IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *University of British Columbia v. Lister,* 2017 BCSC 41

Date: 20170110
Docket: 158377
Registry: Vancouver

IN THE MATTER OF THE *JUDICIAL REVIEW PROCEDURE ACT*, R.S.B.C. 1996, c. 241 (AS AMENDED)

AND IN THE MATTER OF THE *FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT*, R.S.B.C. 1996, c. 165 (AS AMENDED)

AND IN THE MATTER OF ORDER NO. F15-49 OF THE DELEGATE OF THE INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA

Between:

University of British Columbia

Petitioner

And

Geoff Lister and
Information and Privacy Commissioner of British Columbia

Respondents

Before: The Honourable Madam Justice Russell

On judicial review from: An order of a delegate of the Information and Privacy Commission of British Columbia, dated September 9, 2015 (*University of British Columbia (Re)*, 2015 BCIPC 52, Order F15-49).

Reasons for Judgment

Counsel for the Petitioner:	L. Novakowski D. Curtis
Counsel for the Respondent, Geoff Lister:	A. Epstein S. Lam
Counsel for the Respondent, Information and Privacy Commissioner of British Columbia:	T. Hunter A. Hudson

Place and Dates of Hearing:	Vancouver, B.C. November 24-25, 2016
Place and Date of Judgment:	Vancouver, B.C. January 10, 2017

Introduction

[1] In 2012, the University of British Columbia ("UBC") announced that it would adopt a holistic approach to undergraduate admissions called 'Broad Based Admissions' ("BBA"). As part of this process, applicants to UBC submit, in addition to their secondary school marks, answers to personal profile questions relating to their extracurricular activities. Subsequently, their answers to these profile questions are assessed for non-cognitive measures such as problem-solving, contributions to the community, and leadership. These assessments are scored under a rubric developed by the University (the "Rubric"), and combined with the applicant's academic record. This process was put into effect in the 2013 academic year.

[2] After UBC's announcement, Geoff Lister, a journalist with the University's student newspaper, 'The Ubyssey,' submitted a freedom of information request asking for, amongst other things, a disclosure of the Rubric. This request was granted on September 9, 2015 by an adjudicator (the "Adjudicator") of the Information and Privacy Commission of British Columbia: *University of British Columbia (Re)*, 2015 BCIPC 52 ("Order F15-49").

[3] Mr. Lister and the Information and Privacy Commissioner are respondents in this action.

[4] The petitioner is seeking judicial review of the Adjudicator's decision. Specifically, UBC argues that Order F15-49 should be quashed on the following grounds:

a) The Adjudicator's failure to exempt the Rubric under s. 3(1)(d) of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 238 ("*FIPPA*"), was both incorrect and unreasonable; or

b) in the alternative, if this Court finds that *FIPPA* does apply to the Rubric, the decision should be set aside on the basis that the Adjudicator's failure to exempt the Rubric under s. 17(1) of *FIPPA* was unreasonable.

[5] For the reasons that follow, UBC's application for judicial review is denied.

Standard of Review

[6] The *Administrative Tribunals Act*, S.B.C., c. 45, does not apply to the case at bar. Instead, the appropriate standard of review must be determined by applying the analytic framework outlined by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*]: *Sochowski v. British Columbia (Information and Privacy Commissioner)*, 2008 BCSC 1390 at para. 29.

[7] In *Dunsmuir* at para. 55, the Court concluded that, in the common law of judicial review, there are only two standards of review: reasonableness and correctness.

[8] The parties are in agreement that the standard of review that applies to s. 17(1) of *FIPPA* is reasonableness.

[9] The case law confirms that this standard is the appropriate one: *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 60.

[10] Consequently, when considering s. 17(1), I adopt a reasonableness standard.

[11] However, in regard to s. 3(1)(d), the parties disagreement on the appropriate standard of review. UBC submits that the appropriate standard is correctness, while the respondents maintain it is reasonableness.

[12] In *West Vancouver Police Department v. British Columbia (Information and Privacy Commissioner)*, 2016 BCSC 934 [*West Vancouver Police*], this Court recently outlined the appropriate approach to the standard of review analysis in *FIPPA* cases at paras. 17-18:

> [17] Where prior jurisprudence has already satisfactorily determined the appropriate standard of review for a particular category of question, the court can apply that standard: Dunsmuir at para. 62.
>
> . . .

[13] In regard to prior jurisprudence, while this Court has not considered s. 3(1)(d) specifically, it has considered the appropriate standard of review for s. 3(1). In all of these cases, the appropriate standard of review was found to be correctness: *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner) et al.*, 2004 BCSC 1597; *Simon Fraser University v. British Columbia (Information and Privacy Commissioner)*, 2009 BCSC 1481; and *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 931.

[14] In light of this case law, UBC submits that prior jurisprudence has satisfactorily determined that the standard of review for s. 3(1)(d) is correctness.

[15] I disagree with this submission. This Court has recently determined that the s. 3(1) cases cited by UBC have been rendered inapplicable by the SCC's decision in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*]: *West Vancouver Police* at para. 24.

[16] For reasons that I will outline below, I agree with this Court's reasoning in *West Vancouver Police*. Consequently, UBC cannot simply assert that correctness is the appropriate standard to be applied in the case at bar, as I find that *Alberta Teachers* has made those s. 3(1) cases inapplicable.

[17] Given that the Adjudicator was interpreting their home statute, and previous case law has not, in light of *Alberta Teachers*, settled the appropriate standard of review, this Court must analyze the four categories outlined at para. 18 of *West Vancouver Police* but taken from *Dunsmuir.*

[18] It should be noted that these four categories are well-established in the Supreme Court of Canada jurisprudence. For example, a particularly good summary of these categories is found in *Smith v. Alliance Pipeline Ltd.*, 2011 SCC at para. 26:

> Under *Dunsmuir*, the identified categories are subject to review for either correctness or reasonableness. The standard of correctness governs: (1) a constitutional issue; (2) a question of "general law 'that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise'" (*Dunsmuir*, at para. 60 citing *Toronto (City) v.*

> *C.U.P.E., Local 79*, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77, at para. 62); (3) the drawing of jurisdictional lines between two or more competing specialized tribunals; and (4) a "true question of jurisdiction or vires" (paras. 58-61).…

[19] I find that, in the case at bar, it is self-evident that the first three categories are irrelevant. A constitutional question is not engaged, and the question of law here, the scope of *FIPPA*, was clearly within the Adjudicator's expertise as a decision-maker regularly applying the statute in question. Moreover, there were no issues concerning the jurisdictional lines between two or more tribunals. Therefore, the only potentially relevant category is the issue of whether there is a question of true jurisdiction.

[20] In *Dunsmuir* at para. 59, the Court noted that courts should avoid construing the decisions of administrative tribunals as issues of true jurisdiction:

> Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19 (CanLII). In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, *per* Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[21] In *Alberta Teachers*, the Court emphasized its warning against treating an administrative tribunal's decision as a true jurisdictional issue at paras. 33-34:

> [33] Finally, the timelines question does not fall within the category of a "true question of jurisdiction or *vires*". I reiterate Dickson J.'s oft-cited warning in

> *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so" (p. 233, cited in *Dunsmuir*, at para. 35). See also *Syndicat des professeurs du collège de Lévis-Lauzon v. CEGEP de Lévis-Lauzon*, [1985] 1 S.C.R. 596, at p. 606, *per* Beetz J., adopting the reasons of Owen J.A. in *Union des employés de commerce, local 503 v. Roy*, [1980] C.A. 394. As this Court explained in *Canada (Canadian Human Rights Commission)*, "*Dunsmuir* expressly distanced itself from the extended definition of jurisdiction" (para. 18, citing *Dunsmuir*, at para. 59). Experience has shown that the category of true questions of jurisdiction is narrow indeed. Since *Dunsmuir*, this Court has not identified a single true question of jurisdiction (see *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, at paras. 33-34; *Smith v. Alliance Pipeline Ltd.*, [2011] 1 S.C.R. 160, at paras. 27-32; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at paras. 31-36). Although this Court held in *Northrop Grumman Overseas Services Corp. v. Canada (Attorney General)*, 2009 SCC 50, [2009] 3 S.C.R. 309, that the question was jurisdictional and therefore subject to review on a correctness standard, this was based on an established pre-*Dunsmuir* jurisprudence applying a correctness standard to this type of decision, not on the Court finding a true question of jurisdiction (para. 10).
>
> [34] The direction that the category of true questions of jurisdiction should be interpreted narrowly takes on particular importance when the tribunal is interpreting its home statute. In one sense, anything a tribunal does that involves the interpretation of its home statute involves the determination of whether it has the authority or jurisdiction to do what is being challenged on judicial review. However, since *Dunsmuir*, this Court has departed from that definition of jurisdiction. Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[22] Rothstein J. then went on to outline how matters of true jurisdiction are to be determined at para. 39:

> What I propose is, I believe, a natural extension of the approach to simplification set out in *Dunsmuir* and follows directly from *Alliance* (para. 26). True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why

> the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.

[23] No attempt was made by the petitioner to demonstrate that the case at bar was of an exceptional nature. Instead, UBC's submissions regarding the appropriate standard of review for s. 3(1)(d) relied exclusively on the fact that this Court has, in the past, determined that the standard of review for s. 3(1) is correctness. As noted above, this Court recently made it clear in *West Vancouver Police* that the Supreme Court of Canada's decision in *Alberta Teachers* has made these earlier cases inapplicable.

[24] In light of the above, I find that the appropriate standard of review for s. 3(1)(d) is reasonableness.

[25] My finding in this respect is reinforced by what I believe to be a clear signal from the Supreme Court of Canada that it wishes to significantly limit, and perhaps foreclose, the category of true jurisdictional questions. In this regard, the following passage at para. 34 of *Alberta Teachers* is worth requoting:

> …Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions of jurisdiction exists and is necessary to identifying the appropriate standard of review ….

[26] More recently, the Supreme Court of Canada has moved even closer to signalling this change. In *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 [*McLean*] at para. 25, the Court found:

> …In that case [*Alberta Teachers*], the Court expressed serious reservations about whether such questions [of true jurisdiction] can be distinguished as a separate category of questions of law, but ultimately left the door open to the possibility (para. 34).

[27] However, in a footnote attached to this passage, the Court wrote:

> I note that the U.S. Supreme Court has recently shut this door; see *City of Arlington, Texas v. Federal Communications Commission*, 133 S. Ct. 1863 (2013) ("the distinction between 'jurisdictional' and 'nonjurisdictional' interpretations is a mirage" because "a separate category of 'jurisdictional' interpretations does not exist" (pp. 1868 and 1874)).

[28] It should be noted that, as in *Alberta Teachers*, the issue of 'true jurisdiction' was not directly before the Court in *McLean*. Despite this, the Court still felt the need to provide the comments quoted above.

[29] Consequently, in summary, as I did for s. 17(1), In summary, I find that the appropriate standard of review for s. 3(1)(d) of *FIPPA* is reasonableness. I make this finding for the following reasons: (1) in light of *Alberta Teachers* and *West Vancouver Police*, the case law cited by UBC is inapplicable; (2) UBC failed to provide any submissions consistent with the *Alberta Teachers* framework to rebut the presumption that the reasonableness standard applies; and (3) in recent years, the Supreme Court of Canada has strongly admonished courts to avoid relying on the category of true jurisdiction.

Appropriate Principles of Statutory Interpretation

[30] Before embarking on an analysis of whether the Adjudicator reasonably interpreted *FIPPA*, it is appropriate to outline the principles of statutory interpretation that apply in these circumstances.

[31] On this point, I find this Court's comments in *British Columbia (Ministry of Labour and Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2009 BCSC 1700 at para. 36 apposite:

> The question of statutory interpretation, of course, is not an either/or proposition. The principle known as "Driedger's modern principle of statutory interpretation" has been oft-cited and approved as the preferred approach both by the Supreme Court of Canada and our Court of Appeal. It provides as follows:
>
> - Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with this scheme of the Act, the object of the Act, and the intention of Parliament.
>
> See, for instance, *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21, *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, and E. A. Driedger, *Construction of Statutes* (Toronto: Butterworths, 1974) at 67.

[32] In addition, I note the Supreme Court of Canada's recent comments in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 22:

> …Thus, access to information legislation is intended to facilitate one of the foundations of our society, democracy. The legislation must be given a broad and purposive interpretation….

[33] Finally, it is important to take into consideration the Court's description of a reasonableness standard of review as outlined in *Dunsmuir* at para. 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[34] However, I should note that some of the case law has been skeptical of whether a reasonableness standard of review can be applied to a tribunal's interpretation of its home statute. For example, skepticism of this sort was expressed in the dissent in *Alberta Teachers* at para. 85:

> What then is involved in a "reasonableness" review of a tribunal's interpretation of its home statute? The *Dunsmuir* majority said that "[t]ribunals have a margin of appreciation within the range of acceptable and rational solutions" (para. 47). It is clear that the "range of acceptable and rational solutions" is context specific and varies with the circumstances including the nature of the issue under review. In *CHRC*, the reviewing court was called on to judicially review a tribunal's decision that its home statute gave it the statutory power to award costs. On appeal, the Court applied a "reasonableness" standard (referring at several points to the issue being within the "core function and expertise of the Tribunal", e.g., at para. 25). The reasonableness analysis nevertheless followed the well-worn path of *Driedger*'s golden rule and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983)). In other words, the intensity of scrutiny was not far removed from a correctness analysis, in my respectful opinion, just as was the case in *Dunsmuir* itself.

[35] Some of the secondary literature on the subject has also expressed similar skepticism. In this context, Guy Régimbald noted the following in *Canadian Administrative Law*, 2nd ed. (Markham, ON : LexisNexis, 2015) at 193:

> In applying the normal principles of interpretation as in normal appeals under questions of law, however, it is questionable whether the analysis for jurisdictional questions is really distinct from the application of the correctness standard, as courts will intervene if the decision maker adopted an interpretation that is not supported by the enabling statute.

[36] Despite these expressions of skepticism, in the case at bar, I adopt Dreidger's modern principle of statutory interpretation within a reasonableness framework, recognizing that any interpretation of *FIPPA* must be broad and purposive. Consequently, in keeping with the SCC's finding in *Dunsmuir*, I note that there is a range of acceptable and rational interpretations of *FIPPA* when applying these principles of statutory interpretation.

Application of FIPPA to UBC

[37] The application of *FIPPA* to UBC is not a point of contention between the parties.

[38] Section 4 of *FIPPA* provides that a person has a right of access to records in the custody or control of a "public body" upon request. As noted by the petitioner, UBC is a public body by virtue of the following:

a) Pursuant to Schedule 1 of *FIPPA* a "public body" means, among other things, "A local public body";

b) Schedule 1 defines a "local public body" as, among other things, "an educational body";

c) UBC is a "university" as defined in the *University Act*, RSBC 1996, c. 468; and

d) Schedule 1 defines an "educational body" as, among other things, "A university as defined in the *University Act*."

[39] UBC is thus clearly subject to *FIPPA*.

Section 3(1)(d)

[40] The petitioner submits that the term "record of a question" in s. 3(1)(d) is broad enough to include the Rubric. Consequently, UBC contends that the Adjudicator's decision, which found that the Rubric was not captured by this language, was unreasonable.

[41] The text of s. 3(1)(d) of *FIPPA* reads as follows:

> 3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> …
>
> (d) a record of a question that is to be used on an examination or test;

[42] As it did when it was in front of the Adjudicator, UBC has submitted an analysis of the wording of the statute which suggests that the Rubric is exempted from disclosure as a 'record of a question' under s. 3(1)(d).

[43] Moreover, as it also did when arguing in front of the Adjudicator, UBC has referred to a number of cases from other jurisdictions dealing with similar questions. The most relevant of these was the Newfoundland and Labrador Privacy Commissioner's Report A-2008-013, where a statutory provision identical to s. 3(1)(d) was considered. At para. 29 of that decision, the Commissioner in question found the following:

> I agree with the reasoning of my predecessor when he says that an interview process clearly fits the definition of "test" that he applied. In this case, I find that the interview process conducted by Memorial's School of Pharmacy is a "procedure intended to establish the quality, performance, or reliability of something." I interpret the word "question" in section 5(1)(g) to include anything related to the question to be used on an examination or test. As such, I find that the interview questions, the instructions to interviewers, ***and the scoring rubric are a "record of a question that is to be used on an examination or test."*** They are all, to use the words of the Alberta Commissioner in Order F2002-012, "integral to the question." To disclose either one of the three (the questions, the instructions or the rubric) and to withhold the others would lead to the "absurd consequences" referred to by the public body in Alberta Order F2002-012.
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> [Emphasis added.]

[44] In response to these arguments, the Adjudicator found the following at paras. 18-22 of her decision:

> [18] The Interpretation Act [RSBC 1996, c. 238, s. 8] requires that every enactment be construed as remedial and be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects. Further, the Supreme Court of Canada has stated that the modern approach to statutory interpretation requires that the words of an act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the act and the intention of the legislators.
>
> [19] With that in mind, I have considered the BC legislators' choice to use the phrase "record of a question" when other equivalent provincial statutes use the briefer phrase "a question". The added word "record" is a defined term in BC's FIPPA, and the rubrics clearly fall within that definition. Section 3 enumerates the types of records that are excluded from the scope of FIPPA. In my view, the use of "record of" in s. 3(1)(d) emphasizes and clarifies what is already expressed above in 3(1) – that what is being excluded from the scope of FIPPA by s. 3 are records as opposed to just information within records. The phrase "record of" does not expand the meaning of the word "question" beyond its grammatical and ordinary sense. The word "question" is defined by Webster's New World College Dictionary, as "something that is asked; interrogative sentence, as in testing another's knowledge; query". In my opinion, the rubrics clearly do not meet this plain and ordinary meaning of the word "question". The rubrics are instructions and scoring guides to the readers who mark the personal profiles. They do not contain the personal profile questions, nor is it possible to infer from them what the personal profile questions might be.
>
> [20] The purposes of FIPPA are described in s. 2 and include making public bodies more accountable by giving the public a right of access to records subject only to specified and limited exceptions. To expand the meaning of "question" as broadly as UBC suggests would not be a correct approach to the section given the purposes of FIPPA set out in s. 2. Section 3(1)(d) recognizes the necessity of maintaining the fairness and integrity of examinations and tests by ensuring that test-takers do not have advance access to the questions to be asked. However, the meaning and application of s. 3(1)(d) should not be stretched to include records that do not fall within the ordinary meaning of the words chosen by the legislators unless there is some indication that that this was their intention. Given the stated purpose of FIPPA to set only specific and limited exceptions to access rights, I am not convinced that when s. 3(1)(d) was drafted that the intent was to include records which in no way contain a question to be used on an examination or test or would allow one to accurately infer such a question.
>
> [21] Finally, I am not persuaded that the four orders cited by UBC support its submission that the rubrics in this case are "a record of a question" pursuant to s. 3(1)(d). The records in those cases were clearly questions or they were integral parts of questions, without which the questions would not be complete or understandable to the test administrator or test taker. The rubrics at issue here are not at all the same. The rubrics are instructions to guide the

> readers in objectively assessing and scoring the personal profiles, but the rubrics do not contain (or allow one to accurately infer) the actual personal questions.
>
> [22] In conclusion, I find that s. 3(1)(d) does not apply to the rubrics because none of them are a record of a question that is to be used on an examination or test. Therefore, FIPPA does apply to the rubrics.

[45] I see nothing unreasonable in this finding. The Adjudicator provided cogent and sophisticated reasons for her determination. Moreover, the Adjudicator clearly distinguished the cases cited by UBC, which in any event were not binding on the Adjudicator, as they originated in other provinces.

[46] In addition, the petitioner submits that the Adjudicator's consideration of s. 2 while analyzing s. 3(1)(d) was an error that rendered the Adjudicator's decision unreasonable. No case law was provided for this point, and I do not find UBC's arguments persuasive.

[47] Finally, in their written submissions, UBC provided arguments broadly grouped under the titles 'Absurd Consequences' and 'Correct Interpretation.' Again, in these submissions, the petitioner failed to refer to any substantive case law, and there was nothing in them that convinced me that the Adjudicator's finding was unreasonable.

[48] Consequently, I find that the Adjudicator's decision regarding s. 3(1)(d) was reasonable.

Section 17(1)

[49] In the alternative, the petitioner argues that, if this Court finds that s. 3(1)(d) does not exclude the Rubric from the application of *FIPPA*, then it was entitled to withhold the Rubric according to s. 17(1) of *FIPPA*.

[50] Section 17(1) reads as follows:

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British

> Columbia or the ability of that government to manage the economy, including the following information:
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> …

[51] The petitioner submits that its evidence clearly demonstrated that disclosure of the Rubric would cause UBC economic or financial harm. Therefore, UBC contends that this Court should find that the Adjudicator's decision not to exempt the Rubric under s. 17(1) was unreasonable.

[52] With respect, I cannot accede to these submissions.

[53] The Adjudicator clearly addressed all of UBC's arguments in substantial detail at paras. 54-57 of her decision:

> [54] Based on the inquiry materials and the rubrics themselves, it is clear that the BBA process is not like an exam where a student must demonstrate their knowledge of the concepts taught by an educational institution, and where maintaining the secrecy of the questions and answers is essential to the fairness and integrity of the testing. There are no right or wrong answers to a personal profile question. Although UBC did not provide any examples of personal profile questions, I understand they are not secret because UBC's evidence is that it reuses the personal profile questions and approximately 62,000 personal profiles were received in 2014.
>
> [55] UBC believes that if candidates knew how their profiles were to be scored, they would "tailor" what they say and "game the system". By this, I understand UBC to mean that candidates will exaggerate and/or misrepresent themselves. In my view, the possibility already exists that at least some of the candidates might misrepresent themselves in their personal profiles. Every personal profile answer, by its very nature, will be highly individual and pertain to the candidate's unique set of experiences and reflections. UBC did not explain how it currently screens personal profiles to detect misrepresentations. The applicant says that he has been advised by UBC that it uses random reference checks to address the issue of misrepresentation in the BBA process, but UBC did not respond to his submission on this point.
>
> [56] I have carefully reviewed all three rubrics, and they contain nothing that reveals the questions or anything that could be considered to be a "correct" answer. They contain the generic high-level information one would expect to find in instructions to UBC's readers on how to fairly and objectively score a personal profile answer about leadership experience, for example, or commitment and contributions to community. I accept that if candidates had access to the rubrics it might take some of the guesswork out of trying to understand what it is that UBC's readers are looking for when they evaluate personal profiles. That is because the rubrics reveal what information is relevant or important to include and what are the elements of a strong

> personal profile answer. Such information would allow candidates to more clearly articulate how their personal experiences make them the type of student UBC is seeking. However, the candidates would still need to provide a personal profile answer that relates back to their own individual experiences and reflections. Given the nature of the information in these rubrics, I am not convinced that disclosure would make exaggeration, misrepresentation or false information any more prevalent or harder to detect than they currently are. Therefore, I do not accept that it is reasonable to believe, as UBC does, that disclosure of the rubrics would significantly diminish the predictive value of the BBA process, and that the only alternative is to abandon the BBA process.
>
> [57] However, even if it were reasonable to conclude that disclosure of the rubrics necessitates abandoning the BBA process, UBC did not provide information that satisfies me that this could reasonably be expected to harm its financial or economic interests. There was no information provided about anticipated future financial costs or economic impact, if UBC determines that a replacement screening tool needs to be developed. UBC's evidence and submissions on this issue all relate to money it has already spent to develop and maintain the BBA process. Further, the Associate Registrar explained that the BBA process was piloted by UBC's Sauder School of Business in 2003 and has gradually been introduced into other academic programs, which suggests that UBC has had several years of value from the money spent developing the process. This past voluntary expenditure cannot be accurately characterized as an impending "harm" to UBC's financial or economic interests, under s. 17. Therefore, I find that UBC has not established that disclosure of the rubrics could reasonably be expected to harm its financial or economic interests, pursuant to s. 17(1).

[54] I find nothing in this analysis to be unreasonable, and UBC has not provided any authority to convince me otherwise.

[55] In its submissions, UBC noted that the appropriate standard of proof for statutory exceptions that use the language "reasonably be expected to harm," was outlined by the Supreme Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3. The Adjudicator explicitly referred to this case at para. 48 of her decision, and was cognizant of the appropriate legal test. This militates against any finding of unreasonableness.

[56] The Petitioner also submitted a list of ways in which it felt that its economic or financial interests were harmed by the disclosure of the Rubric. This evidence was before the Adjudicator and, as quoted above, the Adjudicator made it clear that she was not convinced by this evidence. As this Court has found in the past, the

Adjudicator was not required to refer to every item of evidence to be considered, or to detail the way each item was assessed: *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para. 53.

[57] In this context, I also find the following quotation from BC Order F08-22 at para. 50 apposite:

> The threshold for harm under s. 17(1) is not a low one met by any impact. Nature and magnitude of outcome are factors to be considered. If it were otherwise, in the context of s. 17(1) any burden, of any level, on a financial or economic interest of a public body could meet the test. This would offend the purpose of FIPPA to make public bodies more accountable to the public by giving the public a right of access to records, subject to specified, limited exceptions. It would also disregard the contextual variety of the harms-based disclosure exceptions in FIPPA.

[58] In her reasons, the Adjudicator clearly took into consideration the nature and magnitude of the outcome resulting from disclosure of the Rubric, concluding that it would be too trivial to qualify as economic or financial harm under s. 17(1).

[59] While UBC provided cogent reasons for why its economic or financial interests may be harmed by the disclosure of the Rubric, this determination was a finding of fact, and this Court owes the Adjudicator deference on this point.

[60] In light of the above, I find that the Adjudicator's decision not to exclude the Rubric under s. 17(1) was reasonable.

Remedy

[61] The petitioner's application is dismissed with costs to Mr. Lister. The Office of the Information and Privacy Commissioner does not seek costs.

"Russell J."

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The Honourable Madam Justice Russell