SUPREME COURT OF PRINCE EDWARD ISLAND

Citation: *Oatway v. Information and Privacy Commissioner*, 2025 PESC 58

Date: 20250729
Docket: S1-GS-30470
Registry: Charlottetown

Between:

Michael Oatway

Applicant

And:

Information and Privacy Commissioner and
Department of Social Development and Seniors

Respondents

Before: The Honourable Justice Jonathan M. Coady

Appearances:
Michael Oatway, on his own behalf
Douglas R. Drysdale, K.C., lawyer for the Respondent, Information and Privacy Commissioner
Bobbi-Jo Dow Baker and Caroline Davison, lawyers for the Respondent, Department of Social Development and Seniors

Place and date of hearing - Charlottetown, Prince Edward Island
January 29, 2025

Place and date of written decision - Charlottetown, Prince Edward Island
July 29, 2025

ADMINISTRATIVE LAW – judicial review – standard of review – reasonableness – procedural fairness

This application sought judicial review of a decision made by the Information and Privacy Commissioner which authorized the Department of Social Development and Seniors to disregard requests made for child protection records. The Commissioner concluded that the requests were repetitious and amounted to an abuse of the right to access records under the ***Freedom of Information and Protection of Privacy Act***, R.S.P.E.I. 1988, c. F-15.01. The Commissioner exercised her discretion to authorize the Department to disregard the requests as well as any future requests for the same records.

After reviewing the reasons provided by the Commissioner as a whole, the court was satisfied that the decision was reasonable. There was no principled basis for intervention by the court on substantive grounds. The court was also satisfied after reviewing the record that there was no denial of procedural fairness by the Commissioner. The application for judicial review was dismissed.

STATUTES REFERRED TO: Freedom of Information and Protection of Privacy Act, R.S.P.E.I. 1988, c. F-15.01; ***Child Protection Act***, R.S.P.E.I. 1988, c. C-5.1; ***Child, Youth and Family Services Act***, R.S.P.E.I. 1988, c. C-6.01; and ***Judicial Review Act***, R.S.P.E.I. 1988, c. J-3.

REGULATIONS REFERRED TO: Child Protection Act Regulations, PEI Reg. EC215/03; and ***Child, Youth and Family Services Regulations***, PEI Reg. EC684/24.

CASES CONSIDERED: Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65; ***Canada Post Corp. v. Canadian Union of Postal Workers***, 2019 SCC 67; ***Mason v. Canada (Citizenship and Immigration)***, 2023 SCC 21; ***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817; ***Knight v. Indian Head School Division No. 19***, [1990] 1 S.C.R. 653; ***Canada (Citizenship and Immigration) v. Harkat***, 2014 SCC 37; ***Zündel v. Citron***, 2000 CanLII 17137 (FCA); ***Yukon Francophone School Board, Education Area #23 v. Yukon Territory (Attorney General)***, 2015 SCC 25; ***Terceira v. Labourers International Union of North America***, 2014 ONCA 839; ***Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board***, 2005 CanLII 24217 (ON CA); ***Eckervogt v. British Columbia***, 2004 BCCA 398; ***Health PEI v Privacy Commissioner***, 2019 PECA 7.

SECONDARY SOURCES REFERRED TO: Sara Blake, ***Administrative Law in Canada***, 7th ed. (Toronto: LexisNexis Canada, 2022).

Coady, J.:

I. Introduction

[1] This is an application for judicial review of a decision made by the Information and Privacy Commissioner (the "Commissioner") which authorized the Department of Social

Development and Seniors (the "Department") to disregard requests made by Michael Oatway (the "Applicant") for certain records. On March 27, 2024, the Commissioner concluded that the requests made by the Applicant were repetitious and amounted to an abuse of the right to access records under the ***Freedom of Information and Protection of Privacy Act***, R.S.P.E.I. 1988, c. F-15.01 [***FOIPP***]. The Commissioner exercised her discretion under s. 52(1)(a) of ***FOIPP*** to authorize the Department to disregard the requests made by the Applicant as well as any future requests for the same records.

[2] The Applicant asks that the decision made by the Commissioner be set aside. The Department, on the other hand, asks that the decision be preserved. The task of the court in this proceeding is to review the decision made by the Commissioner.

[3] Reviewing an administrative decision like the one made by the Commissioner in this case is not an opportunity for the court to hear and decide the matter afresh. The role of the court is more limited. Primary decision-making responsibility in this proceeding was assigned to the Commissioner by the Legislature. That statutory choice must be respected by the court.

[4] Judicial review is an inquiry that begins from a position of restraint. The main function of a reviewing court is to examine the decision actually made by the administrative decision-maker, including the justification offered for that decision. It is not to immediately ask what conclusion the court itself would have reached in the same circumstances. This deferential – but robust – evaluation of administrative decisions not only gives meaning to the contents of the statute designed by legislators, but it also recognizes the legitimacy of the expressions of that statutory authority by administrative decision-makers like the Commissioner.

A. Facts

[5] The Applicant was formerly a child placed in the permanent custody and guardianship of the Director of Child Protection (the "Director"). In an effort to more fully understand his time in the care of the Director, the Applicant made several requests for child protection records from the Director pursuant to the former ***Child Protection Act***, R.S.P.E.I. 1988, c. C-5.1, and ***Child Protection Act Regulations***, PEI Reg. EC215/03 [***Child Protection Regulations***]. These requests were processed by the Director under the ***Child Protection Act*** and ***Child Protection Regulations***, and a number of redacted records were disclosed to the Applicant.

[6] The Applicant was not satisfied with the redacted records disclosed by the Director and made several requests for child protection records from the Department pursuant to ***FOIPP***. Initially, the Department explained that such records were not available using ***FOIPP*** and referred the Applicant to the Director in order to request records related to child protection. However, the Applicant persisted and made additional requests for child protection records from the Department under ***FOIPP***. Eventually, the Department applied to the Commissioner for authorization to disregard the requests made by the Applicant

pursuant to ***FOIPP***. That authorization was ultimately granted to the Department by the Commissioner.

[7] On November 28, 2022, the Department asked the Commissioner for authorization to disregard four requests made by the Applicant for records under ***FOIPP*** (Request Nos. 344, 345, 346, and 347).

[8] On December 13, 2022, the Department again asked the Commissioner for authorization to disregard five additional requests made by the Applicant for records under ***FOIPP*** (Request Nos. 364, 365, 366, 367, and 369).

[9] On December 14, 2022, the Commissioner invited a response from the Applicant in light of the requests from the Department.

[10] On December 28, 2022, the Applicant submitted a response to the Commissioner.

[11] The Applicant also asked for a meeting with the Commissioner.

[12] On January 11, 2023, the Commissioner met with the Applicant. Following that meeting, the Commissioner delivered a letter to the Applicant. The Commissioner had formerly been a lawyer who represented the Director and, in her letter to the Applicant, the Commissioner explained that any knowledge about the family circumstances of the Applicant was not relevant to, and would not be considered by the Commissioner when determining, the requests made by the Department.

[13] On February 14, 2023, the Department submitted a letter to the Commissioner.

[14] On February 16, 2023, submissions to the Commissioner were closed.

[15] On March 27, 2024, the Commissioner issued a written decision – Order No. OR-24-003 – in relation to the requests made by the Department. The Commissioner concluded that the requests made by the Applicant were repetitious and amounted to an abuse of the right to access records under ***FOIPP***. The Commissioner exercised her discretion under s. 52(1)(a) of ***FOIPP*** to authorize the Department to disregard the requests made by the Applicant as well as any future requests for the same records.

[16] On April 16, 2024, the Applicant filed this application for judicial review of the decision made by the Commissioner.

[17] On June 21, 2024, the Commissioner filed the record of the proceeding.

[18] On October 18, 2024, the judicial review was scheduled to be heard on December 6, 2024.

[19] On November 19, 2024, the hearing of the judicial review was rescheduled to January 29, 2025.

[20] On January 29, 2025, the application for judicial review was heard and a decision reserved by the court.

B. Submissions of the parties

[21] The Applicant makes four main claims in his submissions to the court. First, the Applicant says that the effect of the decision made by the Commissioner is to block or frustrate his ability to better understand his time in the care of the Director as a child. Access to unredacted copies of the child protection records would, according to the Applicant, contribute in a positive way to his healing journey and capacity to move forward. Second, the Applicant says that the Commissioner was in a conflict of interest and failed to act fairly. Third, the Applicant challenges the coherency of the Commissioner reasoning that she had no legal authority to determine access to child protection records but then concluding that she did have the authority to authorize the Department to disregard requests for child protection records. Fourth, the Applicant argues that his constitutional right to free expression was not protected because the Department relied on his prior emails and social media posts to support its requests to the Commissioner.

[22] The Department advances three main submissions in response to the judicial review. First, the Department submits that the reasonableness standard of review is applicable to the decision made by the Commissioner. Second, the Department submits that the decision made by the Commissioner is reasonable. According to the Department, the decision is internally coherent, follows a rational chain of analysis, and is justified in light of the facts and the law. Third, the Department submits that there was no reasonable apprehension of bias on the part of the Commissioner. In other words, there was no breach of procedural fairness in this case.

II. Role of reviewing court

[23] When engaged in substantive review of an administrative decision for reasonableness, the question for the reviewing court is whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65 at paras. 85 and 99). This inquiry involves examining both the outcome and the reasoning process used by the decision-maker (***Vavilov*** at paras. 83 and 87). See also ***Canada Post Corp. v. Canadian Union of Postal Workers***, 2019 SCC 67 at para. 29; and ***Mason v. Canada (Citizenship and Immigration)***, 2023 SCC 21 at para. 58.

[24] Deference is engaged (***Vavilov*** at paras. 13-14). Reasonableness review is not a rehearing of the merits of the proceeding or a fresh examination of the question before the administrative decision-maker. It is a "reasons first" evaluation of the conclusion reached by the decision-maker and the justification provided by the decision-maker for that conclusion (***Vavilov*** at paras. 15 and 83-84; ***Canada Post*** at para. 29; and ***Mason*** at para. 8).

[25] When tasked with reviewing an administrative decision for procedural fairness, the question for the reviewing court is whether the procedure used by the decision-maker was fair in all of the circumstances (***Baker v. Canada (Minister of Citizenship and Immigration)***, [1999] 2 S.C.R. 817 at para. 21; and ***Vavilov*** at para. 77). What fairness requires in any particular case is variable and highly contextual (***Baker*** at para. 28; and ***Vavilov*** at para. 77). In this jurisdiction, no deference from the court is owed on judicial review: an administrative proceeding is either fair or unfair (***Ayangma v HRC & ELSB***, 2019 PECA 20 at para. 18).

[26] However, the standard required of administrative decision-makers is not perfection (***Knight v. Indian Head School Division No. 19***, [1990] 1 S.C.R. 653 at p. 685; and ***Canada (Citizenship and Immigration) v. Harkat***, 2014 SCC 37 at para. 43). Subject to statutory and regulatory direction, every administrative decision-maker is the master of its own procedure and need not assume all the trappings of a court (***Knight*** at p. 685). Some care must therefore be exercised by reviewing courts to ensure that administrative decision-makers have sufficient space to develop procedures that are proportionate, adapted to their functions, and fair to those impacted by their decisions (***Knight*** at p. 685; and ***Baker*** at para. 27).

III. Analysis

A. Reasons given by the Commissioner

[27] The reasons given by the Commissioner are summarized below.

[28] After reviewing the factual and statutory background in the case, the Commissioner identified the main issue as whether the requests made by the Applicant satisfied s. 52(1) of ***FOIPP*** and, if so, whether the Commissioner ought to exercise her discretion to authorize the Department to disregard those requests and any future requests for the same records (paras. 24-26). The Commissioner reasoned that the burden of proof in this case rested with the Department (paras. 27-28). The Commission then identified the requests in question, which all involved receiving unredacted copies of records related to the Applicant while in the care of the Director (Request Nos. 344, 345, 347, 364, 365, 366, 367, and 369) or having an opportunity to inspect an unredacted copy of the child protection file related to the Applicant (Request No. 346).

[29] At the outset of her analysis, the Commissioner identified the purpose of s. 52 of ***FOIPP*** as contributing to the purpose and function of ***FOIPP*** by protecting "against the misuse or abuse of the right of access to information" (para. 33). The Commissioner also reasoned that authorizing a public body to disregard a request for records "should be an exception" and not a general mechanism for such bodies to avoid their access to information obligations under ***FOIPP*** (para. 34).

[30] In order to determine whether the requests by the Applicant were "repetitious" within the meaning of s. 52(1)(a) of ***FOIPP***, the Commissioner relied on an earlier

administrative decision which interpreted the word "repetitious" to mean a request for the same records or information that is made more than once (para. 40). The Commissioner found that, between 2018 and 2022, the Applicant made several requests to the Department asking for an unredacted copy of the child protection file. The Commissioner also found that the Applicant himself acknowledged that the same request had been made on several occasions and that those requests would continue until the Department disclosed what was sought by the Applicant (para. 41). The Commissioner concluded that the nine requests made by the Applicant were "repetitious" within the meaning of s. 52(1)(a) of ***FOIPP***.

[31] In order to determine whether the requests by the Applicant amounted to an "abuse of the right to access" within the meaning of s. 52(1)(a) of ***FOIPP***, the Commissioner examined the surrounding context (para. 45). Without any statutory definition of "abuse" in ***FOIPP***, the Commissioner examined the ordinary meaning of the word and reasoned that it "would be an action that could be considered a misuse or improper use of something" (para. 58). The Commissioner went on to consider other legal definitions of the word (paras. 58 and 59) and relied on an administrative decision from another jurisdiction which interpreted the word "abuse" in the context of substantially similar legislation dealing with the same subject (para. 58).

[32] The Commissioner found that the requests made by the Applicant were the same or substantially the same (para. 60), that the Applicant continued to make the requests despite being told on several occasions by the Department that it did not have the authority to grant access to child protection records and despite knowing that the Department did not have that authority (para. 61), that the Applicant had the stated intention of continuing to make requests for the same records (paras. 61 and 62), that the Commissioner had previously determined that the Department did not have the authority under ***FOIPP*** to grant access to child protection records (para. 62), and that the Applicant persisted in making the same or substantially the same requests to the Department after he was aware, or ought to have been aware, that the Department cannot grant access to them (para. 62). The Commissioner ultimately concluded that the requests made by the Applicant amounted to an abuse of the right of access (para. 70).

[33] Having concluded that the requests made by the Applicant were repetitious and an abuse of the right to access records under ***FOIPP***, the Commissioner considered separately whether to exercise the discretion granted by s. 52(1)(a) of ***FOIPP*** to authorize the Department to disregard the requests. The Commissioner reasoned that any such exercise of discretion had to be "reasonable and appropriate in the circumstances" (para. 74).

[34] While recognizing the sincerity of the Applicant seeking to obtain the child protection records (para. 75), the Commissioner found that the Department had repeatedly told the Applicant that it could not grant access to those records under ***FOIPP***, that the Department had directed the Applicant to the Director for such records, that the Commissioner had previously determined that ***FOIPP*** does not apply to the records requested by the Applicant, and that the Commissioner had also confirmed that it did not

have the authority to review any decision by the Director (para. 77). Despite this record, the Commissioner found that the Applicant continued to submit the requests to the Department for child protection records (para. 78). The Commissioner concluded that exercising her discretion, and authorizing the Department to disregard the requests made by the Applicant, was warranted in the circumstances (para. 79).

[35] The Commissioner went on to consider whether the authorization to disregard the requests made by the Applicant also ought to extend to any future requests for the same records (para. 80). After accepting the Department had told the Applicant that it did not have the authority to grant access to child protection records under ***FOIPP*** (para. 80), the Commissioner found that the Applicant had persisted in making the requests for such records (para. 82) and that the Applicant would continue to make such requests of the Department in light of his submissions to the Commissioner (para. 83). The Commissioner also expressly noted that any authorization to disregard future requests by the Applicant would be limited in nature and not extend to future requests for other information (para. 85). In other words, this exercise of discretion was limited only to future requests for child protection records (paras. 80 and 85). In the end, the Commissioner exercised her discretion to authorize the Department to disregard future requests from the Applicant for child protection records (para. 86).

[36] In summary, the Commissioner found that the requests made to the Department by the Applicant were repetitive and amounted to an abuse of the right of access within the meaning of s. 52(1)(a) of ***FOIPP***. The Commissioner then exercised her discretion to authorize the Department to disregard the requests made by the Applicant (Request Nos. 344, 345, 346, 347, 364, 365, 366, 367, and 369), as well as future requests made by the Applicant for child protection records, pursuant to s. 52(1)(a) of ***FOIPP*** (paras. 89 and 91).

B. Standard of review

[37] The substance of the decision made by the Commissioner under s. 52(1)(a) of ***FOIPP*** is reviewable on the reasonableness standard. Primary decision-making authority has been assigned to the Commissioner by the Legislature. The decision by the Commissioner involved the interpretation and application of its home or enabling statute. At its core, this was an exercise of discretion by the administrative decision-maker created for the specific purpose of administering ***FOIPP***.

[38] The presumption of reasonableness has not been displaced by any legislated standard of review or statutory appeal. No constitutional question arises from the reasons of the Commissioner, and there is no general question of law raised in this case that is of central importance to the legal system as a whole. While an earlier decision by the Commissioner resolved the jurisdictional boundaries between the Commissioner, the Department and the Director, that is not the decision under judicial review in this proceeding. Rather, the discretionary decision at issue in this case was one that the Legislature chose to assign to an administrative decision-maker – the Commissioner – and not the court (***FOIPP***, s. 52(1)(a)). That statutory design choice must be respected. The

reasonableness standard of review applies.

[39] When a decision made by the Commissioner is reviewed for procedural fairness, the task is different. A reviewing court must examine whether the procedure used by the Commissioner was fair in all of the circumstances (***Baker*** at para. 21; and ***Vavilov*** at para. 77). No deference is owed on judicial review. The administrative proceeding before the Commissioner was either fair or unfair (***Ayangma*** at para. 18).

C. Substantive review of the decision by the Commissioner

[40] After reviewing the reasons provided by the Commissioner as a whole, the court is satisfied that the decision is based on reasoning that is rational and logical. The court can trace the reasoning used by the Commissioner without encountering any fatal flaws. In other words, the Commissioner charted a line of analysis from the evidentiary record, through the applicable statute, and to the conclusion. This discretionary decision on the part of the Commissioner can be easily understood on the material question raised in the proceeding, namely whether the requests made by the Applicant were repetitious and an abuse of the right of access records under ***FOIPP***. In short, there is no principled basis for intervention by the court on substantive grounds. The reasoning of the Commissioner adds up (***Vavilov*** at para. 104).

[41] When the court examines the decision in light of the relevant legal and factual constraints, it is also satisfied that the outcome reached by the Commissioner was reasonable and justified in the circumstances. It is consistent with the text of ***FOIPP*** – the governing statutory scheme – and it accords with the evidence before the Commissioner and past administrative decisions made by the Commissioner and other statutory decision-makers exercising similar discretion. Finally, the analysis undertaken by the Commissioner of s. 52(1)(a) of ***FOIPP*** took account of the text, context, and purpose of that provision. See e.g. paras. 32, 33, 34, 40, 45, 58, 59, 74, 81, and 85. While there was no express reference to the modern principle of statutory interpretation, that principle is nevertheless evident from the substance of the reasons given by the Commissioner in this case (***Vavilov*** at paras. 119-123).

[42] In summary, there is no substantive ground for setting aside the decision made by the Commissioner. This was a reasonable exercise of discretion. And the outcome was justified by the Commissioner in light the facts and the law.

D. Response to submissions made by the Applicant

[43] In an effort to be directly responsive to the Applicant, the court pauses to specifically address the three substantive concerns expressed by the Applicant. A fourth concern identified by the Applicant, which related to the fairness of the decision made by the Commissioner, is addressed by the court later in this decision.

[44] The Applicant complains that the effect of the decision made by the Commissioner

is to block or frustrate his ability to better understand his time in the care of the Director as a child. There is no question that navigating government bureaucracy can sometimes feel like a maze. However, if you reduce the decision made by the Commissioner to its very core, all she is saying to the Applicant is that, if he wants access to child protection records, he has to request those records from the Director. He cannot request them from the Department under ***FOIPP***.

[45] The Applicant also questions how the Commissioner has no legal authority to determine access to child protection records under ***FOIPP*** but does have the legal authority to authorize the Department to disregard requests for child protection records under ***FOIPP***. Admittedly, this question is a good one. At first glance, it could appear to not make sense. However, the answer is in the design of the applicable statutes and regulations.

[46] When designing the former ***Child Protection Act*** and ***Child Protection Regulations***, the Legislature and Cabinet decided that requests for child protection records would be determined by the Director. When designing ***FOIPP*** and the ***Freedom of Information and Protection of Privacy Act General Regulations***, PEI Reg. EC564/02 [***FOIPP Regulations***], the Legislature and Cabinet decided that: (i) as a general rule, requests for records would be made to governmental departments and the Commissioner would be responsible for giving permission to departments to disregard requests in certain circumstances; and (ii) as a limited exception to the general rule, the specific process for requesting child protection records would continue under the ***Child Protection Act*** and requests for those records would still be processed by the Director.

[47] In this case, the Applicant made requests under ***FOIPP*** for records following the general rule. The Department asked the Commissioner for permission to disregard those requests because the requests were said to be repetitive and an abuse of the right of access under ***FOIPP***. The Commissioner was dealing with requests made by the Applicant under ***FOIPP***. As part of her explanation about why the requests were an abuse of the right of access under ***FOIPP***, the Commissioner pointed out that, according to ***FOIPP*** and the ***FOIPP Regulations***, the Applicant was supposed to use the specific process under the ***Child Protection Act*** and ***Child Protection Regulations*** to request child protection records from the Director. The Applicant was not able to use the general process under ***FOIPP***.

[48] Finally, the Applicant expresses concern that his constitutional right to free expression was infringed because the Department gathered, and relied upon, his prior emails to the Department and certain public social media posts as evidence to support its request to the Commissioner. One can easily understand how expression can mean one thing to its author and something very different to its reader or recipient. The meaning of words is a common source of disagreement. However, the Department did not infringe the freedom of expression of the Applicant.

[49] The Department may have interpreted this expression in a manner that was different than – or used this expression for a purpose that was different from – the one intended by the Applicant, but that is not an infringement of the freedom of expression. No law or

governmental action restrained the expression of the Applicant on purpose or in effect. The Department simply used the words of the Applicant against him in its submissions to the Commissioner.

[50] If anything, this is just another reminder that expression is a bit like a boomerang. Before throwing it out into the world for others to see, hear, read or interpret, one must remember that it can – and often will – return to you someday. When it does, it may be spinning in a way that you did not originally intend or anticipate. This is especially true in a legal proceeding.

[51] At the end of the day, the grievance of the Applicant rests with the Director and not the Department or the Commissioner. Child protection records are not accessible through ***FOIPP***. As explained later in these reasons for the benefit of the Applicant, such records must now be requested under ss. 55 and 57 of the ***Child, Youth and Family Services Act***, R.S.P.E.I. 1988, c. C-6.01. At the time of the decision by the Commissioner, child protection records had to be requested from the Director under ss. 7 and 8 of the former ***Child Protection Act***.

E. Fairness of the decision made by the Commissioner

[52] The starting presumption is that an administrative decision-maker acts fairly and impartially when exercising statutory functions (***Zündel v. Citron***, 2000 CanLII 17137 (FCA) at paras. 36-37). That presumption is a strong one. Cogent evidence to the contrary is required. A reasonable apprehension of bias must be proven with evidence to the standard of being likely or probable – suspicion is not enough (***Yukon Francophone School Board, Education Area #23 v. Yukon Territory (Attorney General)***, 2015 SCC 25 at paras. 20-26).

[53] In this case, there is insufficient evidence to displace the presumption of impartiality in favour of the Commissioner.

[54] More than twenty years before the decision under review, the Commissioner was a lawyer in the legal services section of the Office of the Attorney General. She was an advisor to – and an advocate for – the Director and, in 2001, she had represented the Director in a child protection proceeding involving the mother of the Applicant. She was subsequently appointed as the Commissioner in 2020 and, as part of her statutory functions, made the decision involving the Applicant and the Department in 2024.

[55] As part of her decision-making role, the Director informed the Applicant in writing on January 11, 2023 that any knowledge she had about the family circumstances of the Applicant were "not a consideration in this matter" and would "not affect my decision" about the Department (Record at Tab W). Submissions were closed by the Commissioner on February 16, 2023 (Record at Tab AA). No concern or objection was raised by the Applicant until after the decision was issued by the Commissioner on March 27, 2024. In the notice of application for judicial review filed by the Applicant on April 26, 2024, the Applicant stated the view that the Commissioner was in a "conflict of interest" and

expressed the belief that the Commissioner did not make "a fair decision" (Notice of Application at Grounds (h) and (i)).

[56] A reasonable and informed person viewing this matter realistically and practically would not conclude that the Commissioner was consciously or unconsciously influenced by her participation as a lawyer for the Director in a proceeding involving the mother of the Applicant more than twenty years before the current dispute between the Applicant and the Department about access to child protection records under ***FOIPP***. See generally ***Terceira v. Labourers International Union of North America***, 2014 ONCA 839 at paras. 27, 29-35, and 37. Any knowledge about the family circumstances of the Applicant does not, as the Commissioner confirmed in writing, relate to the nature of the request made by the Department pursuant to s. 52(1)(a) of ***FOIPP***. The Director was also not a party to the matter before the Commissioner. Finally, the Commissioner is an officer of the Legislative Assembly (***FOIPP***, s. 42(1)) and not an appointee of the Minister of the Department or the Executive generally.

[57] There is also no evidence that the Commissioner had any prior involvement in the requests made by the Applicant for child protection records from either the Director or the Department. As explained by Sara Blake, "A past connection with a party, before the party had any interest in the matter at hand, does not give rise to a reasonable apprehension of bias. ... The prior professional association does not give rise to a reasonable apprehension of bias unless the member has some involvement in the matter now before the tribunal" (Sara Blake, ***Administrative Law in Canada***, 7th ed. (Toronto: LexisNexis Canada, 2022) at 124). Here, there is no evidence that the Commissioner had any involvement in the requests made by the Applicant for child protection records. Based on the record before the court, her involvement began only when the Department applied to the Commissioner for relief under s. 52(1) of ***FOIPP*** on November 28, 2022 (Record at Tab B).

[58] There was no denial of procedural fairness by the Commissioner on this ground.

[59] Finally, any concern about bias must be raised when a party first becomes aware of the facts supporting the concern. If the party does not do so, the objection may be considered waived (***Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board***, 2005 CanLII 24217 (ON CA) at paras. 98-100; and ***Eckervogt v. British Columbia***, 2004 BCCA 398 at paras. 46-49). No such objection was raised by the Applicant before the decision was made by the Commissioner.

[60] This general insistence on a timely objection aims to ensure that the administrative decision-maker itself has an opportunity to hear, consider, and decide the complaint of bias. In other words, unless the grounds for bias are revealed only after receipt of the administrative decision, a party concerned about bias cannot wait and complain only upon receipt of an adverse decision. In this case, the reasons for the decision issued by the Commissioner reveal no basis for any such claim. The decision focuses exclusively on the statutory requirements to be satisfied by the Department under s. 52(1)(a) of ***FOIPP***. There

was also no evaluation whatsoever of the merits of any decisions previously made by the Director.

[61] After reviewing the record as a whole, the court is satisfied there is no legal or evidentiary basis for concluding that there was a reasonable apprehension of bias in this case.

F. Statutory pathway for accessing child protection records

[62] There is an existing statutory pathway for accessing child protection records and reviewing any decision made by the Director about the disclosure of those records. However, that pathway is not through ***FOIPP***. And repeated requests to the Department or the Commissioner are not going to change that statutory reality.

[63] Until the Legislature directs otherwise, child protection records are currently accessible through the Director by way of ss. 55 and 57 of the ***Child, Youth and Family Services Act***, R.S.P.E.I. 1988, c. C-6.01. The decision made by the Director is then capable of being reviewed by a review panel under s. 2 of the ***Child, Youth and Family Services Regulations***, PEI Reg. EC684/24. If the Applicant is still seeking child protection records related to his time under the care of the Director, then this is the path forward for the Applicant. And, in the event that the Applicant is ultimately unsatisfied with the decision made by the review panel, the appropriate remedy for the Applicant is to seek judicial review by the court. It is not to request those same records from the Department or the Commissioner.

G. Costs

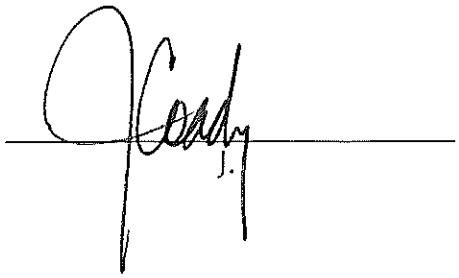
[64] Neither the Commissioner nor the Department asked the court for costs in this proceeding. This position was just and proportionate in the circumstances. In this jurisdiction, costs awards for – or against – an administrative decision-maker discharging statutory functions are rarely made and ordinarily reserved for exceptional circumstances (***Health PEI v Privacy Commissioner***, 2019 PECA 7 at paras. 64-65). There is no justification for departing from that general principle in this case.

H. Style of cause

[65] The style of cause in this proceeding is amended under Rule 5.04(2) and s. 7(3) of the ***Judicial Review Act***, R.S.P.E.I. 1988, c. J-3. A tribunal is properly described for the purpose of judicial review when it is named in the same manner as it is described in the statute conferring its authority (***Judicial Review Act***, s. 7(2)). The Commissioner is so described in s. 42(1) of ***FOIPP***.

IV. Conclusion

[66] The application for judicial review is dismissed without costs to any party.



J.

July 29, 2025