IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner,* 2025 BCSC 1365

Date: 20250718
Docket: S244398
Registry: Vancouver

Between:

Minister of Attorney General of British Columbia

Petitioner

And

Information and Privacy Commissioner for British Columbia

Respondent

Before: The Honourable Justice Thomas

Reasons for Judgment

Counsel for the Petitioner:	J. Gibson M. Fingas
Counsel for the Respondent:	A.R. Hudson
Place and Date of Trial/Hearing:	Vancouver, B.C. May 9, 2025
Place and Date of Judgment:	Vancouver, B.C. July 18, 2025

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I. OVERVIEW

[1] This is a judicial review arising from a decision made by the Information and Privacy Commissioner for British Columbia (the "Commissioner").

[2] On December 2, 2020, Kevin Regan made an access to information request under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 [*FOIPPA*] to the Ministry of the Attorney General (the "Ministry") for all records relating to his criminal prosecution.

[3] The Ministry withheld several records, claiming that a number of statutory exceptions contained in *FOIPPA* applied. Mr. Regan then requested that the Commissioner, who is responsible for administering *FOIPPA*, review the Ministry's decision to withhold said records.

[4] During the inquiry that followed (the "Inquiry"), the Ministry provided to the Commissioner a partially unredacted copy of the records at issue, which were accepted on an *in camera* basis. As a result, the Commissioner did not receive the information that the Ministry sought to withhold under ss. 14 [records relating to solicitor-client privilege] and/or 15(1)(g) [information relating to or used in the exercise of prosecutorial discretion], including some information that the Ministry also withheld under s. 22 [records that may unreasonably invade a third party's privacy].

[5] Based on the records received on an *in camera* basis (the "*In Camera* Records"), the Commissioner's delegate, Adjudicator H., rendered Order F24-52, *British Columbia (Attorney General) (Re)*, 2024 BCIPC 61 on June 19, 2024 (the "Decision"). It confirmed the Ministry's decision to not disclose certain records based on two statutory exceptions, namely, ss. 14 and 22. It included two additional orders.

[6] The first was a final order made under s. 58 (the "Section 58 Order") requiring the Ministry to release the record that it withheld under s. 16(1)(b) [information received in confidence from a government, council, or enumerated organizations or their agencies]. The record in question was received by the Ministry from the

Vancouver Police Department (the "VPD") and included information from the Canadian Police Information Centre (the "CPIC") database controlled by the RCMP.

[7] The second was an interlocutory order made under s. 44 (the "Section 44 Order") requiring the Ministry to produce to the Adjudicator the records that it withheld under s. 15(1)(g) (which included some information that the Ministry also withheld under s. 22(1)) (the "Disputed Records"), to allow the Adjudicator to make a final determination on whether the statutory exception applied.

[8] The Adjudicator determined that he could not decide whether s. 15(1)(g) applied to the record in question unless he could review the Disputed Records in an unredacted format.

[9] The Ministry challenges these two orders on judicial review. The Ministry relies on the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241 [*JRPA*] to set the two orders aside. They also seek two declarations that the Ministry is: (i) not required to produce the information subject to s. 15(1)(g) to the Commissioner; and (ii) not required to disclose the information subject to s.16(1)(b) to Mr. Reagan.

[10] In the alternative, the Ministry seeks an order remitting the matter back to the Commissioner to rehearing of the matter.

[11] For the reasons that follow, I find that the two orders being challenged were reasonable, however, I direct the Commissioner to reconsider and determine the two orders in light of these reasons. I do not address the declaratory orders sought on the petition.

II. BACKGROUND

[12] The counsel for the Commissioner provided a helpful overview of the legislation and the factual basis for this application, which I have relied upon.

Framework of *FOIPPA*

[13] The purpose of *FOIPPA* is contained in s. 2. It aims to make public bodies more accountable to the public and protect personal privacy by, among other things, giving the public a right of access to records in the custody or under the control of public bodies, and by specifying "limited exceptions" to said right of access.

[14] The default rule under *FOIPPA* is that public body records are to be released, unless the records (or parts of the records) are excepted from disclosure pursuant to a disclosure exception set out in Part 2, Division 2 of *FOIPPA.*

[15] This right of access promotes meaningful political participation by citizens and ensures that the government remains accountable to the citizenry. Courts have recognized the quasi-constitutional status of privacy legislations such as *FOIPPA*: see *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)*, 2006 SCC 13 at para. 28; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at para. 24 (in both decisions, the Court discusses the quasi-constitutional nature of privacy legislations, and the intimate connection between, and the interlocking nature of, a person’s privacy and their right to access information about themselves held by the government).

[16] Under *FOIPPA*, a person may request a “public body” (a term defined in Schedule 1 of the Act) to provide access to a record, which triggers a duty upon the public body to both assist the applicant and respond to the substance of the request. The content of the public body’s response is mandated under s. 8 to include, in the event of any refusal of access to a record, the reasons for the refusal and the specific statutory provision on which the refusal is based.

[17] The applicant has the right to ask the Commissioner to review the public body’s decision regarding the refusal. Section 56 of *FOIPPA* empowers the Commissioner to conduct an inquiry to determine all questions of fact and law that arise in the inquiry.

[18] The Commissioner is provided with a broad procedural discretion under this section. It may: conduct the inquiry in private (s. 56(2)); decide whether it receives representations orally or in writing (s. 56(4)(a)); and decide whether a person is entitled to be present during or to have access to or to comment on representations made to the Commissioner by another person (s. 56(4)(b)).

[19] If information excepted from disclosure can be reasonably severed from a record, the access applicant has a right of access to the remainder of the record. In practice, the Commissioner's delegate tasked with deciding the inquiry generally conducts a line-by-line review of the disputed documents to identify which information, if any, is properly withheld from the access applicant.

[20] To facilitate this line-by-line review, the procedures of the Office of the Information and Privacy Commissioner (the "OIPC") typically require the public body to submit to the OIPC a copy of the records in dispute along with its initial submissions in the inquiry. The OIPC generally does not permit that copy to be redacted — it requires that the entire record be visible to the OIPC.

[21] The Commissioner always accepts the records and information in dispute on an *in camera* basis (i.e., without requiring or allowing any other party or the public to have access) because it would defeat the purpose of the inquiry to reveal the record/information.

[22] Where a public body has refused access to all or part of a record, s. 57 places the burden of proof in the inquiry on the public body. It must prove that the applicant has no right of access to the disputed information in the records.

[23] Crucial for this judicial review, s. 44 empowers the Commissioner, for the purpose of conducting an inquiry, to make an order for production of the record in the public body’s custody or control, including a record containing personal information (s. 44(1)(b)). This disclosure to the Commissioner, however, does not affect solicitor-client privilege of the record (s. 44(2.1)). Then, the rule in s. 44(3) requires that, despite “any other enactment or any privilege of the law of evidence”,

a public body must produce the record or a copy of any record to the Commissioner within 10 days.

[24] This requirement to fully produce sensitive records to the Commissioner, ones which could be protected from disclosure under *FOIPPA*, is countervailed by the restrictions contained in s. 47(1). The Commissioner, or anyone acting for or under the directions of the Commissioner, must not disclose any information obtained in performing their statutory duties or exercising statutory powers, except for further specific exceptions provided in ss. 47(2) to (5). Furthermore, s. 47(2.1) prohibits the Commissioner and those acting on his behalf or under his direction from giving or being compelled to give evidence in court or in any other proceedings regarding any records or information obtained while performing their duties or exercising their powers and functions under *FOIPPA*, with limited exceptions.

[25] On completing the inquiry under s. 56, the Commissioner must dispose of the issues by making an order. Section 58 mandates that, if the inquiry is into a decision of a public body to give or to refuse to give access to all or part of a record, the Commissioner must make one of the following orders (found under s. 58(2)):

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

[26] Once the Commissioner's decision is rendered, s. 59 mandates that the public body must comply not later than 30 days after receiving it, unless the public body brings an application for judicial review. The Commissioner's order is stayed for 120 days upon an application for judicial review within that timeframe, unless a court issues an order to shorten or extend the stay. If a hearing date for the judicial review application is set within the 120 business day period, the statutory stay is

extended until the judicial review is completed or the court makes an order shortening the stay.

Initial Disclosure by the Ministry

[27] After the request by Mr. Reagan, the Ministry provided him with 416 pages of documents in response. The Ministry relied on ss. 14, 15(1)(g), 16(1)(b), and 22(1) of *FOIPPA* to withhold certain records, in whole and in part. Each ground being summarized as follows:

a) Section 14 allows a public body to refuse to disclose information that is subject to solicitor-client privilege, including both legal advice privilege and litigation privilege: *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 141.

b) Subsection 15(1)(g) allows a public body to refuse to disclose information which, if disclosed, could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion. However, a public body must not rely on s. 15 to refuse to disclose certain information specified in ss. 15(3) and (4).

c) Subsection 16(1)(b) allows a public body to refuse to disclose information which, if disclosed, could reasonably be expected to reveal information received in confidence from a government, council or organization listed in s. 16(1)(a) or their agencies. This list includes:

> (i) the government of Canada or a province of Canada;
> (ii) the council of a municipality or the board of a regional district;
> (iii) an Indigenous governing entity;
> (iv) the government of a foreign state;
> (v) an international organization of states

d) Subsection 22(1) requires a public body to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's privacy.

[28] The records in dispute is comprised of approximately 126 pages of emails, letters, medical records, and documents concerning Mr. Reagan's prosecution.

The Inquiry (OIPC File Number F21-85628)

[29] By letter dated March 24, 2021, Mr. Regan requested that the Commissioner review the Ministry's decision to withhold the disputed information.

[30] The Commissioner attempted mediation, which did not resolve the dispute. Thus, the Commissioner commenced the Inquiry by issuing a notice of written inquiry dated February 16, 2023.

[31] As aforementioned in the overview, the Ministry only provided partially redacted records to the Commissioner which formed the *In Camera* Records. These records were the only evidence that the Adjudicator accepted on an *in camera* basis in the Inquiry.

[32] The Ministry declined to provide the Adjudicator with a copy of the information it sought to withhold under s. 14 (solicitor-client privilege) and s. 15(1)(g) (exercise of prosecutorial discretion). The Ministry redacted the information it claimed was subject to s. 14 and/or 15(1)(g) from the *In Camera* Records that it provided.

[33] The Ministry asserted that some of the information it sought to withhold pursuant to ss. 14 and/or 15(1)(g) also had to be withheld under s. 22(1) [unreasonable invasion of third-party privacy]. This s. 22(1) information was redacted from the *In Camera* Records and not provided for review.

[34] As a result, the *In Camera* Records did not include any of the information the Ministry sought to withhold under ss. 14 and/or 15(1)(g), which included some of the information the Ministry argued was also properly withheld under s. 22(1).

[35] The *In Camera* Records included the following unredacted information that the Adjudicator was able to review:

a) the one page of information that the Ministry sought to withhold under s. 16(1)(b) (harm to intergovernmental relations); and

b) the information that the Ministry relied on s. 22(1), but not also ss. 14 and 15(1)(g), to withhold.

[36] On April 6, 2023, the Ministry filed its initial submissions and a supporting affidavit in the Inquiry.

[37] Between May 19, 2023 and June 7, 2023, Mr. Regan provided his response submissions in the Inquiry. Mr. Regan did not file documents or affidavit evidence. The Ministry did not provide submissions in reply to Mr. Regan's response submissions.

[38] On March 13, 2024, the Adjudicator requested additional submissions from the Ministry regarding its withholding of information pursuant to s. 14 of *FOIPPA.* On April 10, 2024, the Ministry filed its additional submissions and a supporting affidavit.

The Decision

[39] On June 19, 2024, the Adjudicator issued the Decision. The Ministry does not take issue with the portions of the Decision that confirmed: (i) the Ministry's refusal to disclose information under s. 14; and (ii) the Ministry's refusal to disclose the information under s. 22(1). To reach this conclusion, the Adjudicator reviewed the *In Camera* Records.

Section 58 Order

[40] The Section 58 Order was the Adjudicator's final order regarding the one-page document that the Ministry sought to withhold under s. 16(1)(b).

[41] The Adjudicator's reasons for making the Section 58 Order were based on the following. First, the Ministry had the burden of proving that Mr. Regan had no right of access to the information withheld under s. 16(1)(b). Second, the Ministry needed to establish that: (i) the disclosure would reveal information the Ministry

received from a government, council, or organization listed in s. 16(1)(a) or their agency; and (ii) the information was received in confidence.

[42] The Ministry received the record from the VPD, and it contained information from the CPIC database controlled by the RCMP. The list of organizations under s. 16(1)(a) includes the government of Canada or a province of Canada. As the disputed record was received from the VPD, the Adjudicator determined that the first issue was whether the Ministry lifted its burden to establish that the VPD qualifies as "a government, council or organization" within the meaning of s. 16(1)(a), or their agency.

[43] The Adjudicator reasoned that while the Ministry explained how the RCMP is an agency of the government of Canada, it did not provide an explanation for how the VPD is captured within s. 16(1)(a).

[44] Therefore, the Adjudicator determined that the Ministry did not establish that the information was received from a government, council, or organization listed in s. 16(1)(a) or their agency. The Ministry did not meet its burden to establish that s. 16(1) applies to the information in dispute.

Section 44 Order

[45] The Adjudicator also made the Section 44 Order, under the authorities of ss. 44(1)(b) and (3) of *FOIPPA*, for the Ministry to produce the Disputed Records. The Ministry had until July 4, 2024 to produce the Disputed Records so that the Adjudicator could make a final determination.

[46] The Section 44 Order did not apply to the information that was protected from disclosure by s. 14 (i.e., the information over which the Ministry had successfully established solicitor-client privilege). The Adjudicator did not require the Ministry to produce any solicitor-client privileged information for his review.

[47] As summarized above on the framework of *FOIPPA*, the Disputed Records would be disclosed only to the Adjudicator, on an *in camera* basis, and be governed by the restrictions contained in s. 47.

[48] The Adjudicator has not yet decided whether any part of the Disputed Records must be produced to Mr. Reagan. The Adjudicator may ultimately order under s. 58 that all, some, or none of the information in these records may be withheld under s. 15(1)(g) or must be withheld under s. 22(1).

[49] If, after reviewing the Disputed Records, the Adjudicator makes a s. 58 order requiring that any part of those records be disclosed to the access applicant, the Ministry has the right to seek judicial review of that s. 58 order. If filed in time, the judicial review proceeding would automatically stay the Adjudicator's disclosure order under ss. 59(3) and (4) of *FOIPPA.*

[50] The Adjudicator considered the Ministry's argument on why it must withhold the Disputed Records under s. 15(1)(g). The Ministry argued that the information was protected by "prosecutorial discretion privilege" and that information subject to this assertion ought to be treated in the same manner that the OIPC treats information subject to an assertion of solicitor-client privilege. The Ministry further argued that providing the OIPC with information over which prosecutorial discretion privilege is asserted would infringe the privilege, and that the Ministry's submissions and affidavit evidence were sufficient to decide whether s. 15(1)(g) applies.

[51] The Adjudicator did not accept this argument. In making the Section 44 Order, the Adjudicator reasoned as follows. First, the burden of proof lay on the Ministry to prove that this statutory exception applies. Second, the principles of solicitor-client privilege do not apply equally to prosecutorial discretion. Solicitor-client privilege and prosecutorial discretion are treated differently by the courts, have different purposes, and protect different values. The Adjudicator was not persuaded that information withheld under prosecutorial discretion warrants the same treatment in the inquiry as information withheld under solicitor-client privilege.

[52] The Adjudicator was required to conduct an independent, line-by-line review of the disputed information to decide whether an exception to disclosure applies. The only time this kind of line-by-line review does not occur is with respect to s. 14 because courts have cautioned against reviewing records for which a claim of solicitor-client privilege has been made. In the Adjudicator's view, it would not be appropriate to make a s. 15(1)(g) determination without reviewing the information in dispute.

[53] The Ministry applied s. 15(1)(g) to several different types of records in their entirety: a police file summary, disclosure notices, general occurrence reports, an accused's history report, a jail report, an interview transcript, reports to Crown Counsel and attachments, the VPD notes provided to Crown Counsel, communications between Crown Counsel and their administrative staff, and communications between Crown Counsel and a defence counsel. The Adjudicator concluded that he needed to review this information in detail to determine whether s. 15(1)(g) applied; and also needed to conduct an independent, line-by-line review of the Disputed Records to determine whether s. 22(1) applied to the remaining information that the Ministry argued it had to withhold under that provision.

III. STANDARD OF REVIEW

[54] The parties agree that the standard of reasonableness applies to the Section 58 Order. However, they disagree as to which standard applies to the Section 44 Order. The Ministry argues that the standard of correctness applies, whereas the Commissioner states that the same standard of reasonableness applies. I address them in order.

Vavilov and Reasonableness

[55] As noted by the Ministry, the *Administrative Tribunals Act*, S.B.C. 2004, c. 45 [*ATA*] does not apply to the Commissioner. *FOIPPA* does not adopt provisions from the *ATA*, such as ss. 58 or 59, and as such, determination of the standard of review follows the approach set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65* [*Vavilov*].

[56] Reasonableness is the presumptive standard when a court reviews administrative decisions: *Vavilov* at para. 16. The purpose of reasonableness review is to "give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law": *Vavilov* at para. 82.

[57] The focus of the review is on the decision made by the tribunal, both the reasons and the outcome. The reviewing court does not decide the issue itself and measure the tribunal's result against the outcome that the court would reach. Instead, a reasonable decision is one that is "based on an internally coherent and rational chain of analysis … justified in relation to the facts and law that constrain the decision maker": *Vavilov* at para. 85.

[58] As stated, the parties agree that the reasonableness standard applies to the Section 58 Order. The question then turns to whether Section 44 Order is captured by the exceptions outlined in *Vavilov*.

Exceptions to Reasonableness

[59] The presumption of reasonableness is rebutted in the following limited situations: (i) where the legislation explicitly prescribes a standard of review; (ii) where there is a statutory appeal mechanism from the administrative decision to a court; (iii) the rule of law requires that the standard of correctness be applied, such as where "constitutional questions, general questions of law of central importance to the legal system as a whole and questions related to the jurisdictional boundaries between two or more administrative bodies" arise: *Vavilov* at para. 17.

[60] Section 44 Order is based on the proposition that the OIPC, not the Ministry, is ultimately responsible for ascertaining whether documents fall within the prosecutorial discretion exception to the obligation to disclose documents.

[61] However, the Ministry argues in the petition that prosecutorial discretion is a "fundamentally important component of a properly functioning criminal justice system, needed to ensure Crown counsel's independence in conducting criminal

prosecution." It says that such questions require a final and determinate answer, meaning that a correctness standard of review applies.

[62] Regarding the category of "general questions of law of central importance to the legal system as a whole", the Court in *Vavilov* cautioned that "the mere fact that a dispute is "of wider public concern" is not sufficient … nor is the fact that the question, when framed in a general or abstract sense, touches on an important issue": at para. 61.

[63] The Ministry say that prosecutorial discretion is analogous to solicitor-client privilege and rely on *British Columbia (Children and Family Development) v. British Columbia (Information and Privacy Commissioner)*, 2024 BCCA 190 at para. 26 [*MCFD*]:

> [26] There is no doubt that the question whether the provisions of *FIPPA* override solicitor-client privilege is a question of central importance to the legal system as a whole and that the applicable standard of review is correctness: see *University of Calgary* at paras. 19–20.

[64] The OIPC states that this case is different from *MCFD* because solicitor-client privilege is fundamentally different from prosecutorial discretion. The OIPC says that the proper principles governing prosecutorial privilege are set out in *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337, leave to appeal to SCC ref'd, 33355 (8 April 2010) [*Davies*], where the Court of Appeal stated:

> [34] … Crown immunity is a means by which at least two constitutional principles are protected – the separation between the judicial and executive branches of government, and the prosecutorial independence of the Crown. Crown. Crown immunity is not absolute; it extends only so far as is necessary to protect these values.
>
> …
>
> [55] As we read *Krieger*, the Supreme Court of Canada did not hold that Crown immunity is a constitutional imperative to protect prosecutorial discretion. Rather, *Krieger* establishes that prosecutorial discretion must be protected, in the case of administrative tribunal hearings, by carefully interpreting the statutory mandates of the administrative tribunal in question, and ensuring that no action taken by the tribunal results in improper influence being placed on the Attorney General or Crown counsel.
>
> [Emphasis added.]

[65] The OIPC contrasts the above view on prosecutorial discretion, that it is not absolute and extends only so far as is necessary, against the espoused view on solicitor-client privilege by the courts as a "fundamental principle of our legal system" to be protected "as close to absolute as possible": *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 at para. 85.

Standard of Review Analysis

[66] In my view, the applicable standard of review on the Section 44 Order is reasonableness. The exceptions to the presumption of reasonableness from *Vavilov* does not apply.

[67] This matter is distinguishable from *MCFD*. That case proceeded on the basis that the exception for solicitor-client privilege under s. 14 of *FOIPPA* applied. The court found that since there was no issue that the documents contained solicitor-client privilege, the OIPC had no authority to review the records: *MCFD* at para. 29.

[68] I agree with the OIPC that, in *Davies*, our Court determined that prosecutorial discretion, or crown immunity, is fundamentally different than solicitor-client privilege: *Davies* at para. 34. In this situation, the fundamental principle is the prosecutorial independence of the Crown. *Davies* notes that in protecting this principle:

> [38] … it is important that the courts seek to reduce the pressures that Crown counsel face in exercising prosecutorial discretion. By limiting the possibility of any sort of judicial review of prosecutorial decisions, the courts reduce the possibility that prosecutors will face public humiliation or retribution in the event that their decisions prove unpopular. This aids independence by removing incentives to take popular, as opposed to appropriate, decisions. This rationale for limiting inquiries into the exercise of prosecutorial discretion is equally applicable to courts and to administrative bodies.

[69] *FOIPPA* does not treat disclosure of documents subject to prosecutorial discretion as absolute; it statutorily requires the disclosure of some documents that fall within the general scope of s. 15(1)(g). Subsections 15(3) and (4) read as follows:

> (3) The head of a public body must not refuse to disclose under this section
>
> > (a) a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act,
> >
> > (b) a report, including statistical analysis, on the degree of success achieved in a law enforcement program or activity unless disclosure of the report could reasonably be expected to interfere with or harm any of the matters referred to in subsection (1) or (2), or
> >
> > (c) statistical information on decisions under the *Crown Counsel Act* to approve or not to approve prosecutions.
>
> (4) The head of a public body must not refuse, after a police investigation is completed, to disclose under this section the reasons for a decision not to prosecute
>
> > (a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or
> >
> > (b) to any other member of the public, if the fact of the investigation was made public.

[70] Prosecutorial discretion in this situation depends on whether an *in camera* review of unredacted documents by the OIPC will exert pressure on Crown counsel to the extent that their prosecutorial independence would be compromised. Even if that is the case, it may not apply to documents subject to s. 15(3) and (4).

[71] Therefore, I reject the Ministry's proposition of law that prosecutorial discretion is absolute in these circumstances.

[72] When I consider the structure of s. 15, the purpose of the legislation, and the principles summarized in *Davies*, I agree with the OIPC that the proper characterization of the issue to be reviewed is: whether the Commissioner may assess the public body's assertion of s. 15(1)(g) by reviewing the documents in unredacted form to determine the applicability of s. 15(1)(g), or it is limited to reviewing the affidavit evidence provided by the public body that asserts that the information falls within s. 15(1)(g).

[73] At this stage the adjudicator is only making a determination that he needs to more information in order to assess whether the prosecutorial discretion is properly

asserted. The adjudicator has not yet made a determination of whether the information in question is subject to prosecutorial discretion.

[74] The extent to which OIPC is restricted to reviewing affidavit evidence is determined by balancing its obligations under *FOIPPA*, against its obligation to protect prosecutorial discretion set out in *Davies*.

[75] The extent of the obligation to set out in *Davies* requires the adjudicator to make findings of fact regarding the impact that reviewing documents will have on prosecutorial discretion. It may be that the OIPC will make different decisions on this issue based on the circumstances raised by various information requests.

[76] The Adjudicator noted that there have been no past orders issued by the OIPC in which an *in camera* review of documents to determine the applicability of s. 15(1)(g) has not been conducted. In my view, this is a legitimate consideration.

[77] This analysis leads me to conclude that the appropriate standard of review is that of reasonableness, as the answer to the questions, through the application of *Davies*, is inextricably linked to the facts underlying the decision regarding what constitutes an appropriate level of OIPC review of the public body's claim for s. 15(1)(g) privilege.

IV. SECTION 58 ORDER

[78] The Ministry relied on s. 16(1)(b) to withhold a CPIC record, which is that the disclosure "could reasonably expected to… reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies".

[79] The Adjudicator determined that the Ministry had to prove that the VPD qualifies as a government, council, or organization under s. 16(1)(a), or as an agency of the same. The Ministry established that the RCMP is an agency of the Government of Canada during the Inquiry but did not provide similar evidence with regard to the VPD. The Ministry stated that the BC Prosecution Service did not

anticipate that this issue would be contentious and only submitted three paragraphs in their submissions at the inquiry.

[80] The Ministry states that the Adjudicator erred by requiring a record to be received directly from a qualifying government agency for s. 16(1)(b) to apply, contrary to the decisions in Order 02-19, *Coquitlam (City)*, 2002 B.C.I.P.C.D. No. 73, 2002 CanLII 42444 [Order 02-19].

[81] At this judicial review, the Ministry raised an argument not made at the inquiry; that the VPD was acting as an agent of the municipal council, such that s. 16(1)(b) applied.

[82] The Commissioner states that Order 02-19 does not assist the Ministry, as that case involved detailed evidence and submissions from several parties regarding the issue of whether the RCMP is an agency of the Government of Canada. The analysis in the decision spanned 43 paragraphs and considered numerous authorities.

[83] The Commissioner argues that it would be inappropriate for this Court to decide whether the VPD is an agent of the council of a municipality in the context of a judicial review proceeding, because:

a) there is no reason why the Ministry did not raise the issue at the Inquiry;

b) deciding this issue at the judicial review would fail to respect the legislature's decision to have the OIPC interpret and apply *FOIPPA*'s disclosure exceptions and deprive OIPC of the deference to which it is entitled on such issues;

c) deciding this issue at the judicial review would deprive Mr. Reagan of making submissions; and

d) there is no evidentiary basis to address or consider the issue in the record before this court.

[84] I agree with the respondent that the cases provided by the Ministry all relate to information directly provided by a qualifying government or agency. The issue of supplying CPIC information from a municipal police force to the Ministry has not been addressed by the relevant case law.

[85] In my view, a plain reading of the statute indicates that a direct connection is necessary to invoke the exception to production contained in s. 16(1)(b). This interpretation is consistent with the principle that disclosure exceptions are to be limited. It also makes practical sense as confidential documents disclosed to a third party should not, as a rule, be treated as confidential documents if they are subsequently provided to a government agency.

[86] In my view, at best, the Ministry has provided an alternative interpretation of the statute. This is insufficient to overturn a decision based on a reasonableness standard of review. As the Supreme Court of Canada reaffirmed in *Canada Post Corp. v. Canadian Union of Postal Workers*, 2019 SCC 67 at para. 40, the administrative decision maker "holds the interpretative upper hand": *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para. 40.

Remedy

[87] I share the respondent's concerns about whether I should assess whether the VPD is an agency of the municipal council. Courts must sparingly exercise their discretion to hear new arguments that were not made in the tribunal below: see *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 [*Alberta Teachers*]. In my view, this issue should first be considered and interpreted by the OIPC.

[88] In *The Owners, Strata Plan VR 1120 v. Civil Resolution Tribunal*, 2022 BCCA 189 [*VR 1120*], Justice Horsman summarized the rationale for this general rule as follows:

> [45] Where a petitioner seeks to raise new issues before the court on judicial review, the reviewing judge has discretion as to whether to entertain the issues. Generally, a judge will not exercise this discretion in favour of an

> applicant on judicial review where the applicant could have but did not raise the issue before the tribunal [citation omitted]. In *Alberta Teachers*, at paras. 24–26, the Supreme Court of Canada explained the rationales for this general rule. They include:
>
> > a) respect for the intent of Parliament and provincial legislatures in delegating decision-making powers to administrative bodies, as opposed to the court;
> >
> > b) the need to accord deference to the decisions of statutory decision-makers, particularly when a decision-maker has specialized functions or expertise; and,
> >
> > c) the prejudice that arises if the court does not have an evidentiary record adequate to consider the new issue.

[89] She also noted that exceptional circumstances may warrant that a reviewing judge remit a matter to a tribunal for reasons on a new issue that a petitioner could have, but did not, raise earlier: *VR 1120* at para. 50*.* In that decision, Horsman J.A. held that the reviewing judge erred in principle when he remitted the matter rather than deciding it himself. In coming to this conclusion, she considered as relevant factors that the new issue—alleged conflict between the Human Rights Tribunal Rules of Practice and Procedure prohibiting public access to the content of a complaint file and the provisions in the *Strata Property Act* mandating the disclosure of legal opinions — was a question of pure law that did not require further evidence, and that the applicable standard of review was correctness wherein no deference was owed to the tribunal: at para. 53. This error in remittal unnecessarily lengthened and complicated a proceeding that the reviewing judge could and ought to have dealt with summarily.

[90] In this instance, the same factors militating against remittal are not found before me. The question is not of pure law because it requires a determination on whether the disclosure of a specific record could reasonably be expected to reveal information received in confidence from the VPD *qua* agency of the council of a municipality. In addition, the applicable standard of review is that of reasonableness wherein the court owes deference to the administrative body that is designated by the legislature as the first instance decision maker.

[91] The respondent asserts that there is no evidence before me concerning the importance or confidential nature of CPIC documents.

[92] This may be true; however, in my opinion, it is a matter of common sense that the disclosure of such documents could have a significant impact on how the VPD and RCMP conduct investigations. In my view, the CPIC document in this case should not be disclosed without a comprehensive hearing on the issue of whether the documents fall within s. 16(1).

[93] I note, in Order 17-56; *Delta Police Department (Re)*, 2017 BCIPC 61, the OIPC made several findings about the nature of CPIC records that are applicable in the present proceeding. The OIPC found the following:

a) CPIC records are generally regarded as being confidential. These records contain sensitive and potentially damaging personal information about individuals, including gender, basic physical description, criminal record, gang affiliations, aliases, fingerprint codes, as well as cautionary warnings such as when someone is violent: at para. 87.

b) CPIC information is not compiled for a purpose that would typically lead to disclosure in the ordinary course of events. CPIC information is accessible only to other law enforcement agencies and cannot be disclosed without the permission of the contributing agency: at para. 88.

c) CPIC records have explicit markings of confidentiality: at para. 89.

[94] In my view, given the significance of this matter, and the fact that the BC Prosecution Service did not consider whether the VPD may be an agency of the municipal council was a live issue, this issue should be referred back to OIPC for a full and comprehensive decision on this issue, and solely on this issue. This is not an opportunity to re-argue other issues already decided or to raise additional new issues.

[95] It may be appropriate to gather evidence and submissions from the VPD and/or municipal council to consider this issue thoroughly, as seems to have occurred in Order 02-19.

V. SECTION 44 ORDER

[96] The Ministry alleges that the Adjudicator erred by ordering the production of documents claimed to be excluded from production to the applicant under s. 15(1)(g) so that a line-by-line review of the documents could be performed.

[97] The Ministry's argument centred on the claim that prosecutorial discretion was an absolute privilege, equated with solicitor-client privilege. I have concluded that prosecutorial discretion is not an absolute privilege in this context, but rather relies on an evaluation of the principles outlined in *Davies*, interpreted within the framework of *FOIPPA*.

[98] In my view, the s. 44 order was reasonable.

[99] The Adjudicator was not unreasonable to distinguish prosecutorial discretion from solicitor-client privilege, and that they do not warrant the same treatment in the Inquiry. He noted that past practice supported the OIPC reviewing documents over which s. 15 claims had been previously made, and there was insufficient evidence supporting the proposition that an *in camera* review of the documents by the Adjudicator would impact prosecutorial independence.

[100] In addition, the Adjudicator rejected the Ministry's position that its submissions and affidavit evidence alone were sufficient to decide on s. 15(1)(g). There was no indication in the affidavit evidence that ss. 15(3) and (4) had been considered by the public body. The Adjudicator also noted that the Ministry asserted s. 15(1)(g) over several different types of records in their entirety. This breadth of records, contrasted with the lack of details in the Ministry's affidavit despite being provided with an opportunity to rectify the concerns raised by the Adjudicator, led the Adjudicator to determine that it was necessary to order the production.

Remedy

[101] The OIPC argues that it is only in exceptional circumstances that matters should be remitted back for consideration of issues that could have, but were not raised at the initial hearing.

[102] I agree with this principle, and the principles noted above from *Alberta Teachers* and *VR 1122*; however, in my view it is appropriate to provide the Ministry with an opportunity to address my determination that prosecutorial discretion in this context relies on an evaluation of the principles I referred to from *Davies*, interpreted within the framework of *FOIPPA*.

[103] The issue of prosecutorial discretion is of fundamental importance. The Ministry did not provide evidence on the impact that a review by the adjudicator may have on the prosecution service because they relied on their view that the matter was subject to absolute privilege. I wish to stress that in my view, this is an exceptional situation and in no way should be seen as condoning or acquiescing to a party providing limited submissions and then raising an alternative position during judicial review. Where the issue at stake not something as important as prosecutorial discretion I would have no hesitation in dismissing this aspect of the judicial review.

[104] With reluctance, I refer this matter back to OPIC to provide the Ministry an opportunity to provide evidence on the potential impact that an in-camera review of the documents by the adjudicator may have on prosecutorial independence. This is remitted back solely for this purpose. This is not an opportunity to re-argue other issues already decided or to raise additional new issues.

VI. DISPOSITION

[105] I order that the OIPC reconsider and determine the Section 58 Order and the Section 44 Order in light of these reasons.

[106] I do not order the declaratory reliefs sought by the Ministry.

[107] Given the nature of the review and the relationship between the parties, no costs are awarded.

"Thomas J."