Court File No. 11 4058
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE JUDICIAL REVIEW PROCEDURE ACT
R.S.B.C. 1996 c. 241

BETWEEN:

DR. JOHN TAYLOR

PETITIONER

AND

INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA, HER MAJESTY THE QUEEN IN THE RIGHT OF BRITISH COLUMBIA AS REPRESENTED BY THE MINISTRY OF EDUCATION

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO:

Information and Privacy Commissioner for British Columbia
4th Floor, 947 Fort Street
Victoria, BC V8V 3K3

Her Majesty the Queen in the Right of British Columbia as represented by
the Ministry of Education
c/o Ministry of Attorney General
1001 Douglas Street, Victoria, BC V8W 2C5

This proceeding has been started by the Petitioner(s) for the relief set out in Part 1 below.

If you intend to respond to this Petition, you or your lawyer must

(a) file a response to petition in Form 67 in the above-named registry of this court within the time for a response to petition described below, and

(b) serve on the petitioner(s)

(i) 2 copies of the filed response to petition, and

(ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

(a) if you were served with the petition anywhere in Canada, within 21 days after that service,

(b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,

(c) if you were served with the petition anywhere else, within 49 days after that service, or

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

(1)	The address of the registry is: The Law Courts 850 Burdett Avenue Victoria, BC
(2)	The ADDRESS FOR SERVICE of the petitioner is c/o 514 -737 Yates Street Victoria, BC V8W 1L6 **Attention: John S. Heaney** Fax number for service (if any) of the petitioners: 1-866-615-8276 E-mail address for service (if any) of the petitioner(s): jheaney@heenan.ca
(3)	The name and office address of the petitioner's lawyer is: HEENAN BLAIKIE LLP c/o 514 -737 Yates Street Victoria, BC V8W 1L6 **Attention: John S. Heaney**

CLAIMS OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. An order quashing the ruling of the Adjudicator Jay Fedoruk dated August 18, 2011 (the "Order").

2. An order declaring the Order to be null and of no force or effect.

3. An order declaring that the Ministry of Education and its officials failed to exercise its discretion under Section 35 of the *Freedom of Information and Privacy Act* ("FIPPA" or the "Act") lawfully in 2005 by refusing the Petitioner's request for the renewal of a subsisting research agreement (the "Research Agreement") and by refusing to enter into a new research agreement proposed by the Petitioner in 2007.

4. An order directing the Ministry of Education to enter into a new research agreement with the Petitioner on the same terms and conditions as the Research Agreement, or, in the alternative, an order that the Ministry of Education reconsider the Petitioner's 2007 request for a research agreement and exercise its discretion on proper principles.

Part 2: FACTUAL BASIS

The Petitioner

1. The Petitioner is a doctorate education researcher who has conducted professional research in education and education statistics in British Columbia for twenty years, including for the Ministry of Education (the "Respondent Ministry") and for B.C. schools and school districts.

2. The Petitioner's education research has been highly valued by leaders in B.C. schools and school districts and some of the methods of analysis and reporting he developed have been emulated by the Respondent Ministry. Some leaders in B.C.'s education community have considered the Petitioner's research work valuable enough that they intervened with the Respondent Ministry's deputy minister and other officials to persuade the Respondent Ministry to maintain his access to its education data.

3. The Petitioner has had access to and worked with the Respondent Ministry's student-level data and other education data for many of the past 20 years. During this time, he has done all that was required of him, contractually and professionally, in regard to the use and safeguarding of personal information in the data. At no time in the past twenty years has the Respondent Ministry alleged that the Petitioner did anything other than all that the Respondent Ministry required of him in regard to the use and security of student data.

4. The Petitioner has had access to and worked with the Respondent Ministry's student-level data and other education data under three separate research agreements that the Respondent Ministry entered into with him under the auspices of Section 35 of FIPPA. The Research Agreement was entered into on August 15, 2003 with an expiry date of September 30, 2005. The Petitioner used the Research Agreement data for, among other things, professional statistical research he provided to clients in B.C. schools and school districts. The Respondent Ministry was fully aware of the Petitioner's use of the Research Agreement data. The Petitioner always complied with the conditions in his research agreements.

5. The Research Agreement data and other data the Petitioner received from the Respondent Ministry provided an irreplaceable underpinning of his professional livelihood on which he relies to support two families.

The Respondent Ministry breached the Research Agreement and then refused to renew it

6. In May 2005, the Respondent Ministry began to act in breach of the Research Agreement as Respondent Ministry personnel refused to provide the Petitioner with access to student-level data and other Respondent Ministry education data he was authorized to receive, and had received, under the Research Agreement.

7. The Petitioner directly asked the Respondent Ministry to renew the Research Agreement on numerous occasions ahead of the Research Agreement's September 30, 2005 expiry date and, in 2007, asked officials in the Respondent Ministry to enter into a new research agreement. The Petitioner was told by Respondent Ministry officials in 2005 that the Respondent Ministry could not do so as it was in the process of reviewing its policy on providing education data to external researchers. The Petitioner was told in 2007 that the Respondent Ministry's new policy made him ineligible for a research agreement.

8. While the Respondent Ministry was reviewing its policy on providing education data to external researchers, the Government of British Columbia already had a Policies and Procedures Manual on the interpretation of FIPPA (the "Policy Manual"). The Policy Manual defined "research", "statistics" and "statistical research". It set out the provincial government's policy on Section 35 and on a public body's grant of access to personal information under a research agreement. The policy closely tracks the conditions for disclosure of personal information set out in Section 35. The Policy Manual contains a sample Section 35 research agreement.

9. On September 14, 2005, the Respondent Ministry completed its policy entitled "Provision of Data to External Clients" ("Data Policy"). Though a number of Respondent Ministry officials summarized the Data Policy to the Petitioner and used it as a basis for denying him another research agreement, he was never provided with a copy of the policy until 2007.

10. From the rationale of the policy and its elements, it is clear that the Respondent Ministry intended that the Data Policy was to be applied to decisions on whether to enter into research agreements regarding student-level data under Section 35. The Data Policy contains a number of significant elements that are not found or grounded in Section 35, in the FIPPA regulations, in the Policy Manual or the Policy Manual's sample research agreement.

11. From internal documents created by officials in the Respondent Ministry, it appears clear that it was understood at the highest level of the Respondent Ministry that:

a) the stated justification for the Data Policy did not draw from the requirements of Section 35 or the Policy Manual;

b) the requirement that a researcher applicant for a research agreement prove that their project was reviewed by a post-secondary ethical committee is justified on the basis that it is part of the Respondent Ministry's template research agreement and is considered important by the Respondent Ministry. The requirement is not explained in any way in relation to Section 35 or the protection of privacy; and

c) the Respondent Ministry and deputy minister were aware or made aware that the Data Policy would impact the Petitioner's livelihood in regard to his ability to continue to provide professional education research to B.C. schools and school districts.

12. When the Petitioner made his third request for renewal of the Research Agreement - at a September 22, 2005 meeting with Respondent Ministry director Gerald Morton - Mr. Morton told him that his Research Agreement would not be renewed because, according to Mr. Morton:

a) the Research Agreement was "unlawful" – a statement that Mr. Morton never elaborated on, despite being asked to do so by the Petitioner on September 22 and in subsequent communications, including on December 30, 2005; and

b) the Data Policy condition requiring researcher applicants to have their research reviewed by a post-secondary committee did not apply to the Petitioner, as the Respondent Ministry did not consider what the Petitioner does to be "research".

13. Since 1990, the Petitioner has been doing research and statistical research in B.C. education, as those terms are defined in the Policy Manual.

14. The Respondent Ministry's positions - that the Research Agreement was unlawful and that the Petitioner does not do what the Respondent Ministry considers to be "research" - were communicated to the Petitioner again, including in writing by Mr. Will Sherman, the Respondent Ministry official responsible for FIPPA, on March 21, 2006.

15. The Petitioner enlisted the Information and Privacy Commissioner's ("Respondent Commissioner") assistance with his issues. Ms. Catherine Tully of the Respondent Commissioner's office wrote to Mr. Sherman on January 4, 2007 and asked him if his March 21, 2006 communication accurately reflected the Respondent Ministry's reasons for denying the Petitioner a renewal of his Research Agreement. It does not appear that Mr. Sherman or anyone in the Respondent Ministry ever responded to Ms. Tully's question.

16. In June and July of 2007, the Petitioner again applied to the Respondent Ministry for a research agreement under Section 35 covering education data. After a number of conversations and meetings and after having provided the Respondent Ministry with a draft research agreement that conformed to the conditions under Section 35, the Petitioner was told on September 7, 2007 that he would not be granted a research agreement, as:

a) he was already receiving summary data from the Respondent Ministry and his research could be done without the student-level data he requested in the proposed research agreement;

b) his research proposal had not been submitted to a post-secondary ethical review committee as required by the Data Policy; and

c) Mr. Morton was worried about the security of the data if it was in the Petitioner's custody.

17. The statement about the adequacy of summary data for his research is simply untrue. Further, ois own inquiries, the Petitioner learned that he, and any other similarly-situated member of the public, could not satisfy the condition in b) above unless he was a faculty member or student at a post-secondary institution with access to an ethical review committee.

The Respondent Ministry entered into research agreements with other researchers and provided them the very data it denied to the Petitioner

18. Edudata Canada ("Edudata") is a corporation operating under the auspices of the University of British Columbia and directed by Mr. Victor Glickman, a former senior official with the Respondent Ministry. Edudata charges clients for the research services and products it provides. The Respondent Ministry entered into an agreement with Edudata on March 13, 2003 under which the Respondent Ministry provides Edudata with a range of education data that, to the Petitioner's information, is not available to any other research organization or individual - giving Edudata a virtual monopoly position in the province on some education research services and products.

19. The Petitioner raised with the Respondent Ministry on a number of occasions that Edudata was publishing research material that it would be unable to publish unless it was receiving data that the Petitioner and others had been denied and/or Edudata had been organizing data in a way that the Respondent Ministry does not permit. Despite being told that the Respondent Ministry would end this practice by Edudata, the practices continued. Ms. Tully of the Respondent Commissioner's office asked the Respondent Ministry on January 4, 2007 about the Respondent Ministry's apparent different treatment of Edudata, in terms of the data it received and what it was allowed to do with it; however, the Petitioner is not aware of the Respondent Ministry ever responding to Ms. Tully's questions.

20. The Data Policy indicates that, where applicable and as part of research agreement disclosures, the Respondent Ministry would provide researchers with data linked to encrypted Personal Educations Numbers ("PENs"). On June 30, 2006, the Petitioner made a FIPPA request to the Respondent Ministry, including a request for student-level FSA data with encrypted PENs. Six weeks later, the Respondent Ministry entered into an agreement with Mr. David Johnson of Wilfred Laurier University who is associated with the C.D. Howe Institute to provide Mr. Johnson with education data that included encrypted PENs. However, just six weeks after that, on September 29, 2006, Ms. Gail McQueen, the Respondent Ministry's then director responsible for FIPPA, wrote to the Petitioner to tell him that the Respondent Ministry would not be disclosing his requested data with encrypted PENs as encrypting the PENs would take between 33.75 and 78 effort days over a period of 3.5 to 8 months. Despite having agreed to give comparable data to Mr. Johnson, and despite the Petitioner providing Ms. McQueen with information that the PENs could be encrypted in a few hours, the Respondent Ministry did not relent from its refusal to provide the data with encrypted PENs.

21. The Respondent Ministry's refusal to provide the data with encrypted PENs, despite its agreements with Edudata and with Mr. Johnson and the Petitioner's advice on an encryption process - appears to have been taken at the very highest level of the Respondent Ministry, according to its own documents which contain inaccuracies about the Petitioner and irrelevant considerations on reasons to deny him access to student-level FSA data.

The Respondent Ministry's differential treatment of the Petitioner occurred against a backdrop of it otherwise obstructing his access to education data and applying economic pressure on him

22. The backdrop to the Respondent Ministry exercising its discretion – whether regarding the Petitioner's request for a renewed/new research agreement or Section 4 access to data – includes numerous examples of the Respondent Ministry:

a) obstructing his access to education data;

b) obstructing the work of the Respondent Commissioner; and

c) applying economic pressure to the Petitioner.

23. In an October 5, 2006 letter, the Petitioner raised with the Respondent Commissioner his concern that the Respondent Ministry had not properly exercised its discretion in refusing to renew the parties' Research Agreement.

24. In a January 28, 2008 notice to the parties, the Respondent Commissioner confirmed that he had commenced an investigation of the Petitioner's complaint under Section 42 of FIPPA.

25. In an April 10, 2008 letter, the Respondent Ministry submitted that the Respondent Commissioner did not have jurisdiction to deal with the Petitioner's complaint. The Respondent Commissioner invited submissions from the parties on the matter.

26. Nineteen months later, in an order dated November 10, 2009, the Senior Adjudicator in the Respondent Commissioner's office agreed with the Petitioner and ruled that the Respondent Commissioner had jurisdiction to deal with his complaint and submissions on the substantial question were invited from the parties.

27. Two years later, in the Order, an Adjudicator in the Respondent Commissioner's office ruled that the Respondent Ministry and its officials had properly exercised their discretion.

28. The Petitioner estimates that his gross revenue losses attributable to the Respondent Ministry's denial of access to student-level and summary data, along with his legal costs of pursuing the student-level data, at $350,000.

Part 3: LEGAL BASIS

1. The Petitioner will rely on:

a) Rule 16-1 of the Supreme Court Civil Rules;

b) *Freedom of Information and Protection of Privacy Act*, RSBC, 1996 c. 165, as amended from time to time; and

c) *Judicial Review Procedure Act* RSBC, 1996 c. 241.

The purposes of the statute under which the Respondent Ministry exercised its discretion

2. The purposes of FIPPA are to make public bodies more accountable to the public and protect personal privacy by, among other things, giving the public a right of access to records, specifying limited exceptions to the right of access and preventing the unauthorized disclosure of personal information by public bodies.

Section 2, *FIPPA*

The requestor's right to information in the custody or control of the Respondent Ministry

3. A person who makes a request under Section 5 has a right to access any record in the custody or under the control of a public body and, while the right of access to a record does not extend to information excepted from disclosure under Division 2 of Part 2 of the Act, if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

Section 4(1) and (2), *FIPPA*

4. The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

Section 6(1), *FIPPA*

5. A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the disclosure is for research or statistical purposes and is in accordance with Section 35 of the Act.

Section 22(4)(d), *FIPPA*

6. A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to educational history. However, in determining whether a presumed unreasonable invasion of personal privacy is, at law, an unreasonable invasion of personal privacy, the head of a public body must consider all the relevant circumstances, including whether the disclosure is desirable for the purposes of subjecting the activities of the Government of British Columbia or a public body to public scrutiny.

Sections 22(4)(d); 22(2)(a), *FIPPA*

The requirements for disclosure of personal information under research agreements

7. A public body may disclose personal information 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;

b) the information is disclosed on the condition that it not be used for the purposes of contacting a person to participate in the research;

c) any record linkage is not harmful to the individual that information is about and the benefits to be derived from the record linkage are clearly in the public interest;

d) the head at 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; and

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

e) 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.

Section 35, *FIPPA*

8. Neither "research" nor "statistical research" is defined in the Act or in regulations under the Act.

Schedule 1, *FIPPA*
Section 1, Freedom of Information and Protection of Privacy Regulation B.C. Reg. 323/93 ("*FIPPA* Regulation")

9. The Government of British Columbia's Policy Manual characterizes Section 35 of the Act as follows:

> "Section 35 permits disclosure of information for purposes related to research and statistical studies providing all four conditions in the section have been met".

10. The Policy Manual defines "research" as follows:

> "'Research' is a systematic investigation into and study of materials or sources in order to establish facts and reach new conclusions [OED]. 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."

11. The Policy Manual defines "statistics" as follows:

> "'Statistics' is the science of collecting and analyzing 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 [OED]".

12. The Policy Manual defines "statistical research" as follows:

> "'Statistical research' is any research based on these methods using quantifiable 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 success of training or health programs or to study other social issues and trends".

13. The "Policy" section of the Policy Manual's directions on Section 35 provides that, among other things:

a) a public body is permitted, but not obliged to, disclose personal information for research purposes; if the public body is not completely satisfied a researcher will comply with the provisions of a research agreement, it shall refuse to provide approval;

b) the public body must be satisfied that all four requirements of Section 35 are met before approving a research agreement;

c) a public body shall only authorize a research agreement for a *bona fide* research project;

d) the research agreement is not to be used as a means to browse records;

e) personal information sets cannot be matched or compared with one another to make a decision about a particular person's entitlement or eligibility for, a job, benefit or service;

f) the head of the public body must be satisfied that, without prior approval of the head, the recipient will not disclose or share the personal information with any other party, except as specified in the research agreement, and will destroy any personal identifiers in the information as soon as possible; for example, without prior approval of the head, the researcher may not use the information for another study, use the information to sell products or services to the subjects of the study or sell or give the information to a charity or solicit donations;

g) the head of the public body must be satisfied that adequate security measures are in place to ensure the physical security of the personal information from unauthorized access, disclosure, theft or other danger; and

h) research agreements shall be time limited and shall be drafted for the minimum amount of time required to conduct the research or study; research agreements shall not be ongoing or "open-ended" but may be renewed as required.

14. The Data Policy contains a number of significant elements that are not found or grounded in Section 35, in the FIPPA regulations, in the Policy Manual or the Policy Manual's sample research agreement, including:

a) research that an applicant for a Section 35 research agreement proposes to do must be reviewed by an ethical committee at a post-secondary institution;

b) researchers will get the minimum data required to perform their analysis and, where possible PENs and school codes will be encrypted to further protect the privacy of individuals and schools;

c) the Respondent Ministry retains the option of requiring any researchers to provide the Respondent Ministry with the results of any research conducted with Respondent Ministry data prior to publication of the research; and

d) the Respondent Ministry may veto the release of any material related to the research agreement.

The lawful exercise of discretion

15. A public officer may only exercise discretion according to the law granting the power to decide.

16. A public officer 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.

17. A public officer must consider all relevant factors and ignore all irrelevant ones.

18. A public officer must not decide for his or herself that a "public interest" overrides the direction that flows from the empowering legislation.

19. A public officer must not fetter his or her discretion by reliance on a policy, rule or guideline of their own creation.

Standard of Review

20. While the Adjudicator was interpreting the statute that created his office and which he is appointed to interpret:

a) the proceeding called for him to rule in an area where there was no jurisprudence in British Columbia;

b) the proceeding involved a legal question with which the Adjudicator had developed no field sensitivity;

c) the question, whether public officials lawfully exercised their discretion under a statutory grant of discretion, is a general question of law that is important to the law; and

d) additionally, the question is one that this Honourable Court is better positioned and has greater expertise to answer and, in regards to such a question, owes little, if any, deference to the Adjudicator.

and based on all the foregoing, the proper standard of review in this matter is correctness.

21. In the alternative, the Adjudicator's decision was unreasonable.

The abuse of discretion

22. The Respondent Ministry failed to exercise its discretion within the bounds of jurisdiction conferred on it by the Act.

23. The Respondent Ministry failed to exercise its discretion for a proper purpose.

24. In exercising its discretion, the Respondent Ministry failed to take into account relevant factors and took into account irrelevant factors.

25. The Respondent Ministry unlawfully fettered its discretion by relying on a policy of its own creation that has no foundation in either the Act or the Policy Manual.

26. The Respondent Ministry exercised its discretion under Section 35 knowing that it was not acting within the lawful bounds of that discretion and knowing that its conduct would cause the Petitioner significant economic harm, or, in the alternative, the Respondent Ministry exercised its discretion reckless to both whether it was within the lawful bounds of that discretion and the economic harm to the Petitioner that its conduct would cause.

The Adjudicator erred in law

27. The Adjudicator erred in law, inasmuch as:

a) he misinterpreted and, therefore, misapplied Section 35 of the Act as a result of adopting from the Respondent Ministry an incorrect bifurcation of the discretion granted in the provision and the process by which it is to be exercised;

b) as a result of this misinterpretation, separated the exercise of discretion from the application of the factors for exercise of discretion the Legislature expressly set out in the provision;

c) misstated and misapplied the law of statutory discretionary decision-making, including the principles against:

(i) an official fettering his or her own discretion by reliance on a policy, rule or guideline of his own creation; and

(ii) an official deciding for his or herself that a public interest overrides the direction that flows from legislation;

d) misinterpreted and misapplied jurisprudence in previous orders of the Respondent Commissioner on the exercise of discretion that arise in unrelated areas and that are not analogous to the instant case;

e) misinterpreted and misapplied the law in holding that a policy relied on by the decision–maker can, of itself, delegate to others external to the Ministry a non-delegable grant of discretion;

f) misinterpreted and misapplied the law, and substantially misconstrued the evidence, by not finding that the Petitioner conducted research and effectively, holding that the Respondent Ministry could lawfully exercise its discretion while being wrong on a relevant factor central to the exercise of its discretion; and

g) denied procedural fairness to the Petitioner by first acknowledging that – as a result of the Respondent Ministry being afforded a chance by the Respondent Commissioner to raise new issues - the Petitioner had been denied adequate opportunity to present evidence on central evidentiary claims of the Respondent Ministry and then, having said that his findings on this evidence would not figure in his ruling, imported his findings on this evidence into his holdings.

Part 4: MATERIAL TO BE RELIED UPON

1. Affidavit #1 of Pamela Haliday sworn September 30, 2011.

The petitioner estimates that the hearing of the petition will take two (2) days.

Dated this 30 day of September, 2011

Signature of
[ ] petitioner [✓] lawyer for petitioner
JOHN S. HEANEY

To be completed by the court only:

Order made
[ ] in the terms requested in paragraphs _____ of Part 1 of this petition
[ ] with the following variations and additional terms:

.....
.....
.....
.....

Date:..... .....
Signature of [ ] Judge [ ] Master