s. 35 of FIPPA.

[28] The complainant's submissions have not satisfied me that his project meets the criteria for a research purpose. I note, however, that he could argue justifiably that he has not received a fair hearing on this issue. The Notice of Hearing did not identify this as an issue. The complainant's arguments on this issue came largely in his reply submission, in which he was responding to the arguments that the Ministry provided in its initial submission. It is reasonable to assume that the complainant's argument and evidence might have been fuller on the research purpose issue, had the notice identified research purpose as an issue. I have identified important gaps that his submissions did not address, but might have done, if the complainant knew that research purpose was formally at issue.

[29] I note, for example, that the affidavits from the superintendents were dated over two years before the Ministry identified the issue about research purpose. These affidavits might have addressed the research outcomes more completely, had the superintendents known that they were at issue.

[30] Given the circumstances of this case, I would not make a formal finding on this issue, without giving the complainant an opportunity to make further submissions on the issue before reaching a formal finding. However, I do not find it necessary in this case to make a finding on this issue, for reasons I give below.

[31] Despite not making a formal finding, I think that it would provide useful guidance, for possible future cases, for me to establish the criteria to be used in determining whether a particular project constitutes research for the purpose of s. 35 of FIPPA. There are no previous orders providing guidance on the application of s. 35. I also think it useful to go over the submissions to identify where the gaps are.

[32] **Meaning of "research purpose"**—The Ministry submits that the reason it changed its previous position and declined the complainant's proposal for a research agreement was that it determined that his use of the information did not constitute "research".[13] The complainant disagrees. Thus, the issue turns on the meaning of research purpose.

[33] In my view, a disclosure for a research purpose would be where the researcher intends to use the information for a purpose furthering research. Therefore, it is necessary to establish criteria to determine whether a particular study constitutes research.

[34] The Ministry offers the following definitions of research from unidentified dictionaries:

> "an endeavour to discover new or to collate old facts, etc. by scientific study or by a course of critical investigation"
>
> "systematic investigation to establish facts, principles, or generalizable knowledge"[14]

[35] It also cites the definition of "research" in the government's *Policy and Procedures Manual* ("Manual") that provides guidance to public bodies. The Manual is intended to provide ministries with direction, and other public bodies with useful guidance, in interpreting FIPPA. I think that its definitions, as set out below, provide useful guidance in this case, but it is not binding on me. The Manual defines "research" as:

> a systematic investigation into and study of material or sources in order to establish facts and reach new conclusions. In order for a disclosure of personal information for a "research purpose" to be permissible, the research must intend to use the personal information to investigate and ascertain facts or verify theories.[15]

[36] The complainant also cites this definition of "research"[16] and reproduces the Manual's definition of "statistical research":

> … any research based on these methods [i.e., statistics] using quantifiable personal information, for example, to study trends, extrapolate from the data and/or draw conclusions. Statistical research is often done in demographics (e.g., to study the incidence of disease), to evaluate the

[13] Ministry's initial submission, para. 3.03; Complainant's initial submission, affidavit of complainant, Exhibit X.
[14] Ministry's initial submission, para. 4.04.
[15] Ministry's initial submission, para. 4.05.
[16] Complainant's initial submission, para. 9.

> success of training or health programs or to study other social issues and trends.[17]

[37] The Manual defines "statistics" as:

> the science of collecting and analysing numerical data, especially large quantities of data and usually inferring proportions in a whole from proportions in a representative sample; any systematic collection or presentation of such facts.

[38] The inclusion of the term "statistical research" ensures that it is recognized as a legitimate type of research for the purposes of applying s. 35 of FIPPA. It is clear, however, from the use of the word "including" in s. 35, and from the definition of "statistical research" in the Manual, that it should be treated as a sub-category of general "research" subject to the same criteria, rather than as a separate category subject to different criteria. The definition in the Manual indicates that, while the subject of statistical research is "statistics", the purpose of the research must be to derive something meaningful about the phenomena that the statistics represent, such as incidence of disease or effectiveness of programs. It is evident that the complainant's project involves "statistical analysis", but it must meet certain generic standards to qualify as research.

[39] A key issue in this inquiry is how broadly or narrowly to interpret "research". At one end of the spectrum, it could encompass any investigation or study into any subject, as long as it uncovers new facts. At the other end, it could be restricted to more formal and structured research projects that result in scientifically significant outcomes. It could also fall in a range between those definitions.

[40] In deciding where within this range to place the interpretation of "research" for the purposes of this hearing, it is important to keep in mind that the information at issue in any research agreement is information that cannot otherwise be disclosed under FIPPA. In this case, Adjudicator Francis has already found that disclosure of the requested information would be an unreasonable invasion of personal privacy under s. 22(1) of FIPPA. Therefore, the prospective public benefits of the research project must outweigh the harm of the invasion of privacy before disclosure of this information would be authorized.

[41] While this is the first decision of this office to address the application of s. 35 of FIPPA, a series of orders have examined the concept of research in the context of s. 17(2) of FIPPA, with respect to whether disclosure would deprive a researcher of the priority of publication. For example, former Commissioner Loukidelis found in Order 00-36 that the study protocol for the research

[17] Complainant's initial submission, para. 11.

methodology for a multifaceted study of the health impacts of aerial spraying constituted research information.[18] Another example is Order F07-06, where Adjudicator Francis cited a definition in the Illustrated Oxford English Dictionary that is almost identical to that from the Manual: "the systematic investigation into and study of materials, sources etc in order to establish facts and reach new conclusions".[19] She also considered the meaning of "research information" and determined that it would encompass

> the product of, or information relating to, the investigation or study by experts in a field of scholarly or scientific pursuit.[20]

[42] In Order F10-43, Adjudicator McEvoy considered "research information" in the context of s. 3(1)(e), which exempts from the scope of FIPPA "research information of employees of a post-secondary educational body".[21] In that order, he cited the definition of "research" in s. 2 of the Ontario *Personal Health Information Protection Act*, which reads:

> a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and included the development, testing and evaluation of research.[22]

[43] The Ontario Office of the Information and Privacy Commissioner also developed the following definition of "research":

> The systematic investigation into and study of material, sources, etc. in order to establish facts and reach new conclusions [and] ... an endeavour to discover new or to collate old facts etc. by the scientific study or by a course of critical investigation.[23]

[44] The major research funding councils in Canada (Canadian Institutes of Health research, Natural Sciences and Engineering Research Council of Canada, and Social Sciences and Humanities Research Council of Canada) define "research" as follows"

> An undertaking intended to extend knowledge through a disciplined inquiry or systematic investigation.[24]

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[18] [2000] B.C.I.P.C.D. No. 39.
[19] [2007] B.C.I.P.C.D. No. 8, para. 51.
[20] Order F07-06, para. 52.
[21] [2010] B.C.I.P.C.D. 52.
[22] Order F10-43, para. 14.
[23] Ontario Order PO-2693, [2008] O.I.P.C. No. 133, para. 32.
[24] Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, and Social Sciences and Humanities Research Council of Canada, Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans, December 2010, p. 196.

[45] Taking these various definitions into account, two main criteria stand out. The first criterion is that, for a study to constitute "research", it must be systematic or scientific and the researcher must take a critical approach to their evidence. The study must involve more than the collection or collation of data. The methodology must be structured in a rational way, and the researcher should approach the information seeking answers to specific questions. The researcher should also subject the data or information to critical analysis to assess the extent to which it presents a reliable basis for forming conclusions or testing hypotheses or otherwise deriving something meaningful.

[46] The second criterion is that the purpose of the research must involve evaluation of the information to derive something meaningful, such as new knowledge, including principles, theories or facts. This would involve the development of new theories or conclusions, or the confirmation that existing theories or conclusions, which warranted re-examination, remain valid. This is not to imply that only scientists or professional researchers could meet this standard or that the conclusions must be formal or academic in nature. It does suggest, however, that it is necessary to derive some broader meaning from the results of the investigation.

[47] In statistical research, it is not enough to determine, for example, what an average score or numerical result is. It is also necessary to go a step further and determine what such an average score or number signifies. I reiterate that this should not preclude amateur researchers from qualifying for access to personal information under research agreements. Their projects could meet the necessary criteria, if they explained the purpose of the research and demonstrated why it would be reasonable to conclude that the requested information or data would constitute reliable evidence in support of that purpose.

[48] The above analysis of the meanings of "research" and "research information" is helpful in assessing whether the complainant's project in this case constitutes a research purpose. I will now evaluate the complainant's case under the two criteria that I have identified.

[49] **Does the complainant's proposed use of the data constitute a "research purpose"?**—The Ministry submits that the common characteristic through the different definitions is that there should be an investigation or study for the purpose of determining something that is not previously known.[25] The Ministry suggests that the complainant's purpose does not qualify as research because "it does not contain any element of study or investigation in order to learn something new".[26] Instead, according to the Ministry, the complainant merely displays the data in "different ways" by putting it into a template that arranges the information in an alternative format. The complainant then sells that

[25] Ministry's initial submission, para. 4.07.
[26] Ministry's initial submission, para. 4.08.

product to Boards of Education. The Ministry acknowledges that it provided similar data to the complainant in the past under research agreements, but it now takes the position that those disclosures were in error.[27]

[50] The Ministry argues that FIPPA protects personal information by placing restrictions on disclosure, allowing it only in limited and specific circumstances. One of these circumstances is to support research. However, s. 35 of FIPPA sets out "stringent conditions" for such disclosures, which involve personal information that might not otherwise be accessible under FIPPA. In balancing privacy rights against access privileges, the Ministry argues, FIPPA permits "privacy interests to give way to research interests only under very tight controls".[28]

[51] In the opinion of the Ministry, the meaning of "research" should be interpreted narrowly:

> To open up the word "research" to include such activities as those performed by the [complainant] would be to undermine the careful constraints within which FOIPPA provided that personal information may be disclosed (to further a research end) where it would not otherwise be—it would upset the balance so carefully and appropriately drawn by FOIPPA, and would not be harmonious with the scheme and object of FOIPPA and the intention of the Legislature.[29]

[52] The Ministry submits that the complainant's characterization of his activities as research is weak and supported only by vague generalizations. It says his projects do not include the characteristics common to research projects. The Ministry submits that the complainant:

> has not tendered any evidence that demonstrates that he would engage in a systematic investigation into or study of the requested data to establish new facts or reach new conclusions. [He] does not appear to postulate research questions or hypotheses. Further, he has not submitted any evidence relating to any research methodology in relation to the use of Ministry data to produce his reports. Further, there is no evidence that such reports produce any new conclusions. No questions are being answered by those reports. For those reasons, the Ministry has not been satisfied that the [complainant]'s proposed use of the requested information constitutes "research" for the purposes of the Act.[30]

[53] The Ministry acknowledges that the complainant cites his twenty years of experience working with the Ministry on its data as evidence of his research activities. The Ministry disagrees, however, that this work constitutes research:

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[27] Ministry's initial submission, para. 4.02; Ministry's reply submission, para. 3.
[28] Ministry's initial submission, paras. 4.09-11.
[29] Ministry's initial submission, para. 4.12.
[30] Ministry's reply submission, para. 4.

it characterizes this work as "checking the accuracy of the data".[31] The Ministry also considers it significant that none of the complainant's previous work has resulted in any academic publications.[32] I note that, although evidence of publishing findings of previous research projects might support an applicant's case under s. 35, it is not necessary for a study to be published in order to be considered research.

[54] The complainant responds that his work does, in fact, constitute research and that his "research purpose was *bona fide*".[33] He argues that his twenty years of research on behalf of the Ministry and Boards of Education demonstrate this.[34] He also references the fact that he has current research agreements with over twenty Boards of Education who consider his work to constitute research.[35] The complainant submits that this research "included systematic investigations of Ministry data to establish new facts, and the systematic presentation of those facts in [the District Key Information] binders and other reports to B.C. schools and school districts to help them evaluate the effectiveness of their instructional programs."[36] He describes his work as follows:

> My FSA data validation work included verifying that the marking keys were correct, identifying missing and duplicate records, identifying anomalies between scanned student responses and electronically recorded responses, determining the difficulty level of each assessment item, categorizing student responses and determining performance scores of each student. My summary statistics included calculating summary school, district and provincial performance levels from student level records, calculating margins of error, and the statistical significance of differences between schools, districts and the province. I found and corrected several systemic errors in the initial calculations conducted by the Ministry in 2000.[37]

[55] The complainant submits that the "District Key Information" binders constitute research publications.[38] One Board of Education superintendent confirms that the information that the complainant provides is "very useful in our decision-making".[39] The complainant provides "critical trend and cohort data portrayed in a particularly useful and coherent manner".[40]

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[31] Ministry's reply submission, para. 13.
[32] Ministry's reply submission, para. 14.
[33] Complainant's initial submission, para. 48b.
[34] Complainant's initial submission, para. 49b.
[35] Complainant's initial submission, affidavit of complainant, para. 77.
[36] Complainant's initial submission, affidavit of complainant, para. 3.
[37] Complainant's initial submission, affidavit of complainant, para. 8.
[38] Complainant's initial submission, affidavit of complainant, paras. 10-16.
[39] Complainant's initial submission, Exhibit P, affidavit of Superintendent of the Board of Education of District No. 61 (Saanich), para. 3.
[40] Complainant's initial submission, affidavit of Superintendent of the Board of Education of District No. 61 (Saanich), para. 6.

[56] The complainant submits that, using the Ministry's data, he conducts three types of work that constitute research. The first type involves validating the student level data. The second does not involve student identifiable data and, therefore, is not relevant to the application of s. 35 of FIPPA in this case. The complainant describes the third type of work as "the use of student level FSA data to generate FSA Matched Cohort results for his reports to BC schools and districts."[41] He describes his work as follows:

> Exhibit "A" of my Affidavit #1 shows both a tabular and graphical representation of the actual results of my FSA Matched Cohorts results for a particular (anonymous) district. Rows 1, 2 and 3 in Exhibit "A" contain summary data provided by the Ministry. The values shown in Rows 4, 5, 6 and 7 were not provided by the Ministry in any way. I generated them using the following process on the FSA student-level data from 1999/00 to 2003/04 provided to me under the August 15, 2003 Research Agreement with the Ministry:
>
> a) for all FSA student-level data, I checked the consistency of Ministry school codes over each year and made any necessary corrections to preserve continuity over time;
>
> b) for FSA Reading data and Numeracy data separately, each year separately, and each grade level separately, I checked the validity of the FSA scale scores I was intending to use, by calculating the mean, standard deviation and range of each complete set of scores, and the logical relationship between the scale scores and the 3-point scores (Below / Meets / Exceeds Expectations);
>
> c) for distributions of scale scores that were not comparable over time, I re-scaled them so they were comparable over time;
>
> d) I checked the validity of the 3-point scores;
>
> e) I linked each student's FSA results in grade 4 with the student's FSA results in grade 7 three years later, using the student's PEN in each case;
>
> f) I identified the linked student records I wished to use and those I did not wish to use;
>
> g) I created several tables of school level, district level and provincial level results, consisting of the number of students, the number of usable assessments, the number of common assessments, the mean scale scores for each jurisdiction (school, district and province), and the change in mean scale score from grade 4 to grade 7 for each jurisdiction, each cohort, and each subject; and

[41] Complainant's reply submission, para. 8. The Matched Cohort involves comparing the grade four and grade seven exam scores of identifiable students to determine whether the performance of individual students is improving or declining.

h) I then re-scaled the mean scale scores for presentation purposes so they would be more meaningful to readers of the results.[42]

[57] He submits that his work involves studying trends and drawing conclusions.[43] He states that he was able to provide data for every district and most schools. His reports showed:

> the loss or gain in student FSA achievement for each of the two cohorts shown was new information for every district and school. To my knowledge, they had not been generated before I generated them, by any person or organization. The types of data generated by this research materially conform to a standard research design in common use in the field of program evaluation, and in text books on research design and methodology. The research design is used to evaluate the success or effectiveness of intervention programs, including training and/or instruction.[44]

Analysis

[58] The Ministry characterizes the work of the complainant as presenting existing data in new formats. The complainant insists that his arrangement of the data results in the creation of new information that is not directly apparent from the original data. Representatives from two Boards of Education have attested that they receive more value from his presentation of the data than from what they receive from the Ministry.[45] As I indicated above, I will evaluate the complainant's case using the following criteria:

1. whether the complainant's proposed research method is scientific or critical; and

2. whether it seeks to derive broader meaning from the data.

Is the complainant's approach scientific or critical?

[59] The complainant has developed a particular approach to the data he receives. He has an established method of ensuring the accuracy of the data. He presents the data in particular formats. However, the limited material before me does not provide sufficient evidence that he critically examines or evaluates the data in any way. He ensures that it is accurate, but has not demonstrated that he has determined whether there are reasonable grounds to assume that the

[42] Complainant's reply submission, affidavit of complainant, para. 2.
[43] Complainant's reply submission, para. 27.
[44] Complainant's reply submission, affidavit of complainant, para. 26.
[45] Complainant's initial submission, Exhibit P, affidavit of Superintendent of the Board of Education of District No. 61 (Saanich) and Exhibit Q, affidavit of former Assistant Superintendent of the Board of Education of District No. 39 (West Vancouver).

data represents something meaningful. No one should accept without questioning that it does.

[60] As noted above, although it is clear that the complainant subjects the data to statistical analysis, this is not enough on its own to bring his actions within the definition of "statistical research". The submissions do not include evidence of any attempts, on anyone's part, to critically examine the data and the FSA tests from which it is derived, and determine whether it is a reliable indicator of something meaningful. To take a hypothetical example, if the purpose of the research were to evaluate student achievement, it would be necessary to determine whether the test scores are, in fact, a reliable indicator of achievement. Some possible methods would include verifying whether the questions on the tests accurately measured student achievement and reflected the provincial curriculum. This could involve, for example, analysing the questions and comparing the test results of a sample of students to their course work results to determine whether there was a valid correlation.

[61] Ultimately, the project of the complainant raises many questions that he has not answered so far. Critical analysis involves researchers exploring these kinds of questions and taking nothing for granted that has not been verified objectively. The complainant is an experienced data analyst and he might very well have subjected the evidence to an appropriate level of scrutiny. Nevertheless, there is nothing before me that confirms whether the complainant has taken any steps to confirm that the data is a valid indicator of something meaningful.

Does the complainant's analysis derive broader meaning from the data?

[62] Using the kind information at issue in this inquiry, the complainant, in previous years, has shown whether the test results of individual students are improving between Grade 4 and Grade 7. It is not clear, however, whether this constitutes the discovery of "new knowledge" or the confirmation of existing knowledge that warrants confirmation, or that his statistical analysis offers anything meaningful to learn. The complaint submits that he has, in fact, come to conclusions:

> I studied trends and drew conclusions, but I did not extrapolate from the data because inferential statistics were not needed and were not appropriate. I used the results to evaluate the success of instructional programs in BC schools and districts.[46]

[46] Complainant's reply submission, affidavit of complainant, para. 29.

[63] His submissions do not include examples of such conclusions or the results of his evaluation of the programs.

[64] He has provided examples from his past research, where he reached conclusions from analysing data, but those examples are from analysing aggregate information. The proposed research agreement at issue, on the other hand, involves individual student-level test score data, which is personal information. His examples (comparisons of student-teacher ratios, comparisons of average teacher salaries between districts and with the annual inflation rate and hypothesis that a particular Board of Education once managed a budgetary crisis) did not involve the student-level data concerned here.[47]

[65] He does not provide similar examples of these kinds of comparisons using student level data. I see little indication of any new theories, conclusions or general knowledge or principles that he has developed or tested, or that he has otherwise derived something meaningful from the personally identifiable data. He has placed the data in tabular form and identified mean scores and identified the loss or gain of scores over time,[48] but this is not sufficient. The project should explore the broader meaning of what these tables represent, if it is to qualify as research, especially given that it requires the disclosure of personal information that would otherwise be considered an unreasonable invasion of the personal privacy of third parties. His submissions do not describe any such broader meaning.

[66] The complainant's best argument is that his data analysis enables school districts to determine which of them experienced the greatest loss or gain in scores. The affidavits from the Boards of Education say the information derived from the analysis of the student level data is useful and provides "unique insights into the effectiveness of each of our elementary schools", but they have not identified anything specific that they have learned from the review of this data.[49]

[67] The complainant submits that his work does, in fact, test theories:

> The capacity to eliminate rival hypotheses is an important component of research design in particular. My graphic and tabular displays were designed to enable readers of the binders to do just that.[50]

[68] His submissions do not include any of these rival hypotheses. Yet, his statement does illustrate a significant point. It seems that his purpose is to provide Boards of Education with prepared materials, in order for them to conduct their own evaluation of the data. He presents the data, identifies

[47] Complainant's reply submission, paras. 10-21.
[48] Complainant's reply submission, paras. 22-24.
[49] Complainant's initial submission, Exhibit Q, affidavit of former Assistant Superintendent of the Board of Education of District No. 39 (West Vancouver), para. 3.
[50] Complainant's reply submission, affidavit of complainant, para. 22.

correlations but it is up to his clients to find something meaningful from it. His work plays an important role in facilitating an opportunity for other parties to conduct their own research. However, in isolation, based on the material that is before me, it does not itself constitute research, as other orders have interpreted it. On the issue of whether these clients actually take advantage of these opportunities, however, his submissions are silent. The complainant and his clients might be able to meet the criteria necessary for me to conclude that the project constituted research, if they worked together to demonstrate:

1. what they were looking to learn from the student level data;
2. why they could not learn it from the aggregate data alone or other sources; and
3. how they would use that knowledge.

[69] However, their submissions and affidavits are too vague on these matters to warrant that conclusion.

[70] The complainant also suggests that the fact that he had research agreements with the Ministry in the past and current agreements with many Boards of Education proves that his work constitutes research. The Ministry takes the position that it was in error when it granted the complainant research agreements in the past. Its references to those agreements as being "unlawful" suggest that it considers they were breaches of FIPPA. Whether those agreements contravened FIPPA is not a matter at issue in this hearing. However, I would observe that, in general, any public body that comes to the conclusion that its past practices constituted a breach of privacy must discontinue those practices. I also find the fact that the complainant's assertion that other public bodies have granted him research agreements is not relevant to the determination as to whether the project at issue here constitutes research. Whether these other research agreements comply with FIPPA is not a matter at issue in this hearing. I would also add that public bodies are accountable for their own decisions and should not rely on the decisions of other public bodies in similar cases, without conducting their own thorough assessments of the case that is before them.

Conclusion

[71] In the end, the complainant's submissions were weak in two critical areas. One was that he did not explain clearly the nature of the new knowledge to be derived from his statistical analysis. It was not enough to simply provide numerical descriptions of the cumulative test scores. It is necessary to explain what practical significance the data could represent. The other was that he did not indicate why the data he was requesting was reliable and suitable research material. He did not provide evidence that he had subjected his data to intellectual scrutiny to ensure that it was valid. These are standard components

of most research projects and should be incorporated into any proposals for research agreements under s. 35 of FIPPA.

[72] Had I made a formal finding that the complainant's project constituted a research purpose, and that it met the other requirements of s. 35 of FIPPA, I would then go on to review the Ministry's exercise of discretion. If I found that the Ministry did not exercise its discretion or did so improperly, I could order the Ministry to reconsider its decision, taking into account relevant and appropriate considerations. I would not direct the Ministry to make a particular decision or place any conditions on the decision that would limit the Ministry's discretion to choose one way or the other. If I find that the material before me demonstrates that the Ministry has already made a discretionary decision having regard to appropriate considerations, there is nothing to be gained by having the parties make additional submissions on the preliminary question of whether or not the project constitutes research.

[73] While the Ministry denies that it has made a discretionary decision, the complainant submits that the Ministry has. He has provided extensive submissions on the issue, on the understanding that this would be the subject of the hearing. I think it appropriate for the complainant to be heard on this issue. I also believe the analysis will illustrate the relevant circumstances for parties to take into account, when dealing with the proper exercise of discretion under s. 35 of FIPPA, and could provide useful guidance for future cases.

[74] **Exercise of Discretion**—In this case, it is necessary to determine whether the Ministry made a discretionary decision, before considering whether it made such a decision in an appropriate manner.

Did the Ministry make a discretionary decision?

[75] The complainant made a series of requests, some repeated, for both student-level (identifiable) data and non-student-level data. This hearing is concerned only with student identifiable data, because s. 35 of FIPPA only applies to personal information. The complainant's submission tends to combine them all, so it is necessary to separate them out. Different Ministry officials responded to these series of requests, sometimes with different reasons for turning them down.

[76] The complainant submits that, whenever a public body receives a request for a research agreement and makes a decision either to approve or deny the agreement, the public body is making a discretionary decision.[51] The Ministry takes the position that it never made a discretionary decision. The sole reason it now gives for denying the research agreement was that it determined that the

[51] Complainant's reply submission, para. 1.

complainant's purpose did not constitute research.[52] The complainant also argues that the Ministry's claim that it denied the research agreement solely on the grounds that his purpose did not constitute research is wrong, because it provided him with other reasons for refusing the agreement.[53]

Analysis

[77] Generally, I agree with the Ministry that where FIPPA authorizes discretionary decisions under a particular section, the public body must first ensure that the section applies, before making the discretionary decision. However, s. 35 is more complex than other sections in this regard. This is because the public body must make a series of factual determinations and discretionary decisions, before all the provisions of s. 35 can apply. As the Ministry noted, it must determine whether the purpose constitutes research. It must also determine whether individually identifiable information is necessary to achieve the research purpose. If the research involves data linkage, the public body must determine whether the research would harm the data subjects and whether the objectives of the research are clearly in the public interest. If the research satisfies these requirements, the public body must make discretionary decisions about the privacy and security conditions it will require from the researcher and any other terms to include in a written agreement. It must then make a discretionary decision whether to sign the agreement. It is only then that all of the provisions of s. 35 would be satisfied and the public body would make the final discretionary decision as to whether to disclose the personal information subject to the agreement.

[78] I agree that the Ministry never made the final discretionary decision in these series of steps, because the matter did not reach the final step. I also accept that it justified its first refusal to enter into a research agreement with the complainant on the grounds that his purpose did not constitute research, and that this is a necessary precondition for the application of s. 35 of FIPPA. It is clear, however, that the complainant made a series of requests for a research agreement and the Ministry responded with a series of decisions, sometimes with different reasons, for denying them.

[79] One time, the Ministry refused the request because the complainant's project did not meet the requirements of the Ministry's Data Policy and because it had concerns about the security and privacy of the information. This refusal of the agreement on the grounds of Ministry policy was clearly a discretionary decision. Therefore, despite what the Ministry argues, I conclude that the Ministry did in fact, on at least one occasion, exercise its discretion to deny the complainant a research agreement. I will now turn to reviewing that exercise of discretion based on the information before me.

[52] Ministry's initial submission, paras. 3.02-03.
[53] Complainant's reply submission, para. 5.

Did the Ministry exercise its discretion appropriately?

[80] The complainant cites a variety of case law decisions in support of what he considers to be the criteria for a lawful exercise of discretion. A public officer:

1. may only exercise discretion according to the law granting the power to decide;
2. may only exercise discretion within the bounds of the jurisdiction granted by statute – reasonably, in good faith, for a proper purpose and ignoring irrelevant considerations;
3. must consider all relevant factors;
4. must not decide for him or herself that a "public interest" overrides the direction that flows from the empowering legislation; and
5. must not fetter his or her discretion by reliance on a policy, rule or guideline of her or his own creation.[54]

[81] The complainant then sets out how he believes the Ministry exercised its discretion contrary to these criteria. He submits that, in basing its decision to deny him a research agreement on its Data Policy, the Ministry exceeded the bounds of s. 35 and the purposes of FIPPA. This is because the policy contains criteria that are not contemplated in FIPPA, in that it required the approval of a committee at a public post secondary institution and required the researcher give the Ministry the authority to veto the release of material related to a research agreement.[55]

[82] I agree with the complainant with respect to the criteria that he has identified for the proper exercise of discretion. I disagree, however, with the extent to which he attempts to limit the considerations that the decision-maker can take into account. He appears to be suggesting that the exercise of discretion should take into account only those factors expressly identified in or contemplated by the statute. He specifically identifies the Ministry's Data Policy as incorporating requirements that are not identified in FIPPA and argues, for that reason, that taking the policy into account, while exercising discretion, is unlawful.

[83] Several orders have identified a series of relevant considerations that are appropriate for the exercise of discretion and they include factors that FIPPA does not explicitly identify. In Order No. 154-1997, former Commissioner Flaherty described the process for the proper exercise of discretion, in deciding

[54] Complainant's initial submission, paras. 14-17.
[55] Complainant's initial submission, para. 43.

whether to waive fees in accordance with s. 75 of FIPPA, on the grounds the records relate to a matter of public interest, as follows:

> The two-step process should be applied as follows:
>
> 1. The head must consider the records requested and decide whether, in his or her opinion, they relate to a matter of the public interest. The focus should be on the nature of the information. To give some guidance to public bodies, I suggest that the following kinds of factors should be considered:
>   - has the information been the subject of recent public debate?
>   - does the subject matter of the record relate directly to the environment, public health, or safety?
>   - would dissemination of the information yield a public benefit by
>   - disclosing an environmental, public health, or safety concern,
>   - contributing meaningfully to the development or understanding of an important environmental, health, or safety issue, or
>   - assisting public understanding of an important policy, law, program, or service?
>   - do the records show how the public body is allocating financial or other resources?
> 2. If the head decides that the records do relate to a matter of public interest, then he or she must then determine whether the applicant should be excused from paying all or part of the estimated fees. The focus here should be on the applicant and the purpose for making his or her request. Factors that should be considered would include:
>   - is the applicant's primary purpose to disseminate information in a way that could reasonably be expected to benefit the public, or to serve a private interest?
>   - is the applicant able to disseminate the information to the public?
>
>   If the applicant's primary purpose is to serve a private interest, then the head may be justified in refusing to waive fees, even where he or she is of the opinion that the records do relate to a matter of public interest.[56]

[84] Loukidelis discussed the matter of a public body's exercise of its discretion with respect to the application of discretionary exceptions, such as ss. 13 and 14 of FIPPA, in Order 02-38, where he set out a non-exhaustive list of factors that a public body should consider in exercising its discretion, including the following:

> - the historical practice of the public body with respect to the release of similar types of documents;
> - the nature of the record and the extent to which the document is significant and/or sensitive to the public body;

[56] Order No. 154-1997, [1997] B.C.I.P.C.D. No. 12, para. 20.

- whether the disclosure of the information will increase public confidence in the operation of the public body;
- the age of the record;
- whether there is a sympathetic or compelling need to release materials; and
- when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.[57]

[85] It is clear from both examples that it is appropriate for public bodies to take into account factors that FIPPA does not directly reference. The factors need only have a connection to the matter at issue, relate generally to the purposes of FIPPA and reflect a general concept of fairness and reasonableness.

[86] The complainant submits that the Ministry failed to exercise its discretion for a proper purpose, by refusing to grant him a research agreement when it had done so in the past. He also alleges that the Ministry granted research agreements to other parties for the same information that he was seeking. He concludes that the refusal to grant him an agreement must have been for a purpose other than that permitted by law (though he does not state what that purpose was).[58] I noted above that the Ministry took the position that its previous disclosures did not comply with s. 35 of FIPPA and that any public body that concluded that one of its existing practices did not comply with FIPPA should cease those practices.

[87] The complainant argues that the Ministry failed to take into account relevant factors and took into account irrelevant ones. The relevant factors that he alleges the Ministry failed to take into account are:

1. He was seeking personal information in accordance with the conditions of s. 35;
2. He does do research; and
3. He has proven that he can be trusted to meet the privacy and security requirements of a research agreement.

[88] The irrelevant factors that he claims the Ministry did take into account are:

1. That the Ministry considers the previous research agreements with him were "unlawful";
2. That the Ministry considers that his work does not constitute research;

[57] Order 02-38, [2002] B.C.I.P.C.D. No. 38, para. 149.
[58] Complainant's initial submission, paras. 44-46.

3. That the project was not in compliance with the Ministry Data Policy;
4. That his purposes could be met through access to non-identifiable data;
5. That the Ministry had concerns about the security of the data in his position; and
6. That the complainant uses the data for a commercial purpose.[59]

[89] The Ministry explicitly stated that it would not make submissions on the issue of the exercise of discretion. This is consistent with its position that the matter at issue never reached the stage where a discretionary decision would take place. The Ministry does take issue, however, with the complainant's argument that the relevant factors should be limited largely to the requirements of s. 35 of FIPPA. The Ministry submits that these are not factors to consider, but rather "the preconditions to the granting of a research agreement".[60] The Ministry argues that, once a public body has determined that the proposed research meets these requirements, it must still consider other factors in deciding whether to exercise its discretion in favour of disclosing the personal information.[61]

[90] This leads me to comment on how the complainant has characterized the relevant and irrelevant considerations. I agree with the Ministry that the complainant's first "relevant" consideration is really a precondition to the exercise of discretion. His second "relevant" consideration (that he does research) is just a mirror image of his second "irrelevant" consideration (that his work does not constitute research). Expressed in neutral language, the consideration is really whether the project constituted research. The Ministry claimed that this was a precondition to the exercise of discretion, rather than a consideration for the exercise of discretion itself. Nevertheless, this is a reason that the Ministry gave for refusing to grant the request. Clearly, whether the project constitutes research is relevant to the overall decision as to whether to disclose the personal information. The fact that the complainant came to a different conclusion than the Ministry does not make one conclusion "relevant" and the other "irrelevant".

[91] Actually, there is considerable agreement between the parties as to the tests the project should meet in order to qualify for a research agreement. The parties simply disagree as to whether the project passes those tests. The same applies to the issue as to whether the complainant can provide adequate security for the personal information. He says that his past experience demonstrates that he can. The Ministry disagrees. There is insufficient information before me for me to determine whether the Ministry's concerns are

[59] Complainant's initial submission, paras. 48-49.
[60] Ministry's reply submission, para. 10.
[61] Ministry's reply submission, para. 11.

valid. Nevertheless, this does not matter, because in reviewing the exercise of discretion the issue is whether the public body considered the right question (*e.g.,* Does the complainant provide adequate security for personal information?) not whether it came to the right answer.

[92] With respect to the Ministry's description of his previous research agreement as "unlawful", I take the Ministry to mean that it considered that previous agreements did not comply with s. 35 of FIPPA. Nevertheless, the Ministry did not cite this as a consideration for refusing his latest proposal. The Ministry offered this as a response to the complainant arguing that, as it had granted him agreements in the past, it should grant him another now.

[93] The issue of whether the complainant could meet the objectives of his research without access to student-level data is more complicated. The complainant alleges that this is an irrelevant consideration. It does relate, however, to s. 35(1)(b), which states that the success of the research must depend receiving the information in identifiable form. The Ministry believed the complainant could complete his project without student level data, but the complainant required student level data for his Matched Cohort analysis. It is unclear, however, whether this Matched Cohort analysis would produce results significantly different from an analysis of the aggregate scores. The Ministry did not ask an irrelevant question. The question as to whether the complainant really required identifiable data to meet his research purpose was relevant. Again, the complainant just came to different answer.

[94] The one factor which I find that the complainant is justified in describing as irrelevant is the fact that he makes a profit from selling his analysis of the Ministry data. One Ministry official appears to have suggested that this is the reason why the Ministry felt that his project did not constitute research. The purpose of s. 35 is to facilitate research where there is a clear public benefit, regardless as to whether anyone benefits financially. The financial impact on the researcher should not be a consideration when deciding whether, and under what conditions, to disclose third party personal information.

[95] I stated above that relevant factors for the exercise of discretion need to have a connection to the matter at issue; relate generally to the purposes of FIPPA; and reflect a general concept of fairness and reasonableness. In my opinion, the Ministry's Data Policy meets these requirements. The Data Policy contained the following requirements:

1. research must be reviewed by an ethical review committee at a public post-secondary institution,
2. researchers will get the minimum data required to perform their analysis and where possible P[ersonal] E[ducation] N[umber] and school codes will be encrypted to further protect the privacy of individuals and schools,

3. the Ministry has the option to review all publications prior to release, and
4. the Ministry may veto release of any material related to the research agreement.[62]

[96] The Ministry has submitted a letter from Loukidelis, which explains the purpose of ethical review committees:

> I note that researchers at universities or hospitals must have their research proposals approved by a Research Ethics Board ("REB") in order to receive funding and access to personal information. REBs are appointed by such institutions to review research proposals to ensure that the risks of research are reasonable and proportionate to the potential contribution of the research to the advancement of knowledge.[63]

[97] This function does in fact have a direct connection to s. 35(1)(b) of FIPPA, which stipulates that any data linkage must not be harmful to the data subjects and the benefits to be derived are clearly in the public interest. This provision of the Ministry's Data Policy ensures that these evaluations are made by professionals with expertise in conducting these kinds of assessments.

[98] Loukidelis suggested that the Province establish a similar board of its own to conduct reviews of government research projects.[64] They would form part of individual ministries' exercise of discretion concerning the collection and disclosure of personal information under FIPPA, to apply:

> the criteria of s. 35(1) of FIPPA and such other criteria as are considered mandatory pre-conditions to disclosure of personal information by any public body to the Ministry [of Citizens' Services] for research purposes respecting future projects.

[99] He noted that, while FIPPA did not require the approval of such a body as a condition of disclosure or collection of personal information by the Ministry of Citizens' Services for research purposes, it would be sound public policy. I acknowledge that Loukidelis did not suggest that ministries should require the same kind of formal ethics review for proposals from outside researchers as well. Nevertheless, I think it would be sound public policy for the same reasons: it would ensure that all projects constitute research and meet the requirements of s. 35(1)(b). In all cases, there needs to be a thorough examination of the research project that weighs the benefits of the research against the risk to privacy, ideally through an independent and unbiased process.

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[62] Complainant's initial submission, affidavit of complainant, para. 3.
[63] Ministry's initial submission, Exhibit B, p. 11.
[64] Ministry's initial submission, Exhibit B, pp. 11-12.

[100] The complainant implies that the Ministry's requirement that the project be reviewed by an ethics review board at a post-secondary institution is not fair, because only individuals affiliated with such an institution can meet this requirement.[65] The Ministry points out that the complainant has the option of seeking a research partner who is affiliated with an institution and have them obtain the approval.[66] I note that this might not be possible in all cases, which could lead some researchers to abandon their projects, unless the parties could arrange for an alternative, but equivalent, process of review.

[101] The other provisions of the Data Policy include the requirement that the minimum amount of personally identifiable information be disclosed is also consistent with s. 35(1)(a) of FIPPA. The provisions giving the Ministry the authority to review the products of the research are consistent with the requirements of s. 35(1)(c). As such, subject to my comments on review by an REB, it appears to me that the provisions of the policy are reasonable and appropriate considerations for the exercise of discretion.

[102] The complainant also takes issue with the Ministry's Data Policy, on the grounds that it improperly fetters the discretion of the Ministry. He cites case law in support of the position that public bodies may establish guidelines for making decisions, but they must not be binding on the public body. He asserts that public bodies must make decisions on a case by case basis and take into account all relevant considerations, in addition to policy guidelines. He submits that this particular policy is illegal because it is not grounded in the purposes of FIPPA or the provisions of s. 35 in particular.[67] He states,

> The Data Policy contains approval criteria that are not contemplated in any of the Act, the Policy Manual or the Policy Manual's example research agreement and that are not necessary to advance the purposes of the Act and that are irrelevant to all of the above.[68]

[103] He suggests that the Ministry can establish guidelines to information decisions but cannot treat them as binding and exclude other relevant considerations.[69] I agree with the complainant that persistent rigid, rote application of a policy, without taking into account any other circumstances, could result in an inappropriate fettering of discretion. My only concern is with respect to the flexibility of the Data Policy: a researcher might want to engage in legitimate research but not be in a position to collaborate with an academic partner. It is relevant whether the Ministry would be prepared, in such cases, to waive the requirement for post-secondary ethics review board approval, where it was not feasible and where the researcher or the Ministry could arrange for an

[65] Complainant's initial submission, para. 52.
[66] Ministry's reply submission, para. 46.
[67] Complainant's initial submission, paras. 50-51.
[68] Complainant's initial submission, para. 51.
[69] Complainant's initial submission, para. 50.

equivalent process of review that would achieve the same objective (such as the internal ethics review board that Loukidelis recommended). The Ministry has not addressed the issue of the flexibility of the policy in its submissions. However, as long as the Ministry is prepared to consider making exceptions in certain cases, the policy does not fetter its discretion.

[104] I disagree with the complainant that the Data Policy fettered the Ministry's discretion in this case. When the Ministry cited the Data Policy as one reason for refusing his proposal, it also cited security concerns and its conclusion that he could accomplish his objectives without student level data. This demonstrated that the policy was only one of several circumstances that it took into account. It was not slavishly adhering to a policy to the exclusion of other factors. Moreover, the fact that the complainant, himself, has cited five other considerations that the Ministry took into account (though he characterizes as irrelevant) supports the conclusion that the Ministry considered factors other than just the Data Policy. Therefore, consideration of the Data Policy did not fetter its discretion.

[105] Finally, the complainant alleges that the Ministry employees made their decisions in bad faith. He cites a list of examples of actions that the Ministry took, or failed to take, as evidence of this supposed bad faith, some of which relate directly to the research agreement and personal information at issue, while others relate to matters outside the scope of this inquiry.[70] The Ministry denies these allegations, which it describes as "unfounded" and "inappropriate".[71] I have considered these allegations carefully, but disagree with the complainant that they are relevant to the issue of the Ministry's exercise of discretion. Therefore, I will not describe them.

[106] The purpose of the review of a public body's exercise of discretion is to examine the public body's process of making the decision and its line of thinking, not to judge whether it should have come to different conclusions on those considerations. As Loukidelis stated in Order 02-38, FIPPA "does not contemplate my substituting the decision I might have reached for the head's decision".[72] The same applies in this case.

[107] From this review of the Ministry's exercise of discretion on the one occasion, I have determined that the Ministry took into account relevant considerations in refusing the complainant's request. I expect that, if I required it to exercise its discretion again, it would take into account the same relevant considerations with the same result.

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[70] Complainant's initial submission, paras. 53-62.
[71] Ministry's reply submission, paras. 16-18.
[72] Order 02-38, para. 147.

CONCLUSION

[108] To encapsulate, I indicated at the beginning of this order that the final outcome would be whether to require the Ministry to reconsider its exercise of discretion. I agreed with the Ministry that, before it could properly exercise discretion, it would be necessary to determine whether the complainant's proposal for a research agreement was for a research purpose. In the event that the proposal constituted research, it would be necessary to determine whether it met all of the requirements of s. 35 of FIPPA. It would only be in the event that s. 35 authorized the agreement that the Ministry could properly exercise its discretion to disclose the personal information at issue.

[109] The lack of consensus about the matter at issue and the approaches that the parties took in their submissions left me unable to reach formal findings on the questions of whether: (1) the proposal was for a research purpose; and (2) the proposal satisfied all of the requirements of s. 35 of FIPPA. I indicated that, prior to making formal findings on these issues, I would have to invite the parties to make further submissions.

[110] Prior to considering whether to invite the parties to make further submissions, I chose to explore the relevant circumstances relating to the exercise of discretion, as this was the issue in the Notice of Hearing and the complainant made detailed submissions on this subject. I did so in order to develop a general sense as to whether, in the event that the matter reached its ultimate conclusion, I would have to direct the Ministry to exercise its discretion using different considerations than it had used in previous decisions.

[111] Having reviewed all of the considerations that the parties consider to be relevant or irrelevant, I conclude that most of the considerations that the complainant described as irrelevant, or improper, are, in fact, appropriate. The only one I consider to be inappropriate relates to the fact that the complainant sells a product that he produces with the data that he receives.

[112] The Ministry's Data Policy does not appear to fetter its discretion and is appropriate, as long as the Ministry does not apply it rigidly and without considering other relevant circumstances. The parties essentially agree as to what the appropriate considerations are. The Ministry asks the right questions. The dispute centres on the fact that the complainant does not like the Ministry's answers. Consequently, I would not direct the Ministry to deliberate on different considerations.

[113] In these circumstances, I conclude that there is no basis for me to order the Ministry to exercise, or re-exercise, its discretion. Given this finding, it would be inappropriate for all parties to invest time and resources in formulating new submissions on the exercise of discretion. This would be the case, even if I were ultimately to determine that the complainant's project constituted research and

satisfied all the requirements of s. 35 of FIPPA, because there is no prospect of it resulting in a different decision.

[114] For all these reasons, no order is warranted.

August 18, 2011

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

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