Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-4110

Appeal MA18-346

Toronto Police Services Board

October 15, 2021

Summary: The Toronto Police Services Board (the police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the disciplinary hearing of a specified police constable. The police initially denied access to the responsive records on the basis of the discretionary exemption at section 15(1) (information published or available in public). The police directed the requester to make his request for the records to the police's Disciplinary Hearing Office. The requester appealed the police's access decision. The police then issued a revised access decision denying access to the records on the basis of the exclusions at section 52(3) of the *Act* (labour relations and employment matters).

At adjudication, the appellant raised a constitutional question. As the Disciplinary Hearing Office did not provide the records to the appellant, he argued that the effect of this, as well as the police's claiming of exclusions under the *Act*, was a violation of the open court principle applicable to the adjudicative records of administrative tribunals. In response to the NCQ, the police advised that they would respond to the appellant's request outside of the *Act*, and disclosed several records to him. The appellant maintained objections to the level of disclosure he received outside of the *Act*.

In this order, the adjudicator finds that the police responded to the appellant's request outside of the *Act*, that this approach conforms with the open court principle described in the Ontario Divisional Court's *Toronto Star* decision, and that the courts, not the IPC, are the forum for any dispute about information the police have withheld. As a result, she exercises her discretion under section 41(1) of the *Act* and declines to continue with the inquiry, and dismisses the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 41(1) and 52(3); *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, section 65(16); *Canadian Charter of Rights and Freedoms,* section 2(b), Part 1 of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Tribunal Adjudicative Records Act*, 2019, S.O. 2019, c. 78, Sched. 60, section 2; O. Reg. 211/19.

Cases Considered: *Toronto Star v. Ontario (Attorney General)*, 2018 ONSC 2586; *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC); *R. v. Mentuck*, 2001 SCC 76.

OVERVIEW:

[1] A constable of the Toronto Police Services Board (the police) was subject to a disciplinary hearing at the police's Disciplinary Hearing Office (which is an administrative tribunal that holds adjudicative hearings), under the *Police Services Act*.[1] A journalist made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) seeking access to records related to the disciplinary hearing of that police constable. The request was for copies of eleven specified exhibits presented at the hearing,[2] transcripts of statements made by a specified witness to the police (whom I will refer to as "A.B." in this order),[3] and video surveillance evidence presented at the hearing. During the inquiry, it was clarified that the transcripts sought by the appellant were of statements made to investigators and filed at the disciplinary hearing in the form of exhibits.

[2] The issue in this order is whether the police properly responded to a request made under the *Act* for access to adjudicative records which the police claim they were entitled to deal with outside of the *Act*, and on that basis, whether I should decline to continue my inquiry into the appeal of the police's access decision. In this order, I find that the police have responded to the access request outside of the *Act*'s access scheme, and that this approach aligns with the open court principle articulated in the decision of the Ontario Superior Court of Justice in *Toronto Star v. Ontario (Attorney General)*.[4] In the circumstances, I find that I should not continue my inquiry into the appellant's appeal under the *Act*. As a result, I dismiss the appeal.

[3] In their initial decision to the appellant in April 2018, the police denied access to the records under the discretionary exemption found in section 15(a) (information published or available to the public) of the *Act.* The police advised the appellant to directly contact the police's Corporate Communications unit, which deals with requests for access made to the Disciplinary Hearings Office, in order to obtain access to the records.

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[1] R.S.O. 1990, CHAPTER P.15

[2] The requester asked that if broken down by letter (e.g., Exhibit 44A, Exhibit 44B), that all components be disclosed.

[3] These are not the real initials of the witness that were used by the appellant in his representations.

[4] *Toronto Star v. Ontario (Attorney General)*, 2018 ONSC 2586 (CanLII).

[4] The appellant appealed the police's access decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC). A mediator was appointed to explore resolution. The police revised their access decision, and took the position that the *Act* does not apply to the records, relying on the employment or labour relations exclusions at sections 52(3) of the *Act* to do so. The appellant asked that the appeal proceed to the next stage of the appeal process. As a result, the appeal moved to the adjudication stage, where an adjudicator may conduct a written inquiry.

[5] As the adjudicator of this appeal, I began an inquiry under the *Act* by issuing a Notice of Inquiry to the police, setting out the facts and issues on appeal. I also asked the police to consider the possible application of any discretionary exemptions in the alternative to their claim of the exclusions at section 52(3). The police declined to claim any discretionary exemptions in the alternative, but provided representations in support of their position on the application of the exclusions. The appellant provided representations indicating that although the police had initially referred him to the Disciplinary Hearings Office to obtain the records, the police later refused to provide access to the requested records through that process.[5] He submitted that the effect of this refusal, together with the claiming of exclusions under the *Act*, resulted in a denial of access to information from a public hearing. He submitted that this violated the open court principle, in breach of the *Canadian Charter of Rights and Freedoms* (the *Charter*), as held in the 2018 *Toronto Star*[6] decision of the Ontario Superior Court.

[6] Since the appellant appeared to be raising a constitutional question in the course of the inquiry, I invited him to issue a Notice of Constitutional Question (NCQ)[7] in July 2019. After receiving and reviewing his NCQ and accompanying representations in September 2019, I invited the police and Attorney General of Ontario to provide representations in response. The police sent correspondence to the IPC in October and November 2019 and in January 2020 indicating that they were now actively handling the request for records outside of the *MFIPPA* process. The Attorney General of Ontario advised the IPC that they would not be intervening in this case.[8]

[7] Given the police's correspondence to the IPC saying that they would be processing the request outside of *MFIPPA*, I sent the appellant a letter setting out my preliminary view that the inquiry should not proceed because the records at issue are "adjudicative records" within the definition set out in *Toronto Star*[9] and the police had chosen to respond to his request outside of the freedom of information process. I noted that this is an approach to disclosure that was specifically endorsed by the *Toronto Star* decision. In addition, I stated that if the appellant's view was that the police had

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[5] The police took the position that their internal policy on the release of hearing records did not apply because it post-dated the disciplinary hearing in question.
[6] *Toronto Star v. Ontario (Attorney General)* 2018 ONSC 2586 (CanLII).
[7] The appellant also served the Attorney General of Canada and the Attorney General of Ontario with the NCQ.
[8] The Attorney General of Canada did not participate in the process, after being served with the NCQ.
[9] *Toronto Star v. Ontario (Attorney General)* 2018 ONSC 2586 (CanLII), paragraph 8.

improperly applied the *Dagenais/Mentuck* test to the records (a test for withholding information in adjudicative records, which I describe below), the appellant's remedy was with the courts and not with the IPC. I invited the appellant to provide representations in response to my letter. The appellant advised that over time the police disclosed to him several of the responsive records. After reviewing this disclosure, he advised the IPC of his view that the disclosure was incomplete, as the police had not released statement(s) by "A.B." entered as exhibits at the tribunal. He provided representations with respect to my preliminary view about discontinuing my inquiry.

[8] For the reasons that follow, I find that the police processed the request for records outside of the *MFIPPA* process. I decline to continue to conduct an inquiry under section 41(1) of the *Act*, and I dismiss the appeal.

RECORDS:

[9] The records requested are: several numbered exhibits presented at the disciplinary hearing of a named police constable, transcripts of police interviews with "A.B." filed at the hearing, and video surveillance evidence presented at the hearing. The police did not provide the IPC with a copy of the records. According to the appellant, the police have now provided him with several numbered exhibits, but not the requested interview transcripts of "A.B."

DISCUSSION:

[10] The sole issue in this appeal is whether the police processed the appellant's request for access to adjudicative records outside of *MFIPPA*, and, on that basis, whether I should decline to continue to conduct an inquiry under section 41(1) of the *Act* into his appeal of the police's access decision.[10]

The police's decision to process the request outside of FIPPA

[11] After being invited to provide representations in response to the appellant's NCQ, the police sought an extension of time to provide representations citing, in part, a tribunal publication ban that was still valid. A copy of the publication ban was provided to the IPC. The publication ban covers the publication of any information related to the identity of four witnesses referenced by initials, one of whom is "A.B." The police provided representations in November 2019. The police stated that they would be

[10] Section 41(1) of the *Act* says:

> The Commissioner may conduct an inquiry to review the head's decision if,
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> (a) the Commissioner has not authorized a mediator to conduct an investigation under section 40; or
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> (b) the Commissioner has authorized a mediator to conduct an investigation under section 40 but no settlement has been effected.

providing the appellant with the requested tribunal materials, subject to the parameters of the existing publication ban and the Order of the Superior Court of Justice (which relates to exhibits tendered at the police constable's criminal trial). The police further stated that the appellant had been made aware of which exhibits were currently accessible, which were denied pursuant to existing orders, and which remain under active and ongoing review due to the highly sensitive nature of the records. Accordingly, the police submitted that the adjudication of the merits of the constitutional question should be deferred until it is determined which records may be accessed by the appellant, as the constitutional question may ultimately become moot.

[12] In January 2020, the police advised the IPC that their Corporate Communications Unit would be providing the appellant with "all requested tribunal exhibits that are not subject to the existing tribunal publication ban, the existing court order, or privilege." I note that the existing court order to which the police referred was the Order of the Superior Court of Justice, mentioned above, which gave the appellant the right to supervised access to all but one of the exhibits tendered at the criminal trial (the police constable's duty book). It also provided the appellant with the right to copy and publish any and all exhibits, with the exception of four specified trial exhibits: three photographs of injuries suffered by a witness (the one whose statements the appellant seeks through *MFIPPA*), and that witness's medical records.

[13] In their January 2020 correspondence, the police further advised that:

> a member of the [police], holding the rank of Inspector, is currently finalizing the vetting process with respect to the responsive materials and a formal written response addressing all records at issue will be forwarded to the requester.

The appellant's response to the preliminary assessment letter

[14] The deadline to respond to my February 2020 preliminary assessment letter was extended due to intervening COVID-19 pandemic restrictions that came shortly thereafter and, later, in order to give the appellant an opportunity to review the disclosure the police gave him in May 2020. In October 2020, in response to my preliminary assessment letter, the appellant stated that the police had released all the numbered exhibits to him,[11] but that they "have effectively refused to release any transcripts of police interviews with an individual identified as "[A.B.]." He provided details about his communications with the police in that regard. He indicated that there is a lack of clarity regarding when, or if, the police will grant him access to the requested transcripts which he had been seeking for three years. In light of what has transpired, he argued that it is reasonable to conclude that the police have refused to release transcripts of "A.B.'s" police interviews to him outside of *MIFPPA*, and that their

[11] He states that these numbered exhibits were not the records he expected to receive based on the descriptions that had been provided to him.

failure to respond to repeated communications from him amounts to a refusal to provide the records to him

[15] With respect to the police's reference to a publication ban (as a factor when considering which records or portions of records to release to the appellant outside of *MFIPPA*) in their correspondence to the IPC, the appellant argues that the police have inconsistently applied it. He states that, at first, the police did not allow him to view photographs of the witness in question to conceal his identity, and then allowed him to do so months later, without explanation, and despite the fact that the appellant had seen the witness' appearance, having viewed his testimony at the public disciplinary hearing proceedings. In addition, the appellant submits the following:

> A publication ban is not a tool to arbitrarily suppress information or slow the public's access to records. I understood when you said in your . . . letter that my remedy is with the courts if I believe "the police improperly applied the *Dagenais/Mentuck* test" to the requested records. However, I point out the [police's] inconsistent and arbitrary use of this publication ban to underscore my earlier point: These are not the actions of an institution making an honest effort to release public records in a timely fashion.
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> In the absence of an order from your office, I am concerned that the [police] will continue to block access to what are clearly public records. The service has refused to release the remaining records under its own policies, and should therefore be ordered to release this material in response to my original MFIPPA request.

The requested records are adjudicative records

[16] As I explain below, I find that the records at issue fall squarely within the definition of an adjudicative record.

[17] According to the appellant's representations and correspondence to the IPC, the police continue to withhold transcripts of one or more statements of "A.B." The appellant explains that a transcript of testimony from the disciplinary hearing indicates that at least one of "A.B.'s" statements was entered at the tribunal hearing, and that the police should be compelled to release these records to him.

[18] Although I do not have the records before me, based on the parties' representations, I am satisfied that the material the police have not disclosed falls within what the court described in the *Toronto Star* decision as "adjudicative records":

> The *[Statutory Powers Procedure Act]* contains a list of "records" for the purposes of hearings by tribunals covered by that Act. This list provides a ready definition of the documents to which the present Application applies ("Adjudicative Records"). These include:

> . . .
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> (d) all documentary evidence filed with the tribunal, subject to any limitation expressly imposed by any other Act on the extent to or the purposes for which any such documents may be used in evidence in any proceeding[.]

[19] The Canadian Judicial Council's *Model Policy for Access to Court Records in Canada*[12] describes adjudicative records in the following terms:

> "Court records" include any information or document that is collected, received, stored, maintained or archived by a court in connection with its judicial proceedings. It includes, but is not limited to:
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> a) case files [which is defined as "refer[ing] to docket information and documents in connection with a single judicial proceeding, such as pleadings, indictments, exhibits, warrants and judgments];[13]
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> . . .
>
> g) records of the proceedings in any form[.]

[20] On the basis of these definitions of "adjudicative records," I find that the records requested that have not yet been disclosed to the appellant (that is, one or more transcripts of statements of "A.B.") are adjudicative records.

The Toronto Star decision

[21] Approximately eight months after the appellant states that he started seeking the records at issue (in August 2017), the Ontario Superior Court released the *Toronto Star* decision referred to above, in April 2018. That decision resulted from an application brought by the Toronto Star challenging the application of the *Act* to the adjudicative records (such as pleadings, transcripts, and evidence) of administrative tribunals. This decision considered the application of the "open court principle," as a facet of freedom of expression protected under section 2(b) of the *Charter of Rights and Freedoms*, to the adjudicative records of tribunals containing personal information as defined in the provincial counterpart of *MFIPPA*, the *Freedom of Information and Protection of Privacy Act (FIPPA)*.

[22] In *Toronto Star*, the Court declared the application of the personal privacy exemption at section 21(1) of *FIPPA* to the adjudicative records of certain tribunals to

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[12] *Model Policy for Access to Court Records in Canada*, Judges Technology Advisory Committee, Canadian Judicial Council (September 2005).
[13] *Ibid.*

be unconstitutional and of no force or effect.[14] However, the decision did not interfere with the procedural scheme under *FIPPA*. Therefore, for those tribunals that are subject to *FIPPA*, the decision-making authority of the institution heads and, on appeal, the IPC, remained intact.

[23] The *Toronto Star* decision also made it clear that the open court principle means that tribunals are free to respond to requests for adjudicative records *outside* of *FIPPA*, even where the request is framed as a *FIPPA* request, provided institutions follow the model of other tribunals that do so in conformity with the *Charter*'s principles of openness. The Court stated that:

> Since 8 of the listed tribunals apparently answer requests for Adjudicative Records directly and do not require requesters to engage the *FIPPA* process, little or no change is needed for them. Each must examine its procedures to ensure that the presumption of openness and disclosure required by s.2(b) of the *Charter* is adhered to in responding to requests to inspect or copy Adjudicative Records, but nothing about their procedures is otherwise impugned by this ruling. Other tribunals may follow this model and by-pass the *FIPPA* process altogether by dealing with requests for Adjudicative Records directly and in conformity with the openness that the *Charter* requires.[15]

[24] The "model" tribunals to which the Court referred "fashioned their own method of handling document requests outside of the *FIPPA* process" which entailed "no delay at all" and "typically anonymized" the names of certain individuals.[16]

[25] The Court then went on to note that the openness that the *Charter* requires includes a consideration of the *Dagenais/Mentuck* test.[17] That test allows a tribunal to withhold information in some circumstances, as discussed further below.

[26] After the *Toronto Star* decision was issued, the *Tribunal Adjudicative Records Act*, 2019[18] (*TARA*) became law on June 30, 2019. Section 2(1) of *TARA* provides that certain tribunals shall make available to the public all adjudicative records that relate to proceedings that started from the date that *TARA* became law in 2019 (subject to the tribunal's ability to make confidentiality orders in respect of the records).[19]

[27] Along with the enactment of *TARA*, *FIPPA* was amended. A new exclusion, found

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[14] The Court suspended the declaration of invalidity for 12 months. By order of Justice Morgan dated April 16, 2019, the suspension of the declaration of constitutional invalidity was extended to June 30, 2019 (the date *TARA* came into force).
[15] *Toronto Star*, paragraph 133.
[16] See *Toronto Star*, paragraph 22.
[17] See *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC) and *R. v. Mentuck*, 2001 SCC 76 (CanLII). And see: *Toronto Star v. Ontario (Attorney General)*, *supra*, at paras. 89-91, 134-135.
[18] S.O. 2019, c. 78, Sched. 60.
[19] *Ibid*, s. 2.

at section 65(16) of *FIPPA*, now exists. This exclusion says that *FIPPA* "does not apply to adjudicative records, within the meaning of *[TARA*], referred to in subsection 2(1) of that Act."[20] There is no equivalent of the new exclusion regarding adjudicative records in *MFIPPA*, which is the statute applicable to the appellant's request.

[28] Since the records at issue relate to a hearing that started before June 2019, and since the police disciplinary tribunal is not listed as one of the tribunals to which *TARA* applies, *TARA* does not apply to them.

[29] In Order PO-4088, the IPC held that if a tribunal chooses to respond outside of *FIPPA* to a request relating to proceedings that started before June 30, 2019, the open court principle and *Toronto Star* are relevant for these adjudicative records.[21] The same principle applies here to an access request made under *MFIPPA*.

Impact of Toronto Star on the adjudicative records at issue in this appeal

[30] As discussed above, although the police initially responded to the appellant's request under *MFIPPA* and an appeal was filed in May 2018, in their correspondence to the IPC in November 2019, after the NCQ was filed, the police indicated that they decided to respond to the request outside of *MFIPPA*, subject to "to the existing tribunal publication ban, the existing court order, or privilege."

[31] In their November 2019 response to the NCQ, the police maintain that there is a process in place whereby requests for exhibits from a *Police Services Act* hearing (such as the disciplinary hearing in question) are handled directly through the police's Corporate Communications office itself and that they would be providing the records to the appellant through that process. The police provided the online link for more information about this process.[22] Having reviewed it, I note that under this process, exhibits will be vetted by the police for the purpose of removing personal or confidential information, and that once vetted for release, exhibits can be viewed at the police headquarters or can be copied for a nominal fee if they are not available electronically.

[32] While I acknowledge that the appellant says that he began seeking records from the police in August 2017, to be fair, I must also acknowledge that there have been events that have contributed to the delay in access. An appeal of the police's access decision was filed in May 2018, mediation was attempted, and the appellant himself asked that the processing of his appeal at adjudication be put on hold for a time due to the possibility of receiving disclosure of records from the criminal trial of the constable through the appropriate court channels. I also note that additional time was needed by

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[20] This new exclusion in *FIPPA* goes further than the *Toronto Star* decision and removes adjudicative records from the *FIPPA* scheme entirely if they relate to proceedings that started after a specified date.
[21] In Order PO-4088, the IPC stressed that tribunal records other than adjudicative records (for example, administrative records, or documents exchanged in pre-hearing filings but not entered into evidence) are still subject to *FIPPA*.
[22] See: http://www.torontopolice.on.ca/disciplinaryhearingsoffice/distribution_practice.pdf

the police, the Attorney General, and the IPC to assess the constitutional question he appeared to be raising during the inquiry. Upon my review of the police's November 2019 and January 2020 correspondence addressing this issue, I sent my preliminary assessment letter referred to above to the appellant in February 2020. This letter noted that the police appear to have responded to the access request outside of the *MFIPPA* scheme, that the decision in *Toronto Star* endorsed this approach to requests for adjudicative records, and invited the appellant's submissions on whether I should discontinue my inquiry under *MFIPPA* and close the appeal. After some delay arising from the lockdown necessitated by the COVID-19 pandemic, the police began the process of providing access to many of the adjudicative records that the appellant had requested, outside of *MFIPPA* in May 2020.

[33] In my view, in the unique circumstances of this case, which include a consideration of the time needed to implement a new process of disclosure outside of *MFIPPA* that conformed to the principles set out in *Toronto Star*, the relatively early stages of that process, and the intervening COVID-19 lockdown shortly after the police confirmed their intention to process the request outside of *MFIPPA*, I am satisfied that the police responded to the appellant in a relatively timely way. In so finding, I am not taking into consideration time that the appellant spent dealing with the police before filing his access request under *MFIPPA*, as it was always the prerogative of the parties to address access outside of *MFIPPA*. I also acknowledge that the police's position evolved between issuing their access decision in April 2018 and the issuance of the NCQ in the Fall of 2019, which appears to have been due to some confusion on their part regarding the implementation of the access scheme outside of *MFIPPA*. I presume that going forward, the access process would occur more expeditiously than what transpired here.

[34] I find that the timeframe I have described above is reasonable in the circumstances, noting that even early on in lockdown period, the police began providing the appellant with the requested records, after having taken steps to ensure compliance with the court order and/or publication ban relevant to various records.[23] I am satisfied that the police's response reflects a genuine effort to conform to the model of other tribunals whose processes comply with the *Charter*. The *Toronto Star* decision specifically endorsed such an approach when it stated that tribunals are at liberty to follow the model of other tribunals that currently "by-pass the *FIPPA* process [and by extension, the *MFIPPA* process] altogether by dealing with requests for Adjudicative Records directly and in conformity with the openness that the *Charter* requires."

[35] It is worth noting that the open court principle includes consideration of the so-called *Dagenais/Mentuck* test referenced in the *Toronto Star* court decision.[24] That is, information can be withheld, on a case-by-case basis if:

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[23] While the existence of a publication ban may be relevant to what the appellant can do with the records, it is not relevant to whether he is entitled to have access to them under the open court principle.
[24] See the *Toronto Star* decision at paras. 89-91, 134-135.

a. such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

b. the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[36] In the circumstances of this appeal, the police have provided the appellant with a large volume of responsive records outside of the *MFIPPA* scheme. The appellant appears to be unsatisfied with the police's decision to withhold transcripts relating to one witness. However, the police chose to respond to the appellant's access request outside of the *MFIPPA* scheme, and I have found that they were entitled to do so. If the appellant is of the view that this decision does not meet the *Dagenais/Mentuck* test, his recourse is to the courts, and not to the IPC.

[37] In conclusion, for the reasons set out above I find there is no basis for me to continue with the inquiry under *MFIPPA*. As a result, I dismiss the appeal.

ORDER:

Under section 41(1) of *MFIPPA*, I decline to continue to conduct an inquiry, and I dismiss the appeal.

Original Signed by: October 15, 2021

Marian Sami
Adjudicator