IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Harrison v. Simon Fraser University,* 2025 BCSC 2341

Date: 20251127
Docket: S244929
Registry: Vancouver

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

Between:

Robert Glen Harrison

Petitioner

And

Simon Fraser University, Rummana Khan Hemani, Martin Pochurko, Robert Moseley dba Luxury Transport Inc., British Columbia Office of the Information and Privacy Commissioner, and Patrick Egan

Respondents

Sealing Order in Effect

Before: The Honourable Justice Giltrow

On judicial review from: A decision of the Office of the Information and Privacy Commissioner for British Columbia, dated December 5, 2024

Reasons for Judgment

The Petitioner, appearing in person:	R. Harrison
Counsel for the Respondents Simon Fraser University, R.K. Hemani and M. Pochurko:	H. Jones
Counsel for the Respondent R. Mosely:	J. Menten
Counsel for the Respondents British Columbia Office of the Information and Privacy Commissioner and P. Egan:	K. Phipps
Place and Date of Hearing:	Vancouver, B.C. June 16-17, 2025
Place and Date of Judgment:	Vancouver, B.C. November 27, 2025

Overview

[1] The petitioner in this case was a shuttle bus driver on Simon Fraser University campus for several years, employed by Luxury Transport Inc. On the morning of April 2, 2024, the petitioner made a comment to a construction traffic controller (also referred to as a “flagger” and the “worker” in the record in this case) that led to a complaint being made by the flagger to SFU security. How SFU received that information, and what it then did with it, was the subject of a complaint by the petitioner to the Office of the Information and Privacy Commissioner for British Columbia (OIPC). The petitioner now seeks judicial review of determinations made by the OIPC in relation to that complaint, in addition to other relief which I describe below.

[2] While several orders are sought by the petitioner, as I will explain, I have determined that the only matter properly before this Court is the OIPC’s determination pursuant to s. 28 of *British Columbia Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165 *[FIPPA]* that SFU made every reasonable effort to ensure that the petitioner’s information that SFU collected was accurate and complete before SFU made a decision to request that Luxury remove the petitioner from SFU bus routes.

[3] The exchange at issue occurred when the petitioner stopped the bus he was driving, opened his door, and made a comment to the traffic controller to the effect that she was beautiful and should be photographed. Leaving aside for the moment the precise wording, the petitioner does not dispute the essence of what he said to the traffic controller. He says there was nothing inappropriate about this comment, and he meant it as an act of kindness to someone standing out on the road on a rainy day.

[4] Regardless of the petitioner’s intent, the traffic controller made a complaint about the petitioner’s comment to SFU security.

[5] SFU security staff went to the scene about half an hour after the incident, and took a statement from the traffic controller to whom the comment had been made. SFU also received information from at least one witness related to the incident.

[6] Later that day, April 2, 2024, SFU informed Luxury that it had received a complaint that one of Luxury's drivers had made an inappropriate comment to a traffic controller about her attractiveness. Ultimately, on April 26, 2024, the petitioner's employment was terminated by Luxury. There are a number of events between April 2 and 26 that are relevant to understanding both the procedural history and the relief the petitioner now seeks from the Court.

a) April 2, 2024, Luxury determined internally that it would remove the petitioner from SFU routes. Luxury advised SFU of this. Luxury then contacted the petitioner to advise him they had received a call from SFU about him, asking him whether he knew why they would receive such a call. The petitioner responded to the effect that he had complimented a flagger, and that she had responded with a smile. Luxury told the petitioner he would be removed from SFU routes, and offered him an alternative route in Burnaby, which the petitioner declined. Luxury told the petitioner they would see if they could find other work for him in their business.

b) April 4, 2024, the petitioner submitted a request to the Information and Privacy Division of SFU seeking all information reported to Luxury by SFU, as well as the name and company of the flag person who made the complaint (the "Access to Information Request").

c) April 5, 2024, SFU contacted Luxury confirming that the petitioner was no longer permitted to drive on SFU's campus. SFU did not ask Luxury to terminate the petitioner.

d) April 12, 2024, Luxury met with and interviewed the petitioner as part of their internal investigation into the incident. During the interview the petitioner stated:

I. He had stopped the shuttle bus in the middle of the intersection and opened the door to talk to the Flagger;

II. He told the Flagger that she was beautiful and should be taking pictures and modeling;

III. That his comment was a compliment and the Flagger "loved" it;

IV. There was nothing wrong with what he had said to the Flagger;

V. That "this was not Russia" and he had a right to "free speech" and could say whatever he wanted; and

VI. SFU had breached his privacy, and if Luxury terminated his employment it would strengthen his case against SFU.

e) Following the April 12 interview, Luxury determined that the petitioner should be terminated.

f) April 19, 2024, the petitioner wrote to the OIPC, copying SFU, making a complaint that SFU, as a public body, had failed to ensure the accuracy and completeness of his personal information contrary to s. 28 of *FIPPA.*

g) April 19, 2024, OIPC responded to the petitioner advising him that he was required to allow SFU to respond to the complaint before the complaint was submitted to the OIPC.

h) April 26, 2024, Luxury met with the petitioner and presented him a termination letter. Luxury stated in the letter:

> We met with you on April 12, 2024, to hear your version of what occurred. You admitted that you had stopped the shuttle in front of the Flagger, opened the door of the shuttle, and told the Flagger something to the effect that she was incredibly attractive and should be a model. You told us that you have the right to free speech.
>
> What is of great concern to us is that you do not believe that there was anything remotely wrong regarding your comments to the Flagger. You continue to hold that view. You do not seem to understand or care that your comments had a negative impact on the Flagger to the point that she made the Complaint to the University.
>
> Not only do you not believe you have done anything wrong, but you are convinced that the University somehow breached the Freedom of Information and Protection of Privacy Act by informing us of the Complaint. You have told us that you are filing a complaint against the University, our client. Contrary to what

> you have stated following our meeting, there is no information that the University provided to us that is inaccurate or incomplete.
>
> Please understand that in our view, the University had an obligation to share the Complaint with us given our contractual obligations and their obligation to address complaints about harassment.
>
> After speaking with you, we have concluded that your conduct was a clear and serious breach of our contractual obligation to provide professional services to the University. In our view the University took appropriate measures by informing us about the Complaint so that we could take remedial action.

i) May 21, 2024, SFU's Coordinator of Information and Privacy wrote to the petitioner in response to his Access to Information Request, advising SFU was disclosing 45 pages of records, albeit subject to some redactions contemplated under *FIPPA*. The petitioner was provided with an electronic invitation and password to access the records. The petitioner attests by affidavit in this proceeding that the site to which the password linked him was "empty" and in argument he states that "it turned out to be darkened sheets of paper."

j) May 22, 2024, the petitioner filed a complaint with the OIPC that had two parts, for which separate files were opened at the OIPC:

   i. The first requested a review of SFU's response to the petitioner's Access to Information Request, including the redactions made by SFU in its response. I will refer to this as the "Access Review."

   ii. The second aspect of the complaint was that the information reported by SFU to Luxury was inaccurate and "SFU made no effort to ensure the information was accurate or complete as required under s. 28 of FIPPA." I will refer to this as the "Accuracy Complaint."

k) The petitioner filed the within petition for judicial review about two months later, July 24, 2024. At that time, the OIPC had collected initial information with respect to the Access Review and the Accuracy Complaint, but had not yet commenced its investigation.

[7] The OIPC has now completed its investigation of the Accuracy Complaint. The Investigator's decision was issued December 5, 2024. The petitioner requested reconsideration of this decision from the OIPC. This reconsideration application was declined by the OIPC Director of Investigations in April 2025. This completed and exhausted the statutory authority and processes of the OIPC with respect to the Accuracy Complaint. Accordingly, the December 5, 2024 OIPC determination of the Accuracy Complaint (the "Decision") is now properly before this Court for judicial review.

[8] The OIPC process is not, however, complete with respect to the Access Review. The complaint was mediated by the OIPC appointed investigator, with a non-binding opinion issued November 22, 2024. This did not resolve the matter. The investigator then sought the parties' submissions on whether the matter should proceed to inquiry under *FIPPA*. Having considered those submissions, the investigator has directed that the Access Review proceed to inquiry under Part 5 of *FIPPA* (the Inquiry). That Inquiry had not occurred by the time this matter came before this Court.

Relief Sought on Judicial Review

[9] The petitioner seeks several forms of relief on judicial review. The petitioner advised at the hearing of this matter that he had revised the relief sought from the Amended Petition, and the relief he now seeks is, as set out in his written submissions:

a) Find SFU breached ss. 22, 27 and 28 of the, *FIPPA* by reporting false information to the petitioner's Employer.

b) Find Contract Investigator Patrick Egan engaged in bad faith and misfeasance by, among other things, deliberately altering the language in s. 28 of *FIPPA* in a biased effort to protect respondent SFU.

c) Find SFU is required to release the entire unredacted contents of the record before the decision-maker, including the name of the Flagger, the Flagger's employer, and exactly what the Flagger reported to SFU.

d) Find Robert Moseley dba Luxury Transport used information from the public body it knew was false to make decisions that caused deliberate and serious harm to the Petitioner including making slanderous and defamatory information to the federal government agency, Service Canada.

[10] The petitioner also seeks an order for costs and special costs, and any other orders the Court deems just.

[11] By consent of the parties, the hearing proceeded on the basis of the orders sought in the petitioner's written submission.

[12] For reasons I will explain, I am of the view that the singular matter that is properly before this Court on judicial review at this time is the OIPC Investigator's December 5, 2024 Decision about the Accuracy Complaint. This generally corresponds to the first order the petitioner seeks, although not entirely, as I will explain.

Preliminary Matters

Sealing orders granted

[13] A preliminary issue arises in respect of certain records that were before the OIPC in its investigation of the Access Review. SFU seeks a sealing order over certain portions of those records that comprise:

1. Personal identifying information of the complainant, her employer and witnesses to the incident, none of whom are parties.

2. Information over which SFU claims legal privilege, based on litigation privilege and solicitor/client privilege.

[14] OIPC supports the requested sealing order sought by SFU and has prepared the tribunal's record in such a way as to accommodate the sealing order sought. Affidavit #3 of Kim Woytowich contains the whole of the record before the OIPC Investigator with redactions of those items sought to be sealed. It has been served to the petitioner but not yet filed subject to changes that may arise from the Court's order with respect to sealing portions of the record. Affidavit #4 of Kim Woytowich has been provided to the Court but not to the petitioner. It contains the unredacted text that was before the Investigator but is sought to be sealed in this Court. SFU and OIPC ask that the filing of this affidavit be subject to the requested sealing order which would restrict access to those documents to only Simon Fraser University, Rummana Khan Hemani, Martin Pochurko, Information and Privacy Commissioner of British Columbia and Robert Moseley dba Luxury Transport Inc, who are all the named parties except the petitioner.

[15] Except for one item that is the subject of asserted legal privilege, the totality of the items sought to be sealed are text containing information that contain personal identifying information about the complainant, her employer and witnesses. SFU's determination that this personal information should not be disclosed was made first in SFU's response to the petitioner's Access to Information Request, which forms part of the record in this proceeding (Exhibit 67 of the Affidavit of Kim Woytowich), and again when SFU filed in this proceeding the materials that were before the Investigator and part of the record in the Accuracy Complaint (Exhibits 34, 35, 39 and 43 of the Affidavit of Kim Woytowich).

[16] Material filed in court is presumptively accessible to the public. To have this presumptive access restricted, an applicant must establish three criteria: court openness poses a serious risk to an important public interest; the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and, as a matter of proportionality, the benefits of the order outweigh its negative effects: *Sherman Estate v. Donovan*, 2021 SCC 25.

[17] SFU says there are two categories of information it seeks to seal, one is pursuant to SFU's discretionary determination under the *Act,* whereas the second category of information permits no discretion to SFU—its obligation not to disclose this information is mandatory under the s. 22 of the *Act*. SFU argues that not sealing information that is protected from disclosure under the *Act* under either provision would defeat the purpose of the *Act*. The OIPC argues that maintaining the purpose and integrity of the *Act* is an important public interest that ought to be protected by the sealing order sought.

[18] I agree. In my view this principle was well articulated by Justice G. Weatherill in *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2062 at para. 12:

> The central purpose of *FIPPA* would be defeated if confidential documents of a public body were disclosed when they should not be. An unsuccessful requesting party under *FIPPA* would be able to obtain the documents merely by commencing a proceeding for judicial review. To allow a party seeking disclosure of confidential documents access before the question of the party's entitlement to disclosure is decided may well pre-empt and frustrate the entire process and render the court's substantive ruling on the issue moot.

[19] As I explain below, the judicial review of the Access Review of SFU's response to the petitioner's Access to Information Request, including the redactions, is not properly before the Court, as it is premature. SFU argues that the purpose of *FIPPA* would be defeated if the sealing order were not issued absent a substantive finding the redactions were inconsistent with *FIPPA*.

[20] OIPC takes no position before this Court as to whether the redactions made are consistent with *FIPPA*; that is the very question to be determined in the upcoming Inquiry by the OIPC. OIPC's support for the sealing order rests on the importance of maintaining the integrity of the scheme established under *FIPPA*. OIPC argues the requested sealing order supports this in two ways.

[21] First, the OIPC has a role in furthering the purpose articulated in the legislation of "making public bodies more accountable to the public and protecting personal privacy." In fulfilling this role, the OIPC has an interest in ensuing voluntary

compliance with *FIPPA* by public bodies. OIPC argues that protecting the ability of public bodies to communicate openly with investigators, including by providing confidential information as part of OIPC process, is important to this voluntary compliance. OIPC says it must be able to protect disclosure of information received in confidence as part of its process. OIPC says disclosure of the impugned information would cause a serious risk to the important interest of the OIPC's ability to fulfill its statutory mandate.

[22] Second, the question whether SFU is authorized to withhold the information it has redacted and over which the sealing order is sought is a matter that will be determined by the OIPC in its Inquiry into the petitioner's requested Access Review of SFU's response to the Access to Information Request. If the redacted information were made public through this petition proceeding, it would defeat the purpose of the Inquiry that the OIPC will conduct.

[23] This application for a sealing order is structurally similar to that considered in *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 48. In that case our Court of Appeal recognized that "it would imperil the process before the OIPC if non-redacted documents submitted confidentially to it were later made public by the courts. In addition, at least some of the confidential information is subject to solicitor and client privilege, and its disclosure would defeat the privilege" (para. 8). In my view this applies equally in this case.

[24] The sealing order sought is proportionate, as it seeks to seal only the limited identifying information described, as well as the single instance of text over which legal privilege is claimed. No order sealing of the courtroom nor allowing for the filing of sealed arguments was sought. The negative impacts upon the important principle of court openness have been reduced to their essential minimum in SFU's application for the sealing order, and these impacts are outweighed by protecting against the harms to the important public interest of not defeating the integrity of the OIPC process.

[25] I am not persuaded the associated confidentiality order SFU seeks is necessary in this case. As I explain below, the redacted information is not being considered by this Court on judicial review, as I have determined the petitioner's request for judicial review of SFU's response to his Access to Information Request is to be dismissed on the basis of prematurity. In these circumstances the sealing order sought is sufficient. Furthermore, access to the sealed portion of the record shall be restricted to SFU and the OIPC, as I dismiss the relief sought against Rummana Khan Hemani, Martin Pochurko, Patrick Egan and Robert Moseley dba Luxury Transport Inc.

[26] Accordingly, I grant the sealing order over Affidavit #4 of Kim Woytowich as sought by SFU. Access to the sealed affidavit will be restricted to the respondents SFU and OIPC.

Dismissal of judicial review of Access Review as premature

[27] The petitioner's Access Review of SFU's response to the petitioner's Access to Information Request is still subject to the OIPC process. Indeed, it has been determined within that process to warrant an Inquiry under Part 5 of *FIPPA*, a level of review not all complaints receive.

[28] The OIPC submits the Court should decline to grant the relief the petitioner seeks with respect to the Access Review because the petitioner has an adequate alternative remedy in the Inquiry before the OIPC. OIPC says that until the OIPC determines or resolves the petitioner's Access Review, the relief the petitioner seeks before this Court on that matter is premature.

[29] In argument in support of dismissing this aspect of the petitioner's relief for prematurity, OIPC stated at the hearing of this matter that the petitioner may seek judicial review of the result of the Inquiry when that determination is made.

[30] It is a fundamental rule in Canadian administrative law that parties can proceed to the court system only after all adequate remedial recourses in the administrative process have been exhausted. This prevents fragmentation of the

administrative process, and ensures the Court has the benefit of all the administrative decision-maker's findings: *C.B. Powell Limited v. Canada (Border Services Agency)*, 2010 FCA 61, paras. 30-33:

> [31] Administrative law judgments and textbooks describe this rule in many ways: the doctrine of exhaustion, the doctrine of adequate alternative remedies, the doctrine against fragmentation or bifurcation of administrative proceedings, the rule against interlocutory judicial reviews and the objection against premature judicial reviews. All of these express the same concept: absent exceptional circumstances, parties cannot proceed to the court system until the administrative process has run its course. This means that, absent exceptional circumstances, those who are dissatisfied with some matter arising in the ongoing administrative process must pursue all effective remedies that are available within that process; only when the administrative process has finished or when the administrative process affords no effective remedy can they proceed to court. Put another way, absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted.

[31] This Court has previously held that a judicial review discloses no reasonable claim and should be dismissed pursuant to Rule 9-5(1)(a) of the *Supreme Court Civil Rules* where the petitioner has an adequate alternative remedy before an administrative tribunal that it has not seen through to completion: *Prokam Enterprises Ltd. v British Columbia Farm Industry Review Board*, 2020 BCSC 2138, paras. 66-94, 124(1). And as Cromwell J. stated in *Strickland v. Canada (Attorney General),* 2015 SCC 37 at para. 40: "One of the discretionary grounds for refusing to undertake judicial review is that there is an adequate alternative."

[32] I am satisfied that adequate alternative measures to judicial review of this ground for relief are available through the OIPC Inquiry process, which is pending.

[33] Furthermore, it became apparent at the hearing before this Court that when the petitioner filed his Access Review with the OIPC, he was under the misapprehension that SFU had provided him no records at all, rather than the records with the limited redactions that are before the Court. This error appears to have arisen from a temporary technical issue and subsequent misunderstanding arising from SFU's correspondence in responding to the petitioner's Access to Information Request. There is no need to find fault for this misunderstanding. The

important point is that the OIPC Inquiry will be conducted on the basis of the disclosed record with redactions. This is a further reason to allow the OIPC Inquiry to proceed on the appropriate record without fragmentation caused by premature judicial review.

[34] I would accordingly dismiss the relief sought with respect to the Access Review, set out at para. 127(c) of the Petitioner's argument, on the basis of prematurity.

Dismissal of claims against Respondents Hemani and Pochurko

[35] Dismissal of the relief sought at para. 127(c) against SFU inherently dismisses the relief sought relating to the named individual respondents Rummana Khan Hemani and Martin Pochurko. However, I would also dismiss the relief sought against these individuals for the additional reason that they should not have been named respondents to the petition. The naming of these respondents may have arisen based upon misunderstanding by the petitioner, which was perhaps contributed to by SFU's correspondence to him. In SFU's May 21, 2024 letter to the petitioner responding to his April 4, 2024 Access to Information Request, SFU's University Archivist and Coordinator of Information and Privacy explained the basis for redactions in the 45 page record that was being provided to the petitioner. This letter includes the statement: "The University officials responsible for this access decision are Rummana Khan Hemani, Vice-Provost and Associate Vice-President, Students and International and Martin Pochurko, VP Finance and Administration."

[36] In seeking judicial review of the scope of the University's response to his Access to Information Request, the petitioner named these two individuals. I have already ruled that this ground for judicial review should be dismissed for prematurity. But in any event, it should be dismissed against the respondents Hemani and Pochurko as not proper respondents. SFU is the properly named respondent, as the public body subject to the obligations under *FIPPA* with respect to which the petitioner seeks review.

Dismissal of orders sought against Luxury

[37] I would also dismiss the orders sought against Luxury. The relief sought by the petitioner against Luxury has changed between the Amended Petition and the hearing of this matter, but in neither case is the relief sought against Luxury available to the Petitioner by way of Petition under the *Judicial Review Procedure Act.* Luxury is not a public body subject to the prerogative writs, nor did it exercise any "statutory power of decision": s. 2(2) *JRPA.*

[38] As the Supreme Court of Canada explained in *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26:

> [13] The purpose of judicial review is to ensure the legality of state decision making ... Judicial review is a public law concept that allows s. 96 courts to "engage in surveillance of lower tribunals" in order to ensure that these tribunals respect the rule of law…The state's decisions can be reviewed on the basis of procedural fairness or on their substance. The parties in this appeal appropriately conceded that judicial review primarily concerns the relationship between the administrative state and the courts. Private parties cannot seek judicial review to solve disputes that may arise between them; rather, their claims must be founded on a valid cause of action, for example, contract, tort or restitution. [emphasis added]

[39] Based upon the Amended Petition, and the arguments advanced by the petitioner at the hearing of this matter, the gravamen of the petitioner's complaints about Luxury's actions appears to sound in the tort of defamation, and possibly wrongful dismissal or breach of contract. None of these are properly advanced by petition for judicial review.

[40] I would accordingly dismiss the relief sought in the petition (including as it was reframed in written closing argument at the hearing) against Luxury.

[41] I have considered Luxury's request that special costs should be awarded against the petitioner in the dismissal of the relief sought against Luxury. The evidence before the Court demonstrates that counsel for Luxury sought on several occasions to explain to the petitioner that judicial review was not the appropriate means for the petitioner to advance his claims against Luxury, and encouraged him to get legal advice on the matter. It further appears on the evidence that the

petitioner intends to file a civil claim against Luxury in the future. However, the petitioner has persisted in seeking the relief sought in this petition against Luxury.

[42] This Court's decision in *Skyllar v. The University of British Columbia*, 2022 BCSC 439 provides a helpful review of the circumstances in which special costs have been awarded. These include: where a party has displayed "reckless indifference" by not recognizing early on that its claim was manifestly deficient; where a party made the resolution of an issue far more difficult than it should have been; where a party presents a case so weak that it is bound to fail, and continues to pursue its meritless claim after it is drawn to its attention that the claim is without merit.

[43] In my view in this case the petitioner did display reckless indifference to the deficiency in his petition for judicial review against Luxury, despite repeated efforts by Luxury's counsel to inform him of it. I am persuaded that these are circumstances that warrant an award of special costs against the petitioner in favour of Luxury.

Dismissal of Order sought against Investigator Egan

[44] I would also dismiss the relief sought against Mr. Egan individually. Mr. Egan was appointed as Investigator by the Commissioner to carry out as delegate the Commissioner's authority under ss. 42 and 56 of *FIPPA* to investigate and resolve complaints and review public body responses to access requests.

[45] As the person who is authorized to exercise the statutory power at issue, it is the Commissioner, and not his delegate, who is properly served and named as respondent to the Petition: s. 15 *JRPA*.

[46] In *Surrey (City) v. British Columbia (Oil and Gas Commission)*, 2013 BCSC 1864 (para 118), Justice Truscott found it was an abuse of process for individual decision-makers to be included in a petition without their consent.

[47] Claims against the Commissioner or their delegate as individuals are barred by statute. Section 48 of *FIPPA* provides:

> No proceedings lie against the commissioner, or against a person acting on behalf of or under the direction of the commissioner, for anything done, reported or said in good faith in the exercise or performance or the intended exercise or performance of a duty, power or function under this Part or Part 5.

[48] This provision of *FIPPA* was considered by Justice Macaulay in *Varzeliotis v. The Queen et al.*, 2007 BCSC 620, paras. 46-47:

> [47] In *Speckling v. Kearney,* 2006 BCSC 506, at para. 15, McEwan J. considered the bad faith exception in relation to a similar provision, s. 56 of the Administrative Tribunals Act, S.B.C. 2004, c. 45:
>
> > I am satisfied, having reviewed the statement of claim in its entirely [sic] that, in any event, the discontinued claims brought against the Labour Relations Board and the named adjudicators are simply collateral attacks on the manner in which they carried out their quasi-judicial functions. The complaint against Sharon Kearney is that she "deliberately did not use [her] knowledge", a complaint which, if true, could be addressed on judicial review. The complaint against Michael Fleming is that he "failed to address" or "deliberately failed to adjudicate" a number of matters. These could also be addressed on judicial review. <u>There is nothing pleaded in the statement of claim that would take what the named defendants did out of the realm of their responsibilities under the *Code*. It is not enough to simply characterize the exercise of a quasi-judicial function in terms approximating bad faith to strip an adjudicator of the immunity afforded to such decision makers</u>. (Sources omitted.) [Emphasis added.]

[49] These comments are pertinent here. In this case the petitioner's claim against Mr. Egan is a collateral attack on the manner in which the OIPC carried out its statutory function. Neither the pleadings nor the record in this case takes Mr. Egan outside the realm of his responsibilities as delegate under *FIPPA.* In argument, the petitioner explained that his claim that Mr. Egan "engaged in bad faith and misfeasance by, among other things, deliberately altering the language in s. 28 of FIPPA in a biased effort to protect respondent SFU" relates to the Investigator's determination that "the worker's version of what you said is <u>consistent and substantially similar</u> to what you told SFU." The petitioner argues that "consistent and substantially similar" is not what is required by s. 28, but rather the investigator

was required to determine whether "the personal information is accurate and complete."

[50] This is a question of statutory interpretation, which I will address on judicial review of the exercise of the Commissioner's statutory power of decision. It is not the basis for a claim of bad faith against the Commissioner's delegate.

[51] Accordingly, I dismiss the relief sought against Mr. Egan personally.

Judicial Review of Privacy Complaint

[52] The remaining matter that is properly before this Court for judicial review is the petitioner's request for review of the Commission's December 5, 2024 Decision determining that the petitioner's complaint that SFU had contravened s. 28 of *FIPPA* was not substantiated.

[53] Section 28 requires:

> 28 If
>
> (a)an individual's personal information is in the custody or under the control of a public body, and
>
> (b)the personal information will be used by or on behalf of the public body to make a decision that directly affects the individual,
>
> the public body must make every reasonable effort to ensure that the personal information is accurate and complete.

[54] SFU did not dispute before the OIPC that it had collected the petitioner's personal information in relation to the incident. The Investigator found that the petitioner's personal information was in SFU's custody and control. SFU did not dispute that it used the petitioner's personal information, and the Investigator found that they did so. In particular the Investigator found that SFU made a decision to request to Luxury that the petitioner be replaced on the route transporting SFU students, and that this was a decision that directly affected the petitioner.

[55] The question before the Investigator was whether SFU made every reasonable effort to ensure the petitioner's personal information was accurate and

complete before it decided to request that the petitioner no longer be permitted by Luxury to drive on SFU campus.

[56] The Commission's conclusion was stated at page 7 of the Decision letter, where the Investigator wrote:

> Conclusion
>
> As noted above, SFU took several steps to accurately determine what happened and what was said.
>
> Based on my analysis of the interpretation of s. 28, and on the information provided by you and SFU, I find that SFU made every reasonable effort to ensure the information it collected was accurate and complete before it was used to make the decision to request that your employer remove you from SFU routes.
>
> Therefore, I am unable to substantiate your complaint that SFU contravened s. 28 of FIPPA in this matter.

[57] The steps the Investigator cited had been taken by SFU, and which the Investigator appears to have accepted are:

> • SFU's security staff were called to, and attended, the scene of the incident and spoke to the worker approximately 30 minutes after the incident occurred. The information was current and not outdated.
>
> • SFU's security staff took statements directly from the worker. The information was not supplied anonymously or through a third party.
>
> • SFU's security made notes describing what the worker heard you say. According to the worker, you said:
>
> > The driver opened the door and said that she was beautiful and should have her picture taken.
>
> • SFU's security staff also made notes describing what witnesses were told by the worker about what you said. Those notes were provided to you in redacted form.
>
> • SFU staff prepared a report on the day of the incident of what occurred and what was said according to the worker and witnesses.
>
> • SFU did not investigate the incident further as it did not engage any of its harassment or sexual misconduct policies. For such policies to be engaged, one of the parties in the incident would need to be a SFU student or employee.
>
> • SFU used the information for a purpose directly related to the complaint. It was not used for a secondary purpose.
>
> • SFU did not have the contractual right to request that your employment be terminated or suspended and did not make that request.

> • SFU states that the worker's statement was collected accurately and there was no discrepancy between the behaviour reported by the worker to SFU's Campus Public Safety's staff and what you claim to have said to the worker.

[58] The Investigator also stated in the Decision letter:

> Based on SFU's submission and my review of the records I find that the worker's version of what you said is consistent and substantially similar to what you told SFU.

[59] The Investigator noted that on April 4, 2024, when the petitioner made his request to SFU for records relating to the incident, he confirmed the comments he made did not differ from what was reported to SFU. The petitioner wrote by email to SFU:

> I had stopped my bus, and opened the door to tell her she was, quote '"unbelievably beautiful"'. I then said, quote, "she should get some professional photos made". (she looks like Kate Moss).

Standard of Review

[60] SFU submits that, in accordance with the Supreme Court of Canada's decision in *Vavilov*, the appropriate standard of review to be applied in this case is reasonableness. The OIPC supports this position. The petitioner argues that allowing SFU to comply with anything less than a standard of correctness when it comes to matters of personal information would be dangerous to thousands of vulnerable students.

[61] In *Vavilov*, the Court confirmed that respect for the will of the legislature gives rise to a presumption that the substance of administrative decisions are reviewed on the reasonableness standard of review. The presumption is rebutted only where the legislature has prescribed a different standard of review, or for certain categories of questions where a correctness standard is required to further the rule of law, namely constitutional questions, questions regarding the jurisdictional lines between competing specialized tribunals, or questions of central importance to the legal system as a whole: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para. 16-17, 69.

[62] I agree that the reasonableness standard applies to review of the Investigator's interpretation and application of s. 28 of *FIPPA.* The legislature has not prescribed a different standard of review for decisions by the OIPC, and the petitioner does not raise a category of question to which a correctness standard applies.

[63] When applying the reasonableness standard, courts are required to take a "reasons first" approach, that focuses on the administrative decision maker's justification of the decision in light of any relevant legal and factual constraints. Courts must begin the inquiry into the reasonableness of a decision by examining the reasons provided with respectful attention and seeking to understand the reasoning process followed by the decision maker to arrive at their conclusion. Where a decision is based on an internally coherent and rational chain of analysis, and is justified in relation to the facts and law that constrain the decision maker, a court must defer to the decision: *Vavilov*, paras. 84-85, 91, 94.

[64] I agree with the respondent SFU's submission that the Investigator's Decision with respect to the Accuracy Complaint was reasonable. The Decision fairly reviewed the materials and arguments submitted by all parties, demonstrated a transparent and rational chain of analysis, and the conclusion was justified in relation to the facts before and law to be applied by the decision maker.

[65] In particular, the Investigator was not only persuaded that SFU took every reasonable step to confirm the accuracy of the information it received before it decided to act upon it, but found the accuracy of the relevant information was confirmed by the petitioner himself to SFU. As the Investigator set out in his Decision:

> - SFU's security made notes describing what the worker heard you say. According to the worker, you said:
>
>> The driver opened the door and said that she was beautiful and should have her picture taken.

And:

> - On April 4, 2024, you made a request to SFU for records related to the incident and described what you said to the worker. In explaining the incident, you stated:
>
>> I had stopped my bus, and opened the door to tell her she was, quote, 'unbelievably beautiful'. I then said, quote, 'she should get some professional photos made'. (she looks like Kate Moss).

[66] The Investigator concluded:

> Based on SFU's submission and my review of the records I find that the worker's version of what you said is consistent and substantially similar to what you told SFU.

[67] The petitioner argues that the Investigator should not have taken the April 4 information into account because it arose after SFU collected and conveyed the information about the petitioner to Luxury on April 2, by which time, the petitioner says, SFU had already breached s. 28.

[68] However, the Supreme Court of Canada explained in *Vavilov*: "a reasonable decision is one that is justified in light of the facts…The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them" (para 126).

[69] In this case, the events that followed April 2, 2024, formed part of the evidentiary record. There was no argument before the Investigator that he should not take the evidence into account. Furthermore, it was a relevant part of the general factual matrix that the information collected by SFU was shortly thereafter confirmed by the petitioner himself to be substantially correct. There was no discrepancy between what the petitioner said he had said to the worker, and what the worker told SFU the petitioner had said to her. This was the personal information about the petitioner that the petitioner was concerned with, and which the Investigator was considering. It was appropriate for the Investigator to consider this in coming to his Decision.

[70] Furthermore, SFU's confirmation to Luxury that it did not want the petitioner driving the SFU routes anymore was made April 5, after the petitioner confirmed to SFU what he had said to the worker.

[71] I find that the Investigator's Decision that the steps SFU took, along with the fact that the personal information upon which SFU decided to act was essentially correct, satisfied SFU's obligations under s. 28 of *FIPPA* is rational, intelligible and justified by the Investigator's reasons. I am satisfied that the OIPC decision with respect to s. 28 of *FIPPA* is reasonable. I would dismiss the petition for judicial review on this basis. As I explain in the next section, I decline to go further to assess whether SFU breached ss. 22 and 27 of *FIPPA*.

Requested review of ss. 22 and 27

[72] The OIPC investigation into the Accuracy Complaint was solely into whether SFU breached s. 28 of *FIPPA*. This is evident in the OIPC reasons. Furthermore, that the investigation should proceed under s. 28 was expressly confirmed between the OIPC and the petitioner before the OIPC undertook its investigation. The petitioner confirmed in writing he wished to advance his complaint under s. 28 of *FIPPA*.

[73] However, now on judicial review, the petitioner seeks orders that SFU contravened ss. 22, 27 in addition to s. 28 of the *Act*. The respondents SFU and OIPC say the petitioner is advancing new grounds for review that were not considered by the Commission and ought not be considered for the first time on judicial review. By contrast, the petitioner argues that consideration of SFU's obligations under s. 28 inherently requires application of ss. 22 and 27, and that accordingly this Court's review should include consideration of those provisions. The provisions upon which the petitioner relies state:

> 22 (1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2)In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal

> privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> …
>
> (e)the third party will be exposed unfairly to financial or other harm,
>
> (f)the personal information has been supplied in confidence,
>
> (g)the personal information is likely to be inaccurate or unreliable,
>
> (h)the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant,
>
> …
>
> 27 (1)A public body must collect personal information directly from the individual the information is about unless
>
> (a)another method of collection is authorized by
>
> (i)that individual,
>
> (ii)the commissioner under section 42 (1) (i), or
>
> (iii)another enactment,

[74] Based upon these sections, the petitioner argues that what the flagger said about him was not his personal information because it was not collected directly from him, and it should not have been disclosed to the petitioner's employer. He then goes on to argue that, as set out in his written argument:

> When SFU failed to collect information directly from the petitioner. [*sic*] SFU should have seen that FIPPA 28 required SFU to make "every reasonable effort," to ensure any information they intended to share was "accurate and complete."

[75] The respondents argue that the petitioner raises for the first time arguments that SFU failed to collect personal information directly from him, contrary to s. 27 of *FIPPA*. The OIPC takes no position on whether SFU acted contrary to s. 27 of *FIPPA*, but objects to the Court determining that issue for the first time on judicial review when it could have been, but was not, raised before the OIPC.

[76] I agree with the respondents that this Court should not consider the petitioner's new s. 27 argument, nor any new argument he seeks to advance pursuant to s. 22. The petitioner's argument under s. 22 is not clear, as the petitioner's employer was not "an applicant" for information. In any event, the

argument is new, and, like the argument under s. 27, should not be considered for the first time on judicial review.

[77] As the Supreme Court of Canada explained in *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, the Court should generally not exercise its discretion to hear an argument raised for the first time on judicial review where the issue could have been, but was not, raised before the tribunal. The rationales underlying this general rule include respect for the Legislature's choice of the tribunal as the first instance decision maker, as opposed to the court; respect for the tribunal's expertise, and the loss of the benefit of this expertise when matters are not raised at the first instance; and, prejudice to the opposing party.

[78] In this case all three of these rationales are engaged. OIPC argues that s. 27 is a complex section of *FIPPA* that affords several exceptions. The application of this section should not be considered by the court on judicial review without the Commission having had the opportunity to consider and determine the question based on a full record. It is the Commissioner who is designated by the legislature as "generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved" (*FIPPA* para 42). SFU argues that it has not had the opportunity to put evidence forward below relating to exceptions arising under s. 27, and would be prejudiced now by review of its conduct under that section without a full record.

[79] I decline to exercise my discretion to consider these new grounds on judicial review. SFU was given no notice of this complaint nor opportunity to respond to it or to put evidence before the Investigator, including to seek to establish that an exception applied. Nor do I have the benefit of the Commissioner's determination on that point, as it was not raised below.

Conclusion

[80] The petition is dismissed.

[81] The sealing order over Affidavit #4 of Kim Woytowich sought by SFU is granted. Access to the sealed affidavit will be restricted to the respondents SFU and OIPC.

[82] Costs are awarded against the petitioner on the regular scale, except that the petitioner is ordered to pay special costs to Luxury.

"Giltrow J."