THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Besler v. British Columbia (Information and Privacy Commissioner),* 2025 BCSC 662

Date: 20250409
Docket: S49730
Registry: Penticton

Between:

Bradley H. Besler

Petitioner

And

Office of the Information and Privacy Commissioner of British Columbia and District of Summerland

Respondents

Before: The Honourable Justice Hardwick

On judicial review from: An order of the Office of the Information and Privacy Commissioner for British Columbia, dated February 29, 2024 (*Order F24-15)*

Reasons for Judgment

Appearing in Person:	B.H. Besler
Counsel for the Respondent, Office of the Information and Privacy Commissioner of British Columbia:	K.R. Phipps
Counsel for the Respondent, District of Summerland:	N.S.A. Falzon J.M. Barth
Place and Dates of Trial/Hearing:	Kelowna, B.C. October 16–17, 204
Place and Date of Judgment:	Penticton, B.C. April 9, 2025

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Introduction

[1] This is a petition for a judicial review filed March 11, 2024 (the "Petition") of a decision made by adjudicator Celia Francis (the "Adjudicator") pursuant to s. 43 of the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 ["*FIPPA*" or the "*Act*"].

[2] The Adjudicator is a delegate of the Office of the Information and Privacy Commissioner for British Columbia (the "Commissioner" or the "OIPC").

[3] Section 43 of *FIPPA* grants the Commissioner the discretion to permit public bodies to disregard access requests made pursuant to the *Act* in certain circumstances. The Commissioner has the authority to delegate the exercise of this discretion to Adjudicator pursuant to s. 49 of *FIPPA*.

[4] The parties to the Petition are:

a) The petitioner, Bradley H. Besler (the "Petitioner");

b) The respondent, the Office of the Information and Privacy Commissioner of British Columbia (previously defined, *inter alia*, as the "OIPC"); and

c) The respondent, the District of Summerland (the "District").

[5] As I will articulate further in due course, the Petitioner's "family" or "family members" are also interested persons but are not parties and do not have formal standing for the purposes of the Petition.

General Overview

[6] The Petitioner is a resident of the District. He is actively involved in community issues. Neither is a contested fact.

[7] The Petition is one discrete component of a larger, but somewhat related, dispute involving the Petitioner, the District and various other parties. There is other active

litigation before this Court. These are also uncontested facts and a matter of public record.

[8] The OIPC is only involved in this particular aspect of the litigation between the Petitioner and the District and, even then, takes a very limited position which I will articulate below.

[9] I have intentionally not provided further details pertaining to the related dispute and the broader litigation arising therefrom as it is not, in my view, material to the narrow scope of relief sought in the Petition.

Factual and Procedural Overview Relevant to the Petition

[10] The Petitioner submitted 58 "requests" for documents and/or records to the District under *FIPPA* between January 1, 2019 and November 8, 2023 (the "Access Requests"). The Petitioner has made other requests for documents and/or records under *FIPPA* outside of that timeframe.

[11] The breakdown of the Access Requests is as follows:

a) three (3) Access Requests in 2019;

b) twelve (12) Access Requests in 2020;

c) seven (7) Access Requests in 2021;

d) nine (9) Access Requests in 2022;

e) twenty-seven (27) Access Requests made up to and including November 8, 2023.

[12] Individuals identified as members of the Petitioner's "family" submitted 18 access requests to the District under *FIPPA* between 2019 and 2022. The breakdown of these "family" access requests is as follows:

a) five (5) access requests in 2019;

b) eleven (11) access requests in 2020; and

c) two (2) access requests in 2022.

[13] Dealing exclusively with 2023, the District responded substantively to thirteen (13) of the Access Requests that calendar year.

[14] The District took issue, however, with certain of the Access Requests on the basis that, *inter alia*, 10 of the Access Requests were similar in substance and format and sought, in broad terms, all communications sent or received by certain identified employees of the District.

[15] The difficulty faced by the District in responding to the Access Requests is apparent from a review of representative samples of said requests. Specifically, although the Petitioner does limit the representative Access Requests to a defined period of time, sometimes quite narrowly, there are multiple individuals listed in a single request and, in two of the representative samples, there are various key words listed. The three representative examples cited by the District are the Access Requests seeking:

> a) All communications sent or received by Doug Holmes, Erin Trainer, Marty Van Alphen, Graham Statt, Kendra Kinsley or Marnie Manders from June 26–July 18, 2023 that include any of the following keywords: Besler, Brad, decorum, respect, rules, protocol, workplace, ban, draft, good, bad, idea, rant, Todd, clown, real, video, or Facebook;
>
> b) All emails sent or received by Toni Boot, Doug Holmes, Erin Trainer, Erin Carlson, Doug Patan, Richard Barkwill or Martin Van Alphen from May 9, 2019 to October 15, 2019 that include any of the following key words: charges, charged, RCMP, arrest, arrested, arresting, harass, harassed, harassing, harassment, trespass, trespassing, trespassed, suing, sued, sue, lawsuit, 7.6, or Brad"; and
>
> c) All emails sent or received by Marnie Manders from June 21 to July 2, 2022; and all emails sent or received by Maarten Stam from June 21 to 30, 2022.

[16] On November 9, 2023, the District applied to the OIPC to disregard 10 of the Petitioner's 17 open and active Access Requests pursuant to s. 43 of *FIPPA*. The content of the District's application to the Commissioner (the "Application") is attached

as Exhibit "A" to Affidavit #1 of N. Badea sworn June 19, 2024 (the "Badea Affidavit"). The Application is 150 pages in length.

[17] The OIPC agreed to consider and adjudicate upon the Application.

[18] On November 23, 2023, the OIPC sent a "Notice of Section 43 Application" (the "Notice") to the Petitioner and the District. Beyond advising the Petitioner of the Commissioner's statutory authority to consider the Application under s. 43 of *FIPPA* and confirming that the District bears the burden of proof, the Notice has three primary functions:

a) The Notice informs the Petitioner of the District's position that "Brad Besler's requests" are systematic and/or repetitious, and that they unreasonably interfere with District operations. The Notice also informed the Petitioner that the District's "opinion" is that "Brad Besler's" requests are frivolous and/or vexatious;

b) The Notice articulates the relief sought by the District in the Application; and

c) The Notice sets out a schedule for the provision of written submissions from the District and the Petitioner on a specified schedule.

[19] As it relates to the relief sought by the District, paragraph 2 of the Notice provides, verbatim, as follows:

> The District of Summerland is authorized, for a period of three years from the date of the decision, to disregard all access requests made by the respondent directly or indirectly through family members, or made on their behalf, over and above one open access request at a time.

[20] A copy of the Notice, which is attached as Exhibit "B" to the Badea Affidavit, was not provided by the OIPC to any "family member" of the Petitioner. Nor was a copy of the Application provided by the District or the OIPC to any member of the Petitioner's "family".

[21] The OIPC was, however, aware of the identity of the individuals who submitted the 18 access requests the District referred to in the Application as requests are not made anonymously under *FIPPA.* Moreover, the access requests must provide relevant contact details for the individuals who submitted same so that they can receive correspondence in relation to and information, if any, provided pursuant to a request.

[22] Put simply, the District and the OIPC knew the identify of the "family members" of the Petitioner who had submitted access requests that were alleged to be made on behalf of the Petitioner and had contact information for those individuals.

[23] Pursuant to the Notice, an inquiry was conducted by the Adjudicator on the basis of the Application (the "Inquiry").

[24] The Inquiry proceeded entirely in writing and there was no oral hearing. The material chronology of the Inquiry is as follows:

a) The District provided written submissions on November 29, 2023;

b) The Petitioner provided written submissions on November 30, 2023; and

c) The District provided reply submissions on December 12, 2023.

[25] As of December 12, 2023, submissions on the Application were presumptively closed based upon the schedule previously set by the OIPC and conveyed to the Petitioner and the District in the Notice on November 23, 2023.

[26] The Inquiry became more complicated in early 2024 when the District received two access requests pursuant to *FIPPA* from Vicki Besler on February 13, 2024 ("Vicki's February 2024 Requests"). It is not disputed is that Vicki Besler is the Petitioner's mother.

[27] The receipt of Vicki's February 2024 Requests prompted the District to make a request to the OIPC to amend the Application to include Vicki's February 2024 Requests for consideration in the context of the Application. That request was submitted on February 15, 2024. This request to amend was opposed by the Petitioner.

[28] That same day, namely February 15, 2024, the following material events occurred:

a) The Petitioner emailed the OIPC requesting that additional information be added to his November 30, 2023 written submission; and

b) Vicki Besler emailed the OIPC stating her objection to the inclusion of Vicki's February 2024 Requests as part of the Application.

[29] Vicki Besler again did not receive formal notice from the OIPC regarding the District's request to amend the Application to include Vicki's February 2024 Requests for consideration in the context of the Application. Rather, I accept, Vicki Besler received informal notice of the District request to amend the Application indirectly via the Petitioner.

[30] The Adjudicator issued her decision fairly shortly thereafter on February 29, 2024 in Order F-24-15, indexed as 2024 BCIPC 21 (the "Order").

[31] From a procedural perspective, the Adjudicator declined the District's amendment request and accordingly did not specifically consider Vicky's February 2024 Requests as part of the Inquiry but nevertheless factored them into her ultimate remedy. Specifically, the Adjudicator held as follows at para. 12:

> [12] I acknowledge that the District asked in its s. 43 application that it be permitted to disregard any new requests from the respondent and his family that are dated after its s. 43 application (November 9, 2023) and that are similarly worded and structured to the ten requests at issue in this case. However, over three months have since passed and I do not consider it appropriate to permit the District to add new requests at this late date. In any event, I consider that the remedy I have authorized below will enable the District to manage these and any other new requests from the respondent and his family for the three year time of the authorization (emphasis added).

[32] From a substantive perspective, the Adjudicator found that the Access Requests were "systemic" and "excessively broad" pursuant to s. 43 of *FIPPA* and that fulfilling those Access Requests would unreasonably interfere with the District's operations.

[33] The Order specifically authorized the District to:

a) Disregard the Petitioner's 10 outstanding Access Requests (enumerated at para.76 (1) of the Order); and

b) For a period of three years commencing February 29, 2024 and in relation to all open and future access requests made on or after November 9, 2023 by the Petitioner or his "family" on "his behalf":

   i. Respond to only one open access "request" made under *FIPPA* by the Petitioner or his "family" at a time;

   ii. Determine what a "request" is based on the definition of that term in s. 5(1)(a) of *FIPPA*; and

   iii. Spend no more than eight hours responding to each access "request" submitted by the Petitioner or his "family" on "his behalf".

The Petition

[34] The crux of the Petitioner's argument, as detailed in some length in the Petition, is that the Order was procedurally unfair and/or unreasonable.

[35] Specifically, the Petitioner seeks the following relief pursuant to the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*]:

a) Setting aside of the Order (specifically para. 76 which is the operative portion of the Order);

b) A declaration that the Petitioner's family members were denied their right to procedural fairness during the Inquiry; and

c) A declaration that the Adjudicator is ineligible to preside over or participate in matters concerning access requests made by the Petitioner or his family members.

[36] The relief sought by the Petitioner is opposed by the District in its Response to Petition.

[37] In its Response to Petition, the OIPC takes no position on the outcome of this judicial review, including whether the Order was reasonable and whether the process the Adjudicator employed was procedurally fair, provided that it seeks no costs and that no costs be awarded against it.

[38] As will be detailed below, the OIPC is participating as an interested party to ensure that the judicial review proceeds in a manner that accords with the court's supervisory role and does not amount to a new hearing based on fresh evidence and arguments that could have been raised, but were not, at the tribunal level.

[39] On the issue of costs, although claimed in the Petition, the Petitioner advised that he does not seek costs from either respondent even if he obtains the relief sought. The District does seek costs as against the Petitioner if it prevails in opposing the relief sought by the Petitioner, but does not seek costs as against the OIPC. This effectively addresses the OIPC's position. The remaining issue of the District's claim for cost obviously turns on the outcome of the Petition.

The Role of the OIPC in This Judicial Review

[40] The OIPC is a respondent to this judicial review as a right pursuant to s. 15 of the *JRPA*.

[41] While having standing as a party, the OIPC is not entitled as of right to defend the reasonableness or fairness of its decisions. Doing so could compromise the impartiality of the OIPC should the petition for judicial review be allowed, and the matter be referred back to the OPIC. Moreover, the OIPC has already had the opportunity to make its views known through its reasons, and defending the merits of the judicial review could compromise the finality of the OIPC decision: see *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44 at paras. 41–52.

[42] However, tribunals such as the OPIC may speak to the standard of review, their own jurisdiction in relation to the role of the court, and to speak to the record of the proceedings. Submissions that address those issues do not lead a tribunal to enter the fray of the litigation or discredit its impartiality: see *Pacific Newspaper Group Inc. v.*

Communications, Energy and Paperworkers Union of Canada, Local 2000, 2014 BCCA 496 at paras. 29–35.

Statutory Framework

[43] Section 2(1) of *FIPPA* sets out the purposes of the legislation. The purposes include making public bodies more accountable to the public and protecting personal privacy by giving the public a right of access to records, specifying limited exceptions to the rights of access and providing for an independent review of decisions made under the Act.

[44] Section 4(1) of *FIPPA* sets out the right of the public to access information. It provides as follows:

> Subject to subsections (2) and (3), an applicant who makes a request under section 5 has a right of access to a record in the custody or control of a public body, including a record containing personal information about the applicant.

[45] Public bodies like the District have no authority to unilaterally disregard access requests made by members of the public pursuant to s. 4(1). However, *FIPPA* affords the Commissioner the discretion to authorize public bodies to disregard access requests in certain delineated circumstances. This discretionary authority is grounded in s. 43 of the legislation.

[46] As indicated above, the Order of the Adjudicator was made pursuant to this statutory provision. Section 43 of *FIPPA*, titled "power to authorize a public body to disregard a request", provides as follows:

> **43** If the head of a public body asks, the commissioner may authorize the public body to disregard a request under section 5 of 29, including because
>
> (a) The request is frivolous or vexatious,
>
> (b) The request is for a record that has been disclosed to the applicant or that is accessible by the applicant from another source, or
>
> (c) Responding to the request would unreasonably interfere with the operations of the public body because the request
>
> (i) is excessively broad, or
>
> (ii) is repetitious or systematic.

[47] Intended to curb abuse of the right of access granted by *FIPPA*, s. 43 is remedial in nature. Although s. 43 authorizations are the "exception" and not the rule, such authorizations are intended to guard against misuse of the right of access, which in turn interferes with the ability of others to legitimately exercise their rights under *FIPPA*. The provision has thus been given a "fair, large and liberal construction and interpretation as best ensures the attainment of its objects": see *Crocker v. British Columbia (Information and Privacy Commissioner)*, 1997 CanLII 4406 (BCSC) [*Crocker*] at para. 42.

[48] Similarly, in *Mazhero v. British Columbia (Information and Privacy Commissioner)*, 1998 CanLII 6010 (BCSC) [*Mazhero*], Justice Tysoe (as he then was) said as follows at para. 18:

> [18] The prerequisites for the Commissioner exercising his discretion under s. 43 are found in the section. There must have been requests for information of a repetitive or systematic nature which have unreasonably interfered or would unreasonably interfere with the operations of the public body. There is no prerequisite that the requests be made in bad faith or be frivolous and vexatious.

[49] As a prerequisite to the exercise of the Commissioner's discretion under s. 43, the Commissioner must be satisfied that the request in question meets one of the conditions under s. 43(a), (b) or (c).

[50] This judicial review concerns the Adjudicator's application of s. 43(c) of *FIPPA* as the Adjudicator concluded that a consideration of whether the Access Requests were frivolous and/or vexatious pursuant to s. 43(a) was unnecessary.

[51] The analysis under s. 43(c) involves a two-part test. At the first stage of the test, the public body must demonstrate either that the request is excessively broad or that it is repetitious or systematic. At the second stage of the test, the public body must show that the request would unreasonably interfere with its operations: see *New Westminster Police Department (Re)*, 2023 BCIPC 114 at para. 32 [*New Westminster*].

[52] Section 43 was amended in November 2021 to add the term "excessively broad" in s. 43(c)(i) as a basis to disregard an access request. Previous OIPC jurisprudence confirmed that a request is overly broad where it is likely to result in a volume of

responsive records than can be fairly characterized as “overwhelming” or “inordinate”: see *New Westminster* at paras. 33, 37–39.

[53] Systematic requests, on the other hand, are requests “characterized by a system” in which a request is made according to a plan that is organized and carried out according to a set of rules or principles. In previous decisions, the OIPC has identified a number of potential characteristics of systematic requests. These include:

a) a pattern of requesting more records, based on what the respondent sees in records already received;

b) combing over records deliberately in order to identify further issues;

c) revisiting earlier freedom of information requests;

d) systematically raising issues with the public body about their responses to freedom of information requests, and then often taking those issues to review by OIPC; and

e) behaviour suggesting that a respondent has no intention of stopping the flow of requests and questions, all of which relate to essentially the same records, communications, people and events.

See *Office of the Auditor General of British Columbia (Re)*, 2018 BCIPC 40 at para. 26 [*Auditor General*].

[54] Accordingly, in determining whether a request is systematic, it may be necessary to consider the pattern of previous requests made by the requestor, even where those specific requests are not otherwise at issue: see *Auditor General* at para. 27.

[55] If a request is determined to be “excessively broad” or “systematic”, the next question is whether responding to it would unreasonably interfere with the operations of the public body. This determination rests on an objective assessment of the facts specific to the size and nature of the body and may involve a consideration of the extent to which responding to the relevant requests impacts on the rights of other access

applicants: see *Crocker* at para. 46; *British Columbia (Attorney General) (Re)*, 2022 BCIPC 8 at para. 59.

[56] Having determined that a request meets the requirements of s. 43(c), the Commissioner may exercise their discretion to authorize a public body to disregard that request. It can be inferred from *Crocker* that any such remedy under s.43 must be proportional to the harm inflicted and must reflect the objectives of s. 43, which is to avoid requests that constitute an unreasonable interference with the operations of the public body and alleviate administrative hardship: see *Crocker* at para. 53.

[57] Moreover, in terms of the scope of a s. 43 authorization, the remedial power granted under s. 43 applies to prospective or future requests and is not limited to requests that have been submitted to, but not yet considered by, a public body at the time it applies for a s. 43 remedy. See in particular paras. 40 and 41 of *Crocker* where Justice Coultas stated as follows:

> [40] The question of whether the Commissioner had jurisdiction to authorize BC Transit to disregard the Petitioners' future requests is a matter of statutory interpretation properly characterized as jurisdictional. In my opinion, the language of s. 43 imports a remedial power to make prospective orders. I agree with the submissions of counsel for BC Transit that the Legislature did not intend the section to apply only to requests that have been made to, but not yet considered by, a public body, at the time it applies for a s. 43 authorization. Section 43 would be rendered useless if a public body, which is being unduly burdened by a number of repetitious or systemic requests, had to make separate applications to the Commissioner every time it received a new request from that person. Section 43 could not have been intended to increase the administrative burden on public bodies which would likely occur if the Commissioner did not have the power to make authorizations that extend to future requests.
>
> [41] I agree with the submissions of counsel for BC Transit, the Attorney-General and the Commissioner that the words "would reasonably interfere" in s. 43 supports the forward looking nature of the remedial power to make prospective orders.

[58] This concept is expanded upon in *Mazhero*, where Justice Tysoe (again as he then was) commented on the specific circumstances where granting prospective relief under s. 43 is appropriate and cautioned against, using my own language, a more draconian approach. Specifically, Justice Tysoe stated at paras. 25–30:

[25] There is another distinction which is very important to a consideration of s. 43; namely, whether the request is pending or is one which has not yet been made. In *Crocke*r, Coultas J. held that s. 43 empowers the Commissioner to make prospective authorizations. However, in making a prospective authorization, the Commissioner must bear in mind the objective of s. 43, which is to avoid requests that constitute an unreasonable interference with the operations of the public body.

[26] When the Commissioner is dealing with a pending request for information, he is in a position to determine that the pending request and the previous requests of the applicant are repetitive or systematic in nature and unreasonably interfere with the operations of the public body. If he concludes that these criteria of s. 43 have been met, it would be entirely appropriate for him to authorize the public body to disregard the pending request.

[27] The situation is different, however, when the Commissioner is dealing with future requests. One cannot predict with any certainty that a request which has not yet been made will unreasonably interfere with the operations of the public body. It would not be appropriate to effectively deprive an applicant from the right to make future requests which would not unreasonably interfere with the operations of the public body.

[28] However, in my view, there will be situations where it would be appropriate for the Commissioner to authorize a public body to disregard all future requests for general information where the applicant has so abused his or her right of access to records that the Commissioner is able to conclude with reasonable certainty from the nature of the previous requests that any future request by the applicant would unreasonably interfere with the operations of the public body. Coultas J. gave potential examples of such situations in Crocker when he referred to applicants making repeated requests in bad faith or making frivolous and vexatious requests. But only in very exceptional circumstances would it be appropriate, in my view, for the Commissioner to authorize a public body to disregard all future requests for personal information (or a type of personal information).

[29] As a general rule, even though the Commissioner has determined that the repetitive or systematic nature of past and pending requests represents an unreasonable interference with the operations of the public body, he should not generally authorize a public body to disregard all future requests for records (or a type of records) without regard to whether any such requests will unreasonably interfere with the operations of the public body. As stated by Coultas J. in Crocker, the remedy fashioned by the Commissioner must redress the harm to the public body seeking the authorization. In attempting to minimize such harm, it is too drastic to authorize the public body to disregard all future requests for records (or a type of records) when it is not known whether any such requests will cause unreasonable interference with the operations of the public body. . . .

[30] An appropriate remedy in respect of future requests would be to authorize the public body to disregard such requests in specified circumstances. An example of such a remedy is the one which Coultas J. found acceptable in *Crocker*; namely, that the public body was required to deal with only one request at a time. Another example would be to authorize the public body to disregard a request for records if it would take the staff of the public body more than a

> specified number of hours to comply with the request. I have no doubt that there are other ways to describe circumstances that would allow the public body to disregard future requests which would be likely to unreasonably interfere with its operations. It should also be borne in mind that if the authorization is not adequate in describing circumstances which would permit the public body to disregard a future request which it believes will unreasonably interfere with its operations, the public body may again apply under s. 43 for an authorization to disregard that request.

Standard of Review

[59] There was consensus at the hearing by all parties that the standard of review with respect to the Petitioner's challenge to the Order under the *JRPA* on the basis of procedural fairness (or lack thereof) is correctness whereas the standard of review with respect to the Petitioner's substantive challenge to the Order is reasonableness.

[60] Our Court of Appeal has recently affirmed that the court does not owe deference to an administrative decision maker in determining whether a process was procedurally fair: see *Blanke v. West Vancouver (District)*, 2025 BCCA 90 at para. 86. This standard has been referred to as "correctness", or simply "fairness". I will use the term correctness.

[61] Under the correctness standard the court is not deferential to the decision maker: see *Murray Purcha & Son Ltd. v. Barriere (District)*, 2019 BCCA 4 at para. 28.

[62] Rather, the reviewing court is entitled to make an assessment on its own accord based upon the evidentiary record that was before the decision maker. As stated in *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65*,* at para. 54 [*Vavilov*]:

> [54] When applying the correctness standard, the reviewing court may choose either to uphold the administrative decision maker's determination or to substitute its own view: *Dunsmuir*, at para. 50. While it should take the administrative decision maker's reasoning into account — and indeed, it may find that reasoning persuasive and adopt it — the reviewing court is ultimately empowered to come to its own conclusions on the question.

[63] Consistent with this, the court on judicial review will generally not hear new arguments: see *Alberta (Information and Privacy Commissioner) v. Alberta Teacher's Association*, 2022 SCC 61 at para. 23-27.

[64] Ultimately, the procedural fairness analysis asks the reviewing court to determine whether the procedure leading up to a decision was fair: see *RNL Investments v. British Columbia (Agricultural Land Commission),* 2021 BCCA 67 at para. 57.

[65] As it relates to the substantive challenges to the Order, the District and the Petitioner actually agree on various key legal propositions regarding the application of the reasonableness standard. Given this consensus, I have copied them directly from the Petition and the District's written submissions for efficiency:

a) In order to be upheld as reasonable, the reasons underlying the statutory or administrative decision must be both rational and logical, and the decision itself must be justifiable in light of the relevant facts and the law. *Vavilov* at paras. 101-106.

b) In reviewing an administrative decision-maker's decision and written reasons, the reviewing court must ask whether the decision bears the hallmarks of reasonableness, namely 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 para. 99.

c) An administrative decision-maker's decision should be set aside where there are sufficiently serious shortcomings or flaws that are sufficiently central to render the decision unreasonable. Such sufficiently serious shortcomings or flaws include, but are not necessarily limited to (a) a failure to rationality internal to the reasoning process, and (b) when a decision is in some respect untenable in light of relevant factual and legal constraints that bear on it. *Vavilov*, at paras. 100-101.

d) For a decision to be reasonable, it must be based on reasoning that is both rational and logical. The reviewing court must be able to trace the decision-maker's reasoning without encountering any fatal flaws in its overarching logic and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived". *Vavilov*, at para. 102.

e) The internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. The reviewing court must ultimately be satisfied that the decision-maker's reasoning "adds up". *Vavilov*, at para. 104.

f) An administrative decision-maker must take the evidentiary record into account and the general factual matrix that bears on its decision into account; the decision must be reasonable in light of them. A decision may be unreasonable where a decision-maker has shown that their conclusions and/or decision were not based on the evidence that was actually before them. *Vavilov*, at paras. 125-126.

g) The principles of justification and transparency require that an administrative decision-maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard. A decision-maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision-maker was actually alert and sensitive to the matter before it. *Vavilov*, at paras. 127,128.

h) The legislature's delegation of a particular function to an administrative decision-maker justifies deference from the reviewing court as a reasonableness review is an inherently deferential exercise. *Vavilov* at para. 30.

i) *Vavilov* and subsequent jurisprudence imports a "reasons first" approach in which it is not the role of the court to begin its review with its own perception of the merits. *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21 at paras. 58-64 and 68.

j) Reasons are not to be assessed against a standard of perfection, and cannot be divorced from the institutional context in which the decision was made. *Vavilov* at para. 91.

k) Administrative decision makers will not always employ the same legal techniques as a lawyer or judge, and will often bring their own specialized institutional expertise and experience to bear in their reasons. *Vavilov* at paras. 92-93.

[66] On this final point, *Vavilov* makes clear that while an administrative decision-maker must consider the submissions of the parties, said decision maker is not required to address every piece of evidence before them. A reasonable decision must be justified in light of the facts and that can be jeopardized where the administrative decision maker misapprehended or failed to account for the evidence before it: see *Vavilov* at paras. 125–126. That is different than electing to not respond to "every argument or line of possible analysis": see *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),* 2011 SCC 62 at para. 25.

[67] The burden of proving that the Order was unreasonable and/or procedurally unfair is on the Petitioner. This is a reversal of the burden from the Inquiry where the onus was on the District.

Analysis Regarding Procedural Fairness

[68] The District was clearly entitled to seek relief pursuant to s. 43 of *FIPPA* as it related to the outstanding Access Requests.

[69] Under the "fair, large and liberal construction and interpretation" of s. 43 as directed by the court in *Crocker*, the District was not precluded from seeking an authorization from the Commissioner in relation to prospective requests made by the Petitioner under *FIPPA*.

[70] The Petitioner was on notice of same when he received the Notice. Specifically, paragraph 2 of the Notice, which I have quoted above at paragraph 19 of these Reasons, sets out that the District seeks an authorization for all access requests for a period of three years (emphasis added). That is quite obviously intended to address and manage prospective *FIPPA* requests and not strictly confined to the Access Requests.

[71] The Petitioner had the opportunity to make written submissions in response thereto and did so——primarily on the basis that the Petitioner's requests made under *FIPPA*, including but not limited to the Access Requests, were meritorious and made in good faith, and that the District was improperly invoking s. 43 to avoid its obligations under *FIPPA* to obstruct the release of otherwise producible information to the Petitioner. The fact that the Adjudicator did not accept this argument relates to the substantive fairness of the Order and not procedural fairness.

[72] However, the inquiry into procedural fairness in relation to the Order does not, in my view, end there when applying the correctness standard required at law.

[73] Firstly, it is not delineated in the Application or in the Notice who the Petitioner's "family" or "family members" consist of for the purpose of the Application. The following quotes from the heading "Background" in the Application confirms same:

> It also appears that the applicant is working with family members to submit additional requests as they are similar in form and structure as well the frivolous, vexatious, excessively broad, repetitious, and systematic nature of the requests. The public body is therefore including the applicant's family members in this respect.

> . . .
>
> Please note that when referring to 'the applicant' in this request, the public body is also referring to the applicant's family members".

[74] The term "family" is defined in *Black's Law Dictionary* as:

> 1. A group of persons connected by blood, by affinity, or by law, especially within two or three generations.
>
> 2. A group consisting of parents and their children.
>
> 3. By extension, a group of people who live together and usually have a shared commitment to a domestic relationship.
>
> See *Black's Law Dictionary*, 12 ed., *sub verbo* "family".

[75] This particular definition of the term "family" is not determinative. There are similar, albeit not identical, definitions of the term in other well recognized dictionary sources.

[76] For example, the Merriam-Webster Dictionary defines the term "family" as:

> 1.a: The basic unit in society traditionally consisting of two parents rearing their children
>
> *also***:** any of various social units differing from but regarded as equivalent to the traditional family
>
> See *Merriam-Webster Dictionary*, Newest Edition, *noun* "family".

[77] As is apparent, beyond the very traditional nuclear family of parents and their biological children, the definition of "family" is broad umbrella and can include differing types of social units.

[78] The significance of the lack of delineation of what constitutes "family" carries forward into the Adjudicator's reasoning underlying the Order. Specifically, at paragraphs 7–9 of the Order wherein the Adjudicator states as follows:

> [7] The District said that, over the last three years, the respondent has made 79 access requests, of which his family members made 18 on his behalf. It noted that the family members' requests are similarly worded and structured to those of

> the respondent. [4] The respondent admitted that some of the requests came from his family. [5]
>
> [8] The District's submission indicates that the 10 requests at issue here all originated with the respondent. [6] need not, therefore, consider whether the family members' requests fall under s. 43(a) or (c).
>
> [9] However, I can see that the family members' requests are indeed similarly worded and structured to those of the applicant. I accept that the family members made these requests on the respondent's behalf. Therefore, I have included the family members' requests when considering the burden the 79 earlier requests as a whole have placed on the District in the past and what relief is warranted. [7]

[79] For context, footnote 5 in the above quoted portion of the Order is to paragraph 26 of the Petitioner's written submissions dated November 30, 2023. Paragraph 26 states as follows:

> The Respondent's reasons for submitting each of the FOI requests at issue in this inquiry are described below. None of the information in the FOI requests at issue has been previously requested by the Respondent or anyone in his family; the requests are seeking new information.

[80] The characterization of this brief statement in the Petitioner's submission as an admission seems to be an overstatement. The Petitioner's statement was an introductory remark preceding his detailed submissions as to why the Access Requests were meritorious, not duplicative and so forth and not conceding that requests were being made on his behalf.

[81] More significantly, and corollary to the first point, given "family" is not delineated, no notice was given by the OIPC to any individual potentially caught within the unspecified definition of "family" or "family member" in the Application and no opportunity given to provide, or at least seek permission to provide, written submissions to the Adjudicator for the purposes of the Inquiry.

[82] Continuing in this regard, it was clearly known who submitted the 18 *FIPPA* requests referred to in paragraph 7 of the Order and the District had the necessary contact details because information requests, as I addressed above, are not submitted anonymously. However, the Order does not identify those persons by name nor does it

specify that those are the only “family members” of the Petitioner whom are caught within the rubric of the Authorization.

[83] I must recognize that when the District requested leave from the Adjudicator to amend the Application to include “Vicki’s February 2024 Requests”, Vicki Besler did respond to the OIPC. However, Vicki Besler still was not given any notice that her right of access to information under FIPPA was being adjudicated upon. She was obviously advised by the Petitioner of the request to amend the Application, but the duty of ensuring procedural fairness, I conclude, cannot be delegated in this regard.

[84] Moreover, while the Adjudicator acknowledged receiving written submissions from the Petitioner’s “family member” (again not specifically named), and did dismiss the District’s request, I find the Adjudicator primarily did so because it was essentially moot given that the remedy authorized “will enable the District to manage these and any other new requests from [the Petitioner] and his family for the three-year time of this authorization”: see Order at para. 12.

[85] Continuing with the necessary legal analysis, whilst on its face the breach of procedural fairness might appear to be outside the scope of this judicial review since the Petitioner was on notice of the relief being sought against him in the Application, that takes too narrow a view of the obligations of an administrative decision maker to ensure that the process is fair.

[86] Specifically, the fact that a decision is administrative and affects “the rights, privileges or interests of an individual” is sufficient to trigger the application of the duty of fairness: see *Baker v. Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817 at para. 20.

[87] The broad contextual language used in *Baker* to describe the duty of procedural fairness, along with its application in a several select cases, supports, in my view, the proposition that procedural fairness applies to non-party third-parties.

[88] The quite recent decision of Justice Basran in *Airbnb Ireland UC v Vancouver (City),* 2023 BCSC 1137 [*Airbnb Ireland*], is not directly on all fours with the Petition as it

relates to the judicial review of the OIPC's decision to release third party information following a *FIPPA* request rather than an OIPC decision to prevent third parties from making requests under the rubric of a s. 43 authorization.

[89] However, *Airbnb Ireland* bears some key similarities and Justice Basran's discussion regarding the procedural fairness owed to third parties affected by the OIPC's decision is illustrative. In finding the OIPC breached its duty of procedural fairness by not notifying third-party hosts of its order for Airbnb to disclose the third-party host's information, Justice Basran reviewed and summarized the relevant legal principles on the duty of procedural fairness:

> [71] The duty of procedural fairness is triggered whenever an administrative body's decision affects the rights, privileges, or interests of an individual: *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 320 at para. 28 [*Taseko*] citing *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 20, 1999 CanLII 699.
>
> [72] The content of this duty is inherently contextual and must be determined having regard to the circumstances of a given case: *Taseko* at para. 30 and Baker at para. 21.
>
> [73] A non-exhaustive list of factors that inform the content of the duty of procedural unfairness includes:
>
> a) The nature of the decision being made, and the process followed in making it;
>
> b) The nature of the statutory scheme;
>
> c) The importance of the decision to the affected individual or individuals;
>
> d) The legitimate expectations of the person challenging the decision; and
>
> e) The choices of procedure made by the administrative decision maker itself.
>
> See *Baker* at paras. 23–27, cited with approval in Vavilov at para. 77.
>
> [74] The purpose of the participatory rights contained within the duty of procedural fairness is to "ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker": *Baker* at para. 22, cited with approval in *Taseko* at para. 29.

[90] In the present circumstances, I find that the “rights, privileges or interests” of the Petitioner’s “family” were affected. This triggers the duty of procedural fairness of to the “family”. Stated another way, the fact that the Petitioner’s “family” were not parties to the Inquiry does not mean they are not entitled to procedural fairness.

[91] However, the mere existence of a duty of procedural fairness does not determine its content: *Taseko Mines Limited v. Canada (Environment)*, 2019 FCA 320 at para. 28. The content of the that duty is a contextual assessment that requires consideration of all of the relevant circumstances: at para. 28. The *Baker* factors, as set out by Justice Basran in *Airbnb Ireland* at para. 73, assist in this determination.

[92] Whether or not notice is required depends on whether the party had sufficient interest in the proceedings. In *T.W.U. v. Canada (Radio-Television & Telecommunications Commission),* [1995] 2 S.C.R. 781 the Supreme Court of Canada summarized the notice requirement of natural justice as follows at para. 5:

> **5** The jurisprudence of this Court has made it clear that the requirements of natural justice depend on the circumstances of the case, the nature of the inquiry, the subject matter being dealt with and the statutory provisions under which the tribunal is acting: *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, and *Old St. Boniface Residents Assn. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, at pp. 1191-92. In each case it must be determined whether the party claiming the right to have been given notice and an opportunity to be heard had a sufficient interest in the proceedings such that notice was required by the *audi alteram partem* principle.

[93] While the requirement for notice is a fundamental element of the duty of fairness at common law, the requirements of procedural fairness depend on the context of each case, and a lack of formal notice may not amount to a failure of procedural fairness where a party has actual notice: *Construction and Specialized Workers Union, Local 1611 v. British Columbia (Information and Privacy Commissioner)*, 2015 BCSC 1471 at para. 78.

[94] Continuing with a review of authorities where the courts have considered duties of procedural fairness owing to parties not directly involved in the proceedings is the decision *Margaree Environmental Association v. Nova Scotia (Environment),* 2012 NSSC 296, [*Margaree*], adopted by this court in *Highlands District Community*

Association v British Columbia (Attorney General), 2020 BCSC 2135 at para. 44, aff'd on appeal 2021 BCCA 232, leave to appeal to SCC ref'd 2021 CanLII 112319.

[95] In *Margaree*, which I recognize involved a significantly distinguishable factual matrix, the Court found that a low-level duty of procedural fairness was owing to third parties at the application stage of approval to operate an oil well, which in that case was met by the dialogue between the interested third parties and the decision maker: see paras. 16–18.

[96] The question now turns to the whether, having regard to all the circumstances of the case, the Petitioner's "family" had a right to notice. In my view, the Petitioner's "family" had only a minimal right to procedural fairness as they are only tangentially implicated. A low level of procedural fairness did not, however, negate the right to simple notice.

[97] In making this assessment, I place significant emphases on the *Baker* factor of the "importance of the decision". The Order restricts the ability of the Petitioner's "family" to submit a *FIPPA* request on his behalf whilst their own right to submit such requests is *prima facie* not impacted by the Order. As a result, the interest at stake is not the general rights of the Petitioner's "family" under *FIPPA*, but merely their interest in submitting a request on behalf of the Petitioner. Given this narrow application, I find that the importance of decision to the Petitioner's "family" is low.

[98] I further note here that while the Order is phrased as a restriction on the Petitioner's "family", the interest at stake is better characterized as belonging to the Petitioner. For practical purposes, the Order prevents the Petitioner from using his "family members", as the Adjudicator concluded he had has previously done, to submit a request under *FIPPA* on his behalf. I accept that, in theory, a third party may well have an interest in their ability to submit an application on behalf of another person. In this context, however, the requests submitted by the Petitioner's "family" are better viewed as an extension of the Petitioner's own actions, and the corresponding restriction a limitation on the Petitioner's own rights. As such, the restriction on the Petitioner's

"family" to submit requests on his behalf can only be said, as I indicated above, to tangentially implicate their interests.

[99] In conclusion, having regard to the admissible portion of the record before me and a consideration of the above law, I ultimately find that this is one of those situations where the duty of procedural fairness was owed to the Petitioner's "family" given the impact, or at least potential impact, upon the rights, privileges, or interests of those individuals who otherwise have a presumptive right of access to information under s. 4(1) of *FIPPA*. It was a low level of procedural fairness in the circumstances; but a low level of procedural fairness does not eliminate the duty and notice falls within the scope of even the low bar required.

Analysis Regarding Substantive Reasonableness

[100] In light of my conclusion regarding the denial of procedural fairness, any analysis as to whether the Order is unreasonable would be *obiter*. Given the very high quality of written submissions provided to the Court in relation to this portion of the Petition, there is a certain appeal to engaging in that academic exercise.

[101] However, upon reflection, I ultimately have concluded that such non-binding judicial musing in this particular case would be demonstrably unhelpful to the parties with the exception of the issue of remedy.

[102] Specifically, the Order, as reproduced above at paragraph 33 of these reasons, applies for a period of three years to all open and future requests submitted by the Petitioner's "family" which are made "on his behalf". Applying the above summarized principles from *Vavilov*, that remedy, I find, is unreasonable on the following basis:

a) As articulated in the analysis regarding procedural fairness, there is no definition of who the Petitioner's "family" is. Does that include an aunt or uncle of the Petitioner? Does it include a non-biological relative who is married to someone in the Petitioner's immediate family? These are but two mere representative examples that serve to illustrate the point that arises from the imprecise language in the remedy crafted by the Adjudicator;

b) There are no parameters given for how it shall be determined whether a request from an individual who is captured within this non-delineated category of "family" is making a request under FIPPA in their own right as expressly permitted under s. 4(1) of *FIPPA* or is making it "on behalf" of the Petitioner. Effectively, the District has the sole unfettered discretion to make that determination; and

c) Where an individual who is captured within this non-delineated category of "family" makes a *FIPPA* request that the District determines is being made "on behalf" of the Petitioner, it counts against the Petitioner since the District is authorized to respond to only open access "request" made under *FIPPA* by the Petitioner or his "family" at a time. Is the Petitioner entitled to be notified if this occurs?

[103] The above conclusion, which is made in the alternative to my primary conclusion regarding the breach of procedural fairness, does not necessitate that the entire matter be remitted back to the OIPC for reconsideration.

[104] Specifically, s. 5(1) of the *JRPA*, which delineates the courts' powers to direct a tribunal to reconsider, provides that the court may direct the tribunal to reconsider and determine, either generally or in respect of a specific matter, the whole or any part of a matter to which the application relates. This is subject to s. 5(2) which directs that the court must advise the tribunal of its reasons and give any directions it thinks appropriate for the reconsideration of the whole or any part of the matter back for reconsideration. See *Reid v. Vancouver (City),* 2003 BCSC 1348, at paras. 165, 175–178 as an example of a court relying on s. 5(1) to remit a decision, in part, for reconsideration to the B.C. Human Rights Tribunal.

Reasonable Apprehension of Bias

[105] It is well established law that a decision may also be procedurally unfair if the administrative decision maker was unlawfully biased.

[106] The test for reasonable apprehension of bias as reiterated by the Supreme Court of Canada in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25 at para. 20 is:

> [20] . . . what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly. [Citation omitted.]
>
> (*Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, at p. 394, per de Grandpré J. (dissenting))

[107] The Petitioner's grounds for alleging "unmistakable bias" in favour of the District by the Adjudicator can be summarized as follows:

a) The Adjudicator referred to the Petitioner as "disingenuous" when considering his submission about the availability of the District to respond to his *FIPPA* requests;

b) The Adjudicator used the term "scattergun approach" to describe the Petitioner's processes in making *FIPPA* requests;

c) The adjudicator failed to give adequate weight to the past behaviour of the District in relation to the Petitioner's prior access requests made under *FIPPA*; and

d) The adjudicator arbitrarily imposed an 8-hour time limit for responding to each open request.

[108] The final point is not properly framed as an allegation of bias, actual or reasonably apprehended. That goes directly to the issue of the remedy granted by the Adjudicator which I have already addressed the reasonableness of above.

[109] In my view, the Petitioner's remaining allegations of bias are entirely without merit. There is a principle of impartiality that applies to administrative decision makers (as with judges) and none of the Petitioner's allegations are sufficient to displace the

presumption of impartiality: see *District Director, Metro Vancouver v. Environmental Appeal Board*, 2024 BCSC 1064 at para. 25.

[110] Simply put, adjudicators and judges are entitled to prefer the submissions of one party to the submissions of another. Doing so does not raise a bias issue, even where decision-makers are quite critical in their critique of conduct and/or submissions which, in my view, was not even the case by the Arbitrator here: see *R. v. Gaudaur*, 2007 BCSC 434 at para. 82.

[111] Based upon my disposition of the relief sought in the Petition as set out below, this matter is being remitted back to the OIPC. Given the lack of any actual or reasonably apprehended bias, nothing in these reasons precludes the Adjudicator from presiding over the subsequent inquiry.

Disposition

[112] The Order is quashed, and the matter is remitted back to the OIPC for reconsideration based on these Reasons and after proper notice is provided to the Petitioner's "family".

[113] In the alternative, the Order is quashed in part and the issue of remedy is remitted back to the OIPC for reconsideration based upon these reasons.

[114] The Petitioner's request for a declaration that the Adjudicator is ineligible to preside over or participate in matters concerning access requests made by the Petitioner or his "family members" is dismissed.

Costs

[115] Although the relief granted by this Court does not include all of the relief sought by the Petitioner in the Petition, the District was clearly not the substantially successful party.

[116] Given the Petitioner's concession at the hearing that he was not pursuing any costs order, no further analysis under Rule 14-1 of the *Supreme Court Civil Rules* is required. The parties shall thus all bear their own costs of the Petition.

"Hardwick J."