



Court File No. **VLC-S-S-229630**

No.
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

In the Matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241

And in the Matter of an Order of a Delegate of the Information and Privacy Commissioner of British Columbia, dated October 26, 2022, made under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165

BETWEEN:

THOMPSON RIVERS UNIVERSITY

PETITIONER

AND:

THE INFORMATION AND PRIVACY COMMISSIONER OF BRITISH COLUMBIA

RESPONDENT

Petition to the Court

ON NOTICE TO:

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



Dr. Panagiotis Tsigaris
c/o Office of the General Counsel
805 TRU Way
Kamloops, BC V2C 0C8

Dr. Jaime A. Teixeira da Silva
P.O. Box 7, Miki-cho post Office
Ikenobe 3011-2
Kagawa-Ken 761-0799, Japan

Deputy Attorney General
Ministry of Attorney General
PO Box 9280
Stn Prov Govt
Victoria, BC V8W 9J7

This proceeding is brought for the relief set out in Part I below, by:

- the person named as petitioner in the style of proceedings above
 name(s) (the petitioner)

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
- (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,

- (a) if you were served with the petition anywhere within 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 800 Smithe Street Vancouver, BC V6Z 2E1
(2)	The address for service of the petitioner is:	c/o Harris & Company LLP 1400 - 550 Burrard Street Vancouver, BC V6C 2B5 Attention: Rodney W. Sieg
(3)	The name and office address of the petitioner's lawyer is:	Harris & Company LLP Barristers and Solicitors 1400 - 550 Burrard Street Vancouver, BC V6C 2B5 Attention: Rodney W. Sieg
	Fax number for service of the petitioner:	604 684 6632

Claim of the Petitioner

Part 1: ORDERS SOUGHT

1. The order of adjudicator Jay Fedorak (the “**Adjudicator**”) dated October 26, 2022 in OIPC File No.: F20-81975; Public Body File No.: A19-32 (the “**Order**”) be quashed.
2. Costs awarded to the petitioner.

Part 2: FACTUAL BASIS

Overview

1. This is an application for judicial review by the petitioner Thompson Rivers University (“**TRU**”) of the Order made by the Adjudicator, a delegate of the respondent the Information and Privacy Commissioner of British Columbia (the “**Privacy Commissioner**”).
2. The Order was made during an inquiry under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 (“**FIPPA**”), which was commenced upon an applicant (the

“Applicant”) seeking a review of TRU’s denial to provide the Applicant with access to the Documents (defined below) (the “Inquiry”).

3. The Order was purported to be made under section 58 of FIPPA and required TRU to give the Applicant and Privacy Commissioner access to the Documents. The Order is unreasonable because the Documents are not in the custody or under control of TRU and exempt from FIPPA’s application. The Privacy Commissioner has no power under FIPPA to have made the Order.

The Parties

4. TRU, the petitioner, is a university established under the *Thompson Rivers University Act*, SBC 2005, c 17.
5. The Privacy Commissioner, the respondent, is a tribunal established under the provisions of FIPPA and is responsible for resolving requests for reviews of a decision of a public body, such as TRU, under Part 5 of FIPPA.

The FOI Request to TRU

6. The Applicant made an application under FIPPA to TRU (the “FOI Request”) for access to all correspondence including between a certain email address with the TRU email domain and a certain email address without the TRU email domain for the time period January 1, 2009 – December 17, 2019 (the “Documents”).
7. In the FOI Request, the email address with the TRU email domain is associated with a TRU faculty member at the Bob Gaglardi School of Business and Economics (the “Faculty Member”). The email address without the TRU email domain is associated with an academic who works and lives overseas and is not a TRU faculty member (the “Foreign Academic”).
8. When TRU received the FOI Request, TRU’s former privacy and access officer contacted the Faculty Member advising him that TRU received the FOI Request and asked him to provide the Documents.

9. At the time of the FOI Request, section 3(1)(e) of FIPPA set out that FIPPA applies to all records “in the custody or under the control of” a public body, but does not apply to “a record containing teaching materials or research information of a faculty member...”. Section 3(1)(e) is now sections 3(1) and 3(3)(i)(i), which contain almost identical language to the former section. The current section 3(3)(i)(i) uses the words “teaching or research materials” rather than “teaching materials or research information”.
10. The Faculty Member determined that the Documents comprised primarily of research information, with a small number of the Documents comprised of personal communications. Accordingly, on January 21, 2020, the Faculty Member responded to TRU’s former privacy and access officer to advise her that he would not be releasing any of the Documents as they are exempt from FIPPA’s application.
11. TRU accepted the Faculty Member’s description of the Documents and advised the Applicant that the Documents were exempt from FIPPA’s application and could not be released.

Review to the Privacy Commissioner

12. The Applicant requested the Privacy Commissioner to review TRU’s denial of the FOI Request for the reason that the Documents fell outside FIPPA’s application under the section 3(1)(e) because they comprise of research information.
13. The request for a review eventually resulted in the Privacy Commissioner commencing the Inquiry in which the Applicant and TRU are parties.
14. During the Inquiry, TRU provided submissions on its position in denying the FOI Request on the basis that:
 - a. the Documents are not in TRU’s custody or under its control; and
 - b. the Documents are exempt from FIPPA because they comprise of research information.
15. TRU’s submissions were supported by the following evidence:

- a. affidavit of the Faculty Member made June 3, 2022 (the “**Faculty Member Affidavit**”); and
 - b. affidavit of A. McMaster made June 10, 2022 (the “**McMaster Affidavit**”).
16. The McMaster Affidavit provides excerpts of the collective agreement between TRU and the Thompson Rivers University Faculty Association (the “**Collective Agreement**”) as follows:

9.4.2 Copyright Ownership

The copyright or patent for any work product, including creative work, instructional strategies or curriculum/instructional material, software or any other material or technology that may be copyrighted or patented:

- (a) Belongs to the employee(s) where the work product has been prepared or created as part of assigned duties, other than the duties listed in Article 9.4.2(b) below, and the copyright to all copyrightable material shall be the sole property of the employee(s) and shall be retained throughout the Faculty Member’s lifetime and upon their death by their heirs or assigns; and
- (b) Belongs to the University where one or more employees:
 - (i) Have been hired or agrees to create and produce copyrightable work product for the university, or
 - (ii) Are given release time from usual duties to create and produce copyrightable work product, or
 - (iii) Are paid, in addition to their regular rate of pay, for their time in an appointment to produce copyrightable work product.

...

9.6 Academic Freedom

The common good of society depends upon the search for knowledge and its free exposition. Academic freedom in universities and colleges is essential to both these purposes in the teaching function of the institution as well as in its scholarship and research. Faculty Members of the Faculty Association shall not be hindered or impeded in any way

by the institution or the Faculty Association from exercising their legal rights as citizens, nor shall they suffer any penalties because of the exercise of such legal rights. The Parties agree that they will not infringe or abridge the academic freedom of any Faculty Members of the academic community. Academic members of the community are entitled, regardless of prescribed doctrine, to freedom in carrying out research and in publishing the results thereof, freedom of teaching and of discussion, freedom to criticize the institution and the faculty association, and freedom from institutional censorship. Academic freedom does not require neutrality on the part of the individual. Rather, academic freedom makes commitment possible. Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for knowledge. In exercising the freedom to comment and to criticize, academic staff members have a corresponding obligation to use academic freedom in a responsible manner by recognizing the rights of other Faculty Members of the academic community, and by affirming the rights of others to hold differing points of view.

...

10.2 Academic Duties and Responsibilities

...

10.2.1.1 The responsibilities of Faculty Members with a tripartite workload shall include a combination of [a] teaching/professional role; [b] service; and [c] scholarship.

17. In the Faculty Member Affidavit, the Faculty Member provided sworn evidence explaining the nature of the Documents and provided a detailed explanation of facts surrounding the Documents. That evidence included, among other things, the following:
- a. the Documents are primarily emails and other communications that are collaborations on various research initiatives and materials;
 - b. the Documents include:
 - i. research discussion, exchanges, and thoughts,

- ii. critical assessments of other research,
 - iii. research ideas,
 - iv. research designs, methodologies, and theoretical equations and formulas,
 - v. data, and
 - vi. drafts of research papers, including markups and revisions;
- c. a small number of the Documents are entirely personal in nature;
- d. the Faculty Member has been collaborating with the Foreign Academic on research since August 3, 2017 and, at the time of the FOI Request, the two had collaborated on 15 projects, all of which were published by 2021;
- e. the Faculty Member considers the Documents to be proprietary in nature and has been informed by the Foreign Academic that he views the Documents in the same way;
- f. the Faculty Member does not view the Documents as TRU's property; and
- g. the Faculty Member used TRU's email as a secure means to communicate with the Foreign Academic and it did not occur to him that, by using his TRU email, third parties could make requests for documents and information that are exempt from FIPPA's application.
18. The parties to the Inquiry provided the Privacy Commissioner with full exchange of submissions. The Applicant's submissions stated that the Applicant disputes that the Documents are research information; however, the Applicant provided no evidence that contradicts the Faculty Member's characterization and explanation of the Documents. The Applicant merely requests that the Privacy Commissioner examine the Faculty Member's evidence closely for truthfulness and veracity.

The Rescinded Order

19. On August 12, 2022, the Adjudicator ordered the Faculty Member to produce the Documents to the Privacy Commissioner under section 44(1)(b) of FIPPA because he determined that he was unable to decide the issues without having access to the Documents (the “**First Order**”).
20. On August 26, 2022, the Faculty Member and TRU advised the Adjudicator that the Privacy Commissioner does not have jurisdiction over the Documents to order their production under section 44(1)(b) of FIPPA because the Documents are excluded from FIPPA’s application, and the Adjudicator did not provide the Faculty Member or TRU with an opportunity to provide submissions on his ability to order production under section 44(1)(b).
21. In response, on September 8, 2022, the Adjudicator rescinded the First Order because he did not address the jurisdictional issue and did not provide an opportunity for section 44(1)(b) submissions to be made.

The Order

22. On October 26, 2022, the Adjudicator issued the Order under section 58 of FIPPA in which he:
 - a. found that the Documents are in the custody and under the control of TRU;
 - b. found that TRU failed to establish that section 3(1)(e) of FIPPA applies to the Documents;
 - c. ordered TRU to give the Applicant access to the Documents in accordance with Part 2 of FIPPA; and
 - d. ordered TRU to copy the Privacy Commissioner in providing the Applicant with access of the Documents.
23. TRU disputes that it is required to provide the Applicant and Privacy Commissioner with the Documents because the Documents are not in the custody or under the control of TRU, and the Documents are excluded from FIPPA’s application under section 3(1)(e) of FIPPA.

Part 3: LEGAL BASIS

Judicial Review

1. TRU brings this application for judicial review under section 59(1) of FIPPA, which requires TRU to comply with the Order unless an application for judicial review of the Order is brought within 30 days of TRU's receipt of the Order.
2. The standard of review of the Order is "reasonableness".

Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65 at paras 16-17
("Vavilov")

3. The role of the Court on a reasonableness review is to decide whether the decision and reasoning process is defensible in respect of the facts and the law. A reviewing court must develop an understanding of the tribunal's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks whether the decision bears the hallmarks of reasonableness — justification, transparency, and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision.

Vavilov at paras 83 and 99

4. A reasonable decision is based on the facts and law relevant to the decision, including the governing statutory scheme and other statutory or common law. Elements of the legal and factual context of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

Vavilov at paras 105-106

5. Because administrative decision makers receive their powers by statute, the governing statutory scheme is likely the most salient. Administrative decision makers are not allowed to claim powers the legislature never intended them to have and cannot exercise authority not delegated to it.

Vavilov at para 109

6. As well, common law will impose constraints on what a decision maker can lawfully decide. Where the governing statute specifies a standard that is well known in law and in the jurisprudence, a reasonable decision will generally be one that is consistent with the established understanding of that standard. Precedents on the issue will act as a constraint on the decision maker and the decision maker's failure to explain or justify a departure from the precedent in which the same provision was interpreted may render the decision unreasonable.

Vavilov at paras 111-112

7. In interpreting a statutory provision, the "modern principle" of statutory interpretation applies. An administrative decision maker's interpretation of a statutory provision must be consistent with the text, context, and purpose of the provision. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

Vavilov at paras 117 and 120-121

8. A reasonable decision is one that is justified in light of the facts on the record. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it, or made conclusions that were not based on the evidence that was actually before him.

Vavilov at para 126

Grounds for Review

9. In making the Order, the Privacy Commissioner erred because:
 - a. the Documents are not in the custody or under the control of TRU within the meaning of section 3(1) of FIPPA, and so the Privacy Commissioner has no authority or statutory power to order TRU to give the Applicant and Privacy Commissioner access to the Documents;

- b. there was no evidence, or the Adjudicator fundamentally misapprehended the evidence, in finding that the Documents do not fall within the meaning of “research information” under section 3(1)(e) of FIPPA (now section 3(3)(i)(i)) in issuing the Order; and
- c. the Documents fall within the express exclusion from FIPPA under section 3(1)(e) (now section 3(3)(i)(i)), and so the statutory powers of the Privacy Commissioner contained in section 58 of FIPPA required that the Privacy Commissioner refuse access of the Documents to the Applicant and Privacy Commissioner.

Documents Not in Custody or Under the Control of TRU

- 10. The Adjudicator erred in finding that the Documents are in the custody and under the control of TRU.
- 11. Past orders have found that “custody” within the meaning of section 3(1) FIPPA requires that TRU have physical possession of the Documents, plus some legal right or obligation to the Documents.

British Columbia Institute of Technology, Re, 2020 BCIPC 52 at para 20

- 12. “Control” requires that TRU “has some power of discretion or command over” the Documents.

Canada (Information Commissioner) v Canada (Minister of National Defence), 2011 SCC 25 at para 48

Vancouver (City), Re, 2015 BCIPC 71 at 17

- 13. The Collective Agreement expressly provides that the Faculty Member, not TRU, is the sole owner of the Documents. The Collective Agreement codifies what is otherwise a well-established legal principal: the academic exception. The academic exception is the presumption that faculty members hold a unique position and have first ownership of research information or materials. The academic exception is integral to protect the unfettered pursuit of knowledge.

Dolmage v Erskine (2003), 23 CPR (4th) 495, [2003] OJ No 161 (Ont SC)

University of British Columbia and University of British Columbia Faculty Assn, Re, [2006]
BCLRBD No. 56 (BCLRB)

14. There is nothing under FIPPA that provides the Adjudicator with the power to order TRU to provide access to the Documents in light of the academic exception. TRU has no legal right or obligation to the Documents or ability to exercise control over the Documents.
15. The Adjudicator cites the Collective Agreement to find that the academic exception has limits and therefore TRU has some legal right over the Documents. That conclusion is unreasonable. The limitation in the Collective Agreement is that faculty members must exercise their academic freedom in accordance with the duty to use that freedom in a manner consistent with the search for knowledge and to recognize the rights of other faculty members to hold different academic views. The limitation in the Collective Agreement that the Adjudicator cites in no way provides TRU with any rights over the Documents.
16. The Adjudicator fundamentally misunderstand the academic exception principal. His conclusion that TRU has custody and control of the Documents is unreasonable. The Adjudicator has no statutory authority to compel TRU to give the Applicant and Privacy Commissioner access to the Documents.

No Support for Finding that Documents are Not “Research Information”

17. There was no evidence, or the Adjudicator fundamentally misapprehended the evidence, in finding that the Documents do not fall within the meaning of “research information” under section 3(1)(e) of FIPPA.
18. In the Faculty Member Affidavit, the Faculty Member provided sworn evidence that the Documents comprise of research information. He explained and listed his extensive research collaboration with the Foreign Academic, which supports his explanation of the nature of the Documents. There was no evidence to contradict the Faculty Member’s evidence.
19. Despite the Faculty Member’s sworn evidence, the Adjudicator relies on the submissions of the Applicant, which are not supported by any evidence, sworn or otherwise, to disbelieve

the Faculty Member and goes so far as to order TRU to provide the Applicant with access to all the Documents.

20. The Applicant's submissions are at best speculative. The British Columbia Court of Appeal has explained that it is a legal error for a decision maker to make an inference based on speculation:

73 In assessing the credibility of testimony, a trial judge is entitled to draw inferences that "flow logically and reasonably from established facts": *R. v. MacIsaac*, 2015 ONCA 587 (Ont. C.A.) at para. 46. When inferences reflect conjecture and speculation, based on stereotypical reasoning, a generalization about a particular role or type of individual, unfounded assumptions or otherwise, it amounts to legal error: *MacIsaac* at para. 46, citing *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (Ont. C.A.) at 530 — 531; *R. v. Pilkington*, 2019 BCCA 374 (B.C. C.A.) at paras. 20 — 21. In my view, that is what occurred here and it tainted the judge's credibility assessment.

R v Roth, 2020 BCCA 240

21. Further, the Adjudicator initially determined in the First Order that he required the Documents to determine whether the Documents constitute "research information". The Adjudicator rescinded the First Order on the basis that it was procedurally unfair to have made the First Order without submissions on his ability to compel the Faculty Member to produce the documents, and for failing to address whether FIPPA applies. After doing so, the Adjudicator no longer required inspection of the Documents. In the Order, however, the Adjudicator uses the fact that he has not inspected the Documents against the Faculty Member to argue that there is no independent evidence to corroborate his claim that the Documents are research information, which is unreasonable.
22. The Adjudicator also relies on an article relied on by the Applicant in its submissions to support the finding that the Documents are not "research information". The article, however, is a research article between the Faculty Member and Foreign Academic. There can be no logical chain of analysis to conclude that the research article is evidence that the Documents are not research information. Again, there was no evidence to support the finding that the

Documents are not research information. Alternatively, if the article is evidence, the Adjudicator fundamentally misapprehended the evidence.

Order at para 50

Affidavit #1 of Marina Sparks made November 25, 2022 at Exhibit E

No Jurisdiction Over the Documents

23. “Research information” is excluded from FIPPA’s reach and scope. The Privacy Commissioner therefore cannot exercise authority over documents that the legislature has not provided to it.

British Columbia (Information and Privacy Commissioner) v British Columbia (Police Complaint Commissioner), 2015 BCSC 1538 (“**Privacy Commissioner v Police Complaint Commissioner**”) at para 119

Vavilov at para 109

24. Section 3(1)(e) of FIPPA, the section in place at the time of the FOI Request, states 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:

...

- (e) a record containing teaching materials or research information of
- (i) a faculty member, as defined in the *College and Institute Act* and the *University Act*, of a post-secondary educational body,

25. Section 58 of FIPPA states as follows:

- 58** (1) On completing an inquiry under section 56, the commissioner must dispose of the issues by making an order under this section.

- (2) If the inquiry is into a decision of the head of a public body to give or to refuse to give access to all or part of a record, the commissioner must, by order, do one of the following:

- (a) require the head to give the applicant access to all or part of the record, if the commissioner determines that the head is not authorized or required to refuse access;
- (b) either confirm the decision of the head or require the head to reconsider it, if the commissioner determines that the head is authorized to refuse access;
- (c) require the head to refuse access to all or part of the record, if the commissioner determines that the head is required to refuse access.

...

- (4) The commissioner may specify any terms or conditions in an order made under this section.

26. Under section 3(1)(e) of FIPPA, records over which the Privacy Commissioner has been delegated power excludes research information of faculty members.
27. “Research information” is not defined under FIPPA. The exclusion under section 3(1)(e) is a broad one by plain reading of the provision. By contrast, Saskatchewan’s privacy act, for example, contains a narrower research exclusion in which a record must be “scientific or technical information obtained through research by an employee of a government institution, the disclosure of which could reasonably be expected to deprive the employee of priority of publication”.

The Freedom of Information and Protection of Privacy Act, RRS, c F-22.01, s 18

28. In interpreting the term “research information”, the Adjudicator failed to adopt the “modern principle” of statutory interpretation, which is to interpret the term within the text, context, and purpose of section 3(1)(e): FIPPA’s application has clear limits in that it does not apply to a faculty member’s research information. The provision is consistent with the academic freedom principle.
29. The term “research information”, on its face, encompasses more than “research”. However, the Adjudicator’s analysis focuses on the definition of “research”, rather than “research information”. There was no logical chain of analysis when the Adjudicator concludes that the

Applicant seeks access to “correspondence” which he says is not access to “research materials”. The Adjudicator, in his analysis, committed the precise error *Vavilov* identifies, which was to reverse-engineer his desired outcome.

30. Further, in interpreting “research information”, the Adjudicator’s approach was unreasonable because he relies on the definition of “research” stemming from other jurisdictions which narrowed the broad exclusion under section 3(1)(e) of FIPPA.

Order at para 48

31. Finally, under the analysis of whether the Documents are in the custody or under the control of TRU, the Adjudicator makes an express finding that the Documents were created for the purpose of the Faculty Member fulfilling his “academic research” obligations at TRU. The Adjudicator cannot make an inconsistent finding, as he does, that the Documents are not “research information” in his analysis under section 3(1)(e) of FIPPA. That is manifestly unreasonable.

Order at para 39

32. In *Privacy Commissioner v Police Complaint Commissioner* at para 112, Justice Cullen explained in detail the distinction between records that are subject to an exception under FIPPA and records that are exempted from FIPPA. In the case of the former category of records, whether the records are the subject of disclosure is a matter of assessment and decision, not jurisdiction, and so the application of FIPPA and the Privacy Commissioner’s jurisdiction is engaged. In the case of the latter, neither the application of FIPPA nor the Privacy Commissioner’s jurisdiction is engaged.

33. The Faculty Member’s uncontradicted, sworn evidence that the Documents comprise of records that fall squarely within the “research information” exclusion under section 3(1)(e) of FIPPA required that the Adjudicator refuse the Applicant access to the records under section 58. The Privacy Commissioner has no power over the Documents.

Privacy Commissioner v Police Complaint Commissioner

Legislation and Rules Relied On

34. TRU relies on the following legislation and *Supreme Court Civil Rules*:

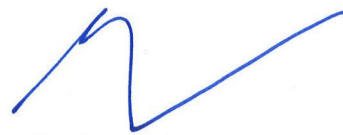
- a. FIPPA;
- b. *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241; and
- c. Rules 2-1(2)(b), 14-1, and 16-1 of the *Supreme Court Civil Rules*.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Marina Sparks made November 25, 2022.
2. Such further and other material as counsel may advise and this Court permits.

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

Dated: November 25, 2022



Signature of lawyer for the petitioner
Rodney W. Sieg

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