Order F26-02

DISTRICT OF SAANICH

Rene Kimmett
Adjudicator

January 14, 2026

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant, SȾÁUTW̱ (Tsawout) First Nation, asked the District of Saanich (District) for access to records related to a subdivision. The District issued a fee estimate of $397.50. The applicant requested a fee waiver under s. 75(5)(a) of FIPPA, but the District denied this request. The applicant made a complaint about the District's refusal to grant the fee waiver. The adjudicator found, in the circumstances, it is fair to excuse the applicant from paying fees for processing the access request.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* RSBC 1996, c. 165, ss. 58(3)(c), 75(1)(b), and 75(5)(a); Freedom of Information and Protection of Privacy Regulation, B.C. Reg. 248/2022, Schedule 1.

INTRODUCTION AND BACKGROUND

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant, SȾÁUTW̱ (Tsawout) First Nation, asked the District of Saanich (District) for access to records related to a subdivision.

[2] The District issued a fee estimate of $397.50. The applicant asked for a fee waiver under s. 75(5)(a), which allows a public body to waive service fees if it is satisfied the applicant cannot afford the payment or there is any other reason it is fair to excuse payment.

[3] The applicant did not argue that it could not afford to pay. Instead, the applicant said it is fair to excuse payment because the records it requested relate to a subdivision development on its traditional territories and requiring it to pay a fee to access information about decisions affecting its lands and rights is incompatible with the principles of reconciliation, the *United Nations Declaration*

on the Rights of Indigenous Peoples (UNDRIP)[1] and British Columbia's *Declaration on the Rights of Indigenous Peoples Act* (DRIPA).[2] The applicant argued that the fees obstruct its ability to meaningfully participate in decisions affecting its territory and to fulfill its governance responsibilities to its people.[3]

[4] In response, the District considered whether the access request related to a matter of public interest under s. 25(1) (mandatory public interest disclosure) and concluded that it did not. The District denied the applicant's request for a fee waiver on the basis that the applicant had not provided evidence of a public interest in the records requested, an inability to pay, or any other reason to excuse payment.

[5] The applicant asked the District to reconsider its decision to not grant the fee waiver. In this request, the applicant noted that the District had primarily considered the public interest, under s. 25(1), and the applicant's ability to pay but did not consider its arguments that payment should be waived on the basis of fairness.

[6] The District declined to reconsider and informed the applicant it could make a complaint to the Office of the Information and Privacy Commissioner (OIPC), if it had further concerns about the denial of the fee waiver.

[7] The applicant complained to the OIPC that the District refused to grant a fee waiver under s. 75(5)(a) of FIPPA. Mediation by the OIPC did not resolve this issue, and the matter proceeded to this inquiry.

AUTHORITY, ISSUE, AND BURDEN OF PROOF

[8] Under s. 58(3)(c) of FIPPA, I have the authority, as the Commissioner's delegate, to confirm, excuse, or reduce the disputed fee in the appropriate circumstances. In this inquiry, I will determine whether it is fair to excuse the applicant from paying fees associated with processing its access request. The applicant has the burden to prove that it should be granted the fee waiver.[4]

FEE WAIVER BASED ON FAIRNESS – S. 75(5)(A)

[9] Section 4(3) of FIPPA states that an applicant's right of access to a record is subject to the payment of fees, if any, required under section 75.

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[1] United Nations Declaration on the Rights of Indigenous Peoples, online: <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>.
[2] *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c. 44.
[3] Applicant's initial submission at Exhibit C, August 7, 2025 request for a fee waiver.
[4] Order F21-48, 2021 BCIPC 56 (CanLII) at paras 6-10.

[10] Section 75(1)(b) says that a public body is authorized to charge prescribed fees for specific services related to processing an access request, subject to the exceptions set out in ss. 75(2) and (3). The maximum fees a public body can charge under s. 75(1)(b) are set out in Schedule 1 of the Freedom of Information and Protection of Privacy Regulation.

[11] If a public body requires an applicant to pay fees under s. 75(1)(b), it must provide the applicant with a written estimate of the total fees before providing the services and may require the applicant to pay a deposit.[5]

[12] In some circumstances, a public body can excuse an applicant from paying fees.[6] The applicant requested a fee waiver under s. 75(5)(a). Section 75(5)(a) states that a public body may excuse payment of all or part of the fees for service, if the public body is satisfied that "the applicant cannot afford the payment or for any other reason it is fair to excuse payment". The applicant is not arguing that it cannot afford to pay and is only seeking a fee waiver on the basis that it would be fair to excuse payment of all fees in the circumstances.

Test for whether it is fair to excuse payment

[13] Section 75(5) is intended to ensure that fees do not become a barrier to access.[7] Previous OIPC orders have not clearly articulated the test for deciding whether it is fair to excuse payment of fees under s. 75(5)(a). I understand this is because there are no set limits on what may be considered under the s. 75(5)(a) fairness analysis. Each case must be considered on its own merits, and the fairness determination must be based on a totality of the circumstances.[8] The factors that may be considered are non-exhaustive.

[14] The District argues I should apply a narrower interpretation of the word "fair" as it appears in s. 75(5)(a). It makes three points on this subject.

[15] First, the District submits the test under s. 75(5)(a) is whether "failure to release the records will have a detrimental impact on an applicant's legal rights or interests."[9] To support this position, the District relies on Decision F08-05, Order F20-14, Order F01-24 and Order F21-18. It submits:

> In the first three cases […], the applicants had an interest in the documents, but payment of the fee did not create a barrier to a right or an interest. It was only in the context of procedural fairness, Order F21-18, where the applicant had the right to know the reasons for a decision

[5] FIPPA, s. 75(4).
[6] FIPPA, s. 75(5).
[7] Order F21-18, 2021 BCIPC 23 (CanLII) at para 17.
[8] *Ibid* at para 33.
[9] District's submission at paras 9-14.

> related to the applicant's interest where the Commissioner found that requiring a fee was an unfair barrier.

[16] In Order F01-24, former Commissioner David Loukidelis held that the applicant's underlying concerns about, allegations against, and legal dispute with the public body did not warrant a fee waiver on the basis of fairness under s. 75(5)(a).[10] OIPC adjudicators made similar findings in Decision F08-05 and Order F20-14.[11]

[17] In Order F21-18, the adjudicator found it was fair to excuse payment in the circumstances because, among other reasons, the applicants had asked for records during an appeal process and the public body, rather than providing the records within that process, asked the applicants to make an access request under FIPPA and pay fees for retrieving the records.[12] The adjudicator found that it was unfair for the public body to make the applicants pay to obtain the information they needed to meaningfully exercise their right of appeal.

[18] I find that these cases do not, as the District suggests, stand for the proposition that the only fairness factor that can be considered is whether failure to release the records will have a detrimental impact on an applicant's legal rights or interests. Each of these cases merely addresses the circumstances put before the adjudicator, as do other OIPC orders that address s. 75(5)(a).[13] It would be absurd to conclude that the only fairness considerations that can be considered under s. 75(5)(a) are those that arose in the very specific fact scenario present in Order F21-18. Further, unlike in Decision F08-05, Order F20-14, and Order F01-24, there is no evidence before me that the applicant and the District have a dispute other than the fee waiver dispute I am deciding in this inquiry. Even if they do have another dispute, the applicant has not argued that it is fair to excuse payment of fees on the basis that the records relate to some other dispute. Instead, the fairness considerations raised by the applicant relate to self-governance, reconciliation and the District's response to its request for a fee waiver.

[19] Second, the District submits "Tsawout's request for access [and a fee waiver] is not to protect a specific right or interest but because of who they are as an entity which OIPC jurisprudence does not support."[14]

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[10] Order 01-04, 2001 CanLII 21558 (BC IPC) at paras 27-28.
[11] Decision F08-05, 2008 CanLII 41153 (BC IPC) at para 22; Order F20-14, 2020 BCIPC 16 (CanLII) at para 37.
[12] Order F21-18, 2021 BCIPC 23 (CanLII) at paras 39-45.
[13] Order F22-37, 2022 BCIPC 41 (CanLII) at paras 20-30; Order F22-18, 2022 BCIPC 20 (CanLII) at paras 34-40; Order 01-24, 2001 CanLII 21578 (BC IPC) at paras 85-90; Order No. 90-1996, 1996 CanLII 532 (BC IPC) at pp 7-8.
[14] District's submission at para 17.

[20] I note that, nearly 30 years ago, former Commissioner Flaherty agreed with an applicant that the "fact that the information request is on behalf of a First Nation should give added weight to the request for a fee waiver".[15] While this sole factor is not determinative of the issue, there are OIPC orders that find it can be appropriate to consider an applicant's Indigenous status when considering whether to grant a fee waiver.

[21] Third, the District submits s. 75(5)(a) does not contemplate the type of fairness raised by the applicant. It submits that, when interpreting and applying FIPPA, it is only required to consider FIPPA itself and previous OIPC orders; not UNDRIP.[16]

[22] Canada endorsed UNDRIP in 2010 and became a signatory in 2016. Among other things, UNDRIP expresses concern "that Indigenous peoples have suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests".[17] It emphasizes Indigenous peoples' right to self-determination through self-governance.[18]

[23] As part of implementing UNDRIP into domestic law, the provincial government enacted DRIPA in 2019. The relevant parts of DRIPA read:

> Purposes of Act
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> 2. The purposes of this Act are as follows:
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> (a) to affirm the application of the [UNDRIP] to the laws of British Columbia;
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> (b) to contribute to the implementation of the [UNDRIP];
>
> (c) to support the affirmation of, and develop relationships with, Indigenous governing bodies.
>
> Measures to align laws with [UNDRIP]
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> 3. In consultation and cooperation with the Indigenous peoples in British Columbia, the government must take all measures necessary to ensure the laws of British Columbia are consistent with [UNDRIP].

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[15] Order No. 90-1996, 1996 CanLII 532 (BC IPC) at pp 7-8, cited with approval in Order 01-24, 2001 CanLII 21578 (BC IPC) at para 79.
[16] District's submission at paras 18-20.
[17] United Nations Declaration on the Rights of Indigenous Peoples, *supa* note 1 at p 3.
[18] *Ibid,* see Articles 3-5 and 23.

[24] In 2021, the legislature also added s. 8.1 to the *Interpretation Act.* The relevant parts read:

> (2) For certainty, every enactment must be construed as upholding and not abrogating or derogating from the aboriginal and treaty rights of Indigenous peoples as recognized and affirmed by section 35 of the *Constitution Act, 1982*.
>
> (3) Every Act and regulation must be construed as being consistent with [UNDRIP].

[25] As a result of s. 8.1(3), British Columbia's laws must be interpreted to conform with the binding international rights, obligations and principles recognized in UNDRIP and to generally harmonize with the international standards and extended rules that UNDRIP articulates, wherever possible.[19]

[26] Based on this requirement, I find that a determination about whether it is fair to excuse an applicant from paying fees, under s. 75(5)(a), can include a consideration about whether the requirement to pay fees is inconsistent with UNDRIP. If it is, then, depending on all relevant circumstances, this may be a reason to find it is fair to excuse an applicant from paying fees.

[27] For the reasons above, I will not adopt the District's narrow approach to what fair means under s. 75(5)(a) when deciding whether it is fair to excuse payment of fees. Below, I will consider the following circumstances, which I find, based on the parties' submissions and evidence, are relevant to the fairness determination in this case:

- Indigenous self-determination and reconciliation with Indigenous peoples.
- other factors raised by the District
- the parties' attempts to resolve the fee dispute.
- the District's fee estimate.

Indigenous self-determination and reconciliation with Indigenous peoples

Parties' positions

[28] The applicant submits that the records it is seeking to access relate to a subdivision development in its traditional lands and more specifically on

[19] *Gitxaala v. British Columbia (Chief Gold Commissioner)*, 2025 BCCA 430 (CanLII) at para 92; for an example of this requirement applied to a municipality, see: *Kits Point Residents Association v Vancouver (City)*, 2023 BCSC 1706 (CanLII) at paras 169-172.

"an ancient village site of profound cultural, spiritual, and legal importance to [Tsawout]."[20] It submits it wants the records to understand how the development impacts its Aboriginal rights and rights under the Douglas Treaty and to effectively engage with the District about current and future development activities in the area.[21] It submits imposing fees for these records interferes with its governance responsibilities and is a barrier to reconciliation and, therefore, is incompatible with the principles of reconciliation, UNDRIP, and DRIPA.[22]

[29] The District says that it does not view the applicant's asserted interest in the lands where the subdivision is located as relevant because it is unable "to assess claims of aboriginal title or rights over property held in fee simple by third parties."[23] The District submits there are seven First Nations with traditional territories within the boundaries of the District (I understand the applicant to be included in this total). It submits these First Nations may have overlapping, asserted interests or responsibilities with respect to the lands where the subdivision is located, but that the District does not take a position on these assertions.[24]

[30] I asked the District whether it had made reconciliation commitments to Tsawout or any other First Nation.[25] In response, the District submits it has a Memorandum of Understanding dated December 3, 2021 with the W̱SÁNEĆ Leadership Council, which, at the time, included Tsawout.[26] The MOU includes a commitment to develop government-to-government relationships and address specified shared interests and W̱SÁNEĆ priorities. The District submits that, after Tsawout informed the District that it had withdrawn from the W̱SÁNEĆ Leadership Council, the District has been in contact directly with Tsawout "over the past few years to attempt to meet and engage directly to better understand priorities and work towards a mutually agreeable arrangement."[27]

[31] I also asked the District whether it viewed the considerations raised by the applicant (i.e., that the records relate to lands significant to the First Nation and the public body has made commitments to reconciliation with that First Nation) as a reason why it may be fair to excuse payment of fees under s. 75(5)(a). In response, the District submits that information sharing is a component of

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[20] Applicant's initial submission at Exhibit C, August 7, 2025 request for a fee waiver.
[21] Applicant's reply submission at para 14.
[22] *Ibid* at paras 18, 19, and 22-30. The applicant also submits, at para 20, that the District has "acknowledged that the records 'relate to development activities on unceded Tsawout territory.'" I find that the District's submission did not include this acknowledgement and instead find that the District's statement, at para 15 of its submission, was merely paraphrasing the applicant's argument.
[23] District's submission at para 15.
[24] District's supplemental submissions #2 at para 2(e).
[25] Adjudicator's letter to parties dated December 9, 2025.
[26] District's supplemental submission #2 at paras 1(a) and (b).
[27] *Ibid* at para 1(b).

reconciliation, but that this component should be achieved through a government-to-government process, separate from FIPPA, to be developed in collaboration with the applicant.[28] It also says that the subdivision was completed in December 2017 and there have been no active subdivision applications on those lands since then. It submits there is no connection between the subdivision completed eight years ago and the applicant's fairness arguments.[29]

Analysis

[32] The District's submissions seem to suggest that if the applicant had a declaration of rights or title related to the lands where the subdivision is located, then the District may have given more credence to the applicant's arguments under s. 75(5)(a). I am not persuaded by this differential approach. For more than 20 years, the preferred approach for reconciling state and Indigenous interests has been through negotiation, since aboriginal claims litigation can be very complex and require years and even decades to resolve in the courts.[30] As a result, many of the province's more than 200 First Nations do not have declarations of rights or title from courts and, where they do, the declaration may only apply to the exercise of specific rights in specific circumstances or locations.[31]

[33] The District has acknowledged, in the MOU and its submissions, that the applicant is a First Nation with traditional territories within the geographic boundaries of the District. The MOU proposes a path for the District and the applicant, when it was part of the W̱SÁNEĆ Leadership Council, to reconcile their interests. The District submits that it has continued to engage directly with Tsawout about developing a mutually agreeable arrangement.

[34] It is clear to me, from the District's decision to voluntarily engage in negotiated reconciliation with Tsawout, that it recognizes an overlap between its geographic boundaries and the applicant's traditional territories. It could be that the District only doubts the applicant's more specific assertion that the subdivision relevant to the access request is located on an ancient village of profound cultural, spiritual, and legal importance to the Tsawout First Nation. However, if this is the case, the District has not raised any specific concerns about the veracity of this claim or asked the applicant to provide more information about its relationship with this area. Nothing the District says persuades me that I should doubt the applicant's assertion that the land where the subdivision is located is significant to Tsawout.

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[28] *Ibid* at paras 2(a), (b), (c), and (k).
[29] *Ibid* at paras 2(g) and (h).
[30] *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 (CanLII) para 14.
[31] For example, *Saanichton Marina Ltd. v. Claxton,* 1989 CanLII 2721 (BC CA) at paras 2, 7-9, 40-41, and 46.

[35] Lastly, the District submits that since the records relate to a subdivision that was completed eight years ago, there is no connection between the records and Indigenous self-determination or reconciliation. In reply, the applicant submits "historical records are often essential for Indigenous Nations to understand past decision-making, assess cumulative impacts, and identify consultation gaps."[32] I agree with the applicant. The fact that the subdivision was completed eight years ago does not mean that the responsive records cannot be relevant to the applicant's self-determination or ability to engage with the District about future subdivision applications.

[36] I find the applicant has established a sufficient connection between the records it is seeking to access and its ability to self-govern and reconcile its interests with those of the District. I, therefore, find that the required fees represent a barrier to access that is inconsistent with the applicant's rights to self-determination and self-governance articulated in UNDRIP. I find that this factor weighs in favour of granting a fee waiver under s. 75(5)(a) on the basis of fairness. For clarity, I find this is only one relevant factor and is not determinative of the issue.

Other factors raised by the District

[37] In its response to my request for more information about its views on reconciliation in the context of s. 75(5)(a), the District submits:

> Although, not relevant to this application, lands adjacent to the subject lands did have an active subdivision application in 2025 and those records were provided to Tsawout as part of a separate request without fees. The historical nature of this subdivision file is why fees are triggered because it will require additional staff time to compile and review the paper records.[33]

[38] The age and type of records responsive to a request and the public body providing the applicant with other records without fees can be relevant considerations in a fairness analysis under s. 75(5)(a). However, in this case, the District does not expressly say that these factors impacted its denial of the fee waiver or that, based on these considerations, I should find it is not fair to excuse payment in the circumstances. Without more information, I find these factors lend little to no weight to a finding that it is not fair to excuse payment.

Parties' attempts to resolve the fee dispute

[39] The applicant submits that the District:

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[32] Applicant's supplemental submission #1 at para 20.
[33] District's supplemental submission #2 at para 2(g).

1. applied the wrong statutory test when considering whether to waive the fee estimate and, therefore, considered irrelevant factors;

2. did not give reasons for rejecting the applicant's fairness considerations and refused to reconsider its decision;

3. failed to consider relevant factors, including reconciliation and its obligations under DRIPA and UNDRIP, when deciding whether to waive the fee estimate. [34]

[40] In response, the District agrees that it cited the wrong section (s. 25(1)) when it denied the applicant's request for a fee waiver. However, it says that the factors it considered were still a proper exercise of discretion under the s. 75(5)(a) fairness analysis because it considered the content of the records, the impact the release of the records would have and whether the payment of fees would cause financial hardship.[35]

[41] In reply, the applicant submits that:

> applying the wrong statutory test cannot be cured simply by re-labelling the same analysis after the fact. Discretion must be exercised under the correct section, for the correct purpose, and by reference to the correct statutory criteria. A public body cannot rely on a s. 25 analysis and retroactively deem it to have been an exercise of discretion under s. 75(5)(a).[36]

[42] The applicant submits that the District has not issued a fresh decision under s. 75(5)(a) and has not explained how it weighed relevant fairness factors, reconciliation obligations, or Tsawout's governance interests.

[43] I find that the District did not adequately respond to the applicant's request for a fee waiver. Public bodies are expected to provide written reasons explaining the denial of a fee waiver before encouraging an applicant to take their concerns to the OIPC.[37] While the District provided written reasons for the denial, these reasons did not address the fairness considerations raised by the applicant. I understand, from the District's submissions in this inquiry, that it does not view these factors to be a reason it is fair to excuse payment under s. 75(5)(a). However, this position was not included in the reasons for denial given to the applicant.

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[34] Applicant's initial submission at para 5.
[35] District's submission at paras 2-3.
[36] Applicant's reply submission at para 7.
[37] Order No. 90-1996, 1996 CanLII 532 (BC IPC) at 12.

[44] The District's reasons for denial also did not include the other factors the District raises in its submissions, such as the age and type of records responsive to the request and the fact that it provided the applicant access to records responsive to an earlier, related request without charging fees.[38]

[45] Overall, I find the District did not provide the applicant with sufficient information to understand the District's reasons for denying the fee waiver, thereby limiting the applicant's ability to resolve the fee dispute directly with the District. I find this factor weighs in favour of finding it is fair to excuse payment of fees in the circumstances.

District's fee estimate

[46] Section 75(1)(b) states that public bodies may charge prescribed fees for services. These prescribed fees are set out in Schedule 1 of the Freedom of Information and Protection of Privacy Regulation. This schedule includes a maximum fee of "$0.10 per page" for a "scanned electronic copy of a paper record".

[47] The applicant included the District's fee estimate as evidence in this inquiry. The fee estimate totals $397.50, which includes 15 hours for locating, retrieving, producing, or preparing records and a fee of $0.15 per digital page for an estimated 250 pages totalling $37.50.

[48] I wrote to the District and asked it to provide the legal basis for charging the $0.15.[39] In response, the District acknowledged that it listed an incorrect fee for digital copying and that it should have listed $0.10 in accordance with Schedule 1 of the Freedom of Information and Protection of Privacy Regulation.[40]

[49] I find that a public body including a fee in its fee estimate that it is not authorized to charge under s. 75(1)(b) represents an unfair barrier to access to records. In this case, I find the inclusion of this fee is a reason to reduce the fee estimate by $12.50 (the difference between the estimate, $37.50, and the total that can be charged using the $0.10 fee, $25).

[50] However, in the circumstances, I find that this factor does not lend weight to waiving any other part of the estimate because there is no evidence that the error was intentional and, when the error was brought to its attention, the District responded appropriately by acknowledging its error.

[38] District's supplemental submission #2 at paras 2(g) and (h).
[39] Adjudicator's letter to parties dated December 2, 2025.
[40] District's supplemental submission #1.

Conclusion – s. 75(5)(a)

[51] In conclusion, I find that $12.50 of the fee estimate should be waived because it represents an amount that cannot be charged under s. 75(1)(b) of FIPPA. I also find that the remainder of the fee estimate should be waived because the applicant has established that:

- the records are sufficiently connected to the applicant's self-governance and reconciliation with the District to find that the fees charged under s. 75(1)(b) impose a barrier to access that is inconsistent with the principles of UNDRIP; and

- the District did not provide the applicant with sufficient information to understand the District's reasons for denying the fee waiver, which limited the applicant's ability to resolve the fee dispute directly with the District.

[52] Based on the above, I find it is fair, in the circumstances, to excuse the applicant from paying all fees associated with processing its access request.

CONCLUSION

[53] For the reasons given above, under s. 58(3)(c), I excuse the applicant from the District's requirement to pay fees for processing the access request and require the District to process the applicant's access request in accordance with Part 2 of FIPPA.

January 14, 2026

ORIGINAL SIGNED BY

Rene Kimmett, Adjudicator

OIPC File No.: F25-01839