IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *British Columbia (Public Safety and Solicitor General) v. Stelmack,* 2011 BCSC 1244

Date: 20110919
Docket: S085647
Registry: Vancouver

In the matter of the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, and in the matter of the decision of Catherine Boies Parker in her capacity as a delegate of the Information and Privacy Commissioner of British Columbia, dated June 27, 2008 (Order F08-13) made under the *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165

Between:

The Ministry of Public Safety and Solicitor General

Petitioner

And

Traysea Stelmack, Information and Privacy Commissioner of British Columbia, the Vancouver Police Department, John or Jane Doe #1 (a staff member of Vancouver Jail), Jane Doe #2 (a correctional officer) and Jane Doe #3 (a correctional officer)

Respondents

Docket: S092479

Between:

Mala Brown

Petitioner

And

The Information and Privacy Commissioner of British Columbia, Traysea Stelmack, the Ministry of Public Safety and Solicitor General, the Vancouver Police Department, John or Jane Doe #1 (a staff member of Vancouver Jail) and Bonnie Smith

Respondents

Before: The Honourable Madam Justice Russell

On judicial review from Re: Ministry of Public Safety and Solicitor General, [2008] B.C.I.P.C.D. No. 21, Order F08-13, June 27, 2008

On judicial review from Re: Ministry of Public Safety and Solicitor General, [2010], B.C.I.P.C.D. No. 16, Decision F10-04 (Additional to Order F08-13), March 16, 2010

Corrected Judgment: The text of the judgment was corrected on October 21, 2011 to add the names of co-counsel for the Petitioners on Page 2

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. January 4-7, 2011 April 26-28, 2011
Place and Date of Judgment:	Vancouver, B.C. September 19, 2011

Introduction

[1] This decision concerns two applications for judicial review of decisions of the Information and Privacy Commissioner of British Columbia (the "Commissioner") respecting video footage taken of the respondent Traysea Stelmack ("Stelmack") while she was in police custody.

[2] The petitioner in matter number S085647 is the Ministry of Public Safety and Solicitor General (the "Ministry"). At the relevant time, the Ministry's Corrections Branch co-administered the Vancouver City Jail (the "VCJ") with the Vancouver Police Department (the "VPD").

[3] The petitioner in matter S092479 is Mala Brown ("Brown"), a corrections officer who was on duty at the VCJ at the relevant time and who appears in portions of the relevant footage.

[4] On March 28, 2006, Stelmack was taken into custody at the VCJ. She says that over the course of 13 hours, she was unlawfully detained, tortured and physically and psychologically assaulted. She says Brown was involved in this unlawful conduct.

[5] Stelmack made a request using the mechanism provided in the *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c. 165 ("FIPPA"). Stelmack requested the VCJ's "video footage from March [28], 2006 starting at approximately 00:30 until March 28, 2006 at 2:00 p.m."

[6] Matt Lang, then acting Warden of the VCJ ("Lang"), reviewed the footage and identified six DVRs of interest to Stelmack. The following parts of the VCJ are shown in the DVRs:

1. DVR 1: booking area;
2. DVR 2: pre-hold cell;
3. DVR 3: cell 119;

4. DVR 4: hallway outside the pre-hold area;

5. DVR 5: hallway outside the pre-hold area; and

6. DVR 6: nurses' station.

[7] The DVRs do not indicate the time when they were made and their numbering does not reflect the order in which they were recorded.

[8] In a letter dated June 27, 2006, the Acting Director of the Ministry's Privacy, Information & Records Management Division denied Stelmack's request pursuant to ss. 4, 15 and 22 of FIPPA, saying "[t]he fundamental role of the Vancouver Jail is the safe and secure custody of inmates. Disclosure of DVR images would serve to undermine the security of the jail."

[9] Following the Ministry's decision not to release the DVRs, Stelmack applied to the Commissioner for a review of the Ministry's decision.

[10] Stelmack has started a civil action against Brown and others and she can therefore avail herself of disclosure pursuant to Rule 7-1. She has nevertheless pursued a FIPPA request because she would like to disseminate copies of the videos to the media, and possibly others, which she cannot do with material acquired through discovery.

[11] In these Reasons, I must distinguish between the actions of the Commissioner's delegates. I will therefore refer to them by their positions, adjudicator and senior adjudicator. However, I acknowledge here that pursuant to s. 49(1) they exercise the Commissioner's delegated authority.

[12] At the time of Stelmack's initial request, Commissioner Loukidelis was in office. He had left office by January 29, 2010. The Commissioner is currently Elizabeth Denham. To minimize confusion, I will refer to the Commissioner in the feminine unless I am referring to a specific, male commissioner.

Statutory Provisions

[13] It is necessary to have read the relevant statutory provision to understand the arguments in this case. The parties principally rely on the following sections of FIPPA:

> **Information rights**
>
> 4 (1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.
>
> **(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.**

[14] Each of ss. 15, 19 and 22 fall within Division 2 referred to in s. 4(2). Therefore information which should be excepted from disclosure pursuant to any one of ss. 15, 19 or 22 must be severed before the record is disclosed.

> **Disclosure harmful to law enforcement**
>
> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> **(a) harm a law enforcement matter,**
>
> ...
>
> **(f) endanger the life or physical safety of a law enforcement officer or any other person,**
>
> ...
>
> **(l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.**
>
> ...
>
> **Disclosure harmful to individual or public safety**
>
> 19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
>
> (a) threaten anyone else's safety or mental or physical health, or
>
> (b) interfere with public safety.
>
> (2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be

expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

Disclosure harmful to personal privacy

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

> ...
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> ...
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> ...
>
> (g) the personal information is likely to be inaccurate or unreliable, and
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

> ...
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
>
> ...
>
> (d) the personal information relates to employment, occupational or educational history,
>
> ...

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

> ...
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,
>
> ...
>
> (h) the information is about expenses incurred by the third party while travelling at the expense of a public body....

> ...
>
> **Information must be disclosed if in the public interest**
>
> 25 (1) Whether or not a request for access is made, the head of a public body **must, without delay, disclose to the public**, to an affected group of people or to an applicant, information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

The Adjudicator's Order

[15] Following an inquiry held pursuant to s. 56 of FIPPA (the "Inquiry"), Adjudicator Catherine Boies Parker (the "Adjudicator"), released *Re: Ministry of Public Safety and Solicitor General*, [2008] B.C.I.P.C.D. No. 21, Order F08-13 on June 27, 2008 (the "Order").

[16] After reviewing the material before her, the Adjudicator summarized the issues as follows:

1. Is the public body required to refuse access to the records under s. 22(1) of FIPPA?

2. Is the public body authorized to refuse access to the records under ss. 15(1)(a), (f) or (l) of FIPPA?

3. Can the public body reasonably sever information from the records under s. 4(2) of FIPPA?

[17] The Adjudicator determined that the public body had the burden of proof with respect to s. 15(1) and the applicant had the burden to show that the disclosure of a third party's personal information is permitted under s. 22: Order at para. 5.

[18] In submissions before the Adjudicator, the Ministry withdrew its reliance on s. 15(1)(a) and the applicant asserted that disclosure is required in the public interest, pursuant to s. 25 of FIPPA: Order at paras. 6 - 7.

Scope of the Order

[19] The Adjudicator treated Stelmack's request as a request for DVRs 2 and 3 only. As I have said, six DVRs were initially identified as being responsive to Stelmack's FIPPA request, however in submissions before the Adjudicator, Stelmack limited her request to "footage of certain incidents" which she then described. The Adjudicator reviewed the DVRs and determined that only DVRs 2 and 3 showed footage related to the incidents of interest to Stelmack.

[20] The Adjudicator described the two DVRs at issue at paras. 16 to 18 of the Order:

> **DVR #2**
>
> [16] DVR #2 is approximately 3¼ hours long. It is a recording of the interior of a cell. The applicant enters the cell and remains there until the end of the recording, with the exception of a very brief time when she leaves with a guard and returns without her shoes. The other people shown in the DVR are a number of jail personnel, including three female persons who are presumably the Third Parties, and a male person, likely a Correctional Officer. There is also one other person who enters the cell for a period. This appears to be a female, who lies on the floor of the cell, and is later taken away by two female Correctional Officers. It is while this second individual is being taken out of the cell that the incident of primary concern to the applicant occurs.
>
> [17] The second individual is in the cell for approximately 27 minutes. For most of this period, her face is entirely hidden. Her face is clearly shown, however, when the two Correctional Officers enter the room and the incident involving the applicant occurs. This episode takes less than a minute.
>
> **DVR #3**
>
> [18] DVR #3 is approximately 2¼ hours long. It shows the interior of another cell. The applicant enters the cell and remains there until very near the end of the recording, when the door is opened and she walks out. After she leaves, the door is left open and it is possible to see other individuals moving about. It is not clear which of these are employees.

[21] The Adjudicator determined that the combined effect of ss. 4(1), 4(2), 5(2) and 9(2) was that Stelmack was entitled to a copy of the DVRs unless they were excepted from disclosure, protected information could not reasonably be severed or a copy could not reasonably be reproduced.

Section 25

[22] The Adjudicator determined that disclosure was not required, pursuant to s. 25, because the public interest did not mandate an "urgent and compelling need for public disclosure without delay".

Section 15(1)

[23] In assessing the arguments under s. 15(1), the Adjudicator cited certain Commissioner's decisions which review the harms based test in s. 15(1), the reasonable expectation of harm and the evidentiary requirements to meet the s. 15(1) test.

[24] The Adjudicator accepted that dissemination to Stelmack amounted to disclosure to the world and that the video surveillance system and VCJ security features constituted "property or system" for the purpose of s. 15(1)(l): Order at para. 43.

[25] She addressed the Ministry's concern that the footage on DVRs 2 and 3 would reveal some information about the cameras' limitations, including the existence of blind spots and the fact that the images are of poor quality. She accepted that this might compromise the effectiveness of such a system in some circumstances. However, she held that:

- the cells are small and the blind spots limited;
- the nature of the blind spots makes it likely that they are obvious to anyone who can see the cameras' position and angle; and
- there is no evidence the cameras are hidden or inaccessible, in fact evidence that inmates often try to disable cameras suggests that they are easily identified.

[26] The Adjudicator concluded, at paras. 45 and 46:

> [45] ...In the case of DVRs #2 and #3 then, there is nothing of significance about the cameras' limitations which will be disclosed by the footage which would not already be apparent to anyone in a position to take advantage of the blind spot. There is no clear and direct connection between the disclosure of the information in question and the alleged harm.
>
> [46] With respect to the poor quality of portions of the video, I do not accept that this is a serious limitation which would be likely to be exploited in a manner which would give rise to the concerns raised by the public body.

[27] She went on to find that it was "not likely" that the deputy warden's security concerns respecting the layout and security features of the VCJ applied to DVRs 2 and 3 because "these tapes do not show the movement of officers or personnel through various parts of the VCJ, and do not show the relationship of the various areas in the VCJ to each other": Order para. 47.

[28] The Ministry argued that the informational value of the footage was amplified when combined with other information. The Adjudicator considered this mosaic effect, finding that because the footage was of the interiors of two cells, any mosaic effect was "unlikely" and speculative: Order para. 48.

[29] The Adjudicator concluded that s. 15(1) does not authorize the Ministry to refuse to disclose DVRs 2 and 3.

Section 22

[30] The Adjudicator determined that the Ministry was required to withhold information relating to identifiable third parties who are not staff and noted that Stelmack had agreed that the faces of these people could be obscured.

[31] With respect to VCJ staff, the Adjudicator accepted the position taken by both Stelmack and the Ministry that release of staff members' images does not constitute an unreasonable invasion of their privacy.

[32] Stelmack was nevertheless content for all faces except Brown's to be blacked out. In her submissions to the Adjudicator she said:

> ...I am requesting all video footage of my time spent in [the holding cell] which is approximately from 00:03 AM-04:30 AM. The other guards face[s] can be

> blocked out, but I am requesting Mayla [*sic*] Brown's be shown in order to seek the justice I deserve through the courts....

[33] In her reply submissions, she said, at para. 10:

> ...I have stated I am content with the faces of any staff or inmates that may appear in parts of my requests to be either removed or in relation to staff, their faces can be blacked out, with the exception of Mayla [sic] Brown, who assaulted me.

[34] Brown supported a review process which permitted the Ministry to maintain control of the DVRs and said that:

> [r]elease of DVR evidence must be prohibited in all instances where an Officer may be at risk of being publicly identified either through image or likeness. Once released, there is no longer any reasonable expectation that a public body would be able to control the use of the images.

Section 4 - Severance

[35] The Ministry adduced evidence demonstrating the difficulty and cost associated with editing the footage. Stelmack submitted that the evidence was vague and misleading.

[36] The Adjudicator was not persuaded "that it will be impossible or prohibitively expensive to edit the DVR[s.]".

DVRs 1, 4, 5 and 6

[37] In dealing with these DVRs, the Adjudicator said the following at para. 15:

> [15] ...As noted, the Deputy Warden has stated that the applicant and the Deputy Warden viewed parts of DVRs #4 and #5 and the public body has indicated its willingness to allow the applicant to review the DVRs in their entirety. If any of the parties have reason to believe that any of the DVRs record other aspects of the incidents referred to by the applicant, they are to notify this office within 10 business days of the date of this decision.

Terms of the Order

[38] The Adjudicator made the following orders at para. 72:

1. The public body is to provide the applicant with a copy of DVR #3, edited to withhold the last portion of the tape which records the time after the applicant has left the room.
2. The public body is to provide the applicant with a copy of DVR #2, edited to remove information which would identify the other person held in custody in the same cell.
3. If the applicant wishes to view the remainder of the DVRs in issue in order to determine if they are relevant to the matters of interest to her, she is to make a request in writing to the public body, with a copy to this office, and the public body is to provide the applicant with access to viewing the DVRs within one week of receiving her request.
4. If the applicant determines that some or all of DVRs #1, #4, #5 and #6 are relevant to her request, she is to inform this office within one week of reviewing the DVRs, and any further request for disclosure will be dealt with on an expedited basis.
5. I require the Ministry of Public Safety and Solicitor General to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before August 12, 2008 and, concurrently, to copy the Registrar of this Office on its cover letter to the applicant, together with a copy of the records.

Judicial Reviews (2009)

[39] The Ministry and Brown both filed for judicial review of the Order and appeared before me on June 2 and 3 of 2009. For reasons I will explain below, I gave unreported oral reasons on June 3, 2009 in which I summarized the proceedings and granted a general adjournment (the “2009 Reasons”).

[40] The petitioners filed affidavits in support of the judicial review which contained a substantial amount of extra-record or fresh evidence, that is, evidence which was not before the Adjudicator. Stelmack and the Commissioner objected to this evidence.

[41] The suggestion arose that the Commissioner should have the opportunity to consider the extra-record material before the judicial review proceeded and the petitioners took the position that the judicial review should be adjourned to permit them to apply to the Commissioner to determine whether she had unspent jurisdiction to consider the extra-record evidence.

[42] The Ministry did not accept that the Adjudicator had unspent jurisdiction but was concerned that no remedy would be forthcoming on judicial review if this Court found that the Ministry had another remedy which it had not pursued.

[43] Brown argued in favour of the Senior Adjudicator reopening the Inquiry, saying that once the images were released, her privacy interest could not be restored.

[44] Stelmack objected to this course of action and argued that there had been substantial delay prejudicial to her interests. I considered that she was entitled to production of documents pursuant to then Rule 26 of the *Rules of Court* and that the delay only affected her ability to disseminate the videos; therefore there was minimal prejudice caused by the delay.

[45] I concluded that the correct course was to adjourn the matter generally. I ordered that the Ministry make its application to the Commissioner for review or rehearing by July 15, 2009 and that Brown do so by July 31, 2009.

Events Subsequent to Judicial Review (2009)

[46] Following my June 3 Reasons, there was a great deal of correspondence between the parties and the Commissioner.

[47] Much of that correspondence dealt with the schedule for submissions.

[48] In addition, in a July 14, 2009 letter, the Ministry inquired into whether the Commissioner had the jurisdiction to further consider the matter and stated its intention to make an application for rehearing and relief on errors it said “go to the heart” of, and taint, the Order.

[49] In a July 16, 2009 letter, counsel for Brown made a similar inquiry.

[50] In a letter dated July 19, 2009, Commissioner Loukidelis declined to express a view on whether he had jurisdiction to further consider the matter or to accept extra-record evidence and invited submissions on those issues.

[51] On January 29, 2010, Celia Francis, a Senior Adjudicator (the "Senior Adjudicator") wrote to the parties to inform them that the Commissioner had left the office and that she would be considering and deciding the matter without input from the former Commissioner or the Adjudicator.

[52] On page two of that letter, the Senior Adjudicator wrote:

> I also note that the Ministry elected not to respond to Ms Brown's application for reopening and that its own application asks for an affirmative decision to be made that the Commissioner is *functus officio*, without reference to the extra-record evidence or grounds in the pending judicial review. I anticipate that it is not going to be possible for me to analyze the implications of the *Chandler* case for Ms. Brown's application, the Ministry's application or the question Russell J. expressed as to whether the Commissioner has unspent jurisdiction, in a vacuum, from those materials. I therefore would like to give the Ministry an opportunity to respond to Ms Brown's application and to flesh out its own application with reference to the extra-record evidence or grounds in the pending judicial reviews, should it wish, by **February 15, 2010**. If the Ministry takes up this opportunity, Ms. Brown and Ms. Stelmack will be given a further right of reply.

[53] I adjourned the judicial review of June 2009 at the petitioners' request so they could determine whether the Commissioner had unspent jurisdiction. I would not have interpreted this as the Court putting a question to the Commissioner regarding her jurisdiction.

Issues on the Application to Reopen

[54] The parties' submissions on reopening address the following issues:

a) jurisdiction to reopen to hear extra-record evidence;

   i. Does the Commissioner have jurisdiction to reopen the Order?

   ii. What test should be used to determine whether extra-record evidence is admissible on reopening?

   iii. Was the extra-record evidence adduced by the Ministry and Brown admissible?

b) the harms test under s. 15(1);

   i. Did the Adjudicator err in applying the harms-based test under s. 15(1)?

c) application of ss. 19 and 22;

   i. Did the Adjudicator err in applying s. 22?

   ii. Did the Adjudicator err in failing to consider s. 19?

d) jurisdiction in respect of DVRs 1, 4, 5 and 6; and

   i. Did the Adjudicator improperly fail to exercise her jurisdiction in respect of DVRs 1, 4, 5 and 6?

   ii. Did the Adjudicator exceed her jurisdiction by ordering the Ministry to permit Stelmack to view unsevered copies of DVRs 1, 4, 5 and 6?

e) severance.

   i. Did the Adjudicator err in ordering the Ministry to sever DVRs which cannot reasonably be severed?

   ii. Did the Adjudicator err by failing to consider whether Brown's image should be severed?

[55] The Senior Adjudicator released *Re: Ministry of Public Safety and Solicitor General*, [2010] B.C.I.P.C.D. No. 16, Decision F10-04 (Additional to Order F08-13) (the "Review Decision") and listed the evidence before her at paras. 15-16:

> [15] I have before me the record of proceedings before the Adjudicator, the correspondence between the Requester, the Commissioner's staff and counsel for the Ministry in the six weeks that followed the issuance of Order F08-13 and the applications about reopening, which include the affidavits of extra-record evidence that the Ministry and the Correctional Officer filed in the judicial review proceedings. My review of the record of proceedings before the Adjudicator included viewing the six DVRs. I am also privy to the petitions, arguments and related filings in the judicial review proceedings.

> [16] I also have submissions from the parties following the assignment of this matter to me.

Parties' Positions on Jurisdiction and Extra-record Evidence

Ministry's Position

[56] In its original submissions dated August 6, 2009, the Ministry took the position that the Commissioner's jurisdiction was spent.

[57] In the alternative, the Ministry argued that if the Commissioner had any power to reconsider, it arose from "the flexibility in the application of the doctrine of *functus officio* with respect to administrative tribunals or decision makers" to "preserve the integrity" of the Order pursuant to *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, 62 D.L.R. (4th) 577.

[58] The Ministry said that any *Chandler* jurisdiction "would require [the Commissioner] to permit the parties to supplement the evidence and make further representations in order to enable the parties to address, frontally, the issues".

[59] These did not constitute submissions on the reconsideration. The Ministry said it would submit further evidence and make further submissions "[i]f, and only if" the Commissioner decided that it had unspent jurisdiction.

[60] The Ministry later took the opportunity to respond to Brown's application and address its own application with extra-record evidence. The Ministry re-iterated its position that the Commissioner, and hence the Senior Adjudicator, did not have unspent jurisdiction. However, should the Senior Adjudicator decide to reopen the matter, the Ministry sought a new hearing and an order that the DVRs be excepted from disclosure pursuant to ss. 4, 15 and 22 and that no viewing of the DVRs be ordered.

[61] The Ministry submits that the following errors permeate the Adjudicator's analysis:

- the Adjudicator applied the wrong legal test under s. 15. The Ministry asked the Senior Adjudicator to consider the extra-record evidence filed before me on judicial review on this issue;

- the Adjudicator erred in ordering disclosure of the DVRs because the Ministry cannot comply with the Order to disclose the DVRs. The Ministry says the DVRs cannot be severed to comply with the Order and asks the Senior Adjudicator to consider the affidavit of Joanne Gardiner, Senior Legislative and Policy Analyst with the Ministry, sworn April 17, 2009 (the "Gardiner Affidavit") and its judicial review submissions on this issue;

- the Adjudicator acted without jurisdiction by ordering the Ministry to permit Stelmack to view the DVRs which contain third parties' personal information. The Ministry referred the Senior Adjudicator to its judicial review submissions on this issue; and

- the Adjudicator failed to exercise her jurisdiction with respect to DVRs 1, 4, 5 and 6.

Brown's Position

[62] By letter dated August 6, 2009, Brown made initial submissions on reopening the Order, arguing that the Commissioner had the jurisdiction to reopen and accept extra-record evidence not presented at the Inquiry and that she should do so.

[63] Brown argued that the finality of the decision-making process was assured once the information was disclosed and that this militated in favour of reopening the Order.

[64] In correspondence dated August 13, 2009, Brown responded to the Ministry's submissions, reasserting her position that the Commissioner was not *functus officio*, arguing that her jurisdiction extended to permit extra-record evidence and rectify jurisdictional errors in the Order. She now sought a new hearing.

[65] Brown said that the Adjudicator had lost jurisdiction because the Order was patently unreasonable in two respects. First, the Adjudicator applied the wrong legal test to determine harm under s. 15 and conflated harm to property and personal safety. Second, Brown said the Adjudicator failed to consider s. 19 and found s. 22(2)(e) irrelevant. She said that both sections were relevant and should have been considered to assess the threat to Brown's physical or mental safety if the DVRs are released.

[66] To determine when extra-record evidence should be admitted, Brown submitted that the Commissioner should apply the test used by a trial judge prior to the entry of a formal order, that is, that a miscarriage of justice would probably occur without a rehearing and that the evidence would probably have changed the result.

[67] As extra-record evidence, she submitted an affidavit, sworn by her April 3, 2009 in support of her application for judicial review (the "Brown Affidavit") which described a threat to her and its consequences arising from an incident at the Surrey Pretrial Centre in 2008.

[68] On September 28, 2009, counsel for Brown replied to Stelmack's submissions.

[69] Brown re-asserted her position that she would suffer harm if disclosure were made and that the evidence she submitted was not available at the original hearing, was reliable, would have changed the result and failure to consider it constitutes a miscarriage of justice.

[70] Brown argued that she did not require medical evidence to demonstrate a reasonable risk of harm when there was uncontradicted evidence that she developed post-traumatic stress as a result of a threat to her safety in 2008.

[71] While she agreed that the Adjudicator's decision has been released, she says this is not final in the sense of an order of the court because the ability to enact a remedy remains intact.

[72] Brown urged the Commissioner to consider the lack of an appeal mechanism and to read her jurisdiction to reopen broadly.

Stelmack's Position

[73] Stelmack asked the Commissioner to refuse to reopen the Inquiry or amend the Order because the Ministry failed to make an application to reopen by the deadline I set in my 2009 Reasons. Stelmack acknowledged that the *functus* rule applies more flexibly to administrative tribunals, but argued that this case did not warrant reopening.

[74] In response to the other parties' submissions, Stelmack agreed with the Ministry's position that the Commissioner lacked jurisdiction to reopen the matter but disagreed that if it found such jurisdiction the Commissioner was required to give the parties time to supplement the evidence.

[75] Stelmack argued that the one application to reopen before the Commissioner was Brown's application and that the Ministry's alternative submissions should not be considered.

[76] Stelmack submitted that the exceptions to the *functus* rule do not apply in the present case. The Ministry's extra-record evidence could have been put before the Adjudicator and/or would not change the result.

[77] In respect of the Brown Affidavit, Stelmack agreed that the test to be applied was that used by a trial judge when deciding whether to accept extra-record evidence prior to the entry of a final order, but urged the Commissioner to be cognizant of the fact that the Adjudicator's final order had already been issued.

[78] She submitted Brown's extra-record evidence did not warrant reopening as it was not related to the incident with Stelmack. She argued that Brown failed to prove that a miscarriage of justice would result from ignoring the extra-record evidence and that that evidence would likely have altered the result. She says this is determinative.

[79] Stelmack submitted that one of FIPPA's purposes is to make public bodies more accountable to the public and that fear of having misconduct exposed cannot be cause to invoke ss. 22(2)(e).

[80] She disputed the reliability of the Brown Affidavit because it was not supported by medical documentation and was self-serving. Stelmack submitted that the test should be with reference to a reasonable expectation of harm and not a subjective expectation.

[81] She referred to her earlier submissions on s. 15 and argued that the Ministry has not shown that it cannot comply with the Order, the portion of the Order requiring the Ministry to permit Stelmack to view DVRs 1, 4, 5 and 6 is spent as she had viewed the DVRs by that point, and that the Adjudicator's decision respecting those DVRs was not a failure to exercise jurisdiction.

[82] Finally, Stelmack objected to what she characterized as "significant and unnecessary procedural delay".

Parties' Positions on Findings of Fact

Ministry's Position

[83] As an alternative to its submission that the Adjudicator was *functus*, the Ministry argued that the Adjudicator erred in finding that "surveillance cameras' blind spots were likely obvious to anyone who could see the camera position and angle". The Ministry said that there was no evidence before the Adjudicator to support this position, and had there been evidence it would have been contrary to this finding.

[84] In support of its position, the Ministry submitted an affidavit sworn July 24, 2008 by Matt Lang, Deputy Warden and Acting Warden at the VCJ at the relevant time, sworn July 24, 2008 (the "Second Lang Affidavit"). At para. 42 he says: "[f]or all of the cameras, the location of the blind spot is unknown until you see the image it projects". This forms part of the extra-record evidence, the admissibility of which is in dispute.

Stelmack's Position

[85] Stelmack also says that the findings on blind spots do not warrant reopening. The decision was based on inferences drawn from evidence before the Adjudicator. In any event, she says, the Adjudicator does not have jurisdiction to change her findings of fact on this point and the extra-record Ministry evidence is too general to be responsive to the issue and would not show that the Adjudicator's finding, which was specific to the cameras used to record DVRs 2 and 3, was unreasonable.

The Review Decision

[86] On March 16, 2010 the Senior Adjudicator released the Review Decision. The summary reads as follows:

> Order F08-13 required the public body to give severed access to two digital video recordings of the applicant while in detention at a correctional facility. Two applications for judicial review of that order were adjourned to permit the petitioners, the public body and a third party, to apply to the Commissioner to reopen the order to consider evidence the petitioners filed in the judicial review proceedings that was not part of the inquiry under FIPPA. The test for reopening to consider new evidence is akin to the test for admission of new evidence on appeal and the application for re-opening must be made promptly. The new evidence here does not meet the test for reopening Order F08-13. Other issues raised on the judicial reviews also do not trigger reopening. Conditions attached to Order F08-13 for considering access to four remaining digital video recordings only if the applicant wished to pursue them after the issuance of Order F08-13, are a matter of continuation of the Commissioner's jurisdiction that could proceed were it not for the stay of Order F08-13 under s. 59(2) of FIPPA occasioned by the pending applications for judicial review.

[87] The Senior Adjudicator summarized her approach to the Review Decision and her rationale for it in paras. 35-36 of that decision:

> [35] I decided that the course of action to take was, as anticipated, to analyze Order F08-13 and the new evidence and grounds in the applications for judicial review against the principle of finality and its exceptions.
>
> [36] I came to this conclusion because the judicial reviews were adjourned to permit the Ministry and the Correctional Officer to apply to the Commissioner for consideration of the extra-record evidence they had filed in support of their applications for judicial review and for the Commissioner to consider any unspent jurisdiction to deal further with the matter. It was against that backdrop that the Correctional Officer had applied for reopening of Order F08-13 on the basis of the new evidence in her affidavit supporting

> her application for judicial review, the Ministry's affidavits supporting its application for judicial review and errors in the order that are alleged in the judicial reviews.

Jurisdiction to Reopen to hear Extra-record Evidence

[88] The Senior Adjudicator determined whether to reopen the Inquiry by considering the requirements for adducing new evidence on appeal. She declined to reopen to consider the new evidence.

[89] The Senior Adjudicator reviewed relevant case law, and determined that the following principles apply to two relevant situations:

> [45] In *Zhu v. Li,* [2007 BCSC 1467], Ehrcke J. described the test for re-opening a trial to adduce fresh evidence after judgement has been pronounced but before the formal order is entered, as follows:
>
> 1. Prior to entry of the formal order, a trial judge has a wide discretion to re open the trial to hear new evidence.
> 2. This discretion should be exercised sparingly and with the greatest care so as to prevent fraud and an abuse of the court's process.
> 3. The onus is on the applicant to show first that a miscarriage of justice would probably change the result.
> 4. The credibility of the proposed fresh evidence is a relevant consideration in deciding whether its admission would probably change the result.
> 5. Although the question of whether the evidence could have been presented at trial by the exercise of due diligence is not necessarily determinative, it may be an important consideration in deciding whether a miscarriage of justice would probably occur if the trial is not re-opened.
>
> [46] On the other hand, when an appeal has been perfected by the formal entry of the trial judgement, the appeal court's discretion to admit evidence that was not before the trial court is guided by the following principles:
>
> 1. The evidence should not generally be admitted if, by due diligence, it could have been adduced at trial, provided that this general principle will not be applied as strictly in criminal as in civil cases.
> 2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
> 3. The evidence must be credible in the sense that it is reasonably capable of belief.

> 4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
>
> [47] In *Zhu v. Li,* Ehrcke J. considered whether the test for adducing fresh evidence on appeal applied to re-opening a trial to adduce fresh evidence after judgement had been pronounced but before entry of the formal order. He concluded that the discretion to re-open a trial to adduce fresh evidence was wider than the test to adduce fresh evidence on appeal (most notably as regards the element of whether, by due diligence, the evidence could have been adduced at trial).

[90] The Senior Adjudicator determined that the latter, more onerous test should be applied to the facts before her:

> [49] The law is clear that an administrative tribunal that is without a statutory provision for reconsideration, and the decisions of which are not subject to a full right of appeal, can re-open its decisions to consider new evidence or argument in wider circumstances than can a court. The judicial history of the doctrine of *functus officio* and the development of finality in administrative law that flows from *Chandler* show that the more flexible application of the principle of finality to administrative tribunals is not premised on the discretion of a trial court to reopen between the pronouncement and formal entry of its judgement (the test in *Zhu v. Li*). The reason for the flexibility in administrative law is that judicial review of a tribunal decision is a more limited review than a right of full appeal of a judicial decision to a higher court. Because of the more limited nature of judicial review and its narrow scope for the admission of extra-record evidence, *Chandler* struck a more flexible application of the principle of finality, "in order to provide relief which would otherwise be available on appeal."
>
> [50] I conclude that the test for the admission of new evidence on appeal is a more relevant point of reference for reopening Order F08-13 than the test for re-opening a judicial trial before entry of formal judgement.

[91] In addition, the Senior Adjudicator determined that substantive criteria required extra-record evidence be

> [72] ...relevant in the sense that it bears upon a decisive or potentially decisive issue in the inquiry; credible in the sense that it is reasonably capable of belief; and such that, if believed, it could reasonably be expected, when taken with the other evidence adduced in the inquiry, to have affected the result in Order F08-13.

[92] In addition, relevant time limits should also be considered. The Senior Adjudicator said, at para. 54:

> [54] Whether the test to re-open Order F08-13 is the test for admission of new evidence on appeal, as I see it, or the test for the re-opening of a trial before entry of the formal judgement, as the Correctional Officer and Requester submitted, a necessary component of the flexible application of the principle of finality is discretion to refuse to consider re-opening after a period of time that is some reasonable parallel to the time to bring an application for judicial review of an order to comply with FIPPA or to settle and enter a trial judgement in court. I would express this as a requirement for diligence in applying for re-opening of a decision made under FIPPA.

[93] In support of timing as a factor relevant to determining the test for admitting extra-record evidence, the Senior Adjudicator cited cases in which adjudicators had considered admitting extra-record evidence and concluded, at para. 55, that "[t]he resulting decisions, few in number though they are, support the importance of timeliness as a factor in the flexible application of the doctrine of finality to inquiries and orders under FIPPA".

[94] The Senior Adjudicator then proceeded to analyze whether the petitioners' extra-record evidence was grounds for reopening the Order.

Brown's Evidence

[95] Brown's evidence consisted of the Brown Affidavit.

[96] The substance of Brown's evidence is that she believes the DVRs' release is a threat to her safety. She says that correctional officers may be targeted for violence both inside and outside the prison. She recounts two assaults against her in 1999 and 2000 and a plot in 2008 by prison inmates to take her hostage and kill her because of a decision she made in the course of her employment.

[97] The plotters apparently knew where Brown lived and Brown believes "the plotters had associates outside Surrey Pretrial and that [she] had been followed home". As a result of the threat, Brown suffered post-traumatic stress and was unable to work for four months.

[98] Brown goes on to say that "[m]y home has already been identified and, in my opinion, it would put me at further risk if I were personally identifiable as well".

[99] The Senior Adjudicator summarized Brown's argument on review at para. 67:

> Her new evidence would change the result of Order F08-13 because, as I read her submissions, she says it establishes that if her image in DVRs 2 and 3 is disclosed she will be endangered and unfairly exposed to physical and mental harm within the meaning of ss. 15(1)(f), 19(1)(a) and 22(2)(e) of FIPPA."

[100] Stelmack submitted that Brown and her home had already been identified and targeted and there was no reason to believe release of the DVRs would imperil her safety or health.

[101] The Senior Adjudicator reviewed the extra-record evidence applying the test for adducing fresh evidence on appeal and her finding that "timeliness in bringing the application to reopen [is part of] the requirement for due diligence" (at para. 69) and found that the evidence could either have been adduced before the Adjudicator or been the subject matter of an application to reopen before April 2009.

[102] The Senior Adjudicator reviewed Brown's original submissions in which she argued that release of her image was an unreasonable invasion of her privacy and that after release the images could be digitally manipulated.

[103] However, the Senior Adjudicator also determined that Brown's evidence did not meet the substance test for admissibility on appeal. It did not have a bearing on a decisive or potentially decisive issue, because it did not connect the release of the DVRs to a risk to her safety or health and could not reasonably be expected to have affected the result.

[104] The Senior Adjudicator therefore found that Brown's extra-record evidence was not admissible on review.

Ministry's Evidence

[105] The Ministry submitted three affidavits on the first judicial review which were analyzed in the Review Decision: the Gardiner Affidavit; the affidavit of Eduardo

Moniz, Strategic Technology Advisor, sworn March 13, 2009 (the "Moniz Affidavit"); and the Second Lang Affidavit.

[106] The Gardiner Affidavit provided information about the Ministry's ability to sever third party information from the DVRs and the cost of doing so.

[107] The Senior Adjudicator rejected this evidence as a basis for reopening saying, at paras. 79-80:

> [79] The evidence in this affidavit does not qualify for admission as fresh evidence at several levels. It was not provided diligently and lacks specifics on when the evidence in it was available and gathered. There is no explanation why the evidence was not provided to the Adjudicator in the inquiry or, at the least, soon after the issuance of Order F08-13.
>
> [80] The evidence is also expert opinion dressed up as factual observations and inquiries by Ms Gardiner, who has no relevant expertise. Ms Gardiner may be credible in terms of what she did, though we do not know when she did it, and for the sincerity of her efforts, but that does not assist the credibility or conclusiveness of the technological evidence in the crux of her affidavit about severing methods and their reversibility, for which she is not qualified to vouch.

[108] Moniz provided evidence about the security and monitoring systems in correctional facilities, their importance and his opinion that releasing video footage which shows blind spots could assist inmates to plan escapes and smuggling operations.

[109] The Senior Adjudicator rejected this evidence as a basis for reopening, at paras. 83-84, saying:

> [83] Mr. Moniz's evidence is not time specific. The general nature of the evidence strongly suggests that it was as available in 2007 as in 2009. There is no explanation why it was not provided to the inquiry the Adjudicator conducted, or before March 2009. None of his evidence is specific to the VCJ or the DVRs in Order F08-13. There is no indication that he is familiar with either the DVRs or with the VCJ during the period of its renovation when the DVRs were taken or otherwise.
>
> [84] I would not reopen Order F08-13 to consider the evidence in this affidavit as it was not provided diligently, is not established to have been unavailable at the time of the inquiry by the Adjudicator and, given its generality and lack of connection to any of the specific facts of that inquiry, could not reasonably be expected to have affected the result of the order.

[110] The Second Lang Affidavit included evidence about the camera limitations, security feature of the VCJ and threats of inmate escape. The Senior Adjudicator described this new information at para. 88 as "mostly general and contextual in nature: the Ministry's goals, how the Corrections Branch is organized, the objectives of jail security, jail security as a holistic concept, the confidential nature of security, the safety of correctional officers."

[111] The Senior Adjudicator declined to reopen based on this evidence. She found that the contextual information and information about severing was available at the time of the Inquiry and could not reasonably be expected to have affected the result.

[112] Lang also gave evidence about the types of cameras available in correctional facilities, saying at para. 42 of the Second Lang Affidavit:

> [42] In many facilities, including the Vancouver Jail, many of the cameras are not visible. Instead, many of the cameras are located behind barriers that allow the camera to function but hide it from view. In this way, the type of camera in an area is not identifiable, and the angle(s) it covers, and any blind spots, are not known by simple observation. For all of the cameras, the location of the blind spot is unknown until you see the image it projects.

[113] Regarding this evidence, the Senior Adjudicator said, at para. 92:

> [92] I understand the new evidence in paragraphs 41 and 42 to be directed to the issue of the visibility of the cameras for DVRs 2 and 3, because the Adjudicator is said to have had no evidence before her upon which to infer that the cameras were visible when in fact they were not.

[114] The Senior Adjudicator found that there was evidence on the record from which the Adjudicator could properly draw the inference that the cameras used in DVRs 2 and 3 were easily identified and that Lang's new evidence was not conclusive respecting the setup of the cameras used to record DVRs 2 and 3.

[115] She therefore found that she would not reopen the Order on the basis of this extra-record evidence because it was available and could have been put before the Adjudicator, it was not relevant to a decisive or potentially decisive issue, and could not reasonably have been expected to have affected the result.

Harms Test Under s. 15(1)

[116] The Senior Adjudicator found, at para. 100, that the "interpretation and application of s. 15 were well within [the Adjudicator's] jurisdiction and invite no scope for reopening Order F08-13".

Applying ss. 19 and 22

[117] Similarly, the Senior Adjudicator found no basis for reopening the Order to reconsider ss. 19 and 22.

Exercise of Jurisdiction Respecting DVRs 1, 4, 5 and 6

[118] The Senior Adjudicator declined to find this a basis for reopening the Order.

[119] She found that Stelmack's application before the Adjudicator was for copies of videos which had footage of two specific incidents. The Adjudicator identified DVRs 2 and 3 as being of interest and left it open to Stelmack to pursue 1, 4, 5 and 6 if she thought they were of interest.

[120] The Senior Adjudicator considered this an "incomplete disposition where the Adjudicator fully realized that her task might not be finished, as opposed to a circumstance of reopening a jurisdiction that she mistakenly thought was concluded": Review Decision at para. 106.

[121] She added that "[i]n the absence of the pending application for judicial review and the associated stay under s. 59(2), the Requester's pursuit of the remaining DVRs could have been addressed in a further decision".

[122] She found that, in the context of the Order, where the Ministry raised no objection to Stelmack viewing the DVRs but only to having them disclosed, it was within the Adjudicator's jurisdiction to make an order to view.

Severing

[123] The Ministry's evidence on the difficulty and cost of severing the DVRs was rejected, however the Senior Adjudicator considered whether the Order should be

reopened to amend or vacate any part of the Order because it is impossible to perform.

[124] To do so, she undertook a review of the evidence on severing which was before the Adjudicator, including evidence that the Ministry lacked the software to complete the job and evidence of the cost of outsourcing the project.

[125] The Senior Adjudicator found that the test under s. 4(2) is reasonableness and that this standard does not permit a public body to resist disclosure on the basis that it would be technologically inconvenient to accomplish.

Conclusion

[126] The Senior Adjudicator declined to reopen the Order and characterized Stelmack's access to DVRs 1, 4, 5 and 6 as a continuation of the Commissioner's jurisdiction which can proceed when the statutory stay is lifted.

Pleadings on Judicial Review (2011)

[127] On January 4, 2011, the judicial review resumed before me.

[128] Many of the errors alleged in the submissions before me are those advanced before me in June 2009 and those advanced before the Senior Adjudicator. In addition to new arguments, Brown has amended her petition to seek judicial review of the Review Decision and the Commissioner has made submissions respecting the Review Decision.

[129] Given the number of issues raised before me, the overlap in submissions, the parties' different characterizations of the issues and my desire to avoid unnecessary repetition, I will begin by listing the issues raised by each party. In the analyses sections below, I will summarize the relevant law and outline the parties' submissions before applying the law to the facts and reaching a conclusion on each issue.

Ministry's Position

[130] In its petition dated August 8, 2008, the Ministry seeks judicial review of the Order on the following grounds:

1. the Commissioner erred in ordering the disclosure of the DVRs;

2. the Commissioner erred in making findings of fact, findings of mixed fact and law and determinations of law, namely that:

    a. disclosure of the DVRs could not reasonably be expected to interfere with the security of the jail generally and the video surveillance systems specifically;

    b. disclosure of the DVRs could not reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person;

    c. the "mosaic effect" did not apply and that there was not a heightened possibility of harm arising from the release of the DVRs in combination with other information;

    d. the nature of the surveillance cameras' blind spots were likely obvious to anyone who could see the camera position and angle;

    e. the scrambling or blurring of the digital information is severing pursuant to s. 4 of FIPPA;

    f. the DVRs could be reasonably severed by the Ministry; and

    g. it was not an unreasonable interference with the personal privacy of third parties to order viewing of unsevered DVRs by Stelmack.

3. the Commissioner exceeded her jurisdiction by ordering the Ministry to provide Stelmack with access to view the DVRs; and

4. the Commissioner improperly failed to exercise her jurisdiction by failing to make a decision with respect to the disclosure of DVRs 1, 4, 5 and 6.

[131] The Ministry relies extensively on the extra-record evidence.

[132] The Ministry seeks the following:

1. an order quashing the Order;

2. a declaration that the DVRs, in their entirety, were properly excepted from disclosure by the Ministry pursuant to ss. 4, 15 and 22 of FIPPA; and

3. in the alternative, an order directing the Commissioner to reconsider the disclosure of the DVRs with directions from this Court.

[133] In its Amended Response to Brown's petition, the Ministry:

1. supports Brown's plea for a declaration that the DVRs were properly excepted from disclosure pursuant to ss. 4, 15 and 22 of FIPPA;

2. takes no position on Brown's plea for a declaration that the DVRs were properly excepted from disclosure pursuant to s. 19;

3. cannot consent to Brown's alternative plea that the Ministry sever her image if the DVRs are released, pursuant to s. 4, because it says the personal information cannot be severed; and

4. does not oppose Brown's plea for an order quashing the Review Decision or, in the alternative, directing the Commissioner to reconsider whether to reopen the Order, but says that the Review Decision constitutes supplementary reasons to the Order.

Brown's Position

[134] On September 17, 2010 Brown filed an Amended Petition.

[135] Brown seeks the following relief:

1. an order quashing the Order;

2. a declaration that the DVRs, in their entirety, were properly excepted from disclosure by the Ministry pursuant to ss. 4, 15, 19 and 22 of FIPPA;

3. in the alternative to 1 and 2, an order that the Ministry sever the Petitioner's personal information from the DVRs, removing from the DVRs information which would identify Brown, pursuant to s. 4 of FIPPA;

4. in the further alternative to 1, 2 and 3, an order directing the Commissioner to reconsider the disclosure of the DVRs, or parts thereof, with directions from this Court;

5. an order in the nature of *certiorari* quashing the Review Decision; and

6. in the alternative to 5, an order directing the Commissioner to reconsider and determine whether to reopen the Order.

[136] Many of Brown's alleged errors are those advanced by the Ministry. For completeness, I have included all errors Brown alleges:

1. the Commissioner erred in ordering the disclosure of the DVRs;

2. the Commissioner erred in making findings of fact, findings of mixed fact and law and determinations of law, namely:

    a. that disclosure of the DVRs could not reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person;

    b. that the "mosaic effect" did not apply and that there was not a heightened possibility of harm arising from the release of the DVRs in combination with other information;

    c. that the scrambling or blurring of the digital information is severing pursuant to s. 4 of FIPPA;

d. that the DVRs could reasonably be severed by the Ministry;

e. that it was not an unreasonable interference with the personal privacy of third parties to order Stelmack to view the unsevered DVRs;

3. the Commissioner exceeded her delegated jurisdiction by ordering the Ministry to provide Stelmack with access to viewing the DVRs;

4. the Commissioner improperly failed to exercise her delegated jurisdiction by failing to make a decision with respect to DVRs 1, 4, 5 and 6;

5. the Commissioner erred in law when she determined that the legal test for the admission of extra-record evidence on appeal was the test to apply on the application to reopen the Order;

6. the Commissioner erred in law when she determined that timeliness was a requirement in bringing an application to reopen;

7. the Commissioner made an unreasonable finding of fact in determining that the release of Brown's image could not reasonably be expected to endanger her physical or mental health;

8. the Commissioner erred in law in determining that the extra-record evidence in the Brown Affidavit could not reasonably be expected to have affected the result of the Order;

9. the Commissioner erred in law by applying the test for admitting extra-record evidence on appeal to the question of whether there was jurisdiction to reconsider the Order in light of an incorrect finding of fact;

10. the Commissioner erred in law or, alternatively, committed an error of mixed fact and law when she determined that there was no premise for reopening the Order to rectify unreasonable errors in the application of s. 15 of FIPPA;

11. the Commissioner erred in law or, alternatively, committed an error of mixed fact and law when she determined that the Order could not be reopened to rectify the unreasonable failure to consider FIPPA s. 19;

12. the Commissioner erred in law or, alternatively, committed an error of mixed fact and law when she determined that the Order could not be reopened to rectify the unreasonable finding that s. 22(2) of FIPPA was not a relevant factor;

13. the Commissioner breached the rules of natural justice and/or procedural fairness in refusing to reopen the Order and consider the extra-record evidence.

Stelmack's Position

[137] In her Amended Response dated April 6, 2007 and her Response to Amended Petition dated September 23, 2010, Stelmack opposes all relief sought. She argues that there is no legal basis for admitting the extra-record evidence and no basis for the Court to interfere with the Order or the Review Decision.

[138] Stelmack relies on the affidavit of Maria Dupuis, sworn October 9, 2008 and the affidavit of Cindy Hamilton, sworn April 9, 2010 which contain the records before the Adjudicator and Senior Adjudicator.

Commissioner's Position

[139] In its Amended Response dated May 25, 2009 and Response to the Amended Petition dated September 24, 2010, the Commissioner takes the following positions:

a) the extra-record evidence consisting of the Second Lang Affidavit, the Moniz Affidavit and the Gardiner Affidavit, is inadmissible in relation to the judicial review of the Order;

b) the extra-record evidence of the Brown Affidavit is inadmissible in relation to the judicial review of the Order, except Exhibits A and B to that affidavit which relate to the process before the Adjudicator;

c) the Review Decision is a decision not to reopen and cannot be characterized as supplementary reasons to the Inquiry and Order;

d) the standard of review on all issues is reasonableness; and

e) the Court has limited remedial authority on judicial review.

[140] The Commissioner relies on the affidavit of Maria Dupuis sworn October 9, 2008 which contains the non-confidential portions of the record before the Adjudicator and the affidavits of Cindy Hamilton sworn May 19, 2009 and April 9, 2010 containing the disputed record and the *in camera* submissions before the Adjudicator and the record of the Review Decision.

[141] As the Commissioner's submissions on these issues are grounded in case law, I will summarize and analyze them as necessary below.

Issues on Judicial Review (2011)

[142] I begin by considering the preliminary issues which affect the analysis and will then proceed to consider the errors alleged with respect to the Review Decision and then those with respect to the Order.

Preliminary Issues

1. Do the Commissioner's submissions extend beyond what is appropriate for submissions of an unbiased decision-maker on judicial review?

2. What are the appropriate standards of review on which to review the Order and Review Decision?

3. How should the Review Decision be characterized?

4. Are the petitioners' extra-record affidavits admissible on judicial review of the Order?

Issues Respecting the Review Decision

5. Did the Senior Adjudicator err in determining whether to reopen the Order?

    a. Did the Senior Adjudicator err by applying the test for admitting extra-record evidence on appeal to the question of whether there was jurisdiction to reconsider the Order?

    b. Did the Senior Adjudicator err in law when she determined that timeliness was a requirement in bringing an application to reopen?

    c. Did the Senior Adjudicator err in determining that the Brown Affidavit could not reasonably be expected to have affected the result of the Order?

6. Did the Senior Adjudicator err by failing to reopen to consider alleged errors in the Adjudicator's application of FIPPA?

    a. Did the Senior Adjudicator err when she determined that there was no basis to reopen the Order to rectify alleged errors in the application of s. 15 of FIPPA?

    b. Did the Senior Adjudicator err when she determined that the Order could not be reopened to rectify the finding that s. 22(2) of FIPPA was not a relevant factor?

    c. Did the Senior Adjudicator err when she determined that the Order could not be reopened to rectify the failure to consider s. 19 of FIPPA?

    d. Did the Senior Adjudicator make an unreasonable finding of fact in determining that the release of Brown's image could not reasonably be expected to endanger her physical or mental well-being?

7. Did the Senior Adjudicator breach the rules of natural justice and/or procedural fairness in refusing to reopen the Order and consider the extra-record evidence?

Issues Respecting the Order

8. Did the Adjudicator err in her analysis of s. 4 of FIPPA?

    a. Did the Adjudicator order "blurring" of images?

    b. Does "blurring" constitute severance for the purposes of s. 4?

9. Did the Adjudicator err in her analysis of s. 15(1)?

    a. Did the Adjudicator err in finding that the nature of the surveillance cameras' blind spots was likely obvious to anyone in a position to take advantage of them?

    b. Did the Adjudicator err in applying the test under s. 15 and in considering ss. (f) and (l) together?

    c. Did the Adjudicator err in finding that the "mosaic effect" did not apply and that there was not a heightened possibility of harm arising from disclosure of DRVs 2 and 3?

    d. Did the Adjudicator err in finding the DVRs could not reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person?

    e. Did the Adjudicator err in finding that disclosure of the DVRs could not reasonably be expected to interfere with the security of the jail generally and the video surveillance systems specifically?

10. Did the Adjudicator err in failing to consider s. 19?

11. Did the Adjudicator err in finding that s. 22 did not authorize the Ministry to withhold the DVRs?

a. Did the Adjudicator err when she determined that Brown's image should not be severed?

b. Did the Adjudicator err in applying the burden of proof under s. 22?

c. Did the Adjudicator err in finding that it was not an unreasonable interference with the personal privacy of third parties to order the Ministry to permit Stelmack to view unsevered copies of DVRs 1, 4, 5 and 6?

12. Did the Adjudicator exceed her jurisdiction or otherwise err by ordering the Ministry to provide Stelmack with access to view the DVRs?

13. Did the Adjudicator exceed her jurisdiction or otherwise err by failing to exercise her delegated jurisdiction by failing to make a decision with respect to the disclosure of DVRs 1, 4, 5 and 6?

Law and Analysis on Preliminary Issues

1. Do the Commissioner's submissions extend beyond what is appropriate for submissions of an unbiased decision-maker on judicial review?

[143] Brown has not applied to strike specific sections of the Commissioner's submissions. This analysis therefore addresses generally the issues on which the Commissioner has made submissions.

[144] I have summarized the Commissioner's positions on judicial review above. The Commissioner takes a position on the following matters:

a) the admissibility of the extra-record evidence on judicial review of the Order;

b) the characterization of the Senior Adjudicator's Review Decision;

c) the standard of review on all issues; and

d) the extent of the Court's remedial authority on judicial review.

[145] Brown argues that the Commissioner's submissions "venture into the merits of the issues such as whether the court should consider the additional evidence, whether the [Review Decision] constitutes Supplementary Reasons to [the Order] and whether the decision itself was reasonable".

[146] Brown suggests that the strict rule in *Northwestern Utilities Ltd. and al. v. Edmonton* (1978), [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161 applies. In that case, the Court said, at 709-10:

> It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. [citations omitted] Where the right to appear and present arguments is granted, an administrative tribunal would be well advised to adhere to the principles enunciated by Aylesworth J.A. in *International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board* [(1958), 18 D.L.R. (2d) 588.], at pp. 589, 590:
>
> > Clearly upon an appeal from the Board, counsel may appear on behalf of the Board and may present argument to the appellate tribunal. We think in all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board[.] If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved, while at the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance.

[147] I agree, however, with the comments of Madam Justice Rowles in *Global Securities Corp. v. British Columbia (Executive Director, Securities Commission)*, 2006 BCCA 404 where she said at para. 60:

> [60] I conclude with the following observation, prompted by some of the submissions of the Intervenors. What was said in *Northwestern Utilities*, to the extent that it has been taken as an invariable rule, may be due for a re-evaluation. The decision of the Ontario Court of Appeal in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 253 D.L.R. (4th) 489 provides support for that view. In that case, Gouge J.A. expressed the opinion that the standing of administrative tribunals on reviews of their own decisions must be considered contextually rather than by reference to an *a priori* rule.

[148] This being the case, what considerations apply when a court is determining the allowable scope of an administrative tribunal's submissions?

[149] I summarize the relevant factors and principles from the reasons of Mr. Justice Gouge in *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commissioner)* (2005), 75 O.R. (3d) 309, 253 D.L.R. (4th) 489 at paras. 36-39 and 43-45 (C.A.):

- The need to have a fully informed adjudication of the issues before the court. Whether because of its specialized expertise, or for want of an alternative knowledgeable advocate, submissions from the tribunal may be essential to achieve a fully-informed adjudication of the issues.
- The importance of maintaining tribunal impartiality. There may be a risk that full-fledged participation by a tribunal as an adversary in a judicial review proceeding will undermine future confidence in its objectivity.
- The nature of the problem, the purpose of the legislation, the extent of the tribunal's expertise, and the availability of another party able to knowledgeably respond to the attack on the tribunal's decision, may all be relevant in assessing the seriousness of the impartiality concern and the need for full argument.
- Other considerations that arise in particular cases.
- In the end, the court must balance the various considerations in determining the scope of standing that best serves the interests of justice.

[150] In *B.C. Teachers' Federation, Nanaimo District Teachers' Association et al. v. Information and Privacy Commissioner (B.C.) et al.*, 2005 BCSC 1562, Madam Justice Garson was asked to consider, on a preliminary basis, the scope of the Commissioner's submissions on judicial review. She took a similar approach, saying, at paras. 44-45:

> [44] ...In my view, the line between permissible and impermissible argument by the tribunal is drawn at the point at which the Commissioner defends the actual merits of his decision.
>
> [45] In this case the particular factors that weigh in favour of greater, but not unfettered, participation include:
>
> - the lack of representation before the court of the applicant parents;

- the role of the Commissioner within the statutory scheme, which is to balance and resolve the public interest in access to information with individual interests in personal privacy;
- the inquisitorial nature of the Commissioner's process; and,
- the special knowledge and expertise of the tribunal, all of which weigh in favour of greater participation.

Conclusions on the Commissioner's Submissions

[151] In the present case, I have considered the importance of ensuring the Court is fully informed and the need for the Commissioner to remain neutral because of her role during inquiries under FIPPA.

[152] The Commissioner's submissions on the admissibility of the extra-record evidence will not be admitted. These stray into arguing the merits of the review, and specifically the merits of the Senior Adjudicator's decision not to reopen the Order to consider the extra-record evidence.

[153] Each party is represented on this judicial review and this issue can therefore be fully argued without the Commissioner's submissions. These submissions may also compromise the parties' perception of the Commissioner's neutrality.

[154] However, as Stelmack adopted the Commissioner's submissions on this issue, they will nevertheless be admitted as Stelmack's submissions.

[155] The Commissioner's submissions on the characterization of the Review Decision are necessary for the matter to be fully considered on judicial review and are of assistance to the Court. The Ministry is the only party that argued this issue. Absent the Commissioner's submissions, the Court would not be fully informed of the relevant arguments.

[156] In addition, in my view, the characterization of the Review Decision does not fall within the merits of the matter. It is a question of the procedure before the Commissioner on which the Commissioner has expertise.

[157] I have no difficulty concluding that the Commissioner's submissions on standard of review are admissible, though they are brief.

[158] Brown says I should not consider these submissions because the "position on standard of review is not in dispute between the parties".

[159] This mistakenly assumes that the Court must accept the parties' position on standard of review. It is ultimately the Court's responsibility to ensure that it undertakes its review of the Commissioner's decisions on the appropriate standard. Any submissions which assist the Court to reach the correct conclusion are of assistance.

[160] In the present case, the Commissioner's submissions provide additional arguments which will assist.

[161] Finally, I find the Commissioner's submissions on the extent of the Court's remedial authority on judicial review admissible. While this Court is able to determine the extent of that authority with the assistance of the parties, this does not concern the merits of the matter and, like standard of review, is not an issue that is between the parties but one which the Court is tasked with getting right.

[162] In my view, accepting submissions on this issue is unlikely to compromise the Commissioner's neutrality and will assist the Court.

2. What are the appropriate standards of review on which to review the Order and Review Decision?

[163] It is well-settled that since *Dunsmuir*, there are two standards of review: correctness and reasonableness. Those standards are explained at paras. 47, 49 and 50 of *Dunsmuir*:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that

> make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> ...
>
> [49] ...In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.
>
> [50] ...When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

[164] In the present case, Brown says the errors she alleges should be reviewed on a reasonableness standard and takes no position on the standard of review for the issues advanced only by the Ministry but urges the Court to consider the prison context in determining what is reasonable. Stelmack and the Commissioner say that all issues should be reviewed on a reasonableness standard.

[165] The Ministry says that questions of pure law and questions that limit or define the scope of FIPPA should be reviewed on a correctness standard and cites *Aquasource Ltd. v. British Columbia (Information and Privacy Commission)* (1998), 58 B.C.L.R. (3d) 61, [1999] 6 W.W.R. 1 (C.A.) and *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2004 BCSC 1597. To the extent that this means that questions of general law and pure jurisdiction are reviewable on the correctness standard, I agree.

[166] The Ministry further says that "[d]ecisions on matters within the Commissioner's core expertise – for example, fact-intensive questions and the interpretation and application of disclosure exceptions, the burden of proof in s. 57, and the Commissioner's discretionary powers concerning [her] own process" have been reviewed on a reasonableness standard. The Ministry cites *Jill Schmidt Health*

Services Inc. v. British Columbia (Information and Privacy Commissioner), 2001 BCSC 101 at paras. 31-32; *Architectural Institute of British Columbia v. British Columbia (Information and Privacy Commissioner)*, 2004 BCSC 217.

[167] The Ministry says the issues of whether the Commissioner exceeded her jurisdiction in ordering the Ministry to permit the petitioner to view the DVRs and in failing to make an order respecting DVRs 1, 4, 5 and 6, should be reviewed on a standard of correctness.

[168] Insofar as ordering disclosure and making certain findings of fact, determinations of law and findings of mixed fact and law constitute errors involving "the contours and content of a legal rule", they must be reviewed for correctness. Otherwise, the Ministry says, these matters are reviewable on the reasonableness standard.

[169] Even if the reasonableness standard applies, the Ministry says that the contextual approach requires that the Court assess what is reasonable with deference to the operational requirements of a prison. It argues that "the nature of the prison and its population, the nature and role of security in a prison environment, the nature of the information being requested and operational mandate of the public body in this case", lead to a very narrow range of acceptable outcomes.

[170] I therefore understand the Ministry's position on reasonableness to be that "reasonableness" in the present case is very close to "correctness".

Law on Assessing the Appropriate Standard of Review

[171] The *Administrative Tribunals Act*, S.B.C. 2004, c. 45 does not apply to the Commissioner's decisions. The process for assessing the appropriate standard of review in cases such as these was outlined in *Dunsmuir v. New Brunswick,* 2008 SCC 9 at para. 62:

> [62] ...First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first

> inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

[172] The factors to be analyzed are those which form the pragmatic and functional approach: *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 at paras. 21, 23 and 25:

> [21] ...In every case where a statute delegates power to an administrative decision-maker, the reviewing judge must begin by determining the standard of review on the pragmatic and functional approach. In *Pushpanathan*[*v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, this Court unequivocally accepted the primacy of the pragmatic and functional approach to determining the standard of judicial review of administrative decisions...
>
> ...
>
> [23] Much as the principled approach to hearsay articulated in *R. v. Khan,* [1990] 2 S.C.R. 531, and *R. v. Smith*, [1992] 2 S.C.R. 915, eclipsed the traditional categorical exceptions to the hearsay rule (*R. v. Starr*, [2000] 2 S.C.R. 144, 2000 SCC 40), the pragmatic and functional approach represents a principled conceptual model which the Court has used consistently in judicial review.
>
> ...
>
> [25] ... it is no longer sufficient to slot a particular issue into a pigeon hole of judicial review and, on this basis, demand correctness from the decision-maker. Nor is a reviewing court's interpretation of a privative clause or mechanism of review solely dispositive of a particular standard of review: *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.,* [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 27. The pragmatic and functional approach demands a more nuanced analysis based on consideration of a number of factors. This approach applies whenever a court reviews the decision of an administrative body. As Professor D. J. Mullan states in *Administrative Law* (2001), at p. 108, with the pragmatic and functional approach, "the Court has provided an overarching or unifying theory for review of the substantive decisions of all manner of statutory and prerogative decision makers". Review of the conclusions of an administrative decision-maker must begin by applying the pragmatic and functional approach.

[173] The Court then went on to review the relevant factors at paras. 26:

> [26] In the pragmatic and functional approach, the standard of review is determined by considering four contextual factors — the presence or absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing court on the issue in question; the purposes of the legislation and the provision in particular; and, the nature of the question — law, fact, or mixed law and fact. The factors may overlap.

> The overall aim is to discern legislative intent, keeping in mind the constitutional role of the courts in maintaining the rule of law...

Standard of Review of Certain Issues Already Decided

[174] Pursuant to the process outlined in *Dunsmuir,* I must first determine whether the standard of review for any of the issues before me has already been determined.

[175] In *B.C. Teachers' Federation, Nanaimo District Teachers' Association et al. v. Information & Privacy Commissioner (B.C.) et al.*, 2006 BCSC 131 at paras. 72-75 [*B.C. Teachers' Federation*], Madam Justice Garson, held that the reasonableness standard applies, to the following:

> (a) the interpretation and application of disclosure exceptions, and specifically, the application of the disclosure exceptions under s. 22 and s. 4;
>
> (b) the burden of proof in s. 57; and
>
> (c) the Commissioner's discretionary powers concerning [her] own process.

[176] Garson J. decided that assessing whether the facts fall within an exception in s. 22 is a matter which engages the Commissioner's core expertise.

[177] I would extend this analysis to s. 15. Though s. 15 lists discretionary disclosure exceptions and s. 22 lists mandatory exceptions, the expertise required to apply the disclosure exceptions to the facts before her is the same and therefore the same standard of review applies. I find questions concerning the interpretation and application of s. 15 are reviewable on a standard of reasonableness.

[178] Where the Court has not already determined the appropriate standard of review, I must consider the factors laid out in *Dr. Q.*

Pragmatic and Functional Factors Applied in the Present Case

Presence or Absence of a Privative Clause

[179] Here, this is a neutral factor in assessing the standard of review.

[180] FIPPA contains neither a privative clause nor a right of appeal. The legislative intent therefore does not suggest either that the courts have a broad right to review

the Commissioner's decision, or an intention to require courts to defer to the Commissioner's decision: *Guide Outfitters Assoc. v. British Columbia (Information & Privacy Commissioner),* 2004 BCCA 210 at 33.

The Commissioner's Relative Expertise

[181] The purpose of this factor is described in *Dr. Q* at paras. 28-29:

> [28] The second factor, relative expertise, recognizes that legislatures will sometimes remit an issue to a decision-making body that has particular topical expertise or is adept in the determination of particular issues. Where this is so, courts will seek to respect this legislative choice when conducting judicial review. Yet expertise is a relative concept, not an absolute one. Greater deference will be called for only where the decision-making body is, in some way, more expert than the courts and the question under consideration is one that falls within the scope of this greater expertise: see *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, 2002 SCC 11, at para. 50. Thus, the analysis under this heading "has three dimensions: the court must characterize the expertise of the tribunal in question; it must consider its own expertise relative to that of the tribunal; and it must identify the nature of the specific issue before the administrative decision-maker relative to this expertise": *Pushpanathan, supra*, at para. 33.
>
> [29] Relative expertise can arise from a number of sources and can relate to questions of pure law, mixed fact and law, or fact alone... Simply put, "whether because of the specialized knowledge of its decision-makers, special procedure, or non-judicial means of implementing the Act", an administrative body called upon to answer a question that falls within its area of relative expertise will generally be entitled to greater curial deference: *Pushpanathan*, *supra*, at para. 32.

The Commissioner's Expertise

[182] In *B.C. Teachers' Federation,* Garson J. said the following about the Commissioner's expertise, at para. 76:

> [76] The Commissioner does have specialized expertise accumulated by his office in the operation of the Act generally, and specifically in applying the presumptions and exceptions in sections 21 and 22. The title of the Act, *Freedom of Information and Protection of Privacy*, illustrates the tension between disclosure of information in the possession of public or government bodies, and the protection against the invasion of the privacy of individuals. The careful balancing of those competing policy objectives is the task of the Office of the Commissioner.

[183] This issue was also addressed by Mr. Justice Metzger in *Architectural Institute of British Columbia* at paras. 23-26:

> [23] The B.C. Commissioner is required to interpret and apply disclosure exceptions and to conduct inquiries. In addition, he may appoint a non-judicial review of access decisions made by public bodies.
>
> [24] ...I am satisfied that the B.C. Commissioner has general expertise in the field of access to information.
>
> [25] The Commissioner regularly makes findings of fact in the context of the *Act* and, thus, has a specialized knowledge and degree of institutional expertise that requires a degree of deference from the court.
>
> [26] Thus, I must still determine whether, in spite of the relative expertise of the Commissioner, the other factors in the pragmatic and functional approach weigh against deference on any of the issues, thereby placing it within the relative expertise of the court.

[184] I find that the Commissioner has greater expertise, relative to the courts, in interpreting and applying disclosure exceptions and in conducting its inquiries. It has generalized expertise in the field of information disclosure. The Commissioner's greater expertise is more relevant in circumstances when she must make polycentric assessments than when she is balancing the competing rights of two parties: *British Columbia (Attorney General)* at para. 44.

[185] Further, I agree with Garson J. in *B.C. Teachers' Federation* at para.75, that *Aquasource,* a case cited by the Ministry in support of a correctness standard on questions of statutory interpretation, has been overtaken by subsequent law which has acknowledged the expertise and deference owed to a tribunal interpreting its own statute.

The Court's Expertise

[186] I repeat that it is only necessary for me to consider these factors when the standard of review has not already been decided. The standard of review for the majority of the issues raised before me has been determined.

[187] However, the characterization of the Review Decision and the standard of review with respect to s. 22(2) and s. 22(4) will require that I consider the Court's relative expertise.

[188] Brown asked this Court to find that it had greater expertise than does the Commissioner in assessing harm and security issues. She suggested that I not accord the Adjudicator and Senior Adjudicator deference when reviewing the harms-based exceptions.

[189] The Commissioner's expertise in interpreting and applying FIPPA and in applying the presumptions and exceptions under s. 22 is acknowledged. So too is the Commissioner's expertise in balancing the interests of freedom of information and protection of privacy. Courts have found the Commissioner has general expertise in "access to information".

[190] These judicial findings of the Commissioner's expertise would have little impact if the Court then found it had greater expertise in assessing harm. Section 22, balancing the interests under FIPPA and providing access to information all require that harm be assessed. Section 22 is headed "Disclosure harmful to personal property"; section 15 is headed "Disclosure harmful to law enforcement; and section 19 is headed "Disclosure harmful to individual or public safety".

[191] While I agree that the prison context is relevant to the reasonableness of the conclusions reached by the Adjudicator and Senior Adjudicator, given the jurisprudence in this area, I cannot find any merit in the suggestion that this Court has greater expertise in assessing harm, relative to the Commissioner.

The Purpose of FIPPA

[192] FIPPA's purposes are outlined in s. 2:

> **Purposes of this Act**
>
> 2(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
>
> (a) giving the public a right of access to records,
>
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves,
>
> (c) specifying limited exceptions to the rights of access,
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

> (e) providing for an independent review of decisions made under this Act....

[193] *Dr. Q,* at para. 30, requires courts "consider the general purpose of the statutory scheme within which the administrative decision is taking place" to determine the intent of the provision at issue.

[194] Metzger J. made the following findings concerning the purpose of FIPPA in *Architectural Institute* at paras. 27-30:

> [27] Section 2 of the Act provides *inter alia* that one of the purposes is to make public bodies more accountable by giving the public a right of access to records while [still] protecting personal privacy.
>
> [28] This statute is not legislation that seeks to resolve disputes between two parties, such as usually occurs in a court setting. This Act requires the Commissioner to protect the privacy of individuals, while at the same time giving the public access to information by weighing opposing interests, determining facts, and defining circumstances.
>
> [29] In *Dr. Q, supra,* at para. 30:
>
> > As a general principle, increased deference is called for where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies: see *Pushpanathan*, *supra*, at para. 36, where Bastarache J. used the term "polycentric" to describe these legislative characteristics.

[195] Metzger J. went on to conclude that FIPPA confers polycentric functions on the Commissioner.

[196] There is also authority for finding the Commissioner's role "bipolar"; one which resolves disputes between parties. I quote Paris J. in *British Columbia (Attorney General)* at para. 44:

> [44] The IPC's delegate was required to resolve a dispute between the applicant and the public body concerning the proper interpretation of the Act. The Court of Appeal said in *Aquasource* that that "conflict resolution" was much more "bipolar" (between parties) than "polycentric" (resolving policy issues) and, therefore, the greater degree of deference called for by the latter is not appropriate here.

[197] In the present case, I find the Commissioner's role was "bipolar" where it concerned balancing Stelmack's right to disclosure of her personal information with

Brown's right to have her personal information withheld. The Commissioner is entitled to less deference on these bipolar issues. Her role was polycentric where she was required to balance generalized interests against Stelmack's right to disclosure.

The Nature of the Issue

[198] Correctness generally applies to issues of jurisdiction and other questions of law in respect of which the tribunal does not have expertise. Reasonableness generally applies to issues of fact, discretion or policy, and, where there is no right of review, to questions of law concerning interpretation of the tribunal's enabling statute: *Dunsmuir* at paras. 53, 54, 59, 163 and 166; *Brown v. Residential Tenancy Act,* 2008 BCSC 1538 at para. 26.

[199] With regard to the standard used when a tribunal interprets its own statute, the majority in *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, 2009 SCC 39 at para. 34 said:

> [34] The inference to be drawn from paras. 54 and 59 of *Dunsmuir* is that courts should usually defer when the tribunal is interpreting its own statute and will only exceptionally apply a correctness standard when interpretation of that statute raises a broad question of the tribunal's authority.

[200] The Ministry says that "[i]dentifying the contours and the content of a legal rule are questions of law" which attract correctness. The jurisprudence suggests that these are questions of law but that the standard of review will be reasonableness where the Commissioner is interpreting FIPPA.

[201] Applying a legal rule "... is a question of mixed fact and law": *Dunsmuir* at para. 164. Questions of mixed fact and law are generally reviewable on the reasonableness standard, except where a question of law can be extricated from the decision-maker's conclusion: *Dunsmuir* at para. 164.

Deference to the Corrections Branch

[202] The Ministry says that the Commissioner must show significant deference "to the public body's operational requirements and its expertise in determining how those are best achieved". I have found portions of the Ministry's submissions on this issue inadmissible as they rely on the extra-record affidavit material.

[203] The Ministry says, at para. 28 of its outline, that context is an important part of the analysis under FIPPA and that:

> [28] The contextual factors include the nature of the prison and its population, the nature and role of security in a prison environment, the nature of the information being requested and operational mandate of the public body in this case.
>
> > Here the nature of the relationship between the parties (jail keeper and accused). The place where the information was obtained (prison), the manner in which it was obtained (a search upon admission). And the seriousness of the crime (manslaughter) form the critical context in which the right to privacy needs to be assessed. [*R. v. Lamirande,* 2002 MBCA 41, leave to appeal to S.C.C. refused, (23 January, 2003), 29205 (S.C.C.).]

[204] The *Lamirande* case cited by the Ministry involved the seizure of notes and documents from, and a strip search of, an accused when she was taken into custody. The admissibility of the seized documents was challenged at trial on the basis that the accused's s. 8 *Charter* rights had been violated. The paragraph cited above is part of the analysis of whether the accused had a reasonable expectation of privacy in the documents, given the prison setting.

[205] The Ministry also cites American jurisprudence for the proposition that "deference should be shown to prison regulations and authorities". The cited United States Supreme Court case, *Hudson v. Palmer*, 468 U.S. 517; 104 S. Ct. 3194 (1984) involved a claim by an inmate for compensation for personal property he says was damaged by a prison guard. There is a discussion about whether the prisoner had a right to privacy in his prison cell.

[206] I do not find these cases assist the Ministry.

[207] The right to privacy is a constitutional right. The extent or existence of that right is determined by considering whether the party asserting it had a reasonable expectation of privacy. Context is important in determining the reasonableness of an asserted expectation of privacy.

[208] This concept does not apply to FIPPA, which does not consider the "expectation of privacy" but the risk of harm from disclosure. The former concerns general privacy rights and the latter rights to information.

[209] This judicial review concerns a review of legislation which has several purposes, one of which is to facilitate the disclosure of an applicant's information. This purpose could not be achieved if the Commissioner were required to defer to the public body resisting disclosure.

[210] In my view, there is no basis on which to find that FIPPA should be applied differently to personal information which originates in the VCJ than it is otherwise applied. It was open to the legislature to except personal information collected in correctional institutions from FIPPA's provisions; it did not do so.

[211] This does not mean that the prison context is irrelevant. Certainly, that environment factors into the harms analysis. However, the fact the information was collected in prison cannot trump Stelmack's rights to access her information.

[212] An additional difficulty with the Ministry's argument on deference is that it asks the Commissioner to defer to information which was not before it, including the Second Lang Affidavit and the Moniz Affidavit. Had this evidence been before the Adjudicator, it might have influenced her conclusion. However, this Court's role on judicial review is to determine whether she erred on the evidence she had before her.

[213] In the result, if the Ministry cannot bring itself within one of FIPPA's exceptions, Stelmack is statutorily entitled to the DVRs. However, to the extent its submissions on deference are admissible, they may be relevant to the reasonableness or the correctness of the Adjudicator's conclusions.

3. How should the Review Decision be characterized?

[214] The Ministry says that the Review Decision should be characterized as supplemental reasons for decision to the Order and therefore that the extra-record evidence which was before the Senior Adjudicator is admissible in support of the judicial review of the Order. The Ministry says that *Re: Uncle Ben's Tartan Breweries of Alberta Ltd.,* 44 D.L.R. (3d) 614, [1974] 4 W.W.R. 119 (Alta. C.A.) and *Alberta Board of Industrial Relations et al. v. Stedelbauer Chevrolet Oldsmobile Limited,* [1969] S.C.R. 137, 1 D.L.R. (3d) 81 support this interpretation.

[215] In my view, the Commissioner is correct in submitting that these cases are distinguishable. In *Uncle Ben's,* the additional decision resulted from a reopening. Therefore, the additional evidence adduced on rehearing formed part of the record of the decision under review.

[216] In *Alberta Board of Industrial Relations*, the additional material was interpreted as the written reasons for the tribunal reaching the decision which was under review. That is not the case here. The Review Decision pertains to an application to reopen, not to the original matter before the Adjudicator.

[217] In my view, the characterization of the Review Decision is a matter of common sense.

[218] The Ministry and Brown appeared before this Court on judicial review seeking to supplement the record each had put before the Adjudicator on matters which were at issue on the Inquiry. After reading the Order, each recognized deficiencies in the evidence they had put before the Adjudicator and sought to fill in the gaps. In Brown's case, a portion of her extra-record evidence concerned matters which occurred after the parties made their submissions to the Adjudicator.

[219] The petitioners then sought an adjournment so the Commissioner could consider whether he had unspent jurisdiction to reopen the matter to consider the extra-record evidence.

[220] The Ministry now seeks to circumvent the question of whether extra-record evidence is admissible on judicial review by saying that the Review Decision constitutes supplementary reasons to the Order and as such, all material before the Senior Adjudicator relevant to the Review Decision forms part of the record of proceeding in the Order and must be considered on judicial review.

[221] I cannot accept that material which the Senior Adjudicator rejected as a basis for reopening the Order should be considered part of the record before the Adjudicator in making the Order.

[222] In my view, a decision on whether to reopen the Order is a matter which falls squarely within the Commissioner's discretionary powers. Were I reviewing this decision, it would be entitled to deference.

4. Are the petitioners' extra-record affidavits admissible on judicial review of the Order?

Brown's Position

[223] Brown says that extra record evidence is admissible on judicial review if it meets the test in *Eamor v. Air Canada Ltd.* (February 16, 1998), Doc. Vancouver A934706, [1998] B.C.J. No. 344 (cited to B.C.J.) at para. 4 (S.C.). She also relied on Federal Court cases which suggest that background information is admissible on judicial review.

[224] In addition, Brown says that FIPPA must be considered in light of its purposes and objectives, including "to make public bodies more accountable to the public and to protect personal privacy": *FIPPA* s. 2; *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 at para. 1; and *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53 at paras. 25-26. She says that one of the purposes of the legislation is to minimize intrusiveness in the lives of public employees and cites *Re: British Columbia (Ministry of Attorney General)*, [1997] B.C.I.P.C.D. No. 19, Order 161-1997 at para. 26, 28.

[225] Brown submits that the Brown Affidavit should be considered.

Ministry's Position

[226] The Ministry relies on its argument that the Review Decision is supplemental to the Order and that material before the Senior Adjudicator is therefore admissible as part of the record.

Stelmack's Position

[227] Stelmack adopted the Commissioner's submissions on this issue. She says that the extra-record evidence is not admissible on judicial review and cites *Harrison v. British Columbia (Information and Privacy Commissioner)*, 2009 BCCA 203 at para. 66-68.

[228] Extrinsic evidence is admissible only where it goes to prove that the tribunal exceeded its jurisdiction or failed in its duty to be procedurally fair: see *Telus Communications Company v. Telecommunications Workers Union*, 2009 BCSC 1289 at para. 43.

[229] Stelmack distinguishes Brown's cases:

> [20] The backbone of all the cases, and prevailing law in the [petitioner's] submission, is that a judge on judicial review is not sitting on appeal and may not conduct the judicial review as though it was an appeal. The review is for lawfulness.

[230] Finally, Stelmack says that considering this evidence amounts to applying a standard of "objective correctness".

Analysis on Admissibility of Extra-Record Evidence

[231] It is trite law that a court's role on judicial review is to supervise administrative decision-makers and not to usurp their function. As Bastarache J. and Label JJ. said in *Dunsmuir* at para. 28:

> [28] ...Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality,

> the reasonableness and the fairness of the administrative process and its outcomes.

[232] Flowing from this is the general principle that courts assess the reasonableness and fairness of an administrative decision on the basis of the evidence which was before the decision-maker, except in circumstances in which a party alleges that the decision-maker exceeded its authority or acted unfairly.

[233] In *Eamor,* the case cited by Brown to support the admissibility of her extra-record evidence, this Court cited *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, 106 D.L.R. (3d) 212 for the four-part test for admitting extra-record evidence on appeal. Mr. Justice Low found that *Wade v. Strangway* (1996)*,* 132 D.L.R. (4th) 406, 18 B.C.L.R. (3d) 108 (C.A.) extended the applicability of the test to judicial review hearings.

[234] However, I note that in both *Eamor* and *Wade,* the petitioner sought to argue that the decision was unfair. In *Eamor,* the petitioner asked the Court to consider evidence that the arbitrator was misled and that the decision against the petitioner was therefore fraudulently obtained. Low J. said, at para. 7:

> [7] For the purposes of the present ruling, I need only determine whether the tendered new evidence is capable of proving fraud and whether or not the fraud, if proved, would go to the foundation of the case.

[235] *Eamor* does not stand for the proposition that all extra-record evidence will be considered on judicial review if it meets the test for admitting new evidence on appeal. Evidence that a decision was fraudulently obtained is generally admissible on judicial review to permit the court to determine issues of procedural fairness because a decision obtained by fraud is unfair.

[236] The underlying case, *Wade,* supports this interpretation. In that case, the petitioner asked the Court to find that a university President's decision not to recommend the petitioner for tenure was based on a wholly inadequate foundation. The Court dismissed the petitioner's application to adduce on review evidence which was not before the decision-maker but which was available at the relevant time.

[237] The Court accepted that the four-part test from *Palmer* applies when assessing whether extra-record evidence should be admitted on appeal of a judicial review. However, again, the petitioner alleged that the decision was tainted by a conflict of interest, that is, that the decision was unfair. After considering the flaws in the new evidence, Newbury J.A., writing for the Court, said at para. 10:

> [10] ...As I said earlier, absent a jurisdictional error or breach of the duty of fairness, Dr. Strangway was entitled to make the decision he did when he did....

[238] I read this case as saying that where a party alleges a jurisdictional error or a breach of the duty of fairness, the *Palmer* test applies to determine whether extra-record evidence is admissible. I note that *Wade* has been cited only once, in *Eamor,* a case in which fraud was alleged.

[239] Brown advanced three other cases in support of applying the *Palmer* test on the present facts: *British Columbia (Ministry of Education) v. Moore,* 2008 BCSC 264; *Gallupe v. Birch* (April 30, 1998), Doc. Victoria 972849, [1998] B.C.J. 1023 (S.C.); and *CPR v. The Information and Privacy Commissioner et al. (In the Matter of the Judicial Review Procedure Act)*, 2002 BCSC 603. Though the test was referred to in each case, only in *Gallupe* was extra-record evidence admitted and there it was limited to evidence of what occurred before the arbitrator.

[240] This review of the relevant law leads me to conclude that the *Palmer* test applies to determine whether extra-record evidence is admissible on issues of jurisdiction and procedural fairness.

Conclusions on Admissibility of Extra-Record Evidence on Judicial Review of the Order

[241] The Senior Adjudicator concluded that the test to determine whether to reopen the Inquiry to consider extra-record evidence, and to revisit the terms of the Order is the *Palmer* test, the test for accepting extra-record evidence on appeal. That test has four parts:

> (1) the evidence should generally not be admitted if by due diligence it could have been adduced at trial, provided that this general principle will not be applied as strictly in a criminal case as in civil cases...;
>
> (2) the evidence must be relevant, in the sense that it bears upon a decisive or potentially decisive issue in the trial;
>
> (3) the evidence must be credible, in the sense that it is reasonably capable of belief; and
>
> (4) it must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the trial.

[242] The first part of the *Palmer* test generally renders inadmissible extra-record evidence that was available at the time of the original decision and which was not put before the decision-maker.

[243] This first part of the test renders inadmissible the Ministry's extra-record evidence and much of Brown's extra-record evidence.

[244] Brown says I have inherent jurisdiction to admit the Brown Affidavit. She further says background evidence is admissible on judicial review.

[245] The Brown Affidavit is not background information. It is new evidence, most of which was available at the time of the Inquiry. I do not find any reason to depart from the general rule that evidence which was available but which was not put before the Commissioner is not admissible on judicial review.

[246] I find inadmissible those portions of the Brown Affidavit which were available when Brown was making submissions before the Adjudicator. Specifically, evidence which concerns prior assaults and her general safety concerns will not be admitted.

[247] I adopt the Senior Adjudicator's analysis with respect to the Ministry's three extra-record affidavits. The Gardiner Affidavit swears to the Ministry's limited technological capabilities and its effect on the Ministry's ability to sever personal information from the DVRs. This information could have been collected and put before the Adjudicator. Though Gardiner says this evidence was prepared in response to the terms of the Adjudicator's Order, the issue of what constitutes severance and whether severance was possible was raised before the Adjudicator

and the Ministry made submissions on these matters. The Gardiner Affidavit attempts to supplement those earlier submissions.

[248] The Moniz Affidavit concerns the importance of security systems in general. Not only do I find that it could have been prepared and put before the Adjudicator, the evidence is not specific to the VCJ or the DVRs in question and cannot assist in the analysis.

[249] Finally, I adopt the Senior Adjudicator's remarks at paras. 88, 90 and 93 which found that the evidence in the Second Lang Affidavit could have been adduced before the Adjudicator.

[250] What remains is the evidence of a plot against Brown, evidence which was not available when Brown was making submissions to the Adjudicator.

[251] Under the first part of the *Palmer* test, I would find this evidence admissible because it was not available at the time the Adjudicator accepted submissions from the parties and I accept that the psychological consequences of the plot prevented Brown from considering whether to make additional submissions before the Adjudicator until August 2008. By that time the Order had been issued.

[252] However, at the relevance stage this evidence becomes inadmissible. I have limited the application of the *Palmer* test to issues of jurisdiction and procedural fairness. Brown's evidence must therefore be relevant to those issues to be admissible.

[253] Brown says that this evidence demonstrates her unique susceptibility to physical and, in particular, mental harm. She says this evidence will lead to the conclusion that the Adjudicator erred in finding that release of Brown's image is not an unreasonable invasion of her privacy.

[254] The evidence cannot assist Brown on this judicial review. I have not found any issues of true jurisdiction and the issues of procedural fairness raised by Brown

relate to her rights to participate in the Inquiry and the sufficiency of the reasons. Evidence of the plot against her is not relevant to these issues.

Law and Analysis on Issues Respecting the Review Decision

[255] Neither petitioner has argued before me that the Senior Adjudicator had no jurisdiction to consider reopening the Inquiry to hear extra-record evidence.

[256] The Ministry's position before the Senior Adjudicator was that she did not have the required jurisdiction. However, the Ministry has not sought judicial review of the Review Decision.

[257] Brown's position before the Senior Adjudicator was that she did have the required jurisdiction and on judicial review she says the Senior Adjudicator erred in declining to reopen.

[258] In the result, I proceed to review the alleged errors in the Review Decision, assuming, without deciding, that the Senior Adjudicator could have reopened the Inquiry to hear extra-record evidence.

5. Did the Senior Adjudicator err in determining whether to reopen the Order?

a. Did the Senior Adjudicator err by applying the test for admitting extra-record evidence on appeal to the question of whether there was jurisdiction to reconsider the Order?

[259] This issue is raised in Brown's Amended Petition.

[260] In order to assess the standard of review, I must consider the basis on which the Senior Adjudicator made her decision. Where the decision is based on an interpretation of her enabling legislation, the jurisprudence suggests she should be accorded deference. In other circumstances, as a question of general law and of jurisdiction, the test to be used when deciding whether to reopen an administrative decision must be reviewed on a standard of correctness.

[261] *Guide Outfitters Assoc.* is an example of a situation in which the Commissioner was required to interpret its governing statute to determine whether to reopen an inquiry; that decision was reviewed on the reasonableness standard. The Minister asked the Court to quash the Commissioner's decision permitting a conservation society, Rainforest, access to the location of grizzly bear kill sites. The Commissioner determined that the Minister was not authorised to refuse to disclose specific information on the kill sites under s. 18(b), as argued.

[262] In light of new submissions made by the Minister and the Guide Outfitters Association of British Columbia (the "Outfitters"), which supported non-disclosure, the Commissioner reconsidered the decision but declined to reopen the inquiry. This decision was based on her finding that s. 19 of FIPPA did not require her to permit the Outfitters to participate in the inquiry to the extent they desired.

[263] The Court of Appeal held that the wording of s. 19 gave the Commissioner broad discretion to determine who could participate in an inquiry and that the Commissioner's decision not to accord the Outfitters additional participatory rights was reasonable in the circumstances.

[264] In the present case, the Commissioner does not have the same statutory guidance when assessing whether to reopen; FIPPA does not outline in what circumstances, if any, the Commissioner can reopen an inquiry after issuing an order or outline the test to be used to determine whether to reopen an inquiry to consider extra-record evidence.

[265] It may assist if I outline the Senior Adjudicator's analysis on this point. She began by considering the context within which the application was made, and specifically the fact that reopening was requested as a means to ascertain whether the Commissioner had unspent jurisdiction to consider extra-record evidence which the petitioners argued would have altered the terms of the Adjudicator's Order. In my view, this context is an important factor in her decision and I will come back to it in analyzing many of the petitioners' issues.

[266] The Senior Adjudicator proceeded to "analyse Order F08-13 and the new evidence and grounds in the applications for judicial review against the principle of finality and its exceptions": Review Decision at para. 35.

[267] She considered *Chandler*. In that case, the majority considered whether the Practice Review Board of the Alberta Association of Architects, whose enabling statute did not confer a power to rescind, vary, amend or reconsider a final decision, was *functus officio* upon delivering its report. The report exceeded the board's jurisdiction by imposing fines and disciplinary action but, the majority held, did not complete the board's statutory task because the board failed to consider whether to make recommendations.

[268] Mr. Justice Sopinka determined that the doctrine of *functus officio* has some application in the administrative law context, and said, at 861:

> ...As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances.

[269] However, he went on to say, at 862:

> ...I am of the opinion that [the application of *functus officio*] must be more flexible and less formalistic in respect of the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

[270] The Senior Adjudicator concluded that the test to determine whether to reopen the Inquiry to consider extra-record evidence, and to revisit the terms of the Order, was the test for accepting extra-record evidence on appeal. That test is summarized in *Palmer* and I have noted the summary and applied it above.

[271] She noted that this discretion was narrower than a trial judge's broad discretion to reopen after judgment and before an order is entered but considered this appropriate, in part, because of the Court of Appeal decision in *Clayton v. British*

American Securities Ltd. et al., [1935] 1 D.L.R. 432 at 441, [1934] 3 W.W.R 257 in which McPhillips J.A. wrote concurring reasons and explained the rationale for the narrower discretion on appeal:

> There are reasons for rules governing the admission of evidence by an Appellate Court, not applicable to a trial Judge. Hearing new evidence is a departure from its usual procedure and it is fitting that departures in ordinary practice should be limited by rules to prevent abuse. Entry of judgment may be merely a formality but it is necessary that at some arbitrary point the jurisdiction of the trial Judge should end. A vested right to a judgment is then obtained subject to a right to appeal and should not be lightly jeopardized. Before the gate is closed by entry a trial Judge is in a better position to exercise discretion apart from rules than an appellate Court. He knows the factors in the case that influenced his decision and can more readily determine the weight that should be given to new evidence offered...

[272] Her analysis also considered the role of time limits in achieving finality. I will consider this below, as Brown says incorporating this factor was a distinct and reviewable error.

[273] In my view, the Senior Adjudicator's decision to apply the test for adducing extra-record evidence on appeal is reviewable on a standard of correctness.

[274] Determining which test to apply to reopen did not require the Senior Adjudicator to interpret FIPPA; FIPPA is silent on the subject. Instead, it required analysis of the nature of judicial review and the jurisprudence on administrative law. The Court has greater relative expertise in the area of general administrative law.

[275] I understand Brown's argument before the Senior Adjudicator to have been that the Adjudicator's alleged incorrect findings of fact, each of which I will address below, are so fundamental to the Order so as to taint the whole proceeding and render the Order a nullity. In those circumstances, the tribunal must start afresh (see *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (December 19, 1978), Doc. Vancouver C796691, 9 B.C.L.R. 232 (S.C.).

[276] I do not view these questions as questions of "true" jurisdiction as that concept is defined in *Dunsmuir* at para. 59:

> [59] ...It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose leaf), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City),* [2004] 1 S.C.R. 485, 2004 SCC 19. In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, per Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in [*Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227] that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

[277] Therefore, the Brown Affidavit is not admissible on this issue.

[278] Before the Senior Adjudicator, Brown argued that the correct test was that applied by a trial judge when determining whether to accept extra-record evidence prior to entry of a formal order. That test requires a party seeking to adduce evidence to demonstrate that a miscarriage of justice would probably occur if the matter were not reheard and that the new evidence would probably have changed the result: *Hodgkinson v. Hodgkinson*, 2006 BCCA 158 at 36.

[279] This test acknowledges that there are circumstances in which evidence which is not likely to change the result must nevertheless be put before the decision-maker in the interests of justice.

[280] I return again to the circumstances which brought the matter before the Senior Adjudicator. The parties sought to adduce extra-record evidence before me during the first phase of this judicial review in 2009. There was a suggestion that the Commissioner had unspent jurisdiction to reopen in light of that extra-record evidence and the parties adjourned this matter to explore this possibility.

[281] In their submissions to the Senior Adjudicator, the parties alleged the Order contained many errors, however the discrete issue which brought them back before the Commissioner was whether she could and would reopen the Inquiry and revisit the Order in light of the petitioners' extra-record evidence.

[282] In my view, in this context, the Senior Adjudicator acted correctly by focusing on whether the extra-record evidence was a basis for reopening.

[283] Further, the Senior Adjudicator correctly applied the *Palmer* test in the circumstances.

[284] I have reached this conclusion for two reasons. First, in *Chandler,* Sopinka J. was clear that an administrative decision reopened to consider extra-record evidence is designed "to provide relief which would otherwise be available on appeal".

[285] If the Senior Adjudicator's limited right to reopen stands in place of a right of appeal, it is logical for her to apply the same test to determine whether to reopen to accept extra-record evidence as she would if she were considering whether to accept extra-record evidence on appeal.

[286] Second, assuming the Adjudicator can be analogized to a trial judge, the Adjudicator's Order was "entered" and would have taken effect if not for the operation of FIPPA s. 59(2), which stayed that Order pending the outcome of this judicial review. The *Hodgkinson* test would therefore not apply.

[287] The real value in the extra-record evidence is in Brown's assertion that it would have changed the result. This is a factor which is considered within both tests.

[288] In the result, I find that the Senior Adjudicator was correct in applying the *Palmer* test for adducing extra-record evidence on appeal to the decision of whether to reopen the Inquiry.

b. Did the Senior Adjudicator err in law when she determined that timeliness was a requirement in bringing an application to reopen?

[289] I have reviewed at length the Senior Adjudicator's approach to reopening. After determining that she was required to apply the test for admitting new evidence on appeal, she said, at paras. 51-52:

> [51] ...It seems to me that a factor not to be overlooked in this is that time limits themselves promote finality and the window to apply to re-open a trial is short, often very short, because it is contained by the entry of the formal judgement and what is usually a time limit to appeal within 30 days of the pronouncement of judgement.
>
> [52] Turning to FIPPA, the time limit for a public body or third party to bring an application for judicial review of an order requiring access to be given to records is usually 30 business days, being the point at which the public body is required to comply with the order... When a public body complies with an order requiring it to give access to records, the order and the ability to re-open it are spent.

[290] She incorporated timeliness in bringing the application to reopen in the requirement for due diligence, the first stage of the *Palmer* test.

[291] As used by the Senior Adjudicator, timeliness is both a question of law and jurisdiction; it affects the manner in which the test for reopening is formulated and therefore the extent of the Commissioner's jurisdiction to reopen. While it was necessary for the Senior Adjudicator to refer to sections of her enabling statute to conclude that timeliness should be considered, she was not required to interpret those sections.

[292] In light of my analysis above on the issue of whether the Senior Adjudicator applied the correct test in determining whether to reopen the Inquiry, I find that the issue of *whether* timeliness can be factored into the doctrine of finality must be reviewed on a standard of correctness. Again, I find this a question of general administrative law on which the Court has greater expertise. I have considered that this is also related to the Commissioner's process, but determined that correctness is the appropriate standard of review.

[293] If the decision to incorporate timeliness into due diligence at the first stage of the *Palmer* test is correct, the *application* of that factor to the present facts is a question of mixed fact and law, specific to the privacy context. The Senior Adjudicator has expertise in this area, relative to this Court's expertise, and the application is therefore reviewable on a standard of reasonableness.

[294] Brown says it was an error for the Senior Adjudicator to incorporate timeliness into the doctrine of finality. This finding, Brown says, permeates the decision and is wrong. *Chandler* requires a more flexible application of timeliness.

[295] Stelmack says the Senior Adjudicator properly incorporated a due diligence requirement; this flows logically from the fact there is no right of appeal and judicial review is a limited right of review. As fixed timelines exist on appeal, they should also be imposed in processes designed to replace a right of appeal.

[296] I find that Stelmack's position has a certain logical appeal. However, I should not be read as saying that the decision to reopen is entirely analogous to the appeal of a trial decision.

[297] While in *Chandler,* a majority of the Supreme Court of Canada says the doctrine of *functus* should be applied flexibly to grant relief which might otherwise be granted on appeal, it is important to remember that FIPPA does not give applicants a right of appeal.

[298] The statutory scheme must be read as valuing finality.

[299] In *Chandler,* the Court considered at what point the board was rendered *functus officio.* Sopinka J. found that the result was dictated by whether the board had made a final decision. A decision was said to be final when it achieved the board's statutory task: *Chandler* at para. 23.

[300] There is therefore a limited time within which a decision-maker can continue to exercise jurisdiction over a matter. To this extent, it is correct to say there is a timeliness factor to the exercise of jurisdiction.

[301] It is not necessary that I determine at precisely what point the Commissioner became *functus* but only to determine whether the Senior Adjudicator's decision on this issue is reasonable in this case.

[302] The Senior Adjudicator found that there was no basis to reopen the Inquiry to hear evidence which was available before the Adjudicator issued the Order. This evidence includes the evidence of the physical assaults on Brown in 1999 and 2000.

[303] It appears that this evidence may not have been put before the Adjudicator because Brown misunderstood the process and was not represented. While this is unfortunate, I cannot find that the Senior Adjudicator acted unreasonably in deciding that this evidence did not support reopening.

[304] The Senior Adjudicator properly deals with the evidence of the March 2008 threat to Brown's life, also referred to as the plot, separately. This evidence could not have been adduced in Brown's original submissions, however it was available before the Order was issued on June 27, 2008.

[305] The Senior Adjudicator considers that the stress of the plot could explain why Brown did not come forward immediately. Instead of requiring that Brown had adduced the extra-record evidence within a certain time of becoming aware of it, she considers the delay excessive because "[i]n August 2008, she was well enough to begin returning to work. She did not bring forward her new evidence, or make her application for judicial review, until April 2009."

[306] The Senior Adjudicator was required to determine how long after the Order was issued the Commissioner retained jurisdiction to reopen a matter which was scheduled for judicial review. She considered that the Commissioner's jurisdiction might extend to permit extra-record evidence to be admitted if it was brought before the Commissioner at the first reasonable opportunity, here, when Brown was well enough to return to work.

[307] *Chandler* is authority for the flexible application of the doctrine of *functus* in the administrative setting, however it does not say that the doctrine does not apply.

[308] I find the Senior Adjudicator's conclusion reasonable that Brown did not meet the timeliness/due diligence requirement to adduce extra-record evidence to reopen the Inquiry. Her approach left Brown considerable leeway within which she could have met this first part of the *Palmer* test while balancing the need for finality in administrative decisions.

c. Did the Senior Adjudicator err in determining that the Brown Affidavit could not reasonably be expected to have affected the result of the Order?

[309] Brown's argument on this point is that the finding of credibility is unreasonable given that the Senior Adjudicator accepted Brown's concerns are *bona fide.*

[310] This question is one of mixed fact and law, that is, an application of the fourth part of the *Palmer* test to the facts of the present case. This is reviewable on a standard of reasonableness for the same reasons that the application of the first part of the *Palmer* test was reviewable on that standard: the Senior Adjudicator was required to interpret her own statute to determine whether the evidence assisted the Ministry to argue s. 15, invoked an element of s. 22 or required her to consider s. 19.

[311] The Senior Adjudicator determined that the extra-record evidence did not meet the test for reopening because it did not have a bearing on a decisive or a potentially decisive issue and could not reasonably have affected the result of the Order. She said, at para. 74:

> [74] [Brown's] evidence of the March 2008 threatening incident at another jail that put her at risk of physical harm and caused harm to her mental health is reasonably capable of belief. It could have bearing on a decisive or potentially decisive issue in the inquiry if reasonably connected to risk to her physical safety or health should her DVR image be disclosed. In my view, it is at this point that the credibility of the new evidence does not bear up. The Adjudicator described the content of DVRs 2 and 3. I also viewed the DVRs. I agree with the Requester that there is a lack of nexus between the threatening incident at the other correctional facility in March 2008 and risk of harm to the Correctional Officer from disclosure of her image in DVR 2. The correctional [sic] Officer's contention that the release of her image could reasonably be expected to endanger her physical safety or mental wellbeing is not reasonably capable of belief. Her subjective concern... however *bona fide*, could not reasonably be expected, taken with the other evidence adduced at inquiry, to have affected the result in Order F08-13.

[312] Brown says that the finding that her evidence was not credible is unreasonable in light of the finding that Brown's concerns are *bona fide* and that her statement is reasonably capable of belief.

[313] As used, "credibility" suggests that the Senior Adjudicator questioned Brown's truthfulness. Brown says that credible should mean "reasonably capable of belief".

[314] I agree with Brown's submission on the meaning of "credible" in this context, but further find that the Senior Adjudicator intended credible to mean "reasonably capable of belief".

[315] The Senior Adjudicator found that the lack of nexus between the plot and the risk of harm from disclosure of Brown's image renders it unlikely that evidence of the plot would have changed the result of the Inquiry. I read this paragraph as saying that the Senior Adjudicator accepts that Brown is concerned, but that she disagrees with Brown's assessment of the effect of the extra-record evidence on the Order.

[316] It appears that the Senior Adjudicator differentiated between whether the statement was capable of belief and whether the impact of the statement was reasonably capable of belief. At para. 74, the Senior Adjudicator says: "[t]he correctional [*sic*] Officer's contention that the release of her image could reasonably be expected to endanger her physical safety or mental wellbeing is not reasonably capable of belief".

[317] It was open to the Senior Adjudicator to determine that the statement would not have affected the result of the Inquiry. It follows that the Senior Adjudicator reasonably applied the fourth part of the *Palmer* test. I do not find that she erred in finding there was no basis upon which to reopen the Inquiry to hear extra-record evidence.

6. Did the Senior Adjudicator err by failing to reopen to consider alleged errors in the Adjudicator's application of FIPPA?

[318] The petition raises the following issues concerning the Senior Adjudicator's Review Decision:

> ***a. Did the Senior Adjudicator err when she determined that there was no basis to reopen the Order to rectify alleged errors in the application of s. 15 of FIPPA?***
>
> ***b. Did the Senior Adjudicator err when she determined that the Order could not be reopened to rectify the finding that s. 22(2) of FIPPA was not a relevant factor?***
>
> ***c. Did the Senior Adjudicator err when she determined that the Order could not be reopened to rectify the failure to consider FIPPA s. 19?***
>
> ***d. Did the Senior Adjudicator make an unreasonable finding of fact in determining that the release of Brown's image could not reasonably be expected to endanger her physical or mental well-being?***

[319] I find it unnecessary to review these issues for the following reasons.

[320] First, I decline to assume the Senior Adjudicator had the jurisdiction to reopen the Inquiry to consider these issues. This issue was not argued before me.

[321] There is authority which suggests that a tribunal may reconsider a matter afresh when the original decision is a nullity but that as long as the original exercise of jurisdiction stands, the tribunal's authority is spent.

[322] In *Lange,* a teacher was dismissed by the board of education because the decision-maker relied, in part, on allegations the teacher had not been given an opportunity to address.

[323] The teacher's termination was set aside and the school board proceeded to investigate the matter afresh, considering all allegations. The teacher was again dismissed.

[324] The teacher argued that after his initial termination was set aside, it was not open to the school board to use the same allegations as the basis for the second termination. The Court disagreed, saying:

> Counsel for the respondent contends, and I think correctly, that **there is a difference between those cases where what was being reconsidered was a valid decision which the board in question had earlier made and this case where the school board, having had its earlier decision rendered a nullity, commenced fresh**

> **proceedings with respect to the same subject matter**. The court in Can*. Indust. Ltd. v. Dev. Appeal Bd. of Edmonton, supra,* recognized this distinction when it pointed out at pp. 638-40 that, if the board had acceded to the request that it vacate its earlier order, it could have entered upon a new hearing, having decided that its previous hearing was a nullity. [Emphasis added.]

[325] In *Re: Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster* (1983), 147 D.L.R. (3d) 637, 45 B.C.L.R. 258 (S.C.), McLachlin J. (as she then was) summarized the law at p. 643:

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision…: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)* (1978), 9 B.C.L.R. 232 (B.C.S.C.); *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] S.C.R. 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in *Ridge v. Baldwin*, [1964] A.C. 40 at p. 79, where he said:
>
> > I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present its case, then its later decision will be valid.

[326] FIPPA does not give applicants a right of appeal. It is therefore not clear that the Senior Adjudicator could have declared the Order invalid and proceeded to re-exercise jurisdiction as if the Order were a nullity.

[327] Second, while on the submissions before me I am unable to decide whether the Senior Adjudicator had jurisdiction to reopen a decision to remedy errors of law and jurisdiction, I can find no statutory or common law authority requiring her to do so.

[328] I would therefore have reviewed the Senior Adjudicator's decisions on these issues on a reasonableness standard. One factor which would have gone into this decision is the reason for the adjournment of the judicial review.

[329] The adjournment was granted to permit the parties to ascertain whether the Commissioner had unspent jurisdiction to consider new evidence. The judicial review was in progress.

[330] It was reasonable for the Senior Adjudicator to limit the scope of her decision to consider only the admissibility of the extra-record evidence when the other issues raised before her were already before this Court on judicial review.

[331] As well, the petitioners have raised issues requiring that I review the Adjudicator's application of ss. 15 and 22(2), her apparent omission of s. 19 from her deliberations, and her finding that release of Brown's image could not reasonably be expected to endanger her physical or mental wellbeing.

[332] Given the context of this review, I would not find the Senior Adjudicator acted unreasonably in declining to reopen to consider these issues unless I found the Adjudicator's decision was in error.

[333] Therefore, any remedy which would flow from reviewing the Review Decision will flow from my review of the Order.

[334] I conclude that if the Senior Adjudicator had authority to reopen the Inquiry to consider whether the Adjudicator erred in applying the law or determining jurisdiction, her decision whether or not to do so is discretionary and would be reviewable on a standard of reasonableness. However, I find that it is not necessary for me to consider these issues to perform my review function.

7. Did the Senior Adjudicator or Adjudicator breach the rules of natural justice and/or procedural fairness?

[335] Brown raises this issue in her Amended Petition but addressed it only tangentially in oral argument. Her comments concerned the process before the Adjudicator and before the Senior Adjudicator. I will address both here.

[336] I understand Brown's first argument to be that she was denied the opportunity to fully participate in the Inquiry. She first became aware that her personal information was the subject of a FIPPA request when she received the Notice of Written Inquiry dated February 9, 2007 (the "Notice"). By the time she received the Notice, the Ministry had applied the statutory exemptions and determined on what

bases it sought to refuse to disclose the DVRs. She therefore says she had no opportunity to require the public body to consider s. 19.

[337] She further says she has never seen the records and therefore in argument before both the Adjudicator and Senior Adjudicator, she did not know what personal information of hers might be disclosed.

[338] Nevertheless, Brown says, in her submissions before the Adjudicator she raised her concern that release of her personal information might lead to harm. Therefore, it was unfair for the Senior Adjudicator not to reopen to the Inquiry and amend the Order and cure the defect in the process before the Adjudicator.

[339] Brown makes the further argument that the Adjudicator did not provide sufficient reasons to explain her conclusions in respect of the s. 22 issue. I will discuss this below when I analyze the other alleged s. 22 errors.

[340] I have carefully reviewed the Notice and the letter from the Registrar of Inquiries to Brown dated February 8, 2007. The Notice provides the following relevant information:

- the Commissioner or a delegate will consider whether the public body is required/permitted to withhold the records pursuant to ss. 22(1), 15(1)(a), (f) or (l), or can reasonably sever personal information pursuant to s. 4(2).

- the burden is on Stelmack to prove that disclosure of personal information would not be an unreasonable invasion of Brown's right to privacy; and

- Brown has a right to make submissions and reply submissions.

[341] In addition to repeating the above information, the letter contains the following relevant passages:

- "Given that you are a third party in this matter, because your image is recorded on the requested digital video recording, you are an appropriate person to notify regarding the application of s. 22(1) to the requested record."

- “Please contact Dorothy Fielding... if you wish details on the records in dispute.”

- “If you have any questions about the inquiry process, please call me....”

[342] The letter made it clear that Brown’s image was recorded on the DVRs and might be released. Brown had been cleared of wrongdoing in her dealings with Stelmack and says she thought this meant the DVRs could not be released.

[343] The letter and Notice gave Brown the opportunity to fully participate in the Inquiry. Brown prepared her submissions with her husband’s help. She also asked a Union representative to assist her. Neither had legal training.

[344] Brown’s decision not to seek legal advice at this stage is perhaps regrettable. It is likely she considered doing so, but dismissed the idea as too expensive or relied on the Ministry to protect her privacy interests. Brown would have benefited from the assistance of counsel or someone with experience acting before the Commissioner. As these Reasons make clear, the evidence put before the Adjudicator at an Inquiry is of the utmost importance at every stage in the process.

[345] However, I must assess procedural fairness based on the opportunities given to Brown.

[346] Brown chose to make short submissions which did not raise s. 19. She did not question the Ministry’s use of its discretionary disclosure exceptions before the Adjudicator. Had she done so, it might have been open to the Senior Adjudicator or this Court to find the Adjudicator acted unfairly if the Adjudicator failed to consider those submissions.

[347] However, the Court is left to determine whether, on the evidence before her, it was incumbent on the Adjudicator to consider s. 19. That issue is addressed below; it does not raise procedural fairness concerns.

[348] I conclude that Brown was accorded full participatory rights before the Adjudicator.

[349] It follows that I find that the Senior Adjudicator did not err in failing to reopen the Inquiry to permit Brown to make submissions on s. 19.

[350] While Brown's submissions did allude to the fact she was concerned that release of her image might result in harm of some kind, she did not provide any evidence which suggested her concern was more than speculative. Brown's bare assertion that she was concerned that disclosure might cause her harm was insufficient.

[351] I cannot find that Brown was otherwise denied an opportunity to fully participate in the Inquiry. There is no evidence before me that Brown sought to view the DVRs, that she made further inquiries about the nature of her personal information contained on them and was denied that information or that she asked about the Inquiry process and did not receive the information she needed to pursue her rights.

Law and Analysis on Issues Respecting the Order

8. Did the Adjudicator err in her analysis of s. 4 of FIPPA?

[352] Section 4 of FIPPA reads:

> **Information rights**
>
> 4 (1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.
>
> (2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

[353] Sections 15, 19 and 22 are within Division 2, therefore s. 4 applies to personal information excepted from disclosure pursuant to those sections.

[354] These issues must be reviewed on a standard of reasonableness, pursuant to *B.C. Teachers' Federation*. The reasonableness of steps required to comply with FIPPA, and in this case, the reasonableness of the effort and cost of severing third party images from DVRs 2 and 3, is a matter which falls within the Commissioner's expertise. It is a polycentric decision which requires a balancing of competing interests and requires FIPPA be interpreted and applied.

[355] The Ministry says that the Adjudicator erred in interpreting "blurring" as severing for the purpose of s. 4. I understand this submission to rely, at least in part, on the fact that severing must be "permanent" and "irreversible" and the Ministry's submissions that certain forms of "blurring" are currently reversible.

a. Did the Adjudicator order "blurring" of images?

[356] The Adjudicator addressed the need to delete third parties' faces from the DVRs; it is apparent that in some circumstances she considers facial features personal information which must be protected. At para. 72, the Order says:

> 1. The public body is to provide the applicant with a copy of DVR #3, edited to withhold the last portion of the tape which records the time after the applicant has left the room.
>
> 2. The public body is to provide the applicant with a copy of DVR #2, edited to remove information which would identify the other person held in custody in the same cell.

[357] She does not expressly say that only faces must be deleted. However, she says, at paras. 69-70:

> [69] I have held that the public body is required to give access to DVRs #2 and #3, and that in doing so, it is required to withhold information which would identify other persons being held in custody at the VCJ. DVR #3 only reveals information about other inmates at the end, after the applicant is removed from the cell, when the door is left open and it is possible to see people moving about....
>
> [70] As described above, DVR #2 includes images of another woman being held in the same cell as the applicant. I find that, prior to releasing DVR #2, the public body is required to determine a manner of withholding from release that information which would identify this third party. This will require some editing or manipulation of the video... Removing the information which identifies the third party will involve, **at the very least, blacking out or**

> **blurring the third party's face during the period of the altercation. It may also require some blacking out or blurring of the third party's face at the time she is brought into the cell.**

[358] Read as a whole, I find that the Adjudicator contemplated that the Order would be carried out by blurring certain faces.

[359] The difficulty in interpreting this aspect of the decision arises because as early as her February 21, 2007 submissions, Stelmack indicated that she was willing for the faces of all third parties to be "blocked out" except for Brown's.

[360] In submissions before the Adjudicator, the Ministry argued that it did not have the technical capability to sever third party information from the DVR and that the cost was unreasonable. It did not argue that blurring did not constitute severance.

[361] The parties and the Adjudicator appear to have proceeded on the assumption that if severing were required, it might involve blurring parts of the DVRs. This not only benefited Stelmack. In the alternative to resisting disclosure, the Ministry argued that certain security features should be obscured from the DVRs prior to their release.

[362] After carefully reviewing the Order, I find that the Adjudicator did decide that blurring was a form of severing. I make this finding because it is clear that the Adjudicator considered certain third party images personal information. The only statutory basis she considers for protecting the privacy of those third parties is s. 4 and its severing provisions.

[363] I conclude that the Adjudicator equated blurring or obscuring to severing in this instance.

b. Does "blurring" constitute severance for the purposes of s. 4?

[364] The Ministry says that the Adjudicator did not have the jurisdiction to order it to "blur", "edit" or "scramble" faces of third parties as this is not "severing" within the meaning of s. 4 of FIPPA.

[365] The Adjudicator had two affidavits before her concerning the severance issue: the affidavit of Vicki Hudson, sworn March 16, 2007 (the "Hudson Affidavit") and the affidavit of Dorothy Fielding, sworn May 15, 2007 (the "Fielding Affidavit").

[366] In the Hudson Affidavit, Hudson says she is Acting Director of the Privacy, Information and Records Management Division of the Ministry and that she "investigated what would be required to sever the DVRs", knowing that "it was a possibility that the Commissioner would want portions of the DVRs severed (removing and/or obscuring portions of the image) which show security features or third parties."

[367] She determined that her office did not have the necessary technology and made inquiries which determined that neither the Corrections Branch nor the Ministry had the technology. She made further inquiries and determined that the Public Affairs Bureau may have the ability to sever the DVRs, but could not confirm this "until they actually undertake the work".

[368] She further said that "she did not believe it would be prudent" to use outside contractors because they did not have security clearance to see the tapes. Obtaining security clearance requires a criminal records check and signing a confidentiality agreement.

[369] Hudson went on to say that based on Corrections' security concerns, she believed that any private company used would have to be bonded.

[370] The Fielding Affidavit says that Fielding contacted one company which provides video editing services. She says she was "necessarily vague" in her description of the nature of the images but that after a thorough discussion she was told that the cost of editing would be approximately $10,800 to blur faces and other images. She does not say why she contacted only one company and does not say that this blurring would be reversible.

[371] Therefore, in submissions before the Adjudicator, the Ministry:

1. contemplated that faces would have to be obscured;

2. adduced evidence indicating that it might be unreasonable to require blurring;

3. did not argue that blurring did not constitute severance;

4. acknowledged that the Public Affairs Bureau may be able to sever the DVRs;

5. indicated that if an outside company was required to do the work, they prefer it be bonded;

6. said that security clearance requires only a criminal records check and a confidentiality agreement;

7. did not indicate what is required to get a company bonded;

8. estimated the cost of editing the DVRs might exceed $10,000 on information obtained from one company.

[372] The Adjudicator held that the public body had not demonstrated that it would be “impossible or prohibitively expensive to edit the DVR” and that evidence about whether the Ministry or Public Affairs Bureau has the expertise is inconclusive and general. She was not convinced that the security issues could not be dealt with appropriately.

[373] Commissioner Loukidelis explained the onus on a public body respecting severance at paras. 51 and 64 of *Re: Ministry of Forest,* [2003] B.C.I.P.C.D. No. 16, Order No. 03-16:

> [51] …The test under s. 4(2) is one of reasonableness. There is no presumption (explicit or implicit) in this test that it is reasonable to sever excepted information only if the public body has the "normal computer hardware and software and technical expertise" for the task. On the Ministry's interpretation of s. 4(2), a public body could replace paper records with electronic records and fail, by design or for other reasons, to develop or acquire computer software or hardware, or technical skills, to sever the electronic version of the records. This would automatically qualify as a circumstance in which information excepted from disclosure cannot be

> reasonably severed and there would be no right of access to the remainder of the record.
>
> ...
>
> [64] It is not an option for public bodies to decline to grapple with ensuring that information rights in the Act are as meaningful in relation to large-scale electronic information systems as they are in relation to paper-based record-keeping systems. Access requests like this one test the limits of the usefulness of the Act. This is as it should be. Public bodies must ensure that their electronic information systems are designed and operated in a way that enables them to provide access to information under the Act. The public has a right to expect that new information technology will enhance, not undermine, information rights under the Act and that public bodies are actively and effectively striving to meet this objective.

[374] In my view, the Ministry's evidence left open the possibility that the Public Affairs Bureau could undertake the work and three other possible avenues for achieving severance: requiring a company to obtain security clearance, requiring a company to become bonded or using a company which is apparently already bonded, though somewhat expensive.

[375] The Ministry sought to adduce additional evidence on this issue both before the Senior Adjudicator and on this judicial review and relied heavily on this new evidence in its submissions.

[376] I have found this evidence inadmissible on my review of the Order. Deciding whether the requested DVRs would be released to Stelmack and, if so, what information would be severed to protect third party interests was the question at the centre of the Inquiry. The issue of severing facial features was part of the submissions and was not a new issue which arose after the Order was issued.

[377] It was incumbent upon the Ministry to adduce specific, relevant evidence on this point to enable the Adjudicator to make a reasonable decision. I decline to exercise my jurisdiction to permit the Ministry to cure defects in that evidence on judicial review.

[378] I do not agree with Stelmack's position that the cost of severing is irrelevant; the cost forms part of the Commissioner's assessment of whether the Ministry can

"reasonably" sever the DVRs. However, I adopt Commissioner Loukidelis's comments, quoted above. A public body cannot avoid its disclosure obligations by failing to acquire or gain access to the software which would enable it to comply.

[379] I find that the Adjudicator's finding was reasonable on the basis of the evidence before her.

[380] The Senior Adjudicator found the Gardiner Affidavit, which contains further evidence on this issue, did not qualify for admission because it was not tendered diligently, either before or soon after the Order was issued, and is an expert opinion which Gardiner does not have the expertise to tender.

[381] The timing of the affidavit is not a concern respecting its admissibility on judicial review. However, I echo the Senior Adjudicator's comments regarding the content.

[382] Though the Gardiner Affidavit says it was prepared in response to the terms of the Order, I have found it inadmissible in part because it attempts to supplement information before the Adjudicator on issues which were before the Adjudicator.

[383] Had the Gardiner Affidavit been admissible, it would not have assisted the Ministry. I proceed with the following analysis as it may be relevant to costs.

[384] Gardiner did not determine whether the Public Affairs Bureau could assist with severance. Therefore, this appears to remain a viable option.

[385] Gardiner considered only bonded video editors. In light of the Adjudicator's comments on Corrections' security concerns and the fact that, once released to Stelmack, the DVRs will likely be widely broadcast, security concerns respecting the content of the DVRs could no longer be a basis for limiting the scope of her inquiry to bonded editors. The only concern about releasing the DVRs is the third parties' privacy interests and she does not say why bonding is required to protect these interests, as opposed to perhaps a confidentiality agreement.

[386] Even if bonding is required or desirable, Gardiner does not appear to have considered whether a new company could be bonded.

[387] The Gardiner Affidavit raises for the first time the Ministry's concerns that "blurring" is reversible. The information contained respecting blurring techniques and whether they are reversible is properly the subject of an expert opinion. I would not deny Stelmack her right to access her personal information because of information pulled off Wikipedia.

[388] Perhaps most importantly, the Gardiner Affidavit provides details about "image separation". Again, this information should have been provided in an expert opinion and before the Adjudicator, but she says "with image separation there is a good chance it would be non-reversible permanently as neither the image not its metadata "footprint" would exist in the copy". She nevertheless asserts in the next paragraph:

> ...there is no certainty that an out-sourced third party could edit the DVR in a manner that would comply with the terms of the Commissioner's Order while at the same time guaranteeing that the public body complies with its ongoing legal responsibility to protect the personal information contained in the DVR.

[389] The Ministry sets the bar for reasonable compliance very high. It appears to assert that any information collected digitally can never be severed to permit release in the event future technological advances can reverse the severing.

[390] Had the Gardiner Affidavit been admissible, the Court would have been left with the following:

1. the technology exists to sever third parties' personal information from the DVRs;

2. the Public Affairs Bureau may have the necessary expertise to sever the DVRs;

3. when the Ministry's security concerns are removed from consideration, there does not appear to be any reason to require the video editing company to be bonded;

4. if an outside editing firm is used, it may be necessary to take steps to protect third parties' privacy interests;

5. there is at least one method of severance which is likely permanent.

[391] On the specific facts of this case, and in light of the parties' submissions on the issue before the Adjudicator, it was reasonable for the Adjudicator to conclude that "blurring" images to obscure faces constitutes severance for the purpose of s. 4. Had the Gardiner Affidavit been admissible on judicial review, I would nevertheless not have disturbed the Adjudicator's Order. Had it been necessary, I would have found the Senior Adjudicator's findings on severance reasonable.

9. Did the Adjudicator err in her analysis of s. 15(1)?

[392] As I determined above, previous jurisprudence has decided that the interpretation and application of disclosure exceptions are reviewable on the reasonableness standard.

[393] The relevant portions of s. 15 read:

> **Disclosure harmful to law enforcement**
>
> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> ...
>
> (f) endanger the life or physical safety of a law enforcement officer or any other person, or
>
> ...
>
> (l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[394] Stelmack has not disputed that Brown is a law enforcement officer for the purpose of s. 15(1)(f) or that the VCJ and its security features fall within s. 15(1)(l).

[395] The nub of the Ministry's argument on this issue is that the Commissioner failed to accord sufficient deference to the Corrections Branch of the Ministry and its view on what is required to maintain security in a prison environment.

[396] The Ministry argues, at para. 7 and 8 of its outline:

> [7] The decision of the Information and Privacy Commissioner in this case has fundamentally interfered with the ability of Corrections to maintain [the] required security.
>
> [8] In the prison environment, knowledge is power, and the safety of those inside the prison environment is dependent on the ability of Corrections to control the dissemination of that knowledge. The decision of the Commissioner in this case, undermines the ability of Corrections to do so, and consequently its ability to keep people in prisons safe and secure.

[397] The Ministry says that the Commissioner must recognize "[t]he breadth and magnitude of the risks that must be managed within the prison environment": Ministry Outline at para. 37.

[398] It further says that security and surveillance are the core of a prison's operations and says, at para. 65:

> [65] The nature of Corrections[ ] day to day operations, its responsibilities and the challenges they face in fulfilling their mandate, are simply inconsistent with an approach to FOI applications which mandates the disclosure of information containing details about security operations, capabilities and limitations in secured areas of prisons.

a. Did the Adjudicator err in finding that the nature of the surveillance cameras' blind spots was likely obvious to anyone in a position to take advantage of them?

[399] This is a finding of fact and is entitled to deference. It is therefore reviewable on a standard of reasonableness.

[400] At para. 45 of the Order, the Adjudicator said:

> [45] ...Nothing in the evidence suggests that the cameras are hidden or inaccessible. Indeed, the evidence of the Deputy Warden is that inmates often try to disable the cameras. This suggests that they are easily identified.

[401] The Ministry sought to adduce additional evidence on this issue before the Senior Adjudicator and on judicial review. I found that evidence inadmissible before me, largely because it was available at the time the Adjudicator undertook the Inquiry.

[402] Relying on the Ministry's extra-record evidence, Brown argued that the finding that the location of camera blind spots was obvious to anyone who could see the camera position "fatally tainted" the Adjudicator's decision that the Ministry could not rely on s. 15(1).

[403] The issue before me is whether on the evidence before the Adjudicator this was a reasonable finding of fact.

[404] The Second Lang Affidavit concerned the general desire for inmates to avoid being captured by surveillance and was targeted at showing how they would take advantage of blind spots.

[405] However, absent evidence that the cameras which shot DVRs 2 and 3 were different, perhaps hidden, it was reasonable for the Adjudicator to infer that inmates could see the cameras and identify the zone captured by them. The Adjudicator limited her finding on blind spots, saying they are obvious to anyone who can see the location and positioning of the cameras.

[406] The Ministry's concerns are broader: where they allege the blind spots can help people outside the VCJ assist inmates to escape. People "in a position to take advantage" of the blind spots may include those not able to see "the location and positioning of the cameras".

[407] This finding concerns only DVRs 2 and 3. The only evidence before the Adjudicator related to escapes which could be relevant to the cells captured on those DVRs comes from the First Lang Affidavit in which he says that two men escaped from a prison when their accomplices pulled the bars off their cell windows from the outside, and two others escaped when a helicopter landed inside a Federal facility.

[408] The outside accomplices involved in these escapes took advantage of weaknesses in security. However, in my view, it was reasonable for the Adjudicator to conclude that disclosing the blind spots which existed in two specific cells at the time Stelmack was in custody five years ago would not lead to the contemplated harms.

b. Did the Adjudicator err in applying the test under s. 15 and in considering ss. (f) and (l) together?

[409] Both petitioners take issue with the application of the harms-based test under s. 15. Some of the extra-record evidence concerned this issue. For the reasons outlined above, I have found that evidence inadmissible.

[410] The Ministry says that "the harms based test applied by the Commissioner was undertaken without a proper contextual base and analysis, and did not accord any or sufficient deference to the expertise of Corrections". I have already found that the Commissioner need not defer to the Ministry.

[411] The Ministry further argues that the Adjudicator used the wrong test. It was an error for the Adjudicator to hold that a public body must adduce evidence to show that a specific harm "is likelier than not" to flow from disclosure. Further, the Adjudicator erred in finding that in some circumstances disclosing gaps in the coverage of surveillance systems could compromise the effectiveness of the system, but nevertheless concluding that there was no clear and direct connection between disclosure and the alleged harm in this case.

[412] Brown says that the Commissioner erred by considering ss. 15(1)(f) and (l) together; it was sufficient for the Adjudicator to find either (f) or (l) a basis for refusing disclosure. Further, she says that different standards apply to those subsections. The latter is concerned with property, and the former with safety. Therefore, she says while both subsections require the Commissioner to assess whether there is a reasonable chance of harm, s. 15(1)(f) requires that "reasonable harm" further consider the nature of the contemplated harm.

Harms Test under s. 15(1)

[413] The issues under s. 15 fall within the "interpretation and application of disclosure exceptions" which Madam Justice Garson determined must be reviewed on a standard of reasonableness: see *B.C. Teachers' Federation.*

[414] The Adjudicator found that the Ministry's contemplated security concerns were "not likely" and that mosaic effect concerns were "unlikely" because DVRs 2 and 3 were each footage of the inside of one cell. She found Brown's concerns "entirely speculative". She quoted *Re: Langley (Township),* [2000] B.C.I.P.C.D. No. 1, Order 00-01 at para. 5 for the test that "a specific harm [must be] likelier than not to flow from disclosure".

[415] At para. 27, the Adjudicator considered *Re: University of Victoria*, [2003] B.C.I.P.C.D. No. 8, Order 03-08, which held that evidence "must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure" and *Re: Ministry of Public Safety and Solicitor General*, [2008] B.C.I.P.C.D. No. 6, Order 08-03 which reiterated this evidentiary requirement and further held that evidence "must establish a clear and direct connection between the disclosure of the withheld information and the alleged harm."

[416] Brown says the Adjudicator's reference to Order 00-01 and to the contemplated security concerns being "not likely" and "unlikely" does not consider the interests at stake, and cites *Re: Fraser Health Authority*, [2008] B.C.I.P.C.D. No. 40 at para. 48:

> [48] In short, harms-based exceptions to disclosure operate on a rational basis that considers the interests at stake. What is a reasonable expectation of harm is affected by the nature and gravity of the harm in the particular disclosure exception. There is a sharp distinction between protecting personal safety or health and protecting commercial and financial interests....

[417] I agree that assessing what constitutes "reasonable expectation of harm" must consider the nature of the expected harm. However, before the Adjudicator can

assess whether there exists a reasonable expectation of harm, there must be an evidentiary foundation linking disclosure and the alleged harm.

[418] In the findings on the s. 15 analysis, the Adjudicator focused on the evidence and whether it establishes the necessary connection between disclosure and harm.

[419] She reviewed the contents of DVRs 2 and 3 and then reviewed each security concern outlined by the Ministry: blind spots, layout and security features, the poor quality of images and the mosaic effect.

[420] She found the blind spots likely obvious to anyone who can see the camera's position and angle which led her to conclude that disclosure would not add information "of significance" to "anyone in a position to take advantage of the blind spot". She therefore found no clear and direct connection between the alleged harm and disclosure of the DVRs.

[421] Concerning layout and security features, the Adjudicator first said "none of these related to DVRs #2 and #3". She then said "these DVRs are not likely" to result in the alleged security issues. Read as a whole, the Adjudicator did not apply a "likelier than not" standard to expectation of harm, she said that there is no evidential foundation for finding a link between these DVRs and the harms alleged.

[422] With respect to poor quality, the Adjudicator rejected the argument that this is "a serious limitation which would be likely to be exploited in a manner which would give rise to the concerns raised by the public body". The Adjudicator therefore appeared to apply the "more likely than not" standard in assessing the probability that poor quality images will lead to an alleged harm.

[423] However, at para. 50 the Adjudicator again addressed the sufficiency of the evidence and said:

> [50] The VPD made virtually no specific submissions on the application of s. 15(1) to the specific DVRs in question. Its affidavit evidence states that "any DVR evidence" should be withheld on the basis that it could expose limitations in the security system and compromise the ability of staff to

> monitor individuals in custody. Section 15(1) clearly contemplates a harms-based, rather than a class exception....

[424] When read as a whole, the Adjudicator found that there was an insufficient evidentiary basis for her to conclude that disclosure would lead to the alleged harms. Absent this evidence, there was no need for her to consider the likelihood of harm.

[425] I would add that the Order clearly shows that the Adjudicator was alive to the current jurisprudence in this area.

[426] I will address the Ministry's submissions on the "mosaic effect" below.

Erred in considering ss. 15(1)(f) and (l) together

[427] The Adjudicator reviewed orders which had considered this section and said, at para. 29:

> [29] In this case, the anticipated harms under s. 15(1)(f) and s. 15(1)(l) are linked, in that the concerns about harm to individuals arise as a result of the anticipated compromise of the VCJ's security systems. As a result, it is appropriate to consider the two subsections together.

[428] Brown says this fell into error because either (f) or (l) is sufficient to justify withholding the records. She says this finding resulted in the Adjudicator improperly failing to consider whether release of her image would endanger Brown apart from any compromise of the VCJ's security.

[429] However, Brown's submissions before the Adjudicator did not raise the physical harm necessary for her to rely on s. 15(1)(f). They rely on general consequences which she says may arise from disclosure, including:

- a contextual data merger for distribution on the Internet;
- complexity and incomprehensibility of data; and
- covert operations (selectively edited or manipulated).

[430] Brown does suggest that there is a "risk of being publicly identified either through image or likeness", but again, she does not raise an issue respecting her

physical safety or any evidence upon which the Adjudicator could have found a reasonable risk of physical harm if Brown were publicly identified.

[431] I agree with Brown's submission that only one of (f) or (l) need apply, however, on the unique facts of this case, subsection (f), which permits non-disclosure when the release of the records will "endanger the life or physical safety of a law enforcement officer or any other person" was dependent on (l) being fulfilled, that is disclosure resulting in "harm to the security of any property or system, including a building, a vehicle, a computer system or a communications system".

[432] However, if that evidence had been admissible, it would not have assisted Brown in her s. 15(1)(f) argument.

[433] Brown's evidence is that individuals involved in the plot were able to identify her and follow her home.

[434] This evidence demonstrates that Brown is already personally identifiable to persons who want to find her. This is perhaps not surprising as the inmates she works with see her, likely several times a day, as she goes about her duties.

[435] Since she is already personally identifiable to people she comes into contact with, and to their "associates outside", there is no evidence that disclosing her image on the DVRs would lead to harm to her physical safety.

[436] The harms to law enforcement the Ministry suggests include: endangering correctional officers and others' safety, facilitating inmate escape, and facilitating the commission of offences by inmates. They depend on the disclosure compromising the security of the VCJ.

[437] I find that the Adjudicator acted reasonably by considering s. 15(1)(f) and (l) together on the facts and evidence before her.

c. Did the Adjudicator err in finding that the "mosaic effect" did not apply and that there was not a heightened possibility of harm arising from disclosure of DRVs 2 and 3?

[438] The Adjudicator found that because each of DVRs 2 and 3 is limited to the interior of a single cell, the DVRs are "unlikely to give rise to the concerns cited by the public body in its submissions on the mosaic effect"?

[439] She further found that a successful mosaic effect argument requires "clear and convincing evidence that the evidence could be linked, and was intended to be linked, with already available information": Order at para. 48. The Adjudicator dismissed such a link as speculative.

[440] The Ministry's position on this issue amounts to a class-based exception for VCJ surveillance records. With some limited exceptions, which do not apply to VCJ, the statute does not contemplate such a class exception.

[441] Lang's admissible evidence on this issue understandably concerns all six DVRs as he was not aware the Adjudicator would limit the scope of her decision to DVRs 2 and 3.

[442] However, much of the "mosaic effect" concerns vanish when considering only two DVRs.

[443] DVRs 2 and 3 do not show "the majority of the women's wing", "how the rooms of the facility are connected", "how the doors between [the] two areas operate" or VCJ's "general layout". "When considered together", DVRs 2 and 3 do not "reveal a great deal of information about the security, layout and staffing of the Jail".

[444] There is no evidence that DVRs 2 and 3 can be linked to other evidence already available to make it more valuable as a means to compromise VCJ security.

[445] Release of these DVRs can be raised before future inquiries to ensure that other information is not released which, when linked with these DVRs, leads to the harms the Ministry anticipates.

d. Did the Adjudicator err in finding the DVRs could not reasonably be expected to endanger the life or physical safety of a law enforcement officer or any other person?

and

e. Did the Adjudicator err in finding that disclosure of the DVRs could not reasonably be expected to interfere with the security of the jail generally and the video surveillance systems specifically?

[446] As the Adjudicator considered these issues together; I will do the same.

[447] The Ministry says that disclosing the records would endanger the life or safety of persons because when inmates know a camera's limitations they will exploit this information to ingest drugs or harm themselves or others. Specifically, the Ministry says disclosure will:

a) endanger the physical safety of correctional officers and staff working in corrections centres as well as other third parties;

b) compromise the ability of the VCJ staff to monitor an individual's well-being while in custody;

c) enables inmates to escape or others to enter the VCJ;

d) facilitate the escape of inmates in correctional centres; and

e) facilitate the commission of offences by inmates.

[448] The Ministry raises the following specific security concerns in relation to the building:

a) the DVRs reveal security camera angles;

b) expose vital information about day-to-day jail operations, including the layout of most of the women's wing;

c) expose what types of arms or limitations of arms are in place for personnel or jail security;

d) the DVRs reveal where video surveillance is lacking or is of poor quality; and

e) the security systems are interdependent; the integrity of each piece of the system must be maintained to avoid compromising the system as a whole.

[449] It says, therefore, that disclosure could result in harm to persons or to the security of correctional centre property or systems.

[450] At para. 87 of its Outline, the Ministry says:

> [87] If inmates know the information Correctional Officers have, and do not have, the systems and procedures used for obtaining this information are ripe for penetration by inmates who seek to devise methods that reduce or defeat the effectiveness of these kinds of surveillance efforts.

[451] At para. 45 of the Order, the Adjudicator agreed with the Ministry's position that "disclosures in gaps in the coverage of a surveillance system might compromise the effectiveness of such a system in some circumstances". However, she went on to find that "there is nothing of significance about the cameras' limitations which will be disclosed by the footage which would not already be apparent to anyone in a position to take advantage of the blind spot" and therefore that there was "no clear and direct connection between the disclosure of the information in question and the alleged harm".

[452] This finding is based, in part, on evidence that DVRs 2 and 3 were taken entirely in small cells and her finding that the blind spots appear obvious to anyone who can see the camera's angle and position.

[453] The Ministry says this was in error. I find this was a reasonable statement agreeing with the Ministry's position that public knowledge of gaps in surveillance in jails could lead to mischief or harm, but finding that DVRs 2 and 3 do not disclose such gaps and therefore will not lead to mischief or harm.

[454] The Ministry says that the Adjudicator erred in finding no connection between disclosure and the alleged harms.

[455] At paras. 9 and 14 of the First Lang Affidavit, Lang says:

> [9] The DVRs show security features of the Jail. This includes the location and operation of doors and locks, windows, and communications systems. The DVRs also reveal camera angles, officer security equipment, and door opening and closing. The DVRs show a lack of security, such as areas without video security and poor quality of video footage. As a result, I have some concerns about the release of the DVRs with respect to maintaining the security of the Jail.
>
> ...
>
> [14] I have reviewed portions of the DVRs and with study, they reveal information on the limitations of the video surveillance, the layout of the Jail and certain particular details of security.

[456] The only specific concerns he addresses with respect to DVRs 2 or 3 are at paras. 15-16, where he says that blind spots are an issue for these DVRs.

[457] Because DVR 2 shows a pre-hold cell, where people are held before being searched, he says that the blind spots could be exploited to permit them to ingest drugs. This puts them at risk of an overdose and corrections personnel at risk because of the inmate's altered state.

[458] He also says, at para. 18:

> [18] It is not uncommon for individuals to try to break or obscure the cameras in their cells, with the intent of escaping video surveillance.

[459] There is no doubt that the prison environment is a dangerous one where information will be used to an inmate's best advantage. However, in order for the blind spots to create a risk which does not already exist, or to increase an existing risk, the DVRs must provide new information to people in a position to exploit the blind spots.

[460] I have found reasonable the Adjudicator's finding that blind spots were likely identifiable to those in a position to take advantage of them.

[461] Not only is there no evidence that someone viewing DVR 2 could identify it as a particular pre-holding cell, a reasonable interpretation of the evidence is that the

location and position of the cameras is already known to inmates, who try to break or obscure cameras to escape surveillance.

[462] This being the case, release of the DVRs cannot help prisoners to exploit blind spots.

[463] The Adjudicator did not accept that the issue of poor quality "is a serious limitation which would be likely to be exploited in a manner which would give rise to the concerns raised by the public body": Order at para. 46. This finding was specific to DVRs 2 and 3, because they "do not show the relationship of the various areas in the VCJ to each other".

[464] The Adjudicator found the Ministry's concerns "generalized and speculative"; and noted that the VPD had made almost no submissions on the application of s. 15(1) to the specific DVRs in question.

[465] I agree. There is nothing in the VPD evidence which demonstrates that the DVRs at issue are connected to the harms alleged.

[466] Again, the VPD and the Ministry appear to ask the Commissioner to make a class-based exception permitting them to withhold all video surveillance taken in VCJ.

[467] The Adjudicator came to a reasonable conclusion in determining that there was no connection between the alleged harms and release of DVRs 2 and 3.

[468] In my discussion on s. 15(1)(f) and (l), I explained why the sections are linked in this case. Absent evidence that security is compromised by disclosure, there was no evidence before the Adjudicator that law enforcement would be at risk. The evidence indicated that other persons in a position to take advantage of the cameras' limitations would already be aware of the blind spots and concerns over use of the image quality are speculative.

[469] I also found that there was no evidence before the Adjudicator on which she could base a finding that physical harm to Brown, specifically, would result from

disclosure. If Brown's extra-record evidence had been admissible, this would not have changed the result.

[470] The Adjudicator's conclusion that s. 15 does not permit the Ministry to resist disclosure was reasonable.

10. Did the Adjudicator err in failing to consider s. 19?

Disclosure harmful to individual or public safety

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

(b) interfere with public safety.

(2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.

[471] The Adjudicator did not consider s. 19 because it was not raised before her. Brown says it was unreasonable for the Adjudicator to fail to consider this section when Brown was unrepresented before the Adjudicator and was not aware of the contents of DVRs 2 and 3.

[472] Brown says that the Adjudicator's duty here should be informed by the legislation's objective of protecting personal privacy. She says that in this context "mental health" has been found to include serious mental distress or anguish, but to exclude the inconvenience, upset or unpleasantness of dealing with a difficult person: see Order 03-08 at para. 24.

[473] Brown says that disclosure threatens to cause her mental harm. As with a risk of physical harm, Brown must adduce evidence which demonstrates a link between disclosure and the harm alleged.

[474] I infer from her submissions that she is concerned that in view of the psychological consequences of the plot against her and her *bona fide* fear of harm

resulting from disclosure of her image, her psychological well-being will be negatively affected by release of the DVRs.

[475] Brown further submits that she had no means to ensure the Ministry considered this discretionary exception.

[476] I have discussed Brown's opportunity to make representations before the Adjudicator above. I found she was accorded full participatory rights in the Inquiry, but acknowledged that she could have benefited from the assistance of counsel in making her submissions.

[477] If Brown had raised s. 19 before the Adjudicator in submissions I have no doubt the Adjudicator would have considered that section. Stelmack raised s. 25 for the first time in her submissions and the Adjudicator addressed that issue in the Order.

[478] Brown asks me to interpret *Re: Ministry of Community Safety and Correctional Services*, [2010] O.I.P.C. No. 114, Order PO-2911 as authority requiring the Commissioner to determine whether the Ministry exercised its discretion under s. 19.

[479] In Order PO-2911, the public body relied on s. 14 of Ontario's FIPPA which also provides a discretionary exemption permitting a public body to resist disclosure. The adjudicator determined that the public body must exercise its discretion and, "[o]n appeal, the commissioner may determine whether the institution failed to do so": at para. 31. The commissioner can require the public body to reconsider the matter but does not have authority to exercise the public body's discretion on its behalf: at para. 33.

[480] The public body in that case did rely on s. 14 and was successful in resisting disclosure under that section.

[481] If this case were binding authority, it could stand only for the proposition that the Adjudicator has the discretion to determine whether the Ministry exercised its discretion. It does not require her to do so.

[482] Brown further says that the Commissioner had a duty to ensure that the Ministry considered all applicable exceptions to disclosure, arising from the Commissioner's statutory obligation to protect personal privacy.

[483] This argument does not consider the Commissioner's competing duty to order disclosure of non-protected information and her neutral role in assessing what information can lawfully be withheld.

[484] The purposes of FIPPA are outlined in s. 2 and include giving access to records, giving an applicant access to her personal information, specifying limited exceptions to disclosure and providing independent review of a public body's disclosure decisions.

[485] The Adjudicator held a written inquiry, conducted pursuant to s. 56. Section 57 outlines the burden of proof on issues raised at the Inquiry, s. 58 requires the Commissioner to make orders disposing of the issues in an inquiry and s. 59 imposes on the public body the obligation to comply with the Commissioner's orders.

[486] There is conflicting case law on whether the Commissioner's role is bipolar or polycentric. In my view, when the Commissioner holds an inquiry under s. 56 at which one party seeks disclosure of her personal information and another claims such disclosure will cause her harm, the Commissioner is balancing two competing interests and adjudicating on the issue. In these circumstances, her role is bipolar.

[487] I am supported in this view by the definition of "non-adjudicative" in Donald J.M. Brown & John M. Evans, *Judicial Review of Administrative Action in Canada,* looseleaf (Toronto: Canvasback Publishing, 2010) at para. 15:1100:

> ...First, the administrative decision-maker does not normally make findings of fact or declarations of law and record them in the form of reasons for decision. Second, the grant of authority both to enact administrative

> legislation and to make non-adjudicative decisions is usually cast in terms of a broad discretionary power.

[488] The Commissioner cannot fall within this definition in the present case as she is empowered to decide "all questions of fact and law", must accept representations from the applicant, the public body and the third party, is required to issue an order on completing the inquiry and has statutory power to enforce her orders in Supreme Court. She is therefore entitled to less deference. Nevertheless, the standard of review is reasonableness.

[489] Finally, Brown says that she raised concerns about the impact of disclosure on her safety in her submissions before the Adjudicator. Brown's general comments could not be interpreted as asking the Adjudicator to consider s. 19. They might reasonably have been interpreted as submissions on ss. 15 or 22.

[490] Absent authority which required the Adjudicator to consider the discretionary bases upon which the Ministry might have resisted disclosure, I cannot find it was unreasonable for the Adjudicator to omit to consider s.19 when that section was not raised in submissions before her.

11. Did the Adjudicator err in finding that ss. 22 did not authorize the Ministry to withhold the DVRs?

[491] The relevant portions of s. 22 of FIPPA read:

> **Disclosure harmful to personal privacy**
>
> 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
>
> > (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
> >
> > ...

> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> ...
>
> (e) the third party will be exposed unfairly to financial or other harm,
>
> ...
>
> (g) the personal information is likely to be inaccurate or unreliable, and
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> ...
>
> (d) the personal information relates to employment, occupational or educational history,
>
> ...
>
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> ...
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff.

[492] Section 4(2) is also relevant to the issues under s. 22. That section reads:

> 4(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

[493] Section 22 falls within Division 2, referred to in s. 4(2), and therefore information which should be excepted from disclosure pursuant to s. 22 must be severed before the record is disclosed.

[494] The Adjudicator determined that the Ministry was required to withhold information relating to identifiable third parties who are not staff pursuant to s. 22(2)(h) and noted that Stelmack had agreed that the faces of these individuals could be removed.

[495] With respect to VCJ staff, the Adjudicator relied on the Ministry's position that "release of the DVRs would not constitute an unreasonable invasion of the staff members' privacy".

[496] Pursuant to *B.C. Teachers' Federation,* the standard of review of s. 22 disclosure exceptions is reasonableness.

[497] While *B.C. Teachers' Federation* only determined the standard of review for the disclosure exceptions in s. 22(3), I find that the Commissioner has greater expertise than the Court to enable it to determine which circumstances are relevant to assessing the reasonableness of an invasion of a third party's personal privacy under s. 22(2), the presumptions in s. 22(4) and to balance these provisions.

[498] Therefore, I find that each question under s. 22 is reviewable on a standard of reasonableness.

a. Did the Adjudicator err when she determined that Brown's image should not be severed?

[499] Brown framed this issue differently; she asked that this Court find that the Adjudicator erred by failing to consider whether her image should be severed.

[500] In my view, the Adjudicator did not fail to consider severance. She discussed the application of s. 22 to VCJ staff for two pages. A finding that s. 22 required the Ministry to refuse disclosure of Brown's personal information would have resulted in severance of Brown's image. She therefore did consider whether Brown's image should be severed.

[501] I have interpreted Brown's actual concern to be that the Adjudicator erred by finding that the Ministry was not required to sever her image.

Is the information about Brown recorded on the DVRs "personal information"?

[502] Brown's image must be severed if it is properly characterized as personal information whose disclosure is an unreasonable invasion of Brown's personal privacy.

[503] "Personal information" is defined in FIPPA's Schedule 1 as "recorded information about an identifiable individual other than contact information".

[504] "Contact information" is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual".

[505] Section 2(2) of FIPPA is also instructive. It says:

> 2(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.

[506] The Adjudicator does not make an express finding in this regard. However, she considers whether Brown's image should be withheld pursuant to s. 22, a step which is only required if Brown's image is personal information.

[507] For greater certainty, I have turned to the case law. An employee's image, captured in the course of performing her duties, has been characterized as "personal" information". In *Eastmond v. Canadian Pacific Railway*, 2004 FC 852 at para. 110, Lemieux J. held that "information captured by the cameras qualified as information about employees as individuals" and was therefore "information about an identifiable individual".

[508] In *Eastmond,* the Court interpreted the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5. The definition of "personal information" incorporates an exception for employment contact information. It reads:

> "personal information" means information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization.

[509] This is similar in all relevant respects to the definitions of "personal information" and "contact information" in FIPPA.

[510] Brown's image is therefore personal information which must be severed from the DVRs if failure to do so would constitute an unreasonable invasion of her privacy.

Should Brown's image be severed pursuant to s. 22?

[511] Stelmack says that one of the purposes of the legislation is to make government more accountable; s. 22(2)(e) should not be invoked because of fear of having misconduct exposed.

[512] Brown says that her image is personal information which should be severed. The harms she alleges will result from disclosure should be considered when assessing whether the invasion of her privacy is reasonable. Brown reminds the Court that she was cleared by her supervisor of any wrong-doing in her interactions with Stelmack.

[513] Section 22 has four relevant sections. Section 22(1) requires the head of a public body refuse disclosure of a third party's personal information if the disclosure would unreasonably invade a third party's privacy.

[514] Section 22(2) lists factors a public body must consider when determining whether disclosure constitutes an unreasonable invasion of privacy.

[515] Section 22(3) sets up a rebuttable presumption that in the listed circumstances, disclosure is an unreasonable invasion of privacy.

[516] Finally, s. 22(4) decides that disclosure is not an unreasonable invasion of privacy in certain listed circumstances. Unlike s. 22(3), these are not presumptions.

[517] The Adjudicator reviewed the submissions of the three VCJ staff before her. She noted that they were concerned "that the integrity of the images will not be maintained" and that Stelmack "may intend to use the DVR in civil proceedings".

[518] She said that the third parties did not specify which subsection they relied on and found that ss. 22(2)(a) and (c) "favour disclosure". She does not say why

Brown's privacy interests can be compromised to ensure the government's activities are scrutinized or why disclosure of Brown's image will assist to ensure that such scrutiny occurs. She does not explain why, in view of Stelmack's ability to access the DVRs through the rules of disclosure in civil proceedings, their release through FIPPA is necessary to a fair determination of Stelmack's rights.

[519] The Adjudicator reviewed s. 22(3)(d) which suggests the information be withheld and s. 22(4)(e) which favours disclosure.

[520] The Adjudicator found, at para. 64, that

> [64] Section 22(3)(d) provides that the disclosure of personal information relating to employment, occupational or employment history is presumed to be an unreasonable invasion of a third parties [*sic*] privacy.

[521] She found that s. 22(3)(d) "can apply" to work activities if they occur as part of a disciplinary action. Though Stelmack complained about Brown's treatment of her, there is no evidence that Brown is being disciplined and the information was not collected as part of a disciplinary proceeding.

[522] In fact, the Ministry took the position that on the DVRs Brown and other staff "appear in the context of the performance of their duties, and the videos merely factually report on their activities and functions at the Jail".

[523] The Adjudicator found that the "third parties' concerns about their own privacy seem to be based on the fact that the videos will identify them as employees of a public body". She said, at para. 65:

> [65] ...This would appear to be information which falls within s. 22(4)(e). However, even if the information is within s. 22(3)(d), I find that its disclosure will not constitute an unreasonable invasion of privacy. The factors set out in s. 22(2)(a) and (c) favour disclosure. The third parties have not argued that s. 22(2)(h) militates against disclosure and none of the other s. 22(2) factors is relevant. As a result the public body is not authorized to withhold the information regarding the staff of VCJ or other employees pursuant to s. 22....

[524] The Adjudicator also said, at para. 63:

> [63] The third parties suggest that any recording which "identifies" them must not be released. However, nothing in s. 22 suggests that identifying a third party as an employee of a public body constitutes an unreasonable invasion of the third party's privacy. Indeed, s. 22(4)(e) demonstrates that the legislature did not intend to treat the disclosure of information about a third party's position with a public body as an unreasonable invasion of the third party's privacy.

[525] No authority is cited for the proposition than an individual's image is information about her position with a public body.

[526] I cannot agree that Brown and the other third parties were only concerned about being identified as correctional officers. Brown has expressed concern about release based on security concerns she has because of the nature of her job. In this way, the harms she alleges are tied to her employment.

[527] However, by limiting the third parties' concerns in this manner, the Adjudicator fails to address their privacy interests in their images.

[528] One of the purposes of FIPPA is to protect personal information. "To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed": *Re: Ministry of Community Safety and Correctional Services*, [2010] O.I.P.C. No. 114, Order PO-2911 at para. 14.

[529] I can think of nothing which would better identify Brown than a photo of her face.

[530] There are numerous cases in which employers have installed video surveillance cameras and their employees have argued that the cameras unreasonably invade their privacy. In many of these cases, the provisions of the employees' collective agreement are relevant as the installation of the cameras lead to a grievance. However, the arbitrator's approach is still instructive. I quote the Ontario Arbitration Board in *Lenworth Metal Products Ltd. v. U.S.W.A., Local 3950,* 1999 CarswellOnt 4424 at para. 7:

> In *Thibodeau-Finch Express Inc. v. Teamsters Union, Local 880* (1988), 32 L.A.C. (3d) 271 (Can. Arb. Bd.) (Burkett), the union claimed a "violation by the

> employer of personal privacy ... by introducing the use of cameras in the workplace". Arbitrator Burkett, in defining the issue before him, referred (as did arbitrator Larson in *St. Mary's Hospital*) to a variety of analogous cases, including those dealing with an employer's right to search employees, in exploring what he refers to as the balancing of "an employee's privacy rights and an employer's right to maintain the security of his business"….

[531] In similar grievance disputes, arbitrators balance the interests of the employee against those of the employer.

[532] It is unlikely anyone would dispute that the benefits to the VCJ, and indeed the benefits to the employees themselves, of monitoring areas of the VCJ outweigh the resulting invasion to Brown's personal privacy in having her image recorded.

[533] Stelmack says that Brown cannot have a privacy interest in the DVRs because she was aware of the cameras.

[534] I accept that Brown waived her right to resist having her personal information captured on the DVRs by accepting a position at the VCJ. However, that waiver did not extend to a waiver of all rights to her image such as to permit the Ministry to take the position that her image is not personal information whose release would be an unreasonable invasion of her privacy.

[535] The Adjudicator and the Ministry conflate Brown with the Ministry. In that process, her personal rights are stripped away.

[536] Commissioner Loukidelis held, in Order F08-03 at paras. 78 - 79:

> [78] Section 22, however, is a mandatory exception to the right of access under FIPPA. Under s. 22, a public body "must" refuse to disclose any personal information in circumstances where the disclosure would be an unreasonable invasion of personal privacy. As regards mandatory exceptions, and consistent with the approach I took in Order 02-22, other jurisdictions have held that, even if raised for the first time during the exchange of submissions, mandatory exceptions must be considered by the adjudicator.
>
> [79] Due to its mandatory nature, and taking into account all of the circumstances. **I find it both necessary and appropriate to consider the s. 22 exception as it related to the s. 86 reports regardless of which or whether a party raised it. Even where s. 22 is not raised in an inquiry, I consider myself obliged to put my mind to its application where, as**

> **here, on my review of the records it is apparent s. 22 applies to some information in them....** [Emphasis added.]

[537] I agree with the former Commissioner's finding. In order to discharge the competing duties of permitting an applicant access to her personal information and protecting the privacy interests of third parties, the Commissioner must ensure that all mandatory exceptions have been considered.

[538] FIPPA imposes duties on public bodies to defend the privacy interests of third parties whose personal information they have collected.

[539] Because the third party whose privacy rights are at stake has limited rights to invoke the mandatory exceptions in s. 22, it is appropriate for the Commissioner to consider whether the public body has considered them before requiring disclosure.

[540] In the present case, the Adjudicator did not fail to address s. 22. However her cursory findings with respect to s. 22(2) do not address Brown's privacy rights in her image. She does not consider each relevant factor, instead she relies on the fact s. 22(2)(h) was not raised. Finally, with respect to s. 22(4)(e), she says that Brown's image "appears to be information which falls" within that subsection. She does not provide the reasoning behind her findings or cite case law in support of it.

[541] I find that the Adjudicator did not act reasonably in declining to consider each relevant factor, including those listed in s. 22(2), each relevant exception under s. 22(3) and in failing to analyze the interaction of ss. 22(2), 22(3) and 22(4)(e) to reach her conclusions.

b. Did the Adjudicator err in applying the burden of proof under s. 22?

[542] FIPPA s. 57 outlines the burdens of proof in an Inquiry before the Commissioner:

> 57(1) At an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part.

> (2) However, if the record or part that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

[543] As can be seen from the legislation, determining which party bears the burden of proof first requires that the information at stake be categorized as either personal information or non-personal information.

[544] As I found that the Adjudicator determined that Brown's image is personal information, Stelmack bore the burden of proving that disclosure of Brown's image would not be an unreasonable invasion of Brown's personal privacy.

[545] The Adjudicator correctly identified the burden on Stelmack at para. 17 of the Order, however she failed to apply it. She did not require Stelmack prove that Brown's image fell within s. 22(4)(e).

[546] Perhaps in view of the Ministry's concurring submissions, the Adjudicator did not require Stelmack to prove that disclosure of Brown's image was not an unreasonable invasion of Brown's privacy. However, it is not the Ministry's privacy interests which are at stake, it is Brown's. The Ministry cannot waive her rights on her behalf.

[547] The Adjudicator did not reasonably apply the burden of proof under s. 57(2).

c. Did the Adjudicator err in finding that it was not an unreasonable interference with the personal privacy of third parties to order the Ministry to permit Stelmack to view unsevered copies of DVRs 1, 4, 5 and 6?

[548] This is a disclosure exception and must be reviewed on a standard of reasonableness.

[549] This argument ignores the fact that the third party information Stelmack saw on DVRs 1, 4, 5 and 6 is third party information she had already observed first hand. The scope of her request for records includes only DVRs in which she appears. The purpose of viewing the DVRs was not so that Stelmack could obtain new information

but so that she could determine whether anything had been captured on the DVRs to enable her to decide whether to pursue disclosure.

[550] In addition, Stelmack has already viewed these DVRs and this Court can therefore not provide a remedy which would cure any breach of third party privacy.

[551] Finally, in submissions before the Adjudicator the Ministry expressly said it did not object to permitting Stelmack to view the DVRs, only to their disclosure: Lang Affidavit at para. 8; Hudson Affidavit at para. 12. In fact, Lang had viewed some portions of the DVRs with Stelmack even before she made her access request.

[552] My statements respecting Brown's image apply equally to the third party images in the DVRs. I do not say that the Ministry could waive the third parties' right to privacy in their images. However, I would not find that the Adjudicator erred by accepting the Ministry's concession on this issue.

[553] For those reasons, I decline to make a finding respecting this issue.

12. Did the Adjudicator exceed her jurisdiction or otherwise err by ordering the Ministry to provide Stelmack with access to view the DVRs?

[554] For the reasons which disposed of the previous issue, I decline to answer this question.

13. Did the Adjudicator exceed her jurisdiction or otherwise err by failing to exercise her delegated jurisdiction by failing to make a decision with respect to the disclosure of DVRs 1, 4, 5 and 6?

[555] The Adjudicator's jurisdiction to require disclosure is dependent on the applicant requesting the information and requesting an inquiry pursuant to s. 56.

[556] The scope of the Adjudicator's power to order disclosure is a question of law which requires she interpret her own statute and involves her exercise of control over her own process. I find it reviewable on a reasonableness standard.

[557] As the FIPPA process wore on, frustrated with the delay in disclosure, Stelmack narrowed the scope of her access request.

[558] The Adjudicator limited the scope of her decision to records she understood complied with Stelmack's narrower request and deferred a decision on whether to order disclosure of the additional DVRs.

[559] The case relied on by the Ministry is *Tidmarsh v. British Columbia (Expropriation Compensation Board)* (February 3, 1995), Doc. Vancouver A943235, 55 L.C.R. 81 (S.C.) in which Shaw J. held that the failure of the chair of the Expropriation Compensation Board to address the interest payable on legal fees was a jurisdictional error. However, in that case, the court remitted the matter to the chair so that entitlement to interest could be considered.

[560] It follows that even if I were to find the Adjudicator failed to exercise jurisdiction in a manner that constituted an error, the remedy would be to remit the issue of DVRs 1, 4, 5 and 6 to her for consideration. I can see no distinction between this and permitting the Adjudicator to deal with the matter as she did: as a continuation of her jurisdiction.

[561] In addition, *Chandler* suggests that it is open to a decision-maker to retain jurisdiction over certain matters while disposing of others.

[562] In *Chandler,* the board released a report which made certain *ultra vires* findings and which also failed to fulfill its statutory task to make recommendations. The majority held that the board retained jurisdiction to make the statutorily mandated recommendations.

[563] In the present case, the Adjudicator's statutory task was to determine whether the DVRs should be released. She fulfilled that task with respect to DVRs 2 and 3 but deferred a decision on DVRs 1, 3, 4 and 5.

[564] I find that it was open to her to do so.

CONCLUSION

[565] I have reviewed the Review Decision and the Order.

[566] I have concluded that the Adjudicator reasonably concluded that the DVRs are not excepted from disclosure by s. 15 and was not required to consider s. 19 as it is a discretionary exception which was not raised in submissions before her.

[567] I have further found that the third party personal information can reasonably be severed by blurring or obscuring faces from these DVRs. I have found this a reasonable conclusion on the evidence before the Adjudicator. I have further determined that the Gardiner Affidavit would not have changed this finding. In other proceedings it may be open to the Ministry to argue that other DVRs cannot reasonably be severed by blurring or obscuring faces if they adduce specific and relevant evidence.

[568] The only errors committed by the Adjudicator are with respect to the release of Brown's image. She erred in failing to consider each of the factors under s. 22(2) and all relevant exceptions in s. 22(3). She did not analyze the balance between s. 22(2), s. 22(3) and s. 22(4) in reaching her conclusion. She further erred in applying the burden of proof to disclosure of Brown's image.

[569] I have not found any errors in the Review Decision. I have concluded that the Senior Adjudicator applied the correct test to determine whether new evidence was admissible to reopen the Inquiry and acted reasonably in declining to reopen to reconsider issues other than the admissibility of new evidence.

[570] The parties urged me to deal with any issues I find should be remitted rather than further delaying this process.

[571] It has been more than five years since Stelmack was detained at VCJ. She has been fighting for release of the DVRs for almost as long. Her desire to have this matter dealt with in a final way is understandable.

[572] However, I do not have jurisdiction to consider the effect of s. 22 or to apply the burden of proof under s. 57 on judicial review. It is for the Commissioner to conclude how to balance Brown's privacy interests and Stelmack's right to disclosure under FIPPA. Her decision must be reasonable and must consider Brown's right to privacy of her image.

[573] I have nevertheless considered the substantial delay in these proceedings and the further delay occasioned by the need to remit these issues to the Commissioner in determining the terms of my order.

[574] It follows that I decline to quash the Order or the Review Decision.

[575] I order that the interpretation and application of s. 22 be remitted to the Commissioner for determination on an expedited basis. The Commissioner must reasonably apply the burden of proof when undertaking this analysis.

[576] The Commissioner should consider all relevant circumstances listed under s. 22(2), and all relevant disclosure exceptions under s. 22(3). The Commissioner should explain the interaction between the relevant parts of s. 22(2) and s. 22(3) and s. 22(4).

[577] I leave it to the Commissioner to determine whether the parties will be permitted to make additional submissions on this issue.

[578] In view of the significant amount of time which has already passed since Stelmack's request and my substantial agreement with the Adjudicator's conclusions, I order the following:

> 1. The public body is to provide the applicant with a copy of DVR #3, edited to withhold the last portion of the tape which records the time after the applicant has left the room.
>
> 2. The public body is to provide the applicant with a copy of DVR #2, edited to remove facial images which would identify any third party, including Brown, the other Correctional Officers and the other person held in custody in the same cell.
>
> 3. The Ministry of Public Safety and Solicitor General is to give the applicant access to this information within 30 days of the date of this

order, as FIPPA defines “day”, and, concurrently, copy the Commissioner’s Registrar on its cover letter to the applicant, together with a copy of the records.

4. If for any reason the Ministry is not able to comply with item 3, the Ministry is to appear before me on or before the 30 days have elapsed, with notice to the other parties, to explain the delay.

COSTS

[579] The Commissioner does not seek costs and no costs will be awarded against the Commissioner.

[580] The remaining parties may arrange a time to speak to costs with the Registry.

“L.D. Russell J.”

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The Honourable Madam Justice Loryl D. Russell