SUPREME COURT OF YUKON

Citation: *VinAudit Canada Inc v Yukon (Government of)*, 2023 YKSC 68

Date: 20231221
S.C. No. 22-A0065
Registry: Whitehorse

BETWEEN:

VINAUDIT CANADA INC.

PETITIONER

AND

YUKON GOVERNMENT
(DEPARTMENT OF HIGHWAYS AND PUBLIC WORKS)

RESPONDENT

AND

THE INFORMATION AND PRIVACY COMMISSIONER

INTERVENOR

Before Justice D.A. Crerar

Counsel for the Petitioner	Mark Wallace
Counsel for the Respondent	Lesley Banton and Simone Dumbleton
Counsel for the Intervenor	Kelly Hjorth

REASONS FOR DECISION

I. INTRODUCTION

[1] The petitioner applies under s. 105 of the *Access to Information and Protection of Privacy Act,* SY 2018, c 9 (the "**Act**")[1] to set aside the July 14, 2022 decision (the "**Decision**") of the Deputy Minister of the respondent department to reject the June 22,

2022 recommendation of an adjudicator of the Yukon Information and Privacy Commissioner (the "**Commissioner**") that the respondent release to the petitioner requested information concerning vehicle accidents from 2016 to 2021.

[2] These reasons are the first to apply the new Act, proclaimed in force on April 1, 2021, in a substantive judicial review.

[3] In *VinAudit Canada Inc v. Yukon (Government of)*, 2023 YKSC 39 at para. 7 (***VinAudit* #1**), Chief Justice Duncan made two rulings preliminary to this hearing:

> 1) the decision to be reviewed is the decision of the respondent to reject the recommendations of the Commissioner; and
>
> 2) the standard of review for judicial review under s. 105 is reasonableness.

[4] For the reasons that follow, even applying the deferential standard set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 and *Mason v. Canada (Citizenship and Immigration)*, 2023 SCC 21, the Court concludes that the Decision was unreasonable and must be set aside.

II. FACTS AND STATUTORY FRAMEWORK

A. The information request

[5] The petitioner is one of several companies that provide customers an online platform to search a given vehicle's history, including its accident history, by reference to its unique vehicle identification number ("**VIN**"). The petitioner obtains this information through access to information requests to Canadian provinces and territories.

[6] In 2017, the respondent granted the petitioner's 2016 request for vehicle accident information from 2012 to 2016. The respondent now takes the position that the 2017 disclosure was in error, and that it should have been refused, then as now, under s. 70

of the Act and s. 98 of the *Motor Vehicles Act*, RSY 2002, c 153 (the "**MVA**"), as discussed further below.

[7] In September 2021, in order to obtain the same vehicle accident information for 2016 to 2021, the petitioner filed an information request under s. 44 for the following data fields:

1. ***ACCIDENT_CASE_ID***
2. ***ACCIDENT_TYPE_DESC***
3. PRIMARY_ACCIDENT_DESC
4. ACCIDENT_DATE
5. ***TOTAL_VEHICLES***
6. ***POLICE_ATTEND_IND***
7. ***ACCIDENT_CITY***
8. ***ACCIDENT_LOCATION***
9. ***VEHICLE_COLOUR_CODE***
10. ***TRAVEL_DIRECTION***
11. ESTIMATE_VEHICLE_DAMAGE
12. ***INSURANCE_COMPANY***
13. ***VIN***
14. VEHICLE_NUMBER
15. IMPACT_LOCATION

[bold italics represent categories of information that the respondent refused to produce]

B. The respondent's denial of access

[8] On November 17, 2021, the respondent denied the petitioner access to the bulk of the records sought. Citing s. 70(1), the respondent redacted all information from the data fields bolded in the list above, denying access to 10 of the 15 data fields sought and wholly redacting 645 of the 774 pages of data sought. Further, the respondent did not provide the records in a useable electronic format, or in the original data field delimited format, but in a PDF format less amenable to re-use.

[9] The cited provision, s. 70(1), sets out an exception to production where the information that "would be an unreasonable invasion of a third party's privacy":

> **70 Third party personal information**
>
> (1) The head of a responsive public body ***must not grant an applicant access to a third party's personal information*** held by the responsive public body ***if the head determines, in accordance with this section, that disclosure of the information would be an unreasonable invasion of the third party's privacy.***
>
> (2) The head ***must make a determination*** under subsection (1) in accordance with the following:
>
> > (a) a disclosure of a type described in subsection (3) is ***presumed to be an unreasonable invasion of a third party's privacy that may be rebutted only after the head weighs all relevant factors known to the head in relation to the disclosure***, including any factors referred to in subsection (5) that are applicable in the circumstances;
> >
> > (b) a disclosure of a type described in subsection (4) is ***not to be considered*** an unreasonable invasion of a third party's privacy;
> >
> > (c) in the case of any other type of disclosure of a third party's personal information, ***the head must weigh all relevant factors known to the head*** in relation to the disclosure, ***including any factors referred to in subsection (5)*** that are applicable in the circumstances.
>
> [emphasis added]

[10] Section 1 defines "personal information" and lists examples of such personal information:

"***personal information***" means, subject to section 3, recorded information ***about an identifiable individual***, including

(a) their name,

(b) their home, mailing or email address or phone number,

(c) their age, sex, gender identity or expression, or sexual orientation,

(d) their skin colour, fingerprints, blood type or any other genetic characteristic or biometric information,

(e) their race, ethnicity or nationality,

(f) information about their current and past physical or mental health, including their personal health information,

(g) information about their marital, family, education or employment status or history,

(h) information about their current or past

(i) political or religious beliefs, associations or activities,

(ii) amounts or sources of income, or

(iii) income tax returns

(i) information about

(i) an asset that they wholly or partially own or owned,

(ii) a liability for which they are or were wholly or partially liable,

(iii) a transaction or banking activity in which they are or were involved,

(iv) an assessment of credit-worthiness of which they are or were the subject,

(v) a discretionary benefit in the nature of income assistance, legal aid or another similar type of benefit that they are receiving or have received, or

(vi) a law enforcement matter of which they are or were the subject,

(j) a personal unique identifier that has been assigned to them,

(k) another individual's opinion or view about them, or

(l) their opinion or view about something other than their opinion or view about another individual;

[emphasis added]

[11] Subsection 70(3) sets out a similar list of categories of personal information, the disclosure of which is presumptively an unreasonable invasion of privacy:

> (3) Each of the following types of disclosure of a third party's personal information is ***considered to be an unreasonable invasion of the third party's privacy***:
>
> (a) the disclosure of information about
>
> (i) the third party's race, ethnicity, or sexual orientation,
>
> (ii) the third party's genetic characteristics or biometric information,
>
> (iii) the education or employment history of the third party,
>
> (iv) the third party's current or past
>
> (A) physical or mental health,
>
> (B) political or religious beliefs, associations or activities, or
>
> (C) amounts or sources of income,
>
> (v) assets that the third party wholly or partially owns or owned,
>
> (vi) liabilities for which the third party is or was wholly or partially liable,
>
> (vii) transactions or banking activities in which the third party is or was involved, or
>
> (viii) assessments of credit worthiness to which the third party is or was subject;
>
> (b) the disclosure of information collected from the third party's income tax returns or collected for the purpose of collecting a tax from the third party;
>
> (c) the disclosure of information about a discretionary benefit in the nature of income assistance, legal aid or another similar type of benefit that the third party is receiving or has received;
>
> (d) the disclosure of information about a law enforcement matter of which the third party is or was the subject, or about a legal obligation owed to a public body by the third party, if the disclosure occurs during a period in which the information is necessary for use in
>
> (i) an investigation into the matter,
>
> (ii) a prosecution of an offence as it relates to the matter, or

(iii) enforcing the obligation;

(e) the disclosure of an individual's opinion or view about the third party that has been provided for the purpose of a recommendation, evaluation or character reference in respect of the third party.

[emphasis added]

[12] Conversely, s. 70(4) sets out categories of personal information disclosure of which is not considered to be an unreasonable invasion of privacy:

(4) Each of the following types of disclosure of a third party's personal information is ***not considered to be an unreasonable invasion of the third party's privacy:***

(a) a disclosure to which the third party consents in writing;

(b) the disclosure of information of a type of information referred to in paragraph 25(g);

(c) in the case of a third party who is or was an employee of a public body, the disclosure of information about

(i) the third party's status as an employee of the public body,

(ii) the third party's classification or salary range, or the duties and responsibilities of the position or positions that they occupy or occupied as an employee of the public body,

(iii) the third party's name as contained in a record prepared by them in the course of their employment with the public body, or

(iv) the third party's opinion or view provided in their performance of the duties and responsibilities of the position or positions that they occupy or occupied other than an opinion or view about another individual;

(d) in the case of ***information contained in a record granting, issuing or otherwise providing a licence, permit or other type of authorization of a commercial or professional nature***, or a discretionary benefit other than a benefit in the nature of income assistance, legal aid or another similar type of benefit, that has been granted, issued or otherwise provided to the third party under an Act, the disclosure of the following as specified in that record:

(i) the name of the third party to whom the licence, permit, authorization or benefit was granted, issued or otherwise provided,

(ii) the type of licence, permit, authorization or benefit that was granted, issued or otherwise provided,

(iii) the date on which the licence, permit, authorization or benefit was granted, issued or otherwise provided,

(iv) if applicable, the period in respect of which the licence, permit, authorization or benefit is or was valid,

(v) if applicable, the date on which the licence, permit, authorization or benefit expires or expired,

(vi) in the case of a monetary benefit, the amount of the benefit that was granted or otherwise provided;

(e) in the case of a third party who travelled at the expense of a public body, the disclosure of information about the expenses incurred by the third party, including all payments made to the third party by the public body in relation to the travel;

(f) the disclosure is authorized or required under an Act of the Legislature (including this Act) or of Parliament, or is authorized or required under a regulation made under such an Act;

(g) a disclosure that the head determines is necessary to protect an individual's health or safety.

[emphasis added]

[13] Subsection 70(5) sets out the relevant factors that the public body must weigh in deciding whether to disclose the requested information:

(5) The following factors are ***relevant factors to be weighed by the head in relation to a disclosure*** under subsection (1) (if known to the head and applicable in the circumstances):

(a) the type and sensitivity of the personal information that would be disclosed;

(b) the relationship, if any, between the third party and the applicant;

(c) whether the personal information that would be disclosed is likely to be accurate and reliable;

(d) the following factors that are considered ***to suggest that the disclosure would be an unreasonable invasion of a third party's privacy***:

(i) the disclosure would unfairly expose the third party to financial or other harm,

(ii) the disclosure would unfairly damage the reputation of any person referred to in a record containing the personal information,

(iii) the personal information to be disclosed was provided to a public body based on the public body's confirmation that it would hold the information in confidence;

(e) the following factors that are considered ***to suggest that the disclosure would not*** be an unreasonable invasion of a third party's privacy:

> (i) the disclosure would subject a program or activity, specialized service or data-linking activity of a public body to public scrutiny,
>
> (ii) the disclosure would be likely to promote public health and safety,
>
> (iii) the disclosure is authorized or required under an Act of the Legislature (including this Act) or of Parliament, or is authorized or required under a regulation made under such an Act,
>
> (iv) the disclosure would assist in researching or validating the claims, disputes or grievances of Aboriginal peoples,
>
> (v) the personal information that would be disclosed is relevant to a determination of the applicant's rights.
>
> [emphasis added]

[14] Section 64 imposes on the respondent the duty to provide reasons for each decision to withhold information requested by the petitioner:

> **Head's response to access request**
>
> 64(1) Subject to subsections (3) and 92(1), the head of the responsive public body must respond to an access request, through the access and privacy officer or in the prescribed manner, if any, not later than the response date for the access request by
>
> (a) granting the applicant access to all the information relevant to the access request that is held by the responsive public body except the information and records withheld under paragraph (b);
>
> (b) withholding from the applicant, in accordance with the regulations, if any, the following information and records relevant to the access request that are held by the responsive public body:
>
> .....
>
> ***(d) providing the applicant with written reasons for the response in accordance with subsection (2).***
>
> (2) The head's written reasons for their response to an access request must
>
> (a) in respect of each determination or decision made under paragraph (1)(b)
>
> ***(i) specify the provision of this Part under which the determination or decision was made, and***
>
> ***(ii) in the case of a decision referred to in subparagraph (1)(b)(iii), provide any further explanation that the head considers necessary to substantiate their reason for making the decision;...***
>
> [emphasis added]

[15] The respondent's reasons for its initial decision to deny access, as set out in the November 17, 2021 letter, were brief:

> Motor Vehicles conducted a consult with Yukon Bureau of Statistics and received a legal opinion on release of this information. Yukon is a small jurisdiction; information was redacted as per section 70 of the ATIPP Act to protect personal privacy.

C. The petitioner's complaint

[16] On December 3, 2021, the petitioner filed a complaint to the Commissioner, pursuant to s. 66, requesting that the information be provided in a complete and unredacted form, and in a usable format.

[17] In February 2022 the Commissioner notified the petitioner and respondent that the complaint would proceed to formal investigation under an adjudicator of the Commissioner, as required under s. 93(4)(b).

D. The Commissioner investigation

[18] In *VinAudit #1*, Chief Justice Duncan summarises the broad investigative powers statutorily bestowed on the Commissioner:

> [16] If the complaint cannot be resolved by consultation, then the investigation begins. It must be conducted in private. The *Act* gives the IPC powers of a court to summon witnesses, compel them to give testimony, compel production of information and records, and examine information and records produced. The public body is required to produce any information or records the IPC compels them to produce. The IPC may also enter premises, conduct interviews, receive and consider any evidence relevant to the investigation, and administer oaths. It may also determine each question of fact arising in relation to the decision or matter under investigation, and each question of law arising in relation to the decision or matter (s. 95). The IPC must permit the complainant and the public body to make submissions to the IPC and may permit another person to make submissions either orally or in writing or in reply.

[19] In the complaint proceeding, the respondent provided a three-page submission, along with a statutory declaration from the Director of the Yukon Bureau of Statistics. The petitioner elected not to provide a reply submission.

[20] The respondent's statutory declaration did not provide a formal legal opinion, but merely attached a brief conclusory email, dated June 29, 2021. The email pre-dates the petitioner's request by three months. It is not clear if it is the "legal opinion" referred to in the initial November 2021 decision to refuse access. The email opinion purportedly justified the non-disclosure of the requested information:

> Hi [name omitted],
>
> We do not publish or otherwise share confidential information that makes it possible to identify an individual or a business in any manner, directly or indirectly. In accordance with our confidentiality management practices, the data in the file are not releasable because of the following reasons:
>
> 1. **High risk of indirect identification of a person or persons**: The number of accidents in a given year is very small for Yukon communities and neighbourhoods with small population base. There is a very high risk of indirect identification as non-personal data (i.e., accident city and location, date and time, along with detailed vehicle information in VIN) can be combined with other relevant information (e.g., news, social media posts, other form of communications, etc.) to identify a person or persons involved in the accident. Also, this may lead to an indirect disclosure of the cause of death or injury which is highly sensitive confidential information.
>
> 2. **Release of third party confidential business information**: The release of information on insurance company along with VIN will be tantamount to releasing third party confidential business information as it will provide a proxy of market share.
>
> I suggest you obtain legal opinion from Justice before deciding on this request.
>
> Thanks,
>
> [name omitted]
>
> [emphasis in original]

E. The Commissioner Report

[21] Section 101 requires the Commissioner to prepare an investigation report setting out recommendations to the public body (such as the present respondent) on whether

the information must be disclosed. The section expressly requires the Commissioner to support each recommendation with reasons:

> **101 Investigation report**
>
> Not later than 30 business days after the day on which an investigation must be completed under section 100, the commissioner must
>
> (a) prepare a report that sets out, in respect of the subject matter of the investigation
>
> (i) each determination of a question of fact or a question of law made by the commissioner,
>
> (ii) the commissioner's reasons for each determination referred to in subparagraph (i),
>
> (iii) based on the determinations referred to in subparagraph (i), each recommendation, if any, that the commissioner believes would adequately address the subject matter of the complaint if complied with by the respondent, and
>
> (iv) ***the reasons for each recommendation referred to in subparagraph*** (iii)...
>
> [emphasis added]

[22] On June 22, 2022, the Commissioner issued its investigation report (the "**Report**"): ATP-ADJ-2022-02-045 Investigation Report.[2] In 155 paragraphs, over 47 pages, the adjudicator Rick Smith of the Commissioner Office extensively reviewed the applicable factual and legislative background, including access to information decisions of commissioners and courts across the country, and considered whether the respondent was obliged to deny the information request based on s. 70. The Report concluded that:

1. the redacted information was not subject to the MVA, s. 98(1)(a), and that the Act applies to the information requested;
2. s. 70(1) did not require the respondent to withhold the redacted information from the petitioner; and

3. the respondent failed in its duty to respond to the petitioner openly, accurately, and completely, because it did not communicate with the petitioner about an appropriate format or provide it with a copy of the records in electronic format ordinarily held by the respondent and capable of re-use, as required by ss. 64(1)(c), 64(5), and 65(3).

[23] The first conclusion above addressed the primary basis asserted by the respondent for continued non-disclosure. The respondent specifically argued that s. 98 of the MVA prohibited disclosure:

> **98 Inspection of accident report**
>
> (1) Subject to subsection (2), a written report or statement made or furnished under this Part
>
> (a) is not open to public inspection...

[24] Specifically, the respondent argued (before the Commissioner and before this Court) that the information sought constitutes s. 98(1) "reports and statements" and are thus "not open to public inspection." The respondent notes that such information is not provided voluntarily to the government, and that the MVA compels disclosure of personal information to the government after an accident. For example, s. 95 of the MVA requires a driver involved in an accident that results in injury or death, or property damage exceeding $1000, to make a written report to a peace officer. Section 96 requires a peace officer to provide a written report to the Registrar of Motor Vehicles. The respondent argued that it was imperative to safeguard and not disclose such statutorily-compelled information.

[25] The Report rejected this position. It noted that the petitioner was not seeking the reports or statements themselves, but rather the anonymous data generated by

accidents, which data may nonetheless be included in such reports or statements. The data sought was thus not subject to the MVA, s. 98, and not the subject of its presumptive prohibition.

[26] The Report next addressed the concern expressed by the Yukon Bureau of Statistics in its email opinion:

> The number of accidents in a given year is very small for Yukon communities and neighbourhoods with [sic] small population base. There is a very high risk of indirect identification as non-personal data (i.e. accident city and location, date and time, along with detailed vehicle information in VIN) can be combined with other relevant information (e.g. news, social media posts, other forms of communications, etc.) to identify a person or persons involved in the accident. Also, this may lead to an indirect disclosure of the cause of death or injury which is highly sensitive confidential information.[3]

[27] The Report embarked on a comprehensive analysis of the specific data sought, in the context of specific judicial (*Leon's Furniture Limited v. Alberta (Information and Privacy Commissioner*), 2011 ABCA 94) and access to information (Information and Privacy Commissioner ("**IPC**") of Ontario Order PO-2410) decisions confirming that a VIN constitutes information about a vehicle --- not an individual --- and thus did not constitute "a third party's personal information" subject to the s. 70(1) consideration.[4]

[28] While that conclusion was sufficient to reject the basis for the respondent's access denial, the Report also noted that the respondent provided no evidence, as it was obliged to do, to inform the respondent's s. 70 assessment: to establish a reasonable basis for hypothesising that the anonymous VINs and accident information could be combined with social media and other information to identify, albeit indirectly, an individual involved in an accident.

[29] The Report then analysed each of the 15 data fields sought, confirming that none disclosed "personal information" about an identifiable individual. The Report went one

step further, analysing the combined effects of the data fields describing a hypothetical accident, further confirming that the combination of data fields revealed no "personal information."

[30] The Report then turned to the second issue. It concluded that the respondent had failed in its duty to respond to the information request openly, accurately, and completely, because it did not provide a copy of the data sought in an electronic format ordinarily held by the respondent, and capable of re-use: para. 148. The Report again canvassed and applied decisions in the access to information sphere, including *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403 and decisions of the Prince Edward Island (Order No. FI–16–005) and Saskatchewan (Review Report 181–2020) information and privacy commissioners.

[31] The Report made two recommendations:

1. the respondent disclose the redacted records in their entirety to the petitioner; and
2. the respondent disclose the unredacted and redacted records to the petitioner in their original format or another format that is capable of re-use by the petitioner, in accordance with s. 65.

F. The respondent's rejection of the Report recommendations

[32] Section 104 requires the respondent, within 15 days, to accept or reject the Commissioner's recommendations and, if it rejects those recommendations, to provide reasons for that rejection:

> **104 Response to investigation report**
>
> (1) Not later than 15 business days after the day on which an investigation report is provided to a respondent under subparagraph 101(b)(ii), ***the respondent must, in respect of each recommendation set out in the investigation report***

(a) decide whether to

(i) accept the recommendation in accordance with subsection (2), or

(ii) reject the recommendation; and

(b) ***provide***

(i) a notice to the complainant that includes

(A) their decision, and

(B) in the case of the rejection of a recommendation, ***their reasons for the rejection*** and a statement notifying the complainant of their right to apply to the Court for a review of the decision or matter to which the recommendation relates, and

(ii) a copy of the notice to the commissioner.

[emphasis added]

[33] In its July 14, 2022 Decision, the Deputy Minister of the respondent rejected the Commissioner's recommendations, in four terse paragraphs[5]:

> We respectfully disagree with the adjudicator's determination that aggregated data is not the same as the information contained in a motor vehicle report.
>
> In a Supreme Court of Canada case "*British Columbia v Phillip Morris International Inc., 2018 SCC 36...*", There is a similar context where the recorded information about individuals was stored on an aggregate basis. The judge determined at paragraphs 22-24 that it remained to be information and records of a particular individual.
>
> The public body also concurs with the Yukon Bureau of Statistics advice that several data fields included in the Records had a strong possibility of being directly linked back to an identifiable individual. Therefore, the Public Body rejects recommendation 1.
>
> The Public Body further respectfully rejects recommendation 2 as it relates to recommendation 1. because no information will be released. However, in future responses to access requests the Public Body will communicate with applicants to seek confirmation regarding providing access to records in accordance with section 65 of the *Access to Information and Protection of Privacy Act.*

[34] On August 24, 2022, the petitioner filed this application for judicial review, pursuant to s. 105(1) of the Act.

III. LAW

A. Introduction

[35] As set out above, the standard of review for this matter is reasonableness: *VinAudit #1* at para. 7.

B. Reasonableness a deferential standard

[36] Reasonableness review is a deferential standard: *Vavilov* at para. 85. It still "finds its starting point in judicial restraint": *Vavilov* at para. 75. It is based on respect for the role of administrative decision makers.

[37] The petitioner bears the onus of establishing that the decision under review was unreasonable. It is a high standard. As set out in *Vavilov*, minor flaws in reasoning will not suffice:

> [100] The burden is on the party challenging the decision to show that it is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision. It would be improper for a reviewing court to overturn an administrative decision simply because its reasoning exhibits a minor misstep. Instead, the court must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable.

[38] The reviewing court is not to impose the conclusion that it would have made in the administrative decision maker's place:

> [15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place.

...

> [82] Reasonableness review aims to give effect to the legislature's intent to leave certain decisions with an administrative body while fulfilling the constitutional role of judicial review to ensure that exercises of state power are subject to the rule of law: see *Dunsmuir*, at paras. 27-28 and 48....
>
> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.
>
> [emphasis in original]

[39] Similarly, the reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at para. 125, citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 at para. 55.

C. A "reasons first" analysis of reasonableness

[40] Generally, the reasons of the decision maker are the starting point of judicial review. As stated in *Vavilov*:

> [85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable...a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[41] The reviewing court considers both the outcome of the decision and the reasoning process that led to that outcome: *Vavilov* at paras. 86–87. As stated here:

> [86] … Reasonableness, according to *Dunsmuir*, "***is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process",*** as well as "***with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law***": *ibid.* ***In short, it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons, by the decision maker to those to whom the decision applies.*** While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, ***an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.***
>
> [emphasis added]

[42] A reasonable decision is one "based on reasoning that is both rational and logical", and a failure in either may lead the reviewing court to conclude that a decision must be set aside: *Vavilov* at para. 102.

[43] The reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Vavilov* at para. 102, citing *Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at para. 55. The court must ultimately be satisfied that the decision maker's reasoning "adds up": *Vavilov* at para. 104.

[44] Further, the reasons should not be read in isolation, but must be "read in light of the record and with due sensitivity to the administrative regime in which they were given": *Vavilov* at para. 103.

[45] *Vavilov* at paras. 102–104 provides principles and examples of unreasonableness that may prompt the setting aside of a decision:

a) if the reasons, read holistically, fail to reveal a rational chain of analysis;

b) if the reasons reveal that the decision was based on an irrational chain of analysis;

c) if the conclusion reached cannot follow from the analysis undertaken;

d) if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point; and

e) if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalisations or an absurd premise.

[46] To be reasonable, the decision must also be justified in light of the legal and factual constraints that bear on the decision maker: *Vavilov* at paras. 105–107. The Court provides a non-exhaustive list of such considerations:

a) *Governing statutory scheme*: a decision may be unreasonable where it fails to comply with the rationale and purview of the governing statutory scheme, or where it exceeds or inadequately exercises the powers given to it. This is usually the most salient consideration (paras. 108–110).

b) *Other statutory or common law*: if the decision involves interpretation of the governing statue, is it consistent with common or statutory law? That said, it may be reasonable for a decision maker to adapt a common law or equitable doctrine to the administrative context (paras. 111–114).

c) *Principles of statutory interpretation*: is the decision maker's interpretation of a statutory provision consistent with the text, context, and purpose of the provision in view of the entire statutory scheme (paras. 115–124)?

d) *Evidence before the decision maker*: the decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and the decision must be reasonable in light of them. As well, "[t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (paras. 125–126).

e) *Submissions of the parties*: the principles of justification and transparency require a decision maker's reasons to "meaningfully account for the central concerns raised by the parties". But a reviewing court cannot expect administrative decision makers to respond to every argument or line of possible analysis, or to make an explicit finding on each constituent element (paras. 127–128).

f) *Past practices and past decisions*: while administrative decision makers are not bound by their previous decisions, general consistency is desirable; like cases should generally be treated alike. Where a decision does depart from longstanding practices or established internal authority, it will be unreasonable to fail to explain that departure (paras. 129–132).

g) *Impact of the decision on the affected individual*: where the decision severely impacts the individual's rights and interests, the reasons must reflect those high stakes. In such circumstances, a failure to grapple with such consequences may well be unreasonable (paras. 133–135).

[47] The recent Supreme Court of Canada decision in *Mason* confirms the "reasons first" approach governing judicial review:

> [59] ***When an administrative decision maker is required by the legislative scheme or the duty of procedural fairness to provide reasons for its decision, the reasons "are the primary mechanism by which administrative decision makers show that their decisions are reasonable***" (*Vavilov*, at para. 81). The purpose of reasons is to "***demonstrate 'justification, transparency and intelligibility"*** (para. 81). Reasons are "the means by which the decision maker communicates the rationale for its decision" (para. 84). This Court emphasized that "***it is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision must also be justified, by way of those reasons***, by the decision maker to those to whom the decision applies" (para. 86 (emphasis in original)).
>
> [60] A decision will be ***unreasonable*** when the reasons "***fail to provide a transparent and intelligible justification***" for the result (para. 136). A reviewing court ***must therefore take a "reasons first" approach that evaluates the administrative decision maker's justification*** for its decision (para. 84). It must "***begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion***" (para. 84, citing D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286). As noted by Professor David Mullan, the "reasons

> first" approach "underscores a commitment to deference" and requires that reasons are "the principal lens through which the exercise of reasonableness review takes place" (p. 202). Thus, as he explains, "the starting or focal point for the conducting of truly deferential reasonableness review should be the reasons provided by the decision-maker" (p. 215; see also Daly (2022), at pp. 108-10).
>
> [61] Under *Vavilov*'s "reasons first" approach, the reviewing court should remember that "***the written reasons given by an administrative body must not be assessed against a standard of perfection***", and ***need not "include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred***" (para. 91). The reviewing judge must ***read the administrator's reasons "holistically and contextually***" (para. 97), "in light of the ***history and context of the proceedings*** in which they were rendered", including "***the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body***" (para. 94). ***Reasons must be read "in light of the record and with due sensitivity to the administrative regime in which they were given***" (para. 103). Such factors may "explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency" (para. 94).
>
> [emphasis added]

IV. DISCUSSION AND DECISION

A. Introduction

[48] The respondent argues that the petitioner has failed in its onus of establishing that the Decision was unreasonable: *Vavilov* at para. 100. It argues that the Decision exhibited the requisite degree of justification, intelligibility, and transparency. It argues that the respondent was not obliged to abandon its initial decision not to release the data in the face of the Commissioner's Report setting out why the data sought was not legitimately withheld under s. 70(1). It argues that it was entitled to continue to cite the advice of the Yukon Bureau of Statistics, that the data would have a high risk of indirect identification of individuals, as a reasoned basis for non-disclosure.

[49] On the "reasons first" approach mandated by *Vavilov* and *Mason*, the Decision was clearly unreasonable.

[50] *Mason* identifies two types of fundamental flaws in reasons under review, both of which are displayed in the present Decision:

> [64] *Vavilov* identified two types of "fundamental flaws" indicating that an administrative decision is unreasonable: (1) ***a failure of rationality internal to the reasoning process***; or (2) ***a failure of justification given the legal and factual constraints bearing on the decision*** (para. 101). A reviewing court need not categorize unreasonableness as falling into one category or another. They are simply a helpful way of describing how a decision may be unreasonable (para. 101).
>
> ***(i) Failures of Rationality in the Reasoning Process***
>
> [65] A failure of rationality in the reasoning process arises if the decision is not rational or logical (paras. 102-4). A decision is ***unreasonable if, "read holistically", it "fail[s] to reveal a rational chain of analysis" or "reveal[s] that the decision was based on an irrational chain of analysis"*** (para. 103). A reviewing court "must be able to trace the decision maker's reasoning without encountering any fatal flaws" in the decision maker's "overarching logic" (para. 102). It must ***"be satisfied that the decision maker's reasoning 'adds up'"*** (para. 104).
>
> ***(ii) Failures of Justification in Light of the Legal and Factual Constraints***
>
> [66] A failure of justification in light of the legal and factual constraints bearing on the decision arises if the decision is not "***justified in relation to the constellation of law and facts that are relevant to the decision***" (para. 105). The legal and factual context "***operate as constraints on the decision maker in the exercise of its delegated powers***" (para. 105). The burden of justification varies with the circumstances, including the wording of the relevant statutory provisions, the applicable precedents, the evidence, the submissions of the parties, and the impact of the decision on the affected persons. ***The greater the interpretive constraints in a given case, the greater the burden of justification on the decision maker in deviating from those constraints*** (see M. Popescu, "L'arrêt *Vavilov*: à la recherche de l'équilibre perdu entre la primauté du droit et la suprématie législative" (2021), 62 *C. de D.* 567, at p. 603). Examples include the seven non-exhaustive constraints set out below. As was highlighted in *Vavilov*, "[t]hese elements are not a checklist for conducting reasonableness review, and they may vary in significance depending on the context. They are offered merely to highlight some elements of the surrounding context that can cause a reviewing court to lose confidence in the outcome reached" (para. 106).
>
> [emphasis added]

B. The Decision's failures of rationality in the reasoning process

[51] Under the first *Mason/Vavilov* failure, the Decision, based on two thin bases, exhibits "failures of rationality in its reasoning process."

[52] The first basis for rejection of the recommendation cites *British Columbia v. Philip Morris International, Inc.*, 2018 SCC 36 at paras. 22–24, which the respondent claims arises in "a similar context," for the proposition that "the recorded information about individuals… stored on an aggregate basis… remained… information and records of a particular individual."

[53] The Decision provides no reasoned explanation for the relevance of that case; had it done so, it would have been clear that *Philip Morris* does not stand for that general proposition. *Philip Morris* reflects a highly specific exercise in statutory interpretation of the British Columbia *Tobacco Damages and Health Care Costs Recovery Act*, SBC 2000, c 30, s. 2(5), which provides that:

> …the health care ***records and documents*** of particular individual insured persons or the documents ***relating to*** the provision of health care benefits for particular individual insured persons are not compellable…"
>
> [emphasis added]

[54] That statute is an extraordinary piece of legislation, creating a statutory cause of action by a specific plaintiff (the Province of British Columbia) against a specific group of defendants (tobacco companies). It proclaims that "[t]he government has a direct and distinct action against a manufacturer to recover the cost of health care benefits caused or contributed to by a tobacco-related wrong" (s. 2(1)), be it exposure to tobacco or another tobacco-related disease. It facilitates that action through specific procedural and evidentiary alterations to the common law and the *Supreme Court Civil Rules*, BC Reg 168/2009. It creates reverse onuses and presumptions to streamline the claim: s. 2(5)(a). For example, it allows recovery of the costs of health care benefits on an aggregate basis (s. 3(2)), supported by population-based evidence, to establish causation and quantify damages or costs (s. 5). The statute revitalises claims previously

dismissed or extinguished under the *Limitation Act*, RSBC 1996, c 266 (s.6). It also anticipates procedural impediments and defences, such as attempts by tobacco defendants to obtain broad discovery of individual tobacco-related disease records. Amongst and consistent with these extraordinary procedural and substantive modifications is the broad definition of "records and documents" of particular individual insured persons exempted from ordinary discovery rules: s. 2(5)(b).

[55] At para. 21, *Philip Morris* notes the breadth of s. 2(5) (as emphasised by the bolded and italicised words in the quotation above), as well as the broad definition of "records" and "documents" in the British Columbia *Interpretation Act*, RSBC 1996, c 238 and the *Supreme Court Civil Rules* (the latter of central relevance to applications for document production in the course of litigation: the context in *Philip Morris*). Given this broad statutory language, information in databases containing both personal and anonymised medical information, constituted "records and documents" immune from production under s. 2(5): paras. 22–23.

[56] In short, *Philip Morris* makes no broad pronouncement that outside of that statutory definition in that specific and extraordinary statute, anonymised aggregate information stored in a database is immune from production generally, let alone pursuant to an access to information request under a statute intended to facilitate access to governmental information.

[57] Parenthetically, *Philip Morris* also expressly concluded that "particular individual" is not synonymous with "identifiable individual": paras. 28–31. Rather, "particular" simply means "distinct" or "specific"; while the data within the database in question in *Philip Morris* is anonymised, that data is based on specific individuals, and is thus

immune on that basis, rather than based on the release of personal information or identification of individuals. In other words, the respondent's reliance on *Philip Morris* for the proposition that individuals may be identified through release of anonymised information, in the context of an access to information request, is even less appropriate.

[58] The respondent's reliance on *Philip Morris* is still more unreasonable, given that it is the first time that case arises in the access request process. The respondent did not cite *Philip Morris* in its initial Decision. Nor did it cite *Philip Morris* in its submissions to the Commissioner, even though it bore the persuasive burden at that stage and was expected to put its best case forward. Had the respondent cited *Philip Morris* in its submissions, it would have allowed the Report to consider, and presumably reject, *Philip Morris* as a basis for the respondent's continued non-disclosure.

[59] The second basis for rejection of the recommendation was the brief email opinion of the Yukon Bureau of Statistics. The Decision provides no reasons for relying on that opinion, or the reasonableness of that opinion, or its weighing of that opinion, as it was statutorily required to do. The Decision does not address the Report's observation that the Bureau's opinion is unsupported by persuasive evidence, or any evidence, and that it is based solely on conjecture and opinion. One might surmise that the Decision does not grapple with these issues as the respondent, obliged to provide reasons for rejecting the Commissioner's recommendations, realised that the evidentiary frailty of its small population argument.

[60] In this, the respondent's blanket reliance on the Yukon Bureau of Statistics email opinion contrasts with the nuanced manner in which courts and privacy commissioners have considered "small cell count" (that is, small population) arguments or similar

"mosaic" arguments: that a person could triangulate anonymised information with other information in order to identify personal or sensitive information. Courts and privacy commissioners are generally skeptical of such broad and speculative arguments, and a government body advancing such arguments must establish them with convincing evidence rather than mere assertion. As stated in *Canada (Attorney General) v. Canada (Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar)*, 2007 FC 766:

> [84] This being said, the mosaic effect is obviously of concern. However, I agree with my colleague Justice Mosley's recent conclusion in *Khawaja*, at paragraph 136, that ***the mosaic effect, on its own, will not usually provide sufficient reason to prevent disclosure of what would otherwise appear to be an innocuous piece of information.*** Thus, further evidence will generally be required to convince the Court that a particular piece of information, if disclosed, would be injurious to international relations, national defence or national security. Consequently the Attorney General, at minimum, will have to provide some evidence to convince the Court that disclosure would be injurious due to the mosaic effect. ***Simply alleging a "mosaic effect" is not sufficient. There must be some basis or reality for such a claim, based on the particulars of a given file.***
>
> [emphasis added]

[61] In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, the provincial ministry refused to disclose the number of sex offender registrants residing in certain areas designated by the first three digits of their postal codes, on the basis that it might have the effect of identifying those individuals and lead to vigilantism. A commissioner adjudicator ordered its production. As here, the adjudicator concluded that the information sought was not "personal information" and that the ministry had failed in its burden of justifying non-disclosure.

[62] In Order PO-4272, the Ontario Privacy Commissioner rejected the argument that disclosure of information about certain physician services in small population areas would identify specific individuals: paras. 88–96. The Commissioner noted that while in certain cases disclosure of anonymised information about a small population centre could identify individuals, the ministry had failed in its persuasive burden of explaining the risk of such disclosure:

> [94] Second, while I acknowledge that in some contexts, the small cell count concept is a useful tool to determine whether the disclosure of non-identifying information relating to a small number of individuals may allow the identification of a specific individual, ***the fundamental determination that must be made is whether it is reasonably foreseeable that an individual could be identified as a result of the disclosure of the information. In this case, the ministry has not explained how, even in a small community, disclosure of the information in the report could result in the identification of a patient who received treatment under the identified fee code.***
>
> [emphasis added]

[63] In *Ontario (Attorney General) v. Pascoe*, 2001 CanLII 32755, the Ontario Divisional Court dismissed the ministry's judicial review of the Ontario Privacy Commissioner's decision to order disclosure of information (fee code, suffix, description of service, and the number of times the service was rendered) about the medical procedure charges by the (anonymised) highest billing general medical practitioner in Toronto in 1998-99, as requested by a journalist. The Court found that the ministry had failed to dislodge its persuasive burden, through compelling evidence:

> [20] ***The Ministry, apart from its small cell count finding, did not proffer any submissions establishing a nexus connecting the record, or any other information, with the affected person. Any connection between the record and the affected person, in the absence of evidence, is merely speculative.*** The Ministry made no submissions explaining its small cell count finding or showing how it applied to the facts of this case. No other information was identified by the Ministry or by the affected person that could link the record to an identifiable individual. For example, ***the Ministry, which has ready access to such data, provided no evidence that the services billed were only provided***

> ***by a small number of physicians in Toronto, unless its reference to its small cell study was intended to constitute such evidence. In the absence of detailed and convincing evidence from the Ministry or the affected person, I am unable to conclude that the commissioner acted other than reasonably***, or indeed had any other option given the onus on the Ministry, when she concluded that the affected person was not identifiable.
>
> [emphasis added]

[64] The Office of the IPC for Nova Scotia's recent review report in 2023 NSOIPC 17 similarly rejected the government's refusal to release anonymised investigation reports into allegations of abuse at publicly funded long-term care facilities as speculative and unfounded in evidence:

> [26] In my view, the public body's arguments were hypothetical and speculative. ***Speculation of identification is not enough. Rather, convincing evidence of a reasonable expectation of identification is required. The fact that there is some risk the disclosure could lead to the identification of individuals through the mosaic effect does not mean there is a reasonable expectation that it will.*** The public body has not presented sufficient evidence of a reasonable expectation that releasing the information severed from the records could identify the individuals mentioned in them. ***No specific information was identified by the public body that could link the investigation reports to identifiable individuals.***
>
> [emphasis added]

[65] The comments in these authorities could equally apply to the respondent's repeated evidentiary failures to support its continued non-disclosure of the records based on the email opinion, in its initial decision, in its submissions to the adjudicator, and in its post-adjudication Decision to reject the adjudicator's recommendations.

[66] Most germanely to the present northern territorial case, in 2019 NUIPC 1, the department refused to disclose requested information about tuberculosis cases in Nunavut communities, arguing that, given the small populations of the communities, disclosure of case numbers could identify individuals. In rejecting the department's

argument, the Nunavut IPC discussed when statistical information can be withheld based on a small population:

> I agree with the department that they must be careful in disclosing statistics for communities for exactly the reasons set out in their submissions. Generally, statistical information is not considered to be "personal information" as defined in the Act. The exception is where the statistical information, when combined with other available information, could be used to identify an individual. I am not convinced that there is a "magic number" which will mark the cut off in any case. One must consider, for example, both the numerator in the equation (the statistical number) and the denominator (the number in the entire pool). So, for example, if one were to know that one child from the City of Toronto had died of flu-related symptoms, it is far less likely that it would be possible to identify that child than if it were one child from the community of Whale Cove, with a population of 427 people, which would almost certainly identify the child. Each situation must be assessed on its own merits, taking into account not only the number in the statistical outline, but also a whole range of factors that could result in the identification of individuals.

[67] The Nunavut commissioner then embarked on a nuanced analysis of which records, for which years, could safely be disclosed without risk of revealing personal identification: for example, "b) the numbers for Clyde River for 2011 and 2015" and "c) the numbers for Igloolik for 2017", etc. With the exception of Iqaluit, all of the population centres in question are hamlets: very small population centres, where everyone knows everyone, generally with fewer than 2000 people. For the capital of Iqaluit, with a population one-fifth the size of Whitehorse, it recommends disclosure of all information for all years. The commissioner did not simply direct blanket non-disclosure, or blanket disclosure, based on a blanket assertions about small populations.

[68] The present Decision, and the evidence which it cites, contains no such nuanced discussion. Nor does it consider or explore a disclosure resolution designed to minimally impair the public's access to information. The Act requires a government entity that considers certain information contained within a record to be excluded from production

on privacy or other grounds to carefully delineate and exclude only that information necessarily excluded. As stated in s. 64:

> **Head's response to access request**
>
> (1) Subject to subsections (3) and 92(1), the head of the ***responsive public body must respond to an access request***, through the access and privacy officer or in the prescribed manner, if any, not later than the response date for the access request ***by***
>
> > (a) ***granting the applicant access to all the information relevant to the access request*** that is held by the responsive public body ***except the information and records withheld under paragraph (b)*** [*i.e., generally excluded information and records; information and records to which access is prohibited under Division 8; and information and records to which the applicant has been denied access under Division 9*] ...
>
> [emphasis added]

[69] More generally, the Decision provides no reasoning or analysis beyond a re-citing of its earlier position. It fails to consider or rebut the Report's 58 paragraphs (15 pages) of factual and jurisprudential analysis, or its specific analysis of the data fields explaining why the information neither constitutes "personal information" nor would reveal personal information, thereby requiring its non-disclosure under s. 70 of the Act. Nor does it discuss or conduct the requisite weighing exercise under ss. 70(2) and (5), or discuss which of the relevant factors under s. 70 bears on its decision.

[70] Finally, the Decision lacks transparency. It does not indicate which of the redacted information would identify personal information, which of the personal information (as set out in the s. 1 definitions and in the s. 70(3) list) would be unreasonably invaded, or how, or why. This flies in the face of specific legislative requirements that the respondent identify a "specific exception" to disclosure (s. 6(e)) and provide reasons for each of its rejections of the investigation report recommendations (s. 104(1)(b)(i)(B)).

C. The Decision's failures of justification in light of the legal and factual constraints

[71] Under the second *Mason/Vavilov* failure, the respondent fails to justify its Decision in light of the legal and factual constraints on the decision maker in the exercise of its delegated powers. Here, the analysis will situate the Decision in its comprehensive and exacting statutory framework that imposes strict obligations on the respondent when considering an information request and responding to an investigation report.

[72] I will start with the Decision itself, in its statutory context.

[73] In many judicial review contexts, the decision under review is made absent any statutory obligations imposed on the decision-maker to provide reasons in any form. Here, the Act expressly imposes multiple obligations on the respondent to provide and justify its reasons for rejecting a request for access to information.

[74] Subsection 64(2) expressly requires the respondent to provide written reasons for its initial response to an access request, for *each* determination or decision.

[75] Subsection 102(c) expressly imposes on the respondent the burden of proving that the complainant has no right of access under this Act to the information or record.

[76] Section 104(1) expressly requires the respondent to address *each* recommendation set out in the investigation report and, for each rejected recommendation, provide a reconsidered decision, along with "their reasons for the rejection".

[77] In many judicial review contexts, the decision under review is made by a decision-maker on its own accord, without consideration of any other input apart from that of the applicant. Here, again, the statutory regime is markedly different, creating a

comprehensive and thorough process wherein an adjudicator of the Commissioner, an expert in the area of privacy and access law, and an independent and objective second opinion, will consider and make recommendations as to whether and to what extent records should be produced: ss. 90–104. This legislative structure demands justified, intelligible, transparent, and responsive reasons for rejecting each of the Commissioner's recommendations. Where the Commissioner's recommendation comprehensively sets out why the initial decision to withhold was incorrect, as here, the carefully calibrated complaints process under the Act, and the respondent's burden of proof under that process, imposes a heightened obligation on the respondent to provide a commensurately thoughtful response for its rejection of the Report and its continued denial of access. Simply rejecting that recommendation, and repeating its prior position, based on since-rejected evidence and argument, is wholly insufficient.

[78] Recently, *Shell Canada Limited v. Alberta (Energy)*, 2023 ABCA 230 found such mere ministerial repetition of prior reasons to constitute an unreasonable decision meriting judicial intervention:

> [23] The Minister's reasons do not explain the analysis undertaken or test applied to determine that Shell's position was "without merit". The reasons simply repeat the department's position that Shell's interpretation was "inconsistent with the regulations as written". The reasons do not disclose the reasoning process that led to that conclusion, fail to address the context and purpose of the regulations and, in the result, do not bear the "the hallmarks of reasonableness — justification, transparency and intelligibility".

[79] The Act's legislative apparatus is wise in two respects.

[80] First, governmental bodies may lack the expertise and time to ruminate fine points of privacy and access rights under the Act.

[81] Second, as disclosure of governmental records will often open those very same decision-makers up to public scrutiny, in many cases the decision makers will have a vested interest in opposing, limiting, or stymieing disclosure.

[82] The Act itself expressly identifies this latter goal of public scrutiny of governmental workings as integral to public participation a functioning democracy:

> **DIVISION 2 - PURPOSES AND APPLICATION OF ACT**
>
> **6 Purposes**
>
> The purposes of this Act are
>
> ...
>
> (d) to require public bodies to ***make particular types or classes of information openly accessible*** so that an access request is not required to access those types or classes of information;
>
> (e) to provide the public with a right to access information held by public bodies (subject to specific exceptions) ***in order to ensure government transparency and to facilitate the public's ability to meaningfully participate in the democratic process***; and
>
> (f) to provide the commissioner with powers and duties that enable the commissioner ***to monitor public bodies' compliance with this Act and ensure that public bodies' decision-making is conducted in accordance with the purposes of this Act*** and that their administration is in accordance with the purposes of this Act.
>
> [emphasis added]

[83] These express purposes reflect jurisprudential analyses of the goals of access to information legislation.

[84] In *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278, Justice Newbury, writing for the Court, described the general purpose of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 in that jurisdiction:

> [1] ***As its name suggests, the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165 (the "Act") has two main purposes — to make public bodies "more accountable" by providing the public with access to their records and to protect personal privacy by preventing the***

> ***disclosure of information that would unreasonably invade the privacy of individual members of the public. Thus the Commissioner appointed to administer the Act has functions that involve the balancing and reconciliation of complex and sensitive interests.*** Some interests, however, have attached to them sufficient constitutional or legal value that they do not admit of compromise or "balancing". This is the case with solicitor-client privilege…
>
> [emphasis added]

[85] Newbury JA in turn cited "the important policy values underlying access to information legislation" identified by Justice La Forest in his dissenting judgment in *Dagg*:

> [28] …. ***His Lordship there suggested that the "overarching purpose" of such legislation is nothing less than to facilitate democracy.*** He continued:
>
> > It does so in two related ways. ***It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry.*** As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:
> >
> > > Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.
> >
> > . . .
> >
> > ***Access laws operate on the premise that politically relevant information should be distributed as widely as reasonably possible.*** Political philosopher John Plamenatz explains in *Democracy and Illusion* (1973), at pp. 178-79:
> >
> > > There are not two stores of politically relevant information, a larger one *shared* by the professionals, the whole-time leaders and persuaders, and a much smaller one *shared* by ordinary citizens. No leader or persuader possesses more than a small part of the information that must be available in the community if government is to be effective and responsible; and the same is true of the ordinary citizen. What matters, if there is to be responsible government, is that this mass of information should be so distributed among professionals and ordinary citizens that competitors for power, influence and popular support are exposed to relevant and searching criticism. [Emphasis in original.]

> ***Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable.*** Consequently, while the *Access to Information Act* recognizes a broad right of access to "any record under the control of a government institution" (s. 4(1)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted. ***[paras. 61-63]***
>
> [emphasis added]

[86] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, Justice Cromwell endorsed and expanded on *Dagg*:

> [21] The purpose of the Act [the federal *Access to Information Act*, RSC 1985, c. A-1] is to provide a right of access to information in records under the control of a government institution. ***The Act has three guiding principles: first, that government information should be available to the public; second, that necessary exceptions to the right of access should be limited and specific; and third, that decisions on the disclosure of government information should be reviewed independently of government*** (s. 2(1)).
>
> [22] In *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 61, La Forest J. (dissenting, but not on this point) underlined that the overarching purpose of the Act is to facilitate democracy and that it does this in two related ways: ***by helping to ensure that citizens have the information required to participate meaningfully in the democratic process and that politicians and officials may be held meaningfully to account to the public.*** This purpose was reiterated by the Court very recently, in the context of Ontario's access to information legislation, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 S.C.R. 815. The Court noted, at para. 1, that access to information legislation "can increase transparency in government, contribute to an informed public, and enhance an open and democratic society". ***Thus, access to information legislation is intended to facilitate one of the foundations of our society, democracy. The legislation must be given a broad and purposive interpretation***, and due account must be taken of s. 4(1), that the Act is to apply notwithstanding the provision of any other Act of Parliament: *Canada Post Corp. v. Canada (Minister of Public Works)*, [1995] 2 F.C. 110, at p. 128; *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, [1996] 3 F.C. 609, at para. 49, aff'd (2000), 25 Admin. L.R. (3d) 305 (F.C.A.).
>
> [emphasis added]

D. Conclusion: the Decision's failures in the required reasoning process

[87] To conclude, apart from "respectfully disagree[ing]" with the adjudicator's recommendations and analysis, and its inapposite citation of *Philip Morris*, the Decision

does not consider or rebut the comprehensive analysis of the adjudicator's Report. The Decision fails to provide a transparent, intelligible, justifiable, and reasonable basis for rejecting the contents of that Report: it largely ignores them. The respondent's perfunctory and conclusory four-paragraph response to the thoroughly 47-page Report borders on contempt towards the presumptive right of the Yukon public to government information, towards the statutory regime designed to facilitate that access, and towards the Office of the Commissioner statutorily entrusted to uphold that legislation and realise its goals.

[88] While a judicial review is not an appeal, and while the decision under Review is the Decision, not the Report, the reasons above will make clear that this Court agrees with the conclusions, recommendations, and analyses of Adjudicator Smith in the Report in their entirety.

E. Disclosure of the records in their original electronic format

[89] The above discussion focuses on the first aspect of the Decision and the Report recommendations: access to the withheld data fields. The respondent did not provide submissions on the second aspect: disclosure of the records in their original format or another format that is capable of re-use by the petitioner, in accordance with s. 65. I understood from this silence that the respondent does not seriously oppose the Report's recommendation or analysis of this issue (at paras. 108–148), based on statutory interpretation and access to information decisions, with which analysis this Court agrees. While perhaps deliberately coy, the Decision itself appears to recognise the respondent's obligation to provide requested information in its original and re-usable format, absent exceptions set out in s. 65(4).

V. REMEDY

[90] The respondent provided no alternative submissions on remedy.

[91] Generally, where a decision is found to be unreasonable, it will most often be appropriate to remit the matter to the decision maker to reconsider the decision, this time with the benefit of the Court's reasons. After reconsidering its decision, the decision maker may arrive at the same or a different outcome: *Vavilov* at para. 141.

[92] At the same time, *Vavilov* provides:

> [142] ...***there are limited scenarios in which remitting the matter would stymie the timely and effective resolution of matters in a manner that no legislature could have intended***...Declining to remit a matter to the decision maker ***may be appropriate where it becomes evident to the court, in the course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose***...Elements like concern for delay, fairness to the parties, urgency of providing a resolution to the dispute, the nature of the particular regulatory regime, ***whether the administrative decision maker had a genuine opportunity to weigh in on the issue in question***, costs to the parties, and the efficient use of public resources may also influence the exercise of a court's discretion to remit a matter, just as they may influence the exercise of its discretion to quash a decision that is flawed....
>
> [emphasis added]

[93] Here, the Act also informs the appropriate remedy. In contrast to many judicial review contexts, the Act expressly contemplates judicial reviews and expressly bestows wide discretion on the Court hearing the review:

> **107 Disposition of application**
>
> After hearing an application made under subsection 105(1) or 106(1), the Court may
>
> (a) make an order, in addition to or instead of any other order, directing the respondent to take any action that the Court considers necessary in the circumstances; or
>
> (b) dismiss the application.

[94] In *Vavilov*, the Court opted not to remit the matter back to the decision maker for reconsideration in part because the applicants had earlier raised all of the issues before the decision-maker, who "had an opportunity to consider them but failed to do so": para. 195. Further, there was no dispute about the underlying facts; the Court's pronouncement on the proper statutory interpretation of s. 3(2)(a) of the *Citizenship Act*, RSC 1985, c C-29, was determinative of the eventual outcome. Accordingly, the Court concluded that "it would serve no purpose to remit the matter" back to the decision maker: para. 196.

[95] Similarly, this Court's conclusion for the reasons provided, matching that of the Commissioner, that the records are not subject to the MVA, s. 98, and are not "personal information" under s. 70 of the Act, and that they must be provided in a usable format, is determinative of the matter. On the respondents' sparse evidentiary record placed before the Commissioner and the Court, there could be no other result. Further, as *per Vavilov*, the respondent has enjoyed multiple genuine opportunities to weigh in on the issue, and to acquit its persuasive burden expressly imposed by the Act, only to reject the comprehensive and well-reasoned Report of the Commissioner: the entity the Act tasks to exercise its expertise in access to information matters and provide investigations and recommendations. Finally, the petitioner filed its access request over two years ago: remitting the matter back to the respondent will further protract the matter, and stymie the "goal of expedient and cost-efficient decision making" underlying the creation of administrative tribunals and underlying the deferential reasonableness standard, as discussed in *Vavilov* at para. 140, quoting *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 55. Accordingly,

it would be inappropriate to remit the matter back to the decision maker for a third consideration of the issue, and a second reconsideration of the issue, based upon these reasons.

VI. CONCLUSION

[96] The Court grants the orders sought, on the terms sought.

[97] The petitioner has been successful, and is entitled to its costs.

CRERAR J.

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[1] All references to sections will be to the Act unless otherwise noted.
[2] As an outlier amongst the practices of Access to Information and Protection of Privacy Commissioners of most other provinces and territories, Yukon Investigative Reports are not published on CanLii.
[3] "Sic" in original.
[4] See also *Shook Legal Ltd. v. Saskatchewan Government Insurance*, 2018 SKQB 238 at para. 35: "A licence plate and a VIN are equivalent avenues by which to identify a vehicle and seek information regarding its owner. Neither a licence plate nor a VIN is, in itself, afforded any level of privacy or protection and is equally available to one who observes any vehicle."
[5] The letter also included an introductory paragraph setting put the Commissioner's recommendations, and a concluding paragraph, setting out the petitioner's right to apply for judicial review of the rejection decision.