

Amended pursuant to Supreme Court Civil Rule 6-1(a)
Original filed on January 18, 2017

No. **17 0210**
Victoria Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of the decision of the Information and
Privacy Commissioner, Order F16-50, dated December 5, 2016
and in the matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

BETWEEN:

MINISTER OF FINANCE

PETITIONER

AND:

INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA
and STANLEY TROMP

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO:

INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA
4th Floor - 947 Fort Street
Victoria, B.C. V8V 3K3

STANLEY TROMP
#204 – 8643 Logan Street
Vancouver, B.C. V6P 3T3

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 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 the 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 the petition anywhere in Canada, within 21 days after that services,
- (b) if you were served the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served 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: 850 Burdett Avenue Victoria, BC V8W IB4
(2)	The ADDRESS FOR SERVICE of the petitioner(s) is: Ministry of Justice Legal Services Branch 6 th Floor - 1001 Douglas Street Victoria, B.C. V8V 9J7 Fax number address for service (if any) of the petitioner(s): 250-356-9154 E-mail address for service (if any) of the petitioner(s): John.Tuck@gov.bc.ca
(3)	The name and office address of the petitioner's(s') lawyer is: John M. Tuck Ministry of Justice Legal Services Branch 6 th Floor - 1001 Douglas Street Victoria, B.C. V8V 9J7

CLAIM OF THE PETITIONER(S)

Part 1: ORDER(S) SOUGHT

1. An order in the nature of certiorari setting aside Order F16-50 of the Information and Privacy Commissioner (IPC), dated December 5, 2016, requiring the Ministry of Finance (the "Ministry") to provide the applicant with the information the Ministry withheld under section 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"); and
2. Such other order as this Court considers just.

Part 2: FACTUAL BASIS

1. OIPC File No. F15-60660 (the "Inquiry") related to a request for records by the respondent, Stanley Tromp ("Mr. Tromp"). Mr. Tromp requested all reports issued by the Internal Audit and Advisory Services Unit and the Special Investigations Unit, Office of the Comptroller General (OCG), of the Ministry from October 14, 2014, to January 6, 2015 (the "Records").
2. The Comptroller General exercises statutory powers under the *British Columbia Financial Administration Act*: see sections 8(2), 9 and 9.1.
3. On February 2, 2015, the Ministry responded to Mr. Tromp's request but denied access to the Records under section 15 of FIPPA. That section deals with potential harm to law enforcement investigations.
4. On February 9, 2015, Mr. Tromp asked IPC to review the Ministry's decision to withhold information from the Records. Mediation did not resolve the issue and Mr. Tromp requested the matter proceed to an inquiry.
5. In a letter to Mr. Tromp dated September 9, 2015, the Ministry advised that it had determined that the records previously withheld under s. 15 of FIPPA would be withheld under s. 22 of FIPPA. Section 22 deals with information that, if disclosed, would be an unreasonable invasion of third party's personal privacy.
6. A Notice of Written Inquiry was issued by the IPC, along with the Investigator's Fact Report on April 13, 2016. The Notice of Inquiry indicated that, at inquiry, the IPC would consider whether the Ministry:
 - was required to refuse to disclose the information at issue under s. 22 of FIPPA; and
 - was required to disclose the information on the basis that disclosure was clearly in the public interest as required by s.25 of FIPPA.

7. Under both s. 22 and s. 25, the issue of whether the personal information of third parties should be released would need to be addressed.
8. On May 5, 2014, counsel for the Ministry advised the IPC that s. 14 of FIPPA should have been applied to some of the information in the Records at issue but was not. Counsel for the Ministry sought leave at that time for the Ministry to rely on s. 14 in support of its decision to withhold some of the information at issue at inquiry. That request for leave was granted. Section 14 protects information that is subject to solicitor client privilege.
9. A Revised Notice of Inquiry was issued on May 4, 2016. The Revised Notice of Inquiry indicated that, at inquiry, the IPC would consider whether the Ministry:
 - was required to refuse to disclose the information at issue under s. 22 of FIPPA;
 - was authorized to refuse to disclose the information at issue under s. 14 of FIPPA; and
 - was required to disclose the information on the basis that disclosure was clearly in the public interest as required by s.25 of FIPPA.
10. The Ministry took the position that the disclosure of any information in the Records would effectively identify the affected third parties and would, therefore, be an unreasonable invasion of their personal privacy under s. 22 of FIPPA.
11. The Ministry provided Initial Submissions to the IPC on May 18, 2015. In those submissions, the Ministry submitted that it would be appropriate for the Commissioner, in the event that she determined that s. 22 did not apply to any of the information in the Records, to afford the third parties the opportunity to make submissions. To the best of the Ministry's knowledge, the IPC did not invite affected third parties to make submissions.
12. Mr. Tromp replied to those submissions on June 15, 2015. The Ministry filed reply submissions on July 4, 2016.

The Decision

13. An adjudicator appointed by the IPC (the "Adjudicator") rendered her decision on December 5, 2016 regarding the Records (the "Decision"). The Decision dealt with the application of ss. 22 and 25 of FIPPA, but not s. 14.
14. The Adjudicator held that s. 25 of FIPPA did not apply to information in the Records and, therefore there was no need for the Ministry to disclose the information on the basis that disclosure was clearly in the public interest.
15. The Adjudicator also found that much of the information in the Records must be withheld under s. 22 of the FIPPA because disclosure would be an unreasonable invasion of third party personal privacy. However, the Adjudicator found that some

information was not subject to s. 22 of FIPPA and must therefore be released to Mr. Tromp.

16. The Adjudicator found that there was information in the Records that was subject to the presumption of an unreasonable invasion of a third party's personal privacy in ss. 22(3)(d) and 22(3)(g) of FIPPA on the basis that:
 - The personal information related to employment, occupational or educational history; and
 - The personal information consists of personal evaluations relating to third parties.
17. The Adjudicator held that s. 22(2)(a) of FIPPA was a relevant factor weighing in favour of disclosing the activities of the individuals and corresponding general findings, but not the information that would tend to identify those individuals.
18. The Adjudicator also held that s. 22(2)(h) of FIPPA was a relevant factor in this case on the basis that disclosing some of the information in the Records would cause unfair reputational harm to various third parties.

Steps Taken to Protect Employee Personal Privacy

19. Ministry staff reviewed the Decision of the Adjudicator and came to the conclusion that even with redactions, third parties could be identified and their personal information released. As this was a concern for the Ministry, on January 10, 2017, the Ministry advised affected third parties, being employees whose personal information was ordered released, by letter that the IPC had ordered the Ministry to disclose information that, although it does not identify them by name, someone with knowledge of the case might accurately infer the nature of the matter under investigation and the fact that the third party was involved.
20. On January 11, 2017, the Ministry advised the IPC that because the affected third parties were not given notice of the inquiry or given the chance to make submissions at inquiry, the Ministry had determined that it would be fair to provide the third parties with advance notice of the impending release of information, pursuant to the Decision, that could potentially identify them.
21. On January 18, 2017, the Ministry requested that the IPC reopen the inquiry for the purpose of allowing the affected third party employees to make submissions to the Commissioner with respect to their privacy interests. The Ministry noted that there are some arguments that the third parties may have made that the Ministry did not make had they been invited to participate. The Ministry also noted that Commissioner Loukidelis has held that the law was clear that, if a person was not given an opportunity to be heard when that opportunity was required to be given, it was possible for the decision to be re-opened without waiting for a court order setting it aside or declaring it invalid (see Supplemental decision dated May 10, 2002 to Order 01-52, [2001] B.C.I.P.C.D. No. 55.).

22. To date, the third parties have not been provided with an opportunity to provide information or submissions to the IPC.

Part 3: LEGAL BASIS

1. This Petition is brought pursuant to the *Judicial Review Procedure Act*, R.S.B.C., c. 241 and the Supreme Court Civil Rules.

Grounds for Judicial Review

2. The Decision must be set aside because:
 - the Adjudicator violated the principles of procedural fairness in not providing notice and an opportunity to participate to the third parties whose personal information has been ordered disclosed; and
 - the Decision was unreasonable.

The Statutory Framework

3. The purposes of FIPPA are to make public bodies more accountable to the public through the disclosure of information while also protecting personal privacy (section 2).
4. *FIPPA* applies to all records in the custody and under the control of a public body (section 3).
5. In general terms, *FIPPA* is a regulatory regime governing the right of access to records which are in the custody or under the control of public bodies, subject to information being subject to one or more of the exceptions found in Part 2 of the Act. The Commissioner has independent oversight of the administration of the Act.
6. Part II of *FIPPA* establishes information access rights and describes how those rights may be exercised when seeking disclosure of information. The statute's general policy is that there is a right of access to any record in the custody or under the control of the public body. This right does not extend, however, to information excepted from disclosure under ss. 12 to 22.1 of *FIPPA*: ss. 4(1), (2). These exceptions either require or authorize the head of a public body to refuse access to information in certain prescribed circumstances.
7. Section 22 (1) of *FIPPA* provides that "the head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy" [underlining added].

8. Section 22(4) provides for different types of personal information the release of which would not be an unreasonable invasion of a third party's person privacy. This includes such instances as when the third party has consented in writing to the disclosure of the information (s.22(4)(a)).
9. Section 22(3) provides types of personal information the disclosure of which is presumed to be an unreasonable invasion of a third party's personal privacy. In particular, section 22(3)(d) provides that the disclosure of personal information that relates to employment history is presumed to be an unreasonable invasion of a third party's personal information. Likewise, section 22(3)(g) provides that the disclosure of personal information that relates to personnel evaluations about the third party is presumed to be an unreasonable invasion of a third party's personal information.
10. In determining whether disclosure of personal information is an unreasonable invasion of third party personal information, the head of a public body must consider all relevant circumstances including the items listed in section 22(2). Section 22(2) (a) requires the public body to consider whether the disclosure of personal information is desirable for the purpose of subjecting the activities of government to public scrutiny. Section 22(2)(f) requires the public body to consider whether the personal information was provided in confidence. Section 22(2)(h) requires the public body to consider whether the disclosure may unfairly damage the reputation of any person referred to in the records requested. After considering all of the relevant factors the public body must decide whether the third party personal information should be disclosed.
11. Section 23(2) of FIPPA provides that if the head of a public body intends to give access to a record that the head has reason to believe contains information that might be excepted from disclosure under section 21 or 22, the head must give the third party a written notice under subsection (3).
12. Under s. 24(1) of FIPPA, within 30 days after such notice is given, the head of the public body must decide whether or not to give access to the record or to part of the record, but no decision may be made before the earlier of
 - (a) 21 days after the day notice is given, or
 - (b) the day a response is received from the third party.
13. On reaching a decision under subsection 24(1), the head of the public body must give written notice of the decision to the applicant, and the third party. If the head of the public body decides to give access to the record or to part of the record, the notice must state that the applicant will be given access unless the third party asks for a review under section 53 or 63 within 20 days after the day notice is given under subsection (2). Section 53 permits a third party to request a review of a decision under s. 22 of FIPPA.

14. Section 54 of FIPPA provides that on receiving a request for a review, the commissioner must give a copy to the head of the public body concerned, and any other person that the commissioner considers appropriate.
15. Section 56 (1) of FIPPA provides that if a matter is not referred to a mediator or is not settled under section 55, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry. Under s. 56(3), the person who asked for the review, the head of the public body concerned and any person given a copy of the request for a review must be given an opportunity to make representations to the commissioner during the inquiry.

Procedural Fairness

16. On judicial review, the reviewing court's task is to determine whether the decision-maker correctly applied the principles of procedural fairness / natural justice (*Robertson v. British Columbia (Teachers Act, Commissioner)*, 2014 BCCA 331 at para. 66). In this assessment "reasonableness" does not come into the picture. Either the process was fair or it was not (*Wong v. College of Traditional Chinese Medicine Practitioners & Acupuncturists (British Columbia)*, 2005 CarswellBC 2443 at para. 18). Here, the Adjudicator did not correctly apply the principles of procedural fairness as she failed to provide notice and an opportunity to participate in the proceedings to the very individuals who would be affected by her decision.
17. Procedural fairness is a "central principle of Canadian administrative law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para. 90. It demands that statutory decision makers, in the exercise of public powers, "act fairly in coming to decisions that affect the interests of individuals" (*Dunsmuir*, at para. 90 and *Canada (Attorney General) v. Mavi*, 2011 SCC 30, at para. 38).
18. What is owed by a statutory decision maker to meet the principles of procedural fairness varies with the legislative and administrative context (*Mavi*, at para. 39 and *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817). However, at its core, common law procedural fairness guarantees that persons whose rights or interests may be adversely impacted by a decision of a public body are given notice that such a decision may be made and an opportunity to be heard before an unbiased decision maker (*Canadian Union of Public Employees, Local 301 v. Montreal (City)*, [1997] 1 SCR 793 at para. 73 and *Indian Head School Division No. 19 (Saskatchewan Board of Education) v. Knight*, [1990] 1 SCR 653).

19. The issue before the Adjudicator was whether or not she should order the release of personal information either by requiring the proactive release of the information by the Ministry under s. 25 of FIPPA or by determining whether the personal information must be released notwithstanding s. 22 of FIPPA. Clearly the Adjudicator's Decision affects the interests of the individuals whose personal information she ordered released. Notwithstanding the nature of her Decision, and notwithstanding the request of the Ministry to give notice and participation rights to the individuals, no such opportunity was given to these individuals.
20. The process before the Adjudicator did not meet the basic requirements of fairness and, therefore, the Decision should be quashed.

The Decision was Unreasonable

21. In addition to the procedural fairness issue, the Decision is unreasonable. The Adjudicator's interpretation and application of section 22 was unreasonable as it is internally inconsistent and fails to acknowledge that section 22 is about the disclosure of information that will identify third parties.
22. The standard of review to be applied to the Decision of the Adjudicator is reasonableness (*Construction and Specialized Workers Union Local 161 v. British Columbia (Information and Privacy Commissioner)* 2015 BCSC 1471 at paras. 70-71).
23. In applying the reasonableness standard to a question of statutory interpretation, if there are multiple reasonable interpretations of a section then the Court must defer to the interpretation of the decision-maker. If, however, "after applying the ordinary tools of statutory interpretation" a court concludes that "there is a single reasonable interpretation" and that single interpretation is different than the decision-makers then the decision must be set aside as unreasonable (*Laurson v. Director of Crime Victim Assistance*), 2017 BCCA 8 at para. 47. See also: *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)* 2013 BCSC 2322).

24. The Adjudicator notes that section 22 “is a mandatory exception requiring a public body to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy”. She goes on to find “that a significant amount of the withheld information is personal information, as it describes the words and actions attributed to specific, identifiable individuals” (para. 23). She also finds “some information which would not normally be classified as personal information” is personal information because the “information is reasonably capable of identifying an individual or a small group of identifiable people”.
25. The Adjudicator goes on to consider the factors listed in section 22(2). She considers whether the disclosure of the personal information is desirable for the purpose of subjecting the activities of government to public scrutiny under s. 22(2)(a). She also considers whether the disclosure may unfairly damage the reputation of any person referred to in the record 22(2)(h). She concludes that section 22(2)(h) is a significant factor that “weighs significantly against disclosure of information that would identify individuals named in the investigation report” (para. 54). With respect to section 22(2)(a) she finds that this is a factor “that weighs in favour of disclosing the activities of the individuals and corresponding general findings, but not the information that would tend to identify the individuals” (para. 51) (underlining added). The Adjudicator concludes, that the “Ministry applied s. 22(2)(a) too narrowly when deciding whether to disclose information, in non-identifying form, about some of the investigation and details” (para. 56) (underlining added).
26. This interpretation of s. 22(2)(a) is flawed in that it does not acknowledge that section 22 generally and section 22(2)(a) in particular is specifically about the disclosure of personal information. The phrase “personal information” is defined in Schedule 1 of FIPPA as “recorded information about an identifiable individual other than contact information” (underlining added). As such, by the very definition of “personal information” and by the wording of s. 22(2)(a), it is not possible to use section 22(2)(a) as a means to disclose anything but information that would identify individuals. While the Adjudicator explicitly stated she did not intend to disclose information that would identify the individuals named in the investigation report, her misinterpretation of s. 22(2)(a) would effectively do exactly that.
27. The Adjudicator erred in not following her own interpretation of s. 22(2)(a) and s. 22(2)(h). At paragraph 51, the Adjudicator stated that s. 22(2)(a) did not weigh in favour of disclosing information that would tend to identify individuals. Similarly, at paragraph 54, the Adjudicator stated that s. 22(2)(h) “weighs significantly against disclosure of information which would identify the individuals named in the investigation reports.” And yet the Adjudicator ultimately ordered the disclosure of information that will identify

third parties. This internal inconsistency makes the Adjudicator's Decision unreasonable.

Remedy

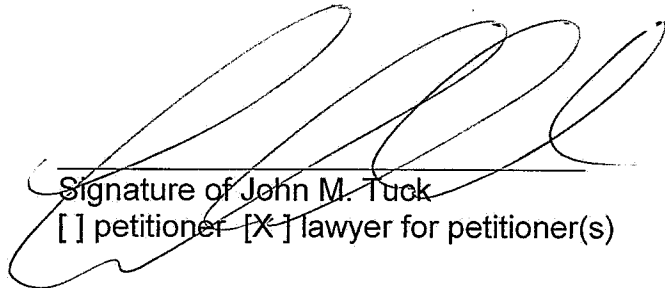
28. Order F16-50 of the IPC should be set aside and the matter should be remitted to the IPC to be decided in accordance with the principles of procedural fairness and the reasons of this Court.

Part 4: MATERIALS TO BE RELIED ON

1. Affidavit #1 of Shauna Rasmussen, sworn January 18, 2017
2. Affidavit #1 of John Davison, sworn January 18, 2017;
3. Such other material as the Petitioner may advise.

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

Date: January 19, 2017



Signature of John M. Tuck
 petitioner lawyer for petitioner(s)

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:[dd/mmm/yyyy].....

Signature of Judge Master